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THE CLASS ACTION AS LICENSING AND REFORM DEVICE

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The age of digital distribution exacerbates transaction costs in two distinct ways. First, the dissemination of large quantities of works requires permissions from myriad copyright holders. Second, new technologies lower the cost of content creation, resulting in millions of individual creators, rather than a discrete set of large industry repeat players. The potential of class actions to address this rising transaction cost problem has gone largely unexplored. Instead, copyright scholars approaching the problem have advocated for either private ordering or legislative reform. But aggregate litigation fulfills a different function—something much closer to an administrative copyright—administering millions of licenses while filling in statutory gaps to address a rapidly shifting technological landscape.

In this sense, copyright class actions also differ from procedural scholars' understanding of mass litigation as either a regulatory or joinder device to address distinct past harms. Instead, this Article offers a novel view of the class action as both an efficient transactional mechanism—a hybrid public-private licensing scheme—and as substantive legal reform, updating copyright law for new technological uses. Settlements in copyright class actions have been used as blanket licenses—for both past harms and forward-looking royalties—where individual negotiations are impossible. They have also been progenitors to landmark copyright legislation—and indeed, some settlements themselves contain quasi-legislative components that solve long-standing problems in the copyright industry. This Article argues for a vision of copyright class actions as the future and for the promise of licensing and reform by litigation in an age of mass aggregation, far-flung rights, and legislative gridlock.

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INTRODUCTION

Copyright class actions are not new.¹ But, in comparison to other types of class actions, they are exceedingly rare.² Indeed, since the advent of the modern-day class action,³ it is likely that only a few hundred copyright class actions have ever been filed—less than 0.5% of all class action cases.⁴ While small in number, however, copyright class actions are enormous in impact: They have resulted in sweeping settlements that contained provisions not just for past harms but for ongoing royalties, shaping the future income streams for hundreds of thousands of copyright-holding class members.⁵ They have been the driving impetus for landmark copyright legislation that imposed royalties on home-recording devices,⁶ digital radio,⁷ and streaming services.⁸

1. See *infra* section II.A (detailing how the first copyright class action coincided with the promulgation of Federal Rule of Civil Procedure 23 (Rule 23)).

2. See William F. Patry, *Copyright Law and Practice* 1141 (1994) (describing class actions in the copyright context as “rare”). The most recent edition of a well-known copyright treatise, however, describes copyright class actions as “not infrequent[,],” reflecting, perhaps, the increase in popularity of the class action mechanism in the copyright context. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.09[D][2] (2022).

3. Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next?*, 69 *Def. Couns. J.* 432, 432–33 (2002) (describing the 1966 revision of Rule 23 as the “beginning point” of the contemporary class action mechanism).

4. Publicly available data from 1997 to 2004 from the U.S. Administrative Office’s Judicial Business Reports show that a total of 18,731 federal class actions were filed during that eight-year period. Of those cases, only thirty-five were federal copyright class actions (0.187%). U.S. Admin. Off. of the U.S. Courts, X-5: U.S. District Courts—Class Action Civil Cases Filed, by Jurisdiction and Nature of Suit, U.S. Courts, <https://www.uscourts.gov/data-table-numbers/x-5> (last visited Aug. 16, 2022) (on file with the *Columbia Law Review*).

5. See *infra* sections II.B–D.

6. See Audio Home Recording Act of 1992, Pub. L. No. 102-563, §§ 1003–1007, 106 Stat. 4237, 4240–44 (codified at 17 U.S.C. §§ 1001–1010 (2018)); S. Rep. No. 102-294, at 30 (1992) (explaining that the Audio Home Recording Act provides royalties for “the various elements of the music industry”); see also *infra* section II.B.1.

7. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, sec. 4, § 115, 109 Stat. 336, 345–47 (codified as amended in scattered sections of 17 U.S.C.); see also *infra* section II.B.2.

8. See Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 102(a)(1)(B), 132 Stat. 3676, 3680 (2018) (codified at 17 U.S.C. § 115(c)(1)(F)); see also *infra* section II.D.

Despite the import of the class action mechanism⁹ for copyright law, virtually no scholarship has been written on copyright class actions.¹⁰ Likewise, even as procedural scholars point to the general trend of class actions and aggregated settlements in the modern technological age, scant attention has been paid to how the rise in prominence of *copyright* class action settlements provides concrete proof of this transactional model of litigation.¹¹ This Article is the first to present an in-depth analysis of the class action mechanism in copyright cases and, in doing so, to demonstrate that copyright class actions present a little-examined solution to a problem that has vexed copyright scholars with the rise of digital creation and dissemination. As others have written about, new technologies present two unique problems for rights clearances. First, new technologies often

9. The term “mechanism” is used here because “class action” in this Article refers to any suit styled as a putative class action, regardless of whether a court ultimately certifies the class. This Article shows that rightsholders have good reason to aggregate and style their claims as class claims and defendants have good reason to wish the claims disposed of on a class-wide basis. Almost all of the copyright actions filed as class actions that are examined herein have settled. This is, however, not all that unique from class actions more generally, in which settlement is almost always the norm. See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 *Tex. L. Rev.* 287, 289 (2003) (describing class actions as characteristically producing settlement agreements). See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 *Vand. L. Rev.* 1571 (2004) (describing the pervasive nature of aggregate settlements throughout the history of U.S. tort law).

10. Two notable exceptions are Professor James Grimmelmann and Professor Pamela Samuelson, who have each written on one particular copyright class action: the Google Books case. See James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 *N.C. L. Rev.* 387, 419–20, 456 (2013) [hereinafter Grimmelmann, *Future Conduct*] (arguing, *inter alia*, that the Google Books settlement was improper because it contained a release for future conduct, creating severe informational problems and giving the settling defendant concentrated market power); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 *Minn. L. Rev.* 1308, 1359 (2010) [hereinafter Samuelson, *Google Book Search*] (arguing that the proposed Google Books settlement was too expansive and, if approved, could adversely impact competition and usurp the role of Congress); Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 *Wis. L. Rev.* 479, 560 [hereinafter Samuelson, *Google Book Settlement*] (“The [rejected Google Books settlement] is perhaps the most adventuresome class action settlement ever attempted. There are numerous respects in which the settlement, if approved, would have brought about results akin to reform of U.S. copyright laws.”). This Article does not discuss defendant class actions where individual plaintiffs sue numerous defendants. See Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 *Denv. U. L. Rev.* 73, 78 (2010) (discussing an application of defendant class actions to copyright cases); see also Joshua A. Druckerman, Note, *The Uncertifiable Swarm: Why Defendant Class Actions and Mass BitTorrent Copyright Litigation Don’t Mix*, 58 *N.Y. L. Sch. L. Rev.* 931, 934 (2013) (arguing that defendant classes in these cases are not allowed under Rule 23 and are neither fair nor efficient in the context of person-to-person file sharing).

11. See, e.g., Issacharoff & Witt, *supra* note 9, at 1571–77; Nagareda, *supra* note 9, at 361–62; Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 *U. Pa. L. Rev.* 2119, 2144–59 (2000) [hereinafter Resnik, *Money Matters*].

aggregate and disseminate large quantities of copyrighted works, which itself requires obtaining rights from a large number of copyright holders.¹² Second, new technologies lower the cost of content creation.¹³ On the one hand, this creates a democratizing effect: As Professor Madhavi Sunder put it, new technologies “empower[] democratic cultural participation . . . in which all individuals can ‘rip, mix, and burn’ culture.”¹⁴ Yet the now trite adage that “anyone can be a creator” in the internet age has, as Professor Molly Van Houweling has explored, a downside: Many rights are now spread out among millions of individual creators, rather than concentrated in a discreet set of large industry repeat players.¹⁵ Some refer to this as the “long tail” of copyright holders.¹⁶ In short, digital technologies exacerbate, rather than reduce, the problem of transaction costs.¹⁷ And these costs are only likely to increase, as the newly-enacted Copyright Alternative in Small-Claims Enforcement (CASE) Act makes it easier for individual creators to file infringement actions in a specialized copyright claims court, potentially subjecting large technology users, like Google, to thousands of claims each year from long tail copyright holders.¹⁸

12. See Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 *Tex. L. Rev.* 783, 792 (2007) (noting that some form of compensation, but not permitting the intellectual property owner to stop the secondary use, is appropriate “where the production of a particular type of work requires clearances of so many rights, or rights are so hard to find, that doing so would be uneconomic”); Samuelson, *Google Book Search*, *supra* note 10, at 1358–59 (describing the “‘Gordian knot of the huge’ transaction costs” associated with obtaining permissions to digitize millions of out-of-print books (quoting Letter from Mary Ellen Davis, Exec. Dir., Ass’n of Coll. & Rsch. Librs., Keith Fiels, Exec. Dir., Am. Libr. Ass’n & Charles Lowry, Exec. Dir., Ass’n of Rsch. Librs., to William F. Cavanaugh, Deputy Assistant Att’y Gen., Antitrust Div., DOJ (Dec. 15, 2009), <https://lca.x0x8kvd0-liquidwebsites.com/wp-content/uploads/2018/04/lca-ltr-gbs-settlement-15dec09.pdf> [<https://perma.cc/X7BD-K3U8>])). As Professors Lemley and Weiser note, the most commonly proposed solution to the compensation-without-control model is a compulsory license, a solution that has been enacted by Congress, as well as proposed by scholars. See Lemley & Weiser, *supra*, at 792 (citing 17 U.S.C. §§ 111, 114–115, 118–119); see also William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* 199–258 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *Harv. J.L. & Tech.* 1, 25 (2003).

13. See Mark A. Lemley, *IP in a World Without Scarcity*, 90 *N.Y.U. L. Rev.* 460, 487–88 (2015) (noting the reduction in reproduction and distribution costs).

14. Madhavi Sunder, *IP*³, 59 *Stan. L. Rev.* 257, 262 (2006).

15. See Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 *Va. L. Rev.* 549, 616 (2010).

16. See *infra* section III.B.

17. See Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 *Nw. U. L. Rev.* 1607, 1664 (2009) (“[I]ronically, while [i]nternet search engines have reduced transaction costs in relation to many copyrighted markets, they themselves are subject to increasing transaction costs by virtue of their own success.”).

18. See Copyright Alternative in Small-Claims Enforcement Act of 2020, Pub. L. No. 116-260, 134 Stat. 2176 (to be codified at 17 U.S.C. §§ 1501–1511).

The use of class actions in addressing how copyright law has responded to new technological uses has gone largely unexplored, and its potential underutilized, in the intellectual property literature. Copyright scholars addressing the acute problem of transaction costs in the digital age have either advocated for a vision of private ordering via new licensing collectives or contractual arrangements, or common law and legislative interventions in the form of fair use reform, specialized rate courts, and tailored legislation.¹⁹ Missing from their analysis, however, is how aggregate litigation may fulfill a different function, something much closer to an administrative copyright: administering millions of licenses for not merely past infringement but future uses and, in the process, filling in statutory gaps to address a rapidly shifting technological landscape.²⁰ In this sense, copyright class actions also differ from procedural scholars' understanding of aggregate litigation as either a regulatory device for the wide-scale administration of public policy or a joinder device to ensure litigation efficiency.²¹ Mass torts, discrimination, and consumer class actions attempt to do some form of rough justice to make class plaintiffs whole for economic or personal injuries that are defined by existing substantive law.²² But this Article's examination of copyright class actions uncovers the class mechanism doing something slightly different from merely administering compensation for defined harms: It updates and fills in gaps in the substantive law and determines exactly what constitutes a copyright injury in the first place for new technological uses such as audio recording, user-generated content, and digital streaming.²³

Thus, this Article fills the chasm between two domains that are rarely in conversation with one another and offers a novel view of the class action device as both an efficient legal coordinating mechanism—as a hybrid public-private licensing scheme—and as having a part to play in making substantive copyright law. The copyright class actions and ensuing settlements examined in this Article are notable: as court-fashioned

19. See *infra* Part I.

20. See *infra* Part II.

21. See, e.g., David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 *BYU L. Rev.* 1511, 1512 (describing two conceptions of the class action, one as a conflict resolution vehicle and the other as a regulatory device). A third conception of the class action as theorized by procedural scholars might be described as a combination of the prior two: a regulatory-administrative framework that sees the class action device as creating temporary agencies for the efficient processing of wrongdoing at scale. See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 *Colum. L. Rev.* 2010, 2020 (1997).

22. See Jack B. Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* 148 (1995) (outlining the purpose of mass tort cases as compensation-based); David Marcus, *Some Realism About Mass Torts*, 75 *U. Chi. L. Rev.* 1949, 1950 (2008) (describing the mass torts framework as starting from a “defendant engag[ing] in allegedly injurious conduct” and “prospective claimants acquir[ing] legal rights defined by the applicable substantive law”).

23. See *infra* Part II.

compulsory licenses establishing forward-looking royalty payments for millions of rightsholders, as sweeping settlements containing market-based royalty rates, as catalysts for significant legislative reform, and as precisely the type of hybrid solution (of private ordering and judge-made law) to the problem of digitization and dissemination of copyrighted works that scholars have long cogitated over.

This Article proceeds as follows. Part I begins by examining the problems posed by new technologies that redistribute mass quantities of existing copyrighted works. Not only do these technologies fail to fit comfortably into the fair use paradigm, but they also present the intellectual property corollary to the holdout problems that Professors Guido Calabresi and Douglas Melamed famously identified in the real property context.²⁴ Part I also discusses solutions, and problems with those solutions, posed by scholars and implemented by courts, ranging from judicially imposed liability rules that may mimic compulsory licenses to the establishment of private collection societies that could issue voluntarily negotiated blanket licenses. Part II provides a historical overview of the development of copyright class actions, from examples of early representative suits, to increased class action suits in the 1990s as responses to new digital technologies, to two recent, and particularly advanced, settlements in class action cases, involving Google Books and Spotify. This Part pays particular attention to the nonmonetary components of any ensuing settlements, analyzing them as explicit or implicit attempts to advance legislative changes that ultimately resulted in the passage of several landmark copyright laws. By joining far-flung, disparate rightsholders as putative class members, these class action suits exposed the defendants to enormous risk while creating enormous opportunity—to craft private settlements that would first release all claims, known or unknown, past, present, and future, against the defendant in one fell swoop and serve as the blueprint for industry-wide change. Using these learnings, Part III argues that aggregate litigation, if implemented properly, can solve the problem of mass infringements, high transaction costs, unwieldy holdouts, and a long tail of small, individual rightsholders. Part IV addresses potential objections, such as concerns that reform by private settlement usurps the role of legislatures, or that any such ensuing settlements may vest monopoly power in the settling defendant. This Article concludes by looking toward the future and suggesting that the class action mechanism represents one model for what the future of copyright infringement remedies may look like in a digital age rife with increasingly fragmented rights and rightsholders.

24. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1106–07 (1972); *infra* section I.A.

I. THE PROBLEM OF DIGITAL TECHNOLOGIES AND REPRODUCTIVE USES

The rise of new technologies that disseminate or copy vast amounts of content has vexed judges, scholars, and the content industry since the invention of the printing press.²⁵ This problem has only grown more acute in the new digital age. On the one hand, new technologies can transform the way we consume, interact with, and access content.²⁶ On the other hand, rightsholders are increasingly threatened by the digitization of copyrighted content, not only because new technologies may make it easier to copy and distribute these works but because these uses are oftentimes substitutive of existing ones, potentially impairing the author's incentive to create.²⁷ Indeed, this "copyright-innovation tradeoff" oftentimes lies at the heart of the debate about how the law should evolve to address new digital technologies.²⁸

25. See *Sony Corp. of Am. v. Universal City Studios, Inc. (Betamax)*, 464 U.S. 417, 430 (1984) ("From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection." (footnote omitted)).

26. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (noting that "a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work"); *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011) (noting the "many" benefits of the Google Books project, including allowing "[l]ibraries, schools, researchers, and disadvantaged populations" to "gain access to far more books," and "facilitat[ing] the conversion of books to Braille and audio formats, increasing access for individuals with disabilities").

27. See, e.g., Douglas Lichtman, *Copyright as Innovation Policy: Google Book Search From a Law and Economics Perspective*, 9 *Innovation Pol'y & Econ.* 55, 70 (2009) (arguing that the market harm factor of the fair use test should significantly weigh against Google's use, in part because Google's project "directly undermines author opportunities to pursue projects that are similar to and/or partially competitive with Google Book Search"); Timothy Wu, *Copyright's Communications Policy*, 103 *Mich. L. Rev.* 278, 278 (2004) [hereinafter Wu, *Copyright's Communications Policy*] (noting that content owners "say that newer and better technologies have made it too easy to be a pirate" and that "[e]asy copying, they say, threatens the basic incentive to create new works"). Whether the "incentive-to-create" argument is merely a construct of copyright law rather than a reality of content creation continues to be up for debate. Compare William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 8 (2003) (examining copyright law from a law and economics perspective), with Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 *Hous. L. Rev.* 451, 457 (2017) (arguing that "the link between copyright and creative incentives is considerably less robust than theory may have led us to expect"), and Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 *Theoretical Inquiries L.* 29, 35 (2011) (asserting that "there has long been reason to be suspicious of the claim that economic reward is the engine that makes innovation run").

28. See Dotan Oliar, *The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm*, 64 *Stan. L. Rev.* 951, 953 (2012) (noting that "imposing copyright liability on technology companies would promote authorship but chill innovation, while immunizing innovators from liability would promote innovation but chill authorship"); see also Jane C. Ginsburg, *Copyright and Control Over New Technologies of*

A. *Mass Digitization and the Transaction Cost Problem*

The invention of home-recording devices, such as VHS or Betamax machines, in the 1970s suddenly allowed individuals to engage in mass copyright infringement. By copying large amounts of copyrighted, televised content onto blank tapes, consumers could save content for later viewing.²⁹ The resulting case, *Sony Corp. v. Universal Studios (Betamax)*, was certainly not the first time a new technology spurred a series of heated copyright debates.³⁰ But the Supreme Court, in declining to hold that the VHS maker was engaged in contributory infringement of respondents' copyrighted television programs, was the first to apply the fair use doctrine—a complete defense to copyright infringement³¹—to solve the problem of acquiring mass permissions.³² In her seminal 1982 law review article, Professor Wendy Gordon referred to the so-called “*Betamax* problem” as a classic example of market failure in transactions for copyrighted works, as home users who wished to copy vast amounts of televised content “might well find transaction costs prohibitively high if they were required to bargain individually with copyright owners over the right to tape each desired program.”³³ Further, Professor Gordon reasoned, “The mere task of identifying the copyright owners in advance of broadcasts might present insurmountable difficulties.”³⁴

In effect, Professor Gordon was describing the intellectual property corollary to the problem famously identified by Professors Calabresi and Melamed in their article *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.³⁵ Writing in the real property context, Professors Calabresi and Melamed used the example of a park to illustrate how socially beneficial uses may nonetheless be forestalled if property rules were strictly enforced.³⁶ If building a park requires aggregating 1,000 tracts of land, each owned by a different property owner, and enough owners hold out for more than what they actually value the property at because they think the buyer is willing to pay more *in the aggregate*, then the total

Dissemination, 101 Colum. L. Rev. 1613, 1613 (2001) (arguing that “the copyright statute and the judges who interpret it attempt a balance: Creators should maintain sufficient control over new markets to keep the copyright incentive meaningful, but not so much as to stifle the spread of the new technologies of dissemination”).

29. See *Betamax*, 464 U.S. at 423.

30. *Id.* at 431 (listing copyright cases spurred by “major technological innovations”).

31. For a more detailed discussion of the fair use doctrine and how it has been proposed as a solution to the infringement that would otherwise occur from mass aggregation and distribution of copyrighted content, see *infra* section I.C.

32. See *Betamax*, 464 U.S. at 454–55.

33. Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors, 82 Colum. L. Rev. 1600, 1655 (1982).

34. *Id.*

35. See Calabresi & Melamed, *supra* note 24, at 1106–07.

36. *Id.*

amount demanded for the park will exceed the buyer's valuation and no park will result.³⁷ In this case, Professors Calabresi and Melamed argued, society would be better off if we deny the property owners their right to exclude and move to a liability rule instead. Indeed, the doctrine of eminent domain for real property does just that.³⁸

Subsequent applications of Professors Calabresi and Melamed's transaction cost theory to intellectual property transactions for new technologies that reproduce large quantities of copyrighted material, all of which are owned by disparate rightsholders, broke out transaction costs into two distinct categories. First, there are the high costs associated with identifying rightsholders.³⁹ In the copyright context, merely the first step—identification of ownership—can prove insurmountable, as changes in copyright laws throughout the decades have eliminated registration and notice requirements, leading to a large number of so-called "orphan works."⁴⁰ Even mass digitization projects much smaller in scale than a Google Books or a Spotify can require years of research to identify the copyright owners, only to find ownership information lacking for more than a fifth of the content.⁴¹

Second, even assuming all owners can be identified, there is the sheer size and scope of the negotiation process. Today's digital aggregation technologies comprise rights far exceeding the 1,000 tracts of land in

37. *Id.* In Professors Calabresi and Melamed's example, the total value of the 1,000 parcels of land from which the park would be built is worth \$10 million to the buyers. Each parcel is worth \$8,000 to the landowner. "On this assumption, the park is, in economic efficiency terms, desirable—in values foregone it costs \$8,000,000 and is worth \$10,000,000 to the buyers." *Id.* at 1106. Yet if enough of the owners hold out for more than \$10,000 to attempt to capture the \$2 million surplus that they guess the buyers are willing to pay, above and over the actual value the sellers place on their land, the total price demanded will be more than \$10 million, and no park will result. In this sense, as Professors Calabresi and Melamed observe, efficient transactions are difficult because parties have incentives to hide their true valuation, and marketplace transactions may not be successful at drawing it out, either. See *id.* at 1107.

38. See *id.* at 1108. An entitlement protected by a property rule cannot be wrested from the entitlement holder unless they voluntarily agree to part with it, at a value that is agreed to by both the entitlement holder and the buyer. On the other hand, where the initial entitlement may be destroyed by some objectively determined sum—even if the entitlement holder complains that they deserve more—that entitlement is protected by a liability rule. *Id.* at 1105–06.

39. See Register of Copyrights, U.S. Copyright Off., Orphan Works and Mass Digitization 1 (2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [<https://perma.cc/Y7VB-4BWY/>] [hereinafter Copyright Off., Orphan Works].

40. See *id.* at 10.

41. See, e.g., Megan L. Bibb, Note, Applying Old Theories to New Problems: How Adverse Possession Can Help Solve the Orphan Works Crisis, 12 *Vand. J. Ent. & Tech. L.* 149, 151 (2009) (describing a digital library project for which 7,000 items were initially selected, 1,496 of which remained unaccompanied by copyright information after two years of research by librarians).

Professors Calabresi and Melamed's example.⁴² Indeed, the Copyright Office noted that "obtaining permission" for mass digitization works is "essentially impossible, not necessarily because of a lack of identifying information or the inability to contact the copyright owner, but because of the sheer number of individual permissions required."⁴³

B. *"Permitted but Paid" Solutions*

Some scholars have proposed reducing transaction costs by allowing collective rights organizations to offer blanket licenses.⁴⁴ The aggregation of large tracts of rights within one or two parties, however, poses serious antitrust concerns.⁴⁵ While Professor Robert Merges, for example, has used performing rights organizations (PROs)⁴⁶ as examples of how private ordering can occur through collective bargaining,⁴⁷ the two largest PROs in the United States, American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), are heavily regulated.⁴⁸ Indeed, after the Department of Justice opened antitrust investigations into both PROs, the two organizations entered into consent decrees, which impose a number of rules on the PROs and, more importantly, subject them to the jurisdiction of a specialized "rate court" to determine reasonable royalties in the event of bargaining breakdown.⁴⁹

While some scholars have looked to these specialized rate courts as one example of how legislative action could solve the problem of reproductive technological uses, few scholars to date have been able to agree on what this compulsory license scheme would look like, who would

42. See Copyright Off., Orphan Works, *supra* note 39, at 5 (noting how, in the age of mass digitization, a digitization project can involve "hundreds, thousands, or millions of copyrighted works").

43. *Id.* at 1.

44. See Robert P. Merges, Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 Calif. L. Rev. 1293, 1329 (1996).

45. See ASCAP v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012) (noting that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music").

46. These organizations aggregate public performance rights from hundreds of thousands of rightsholders, licensing them on a collective, or "blanket," basis to restaurants, bars, sports stadiums, and even digital services—anyone who would like to play music in a public space. See About Us, ASCAP, <https://www.ascap.com/about-us> [<https://perma.cc/JN9S-WYWL>] (last visited July 24, 2022); About, BMI, <https://www.bmi.com/about> [<https://perma.cc/W8Q3-2EP7>] (last visited July 24, 2022).

47. See Merges, *supra* note 44, at 1328–40.

48. See Peter DiCola & Matthew Sag, An Information-Gathering Approach to Copyright Policy, 34 Cardozo L. Rev. 173, 182 (2012) (noting that law and economics literature extolling PROs as a solution to government price-setting "has largely overlooked the role of the government in making such private ordering possible").

49. See *United States v. ASCAP*, 1940-43 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. Mar. 4, 1941), amended by 2001-2 Trade Cas. (CCH) ¶ 73,474, pt. IX.A (S.D.N.Y. June 11, 2001); *United States v. BMI*, 1966 Trade Cas. (CCH) ¶ 71,941, amended by 1996-1 Trade Cas. (CCH) ¶ 71,378, pt. I.A (S.D.N.Y. Nov. 18, 1994).

administer it, and how the amount would be determined.⁵⁰ At its most basic level, there are definitional difficulties: What types of uses would qualify for rate court adjudication? Would a peer-to-peer service that allows users to engage in mass downloading of copyrighted works have every right to claim that it, too, constitutes a “new technology” that is eligible for a compulsory license?

Finally, rightsholders themselves have long disliked rate courts, arguing that they depress rates in comparison to what they could receive in the free market.⁵¹ Indeed, music publishers have complained of being subject to rate court adjudication for public performance rates, claiming that government regulation has depressed royalties for musical works.⁵²

C. *The Permitted and Free Solution*

In the face of insurmountable market barriers on the licensee side and definitional difficulties and wariness of unwarranted government regulation on the licensor side, courts and scholars have defaulted to the use of a liability rule for socially valuable uses that is unique to copyright law: the zero-fee doctrine of fair use.⁵³ By offering case-by-case adjudication, fair use allows courts to be agile and flexible in evaluating each new technology, and each new use of that technology, on its own

50. See Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 *Berkeley Tech. L.J.* 1383, 1436–37 (2014) [hereinafter Ginsburg, *Fair Use for Free*].

51. The term “free market” is used here to mean a marketplace without government regulation. It does not imply that a marketplace without government regulation would be competitive. Indeed, as courts have recognized, “because music performance rights are largely aggregated in the PROs which operate under consent decrees, ‘there is no competitive market in music rights.’” *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014) (quoting *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 577 (2d Cir. 1990)). Thus, rates are higher in the “free” market because rightsholders possess disproportionate bargaining power, an asymmetry that is corrected by a rate court applying a fair market value standard. See *id.* at 346 (noting that Sony leveraged its size to charge an industry-wide royalty rate that exceeded the prevailing industry rate by 25%).

52. See Nat’l Music Publishers’ Ass’n, *Comment Letter Submitted in Response to U.S. Justice Department Antitrust Division Solicitation of Public Comments Regarding Review of the ASCAP and BMI Consent Decrees 1* (Aug. 6, 2014), <https://www.justice.gov/atr/page/file/1082536/download> [<https://perma.cc/7K26-4NV3>] [hereinafter *NMPA Comments*] (“[T]he consent decrees have become a significant impediment to a well-functioning market for licensing the performances of musical works, resulting in inefficient licensing and failing to provide fair market-based compensation for songwriters and music publishers.”).

53. See Lemley & Weiser, *supra* note 12, at 790 (describing fair use as a “zero-price” liability rule). The fair use doctrine provides that use of copyrighted works for purposes such as “criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107 (2018). The statute provides four factors that a court should consider in determining whether a use is fair and thus noninfringing. See *id.* By imposing liability only over unfair uses of copyright, the statute seeks to protect socially valuable uses. See H.R. Rep. No. 94-1476, at 65–74 (1976).

merits. Unlike proposals for legislative action,⁵⁴ in which lawmakers may be wary of attempts to “future proof” copyright law for unforeseen uses,⁵⁵ fair use allows the law to adapt and change in a narrowly targeted manner. In other words, fair use takes a scalpel to the problem of new technological uses.

But to some detractors, fair use is a blunt tool, either disallowing uses completely or allowing them on an ongoing, zero-fee basis.⁵⁶ After all, the very point of Professors Calabresi and Melamed’s proposal is that courts may forgo this dilemma, choosing instead to deny injunctive relief but nonetheless award plaintiffs a limited entitlement: damages.⁵⁷ Indeed, the Supreme Court’s decision in *eBay v. MercExchange* reversed the long held presumption in intellectual property cases that injunctive relief should automatically issue in infringement cases, inviting courts to use their equitable discretion to award damages instead.⁵⁸ And courts following *eBay* did not just do so with regard to past infringement—rather, courts also began ordering ongoing royalty arrangements, amounting to what is essentially a court-fashioned compulsory license.⁵⁹ An empirical study of court-issued remedies post-*eBay* found that most damages in the patent context were in the form of prospective royalties.⁶⁰ Otherwise, absent

54. For example, the National Music Publishers’ Association (NMPA), the largest association of songwriters and music publishers, has complained that rate courts are “inherently inflexible” and “unresponsive to market forces.” See NMPA Comments, *supra* note 52, at 1.

55. See Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before Subcomm. No. 3 of the H. Comm. on the Judiciary, 89th Cong. 57–58 (1965) (“We have tried to phrase the broad rights granted in such a way that they can be adapted as time goes on to each of the new advancing media.”); Staff of the H. Comm. on the Judiciary, 89th Cong., Copyright Law Revision, Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill 13–14 (Comm. Print 1965) (warning against limiting an author’s rights based on present technology because, over time, their “copyright loses much of its value [due to] unforeseen technical advances” and, thus, suggesting that “the author’s rights should be stated in the statute in broad terms”); Brad A. Greenberg, Rethinking Technology Neutrality, 100 Minn. L. Rev. 1495, 1499 (2016) (“[B]ecause the 1976 Act uses broad terms that are per se inclusive of new technologies, courts have responded by expanding the availability of use-specific exceptions to copyright liability. In particular, fair use has taken on an outsized role.”).

56. See, e.g., Ginsburg, Fair Use for Free, *supra* note 50, at 1385 (“Fair use is an on/off switch: either the challenged use is an infringement of copyright or it is a fair use, which section 107 declares ‘is not an infringement of copyright.’” (quoting 17 U.S.C. § 107)).

57. Calabresi & Melamed, *supra* note 24, at 1107.

58. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

59. See *Innogenetics, N.V. v. Abbott Lab’ys*, 512 F.3d 1363, 1379–81 (Fed. Cir. 2008) (confirming that it is within a district court’s authority to order prospective royalties following denial of injunctive relief); *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1313–15 (Fed. Cir. 2007) (addressing the district court’s ongoing royalty order, which allowed the defendant to continue using the patent at a fixed cost per vehicle).

60. See Jiarui Liu, Copyright Injunctions After *eBay*: An Empirical Study, 16 Lewis & Clark L. Rev. 215, 267 (2012).

injunctive relief, rightsholders would need to pursue repeat litigation for ongoing infringement.⁶¹

But courts' ability to fashion an appropriate damages award for copyright infringements is an altogether different story. Critically, copyright law differs from patent law in one crucial aspect: the availability of statutory damages.⁶²

Copyright's statutory damages provision has long been a point of concern for scholars.⁶³ Originally designed to address the difficulty of determining actual damages in copyright infringement cases,⁶⁴ section 504 of the Copyright Act permits a rightsholder to elect, at any time before final judgment, statutory rather than actual damages—up to \$150,000 per work.⁶⁵ Importantly, statutory damages need bear no relation to a copyright holder's actual damages.⁶⁶ The availability of statutory damages complicates copyright problems for mass-aggregation technologies in two fundamental ways. First, it calls on courts to create a compulsory licensing scheme (by awarding ongoing royalties as damages) that is unlikely to work, since a plaintiff may elect to receive high statutory damages in lieu of actual damages.⁶⁷ Also, Congress's intent in enacting the statutory damages provision suggests to judges that they are ill-positioned to calculate a reasonable royalty for copyrighted works.⁶⁸ Second, the availability of an outsized statutory damage award that well exceeds the

61. *Id.*

62. Compare 17 U.S.C. § 504(c)(1) (2018) (permitting a copyright owner “to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action”), with 35 U.S.C. § 284 (2018) (awarding patent claimant “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court”).

63. See Ben Depoorter, Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong, 66 UCLA L. Rev. 400, 404–05 (2019) (arguing that statutory damage awards are a poor fit for the age of the internet); Mark A. Lemley & Bryan Casey, Fair Learning, 99 Tex. L. Rev. 743, 759 (2021) (arguing that statutory damages incentivize plaintiffs to sue opportunistically in pursuit of windfalls in the copyright space); Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 Wm. & Mary L. Rev. 439, 447–52 (2009) (noting that section 504(c) of the 1976 Copyright Act “created a new higher range for statutory damages that could be awarded against willful infringers, which unfortunately opened up opportunities for excessive awards far beyond congressional intent”).

64. Samuelson & Wheatland, *supra* note 63, at 448–49.

65. See 17 U.S.C. § 504(c)(2).

66. See *Cohen v. G & M Realty L.P.*, 320 F. Supp. 3d 421, 442 (E.D.N.Y. 2018) (citing *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 127 (2d Cir. 2014)).

67. Lemley & Casey, *supra* note 63, at 759 (“Copyright law awards statutory damages of up to \$150,000 per work, plus attorneys’ fees, regardless of the plaintiff’s actual loss or the defendant’s actual gain.”).

68. See Lemley & Weiser, *supra* note 12, at 819 (noting the difficulty for courts in calculating an appropriate liability rule for uses like Google image search).

market value for a copyrighted work—not to mention one that could bankrupt the digital service⁶⁹—leads to exacerbated holdout problems.⁷⁰

Finally, *eBay*'s promise for judge-made compulsory licenses is ultimately limited because individual litigations, with their damages awards, only bind the specific parties in suit.⁷¹ For lack of a better term, this is a whack-a-mole problem: For companies like Google and their image search or Google Books projects, as soon as one copyright litigation is settled, another ten litigants pop out to collect their dues. Large plaintiffs might control a significant percentage of any given category of copyrighted work—as Author's Guild does with books, or Viacom does with audiovisual content, or major labels or music publishers with music—but there will nonetheless be a significant long tail of content and, accordingly, of content holders.⁷²

No wonder, then, that courts, scholars, and new technologies themselves prefer to rely on copyright's fair use provision,⁷³ which finds no corollary in patent law.⁷⁴ For copyright users, a win against one is a win against all rightsholders, whether known or unknown: Unlike individuated damages awards, once a new technology has been adjudged fair in one litigation, further copyright litigation by other content holders is a losing

69. Consider, for example, the recent \$1 billion statutory damages award against the internet service provider Cox Communications: The jury awarded \$99,830.29 for each work infringed, multiplied by a little over 10,000 infringing works. See Verdict Form at 2, *Sony Music Ent. v. Cox Commc'ns*, 464 F. Supp. 3d 795 (E.D. Va. 2019) (No. 1:18-cv-950), ECF No. 669 [hereinafter *Sony Music Verdict Form*].

70. See Samuelson & Wheatland, *supra* note 63, at 446 ("Although Congress made some effort to cabin statutory damage awards to avoid excessiveness in the Copyright Act of 1976, the presence of the enhanced damage provision available for willful infringements has led to an increasing number of awards that are not only punitive in effect, but punitive in intent."); see also Gordon, *supra* note 33, at 1630 n.162 ("[T]he availability of injunctive relief and statutory damages provides a motive for objecting, once a use has been made, even to those copyright owners who would have been inclined to consent *ab ante*.").

71. See, e.g., *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918) ("[A] State . . . cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.").

72. For a description of the long tail problem created by the ease of content creation, and the infinite shelf space, in the digital era, see *infra* section III.B.

73. See Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. Rev. 905, 907 (2020) ("Google's copying of millions of copyrighted books as part of Google Books, for instance, is possible because courts have ruled that Google digitally copying those books into its database is a fair use."); Jennifer Jenkins, *In Ambiguous Battle: The Promise (and Pathos) of Public Domain Day, 2014*, 12 Duke L. & Tech. Rev. 1, 8, 13 (2013) ("Fair uses by definition do not require permission, and are evaluated in court according to a set of rules designed to balance competing interests. . . . Endeavors such as Google Books and HathiTrust's Digital Library are possible precisely because no permission is required.").

74. Katherine J. Strandburg, *Patent Fair Use 2.0*, 1 U.C. Irvine L. Rev. 265, 266 (2011) ("Patent law has no fair-use-type doctrine and the 'research exemptions' that exist are either very narrow or available only in highly specific circumstances." (footnote omitted)).

proposition.⁷⁵ For judges and commentators, analysis and proposals as to how fair use can, or should evolve to, accommodate new technologies avoids the very difficult problem of fashioning an appropriate ongoing royalty rate, especially if a plaintiff chooses a statutory damages remedy.⁷⁶

Applying fair use to new technologies that reproduce copyrighted works wholesale, no matter how innovative, is also problematic. As Professor Jane Ginsburg highlights, the 1984 *Betamax* decision represented a “significant departure from prior law” by extending fair use beyond “productive” uses—or those that employ copyrighted content in the creation of a new work—to merely reproductive ones.⁷⁷ To detractors, cloaking new modes of disseminating or engaging with copyrighted works in the guise of fair use is problematic. This is because one of the most critical fair use factors turns on harm to potential markets for the copyrighted work, under which new modes of technological delivery would almost certainly fall.⁷⁸ As Professor Douglas Lichtman argued with respect to Google Books, for example, at the time of the project’s development, authors were in the process of pursuing similar, competitive projects—that is, electronic book access and searching-within-book capabilities.⁷⁹ That courts have nonetheless found certain technological uses to be fair could be explained, again, by a desire to promote socially valuable uses in the face of insurmountable transaction costs.

Yet, there is another way forward—one that avoids the zero-fee compulsory license problem of fair use and one that need not rely on legislative action and ongoing rate court supervision. The following Part provides an overview of something few scholars have examined: the class action mechanism in copyright cases.

II. A HISTORY OF COPYRIGHT CLASS ACTIONS: FROM EARLY LICENSING COLLECTIVE SUITS TO INTERACTIVE STREAMING SETTLEMENTS

From seemingly outsized attorneys’ awards to arguments about lack of due process, there is something for everyone to dislike about the

75. See Jenkins, *supra* note 73, at 13 (“[T]he expense and logistical hurdles associated with scores of discrete negotiations would derail even a modest project. . . . [In fair use litigation,] the use is evaluated in an impartial court according to specific rules, rather than through piecemeal bargaining subject to the manifold preferences of private parties.”).

76. See Lucille M. Ponte, *Coming Attractions: Opportunities and Challenges in Thwarting Global Movie Piracy*, 45 *Am. Bus. L.J.* 331, 345–48 (2008); Richard Swope, *Peer-to-Peer File Sharing and Copyright Infringement: Danger Ahead for Individuals Sharing Files on the Internet*, 44 *Santa Clara L. Rev.* 861, 895–96 (2004).

77. Ginsburg, *Fair Use for Free*, *supra* note 50, at 1404.

78. See 17 U.S.C. § 107(4) (2018) (discussing how the potential market of the copyrighted work is a factor for consideration in assessing whether fair use should apply).

79. Lichtman, *supra* note 27, at 69–70 (discussing that the Google Book Search feature gives rise to multiple types of cognizable harm and would likely not result in a finding of fair use).

modern-day class action. Yet, as a number of procedural scholars have noted, to reject the aggregate judicial processing of thousands (or hundreds of thousands) of individual claims out of hand is to miss the point: There is no question that aggregate litigation, especially aggregate settlement, will only grow in import. The important question is what that aggregate litigation will look like.⁸⁰ Or, as Professor Judith Resnik aptly put it:

The technologies of construction, air travel, engineering, photocopying, computers, and the [i]nternet have transformed both the problems with which the legal system has to cope and the legal system itself. Mass marketing of products, the structure of insurance, the desire of corporate defendants to circumscribe liability, the marvelous interactional information capacities generated by the web, and the painful inequalities thus revealed continue to create powerful incentives to find ways of responding to widespread injury by more than the familiar—but insufficient—single-file, laissez-faire, unaided civil justice system.⁸¹

The point of this Article is not to suggest generalized proposals for reform—an area where much work is already being done.⁸² Instead, this

80. Professors Samuel Issacharoff and John Fabian Witt call settlements in mass torts cases an “inevitability,” but they argue that this is not a bad thing. See Issacharoff & Witt, *supra* note 9, at 1633. They remark:

How the mass tort settlement class will ultimately be managed is beyond the scope of this Article. The historical record from the last century of practice in the area of mature torts, however, powerfully suggests that it will not be on the basis of individual claimants, individually represented, seeking their day in court. As Richard Nagareda aptly summarizes the world of the mature, mass harms in aggregated proceedings: “Transactions, not trials, are overwhelmingly the endgame of class lawsuits.” And in many ways, this is a good thing, too, for reasons of both administrative efficiency and intra-class equity.

Id. (quoting Nagareda, *supra* note 9, at 289).

81. Resnik, *Money Matters*, *supra* note 11, at 2158.

82. For just a small sampling, see L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 *La. L. Rev.* 157, 227–46 (2004) (proposing a requirement of judicial approval of mass tort settlements); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 *Colum. L. Rev.* 370, 379–80 (2000) (discussing potential options and opportunities available for class action members); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 *U. Chi. L. Rev.* 877, 918–30 (1987) (discussing the possibilities for mass tort reform); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 *U. Chi. Legal Forum* 519, 575–77 (discussing client autonomy at settlement as a means of reform); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 *Sup. Ct. Rev.* 337, 341–42 (discussing the problems and areas for improvement in virtual representation in the class action context); Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 *N.Y.U. L. Rev.* 765, 786–92 (1998)

Part contributes to the conversation on aggregate litigation in a different manner: It provides a framework for understanding *how* and *why* a distinct group of litigants—copyright holders—began turning to class actions to resolve their claims and discusses what the often ambitious settlements in some of those cases looked like.⁸³ Indeed, while the literature on the trend toward aggregate litigation has not cited copyright claims as an example, they are, as this Article will demonstrate, a concrete and particularly potent example of how and why the invention of new technologies might encourage a different type of procedure for the processing and disposal of claims. Copyright commentators have likewise recognized this trend as a descriptive matter. A respected copyright treatise by William Patry from a few decades ago described copyright class actions as “rare” but predicted that “with the increasing collective administration of copyright rights, there no doubt will be an increase in them.”⁸⁴ Patry turned out to be prescient. Research shows that twenty-three copyright class actions were filed in the decade from 1990 to 2000—a small number that obscures the fact that this represents an increase of almost 500% over the previous five decades combined.⁸⁵

Undoubtedly, the rise in copyright class actions is directly tied to the rise of digital technologies that facilitate the copying of mass quantities of copyrighted works.⁸⁶ As this Part details, aggregate litigation and its ensuing settlements act as both blanket licenses, where individualized licensing negotiations proved impossible, *and* as the blueprint for gap-filling legislation. This Part’s survey of the history of copyright class action litigation begins at the adoption of Federal Rule of Civil Procedure 23 (Rule 23) and details how, as new mass-aggregation technologies began proliferating, so, too, did use of the class action mechanism.

(proposing two solutions to finding the right balance in assuring adequate representation for absent class plaintiffs); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, Individuals Within the Aggregate: Relationships, Representation, and Fees, 71 N.Y.U. L. Rev. 296, 305–08 (1996) (discussing class action reform and competing visions of litigation); Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2056–58 (1995) (discussing agency cost issues and reform in class actions); Patrick Woolley, Rethinking the Adequacy of Adequate Representation, 75 Tex. L. Rev. 571, 572–73 (1997) (discussing adequate representation in class action suits).

83. This Article, too, addresses concerns with use of the class action mechanism, particularly in the copyright context. See *infra* Part IV.

84. Patry, *supra* note 2, at 1141–42.

85. A complete record of all copyright class actions as of July 20, 2020, is on file with the *Columbia Law Review*.

86. See Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 164 (2019) [hereinafter Cohen, Informational Capitalism] (“Intellectual property class action litigation is relatively rare, although class claims alleging large-scale unauthorized exploitation of copyrighted works have become somewhat more common in the networked digital era.”).

A. *Rule 23's First Five Decades: A Quiet Period for Copyright Class Actions*

The decision in the first copyright class suit ever brought auspiciously coincided with the adoption of Rule 23 in 1938.⁸⁷ In *Buck v. Russo*, the court permitted the president of the music performing rights society ASCAP to bring a suit on behalf of himself and hundreds of absentee society members.⁸⁸ In bringing the suit, the plaintiff specifically noted the “impracticability in joining” all of ASCAP’s members.⁸⁹ The court agreed, citing to Rule 23’s predecessor, Equity Rule 38.⁹⁰ As to the binding effect of the suit for absentee members, the court was clear:

[T]he fact that one’s name does not appear as a party to a suit in equity . . . does not necessarily [mean] that he is not bound by the result of it [R]epresentatives of the entire class . . . may . . . sue or defend for all . . . the judgment or decree rendered binding upon all⁹¹

The *Russo* court’s early and confident articulation of the binding effect of the class suit device is remarkable for its time,⁹² but it is not surprising. In many ways, copyright’s PROs proved uncontroversial plaintiffs for the class action device, as the very premise of organizations like ASCAP and BMI is to represent the interests of their everchanging

87. The 1938 version of Rule 23(a) provided for class suits as follows:

[W]hen the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Fed. R. Civ. P. 23(a) (as codified at Rules of Civil Procedure for the District Courts of the United States, 28 U.S.C. (Supp. V 1939)).

88. See 25 F. Supp. 317, 319 (D. Mass. 1938).

89. See *id.*

90. *Id.* at 321 (“[W]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”).

91. *Id.* (quoting *McClelland v. Rose*, 247 F. 721, 723–24 (5th Cir. 1918)).

92. Notably, Professors Geoffrey Hazard, John Gedid, and Stephen Sowle’s historical analysis showed:

When Federal Rule 23 was adopted in 1938, the state of the law on the binding effect of class suits . . . continued to be confused, despite the fact that there now were two major Supreme Court precedents—*Smith v. Swormstedt* and *Supreme Tribe of Ben-Hur v. Cauble*—confidently stating that a class suit would be binding on absentees.

Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L. Rev. 1849, 1937 (1998) (footnotes omitted).

roster of hundreds of thousands of artists.⁹³ A much more complex endeavor would be the filing of a class suit by one or several plaintiffs on behalf of disparate absentee class members not part of a collective, as some attempted to do in the years following *Russo*—with little success.⁹⁴ Perhaps due to this very complexity, few copyright class actions were filed between 1938, when Rule 23 was promulgated, and 1990.⁹⁵ In fact, almost every single one of the successful class suits was for classes of plaintiffs already part of an existing collective, be it a PRO like ASCAP or an organized guild.⁹⁶ The early suits, then, give credence to Professor Resnik's general observation that the ambitious scope of the modern-day class action required some other galvanizing factor—that the mere advent of Rule 23 as a litigation mechanism is not itself the catalyst (or culprit, depending on one's view) of the growing trend of aggregate justice.⁹⁷ Indeed, as the following section shows, it was only with the rise of new digital technologies in the twentieth century that copyright class actions began to rise, as well.

B. *1990 to 2000: The Digital Age Gives Rise to Significant Copyright Class Action Suits*

As noted above, in the four-plus decades following *Russo*, only a handful of copyright class actions were filed. But in the 1990s, two notable things occurred. One, the frequency and number of copyright class action filings dramatically increased, no doubt spurred by the development of new modes of digital dissemination that made large quantities of copyrighted works available to the public.⁹⁸ Two, the period from 1990 to 2000 gave rise to several notable class actions and class action settlements, described below, that filled in gaps created by the common law and the copyright statute.

93. See *Russo*, 25 F. Supp. at 318. Indeed, Gene Buck, the president of ASCAP, filed two other suits following *Russo*, each in a "representative capacity." *Buck v. Crescent Gardens Operating Co.*, 28 F. Supp. 576, 577 (D. Mass. 1939); *Buck v. Royal Palms*, 23 F. Supp. 29, 30 (D. Mass. 1938). In another class action filed decades later, *David v. Showtime/The Movie Channel, Inc.*, the lead plaintiff sought to represent himself and all other members of ASCAP. 697 F. Supp. 752, 754 (S.D.N.Y. 1988). The class was certified. See *id.*

94. See *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 978 (2d Cir. 1975) (describing the class of lyricists and music composers as "elaborate"); *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70, 77 (S.D.N.Y. 1986) (granting a motion to dismiss in a suit brought by the plaintiff on behalf of itself and all other copyright owners represented by the mechanical licensing collective Harry Fox Agency for failure to adequately represent the class pursuant to Rule 23).

95. See Patry, *supra* note 2, at 1141 ("Class actions in the past have been rare in copyright cases.").

96. See *Showtime*, 697 F. Supp. at 754.

97. See Resnik et al., *supra* note 82, at 299 ("Indeed, one of the primary purposes of class actions is to enable groups otherwise without legal representation to obtain access to courts; the group creates sufficiently large economic or social interests to attract attorney attention and entrepreneurial risk-taking.").

98. See *supra* note 85 and accompanying text.

1. *Cahn v. Sony Music Corp.: Common Law Gap Filling.* — While the Supreme Court's 1984 decision in *Betamax* handed a win to manufacturers of home video-recording devices, the import of the Court's decision for other industries was far from clear.⁹⁹ Following the Court's decision, various industries began lobbying Congress for a resolution to questions left open by *Betamax*, including a legislative answer to the question of whether *Betamax*'s holding applied to other types of recordings, such as audio cassette tapes.¹⁰⁰ In the late 1980s, Congress proposed several legislative solutions: bills requiring recording devices to "contain a copy-guard system prior to distribution" and a system proposed by CBS Records intended to "prevent all digital audio copying" called Copycode.¹⁰¹ In effect, Copycode was a rudimentary form of modern-day digital rights management tools.¹⁰² Ultimately, a digital rights management tool called the Serial Copy Management System (SCMS) was developed, but Congress failed to reach a consensus on how best to incorporate SCMS into new legislation.¹⁰³ Thus, in 1989, record companies and audio hardware manufacturers met in Athens, Greece to negotiate what ultimately became the Athens Agreement, which agreed to incorporate SCMS technology into all digital audio-only recording devices and to pursue legislation codifying the agreement.¹⁰⁴

But the Athens Agreement was unsatisfying to many rightsholders because it did not contain any royalty payment terms that could ostensibly offset lost revenue from large-scale audio taping.¹⁰⁵ And so, in July 1990, a plaintiff class of musical composition holders led by songwriter Sammy Cahn sued Sony (which manufactured, in addition to the home video-taping devices at issue in the *Betamax* litigation, digital audio tape recorders and blank cassettes).¹⁰⁶ Rather than resulting in a ruling that may have interpreted how *Betamax* applies to other types of tape-recording technologies outside of the audio-visual context, *Cahn* was instead notable

99. For a discussion of *Betamax*, see *supra* Part I.

100. See S. Rep. No. 102-294, at 31–32 (1992).

101. *Id.* at 31.

102. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *Yale L.J.* 804, 823 (2008). Professor Kapczynski explained: "New technologies also make it possible for rights holders to exert more control over information at the code level. 'Digital rights management' (DRM) tools or 'technical protection measures' have become an important part of the contemporary appropriation strategies of the information industries." *Id.*

103. See S. Rep. No. 102-294, at 32.

104. See H.R. Rep. 102-873, at 9–10 (1992); Joel L. McQuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 *Hastings Commc'ns & Ent. L.J.* 311, 322 (1994) (providing a more detailed summary of the Athens proceedings than the House Report).

105. See S. Rep. No. 102-294, at 50; see also McQuin, *supra* note 104, at 322.

106. Complaint—Class Action at 1–3, *Cahn v. Sony Corp.*, No. 90 Civ. 4537 (S.D.N.Y. filed July 9, 1990) [hereinafter *Cahn* Complaint].

because it ended with a class-wide settlement one year later—premised *not* on payment to the class but rather on a promise to support legislation for royalties on digital audio recording equipment and software.¹⁰⁷ In other words, *Cahn* was a notable example of a copyright class action settlement that was explicitly premised on, and which triggered, subsequent copyright legislation.¹⁰⁸

The resulting law, the Audio Home Recording Act (AHRA), was passed shortly after the *Cahn* settlement was reached.¹⁰⁹ The AHRA was a legislation of significant firsts. It was the first—and the only¹¹⁰—law to establish a royalty system for device manufacturers in the United States, out of the belief that consumers' access to blank tapes for home copying would negatively impact record sales.¹¹¹ It was also the first—and again, the only¹¹²—time U.S. copyright law mandated a rudimentary form of digital rights management, requiring the inclusion of SCMS or a similar tool on digital audio recording devices.¹¹³ Finally, and relatedly, it prohibited attempts to circumvent SCMS, in what was the first anti-circumvention provision in U.S. copyright law and what would pave the way to the modern-day section 1201 of the Digital Millennium Copyright Act (DMCA).¹¹⁴

Cahn was not the only class action that illuminated issues with new technologies that were ultimately resolved in the DMCA, which

107. See Gary S. Lutzker, Note, DAT's All Folks: *Cahn v. Sony* and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes?, 11 Cardozo Arts & Ent. L.J. 145, 146 (1992) (noting that the defendant, Sony, and the NMPA agreed to “support legislation that included royalties on digital audio recording equipment and software” in exchange for dismissal of the action).

108. See H.R. Rep. No. 102-873, pt. 1, at 10; Lutzker, *supra* note 107, at 181 (noting that the royalty provision of the Audio Home Recording Act, in particular, was the result of parties' negotiations in *Cahn*).

109. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001–1010 (2018)).

110. See Hester Wijminga, Wouter Klomp, Marije van der Jagt & Joost Poort, International Survey on Private Copying 164 (25th ed. 2016) (indicating that AHRA remains the basis for such royalties in the United States); Monica Zhang, Note, “Fair Compensation” in the Digital Age: Realigning the Audio Home Recording Act, 38 Hastings Commc'ns & Ent. L.J. 145, 155–56 (2016) (explaining that U.S. law does not provide for royalties related to recording mediums not covered by AHRA).

111. See S. Rep. No. 102-294, at 34–35 (1992) (noting that the music industry's concern over home taping and the Copyright Office's assertion that home taping is displacing the sales of authorized copies explain AHRA's provision for royalty payments).

112. While section 1201 of the Digital Millennium Copyright Act makes it illegal for anyone to circumvent a “technological measure that effectively controls access” to a copyrighted work, it does not require the use of such technological measures by device manufacturers. See 17 U.S.C. § 1201.

113. See *id.* § 1002(a).

114. See *id.* § 1002(c) (prohibiting attempts to circumvent SCMS); cf. *id.* § 1201 (prohibiting circumvention of “measure[s] that effectively control[] access to a work protected under this title”).

significantly updated U.S. copyright law for the internet age.¹¹⁵ While *Cahn* directly spurred legislation that focused on new modes of recording content, the filing of *Frank Music Corp. v. CompuServe* in 1993 focused on a new mode of distributing content: the internet intermediary.¹¹⁶

2. *Frank Music Corp. v. CompuServe: Statutory Gap Filling.* — Are internet service providers liable for the infringements of their users? This question—now well-settled by statute¹¹⁷—was uncharted territory at the time the *Frank Music Corp. v. CompuServe* class action was filed. The lead plaintiff in *Frank* was a music publishing company, which sought to represent itself and all other music publisher members of Harry Fox Agency (HFA), a mechanical licensing collective.¹¹⁸ The defendant was one of the earliest and largest online service providers, providing, inter alia, message forums where users posted a variety of content, including, as the plaintiffs in *Frank* contended, copyrighted music content.¹¹⁹ *Frank* was one of the first lawsuits, and the very first class action, to allege infringement by an online database or forum based on the activity of its users.¹²⁰ Styling the suit as a class action vastly increased CompuServe's exposure: The plaintiffs alleged hundreds of instances of infringement and demanded statutory damages of at least \$100,000 for each infringement.¹²¹ Likely due to the uncertainty and potentially catastrophic consequences of a loss for CompuServe, the service provider chose to settle with plaintiffs for over \$500,000 instead.¹²²

In addition to providing for the monetary payment for past infringement, the *Frank* settlement was unique in that it was the first copyright class action settlement in which the defendant agreed to enter into a licensing

115. See S. Rep. No. 105-190, at 1–2 (1998) (stating that the DMCA was a response to changing digital technologies and thus updated copyright law by “mak[ing] available via the [i]nternet . . . movies, music, software, and literary works”).

116. Complaint: Class-Action, *Frank Music Corp. v. CompuServe Inc.*, No. 93 Civ. 8153 (S.D.N.Y. filed Nov. 29, 1993) [hereinafter *Frank* Complaint].

117. See *infra* note 128 and accompanying text.

118. *Frank* Complaint, *supra* note 116, at 1–2.

119. See *id.* at 3–4.

120. Professor Matthew Sag has traced the enactment of the DMCA's safe harbor provision to other cases in the 1990s as “suggest[ing] that online service providers, such as internet bulletin boards, would be held directly liable for unlawful material posted by their users.” Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 *Notre Dame L. Rev.* 499, 507 (2017) [hereinafter Sag, *Internet Safe Harbors*] (citing *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993)). *Frank*, while coinciding with the decision in *Frena*, was the first lawsuit alleging infringement by a bulletin board that was styled as a class action.

121. See *Frank* Complaint, *supra* note 116, at 8.

122. See Order Approving Settlement of Class Action, Exhibit I, at 5, *Frank Music Corp. v. CompuServe Inc.*, No. 93 Civ. 8153 (S.D.N.Y. Dec. 19, 1995) [hereinafter *Frank* Order Approving Settlement]; Nancy A. Bloom, *Protecting Copyright Owners of Digital Music—No More Free Access to Cyber Tunes*, 45 *J. Copyright Soc'y U.S.* 179, 193 (1997).

agreement providing for future royalties to the class.¹²³ Under the terms of the agreement, HFA agreed to maintain a song file database that allowed CompuServe's forum board managers¹²⁴ to identify copyrighted songs requiring a license.¹²⁵ The royalty amount was determined by section 115, the Copyright Act's compulsory license provision for mechanical reproductions.¹²⁶

In exchange for entering into a forward-looking licensing arrangement, CompuServe aimed to avoid future lawsuits.¹²⁷ As an intermediary service provider, CompuServe's agreement to pay ongoing royalties in exchange for a release from potential future claims of infringement based on the activity of its users is also noteworthy because it predated the passage of section 512 of the DMCA, which exempts by statute any licensing obligation by service providers like CompuServe for precisely this type of user activity.¹²⁸ But the decision to pay royalties in exchange for some assurances against future suits may just exemplify one of the earliest examples of what scholars have subsequently termed "DMCA-plus" agreements, or agreements made in the shadow of copyright laws that seek to remove legal uncertainty surrounding user-generated content.¹²⁹

123. See Bloom, *supra* note 122, at 192.

124. The settlement agreement defines "Manager" as any manager or operator (including system operators or SYSOPS) of a CompuServe Forum/Library, provided that the term shall not be construed to refer to or include CompuServe except in the instance, if ever, that CompuServe is the sole manager or operator of such Forum/Library and shall include those persons or entities listed on Schedule "B" annexed to and made part of this Agreement.

Frank Order Approving Settlement, *supra* note 122, Exhibit I, at 7–8. Interestingly, this definition creates a demarcating line between CompuServe's forum managers and CompuServe itself, in what was likely an extralegal attempt to limit exposure and a pre-DMCA means of providing some shield from liability for the service provider.

125. See *id.* at 11.

126. See *id.* Section 115 rates are set by the Copyright Royalty Board, an administrative three-judge panel. 17 U.S.C. §§ 115(c)(1)(F), 801(b) (2018).

127. See *Frank* Order Approving Settlement, *supra* note 122, Exhibit I, at 4 (providing for a "Licensing Arrangement" . . . for continued use of the . . . musical compositions owned or controlled by the Class Plaintiffs" in "order to avoid future uncertainties and the prospects of future litigation").

128. See 17 U.S.C. § 512(c) (providing that a service provider is not liable in most cases for monetary relief for copyright infringement based on the activity of its users).

129. See Sag, Internet Safe Harbors, *supra* note 120, at 540–41 (noting that because "rightsholders have generated considerable uncertainty through their 'willingness to litigate every word of the DMCA'" and internet platforms "have a lot to lose from protracted federal court litigation," a number of internet platforms have chosen instead to adopt proactive policies in the shadow of existing laws (quoting Org. for Transformative Works, Comments in the Matter of Section 512 Study: Notice and Request for Public Comment 19 (Mar. 21, 2016), <https://www.transformativeworks.org/wp-content/uploads/2016/04/512otw-submission.pdf> [<https://perma.cc/D69F-LBSB>])).

The resulting exposure for service providers, as well as the potentially lucrative payouts for rightsholders, led CompuServe to lobby Congress for an amendment to existing copyright law to resolve the question of whether digital transmissions of sound recordings by an internet service provider constitute infringement and to address the issue of intermediary liability for user infringement.¹³⁰ The first of that legislation, the Digital Performance Right in Sound Recordings Act (DPRSA), amended sections 106 and 114 of the Copyright Act to add an exclusive right of public performance for sound recordings “by means of a digital audio transmission” and included statutory licenses for sound recordings in much the same way that section 115 did for musical compositions.¹³¹ Notably, CompuServe had advocated for a different version of the law, arguing that any digital performance right should include a carve-out for online service providers.¹³² Because online information services “have an extremely limited ability to monitor the transmissions generated by their users,” CompuServe argued, online information services should be exempted “from liability unless they have actual knowledge of infringing transmissions.”¹³³

What CompuServe did not get in the DPRSA, it eventually received in section 512 of the DMCA after extensive, continued lobbying of Congress for a liability carve-out for service providers (spurred by lessons learned in *Frank*). For example, testifying before Congress in 1996 in support of precursor legislation to the DMCA,¹³⁴ CompuServe’s general counsel argued that lawsuits based on user activity were a “very real threat,” referencing the company’s experiences with past “music litigation” as an example.¹³⁵ In that testimony, CompuServe again lobbied for a law that would exempt service providers from “liability for the infringing conduct of others” where the service provider had no “meaningful participation in the wrongful conduct.”¹³⁶ With the passage of section 512 just two years later, CompuServe got what it asked for, as the statute, in language mirroring CompuServe’s pleas to Congress, shields service providers from claims of copyright infringement where the material is transmitted “at the direction of a user,” so long as the provider does not have knowledge of

130. See The Performance Rights in Sound Recording Act of 1995: Hearing on S. 227 Before the S. Comm. on the Judiciary, 104th Cong. 91–95 (1995) (statement of CompuServe) [hereinafter Hearing on Performance Rights].

131. See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 114).

132. Hearing on Performance Rights, *supra* note 130, at 91 (statement of CompuServe).

133. *Id.*

134. NII Copyright Protection Act of 1995 (Part 2): Hearings on H.R. 2441 Before the Subcomm. on Cts. & Intell. Prop. of the H. Comm. on the Judiciary, 104th Cong. 234–62 (1996) (statement of Stephen M. Heaton, General Counsel and Secretary, CompuServe, Inc.).

135. *Id.* at 235.

136. *Id.* at 236–37.

the infringing activity.¹³⁷ Commonly known as the “safe harbor,” section 512 fundamentally altered the landscape of copyright usage and infringement on the internet, and remains one of the most contested copyright laws today.¹³⁸

3. *American Geophysical Union v. Texaco and the Limits of Common Law Fair Use in Aggregated Copying Cases.* — Finally, a discussion of the 1990s as a significant decade for the filing of copyright class actions must include a mention of *American Geophysical Union v. Texaco*, one of the most oft-discussed fair use decisions.¹³⁹ *Texaco* is not often thought of as a class action because the parties stipulated to try fair use first before any class issues.¹⁴⁰ That the suit was filed as a putative class illustrates why use of the class action device in representing the interests of a large number of rightsholders has increased as digital distribution picked up pace, further portending its prominence in an age of mass-aggregation technologies. Further still, *Texaco* presents a key example—the Copyright Clearance Center (CCC)—of alternative licensing mechanisms, which have sprung up to efficiently license collective rights.¹⁴¹ The CCC offers blanket photocopying licenses for any of the journals and books in its archive.¹⁴² In fact, the very availability of a blanket license through CCC proved pivotal in the court’s denial of fair use.

The plaintiffs in *Texaco* were publishers of scientific and technical journals, which owned the copyrights to a number of scientific articles.¹⁴³ The defendant, *Texaco*, was accused of making unlawful copies of articles from the plaintiffs’ journals.¹⁴⁴ *Texaco* argued that its copying constituted fair use because it was done for research purposes.¹⁴⁵ Judge Pierre Leval, who was responsible for reshaping the fair use doctrine through the

137. 17 U.S.C. § 512(c) (2018).

138. See Sag, Internet Safe Harbors, *supra* note 120, at 503 (noting that the DMCA safe harbors “have had a profound effect on the behavior of traditional content producers, online platforms, and users”). For one example of a debate, compare The Digital Millennium Copyright Act at 22: What Is It, Why Was It Enacted, and Where Are We Now: Hearing on S. 227 Before the S. Comm. on the Judiciary, Subcomm. on Intell. Prop., 116th Cong. 4–6 (2020) (statement of Rebecca Tushnet, Professor, Harvard Law School) (explaining how section 512 “has helped enable an explosion of creativity from both traditional and new creators”), with *id.* at 5–7 (statement of Mark Schultz, Director of IP & Technology Law Center, University of Akron School of Law) (explaining the consequences of the outdated DMCA, including that “many small players have given up either trying to enforce their rights or investing in commercial creativity entirely”).

139. 802 F. Supp. 1 (S.D.N.Y. 1992), amended (Oct. 26, 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994).

140. See *id.* at 4.

141. *Id.* at 8.

142. *Id.*

143. See *id.* at 4.

144. *Id.*

145. *Id.* at 5.

publication of a famous *Harvard Law Review* article,¹⁴⁶ disagreed.¹⁴⁷ His reasoning hinged on precisely the problem this Article discusses in Part I: the uneasy fit between the fair use doctrine and reproductive, rather than productive, uses. “Texaco’s copying,” Judge Leval noted, was simply “not of the transformative, nonsuperseding type that has historically been favored under the fair use doctrine.”¹⁴⁸

Although Judge Leval was acutely aware of the high transaction costs associated with obtaining permissions from each academic publisher,¹⁴⁹ he cited the availability of a license through CCC as a reason for denying Texaco’s fair use claim: “[P]rivate cooperative ingenuity has found practical solutions to what had seemed unsurmountable problems A finding that such unauthorized copying is an infringement would no longer impede the progress of science.”¹⁵⁰ In other words, evidence of private ordering in the form of licensing collectives was distinctly relevant to the denial of fair use because it ameliorated the problem of high transaction costs that might otherwise have justified the zero-fee liability rule fair use offers.

Scholars have criticized *Texaco* for its development of the “lost licensing revenue” theory for fair use. For example, Professor Mark Lemley argues that denying fair use in instances where a licensing market exists “unmoor[s] fair use from the traditional rationale of market loss,” potentially making “any use for which the user could afford to pay into a use for which they must pay.”¹⁵¹

146. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). Judge Leval argued that courts, in evaluating fair use, should focus on whether the infringing use is “transformative,” thereby adding “new aesthetics, new insights and understandings” to the original work. *Id.* This argument was subsequently adopted by the Supreme Court in the case that would shape fair use doctrine for the next few decades. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

147. *Texaco*, 802 F. Supp. at 13.

148. *Id.*

149. *Id.* at 23. Judge Leval explains:

A problem that has bedeviled the application of the copyright laws to the making of copies has been the transaction costs of arriving at a license agreement An honest user, who would be happy to pay a reasonable royalty, faces the problem of the enormous administrative difficulty and expense of making an agreement with the copyright owner for a license to make a single copy. Notwithstanding that the transaction might ultimately involve a fee of no more than a few dollars, enormous time, expense, and burden may be involved for both sides in reaching such an agreement.

Id.

150. *Id.* at 25.

151. Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 Law & Contemp. Probs. 185, 190 (2007); see also Brian T. Ster, Note, *Photocopying and Fair Use: Exploring the Market for Scientific Journal Articles*, 30 Ind. L. Rev. 607, 608 (1997) (“The

But another way of limiting the reasoning and holding in *Texaco* is that the availability of a licensing market—or, more broadly speaking, the availability of solutions to the transaction costs of large-scale licensing—is only relevant in cases of reproductive, rather than productive, uses. Indeed, that was the very point of the district court’s analysis of the difference between reproductive and productive uses, in which Judge Leval discussed the *Betamax* opinion at length.¹⁵² The Second Circuit adopted Judge Leval’s reasoning in its affirmance, noting that it “seriously question[ed] whether the fair use analysis that has developed with respect to works of authorship alleged to use portions of copyrighted material is precisely applicable to copies produced by mechanical means,” for “[m]echanical ‘copying’ of an entire document . . . is obviously an activity entirely different from creating a work of authorship.”¹⁵³ Just as Part I discussed *Betamax* as an outlier in applying fair use to reproductive uses to solve market failures, Judge Leval and the Second Circuit’s affirmance, too, saw *Betamax* as a fix for market failures.¹⁵⁴ Where markets work, however—as was the case in *Texaco*—then no fair use should be granted for reproductive uses.

Betamax was, in fact, the first and last case to ever apply fair use to for-profit, purely reproductive uses that directly impinge on the revenue streams of copyright holders.¹⁵⁵ As discussed *supra*, uncertainty around the broader application of the decision and an outcry from rightsholders ensured that subsequent claims of fair use by other industries looking to

problem with this analysis, as *Texaco* unsuccessfully argued to the court, is the circularity of its reasoning: the court presupposes the publishers’ right to demand such fees when determining market effect, but this right is the very question that the fair use trial was to determine.”).

152. *Texaco*, 802 F. Supp. at 11–13.

153. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (2d Cir. 1994).

154. *Texaco*, 802 F. Supp. at 12 (“The [*Betamax*] holding did not overturn the preexisting concept that productive . . . uses were favored over non-productive . . . copies. It ruled only that productivity was not determinative in the inquiry, and that equitable considerations could lead to a conclusion of fair use in spite of a non-productive copying.”).

155. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207–08 (2d Cir. 2015) (applying fair use to full-text searching of copyrighted books); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014) (same); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (applying fair use to search engine displays of copyrighted images); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003) (same). All can be distinguished from *Betamax*’s license for users to reproduce copyrighted works wholesale because crucial to the courts’ fair use determinations in those four cases was the fact that rather than serve as substitutive uses, the secondary uses only made information available about the copyrighted works. See *Authors Guild*, 804 F.3d at 217 (relying on *HathiTrust* in reasoning that “the purpose of Google’s copying of the original copyrighted books is to make available significant information *about those books*”); *Perfect 10*, 508 F.3d at 1165 (relying on *Kelly* regarding the transformative nature of thumbnails); *Kelly*, 336 F.3d at 819 (explaining that a search engine “serves a different function than [the copyright holder’s] use—improving access to information on the internet versus artistic expression”). In short, these were nonconsumptive, nonsuperseding uses.

wholesale reproduce copyrighted content would be denied.¹⁵⁶ Perhaps aware of the perils of a fair use defense for a wholly reproductive use, when search giant Google began digitizing hundreds of thousands of books, it sought a different tack to the transaction cost problem: a class action settlement.

C. *The Google Books Class Action and the Modern (Failed) Ambitions of Aggregated Settlement*

In 2004, Google announced that it had entered into agreements with several large research libraries to digitally scan their collections, creating a large electronic database of millions of books that would also be searchable texts.¹⁵⁷ While Google was not the first to digitize books, the scale and ambition of its project vastly exceeded previous book-scanning projects.¹⁵⁸ By one account, Google aimed to make available as many as thirty-two million books—the most volumes listed in any catalogue—for full-text search.¹⁵⁹

Google had already completed scanning of about twelve million books by the time the inevitable copyright infringement lawsuit and proposed settlement were before a court.¹⁶⁰ As discussed supra, the sheer transaction costs associated with identifying and negotiating with rightsholders—not to mention the large volume of works with unidentifiable rightsholders (“orphan works”)¹⁶¹—virtually guaranteed large-scale infringement. The question was only whether the infringement could be excused under fair use, as Google’s previous infringement for image search had been.¹⁶² While there were plausible points in favor of fair use, it was certainly not an airtight argument.¹⁶³

156. See supra section II.B.1.

157. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670 (S.D.N.Y. 2011); Google Checks Out Library Books, News From Google (Dec. 14, 2004), <http://googlepress.blogspot.com/2004/12/google-checks-out-library-books.html> [<https://perma.cc/D3LT-7HA8>].

158. Jeffrey Toobin, Google’s Moon Shot, *New Yorker* (Jan. 28, 2007), <https://www.newyorker.com/magazine/2007/02/05/googles-moon-shot> [<https://perma.cc/H7YD-4REU>].

159. See *id.* (quoting Marissa Mayer, Google Vice President in charge of the Google Books project).

160. *Authors Guild*, 770 F. Supp. 2d at 670.

161. See Copyright Off., Orphan Works, supra note 39, at 10; supra note 40 and accompanying text.

162. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

163. For a discussion of arguments weighing in favor of and against fair use, see Samuelson, *Google Book Settlement*, supra note 10, at 485–91. Ultimately, Professor Samuelson concludes, after weighing all the arguments, that

[i]f Google recognized that its fair-use defense was not a sure winner, this may have contributed to its receptivity when representatives of the

But perhaps the ultimate motivating factor in forgoing fair use for a settlement was that Google's agreement with the Authors Guild would have allowed it to do far more than just make snippets of text available for full-text search. Previous scholars, including Professor Pamela Samuelson and Professor James Grimmelmann, have excavated the settlements in depth, and, generally, the Google Books litigation and ensuing settlement have generated voluminous scholarly analysis and attention.¹⁶⁴ This section will only highlight some notable features of the settlement agreement that best illustrate both the benefits and the potential problems of using class action settlements to affect large-scale licensing.

By the broadest strokes, the proposed settlement contained provisions for both past harms and future royalties. For past infringement, Google agreed to pay a minimum of \$45 million into a settlement fund.¹⁶⁵ The future-looking provisions of the agreement permitted Google to continue scanning books and to make those digitized books available for sale, whether through a subscription to the full database or otherwise through individual sales.¹⁶⁶ In addition, Google would be permitted to monetize scanned books by selling advertising.¹⁶⁷ As compensation for these uses,

Authors Guild and [the Association of American Publishers] approached it to suggest a settlement of the litigation that would allow Google not only to continue to scan in-copyright books, but also to commercialize them.

Id. at 493.

164. See Grimmelmann, *Future Conduct*, supra note 10, at 401–06 (describing the terms of the Google Books proposed settlement agreement and emphasizing that the court rejected it in part because of the breadth of its future conduct provisions); Samuelson, *Google Book Search*, supra note 10, at 1310 (discussing the implications of the proposed settlement agreement before the court rejected it and advocating for a digital library created by libraries as an alternative); Samuelson, *Google Book Settlement*, supra note 10, at 483 (discussing the quasi-legislative effects of the proposed Google Books settlement and whether such effects should weigh in favor or against approval of the settlement); see also Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. Marshall Rev. Intell. Prop. L. 227, 236–55 (2009) (contrasting the Ninth Circuit's jurisprudence, which favored Google's fair use argument, with the plaintiffs' arguments against fair use, such as the impact on the publishing industry); Einer Elhauge, *Why the Google Books Settlement is Procompetitive*, 2 J. Legal Analysis 1, 34 (2010) (arguing that the proposed settlement increases competition by increasing output and availability of books through online retail); Kelvin Hiu Fai Kwok, *Google Book Search, Transformative Use, and Commercial Intermediation: An Economic Perspective*, 17 Yale J.L. & Tech. 283, 293, 316–17 (2015) (asserting that the court properly held that Google's scanning of book snippets was fair use); Marina Lao, *The Perfect Is the Enemy of the Good: The Antitrust Objections to the Google Books Settlement*, 78 Antitrust L.J. 397, 399 (2012) (considering the antitrust issues at stake in the case and arguing that the settlement would have been procompetitive had it been approved); David W. Opderbeck, *Implications of the Google Books Project Settlement for the Global Library Community*, 48 Int'l Info. & Libr. Rev. 190, 193–95 (2016) (describing how Google Books could help librarians locate resources but could also compromise essential values, such as equitable access to information).

165. *Authors Guild*, 770 F. Supp. 2d at 672.

166. *Id.* at 671.

167. *Id.*

the parties agreed to a revenue-sharing model in which rightsholders received the majority of subscription and advertising revenue.¹⁶⁸ While the agreement provided for a 70/30 revenue split in favor of copyright owners, that split could be renegotiated by individual rightsholders.¹⁶⁹

The settlement agreement was particularly notable because it distinguished between in-print, or commercially available, and out-of-print books. With regard to in-print books, Google could not make them available at all without express authorization from the rightsholder.¹⁷⁰ On the other hand, the agreement employed an opt-out structure for books that were out of print: Google could include an out-of-print book in the database until a rightsholder gave notice that it wished to have the book removed.¹⁷¹ Undoubtedly, the differing structures address the twin assumptions that in-print books are more valuable and that the owners are specifically identifiable; out-of-print books, on the other hand, are more likely to be orphan works, for which an opt-in structure would severely limit availability.¹⁷²

Indeed, the settlement also undertook to establish a Book Rights Registry, in the earliest example of a class action settlement that sought to address a long-standing problem within the industry.¹⁷³ In agreeing to maintain a database of rightsholders of all books, the Book Rights Registry would not only facilitate the payment of royalties but would also constitute the first large-scale attempt to maintain a list of comprehensive ownership

168. See Amended Settlement Agreement at 23–24, 68–69, *Authors Guild*, 770 F. Supp. 2d 666 (No. 05 CV 8136-DC), ECF No. 770-2 [hereinafter *Google Books Settlement*]. A “standard revenue split is 70 percent of revenue minus 10 percent for operating costs, which comes to 63 percent.” Elhauge, *supra* note 164, at 33 n.54. The 70% would not have included advertisement and subscriber revenue. See Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. Competition L. & Econ. 383, 399 n.68 (2009). The 63% of revenues would have included advertisement and subscriber revenues. *Authors Guild*, 770 F. Supp. 2d at 672 (citing *Google Books Settlement*, *supra*, at 13–14, 68).

169. See *Authors Guild*, 770 F. Supp. 2d at 672.

170. *Id.*

171. *Id.*

172. See Miguel Helft, *Google’s Plan for Out-of-Print Books Is Challenged*, N.Y. Times (Apr. 3, 2009), <https://www.nytimes.com/2009/04/04/technology/internet/04books.html> (on file with the *Columbia Law Review*) (quoting a Google lawyer who stated that “[the settlement] agreement expands access to many of these hard-to-find books”); see also James Grimmelman, *The Elephantine Google Books Settlement*, 58 J. Copyright Soc’y U.S. 497, 508 (2011) (noting that “[s]ince the owner [of the orphan work] cannot be found, she would also have been unlikely to pull the ‘opt-out’ lever on her book in the settlement”); Samuelson, *Google Book Settlement*, *supra* note 10, at 497 (“Google may have decided to mass digitize books from its library partners’ collections in part to make orphan books more accessible.”).

173. *Authors Guild*, 770 F. Supp. 2d at 671–72; see also Samuelson, *Google Book Settlement*, *supra* note 10, at 501–03 (“When Google began GBS, it ignored the limitations of Copyright Office records because it believed that its fair-use defense would make checking Copyright Office records unnecessary. Under the settlement, however, Google is seemingly committed to establish an online database of all books in copyright and in the public domain.”).

data for books.¹⁷⁴ By contrast, Copyright Office registration records are notoriously incomplete or simply unavailable, as registration and maintenance are not required for copyright protection.¹⁷⁵

While the settlement constituted in effect a comprehensive attempt to achieve, by private ordering, what copyright law had long eluded—poor ownership data, large swaths of orphan works, and a blanket licensing scheme that facilitates compensation for new technological uses of copyrighted works while avoiding the transaction costs that would otherwise make such dissemination impossible—it was not without its detractors. Professor Samuelson, for example, argued against approval of the settlement due to its quasi-legislative nature and due to “considerable diversity and potentially serious conflicts of interest among the . . . settlement class members,” as evidenced by the hundreds of objections lodged against it.¹⁷⁶ And indeed, these two reasons loomed large in the district court’s decision to deny settlement approval, as the court focused in on the large number of class members who opted out—6,800 in total—and the fact that the overwhelming majority of submissions commenting on the settlement objected to its approval.¹⁷⁷ Ultimately, the court concluded, “[T]he establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court.”¹⁷⁸ These concerns are as applicable to the particular settlement in Google Books as they are to the use of the class action settlement as a blanket licensing mechanism, and Part IV of this Article responds to them in depth. For now, it bears noting that Google, while abandoning its plan to commercialize and make available for viewing entire books, continued to make them available for full-text search and snippet view after it won on its fair use defense.¹⁷⁹ To some scholars, forgoing the “institutional texture” and public-facing provisions of the settlement in favor of a blanket ruling on fair use absolved Google of any further accountability to the authors whose works it exploited.¹⁸⁰

174. See *Authors Guild*, 770 F. Supp. 2d at 671; Samuelson, Google Book Settlement, *supra* note 10, at 502–03.

175. See Samuelson, Google Book Settlement, *supra* note 10, at 503 (noting that “there is no duty to notify the Copyright Office of changes in ownership” and that the Copyright Office “has not . . . digitized registration data from the paper documents filed prior to its adoption of an online registration system”).

176. *Id.* at 545.

177. *Authors Guild*, 770 F. Supp. 2d at 673.

178. *Id.* at 677.

179. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208–11 (2d Cir. 2015).

180. Professor Julie Cohen, for example, explained that
[a] subsequent fair use ruling sheltered the Book Search program comprehensively from infringement liability, but at the cost of the institutional texture that the settlement would have provided. Although Google voluntarily implemented measures to restrict the size of search

Perhaps as further evidence of the muddled nature of the Google Books litigation, the failed settlement, and the ensuing fair use determination, just months after the rejection of the Google Books settlement, the Second Circuit approved a remarkably similar settlement in a class action litigation brought by freelance authors objecting to the digitization of their works.¹⁸¹ The approved settlement from *In re Literary Works in Electronic Databases Copyright Litigation*, like that in the rejected Google Books settlement, contained an opt-out structure: Authors who failed to affirmatively opt out of a future use release were deemed to have granted permission for the electronic use and commercialization of their articles in exchange for 65% of the compensation received for such use.¹⁸²

As it turns out, among proposed settlements filed in copyright class actions, the rejected Google Books settlement is the exception. Indeed, the overwhelming number of settlements in copyright class actions—including ones that contain forward-looking royalties and releases for future claims—have been approved.¹⁸³ To understand the reasons why the proposed Google Books settlement was an outlier, it might be helpful to compare it with the recently approved settlement in a litigation against Spotify.

D. *The Spotify Litigation and the Class Action as Blanket License and Copyright Reform*

The filing of two separate class actions—eventually consolidated into one—against the music streaming service Spotify rested on a complicated and highly technical provision of the Copyright Act.¹⁸⁴ To fully understand

results returned to users, it chose not to implement some of the other arrangements for safeguarding both authors' interests and the public interest that had been included in the proposed settlement.

See Cohen, *Informational Capitalism*, supra note 86, at 166.

181. See Grimmelmann, *Future Conduct*, supra note 10, at 395–96. It was no mere accident that the structure and revenue-sharing model bore striking similarities to Google Books. As Professor Grimmelmann pointed out, the same class counsel negotiated the settlement.

182. 654 F.3d 242, 246 (2d Cir. 2011); Order Granting Final Approval of Revised Proposed Settlement and Final Judgment at 2–5, *In re Literary Works*, 654 F.3d 242 (MDL No. 1379), ECF No. 51.

183. See *In re Literary Works*, 654 F.3d at 243 (granting the settlement); *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (AJN), 2018 WL 2324076, at *1 (S.D.N.Y. May 22, 2018) (same); Final Order and Judgment at 3, *The Music Force LLC v. Black Ent. Television LLC*, No. 09-CV-00376 (GBD) (S.D.N.Y. July 26, 2011), ECF No. 58 (same); Order Certifying Class Actions and Approving Settlement and Compromise of Class Actions at 2, *Rodgers & Hammerstein Org. v. Platinum Ent., Inc.*, No. 00 C 3020 (N.D. Ill. Sept. 6, 2001), ECF No. 20 (same); *Frank Order Approving Settlement*, supra note 122, Exhibit I, at 3 (same); but see *Authors Guild*, 770 F. Supp. 2d at 669–70 (denying the proposed settlement).

184. See Order re: Motions to Consolidate and Appoint Interim Lead Class Counsel at 1, *Lowery v. Spotify USA Inc.*, Nos. CV 15-09929-BRO (RAOx), CV 16-00180-BRO (RAOx) (C.D. Cal. May 23, 2016), 2016 WL 6818756 [hereinafter *Lowery Order to Consolidate*]

the \$200 million suit, the implications it had for all streaming services, the follow-on class action litigation against Spotify's competitors (including Google, Amazon, and Apple),¹⁸⁵ and the eventual passage of the most significant copyright reform in a decade,¹⁸⁶ a bit of music copyright background is in order.

1. *The Compulsory License for Musical Compositions.* — A copyrighted song is actually comprised of two distinct copyrights: a musical composition copyright (i.e., the sheet music and the lyrics) and a sound recording copyright (i.e., a particular recording of the musical composition).¹⁸⁷ Some famous musicians, like Taylor Swift, are singer-songwriters precisely because they might have had a hand in both writing the song and then in recording it. Some other famous musicians, like Rihanna, typically do not write their own songs. Instead, they rely on an army of professional songwriters, many of whom toil in obscurity,¹⁸⁸ to deliver musical compositions to famous recording artists. Two different parties hold the two distinct copyrights. For example, Universal Music Group manages licensing rights for all the sound recordings in its catalog, while its sister organization, Universal Music Publishing Group, manages licensing rights for all the musical compositions in its catalog.¹⁸⁹

Whereas sound recording reproduction rights must be negotiated through direct licenses because of antitrust accusations leveled against early musical composition owners (so-called “piano roll” companies) in the early twentieth century, the reproduction of musical compositions is

(granting the plaintiffs' motion to consolidate and ordering administrative closure of *Ferrick v. Spotify USA Inc.*); Amended Class Action Complaint for Copyright Infringement at 1, *Ferrick v. Spotify USA Inc.*, No. CV 16-00180-BRO (RAOx) (C.D. Cal. Mar. 14, 2016), 2016 WL 3680359 [hereinafter *Ferrick* Amended Complaint]; Amended Class Action Complaint for Damages and Injunctive Relief at 1, *Lowery*, No. CV 15-09929-BRO (RAOx), 2016 WL 1391339 [hereinafter *Lowery* Amended Complaint].

185. See *Yesh Music, LLC v. Amazon.com, Inc.*, 249 F. Supp. 3d 645 (E.D.N.Y. 2017); *Yesh Music, LLC v. Google, Inc.*, No. 1:16-CV-01566 (KPF), 2016 WL 8117201 (S.D.N.Y. 2016); Second Amended Complaint and Jury Demand for Damages for Copyright Infringement and Underpayment of Royalties, *Eich v. Apple Inc.*, No. 17-cv-9857 (LSS) (S.D.N.Y. filed Mar. 28, 2018); Second Amended Complaint and Jury Demand for Damages for Copyright Infringement, *Cupolo v. Pandora Media Inc.*, No. 17-cv-6304 (WHP) (S.D.N.Y. filed Oct. 3, 2017), 2017 WL 10605323; Class Action Complaint and Jury Demand for Damages for Copyright Infringement and Underpayment of Royalties, *Eich v. Rhapsody Int'l, Inc.*, No. 17-cv-5132 (S.D.N.Y. filed July 7, 2017); Class Action Complaint for Damages and Injunctive Relief, *Lowery v. Rhapsody Int'l, Inc.*, No. 16-cv-1135 (N.D. Cal. filed Mar. 7, 2016).

186. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 102(a)(1)(B), 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C.).

187. 17 U.S.C. § 102(a)(2), (7) (2018).

188. See, e.g., Danny Ross, *This Guy Wrote Your Favorite Songs (and You've Never Heard of Him)*, *Forbes* (June 20, 2017), <https://www.forbes.com/sites/dannyrross1/2017/06/20/how-this-guy-wrote-your-favorite-songs-and-youve-never-heard-of-him/?sh=76ae9746799c> [https://perma.cc/34ZS-U79Y].

189. FAQs, Contact Us, Universal Music Grp., <https://www.universalmusic.com/contact-us/> [https://perma.cc/PQ2C-BULK] (last visited Aug. 15, 2022).

subject to a compulsory license pursuant to section 115 of the Copyright Act.¹⁹⁰ Anyone who wishes to reproduce a musical composition may simply serve what is known as a “notice of intent” (NOI) upon *either* the musical work owner *or* the Copyright Office.¹⁹¹

2. *The Class Actions.* — At its inception, Spotify had famously partnered with the major record labels, who took ownership stakes in the interactive streaming company in exchange for licenses to all the songs in their catalogs.¹⁹² And Spotify, too, entered into direct licenses with large music publishers like Warner, Universal, and Sony.¹⁹³ But according to the class action suits filed against Spotify, those deals failed to capture rights owned by a large number of smaller, individual rightsholders, including works owned by the songwriters David Lowery and Melissa Ferrick.¹⁹⁴ The lawsuits alleged that Spotify, or HFA, the private collective that Spotify partnered with, should have served individual NOIs for each of those works that it failed to cover with a direct license.¹⁹⁵

Notably, at the time the lawsuits were filed, it was not clear whether digital streaming even infringed on a copyright owner’s reproduction right. Accordingly, Spotify subsequently argued in court filings that streaming only implicated the separate right of public performance.¹⁹⁶

190. See 17 U.S.C. § 115. Congress passed the compulsory license to ameliorate the market power exercised by the Aeolian Company, which single-handedly dominated the market for piano rolls and player pianos. See Michael J. Meurer, Vertical Restraints and Intellectual Property Law: Beyond Antitrust, 87 Minn. L. Rev. 1871, 1907–08 (2003). The statute nullified existing terms in Aeolian’s contracts with music publishers that gave it the exclusive right to create piano rolls from the songs in the publishers’ catalogs. See *id.*

191. 17 U.S.C. § 115(b).

192. Variety Staff, Spotify: At Day’s Close, What Are the Major Labels’ Shares Worth? A Lot . . . , Variety (Apr. 3, 2018), <https://variety.com/2018/biz/news/spotify-at-days-close-what-are-sony-warner-and-universals-shares-worth-a-lot-1202743146/> [https://perma.cc/79Q2-YYS6] (“It was long an open secret that the three major labels—Sony, Universal and Warner Music—owned stakes in Spotify This was a very savvy strategy on the part of Spotify: Making the labels not only partners, but party to their success or failure.”).

193. See John Seabrook, Revenue Streams, New Yorker (Nov. 17, 2014), <https://www.newyorker.com/magazine/2014/11/24/revenue-streams> (on file with the *Columbia Law Review*) (discussing Spotify’s history and its deals with the music industry, for instance, noting that Spotify “paid out more than two billion dollars to the record labels, publishers, distributors, and artists who own the rights to the songs”).

194. *Ferrick* Amended Complaint, *supra* note 184, at 1–2, 4; *Lowery* Amended Complaint, *supra* note 184, at 2, 4–5.

195. *Ferrick* Amended Complaint, *supra* note 184, at 2–3; *Lowery* Amended Complaint, *supra* note 184, at 12–13.

196. Defendant’s Memorandum in Support of Motion for a More Definite Statement at 7, *Gaudio v. Spotify USA Inc.*, No. 3:17-cv-01052 (M.D. Tenn. filed Aug. 30, 2017), ECF No. 21. Spotify argued:

In short, the act of streaming does not reproduce copies of sound recordings or musical compositions, and equally does not distribute copies of either sound recordings or compositions. This is not to say that

Notwithstanding the statutory silence as to whether a mechanical license was even required, as class actions against Spotify and other streaming services based on failure to obtain mechanical licenses picked up, streaming services responded by inundating the Copyright Office with NOIs for mechanical licenses.¹⁹⁷ What followed was a lesson in the limited ability of dedicated agencies like the Copyright Office—or even private industry organizations, like HFA—to facilitate and oversee large-scale transactions.¹⁹⁸ At first blush, the NOI system seems to represent both a corollary and an example of a potential solution to the problem presented in the Google Books litigation: Every song, even “unmatched” songs (“orphaned works” in the music context¹⁹⁹), could be licensed without direct negotiations with the rightsholder. But in practice, the Copyright Office proved itself unequipped to bear the administrative costs of processing the volume of NOIs that the streaming age requires.²⁰⁰ By one

streaming has no copyright consequence. Streaming does result in a public performance of both sound recordings and musical compositions. But Plaintiffs do not allege that Spotify has violated their public performance rights

Id. (emphasis omitted) (citations omitted). As noted *supra*, mechanical licenses are for the reproduction, as opposed to the public performance, of musical compositions. See 17 U.S.C. § 115(d)(13)(B). Interactive streaming services like Spotify obtain public performance licenses for musical compositions from PROs. See Spotify Tech. S.A., Annual Report (Form 20-F) 39–40 (Feb. 3, 2022), <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001639920/000163992021000006/ck0001639920-20201231.htm> [<https://perma.cc/99D5-X5AD>].

197. See Chris Castle, Meet the New Boss: Tech Giants Rely on Loopholes to Avoid Paying Statutory Royalties With Mass Filings of NOIs at the Copyright Office, 33 *Ent. & Sports Law.* 65, 66 (2017) (stating that, as of April 2016, millions of address unknown NOIs were filed). David Lowery brought the original class action against Spotify and filed it in 2015. See *Lowery* Order to Consolidate, *supra* note 184, at 1. Lawsuits against other major streaming services like Amazon, Google, and Rhapsody followed. See *supra* note 185.

198. HFA is a private collective that manages and distributes mechanical licensing fees on behalf of its music publishing members. History of HFA, HFA, <https://www.harryfox.com/> [<https://perma.cc/TA6W-URWR>] (last visited July 24, 2022). While it is widely agreed that HFA was derelict in actually sending out NOIs, it is unclear why HFA failed to fulfill its obligations. See Mike Masnick, Music Licensing Shop Harry Fox Agency Appears to Be Scrambling to Fix Its Failure to Properly License Songs, *TechDirt* (Mar. 11, 2016), <https://www.techdirt.com/2016/03/11/music-licensing-shop-harry-fox-agency-appears-to-be-scrambling-to-fix-failure-to-properly-license-songs/> [<https://perma.cc/NT4V-H9W7>]. Indeed, HFA, as a private collective formerly owned by the NMPA (which represents the interests of numerous music publishers, including the largest music publishers), would seem the best equipped to do so. See Nat’l Musical Publishers’ Ass’n & The Harry Fox Agency, Inc., Comments in Response to February 10, 2014 Notice of Inquiry (May 19, 2014), [https://www.copyright.gov/orphan/comments/Docket2012_12/National-Music-Publishers-Association\(NMPA\)-Harry-Fox-Agency\(HFA\).pdf](https://www.copyright.gov/orphan/comments/Docket2012_12/National-Music-Publishers-Association(NMPA)-Harry-Fox-Agency(HFA).pdf) [<https://perma.cc/3GPL-NQ8W>]. Yet the class action lawsuit filed by Lowery exposed just how inadequate HFA was for the task.

199. See U.S. Copyright Off., Copyright and the Music Marketplace 169 (2015) [hereinafter Copyright Off., Music Marketplace] (referring to unmatched works as a problem requiring a solution); see also H.R. Rep. No. 115-651, at 7–8 (2018).

200. See Copyright Off., Music Marketplace, *supra* note 199, at 107.

count, the number of NOIs filed by large streaming platforms like Google and Amazon numbered in the millions for works of unknown authorship *alone*.²⁰¹ The deluge of NOIs in the Copyright Office laid bare the inadequacy of the work-by-work compulsory licensing model in the digital streaming age.²⁰² Clearly, then, a different solution was in order.

What the Spotify class actions ultimately resulted in—a sweeping settlement, followed by comprehensive legislative reform—was a workable blanket licensing mechanism that combined the type of private ordering neoclassical IP theorists like Professor Merges had long advocated for *with* robust regulatory oversight.²⁰³ The Spotify class action at once offered a novel example of Professor Merges’s theory that new collective rights organizations can be established to meet changing licensing needs, while perhaps validating the concerns of Professor Merges’s critics on the inadequacy of private licensing alone.²⁰⁴ To understand why this is so, one must examine the details of the settlement and ensuing legislation.

3. *The Spotify Settlement.* — Two years after the litigation was brought, the parties reached a settlement deal. While roughly a third of the total settlement amount of \$112.55 million was for past damages, more than half of the total amount was dedicated to future royalties—that is, a forward-looking license.²⁰⁵ While the future royalties provision simply provided for the prospective licensing of musical works pursuant to the compulsory licensing provision of the Copyright Act, its improvement over the statutory scheme was that the license was on a blanket—rather than work-by-work—basis, absolving Spotify of the cumbersome and unhelpful process of filing millions of “work unknown” NOIs with the Copyright Office.²⁰⁶

One of the most significant improvements the class action settlement made to copyright law was not its monetary components but rather its nonmonetary components. As part of the settlement, Spotify agreed to establish a mechanical licensing committee consisting of three members appointed by copyright owners and three members appointed by Spotify.²⁰⁷ The committee would meet every four months for two years, with the goal of discussing strategies to better match works available on Spotify to their copyright owners.²⁰⁸ The purpose of the database was to

201. Castle, *supra* note 197, at 65–66 (stating that the NOIs filed did not include NOIs filed for songs with known addresses). Royalties for address unknown works do not accrue until the author is located.

202. See Copyright Off., Music Marketplace, *supra* note 199, at 111.

203. See Merges, *supra* note 44, at 1301.

204. See *supra* note 48 and accompanying text.

205. See *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (AJN), 2018 WL 2324076, at *6 (S.D.N.Y. May 22, 2018).

206. See *id.*

207. See Settlement Agreement and Release at 53, *Ferrick*, No. 16-cv-8412 (AJN), ECF No. 176-3 [hereinafter *Ferrick* Settlement Agreement].

208. *Id.*

begin filling in the numerous gaps in ownership data that had long plagued the music publishing industry. The fruits of that enormous undertaking would not only be enjoyed by Spotify; rather, the streaming service agreed to invite other large streaming services (Amazon, Apple, and Pandora) and large music publisher stakeholders (Universal Music Publishing, Warner, and others) to establish a Copyright Data Sharing Committee.²⁰⁹ In return for the benefits of data sharing, these stakeholders from both sides of the licensing divide would agree to contribute to its undertaking by sharing music catalog data, filling in large gaps in the Copyright Office records, and digitizing the information in a free database accessible to the public.²¹⁰

While the nonmonetary components of the settlement were innovative for their concerted effort to use private cooperation as a means of achieving long-awaited change in the music industry as a whole, the agreement's forward-looking licensing scheme, like that in the rejected Google Books settlement, would only benefit Spotify.²¹¹ Part IV discusses ways of addressing the anticompetitive concerns of forward-looking royalty arrangements in settlement agreements that only benefit one party—but perhaps one of the most surefire and sweeping ways to do so is to use learnings from the settlement as a model for legislative change. This is precisely what occurred with the Spotify settlement and the ensuing Music Modernization Act (MMA).

4. *Follow-On Legislation.* — The MMA has been described as the most comprehensive copyright law reform in more than a decade.²¹² It also replicated the three most significant aspects of the Spotify class action settlement. First, like the Spotify settlement, the legislation replaced the work-by-work NOI process with a blanket mechanical license for digital streaming services²¹³ and established a new collecting society, the Mechanical Licensing Collective, responsible for distributing royalties.²¹⁴

209. *Id.* at 54.

210. *Id.*

211. See *id.* at 66 (limiting release for future claims to Spotify only).

212. See Press Update, U.S. Copyright Off., U.S. Copyright Office Designates Mechanical Licensing Collective, Inc. as the Mechanical Licensing Collective and Digital Licensee Coordinator, Inc. as the Digital Licensee Coordinator under the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (July 5, 2019), <https://www.copyright.gov/press-media-info/press-updates.html> [<https://perma.cc/5PD3-A5WQ>] (quoting Karyn Temple, Register of Copyrights, as describing the MMA as “the most significant piece of copyright legislation in decades”).

213. See, e.g., H.R. Rep. No. 115-651, at 20 (2018) (“Under current law, a digital music provider (such as Spotify, Apple Music, or Pandora) must pay the copyright owner a royalty fee to use a protected work of music. H.R. 5447 [(the MMA)] would eliminate notice-of-intent licensing for digital musical works”); 164 Cong. Rec. H3522–36, H3540 (daily ed. Apr. 25, 2018) (statement of Ms. Jackson Lee) (“[The MMA] provides streaming services with confidence that, if they follow the process, they can accurately and comprehensively license all the music works on their service without fear of billion dollar lawsuits against them.”).

214. 17 U.S.C. § 115(d)(3)(G) (2018).

Second, and again taking its cues from the Spotify settlement, it established a publicly accessible musical works database for identifying and locating owners of musical works, which the new Mechanical Licensing Collective is also tasked with updating.²¹⁵ Significantly, and unlike the previous NOI system in which unmatched works simply went uncompensated, the newly established Mechanical Licensing Collective distributes royalties in an interest-bearing escrow account for those works that do not have known owners or for which ownership information is disputed.²¹⁶

Finally, and perhaps most importantly, the legislation made explicit what the private settlement had already recognized: that digital streaming *does* implicate the copyright holder's exclusive right of reproduction.²¹⁷ Prior to the MMA, the Copyright Act said nothing about whether streaming violated the reproduction right and, indeed, "streaming was generally thought to implicate the public performance right but *not* the reproduction or distribution rights."²¹⁸ But the MMA made clear that "an interactive stream" constitutes a "digital transmission of a sound recording that results in a specifically identifiable *reproduction*."²¹⁹

In transposing the structure and innovations of a settlement agreement devised between private parties to public-facing legislation, the MMA at once exemplifies the vast potential of the class action device for copyright law as it may also serve to debunk potential criticisms of a licensing-by-litigation mechanism. The remaining two Parts of this Article discuss first the promise of copyright class actions and why they represent the future of copyright, before addressing potential pitfalls that courts evaluating proposed settlements in class actions should be wary of.

III. COPYRIGHT CLASS ACTIONS AND THE FUTURE OF DIGITAL LICENSING

Despite the seeming promise of the Supreme Court's decision in *eBay v. MercExchange* to usher in a new era of court-fashioned compulsory licenses for technologically innovative uses of creative works, little has changed with regard to how courts evaluate new technologies in the almost two decades since that decision.²²⁰ Either a new technological use

215. Id. § 115(d)(3)(E).

216. Id. § 115(d)(3)(H)(ii).

217. See id. § 115(e)(13) (specifying that an "interactive stream" is a "digital phonorecord delivery" implicating copyright owners' exclusive reproduction rights).

218. Lydia Pallas Loren, Copyright Jumps the Shark: The Music Modernization Act, 99 B.U. L. Rev. 2519, 2531 (2019) (emphasis added).

219. 17 U.S.C. § 115(e)(10) (emphasis added). Note that noninteractive streaming services, such as digital radio services, are excluded from this definition. See Loren, *supra* note 218, at 2532.

220. This is not to suggest that *eBay* has not changed how courts may evaluate injunctive relief in all copyright infringement cases. One statistical study suggests that the rate at which courts granted permanent injunctive relief in all copyright cases fell by 11% in the years

is deemed sufficiently socially valuable such that copyright's fair use defense can excuse the use and forgo any payment to rightsholders,²²¹ or it must be enjoined because it unfairly impinges on a copyright holder's potential new future revenue streams.²²² In reality, new technologies are more likely to exist somewhere in between that stark duality—sufficiently innovative for society to encourage the use, but sufficiently substitutive of existing revenue streams for copyright holders to claim a portion of the proceeds. While this proposal is hardly novel,²²³ the application matters. What this Article has described is a subtle but growing trend with monumental impact: the use of the class action device as a blanket licensing scheme and catalyst for change that combines private ordering with public oversight.

This Article predicts that the class action mechanism—in all its various stages, from the filing of the first putative class action complaint to the final settlement—as an aggregator of rights and rightsholders, as a coordinating mechanism amongst industry players, as exposing fractures and damaging exposures that warrant legislative lobbying or relief or a settlement or all of it, will play an increasingly important role in copyright licensing and reform. And in particular, settlements in class actions, far from being just “an agreement among private, self-interested parties” that wrest power away from the legislature,²²⁴ instead represent an inevitable growing trend in the digital age. This Part puts forth several reasons for why copyright class actions, and why settlements in particular, if implemented correctly, could present both a highly flexible and workable solution to the problem of acquiring large-scale permissions as it can also catalyze real, lasting legislative change and regulatory oversight.

following *eBay*. Matthew Sag & Pamela Samuelson, *Discovering eBay's Impact on Copyright Injunctions Through Empirical Evidence* 29 (Jan. 28, 2022) (unpublished manuscript), <https://ssrn.com/abstract=3898460> [<https://perma.cc/NV7C-9C42>].

221. For some recent post-*eBay* examples, see *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1209 (2021) (holding that Google's use of the Sun Java API was fair use); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015) (finding that Google's digitization of copyright protected works was a noninfringing fair use); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014) (concluding that the doctrine of fair use allows libraries to digitize copyrighted works for full-text searches); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176 (9th Cir. 2007) (reversing the district court's determination that Google's revisions of the plaintiff's images constituted infringement).

222. For some recent post-*eBay* examples, see *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 436 (2014) (finding that Aereo infringed the Copyright Act by selling technology that allowed subscribers to watch television online at the same time that it was broadcast on air); *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180 (2d Cir. 2018) (holding that TVEyes' offerings of clipping, downloading, and archiving content violate the Copyright Act); *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 852 (9th Cir. 2017) (affirming the district court's holding in favor of companies suing for copyright infringement).

223. See Ginsburg, *Fair Use for Free*, *supra* note 50, at 1432, 1445–46.

224. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 677 (S.D.N.Y. 2011).

A. *Class Action Settlements Represent a Workable, Readily Implementable Form of Compulsory License that Merge Privately Negotiated, Market-Like Rates With Judicial Oversight*

Settlements in copyright class actions alleviate courts' reluctance to fashion an ongoing royalty in copyright cases.²²⁵ Rather, judges need only approve any royalty provisions in a proposed settlement agreement, which provisions were negotiated between private parties represented by competent counsel.²²⁶ In other words, royalty provisions in settlement agreements are at once market rates²²⁷ as they are subject to two additional layers of oversight not always present in actual marketplace negotiations—one, because Rule 23(a) requires that class member interests are represented by adequate counsel,²²⁸ and two, because the rates are subject to final court approval of the settlement as “fair, reasonable, and adequate.”²²⁹ Pursuant to Rule 23(e), a court must review the settlement for procedural and substantive fairness; to satisfy the former requirement, the settlement must be the product of arm's length negotiations between experienced counsel reached after meaningful discovery.²³⁰

In assessing substantive fairness, a court considers an extensive set of factors including the reaction of the class to the settlement; the stage of the proceedings; the amount of discovery completed; the risks of establishing liability and damages; and the range of reasonableness of the

225. See Lemley & Weiser, *supra* note 12, at 795.

226. *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (A.J.N.), 2018 WL 2324076, at *3 (S.D.N.Y. May 22, 2018) (“With respect to procedural fairness, a proposed settlement is presumed fair, reasonable, and adequate if it culminates from ‘arm’s-length negotiations between experienced, capable counsel after meaningful discovery.’” (quoting *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009))).

227. See *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014) (explaining that the “market value” for a copyrighted work is “the amount a willing buyer would have been reasonably required to pay a willing seller” (quoting *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 786 (9th Cir. 2006))).

228. See Fed. R. Civ. P. 23(a)(4).

229. Fed. R. Civ. P. 23(e)(2). Rule 23 also requires that the settlement meet four threshold criteria: (1) numerosity (“the class is so numerous that joinder of all members is impracticable”); (2) commonality (“there are questions of law or fact common to the class”); (3) typicality (“the claims or defenses of the representative parties are typical of the claims or defenses of the class”); and (4) adequacy of representation (“the representative parties will fairly and adequately protect the interests of the class”). Fed. R. Civ. P. 23(a)(1)–(4). Once the threshold criteria are satisfied, the settlement must then meet the requirements of Rule 23(b)(3), which not only requires that common issues predominate over individual ones but also that a class action be the superior method of fairly and efficiently adjudicating the controversy at issue as opposed to, for example, individual litigation. See Fed. R. Civ. P. 23(b)(3).

230. See *McReynolds*, 588 F.3d at 803–04. Other circuits are in accord. See *In re Heritage Bond Litig.*, 546 F.3d 667, 674 (9th Cir. 2008); *Rutter & Willbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *City P’ship Co. v. Atl. Acquisition Ltd.*, 100 F.3d 1041, 1043 (1st Cir. 1996); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991).

settlement fund in light of the best possible recovery.²³¹ Of these factors, the reaction of the class may be particularly telling of substantive fairness and, consequently, the likelihood of court approval of the settlement.²³² “If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.”²³³

While few putative class members in any given litigation exercise their right to object,²³⁴ the small percentage of objections that do get filed may raise a host of new issues that could significantly influence whether a court chooses to approve or reject the settlement. Indeed, in evaluating the proposed Google Books settlement, the court determined that each of the *Grinnell* factors weighed in favor of its approval except for one: the reaction of the class to the settlement.²³⁵ This factor, the court noted, was “important,” for “[n]ot only are the objections great in number,” but “some of the concerns are significant.”²³⁶ And in fact, it was the objections that formed the blueprint for the court’s ultimate rejection of the settlement, as the court credited six of the seven concerns cited by various objectors as the basis for its denial of settlement approval.²³⁷ Thus, Rule 23 transforms what would otherwise be purely private dealmaking into what could perhaps be described as market-plus rates: private ordering coupled with judicial oversight.

231. See *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Other circuits are in accord. See *Does 1–2 v. Déjà Vu Services, Inc.*, 925 F.3d 886, 894–95 (6th Cir. 2019); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005); *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375–76 (9th Cir. 1993); *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975).

232. Individuals who request to be excluded or “opt out” of a settlement no longer have standing to challenge the settlement. Instead, individuals who opt out have the ability to bring their own separate suits. See *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).

233. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:41, at 108 (4th ed. 2002)). Of course, in order to adequately review the number of objections, a court must first find that the defendant provided adequate notice to putative class members, which is typically done via a combination of traditional mail, email, press releases, internet and print advertising, phone, outreach, and disclosures on the defendant’s website. See, e.g., *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (AJN), 2018 WL 2324076, at *2–3 (S.D.N.Y. May 22, 2018). In the Spotify litigation, notice was provided by traditional mail to 535,380 recipients. An estimated 95% of the recipients received the notices. *Id.* at *2.

234. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1532–33 (2004) (finding that, though objector rates vary by case type, even the cases with the highest number of objectors—employment and civil rights cases—had objector rates of less than 5%).

235. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 674–76 (S.D.N.Y. 2011) (raising a second *Grinnell* factor, the ability of the defendant to withstand judgment, as a potential concern but ultimately concluding that “there is no real risk that a judgment following trial would render Google insolvent, and thus the avoidance of insolvency is not an issue”).

236. See *id.* at 676.

237. See *id.* at 676–86.

B. *The Class Action Mechanism Captures the Long Tail of Small Rightsholders*

The “infinite shelf” represents both a cliché and a fundamental shift between the old world of copyrighted goods and the new digital age. As cultural reporter Chris Anderson puts it in his 2004 book *The Long Tail*, an old regime driven by physical scarcity—scarcity of bookshelf space in the local Barnes & Noble and scarcity of bandwidth on television and radio—fostered a culture driven by Top 40s hits as a means of catering to the median.²³⁸ As Anderson writes:

An average movie theater will not show a film unless it can attract at least 1,500 people over a two-week run; that’s essentially the rent for a screen. An average record store needs to sell at least two copies of a CD per year to make it worth carrying; that’s the rent for a half inch of shelf space. And so on for DVD rental shops, videogame stores, booksellers, and newsstands.²³⁹

Hits ensure sufficient sales to keep a store and a movie theater going; Top 40s hits on the radio ensure the widest possible audience.

But the internet’s infinite bandwidth removed the constraints of the physical world. A physical world limited by scarcity shifted, instead, to an unconstrained digital world marked by abundance. The old intuition, that only 20% or so of the titles in any online digital media store will end up being streamed or downloaded, proved to be wrong.²⁴⁰ Instead, online distributors like Rhapsody found that no matter how many songs comprised their library—whether 100,000 or 400,000—somewhere, someone streamed that song at least once.²⁴¹ Just five years after its launch, Spotify bucked the old 20% rule when it reported that 80% of the twenty million tracks on its service had been streamed at least once.²⁴² Streaming services like Netflix

238. See Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More* 17–18 (2d ed. 2008).

239. Chris Anderson, *The Long Tail*, *Wired* (Oct. 1, 2004), <https://www.wired.com/2004/10/tail/> [<https://perma.cc/D2TH-3ELJ>].

240. *Id.*

241. *Id.*

242. Mario Aguilar, *More Than 4 Million Spotify Songs Have Never Been Played*, *Gizmodo* (Oct. 14, 2013), <https://gizmodo.com/more-than-4-million-spotify-songs-have-never-been-playe-1444955615> [<https://perma.cc/9PY3-3QWE>].

have content for every niche interest: oversized horticultural competitions,²⁴³ glassblowing extravaganzas,²⁴⁴ and Indian matchmaking.²⁴⁵

While abundance is great for consumers—who can now find exactly what they want to watch, read, or listen to, no matter how obscure or unconventional—it is terrible for copyright law. Google’s “moon shot” to digitize every book under the sun crashed to earth when the company discovered just what percentage of long tail content lacked proper ownership information for purposes of obtaining a license.²⁴⁶ Yet even *known* rightsholders provide their own transaction cost issues: A long tail of individual rightsholders, for which digital services like Spotify chose not to enter into direct licensing arrangements with, resulted in an influx of individual NOIs in the Copyright Office.²⁴⁷ Indeed, this latter example illustrates the limits of a work-by-work compulsory licensing scheme. After all, a government-mandated compulsory licensing scheme requires both government resources and a government agency to process what is effectively millions of mini-licenses. The Copyright Office admitted that it was incapable of doing so for musical works alone—to say nothing of a potential compulsory licensing scheme that expands beyond one discreet type of copyrighted work.²⁴⁸

243. Sangeeta Singh-Kurtz, I Love This Ridiculous Show About Amateur Florists, *The Cut* (May 19, 2020), <https://www.thecut.com/2020/05/the-big-flower-fight-on-netflix-is-ridiculous-and-fantastic.html> [<https://perma.cc/LPQ4-KNHA>] (discussing “The Big Flower Fight,” a Netflix reality competition show about amateur florists crafting “enormous floral structures”).

244. Rachel Syme, The Fiery Pleasures of “Blown Away,” a Reality-TV Competition for Glassblowing, *New Yorker* (July 31, 2019), <https://www.newyorker.com/recommends/watch/the-wacky-pleasures-of-blown-away-a-reality-tv-competition-for-glassblowing> (on file with the *Columbia Law Review*) (discussing “Blown Away,” a Netflix reality competition series about glassblowing).

245. Sheila Yasmin Marikar, Sima Taparia’s Matchmaking Business Booms in Lockdown, *New Yorker* (Aug. 31, 2020), <https://www.newyorker.com/magazine/2020/09/07/sima-taparias-matchmaking-business-booms-in-lockdown> [<https://perma.cc/2LQJ-UT5G>] (discussing a Netflix 2020 reality show called “Indian Matchmaking”).

246. See Scott Rosenberg, How Google Book Search Got Lost, *Wired* (Apr. 11, 2017), <https://www.wired.com/2017/04/how-google-book-search-got-lost/> [<https://perma.cc/R48W-XHKE>]; James Somers, Torching the Modern-Day Library of Alexandria, *Atlantic* (Apr. 20, 2017), <https://www.theatlantic.com/technology/archive/2017/04/the-tragedy-of-google-books/523320/> [<https://perma.cc/6YEQ-5LQL>] (“After the settlement failed, . . . ‘there was just this air let out of the balloon.’ Despite eventually winning . . . and having the courts declare that displaying snippets of copyrighted books was fair use, the company all but shut down its scanning operation.” (quoting Dan Clancy, Google’s lead engineer on the scanning project)); Tim Wu, What Ever Happened to Google Books?, *New Yorker* (Sept. 11, 2015), <https://www.newyorker.com/business/currency/what-ever-happened-to-google-books> [<https://perma.cc/HMR4-SKAX>].

247. Castle, *supra* note 197, at 65.

248. See Kristelia A. García, Copyright Arbitrage, 107 *Calif. L. Rev.* 199, 222 (2019) (“Exacerbating the problem [of mass NOI filings] . . . is the fact that the Copyright Office is understaffed and overworked, with a tremendous backlog of registrations waiting to be processed.”).

Whereas denying injunctive relief and awarding prospective royalties in individual litigations avoids the disproportionate outcome that *eBay* attempted to remedy (shutting down an entire service in favor of one rightsholder),²⁴⁹ such individualized determinations cannot capture the long tail of all individual rightsholders, whether unlocatable and unknown—or just too small and far-flung to engage in individual licensing negotiations with. Thus, because defendants may be wary of battling countless lawsuits in this manner, many, like Google, favor other defenses that can extinguish all possible claims against them, such as fair use.²⁵⁰

Outside of fair use, only a class-wide resolution has the same effect of extinguishing all claims while also, unlike fair use, compensating smaller rightsholders. In this sense, settlements that capture the long tail do more justice to copyright's basic premise of being by and for individual authors than the operation of much of copyright in practice, as being made by and for corporations owning large catalogs bought and sold like investment properties.²⁵¹ The long tail of individual creators may be too numerous and too inefficient to engage in individual licensing negotiations with unless swept in by a class action blanket license.

C. *The Settlements' Nonmonetary Provisions Solve Long-Standing Problems Unique to Particular Copyright Industries by Actual Industry Participants*

Perhaps most notable about the rejected Google Books settlement and the approved Spotify settlement was not the monetary amount of the settlements, but the nonmonetary provisions the agreements contained, which addressed long-standing problems specific to those particular industries. For a long time, scholars, the Copyright Office, and industry experts alike have bemoaned the problem of orphan works.²⁵² The Copyright Office took up the problem of unlocatable and unknown authors numerous times—in 2006, 2011, and 2015—while the House and

249. See *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 590–91 (E.D. Va. 2007) (denying MercExchange's renewed motion for a permanent injunction).

250. See *supra* section II.C.

251. See Julie E. Cohen, Copyright as Property in the Post-Industrial Economy: A Research Agenda, 2011 Wis. L. Rev. 141, 143 [hereinafter Cohen, Copyright as Property] ("In the contemporary information society, the purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited.").

252. See NMPA Comments, *supra* note 52, at 11 ("[W]ith regards to orphan works, the commercial motives of distributors are not sufficient justification for eliminating the exclusive rights of copyright owners."); Aaron C. Young, Copyright's Not So Little Secret: The Orphan Works Problem and Proposed Orphan Works Legislation, 7 *Cybaris Intell. Prop. L. Rev.* 202, 203 (2016) ("Certain national trade groups and unions have disputed the severity or actual existence of an orphan works problem. The Copyright Office, however, refutes these views as outliers from the general consensus that a substantial orphan works problem is at hand." (footnote omitted)); *id.* at 204 ("These orphan works are then left to live in the orphanage of copyright limbo, neither able to further the advancement of culture through their use nor able to benefit their authors through licensing and monetization.").

Senate Judiciary Committees held multiple hearings and attempted to introduce several bills on the issue throughout the 2000s.²⁵³ All parties recognized that mass digitization only made the orphan works problem more dire.²⁵⁴ But to date, and notwithstanding the Copyright Office's numerous attempts to suggest proposed legislation that would limit legal liability for good faith orphan works users and the related congressional hearings, no legislation has been passed.

But the downsides of class litigation itself and a potential loss as well as the upsides of settlement—for plaintiffs, weighing denial of litigation class certification against a reasonable settlement payout; for defendants, weighing mass exposure against the certainty provided by settlement—bring the parties most affected by these problems to the bargaining table. As discussed in section II.C, if approved, the Google Books settlement would have implemented a private solution to the long-standing orphan works problem—with ramifications not just for Google but for all other book digitization efforts that might be able to use the settlement as a model, or to use the Book Rights Registry for their own identification purposes²⁵⁵—by allowing Google to commercialize orphan works, so long as it paid accruing royalties to a Book Rights Registry that would take on the task of identifying and maintaining a database of unknown rightsholders.²⁵⁶ And where Google's proposed settlement failed, Spotify succeeded in fashioning a similar solution to orphaned musical works. Indeed, as discussed in section II.D—and as if using Google's failed settlement as a model—the approved Spotify settlement established a Mechanical Licensing Committee, comprised of three appointees made by copyright owners and three made by Spotify, that would share data to facilitate the creation of a publicly available musical works ownership database.²⁵⁷ The creation of such a publicly available digital database disclosing musical work ownership is pivotal: The lack of publicly available data about musical works was a problem that even musical works owners themselves were keenly aware of for a long time.²⁵⁸ Despite bad data being

253. See Copyright Off., Orphan Works, *supra* note 39, at 1.

254. See *id.* at 2.

255. Settlement Notice from U.S. Dist. Ct., S.D.N.Y., to Potential Class Action Members Regarding Google's Digitization of Books and Other Writings 10 (Feb. 11, 2009), https://www.stm-assoc.org/2009_02_11_Google_Books_Search_Settlement.pdf [<https://perma.cc/ZV9X-8UJJ>] (notifying potential class members affected by any settlement in *Authors Guild v. Google, Inc.* that “[t]he Registry [would] be jointly managed by a Board comprising an equal number of representatives of the Author Sub-Class and Publisher Sub-Class”).

256. See *supra* section II.C.

257. See *Ferrick Settlement Agreement*, *supra* note 207, at 53.

258. See Bart Herbison, Dir., Nashville Songwriters Ass'n Int'l, Symposium Presentation: On Copyright Reform at the Belmont Law Review Symposium: Entertainment

at the center of previous lawsuits,²⁵⁹ it took a class action against the world's largest streaming service²⁶⁰ for the industry to actually attempt to do something about it.

D. *Copyright Class Actions May, and Often Do, Lead to Lasting Legislative Change*

On the other hand, some might object to settlements completely as shifting the administration of law away from public-facing accountability: private ordering routing around proper legislation. For example, Professor Samuelson objected to the Google Books settlement in part because of its quasi-legislative nature.²⁶¹ Others, like Professor Julie Cohen, have pointed specifically to the “growing practices of settlement without responsibility” as part of a concerning movement that “valorize[s] market institutions as the principal source of structural discipline,” expressing and reinforcing neoliberalism’s “bargain-basement resolution of claims for aggregate monetary relief.”²⁶² Of course, fully examining the consequences of the modern-day transformation of the judicial system from one focused primarily on meting out individualized justice to aggregating large numbers of claims—what civil procedure scholars like Professor Resnik have called the reorientation of the court system toward

Law and Music Business in Transition (Oct. 16, 2015), *in* 3 Belmont L. Rev. 123, 133 (2016). As Herbison noted:

The data is junk. ASCAP’s data system is different from BMI’s, which is different from SESAC’s, which is different from Harry Fox’s. And even good players in the digital space that want to go get a license, and depending on how they want to use it they may have to get two, three, four licenses—they don’t know who owns the song.

Id.

259. See, e.g., *BMI v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 277 (S.D.N.Y. 2015) (“At no point during the negotiations did Pandora ask EMI for a list of EMI-published works that had been withdrawn from ASCAP; i.e. the works Pandora would be unable to perform if it could not agree with EMI.”); *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 346 (S.D.N.Y. 2014) (explaining that despite ASCAP’s attempt to show that Pandora could have used public sources to identify the Sony catalog, “it failed to show that such an effort would have produced a reliable, comprehensive list, even if Pandora had made the extraordinary commitment necessary . . . to compile such a list”).

260. Eamonn Forde, *Spotify Comfortably Remains the Biggest Streaming Service Despite Its Market Share Being Eaten Into*, *Forbes* (Jan. 19, 2022), <https://www.forbes.com/sites/eamonnforde/2022/01/19/spotify-comfortably-remains-the-biggest-streaming-service-despite-its-market-share-being-eaten-into/?sh=6563ac334743> [<https://perma.cc/SLC3-9ZXX>].

261. See Samuelson, *Google Book Settlement*, *supra* note 10, at 552 (“The GBS settlement has legislative character in two key respects: First, because it would modify substantive rights of members of the settlement class, which Rule 23 plainly forbids. And second, because it would have significant spillover effects on third parties who did not participate in the settlement negotiations.”).

262. Cohen, *Informational Capitalism*, *supra* note 86, at 164.

managerialism²⁶³—is something that other scholars engaged with class actions more broadly have examined in detail.²⁶⁴ This Article, in excavating the narrow space that copyright claims occupy within the broader class action framework, can only hope to offer some more limited observations and a cautious note of optimism.

What might explain the fact that some copyright class actions went above and beyond a settlement between the parties and instead provided the impetus for legislative reform? As discussed in Part II, the class-wide settlement in *Cahn*, for example, was premised *not* on payment to the class, but instead on an explicit agreement to support subsequent legislation for royalties on digital audio recording equipment and software.²⁶⁵ And the legislation that resulted, the Audio Home Recording Act, in fact became the only U.S. law that required the payment of royalties by device manufacturers—in addition to paving the way for one of the most significant new technology bills in the past century: section 1201 of the Digital Millennium Copyright Act.²⁶⁶ Likewise, the Spotify class action and follow-on suits collectively alleging billions of dollars in damages against other music streaming services, such as Amazon Music, Apple Music, Google Play, Pandora, and Rhapsody, naturally caused streaming services and rightsholders to seek resolution in Congress, resulting in the most significant change to copyright laws in well over a decade: the Music Modernization Act.²⁶⁷ And even where class action settlements do not explicitly lead to legislative reform, the legal issues that mass litigation raises—not to mention the exposure created for defendants and the possibility of a lucrative future revenue stream for plaintiffs—can be one of the driving impetuses for increased lobbying efforts, as seen after *Frank*.

263. See Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 376 (1982) [hereinafter Resnik, *Managerial Judges*] (“Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, ‘managerial’ stance.”).

264. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1350 (1995) (arguing that “the mass tort class action now often provides a means by which unsuspecting future claimants suffer the extinction of their claims even before they learn of their injury” rather than serving as a vehicle for aggregating small claims to make litigation economically feasible); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. Rev. 1713, 1723–24 (2012) (explaining the reform in judges’ roles as managers in their cases); Resnik, *Managerial Judges*, supra note 263, at 376 (describing the increasingly “managerial” nature of the modern judicial role); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Geo. L.J. 371, 416 (2001) (pointing out some shortcomings of the managerial conception of the modern judiciary); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. Rev. 631, 673 (outlining an argument that expands the extent to which one can speak of managerial judging); Adam S. Zimmerman, *The Global Convergence of Global Settlements*, 65 U. Kan. L. Rev. 1053, 1057 (2017) (discussing the apparent global trend toward a “governmental approach to the compensation of mass claims”).

265. See supra note 107 and accompanying text.

266. See supra note 114 and accompanying text.

267. See supra section II.D.

Unlike, for example, mass torts litigation that focuses on compensation for defendants' prior bad acts,²⁶⁸ the copyright class action is not just some one-off litigation for which any ensuing settlement can close the chapter on past harms. Instead, the litigation itself portends larger issues in how technology is changing the future of copyrighted content consumption and delivery: For copyright owners as putative plaintiffs, this means possible new revenue streams that warrant explicit recognition in the law, and for the large technology user as defendant, flashpoints of vulnerability that likewise require some clarity if the business model is to succeed.²⁶⁹ Or, as Professor Matthew Sag suggested, class action litigation acts as an information-gathering device for both content owners and content users. They are "a way of demonstrating to Congress and the [C]opyright [O]ffice that there is an issue that needs to be addressed."²⁷⁰ It is unsurprising, then, that legislation like the MMA indicates congressional desire to curb class actions through liability-limiting measures intended to reduce expensive and unnecessary litigation that diverts royalties from artists.²⁷¹

In this regard, the story of copyright class actions is one that can be more aptly described *not* as the standard class action tale of a plaintiffs' bar versus a corporate defendant²⁷² but rather as reaching much closer to the core of how copyright policy has long been fought and made: incumbent rightsholders versus new technologies.²⁷³ Incumbent rightsholders may be

268. See *supra* note 22.

269. Unsurprisingly, then, some have described the MMA as closing "loopholes," or, more appropriately, parts in existing law that needed refinement in the face of technological change. See Bill Rosenblatt, *Here Are the Loopholes Closed by the Music Modernization Act*, *Forbes* (Oct. 11, 2018), <https://www.forbes.com/sites/billrosenblatt/2018/10/11/music-modernization-act-now-law-leaves-one-copyright-loophole-unclosed/?sh=2a0f1f637272> (on file with the *Columbia Law Review*) ("The loophole that the MMA fills has to do with the massive amounts of paperwork and royalty processing that digital music services have to handle in order to comply with existing mechanical licensing law—and the legal risk that they incur if they get any of it wrong.").

270. E-mail from Matthew Sag, Professor of L., Loyola Univ. Sch. of L., to author (Oct. 8, 2021, 09:44 EST) (on file with the *Columbia Law Review*).

271. See S. Rep. No. 115-339, at 14–15 (2018) ("The [MMA] contains a key component . . . limiting liability for digital music providers after January 1, 2018, so long as they undertake certain payment and matching obligations. Such agreement is welcomed since continued litigation generates unnecessary administrative costs, diverting royalties from artists.").

272. In the traditional class action context, the two sides of the debate take opposing views on the role of class actions and the subsequent importance of putative plaintiffs' individual claims. See David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 *Fordham L. Rev.* 1785, 1808–09 (2018) [hereinafter Marcus, *History of the Modern Class Action*]. The skeptic, who would view the class action as a joiner device, views each individual claim held by an ordinary citizen as one of trivial significance. The optimist, likewise, views his role as aggregating enough small claims into a litigation with a scope broad enough to create real change. See *id.*

273. See, e.g., Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 *B.U. L. Rev.* 71, 74 (2020) ("New technologies disrupt existing industries. They always have, and they probably always will . . . Incumbents don't like innovations disrupting their industries.");

all the more incentivized to seek resolution in Congress because class action settlements only reach works already in existence at the time of settlement—they do not cover works not yet created.²⁷⁴ Finally, while a class action settlement provides the settling defendant with a blanket license to copyrighted content owned by all possible claimants,²⁷⁵ follow-on legislation is the incumbent rightsholder's own version of a blanket license. This is because follow-on legislation provides a promise of future revenue streams not only against the settling technology defendant (e.g., Spotify) but against all similar new technologies (e.g., Spotify's competitors such as Apple Music and Google).

The foregoing political economy story may also explain why some copyright class actions led to legislative change where others failed. While the allegedly unlicensed songs in the Spotify suit were often portrayed as niche or indie, the fact remains that these were nonetheless working songwriters with much to gain, or lose, from a change in the laws.²⁷⁶ To develop a codified way in which all these songwriters could get paid from streaming, even if their smaller music publishers were not part of Spotify's lucrative deals with larger music publishers, is no small feat. On the other hand, the Google Books settlement attempted to address orphaned books—books for which the author could not be located; books that had been out of print with no cognizable revenue stream for decades.²⁷⁷ Without incumbent rightsholders motivated to seek change in Congress, it is not surprising that no further legislative action occurred following the failed Google Books settlement.

Wu, Copyright's Communications Policy, *supra* note 27, at 286 (stating that copyright law, in part, "emerges as a byproduct of conflict between" incumbent authors and new authors).

274. For example, the Spotify settlement only covered works that were registered as of the date the court was to grant preliminary approval of the settlement agreement. *Ferrick Settlement Agreement*, *supra* note 207, at 4–5, 17–18 (defining "Claimed Musical Work" as a copyrighted work that Spotify made available during the Class Period—the period from December 28, 2012, up to and including the date of the Preliminary Approval Order—for streaming or downloading without a license). It did not sweep in works that may have been registered, let alone created, after the settlement date. See *id.*

275. Except those who opt out, of course. See *supra* note 232 and accompanying text.

276. See Andrew Flanagan, In \$43 Million Settlement, Spotify Forced to Confront a Persistent Problem, NPR (June 1, 2017), <https://www.npr.org/sections/therecord/2017/06/01/531029555/in-43-million-settlement-spotify-forced-to-confront-a-persistent-problem> [<https://perma.cc/9TLH-ZL8V>]. Another Victory argued that it had not been paid for fifty-three million streams but then noted: "For numerical context, Drake's 'One Dance,' the most popular song of last year, was streamed 1.23 billion times—not to suggest that less popular songwriters don't deserve to be paid the same as everyone else." *Id.* David Lowery has long been an outspoken advocate for artists' rights, in addition to being the front man for the well-known rock bands Cracker and Camper Van Beethoven. See Ben Sisario, David Lowery Sues Spotify for Copyright Infringement, N.Y. Times (Dec. 29, 2015), <https://www.nytimes.com/2015/12/30/business/media/david-lowery-sues-spotify-for-copyright-infringement.html> (on file with the *Columbia Law Review*).

277. See *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 678–79 (S.D.N.Y. 2011); *supra* note 40 and accompanying text.

IV. CONCERNS UNIQUE TO COPYRIGHT CLASS ACTION CASES

The examples of both the major copyright reforms enacted in the past century and the class actions that served as either explicit progenitor or else a factor leading to such legislation might provide one response to critics of the judicial managerial system of mass aggregated claims and a potential future dominated by private settlements for copyright claims.²⁷⁸ This last Part examines this and several other concerns that courts and litigators crafting and approving settlements in copyright class action cases should be especially attuned to as the use of aggregated claims continues to grow in scope and popularity.²⁷⁹ It begins by discussing when reform by litigation may be beneficial and when it may be anticompetitive. It then considers how blanket compulsory licensing may interact with the fair use defense and the threat of aggregated statutory damages. Ultimately, it examines whether blanket compulsory licensing treads upon the copyright holder's right to exclude.

A. *The Privatization of Public Law (and Other Monopoly Perils)*

To those acutely attuned to the public interest in using copyrighted works,²⁸⁰ the idea that private litigation—and worse yet, a private settlement—could potentially restrict user rights is deeply problematic. Since the defendant is a “copyright user” as that term is typically conceived,²⁸¹ the broader question becomes whether the defendant would act in a manner that advances the greater public interest or whether the defendant would instead engage in self-dealing that restricts public access to copyrighted works.

Yet the hybrid public–private settlement approval process means that user rights may oftentimes be better represented through settlement than through the power-broker-driven legislative lobbying process. Indeed, in rejecting the Google Books settlement, the court not only cited to objections by academic publishers and competitors raising antitrust

278. See *supra* notes 261–262 and accompanying text.

279. This Part does not retrace arguments about the concerns posed by class actions more generally—a path laden with critiques of, and potential solutions to, the problems of adequacy of representation, class lawyers' incentives (and fees), governance and legitimacy, due process, accountability, possible collusion in settlement deals, conflicts of interest, and more—that are already well-trodden by a number of other procedural scholars. See *supra* note 82.

280. This is often summed up in the copyright literature as the “access” prong of the access–incentives trade-off. See, e.g., Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives–Access Paradigm*, 49 *Vand. L. Rev.* 483, 485 (1996).

281. See, e.g., Jane C. Ginsburg, *Authors and Users in Copyright*, 45 *J. Copyright Soc'y U.S.* 1, 3 (1997) (“‘[U]ser rights’ concern assertions by a variety of intermediaries, from some library establishments, to home electronic equipment manufacturers, to online service providers, as well as by some free spirits, who insist that the ‘information society’ requires that end users have open and free access to consume works of authorship.”).

concerns but also to amicus briefs filed by parties committed to preserving public access to books.²⁸²

To further advance the public interest, courts may choose to encourage settlements containing innovative nonmonetary provisions that solve long-standing problems. An example is the agreement in the Spotify settlement for further cooperation by rightsholders and licensees to share data for unmatched musical works.²⁸³ Courts might also look more kindly upon settlements, such as those in *Cahn*, that are predicated on the parties seeking new legislation in Congress, *especially* if the court believes that the settlement goes beyond the scope of the lawsuit²⁸⁴—as the rejected Google Books settlement did—or if the agreement would otherwise give the settling defendant undue market power.²⁸⁵ The Google Books court, for example, feared that approving the settlement would grant Google a de facto monopoly over the digitization of books. As the court noted, “Only Google has engaged in the copying of books en masse without copyright permission.”²⁸⁶ Yet it is worth pointing out that even there, and as with all things involving new technologies, it would turn out that as the technology became cheaper and easier to use, other less-resourced parties began digitizing books as well.²⁸⁷ Like Google’s efforts, these digitization efforts were ultimately validated by fair use.²⁸⁸

282. See *Authors Guild*, 770 F. Supp. 2d at 682–84 & n.20. Others have documented the important role that amicus briefs may play in representing the interests of nonparties. See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 Rev. Litig. 669, 680–84 (2008).

283. See *supra* notes 207–211 and accompanying text.

284. Courts sometimes approve settlements that may go beyond the scope of the lawsuit if they find that the “released conduct arises out of the ‘identical factual predicate’ as the claims at issue in the case.” 6 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 18:19 (6th ed. 2022). Thus, courts have approved settlements that release nonparties as well as those that release claims not pleaded in the complaint, including those beyond the court’s jurisdictional authority, so long as the released conduct arises out of the same core nucleus of facts underlying the claims of the settled class action. See, e.g., *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (permitting release of a claim even when the claim was not presented and might not have been presentable in class action); *Fanning v. Acromed Corp.* (In re Orthopedic Bone Screw Prods. Liab. Litig.), 176 F.R.D. 158, 181 (E.D. Pa. 1997) (approving a settlement releasing products liability-related claims that shared a common set of facts with the claims of the settlement class).

285. For a critique of the Google Books settlement on the basis that it gave Google the singular ability to digitize books, see Grimmelmann, *Future Conduct*, *supra* note 10, at 456; Samuelson, *Google Book Search*, *supra* note 10, at 1359.

286. *Authors Guild*, 770 F. Supp. 2d at 682.

287. See Aaron Elkins, *Beyond Google Books: Getting Locally-Digitized Material Into HathiTrust*, Univ. of Mich. Blogs (June 4, 2015), <https://apps.lib.umich.edu/blogs/library-tech-talk/beyond-google-books-getting-locally-digitized-material-hathitrust> [<https://perma.cc/NSZ4-VQ79>] (describing how HathiTrust, a partnership of research and academic institutions, moved beyond digitizing books through Google “to support preservation and access to a wide array of digitized book material”).

288. See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014) (holding that HathiTrust was engaged in fair use in the large-scale digitization of copyrighted works).

On the other hand, where an agreement is for a technology that is already well-developed among many large parties (streaming) and goes directly to the issues and facts squarely presented in the case, such as the Spotify settlement, the concern of undue market power (or the possibility that a license provided by settlement would give the defendant an unfair head start) is lessened. Certainly, if Spotify were the only streaming service that would be exempt from sending individualized NOIs²⁸⁹ to rightsholders due to its settlement with the music publishers in *Ferrick*, it would have given them deep competitive advantages over other established streaming services like Apple Music, Amazon Music, Google Play, Pandora, and Rhapsody. Little wonder, then, that the MMA passed as the concerted effort of numerous large streaming services (and rightsholders) negotiating at the bargaining table.²⁹⁰ Similarly, it is no surprise that service providers like CompuServe, even after reaching a settlement with the record labels that provided them a release for past harms, sought—and received—clarity from Congress.²⁹¹

Further, if restricted to the specific scope of the lawsuit, a blanket license garnered by settlement in the copyright context might be more warranted than class-wide settlements in other types of litigation that have quasi-legislative effects.²⁹² After all, as Part I discusses, copyright law is unique in that the doctrine of fair use accomplishes precisely what a license garnered by class-wide settlement would achieve (judicially sanctioned uses of entire swathes of copyrighted works by new technologies not yet evaluated by Congress) but without any payment to rightsholders.²⁹³ Thus if in fact settlements, more so than, say, fair use adjudications, have led to more legislative change, then settlements should be encouraged rather than condemned as the ultimate derogation of the public-facing duty of copyright law.

In any event, the tug-of-war between whether Congress or courts are best placed to create laws to address new technologies is an age-old problem, not one created, or even necessarily exacerbated by, the use of class action settlements. From the release of the Betamax in 1975 to streaming technologies in the 2010s, courts have long engaged with this

289. See 17 U.S.C. § 115(b) (2018) (discussing service of NOIs).

290. See Andrew Flanagan, A Music Industry Peace Treaty Passes Unanimously Through Congress, NPR (Sept. 19, 2018), <https://www.npr.org/2018/09/19/649611777/a-music-industry-peace-treaty-passes-unanimously-through-congress> [<https://perma.cc/8FCB-5ZGE>] (“The [MMA] is essentially a music business peace treaty It’s the result of years of slow-moving compromise between tech companies like Spotify that rely on music[,] . . . entrenched music industry interests[,] . . . [and] artists . . . and the organizations that advocate for them.”).

291. See *supra* section II.B.2.

292. See Marcus, History of the Modern Class Action, *supra* note 272, at 1829 (“All class settlements arguably have a legislative effect. Without their consent, class members lose one right, the right to sue, and gain another, the right to claim compensation from a fund.”).

293. See 17 U.S.C. § 107; *supra* notes 53–56 and accompanying text.

difficult and complex question, with no clear answers to date. The Ninth Circuit, writing in 1981 in the decision that would eventually be overturned by the Supreme Court in *Betamax*,²⁹⁴ stated that whether the statutory fair use scheme should apply to the *Betamax* is ultimately a public policy question that is best left “for the legislative branch.”²⁹⁵ Yet the Supreme Court disagreed in spirit if not in clear writing, overturning the Ninth Circuit’s decision and finding fair use, noting that if Congress wanted to take a “fresh look” at this new technology, it may do so.²⁹⁶

Likewise, in a 2014 decision evaluating a streaming technology named Aereo that assigns users their own antennas to capture over-the-air broadcasts, the Supreme Court rejected the argument that such a technological design fits within the technical definition of a private performance.²⁹⁷ In a scathing dissent, Justice Antonin Scalia eviscerated the majority’s holding as attempting to shoehorn a new technology into existing copyright law, writing that Aereo may have found a “loophole” in the law but that it is “the role of Congress to eliminate them if it wishes. Congress can do that . . . in a much more targeted, better informed, and less disruptive fashion than the crude ‘looks-like-cable-TV’ solution the Court invent[ed].”²⁹⁸

The above examples merely serve to illustrate the point that both courts *and* legislatures will continue to play important roles in adjudicating copyright disputes involving new technologies. For every reflexive retort that a class action settlement encroaches upon the role of the legislature, one may well respond, as others have, that “litigation may in fact be an efficient means of resolving social conflicts.”²⁹⁹ Indeed, empirical analyses have directly linked variations in judicial power to executive and legislative fragmentation, with the former increasing in strength as the latter grows increasingly gridlocked.³⁰⁰ In this sense, the *Authors Guild* court’s rejection of the Google Books settlement reflected an overly narrow view of the class action mechanism that focuses on litigation as conflict resolution, “bounded in effect” and limited in its impact “to the (two) parties before the court.”³⁰¹ But a more ambitious, expansive view moves beyond just conflict resolution and instead sees class actions as having a part to play in

294. Sony Corp. of Am. v. Universal City Studios, Inc. (*Betamax*), 464 U.S. 417 (1984).

295. Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 971 (9th Cir. 1981).

296. *Betamax*, 464 U.S. at 456.

297. Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 449 (2014).

298. *Id.* at 462 (Scalia, J., dissenting).

299. Tonja Jacobi, The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States, 30 J. Legal Stud. 205, 206 (2009).

300. See *id.* at 209–11 (noting that the farther the distance between players whose approval is needed for legislation, the greater the range of judicial discretion).

301. Abram Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 5 (1982).

regulatory reform, “implicat[ing] matters that extend well beyond ‘the effects of the decision on the parties before the court.’”³⁰²

B. *Fair Use Concerns*

This Article has argued that the types of uses that might constitute a fair use, as opposed to those that would be more amenable to a blanket license by class settlement, are different: Uses like Spotify’s—purely reproductive uses—would not be eligible for fair use, anyway.³⁰³ But to those that have long argued that copyright doctrine should err on the side of less protection, my proposal might strike some as potentially erosive of fair use doctrine, by providing courts an alternative to the seemingly limitless permissiveness of fair use—Professor Ginsburg’s “permitted-but-paid” regime.³⁰⁴

This critique is the most pressing and certainly highlights the fissures this Article has described between those who believe that fair use should be limited to productive uses that engage copyrighted material to create new expressive works rather than reproductive works, and cases in which fair use doctrine serves as a judicially created sanction of new technologies,³⁰⁵ although one reading of the legislative history of section 107 certainly suggests Congress did not intend to exclude new technologies from fair use’s ambit.³⁰⁶ But productive uses are unlikely to be the subject of a class action. One would have to imagine, for example, a lawsuit hinged on the creation of multiple secondary works that utilize thousands of existing copyrighted works—but even then, differences in how each secondary work uses the copyrighted work make these cases unlikely candidates for class certification.³⁰⁷ This, then, leaves reproductive uses. And on this front, it bears pointing out that there have been but a small number of cases that have found that mass-aggregation new technologies’ use of copyrighted works were fair, validating only three such types of uses:

302. Marcus & Ostrander, *supra* note 21, at 1517 (quoting Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 Colum. L. Rev. 1, 3 (1985)).

303. See *supra* Part I.

304. See Ginsburg, *Fair Use for Free*, *supra* note 50, at 1386.

305. See *supra* Part I.

306. See H. Rep. No. 94-1476, at 66 (1976) (“The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”).

307. One such example might be a class action suit that was filed on secondary liability grounds against a website that exclusively hosts remixes or other songs utilizing samples. But while websites like Vimeo, Soundcloud, and Hypemachine certainly host plenty of remixes, the sheer variety of divergent issues in such cases—for example, whether the copyright owner herself uploaded the content; whether the site otherwise had permission to upload the content; and the availability of nonderivative, purely reproductive uses on such sites—makes these types of cases inappropriate for class action treatment under Rule 23. See Fed. R. Civ. P. 23(a) (outlining the prerequisite requirements for class actions, including common questions of law or fact and typicality in claims or defenses).

book digitization, private recording and time-shifting, and image search.³⁰⁸ In comparison—and perhaps a fact overlooked by decades of scholarship focused on fair use and new technologies—the number of class action settlements involving new technologies has been, in fact, greater.³⁰⁹

All of this is to say that these settlements are already occurring and will likely occur with greater frequency in the near future. Similarly, enough uncertainty and protracted litigation regarding the uneven application of fair use to these new technologies (Google Books is permitted but mass archiving of audiovisual clips is not, as the Second Circuit found in *Fox News Network v. TVEyes*,³¹⁰ audiovisual time-shifting was permitted by the Supreme Court but that did not stop the music industry and the tape-recording industry from pursuing settlement and ultimately new royalty-bearing legislation in the Audio Home Recording Act³¹¹) make settlements a reasonable choice. My proposal has highlighted the value in these settlements and identified the reasons that make them a compelling choice for defendants, plaintiffs, and courts alike.

Of course, defendants themselves will doubtless continue to assert the fair use defense if a use seems to be well qualified for it. After all, one would certainly prefer a permitted-and-free use than a permitted-but-paid regime. In the final analysis, it will be up to courts to continue to shape the fair use doctrine to confront these new uses—and for scholars to continue to argue for or against the common law's role in that analysis.

C. *Aggregation and Copyright's Statutory Damages Problem*

As discussed in Part II, scholars have long critiqued copyright's statutory damages provision, in which plaintiffs may recover up to \$150,000 per work infringed—a number that adds up quickly for mass-aggregation technologies.³¹² Critics have argued that the statutory damages awards are

308. See *Sony Corp. of Am. v. Universal City Studios, Inc. (Betamax)*, 464 U.S. 417, 456 (1984) (applying fair use to video recording and time-shifting copyrighted materials); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207–08 (2d Cir. 2015) (applying fair use to the digitization of copyrighted books); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014) (applying fair use to the full-text searching of copyrighted books); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176 (9th Cir. 2007) (applying fair use to search engine displays of copyrighted images); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003) (applying fair use to thumbnail displays of copyrighted images).

309. See notes 107–108 and accompanying text (discussing the *Cahn* settlement); notes 122–129 and accompanying text (discussing the *Frank* settlement); notes 180–181 and accompanying text (discussing the *In re Literary Works* settlement); notes 204–210 and accompanying text (discussing the *Ferrick* settlement).

310. *Fox News Network LLC v. TVEyes*, 883 F.3d 169, 182 (2d Cir. 2018).

311. See *Betamax*, 464 U.S. at 420 (holding that the sale of time-shifting technology did not infringe on copyrights); cf. S. Rep. No. 102-294, at 38 (1992) (describing the *Cahn* settlement as a “historic compromise” which informed the AHRA’s passage); *Cahn* Complaint, *supra* note 106, at 2–3 (seeking copyright relief for unauthorized audio taping using DAT recorders).

312. See 17 U.S.C. § 504(c) (2018).

“arbitrary, inconsistent, unprincipled, and sometimes grossly excessive” and completely unmoored from actual damages suffered by the plaintiff.³¹³ Recent high-profile copyright cases (in the nonclass context), in which juries have awarded copyright holders millions—if not billions—of dollars in statutory damages, underscore this point.³¹⁴

Yet these recent, nonclass statutory damages awards prove the point that new technologies, not the availability of the class action mechanism, created our new reality of aggregate litigation.³¹⁵ Even without Rule 23, copyright holders will find ways to efficiently litigate the dissemination of hundreds of thousands of their copyrighted works, which may result in hefty statutory damages awards, especially if the litigation is allowed to proceed to a jury. In this sense, aggregation is less a symptom of class actions than it is of digitization. There is no reason to believe that class action litigation, by enabling one particular type of aggregated claim, exacerbates the likelihood of a high statutory damages award. Indeed, evidence from this Article’s survey of the hundred-plus class actions filed to date even suggests that the class action device may *reduce* the likelihood of an outsized statutory damages award.

Unlike in the nonclass context, not a single one of the hundred-plus copyright class actions filed to date has resulted in a statutory damages award—including in any class settlement awards. And that the majority of class actions have resulted in settlements should further hearten those concerned about statutory damages awards. After all, unlike with a damages award rendered by a trial court or jury, defendants settling a class action must actually *agree* to the amount they must pay, and they are unlikely to agree to an outsized award that bears little semblance to actual damages. Further, there is reason to believe that the difficulties and uncertainty of class action litigation, in particular, might motivate settlements more so than in nonclass contexts. For one, the very uncertainty of class certification sets class actions apart from other types of litigation in which plaintiffs might be motivated to settle, as the “rigorous” certification requirements for litigation classes (as opposed to settlement-only classes) impose an additional layer of uncertainty that is simply not present in other litigations.³¹⁶

313. Samuelson & Wheatland, *supra* note 63, at 441.

314. See, e.g., *Columbia Pictures Television, Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186, 1195 (9th Cir. 2001) (awarding \$31.68 million in statutory damages for unauthorized television broadcasts of copyrighted content); *Energy Intel. Grp., Inc. v. CHS McPherson Refinery Inc.*, No. 16-01015-EFM, 2019 WL 367788, at *1 (D. Kan. Jan. 30, 2019) (awarding \$1,119,750 in statutory damages for unauthorized electronic forwarding of copyrighted newsletters); *Sony Music Verdict Form*, *supra* note 69, at 1–2 (awarding \$1 billion in statutory damages for internet service provider’s enabling of copyright infringement).

315. See *supra* notes 80–81 and accompanying text.

316. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (describing the class certification process as a “rigorous analysis” of prerequisites by the trial court); *Auscape Int’l v. Nat’l Geographic Soc’y*, No. 02 Civ. 6441 LAK HBP, 2003 WL 23531750, at *12 (S.D.N.Y.

To further complicate matters for plaintiffs seeking class certification, courts have repeatedly noted that copyright claims, in particular, “are poor candidates for class-action treatment.”³¹⁷ Indeed, some courts have explicitly cited the availability of statutory damages in copyright cases as a factor militating against class certification, noting that “the availability of statutory damages is designed to give litigation value” to the bringing of individual cases, instead.³¹⁸ Further, that courts have wide discretion to set a statutory damages number anywhere between \$750 to \$150,000 based on a number of factors, including the value of the copyrighted work and the revenues lost by the copyright holder, introduces individualized inquiry into each copyrighted work.³¹⁹

Thus, the rigorous process of certification of a litigation class, not to mention courts’ skepticism of litigation classes in copyright cases in

July 25, 2003) (finding that the class should not be certified because of “the divergent contracts and other agreements NGS had with the members of the putative class over the 115-year period encompassed by the proposed class”); *Chambers v. Time Warner*, No. 00 Civ. 2839(JSR), 2003 WL 749422, at *7–8 (S.D.N.Y. Mar. 5, 2003) (finding that class certification was not warranted because the court would have to perform “individualized” assessments of the plaintiffs’ copyright and Lanham Act claims). As the Supreme Court ruled in *Amchem Products, Inc. v. Windsor*, “Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.” 521 U.S. 591, 620 (1997) (citation omitted).

317. See *Blagman v. Apple, Inc.*, No. 12 Civ. 5453(ALC) (JCF), 2013 WL 2181709, at *8 (S.D.N.Y. May 20, 2013) (internal quotation marks omitted) (quoting *Football Ass’n Premier League v. YouTube, Inc.*, 297 F.R.D. 64, 65 (S.D.N.Y. 2013)). On the other hand, courts routinely certify settlement classes that might not have been certifiable for trial purposes. Following *Amchem*, courts, which often treat the problem of individualized determinations as a manageability issue, have repeatedly observed that classes inappropriate for trial due to individualized inquiries would nonetheless be appropriate candidates for settlement. See, e.g., *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 558 (9th Cir. 2019) (“A class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable.”); *Kim v. Tinder, Inc.*, No. CV 18-3093-JFW(ASx), 2019 WL 2576367, at *5 (C.D. Cal. June 19, 2019), rev’d on other grounds sub nom. *Kim v. Allison*, 8 F.4th 1170 (9th Cir. 2021) (“Courts . . . regularly certify settlement classes that might not have been certifiable for trial purposes because of manageability concerns.” (alteration in original) (internal quotation marks omitted) (quoting 2 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 4:63 (5th ed. 2018))); *In re Payment Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 56 (E.D.N.Y. 2019) (noting that the predominance inquiry required for class certification can be more easily satisfied in the settlement context); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 619 (W.D. Wash. 2003) (denying class certification because whether each class member actually purchased the product at issue would require a “host of mini-trials” but suggesting that certification for settlement would be appropriate because inquiries into individual proof of purchase constituted an “intractable management problem” that need not be considered for settlement purposes).

318. *Football Ass’n Premier League*, 297 F.R.D. at 66.

319. See *Fitzgerald Publ’g Co. v. Baylor Publ’g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) (noting that factors considered in any given case may include “revenues lost by the plaintiff,” “the value of the copyright,” “the deterrent effect on others besides the defendant,” and “the blameworthiness of one defendant against another”).

particular, imposes a formidable hurdle to any potential dream of a large statutory damages award at the end of the road. These obstacles might very well encourage plaintiffs to take a settlement offer (as the old adage goes, a bird in the hand is worth two in the bush). Both certification and the possibility that some defendants, faced with a potentially crippling damages award, may choose to double down on defenses that would ensure plaintiffs receive no compensation at all (like fair use³²⁰ or other novel arguments³²¹) create uncertainty for plaintiff classes. Because of this, it is unsurprising that some classes have forgone chasing a potentially lucrative statutory damages pot, opting instead for comparatively paltry settlement awards that bear much more semblance to actual damages.³²²

D. *A Note on Concerns About Adequacy of Notice (Including for Orphaned Works)*

The discussion of fair use above might also prove instructive in considering one final point: whether one of the biggest benefits of class actions—the ability to capture the long tail of rightsholders, many of them unknown—also means that notice may never be adequate enough to satisfy Rule 23’s notice and opt-out requirements for monetary

320. See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015) (holding that a defendant’s actions furthering fair use of copyrighted materials provided “no basis . . . to impose liability”).

321. As noted *supra*, Spotify argued that no mechanical licenses from musical works owners were even required for streaming, which would severely damage the plaintiffs’ revenue streams. See *supra* note 196 and accompanying text.

322. See *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 246 (2d Cir. 2011) (detailing the settlement, under which Category B plaintiff authors, whose works were registered too late to receive statutory damages, received the greater of \$150 or 12.5% of the original sale price of their book); *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412 (AJN) (S.D.N.Y. May 22, 2018), 2018 WL 2324076, at *6 (acknowledging that it was not clear how the plaintiffs arrived at the damages figure in the settlement and they were unlikely to establish liability up to that amount); Plaintiffs’ Notice of Motion and Motion for Preliminary Approval; Memorandum of Points and Authorities at 13, *Lowery v. Rhapsody Int’l*, No. 4:16-cv-01135-JSW (N.D. Cal. Mar. 21, 2019), 2019 WL 4594093 (noting that although the awarded amount under the terms of the settlement was less than statutory damages, due to the substantial risks of further litigation, the amounts received by each class member were adequate and fair); *Frank* Order Approving Settlement, *supra* note 122, Exhibit I, at 5 (awarding each of the 947 HFA plaintiff members \$500). Note that the *Lowery* settlement establishing two settlement classes—one for owners of registered works and one with a much lesser amount, subject to further reduction, for owners of unregistered works—may provide a middle road between those who worry about owners of unregistered works (the copyright corollary of the mass tort action’s future claimant) not getting enough and those who worry that owners of unregistered works are only receiving compensation as a consequence of the class mechanism. Cf. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169–70 (2010) (holding that the trial court had subject matter jurisdiction to certify a settlement class of both registered and unregistered owners of works); Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (1991) (describing how mass torts “future claimants,” or those who had not experienced symptoms from exposure, might lose out on any compensation).

settlements.³²³ After all, if the appeal of the failed Google Books settlement was to get around the orphan works problem, those unknown owners certainly cannot receive adequate notice so as to opt out of the settlement.³²⁴

Critically, Rule 23's notice requirements do not require that 100% of the putative class members receive notice and an opportunity to opt out—certainly, the recently approved Spotify settlement only reached about 95% of the putative class, which the court there found to constitute adequate notice.³²⁵ The crucial point is that Rule 23 merely provides for “the *best notice that is practicable under the circumstances*, including individual notice to all members who can be identified through *reasonable effort*.”³²⁶ Of course, for those copyright holders that do have registrations with the Copyright Office, notice should be provided by mail directly to the addresses and individuals listed on the registrations.³²⁷ For unknown rightsholders and those that did not register their works with the Copyright Office,³²⁸ there is no reason why notice in the form of print and internet advertisements, press releases, a website, and disclosures on the defendant's service cannot constitute a reasonable effort to identify class members and provide them notice that is practicable under the circumstances.³²⁹ Indeed, the very publicity generated by the lawsuit itself might alert potential copyright owners of their rights.

And there is reason to believe that peculiarities inherent in copyright law, in addition to the statutory language itself, do not dictate that every conceivable rightsholders need receive notice and an opportunity to opt out in order to satisfy Rule 23. As noted at the outset, fair use might provide one interesting comparison to the soundness of a rule that does not require notice to all conceivable rightsholders in order to generate returns to a good majority. After all, the class action mechanism allows many more rightsholders to opt out and pursue their own infringement

323. See Fed. R. Civ. P. 23(c)(2)(B).

324. See Samuelson, *Google Book Settlement*, *supra* note 10, at 547–48 (“It is, moreover, impossible to give adequate notice to orphan-rights holders.”).

325. See *Ferrick*, 2018 WL 2324076, at *2–3 (“The content of the written notice and the manner in which notice was provided were sufficient to satisfy the requirements of Rule 23 and due process.”).

326. Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). Notice can be provided by first class or bulk mail, publication, broadcast, the internet, or email. See 3 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 8:27 (6th ed. 2022).

327. See *Ferrick*, 2018 WL 2324076, at *2–3 (finding sufficient notice where notice was mailed to the registered copyright holders at the addresses recorded at the Copyright Office, in addition to other means of providing notice).

328. Registration is not required under U.S. copyright law. See U.S. Copyright Off., *Copyright Basics* 4 (2021), <https://www.copyright.gov/circs/circ01.pdf> [<https://perma.cc/67XJ-FN5N>] (“Although registering a work is not mandatory, for U.S. works, registration (or refusal) is necessary to enforce the exclusive rights of copyright through litigation.”).

329. See, e.g., *Ferrick*, 2018 WL 2324076, at *3.

suits—or else stay in the class and enjoy the benefits provided under the agreement. On the other hand, a fair use ruling in favor of a defendant effectively extinguishes all potential copyright claims against the defendant from all claimants, even if the case itself only involved one or a handful of copyright owners.³³⁰

In an interesting aside in the opinion rejecting the Google Books settlement, the court noted that many of the concerns leading to its rejection might be “ameliorated if the [settlement] were converted from an ‘opt-out’ settlement to an ‘opt-in’ settlement.”³³¹ Setting aside the fact that opt-in settlements for monetary damages are exceedingly rare today across all types of class actions,³³² an opt-out class for copyright actions requiring rightsholders to take some action if they wish not to be bound by the terms of the settlement (i.e., to come forward, to opt out) perfectly comports with the broader trend of copyright law over the past two decades. As Professor Tim Wu noted over a decade ago, “[C]opyright has begun in various areas to require action by both parties to ‘arm’ the right.”³³³ As an example, Professor Wu points to section 512 of the DMCA, which allows infringing content to remain on a website until a copyright holder identifies it and sends an explicit notice of takedown.³³⁴ Another example he cites is nonprofit performance of copyright works, which “are, subject to certain conditions, allowable unless the copyright owner objects and serves notice.”³³⁵ Permitting a copyright holder who has not been diligent in pursuing their rights to nonetheless stand on those rights, on the other hand, has been as widely criticized from a law-and-economics framework of inefficiency as it has been from a normative perspective.³³⁶ Finally, examples like fair use, and *eBay*’s dictate that monetary damages, not injunctive relief, should be awarded where the latter would harm the

330. See *supra* note 293 and accompanying text.

331. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011).

332. See, e.g., Scott Dodson, *An Opt-In Option for Class Actions*, 115 Mich. L. Rev. 171, 173 (2016) (arguing that empirical evidence “strongly suggests that opt-out classes are much larger than opt-in classes” in federal class actions).

333. Timothy Wu, *Tolerated Use*, 31 Colum. J.L. & Arts 617, 621 (2008).

334. *Id.*

335. *Id.* at 622.

336. See Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 Tex. L. Rev. 1799, 1804–05 (2007) (arguing that an opt-out structure in copyright law is both economically efficient and normatively desirable); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471, 517–18 (2003) (noting that a copyright owner’s failure to regularly maintain copyright records should result in the work falling into the public domain); see also Xiyin Tang, *Can Copyright Holders Do Harm to Their Own Works? A Reverse Theory of Fair Use Market Harm*, 54 U.C. Davis L. Rev. 1245, 1274 (2021) (arguing that the fourth factor of fair use should be weighed against the copyright holder where they have engaged in “negative” actions to harm, destroy, or reduce value in the market for their copyrighted works).

public interest³³⁷—a dictate that has since been extended to the copyright context³³⁸—refute the rather facile retort that copyright law provides an absolute right to exclude and thus should require no action by the owner to exercise that right.³³⁹ The history of copyright has long been a balancing act between permitting some use of copyrighted works and allowing the copyright holder a limited monopoly over the work. But that right has never been absolute.

CONCLUSION

Critics of judicial managerialism and the overexpansion of copyrights at the expense of the public domain of fair use are, while seemingly disparate, nonetheless united in a commitment to the public function of laws and legislatures while rejecting the twenty-first century impulse to delegate to private markets. Further, these two strands of criticism share another similarity: a privileging of the individual over corporate interests. In that sense, scholars who believe that copyright is too expansive have long believed that overexpansion is due to powerful lobbying interests, backed by large corporate parties.³⁴⁰ These copyright scholars have long noted that the author-centric frame of copyright law is simply a fiction, a story that gives normative meaning to the cold business of horse trading, for so rarely does copyright benefit individual authors over large content conglomerates.³⁴¹

Regulatory capture aside, private agreements made in the shadow of the law have long been commonplace in the entertainment-industrial complex.³⁴² This Article, however, has argued that the class action mechanism is different, and new: It is meant to capture *not* the large content industries who are already in the business of licensing their content and of availing themselves of the judicial system but the remainder—individual authors and smaller parties, the long tail of copyright owners. And that long tail has simultaneously vexed scholars and

337. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

338. *Salinger v. Colting*, 607 F.3d 68, 77 (2d Cir. 2010) (holding that *eBay* applies to injunctions issued for alleged copyright infringement).

339. See Bracha, *supra* note 336, at 1809 (noting that “the remedy of injunctive relief is notoriously easy to obtain in copyright cases”).

340. See, e.g., Jessica Litman, *Digital Copyright* 61–62 (2017).

341. See Cohen, *Copyright as Property*, *supra* note 251, at 141 (noting that “copyright law in the post-industrial era works . . . to separate authorship from control of creative works”).

342. See Kristelia A. García, *Private Copyright Reform*, 20 Mich. Telecomm. & Tech. L. Rev. 1, 3–4 (2013); Kristelia A. García, *Super-Statutory Contracting*, 95 Wash. L. Rev. 1783, 1787 (2020); Sag, *Internet Safe Harbors*, *supra* note 120, at 540–41; Xiyin Tang, *Privatizing Copyright*, 121 Mich. L. Rev. (forthcoming Mar. 2023) (manuscript at 2–3), <https://ssrn.com/abstract=4057573> [<https://perma.cc/4Q3Y-NB6D>].

licensees as it has been largely ignored in the conversations surrounding copyright over- or underprotection.

Aggregate litigation of copyright claims enables creators of all sizes to take advantage of a legal system that had previously been monopolized by the largest copyright holders.³⁴³ And there are signs that the copyright system is expanding to accommodate further access by individual copyright holders to a judicial system that is simply too costly for the average copyright claimant to take advantage of. Aside from the legislation spurred or influenced by the class actions discussed in this Article, there is the recent enactment of the CASE Act, which establishes a specialized copyright claims court for those individuals who lack the resources to engage in expensive litigation.³⁴⁴ While this development is a boon to individual creators, it further exacerbates the transaction cost problem by subjecting large technology users to thousands of individualized suits from thousands of small creators each year. Thus, even as this Article has identified a subtle trend with significant impact in copyright litigation, it would not be surprising to see the import of copyright class actions growing even greater in the coming years.

Nor, as this Article has argued, should we lament this development. Providing some bit of relief to both defendants at risk of thousands of individualized infringement actions and to individual authors left behind by the content creation juggernaut is no small feat. The bigger question as we look ahead, then, will be how better to acknowledge the roles that creators of all sizes play, and what copyright can do for them. This proposal is only but a tiny piece of that large, complex puzzle.³⁴⁵

343. Cf. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 *Colum. L. Rev.* 1992, 2037 (2012) (“[A]ggregation also provides more access by granting plaintiffs the same ‘economies of scale’ as well-financed defendants.”).

344. See *supra* note 18 and accompanying text.

345. A future point of interest is whether an expanded copyright administrative state—in the form of regulatory antitrust oversight of a content industry rife with concentration—can generate, among other benefits, greater returns to individual authors. See Xiyin Tang, *The Copyright-Antitrust Paradox* (working draft on file with author).

