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From Library to Liability—Importing Trade Secret Doctrines to Erase Unfair Copyright Risks Lurking in YouTube’s Creative Commons Library

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From Library to Liability—Importing Trade Secret Doctrines to Erase Unfair Copyright Risks Lurking in YouTube’s Creative Commons Library

I. INTRODUCTION

Profiting off someone else’s work keeps getting easier. The digital age has brought with it new tools for finding and leveraging the creative handiwork of others. Not the least of these new tools is YouTube’s new Creative Commons library.¹ The video-sharing behemoth’s Creative Commons library is a repository of millions² of videos uploaded by YouTube users who have granted anyone, anywhere license to re-use and modify their works. Video creators can search the library and incorporate the videos into their own videos—even when those videos have a commercial purpose—without paying any royalties or licensing fees.³

Some creatives have lauded YouTube’s efforts to further “open the door to collective imagination.”⁴

Do you need a professional opening for your San Francisco vacation video? Perhaps some gorgeous footage of the moon for your science project? How about a squirrel eating a walnut to accompany your hot new dubstep track? All of this and more is available to inspire and add to your unique creation.⁵

But like any other new tool, YouTube’s Creative Commons library comes with potential for abuse and legal controversy. For example, video creators can simply republish Creative Commons videos in

1. Elliot Harmon, *Four Million CC-Licensed Videos Uploaded to YouTube*, CREATIVECOMMONS.ORG (July 25, 2012), <http://creativecommons.org/weblog/entry/33421> (“By letting people remix and adapt videos without having sophisticated editing software or expertise, YouTube and CC are making it easier for *anyone* to build on the work of others. And that’s pretty cool.”).

2. *Id.*

3. *Creative Commons*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797468> (last visited Nov. 2, 2015).

4. Cathy Casserly, *Here’s your invite to reuse and remix the 4 million Creative Commons-licensed videos on YouTube*, YOUTUBE OFFICIAL BLOG (July 25, 2012), <http://youtube-global.blogspot.com/2012/07/heres-your-invite-to-reuse-and-remix-4.html>.

5. *Id.*

entirety without any creative additives except a new (and perhaps more search engine-optimized) name and compete with the original owner for profitable views.⁶ The only benefit the open-minded video donors (those who initially add the video to YouTube's Creative Commons) get from the bargain is a buried link to their donated videos in the borrower's video description.⁷ While this is no doubt an issue of great frustration for those donors who feel borrowers have taken advantage of their creative generosity, this Comment leaves that issue for another day. This Comment instead addresses a far more problematic and far-reaching issue: the complex copyright risks that well-intentioned and mostly uninformed borrowers face when leveraging YouTube's Creative Commons library.

In particular, Creative Commons borrowers may face copyright liability for republishing content that Creative Commons donors never had the right to donate in the first place. This is likely the case without consideration of whether the borrowers acted in bad faith. This should not be the case. Republishing or modifying a work that is presented as fair game Creative Commons material through the facilitation of an Internet powerhouse, like YouTube, should not expose good faith borrowers to liability.

Part II of this Comment demonstrates that under the current copyright regime, an untold number of YouTube video creators who use Creative Commons videos in their own works could be strictly liable for substantial statutory damages—even for good-faith borrowing. Part III recommends that copyright law adapt to protect the interests of such well-meaning creatives by adopting a well-accepted doctrine from another realm of intellectual property—namely, the doctrine protecting good faith “second publishers” under trade secret law. Part VI concludes.

6. Ekai, *Why I'm Giving up on Creative Commons on YouTube*, EDDIE.COM (Sept. 5, 2014), <http://eddie.com/2014/09/05/why-im-giving-up-on-creative-commons-on-youtube/> (“The real issue is YouTube's remix tool is horribly broken. Of the 68 videos that users have 'remixed' from my video, 36 are wholesale reposts of my entire video (many of which are monetized with ads). 28 are by accounts that have since been deleted by YouTube for various TOS violations and a whopping **THREE** are actual original new works in which a sample of my video appears.”).

7. *Id.*

II. COPYRIGHT LIABILITY UNDER THE CURRENT LAW

Well-intentioned Creative Commons borrowers have expressed frustration when, after investing time and energy to publish and promote new videos leveraging resources in YouTube's Creative Commons library, their YouTube accounts have received copyright strikes. These strikes make it so that creatives can no longer monetize *any* videos on their channels—not just those accused of violating copyright laws.⁸

[H]ow could it be, that I get . . . copyright strikes on some of these videos when they are supposed to be in the CC-BY⁹ license? As You[T]ube is also attributing the original Video [sic] with the links to it and I also put the original author and links into my video descriptions, there should be no copyright strike on these types of videos[.]¹⁰

In other words, YouTube penalizes creatives who unwittingly use copyrighted material illegally placed in the Creative Commons by others. Hoping to avoid headaches like this in the future, video creators are left to wonder: how can they borrow from the Creative Commons library without putting their YouTube accounts at risk?¹¹ That is ultimately a question left for YouTube and its policy team to answer, though common sense would suggest that YouTube strike offending *donors*, not borrowers.¹² But more alarming than the risks of YouTube's internal remedial efforts, is that well-meaning Creative

8. Forum, *YouTube Monetization: Phone number from Youtube Copyright team ? Need to speak with someone from the DMCA Counter Notification team*, GOOGLE PRODUCT FORUMS (Jan. 15, 2014), https://productforums.google.com/forum/#!category-topic/monetization-on-youtube/monetization-is-disabled-on-my-channel/q7Q8MKtmn_g.

9. CC-BY is the broadest of Creative Commons licenses. It “lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation.” *About the Licenses*, CREATIVE COMMONS, <https://creativecommons.org/licenses/> (last visited Oct. 20, 2016).

10. Forum, *YouTube Monetization: Getting Copyright Strikes on Creative Commons CC-BY Youtube CC Library videos after remixing them*, GOOGLE PRODUCT FORUMS (Jan. 15, 2014), https://productforums.google.com/forum/#!topic/monetization-on-youtube/Wu4L_OJ4VdE.

11. *Id.*

12. It is true that YouTube may be legally obligated to take down any videos borrowing copyrighted content that should have never been donated into the Creative Commons library, but that does not mean that YouTube should penalize good-faith borrowers by demonetizing or disabling accounts.

Commons borrowers can be sued for statutory damages because of donor copyright disregard.

A. Strict Civil Liability for Infringing Creative Commons Borrowers

Creative Commons borrowers currently face strict liability for copyright infringement that results from a donor's disregard for others' copyrights.¹³ "Noticeably absent from [the copyright civil¹⁴ liability] standard is any scienter, intent, knowledge, negligence, or similar culpable mental state."¹⁵ Copyright holders can sue well-intentioned Creative Commons borrowers for an injunction¹⁶ (requiring the borrower to cease infringement) and damages (monetary relief).¹⁷

Just because Creative Commons borrowers have received a license to use YouTube library content likely does nothing to hamper strict liability statutory damages when donors have no right to grant a license to borrowers. Copyright is property, "which [can]not be legally deprived without . . . consent" from the actual copyright holder.¹⁸ In *American Press Ass'n v. Daily Story Publishing Co.*, one publisher led a second publisher to believe an article was not subject to copyright.¹⁹ In reliance on the representations of the first publisher, the second publisher reproduced the article without getting

13. Religious Tech. Ctr. v. Netcom On-line Comm. Serv's, Inc., 907 F. Supp. 1361, 1367 (N.D. Cal. 1995) ("[Copyright] infringement does not require intent or any particular state of mind . . .").

14. Creative Commons borrowers do not face criminal liability. Criminal copyright liability requires "willful" infringement. 17 U.S.C. § 506 (2012). Good faith infringement is the antithesis of willful infringement; thus, such borrowers likely face no criminal exposure.

15. Dane S. Ciolino & Erin A. Donelon, *Questioning Strict Liability in Copyright*, 54 RUTGERS L. REV. 351, 356 (2002); see also 17 U.S.C. §§ 501–505 (2012); David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F. L. REV. 1, 14 (1998) ("Indeed, a party can even be liable for direct copyright infringement for unconscious copying of another's protected work, as well as for innocent copying.") (internal quotations, citations, and emphasis omitted).

16. This Comment will not dwell on injunctive relief because it does not suggest that good faith Creative Commons borrowers should be shielded from injunctions; no amount of good faith should permit an infringer to continue infringing, let alone profit off continued infringement. Instead, this Comment will focus on actual and statutory damages.

17. 17 U.S.C. § 504 (2012).

18. *American Press Ass'n v. Daily Story Pub. Co.*, 120 F. 766, 768 (7th Cir. 1902).

19. *Id.* at 767.

permission from the article's actual author.²⁰ The Ninth Circuit found the second publisher liable for copyright infringement.²¹ "It is not material, we think, that the [second publisher] in publishing this copyrighted story was not aware that the story was protected by copyright. [The second publisher] published it at its peril, and ignorance will not avail."²² The Ninth Circuit reasoned, "[t]itle to copyright is no more lost by the theft of the manuscript, or piratical publication of it, than is one's title to a horse lost by the stealing of it, or by the unlawful sale of it to a stranger."²³

Though *American Press* is over a century old and operated prior to the enactment of the Copyright Act of 1909 and the Copyright Act of 1976, it is consistent with courts' continued merciless enforcement of strict copyright liability. For example, in *Sater Design Collection, Inc. v. Waccamaw Construction, Inc.*, the United States District Court for the District of South Carolina found a prima facie case for copyright infringement against a well-intentioned home construction company.²⁴ The construction company had no idea that the building plans given to it by two future home owners were sold to the future home owners by a third party who did not actually own the copyright to the plans or have permission to distribute them.²⁵

The reliance that Creative Commons borrowers place on the representations of library donors is not unlike the reliance a homebuilder places on plans given to it. As in *Sater Design*, where the court ruled that an unlawful blueprint sale could not defeat an infringement claim against an ignorant builder, it is likely that a court would find that an unlawful video donation does not defeat claims alleging infringement by Creative Commons borrowers.

20. *Id.*

21. *Id.* at 770.

22. *Id.* at 769.

23. *Id.* at 768.

24. *See Sater Design Collection, Inc. v. Waccamaw Constr., Inc.*, 2011 U.S. Dist. LEXIS 15226, *25, 27 (D.S.C. Feb. 14, 2011).

25. *Id.* ("Assuming that the Qwest plan infringed Sater's copyright, Waccamaw and Hostetler may have difficulty avoiding liability by asserting they did not know they were infringing Sater's copyright by using the Qwest design to build the Waterton residence. Case law establishes that knowledge or intent is not an element of copyright infringement A builder constructing a house based on a copyrighted set of plans without permission from the copyright holder would arguably constitute conduct that causes in some meaningful way an infringement.").

B. *“Fair Use” May Not Excuse Many Good Faith Creative Commons Borrowers*

Fair use likely will not excuse the unknowing copyright infringement committed by many good faith Creative Commons borrowers. Fair use is a defense to copyright infringement based on reasonableness.²⁶ Fair use “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²⁷ Whether a use qualifies as fair use hinges mostly on four statutory factors, which sound straight-forward enough:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁸

Judges can also consider any other factors they deem relevant, such as attribution, which would weigh in favor of fair use.²⁹ But courts rarely, if ever, give weight to good faith, which, if considered, would also weigh in favor of fair use.³⁰

Each statutory factor merits a brief explanation. Regarding the purpose or character of use, commercial use weighs against fair use, while nonprofit or educational use weighs in favor.³¹ Works of artistic natures usually get more protection than works that are informational.³² The odds of fair use decreases as the quantity and quality of borrowed material increases in relation to the original

26. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

27. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

28. 17 U.S.C. § 107 (2012).

29. Kevin J. Hickey, *Consent, User Reliance, and Fair Use*, 16 YALE J. L. & TECH. 397, 410 (2014) (“Courts have discretion to consider a variety of other factors, and they often do so.”).

30. However, courts occasionally let “bad faith” tip the scales against fair use. See *id.* at 410 n.53 (citing NXIVM Corp. v. Ross Institute, 364 F.3d 471, 479 (2d Cir. 2004)).

31. *Harper & Row*, 471 U.S. at 562 (“The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”).

32. *Id.* at 594 (“the scope of fair use is generally broader when the source of borrowed expression is a factual or historical work”).

work.³³ And the odds of fair use decreases as the harm, whether individually or in the aggregate, to the original work's market increases.³⁴

Not all factors of the fair use defense are created equal.³⁵ The second statutory factor (“nature of the borrowed work”) “is considered to be the least important fair use factor, and has been found to exert almost no influence on the actual outcomes of fair use cases.”³⁶ In contrast, a leading empirical study suggests that the first statutory factor (“purpose of use”) and, to an even greater degree, the fourth statutory factor (“market effect”) are the most influential in driving fair use outcomes.³⁷

This comes as little surprise because three decades ago, the United States Supreme Court demonstrated its preoccupation with factors one and four over a series of cases. In reference to the first factor, the Court stated, “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”³⁸ A year later, in reference to the fourth factor, the Court stated that the effect on a copyrighted work's market “is undoubtedly the single most important [factor] of fair use.”³⁹

Still, not unlike many legal factor tests, figuring out whether a court will call copyright infringement “fair use” is no easy task. Scholars and judges have called fair use “unpredictable,”⁴⁰ “most

33. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992) (“It is not fair use when more of the original is copied than necessary. Even more critical than the quantity is the qualitative degree of the copying: what degree of the essence of the original is copied in relation to its whole.”).

34. *See* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (“It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.”) (internal quotations and citations omitted).

35. Hickey, *supra* note 29, at 409.

36. *Id.*

37. *Id.* at 409 n.49 (quoting Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 586 (2008) (“[T]he outcome of the fourth factor appears to drive the outcome of the test, and that the outcome of the first factor also appears to be highly influential.”)).

38. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

39. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

40. *See, e.g.*, Hickey, *supra* note 29, at 445 (“Fair use is frequently derided for creating uncertainty through an unpredictable, multi-factor test.”) (internal citations omitted).

troublesome,”⁴¹ “muddy,”⁴² “messy,”⁴³ “amorphous,”⁴⁴ “erratic,”⁴⁵ “fickle,”⁴⁶ “capricious,”⁴⁷ “arbitrary,”⁴⁸ and “unreliable,”⁴⁹ along with other accusatory adjectives.⁵⁰

Even in the face of its unpredictability, it is likely that many Creative Commons borrowers who use infringing works from YouTube’s library would not be protected by a fair use defense. As mentioned, the library allows the blatant, wholesale copying of other videos for commercial purposes without requiring royalties.⁵¹

Regarding the purpose of use (which, again, is one of the most important factors), courts would not likely find a purpose that aligns with fair use. Most likely, many borrowers monetize their YouTube

41. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (“[T]he issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright . . .”).

42. *See, e.g.*, Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 140 (1999) (“Copyright doctrines such as fair use appear to operate as muddy entitlements. . . . It is essentially impossible to determine in advance of litigation whether a particular unauthorized use is fair; the copyright statute instructs courts to consider several factors in determining fair use, including the extent of the taking, the type of work involved, the use made, and the effect on the market for the work—a classic ‘muddy’ balancing test.”).

43. *See, e.g.*, Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 590 (2004) (“Fair use and free speech are messy concepts.”).

44. *See, e.g.*, Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1533 (1989) (“the amorphous ‘fair use’ defense”).

45. *See, e.g.*, Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CAL. L. REV. 53, 65 (2014) (“The erratic path of fair use case law has led some scholars to conclude that it is now virtually impossible to predict the outcome of fair use cases.”) (internal quotations and citations omitted).

46. *See, e.g.*, John Tehranian, Symposium, *Introduction: Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 543 (2007) (“Fair use is, after all, notoriously fickle and the defense offers little ex ante refuge to users of copyrighted works.”).

47. John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. REV. 1201, 1216 (2005) (“The capricious outcome of fair-use cases has, of course, been previously observed.”).

48. *See, e.g.*, Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL’Y 273, 291 (2009) (“Fair use . . . thus seems arbitrary and unreliable.”).

49. *Id.*

50. *See, e.g.*, MELVILLE NIMMER, NIMMER ON COPYRIGHT § 16-CLRP8 (“Treatises say that the scope and limit of fair use is most obscure.”); Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1619 (2009) (“the currently incomprehensible fair use doctrine”).

51. *Creative Commons*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797468> (last visited Nov. 2, 2015).

videos. The fact that YouTube allows users to do this is a major selling point of the Creative Commons library. Courts would likely find that the commercial purpose behind monetization cuts against fair use.⁵²

As for the nature of the borrowed work, the library contains videos of different natures. Some have a utilitarian nature (e.g. how-to videos or tutorials), others a more factual nature (e.g. news reports), and still others a more artistic nature (e.g. comedy sketches). The more artistic videos would likely get more protection, which would cut against fair use.⁵³ But, because courts typically give little weight to the nature of the allegedly infringing work,⁵⁴ a video's nature likely will not push the court in any meaningful way.

Regarding the amount and substantiality of the use, it is likely that courts would find many borrowers take too much content from both quantitative and qualitative standpoints. First, there is nothing to prevent a borrower from using the entirety of an uploaded video. And, more importantly, borrowers have an incentive to use the most valuable or substantial part of the videos in the library. If a user is interested in making money through YouTube video monetization (or just producing the best product he can for other purposes), he is not likely to copy boring or insubstantial stuff content, but the juicy, potential-to-go-viral stuff.

As for the final and most important statutory factor—market effect—a court would likely have another reason to disfavor finding fair use. Borrowing likely hurts the market for the original copyrighted works in several ways. First, to the extent original video owners hope to generate income through advertising, relying on view or click counts, any copying likely waters down the channel's web traffic. It is also possible that many copiers aim for the same audience as the original, making any web traffic dilution more acute. Second, there is a market for stock videos. People are willing to pay subscription fees

52. Of course, those borrowers who opt out of monetization and produce videos for other purposes (like the teacher who wishes to compile a few clips for a class), will be able to make a much better case for fair use.

53. *See Campbell*, 510 U.S. at 586 (“This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 594 (1985) (“not all copyrights are fungible . . . copying a news broadcast may have a stronger claim to fair use than copying a motion picture”) (internal quotations and citations omitted).

54. Hickey, *supra* note 29, at 409.

to stock video libraries which license copyrighted works for royalties.⁵⁵ Thus, at the very least, unpermitted, royalty-free borrowing harms video authors' licensing market. As mentioned *supra*, one of the major draws of the YouTube Creative Commons library is that users can find and borrow quality content without paying a dime for it.

Though there may be judge-imposed factors such as attribution⁵⁶, those factors likely would not make a difference in the face of substantial, commercial copying that harms the market value of original videos. Thus, fair use would not likely shield many borrowers of infringing content from liability.

C. Damages Payable by Infringing Creative Commons Borrowers

Infringing Creative Commons borrowers could be required to fork over at least hundreds—even thousands—of dollars to rightful copyright holders regardless of how much damage is actually suffered.⁵⁷ Even if the copyright holder suffers no actual damages (i.e., lost profits) from the infringement, the copyright holder can still collect statutory damages.⁵⁸ Statutory damages generally range from \$750 to \$30,000.⁵⁹

Section 504 also contains an exception to the \$750 floor, which permits a payment as low as \$200 if the borrower can prove she “had *no* reason to believe that his or her acts constituted an infringement of copyright.”⁶⁰ According to the statute’s plain terms, if a library borrower had *any* reason at all to think the library donor did not have the right to license the borrowed video or *any* other reason to think his or her acts constituted infringement, this exception would not

55. *See, e.g.*, SHUTTERSTOCK, www.shutterstock.com (last visited Oct. 20, 2016); ISTOCK, www.istockphoto.com (last visited Oct. 20, 2016).

56. The attribution consideration would also cut against fair use. Though attribution automatically occurs when users borrow content from YouTube’s Creative Commons library, the attribution is going to the wrong place (i.e., to the infringing donor—not to the *actual* copyright holder).

57. 17 U.S.C. § 504 (2012) (“[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages . . .”).

58. *Id.*

59. *Id.* There is an exception to the \$30,000 ceiling that likely would not apply to good faith borrowers because their infringement is not “committed willfully.” *Id.*

60. *Id.* (emphasis added).

apply.⁶¹ For example, the exception likely would not apply if it appeared that the donor simply recorded and uploaded a portion of a television broadcast to the library. However, even if the standard is met, any damage diminution still hinges on judicial discretion.⁶² In addition to damages, the statute offers the possibility of injunctive relief and attorney fees.⁶³

III. EXTENDING TRADE SECRET SECOND-PUBLISHER PROTECTIONS TO COPYRIGHT

Good faith Creative Commons borrowers should not bear the illustrated risks of statutory or other damages any more than good faith second publishers of trade secrets should bear those same risks for misappropriation. Likes should be treated alike. And the competing policies delineating the bounds of trade secret protection mirror the policies justifying copyright protection.

A. Trade Secret Second-Publisher Protections

A trade secret is confidential business information that endows a company with competitive advantage.⁶⁴ Trade secrets are governed by state law, but almost every state has adopted the Uniform Trade Secret Act.⁶⁵ Under the UTSA, the owner of trade secret can sue others misappropriating (or misusing) that trade secret.⁶⁶ Misuse includes wrongful disclosures (or publication).⁶⁷

Whether the wrongful publication of a trade secret incurs liability on a second publisher depends on the second publisher's knowledge.⁶⁸

61. *Id.*

62. *See id.* (“[T]he court in its discretion *may* reduce the award of statutory damages”) (emphasis added).

63. *See* 17 U.S.C. §§ 502, 505 (2012).

64. Matthew Edward Cavanaugh, *Contract + Tort = Property: The Trade Secret Illustration*, 16 MARQ. INTELL. PROP. L. REV. 427, 449 (2012).

65. To date, forty seven states have enacted the UTSA and two of the three holdout states are considering its adoption this year. *Legislative Fact Sheet - Trade Secrets Act*, UNIFORMLAWS.ORG, <http://www.uniformlaws.org/legislativfactsheet.aspx?title=trade%20secrets%20act> (last accessed Oct. 27, 2015).

66. UTSA § 1.2 (1979), http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf.

67. *Id.*

68. *Id.*

According to the UTSA, a second publisher can be liable for trade secret misappropriation if

at the time of disclosure or use, [the second publisher] knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who had utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.⁶⁹

If a second publisher should know that she is re-publishing a trade secret that the initial publisher acquired through improper means or disclosed in breach of a confidentiality agreement, then the second publisher is liable for misappropriating the trade secret.⁷⁰ On the other hand, if the second publisher has no reason to know that the initial publisher acquired the trade secret through improper means or disclosed the trade secret in breach of a confidentiality agreement, then the second publisher is immune to suit.⁷¹

For example, if a disgruntled non-disclosure-agreement-bound former employee of Super Duper Saucy company takes to the web and publishes the ingredients to his former employer's super-secret BBQ sauce in a blog post entitled "An Ex-Employee's Super Saucy Exposé: The Recipe the World Has Been Waiting For," and then a popular recipe blog re-publishes the secret recipe on its own site, it is quite likely that Super Duper Saucy could successfully sue the recipe site for trade secret misappropriation. Strong arguments could be made that the context and title of the recipe put the recipe site on notice that the

69. UTSA § 1.2(ii)(B); Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167, 199–200 (2005) (italics omitted) ("Liability for misappropriation under the Restatement (Third) of Unfair Competition is nearly identical to that of the UTSA."). In regards to second publishers, the Restatement (Third) of Unfair Competition finds trade secret liability when "at the time of the use or disclosure, (1) the actor knows or has reason to know that the information is a trade secret that the actor acquired under circumstances creating a duty of confidence owed by the actor to the other . . . ; or (2) the actor knows or has reason to know that the information is a trade secret that the actor acquired by means that are improper . . . ; or (3) the actor knows or has reason to know that the information is a trade secret that the actor acquired from or through a person who acquired it by means that are improper . . . or whose disclosure of the trade secret constituted a breach of a duty of confidence owed to the other" § 40(b).

70. UTSA § 1.2(ii)(B).

71. *See id.*

recipe was a trade secret. However, if the former employee had instead published the trade secret in a post entitled, “The Amazing Sauce I Invented Yesterday that will Change the World Forever,” then Super Duper Saucy would likely not succeed in a trade secret suit against the recipe site for damages. Of course, Super Duper Saucy would still be able to pursue a remedy against the disgruntled employee for the initial disclosure.⁷² Also, if Super Duper Saucy (or anyone else) put the recipe site on notice regarding the recipe’s trade secret status, the recipe site could be liable for future misappropriation (e.g., failure to remove the offending re-publication).⁷³

B. How Trade Secret Second-Publisher Protections Could Extend to Copyright Infringement

If trade secret second-publisher protections extended to copyright claims against Creative Commons borrowers, it would mean that unless a borrower had reason to know that the Creative Commons donor did not have authority to license the borrowed video (e.g., because the donor did not own the copyright to the video he uploaded to the library), the Creative Commons borrower could not be sued for damages. This would not leave the copyright owners without remedy. As in the context of trade secrets, where the improper initial publisher can still be sued for misappropriation, the copyright owner could still sue the infringing Creative Commons library for infringement. In addition, there would be nothing to prevent the copyright owner from putting the Creative Commons borrower on notice that the donor had no copyright to donate. If, after receiving notice, the borrower continued to publish infringing content (e.g., failed to take down her videos incorporating infringing library videos), then the copyright holder could sue the borrower for such post-notice infringement.⁷⁴

72. *See id.*

73. *See id.*; Cavanaugh, *supra* note 64, at 458 (“Once the recipient constructively learns of the breach and the trade secret status of the information, continued use is infringement.”).

74. No doubt, this would be frustrating for good faith borrowers, especially if they put significant time and energy into creating videos that happen to contain offending content. Depending on how minor the infringing elements are in the context of the complete work, continued publication may be excused under the doctrine of fair use. Also, the good faith borrower may have a right to a remedy against the wrongful library donor under a breach of contract theory. A court could possibly find that giving attribution in exchange for the license to use a video could comprise consideration sufficient to make a legally binding agreement.

It is important to remember that the standard penalizing the second publication of trade secrets hinges on whether the second publisher knew or *should have known* he was publishing a trade secret. Thus, ignorance is not an absolute defense for trade secret misappropriation. Nor should ignorance be an absolute defense for Creative Commons borrower infringement of copyright. There may be times when Creative Commons borrowers should be liable because they “should have known” that donors did not have the right to donate the videos they uploaded to the library. For example, a donor may upload a video that is clearly a recording of a news broadcast, television show, or a movie. Such uploads to the Creative Commons library should be highly suspect in the eyes of a reasonable borrower. Similarly, Creative Commons borrowers should be on their guard for apparently high-jacked paintings, “periscoped” concerts, or bootlegged music.

C. Why Extending Trade Secret Second-Publisher Protections to Copyright Infringement Makes Sense

There is no legitimate justification for protecting good-faith second publishers under trade secret law, but not under copyright law. Likes should be treated alike under the law. Trade secret and copyright laws attempt to serve identical purposes. Both help respond to the Constitutional mandate “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷⁵ In other words, both aim to incentivize innovation.⁷⁶ Also, both try to

75. U.S. CONST. art. I, § 8; *Eldred v. Ashcroft*, 537 U.S. 186, 192 (2003) (tying federal copyright protections to the clause); Judge Richard Posner, *Trade Secret Misappropriation: A Cost-Benefit Response to the Fourth Amendment Analogy*, 106 HARV. L. REV. 461, 473 n.75 (1993) (discussing trade secret laws in the context of the clause).

76. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (“The purpose of copyright is to create incentives for creative effort.”); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 842 (Fed. Cir. 1992) (“The Copyright Act encourages authors to share their creative works with society.”); *3M v. Pribyl*, 259 F.3d 587, 595 n.2 (7th Cir. 2001) (“[T]he purpose of trade secret law is to encourage innovation and development.”); *Briefing.com v. Jones*, 126 P.3d 928, 930 (Wyo. 2006) (“Trade secret laws have their genesis in society’s need to encourage innovation and to foster standards of trust in the marketplace.”).

strike a healthy balance between innovation incentives and First Amendment free speech rights.⁷⁷

The “secret” aspect of trade secrets is not a valid reason for treating trade secrets differently from copyrighted works. Copyright protections do not just extend to published works, but also unpublished works.⁷⁸ Thus, the “secret” aspect of trade secrets should not provide any meaningful distinction from copyright. It could be argued that disclosure of a trade secret is much more egregious than infringing a copyright because of the havoc it could wreak on a company. However, if anything, that argument supports granting trade secrets *greater* recourse against secondary-publishers, not less than those available in the copyright context. There is no good argument for punishing secondary infringers of copyright *more* than secondary infringers of trade secrets, as is currently the case.

Protecting good faith borrowers fuels innovation. Extending second-publisher protections to good faith Creative Commons borrowers will encourage creators to utilize the YouTube library to create innovative works. Without such protections, would-be borrowers may hesitate to use the library at all—even though many of the works available are non-infringing—for fear of grabbing a bad apple and getting sued. It would take a great deal of effort to determine the legitimacy of each individual video before borrowing. The vast majority of copyrights go unregistered. It may be impossible to communicate with a donor about his or her actual rights to the video. Even if a borrower had some form of conversation with a donor, that donor may mislead the borrower. It may difficult to know whether to take a donor at his word. Imposing on borrowers the difficult burden of vetting Creative Commons content would almost certainly stifle creativity. Though borrowers might still occasionally be required to take down or modify a video to remove offending portions upon notice of infringement,

77. *Whelan Assoc’s v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1235 (3d Cir. 1986) (“[T]he purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development.”); Elizabeth A. Rowe, Symposium, *Trade Secret Litigation and Free Speech: Is it Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425, 1428 (2009) (“The challenge is to apply these standards with sufficient rigor to achieve the optimal balance between plaintiff trade secret holder’s rights and defendants’ free speech rights . . .”).

78. *New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 581 (2d Cir. 1989) (“[U]npublished works normally enjoy complete protection against copying any protected expression.”).

that possibility is much less paralyzing than the possibility of being sued for damages.

Protecting good faith borrowers does not unduly expose copyright holders. In addition to promoting innovation among the YouTube community, it cannot be reasonably said that extending second-publisher protections to good-faith Creative Commons borrowers will dissuade injured copyright holders from creating future works. Those injured by infringing donations to the library would still have remedies. As mentioned above, the copyright holder can always sue donors, who almost always know or should know when they uploading works to the library that they do not own. Additionally, those injured can still notify second publishers and enjoin future use.

Protecting good faith borrowers avoids damage to commercial morality and respect for legal authority. By its callous nature, strict liability, whether in trade secret or copyright contexts, diminishes commercial morality⁷⁹ while simultaneously fostering disdain for legal authority.⁸⁰

Protecting good faith borrowers does not harm judicial economy. It is true that eliminating questions of culpability can “reduce the costs associated with resolving individual disputes.”⁸¹ But, it is also true that “strict liability may increase overall costs by markedly increasing the total volume of copyright infringement claims.”⁸² Taken together, there is no strong efficiency argument necessitating strict liability.

Protecting good faith borrowers is in the interest of economic efficiency. There are economic efficiency considerations in copyright that are similar to those found in trade secret law.⁸³ Rather than

79. Jay Dratler Jr. & Stephen M. McJohn, INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY § 4.04(5)(a) (“Strict liability would not promote the policy of fostering commercial morality, for by definition innocent acquirers of trade secrets have done nothing immoral.”). So too have innocent second publishers of copyrighted works done nothing immoral.

80. *Id.* (“Imposing liability without fault would only encourage resentment and disrespect for law.”).

81. Ciolino & Donelon, *supra* note 15, at 388.

82. *Id.*

83. *Id.* (“[S]trict liability would undermine the policies of economic efficiency that underlie trade secret protection. If the law imposed strict liability for use of others’ [sic] trade secrets without fault, every firm that hired a new employee or contractor would have to check the employment history and honesty of the individual involved, and every firm that received a license of unpatented technology would have to check its pedigree, in order to reduce the risk of strict liability. The result would be an increase in the cost and a decrease in the incidence of

maintaining the current redundancy where both the video donor and borrower bear the burden of expending resources to avoid infringement, it makes more sense to put the risk on the more knowledgeable party: the donor, whose avoidance costs are likely *de minimis*.⁸⁴

Protecting good faith borrowers is not a departure from precedent but a restoration of historic principles. Finally, state-of-mind-contingent, second-publisher copyright liability is more true to the original American copyright regime than strict liability. Some incorrectly believe that “strict liability is justified in copyright today because it was a part of copyright yesterday.”⁸⁵ Strict liability became a part of the American copyright picture in 1909.⁸⁶ Before that, liability was tempered in many ways that resemble the approach this Comment suggests.

Early American colonial and state copyright law leaned heavily⁸⁷ on England’s 1710 Statute of Anne, which protected innocent infringers in a host of ways. For example, “the statute contained stringent registration and notice requirements” and “distinguished among classes of infringers based, in part, on their relative culpability or innocence.”⁸⁸

Some of those protections endured through the birth of federal copyright legislation in 1790.⁸⁹ Notably, when distributing infringing copies of works, distributors incurred liability only if they knew their copies of works were illegitimate.⁹⁰ This protection continued with the Copyright Act of 1870 and did not disappear until 1909.⁹¹ In other words, America recognized such protections on a state or federal level

both employee mobility and licensing[—]the very sorts of economic inefficiencies that trade secret protection seeks to avoid.”).

84. If any redundancy ought to exist at all, it would make more sense to share liability between YouTube and the wrongful donor. Borrowers certainly rely on the representations of donors, but they also rely on YouTube’s representations that library videos are fair game.

85. Ciolino & Donelon, *supra* note 15, at 359.

86. *Id.* at 361.

87. *Id.* at 360. It more or less became the law in many states. *Id.* (“Many states followed the British model verbatim and carefully constructed their statutes to distinguish between innocent and willful infringers.”) (internal citations omitted).

88. *Id.* at 359–60.

89. *Id.* at 361.

90. *Id.*

91. *Id.*

for 133 years. Thus, the state of the law for the 106 years since can be no more considered the historical rule than the exception.

The particular exception protecting good faith distributors is not very different from the second-publisher protections this Comment encourages. Distributors rely on those they purchase from, without an easy way to confirm the veracity of supplier representations. Similarly, Creative Commons borrowers rely on the representations of library donors in re-distributing video content, without an easy way to know the legitimacy of the video's license.

In summary, extending trade secret second-publisher protections to copyrighted material would not only buoy innovation, discourage commercial immorality, and boost judicial and economic efficiency, but would also be in harmony with the historic American copyright system.

IV. CONCLUSION

Many innocent video creators who leverage YouTube's Creative Commons library could be independently liable for the copyright wrongs committed by library donors. Instead of penalizing innocent borrowers and subjecting them to undue burdens of investigation, copyright law should adopt an approach akin to the treatment of second publishers under trade secret law. Borrowers should not face liability for using a video held out as fair game in YouTube's Creative Commons library unless they know or have reason to know that the library donor did not have authority to grant a license for that video. The adoption of this rule, which could and should apply beyond YouTube's Creative Commons library to other second-publisher contexts, would serve the Constitutional purpose of copyright protection by increasing innovation. Adopting this rule would also help return United States copyright law to its original, state-of-mind-contingent regime.

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