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THE SUPREME COURT'S FRAGILE COPYRIGHT LAW

STEPHEN YELDERMAN

ABSTRACT

For a generation, copyright scholars have taken it as a given that copyright law is destined to be disrupted by technological change. The basic problem, they have explained, is that it is impossible for Congress to anticipate the ways that new technologies will affect the creation, distribution, adaptation, and consumption of creative work. While excusing Congress and the courts for copyright law's uncertainties, this view also leads to a kind of resignation. Unless we are to halt the march of technological progress, we must accept the unpredictability of copyright law as an inexorable fact of life.

This Article complicates the conventional account by identifying an independent cause of copyright uncertainty, one that is rooted not in technological change but in the judicial process itself. Copyright law is vulnerable to disruption due to an unappreciated interaction between the certiorari- and merits-stage practices of the Supreme Court. For a century, the choice to hear copyright cases has rested in the Court's discretion, and it has typically used that discretion to avoid the field. Because intervention by the Court is infrequent and unpredictable, participants in the copyright system have no choice but to look to circuit law. Indeed, some of the most important precedents for copyright industries today are not precedents of the Supreme Court but of the circuit courts of appeals. But occasionally the Supreme Court decides to hear a copyright case. And when it does, the circuit law forming the bedrock of our copyright system suddenly becomes vulnerable. Although the Court has, at times, deferred to lower court decisions in other areas of law, it has not done so in any contemporary copyright case. Repeatedly, the Court decides copyright cases without deference to lower court decisions, even decade-old decisions that have been widely accepted by the relevant industry and engendered significant reliance interests.

Identifying this mechanism reveals the prevailing technology-focused account of copyright disruption to be incomplete. A surprisingly small share (less than fifteen percent) of recent Supreme Court copyright cases involve any post-enactment technological developments. But rather than discrediting the conventional view, this complication suggests that copyright uncertainty may be more pervasive than previously recognized. To the extent technological developments are raising new questions of copyright law, the Supreme Court—and hence, the judicial process—is not providing many final answers.

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INTRODUCTION

Hundreds of films were at risk. Every major studio, after all, had made its share of movies based on books. They had done so with the comfort of licenses, for which they had paid, sometimes generously, other times not so generously. But under a new rule announced by the Ninth Circuit, the untimely death of a book's author ended that license, jeopardizing a studio's ability to continue showing a film it had already made. In response, all the major studios rushed to the Supreme Court, seeking a reversal that might restore their extensive catalogs.¹

The studios did not arrive unprepared. More than a decade prior, one of the nation's most respected copyright jurists, Judge Friendly, had written a unanimous Second Circuit opinion that firmly vindicated a studio's right to sell and exhibit films based on the work of a deceased author.² The Supreme Court had declined to review that

1. See Petition for Writ of Certiorari, *Stewart v. Abend*, 495 U.S. 207 (1990) (No. 88-2102); Brief Amicus Curiae Submitted by Columbia Pictures Industries, Inc. et al. in Support of Petition for Writ of Certiorari, *Stewart*, 495 U.S. 207 (No. 88-2102), 1989 U.S. S. Ct. Briefs LEXIS 1231.

2. *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484, 494 (2d Cir. 1977).

judgment without comment.³ And for years, the studios contended, they had reasonably relied on that precedent, basing their industry practices on this seemingly settled understanding of the law.⁴

This argument worked in one sense: the Supreme Court granted certiorari.⁵ But then something unexpected happened. The Court *affirmed* the Ninth Circuit, jettisoning the work of the great Judge Friendly on which the studios had relied.⁶ Unfortunately for the studios, that decision was merely “circuit law”—not a Supreme Court case that would be entitled to respect as *stare decisis*. Instead, a detailed opinion from the Court carefully worked through all the arguments, treating the question as one of first impression.⁷ Having circuit law on their side may have helped the studios to obtain certiorari, but it seemed to carry no weight once the Court took up the merits. The studios lost.

This is the story of *Stewart v. Abend*, and it is only one example of a larger phenomenon that has occurred repeatedly and that significantly reduces the reliability of our copyright system. The pattern can take several forms, but its simplest incarnation goes like this. First, a circuit court promulgates an important new rule of copyright law to which the creative industries must adapt. The Supreme Court declines to review that rule initially, and so industry actors have no choice but to rely on the current state of circuit law. Some time (often much) later, the Supreme Court then considers the question *de novo*. In this later stage of review, the Court gives no overt consideration to the reliance interests that have developed since the original circuit court decision. Free of such concerns, the Court often (though not always) upsets the settled expectations of those who have relied on a particular understanding of the law.

This dynamic undermines the stability of our copyright law, and in so doing, it frustrates the very goals that law is intended to advance. Copyright is a system of private rights intended to facilitate investment in the creation, distribution, and adaptation of creative works.⁸ The success of a system like this depends on private actors having confidence in the system’s representations, both as to what the law forbids and what it permits. These promises are meant to induce long-term,

3. Rohauer v. Killiam Shows, Inc., 431 U.S. 949 (1977).

4. Petition for Writ of Certiorari, *supra* note 1, at 18-20.

5. *Stewart v. Abend*, 493 U.S. 807 (1989).

6. *See Stewart v. Abend*, 495 U.S. 207, 238 (1990).

7. *Id.* at 228-38.

8. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749-50 (1989) (“In a ‘copyright marketplace,’ the parties negotiate with an expectation that one of them will own the copyright in the completed work. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.” (citation omitted)).

even intergenerational reliance.⁹ But shifting legal ground can undermine the power of these promises to the detriment of the creators, consumers, and intermediaries who rely on the copyright system.

In one context, at least, the Supreme Court recognizes all this. In cases “involving property and contract rights,” the “[c]onsiderations in favor of *stare decisis* are at their acme.”¹⁰ This is because the affected groups are “especially likely to rely on such precedents when ordering their affairs.”¹¹ But, critically, the Court has offered these assurances only in the shadow of *its own* prior decisions. When a litigant’s claimed reliance interest is rooted in circuit law, the same concerns seem to fall by the wayside. If—as is often the case—there is no Supreme Court precedent anywhere in the neighborhood, these reliance interests are seemingly left to chance.

To be clear, the problem is *not* that the Court sometimes upsets reliance interests in copyright law. There are difficult tradeoffs at play here: between earlier and later decisions from the Court, between having the law be settled versus right, and between the appropriate role of Congress versus the courts when it comes to correcting erroneous statutory interpretations. Rather, the problem is that the Court appears not to have a framework for navigating these concerns at all. At neither the certiorari stage nor the merits stage does the Court explicitly consider the reliance interests that either will form, or have already formed, around lower court decisions. The failure to consider these reliance interests, either *ex ante* or *ex post*, results in a copyright system that is less stable—more fragile—than it might otherwise be.

This Article demonstrates how the presently unmitigated interaction between the Supreme Court’s certiorari and merits decisions can inject avoidable uncertainty into copyright law. In so doing, it complicates a long-held scholarly view (occasionally invoked by the Court itself), which centers technology as the source of copyright law’s troubles.¹² According to this conventional account, the constant march of technological progress ensures that the copyright statute will be perpetually obsolete, forcing courts to grapple with questions that Congress could not possibly have foreseen. This quickly leads to a

9. See 17 U.S.C. § 302; *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.14 (2003) (promising authors not just “the right to profit from licensing one’s work during one’s lifetime” but also “to take pride and comfort in knowing that one’s children—and perhaps their children—might also benefit from one’s posthumous popularity” (citing 141 CONG. REC. 6553 (1995) (statement of Sen. Feinstein))).

10. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

11. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 457 (2015).

12. See *infra* Section IV.A.

kind of resignation when it comes to the copyright system. Unless we are to halt the march of technological progress—likely just as impossible as it is undesirable—we must accept the uncertainties of copyright law as an inexorable fact of life.

As we will see, this story isn't necessarily wrong, but it is incomplete. For one, it is a surprisingly poor fit with the Supreme Court's contemporary copyright jurisprudence. Among all of the copyright questions the Supreme Court has decided since 1976, only three (fewer than fifteen percent of all cases) can be plausibly described as conflicts between the statute and post-enactment technological developments.¹³ This suggests that the disruptive mechanism explored here may be interacting with and compounding the effects of the technological changes that have so long been the focus of scholars. To the extent technological developments are raising new questions of copyright law, the Supreme Court—and hence, the judicial process—isn't giving many final answers to them.

This Article proceeds in five parts. Part I introduces the mechanism by which the Supreme Court's certiorari and merits practices interact to disrupt copyright law. Part II presents several case studies, illustrating how the doctrines that ordinarily protect reliance interests at the Supreme Court are prone to failure in cases of copyright law. Part III turns from the past to the future, highlighting a number of existing copyright doctrines with enormous economic significance that would be at risk should they come before the Court. Part IV applies these observations to existing theories of copyright disruption and shows how the problem of copyright uncertainty is much worse—but also more ameliorable—than previously thought. Part V explores why copyright is more vulnerable to this form of disruption than other areas of law, notwithstanding that the Supreme Court's certiorari and merits practices are facially neutral and trans-substantive. A brief conclusion follows.

I. THE MECHANISM

The mechanism by which the federal court system injects copyright law with uncertainty has three basic components. First, the Supreme Court is usually absent in the early years when a new question of copyright law is initially litigated. Second, and as a result, participants in the copyright system must order their affairs around the decisions of lower courts. For some time, circuit law will provide the closest thing to a definitive answer.

But, at least in some cases, circuit law turns out not to be the final answer. The third component of the copyright-disruption mechanism is the Supreme Court's episodic reconsideration of lower court precedents. Because the Court reviews copyright cases by a discretionary

13. See *infra* Section IV.A.

grant of certiorari, its interventions in copyright law are unpredictable. And, critically, when addressing questions of copyright law, the Court pays no deference to lower courts or the reliance interests that have developed based on their decisions. If no answer is to be gleaned from the U.S. Reports, the Court treats the copyright question as one of first impression.

This Part explores these three features in turn. Each is perfectly understandable and unobjectionable in isolation. But, as Part II will explore through historical example, in combination, these features reduce the certainty that might otherwise be found in copyright law.

A. *The Supreme Court Is Initially Absent*

When a new question of copyright law arises, lower courts will typically be forced to confront it with little guidance from the Supreme Court. One reason for this is simple: by the numbers, the Supreme Court has not decided many copyright cases. Review of copyright cases became discretionary in 1916,¹⁴ and the Court has displayed a consistent disinterest in this area ever since.¹⁵ Most relevant, in the time since Congress overhauled the copyright laws in 1976, the Supreme Court has decided only twenty-three cases involving a question of statutory copyright law.¹⁶ These twenty-three decisions are necessarily spread thin over a highly technical statute that, as originally enacted, ran for more than 33,000 words.¹⁷ And the record for more recent legislation is even sparser.

14. Act of Jan. 28, 1915, ch. 22, §§ 2, 4, 38 Stat. 803-04 (replacing direct appeal of copyright cases with discretionary review by certiorari).

15. Between 1916 and 2022, the Supreme Court decided a total of forty-seven copyright cases, for an average of about one case every two years. *See infra* Appendix.

16. *See infra* Appendix.

17. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810).

Significant, substantive amendments and additions to copyright law enacted in 1984,¹⁸ 1990,¹⁹ 1992,²⁰ 1995,²¹ 1998,²² 2005,²³ and 2018²⁴ have been the subject of exactly zero Supreme Court decisions.²⁵

The lack of decisions under the 1976 Act might not be significant if there was a substantial body of older Supreme Court cases on which to draw. But the Copyright Act of 1976 largely displaced rather than codified the prior centuries of precedent. As the Register of Copyrights observed at the time, “the New Act is not a ‘general revision’ in the . . . sense [of] . . . bringing together . . . scattered statutory provisions with relatively few changes or innovations. The New Act is rather a completely new copyright statute”²⁶ In 1985, the Supreme Court similarly recognized that “[t]he Copyright Act [of 1976] represents the culmination of a major legislative reexamination of copyright doctrine.”²⁷ Putting aside a few scattered provisions codifying specific bodies of case law,²⁸ the expectation was that courts would begin anew with the whole cloth spun by Congress.²⁹

18. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (codified as amended at 17 U.S.C. §§ 109, 115).

19. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified as amended in scattered sections of 17 U.S.C.).

20. Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (codified as amended in scattered sections of 17 U.S.C.); Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1001-1010).

21. 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, 114-115).

22. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 and 28 U.S.C.).

23. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (codified as amended in scattered sections of 15, 17, and 18 U.S.C.).

24. Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676 (2018) (codified as amended in scattered sections of 17 and 28 U.S.C.).

25. In addition to these twenty-three cases involving questions of statutory interpretation, the Court has considered the constitutionality of post-1976 amendments on three occasions. See *infra* Appendix.

26. Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479, 482 (1977); see also Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 896 (1986).

27. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 552 (1985).

28. See, e.g., H.R. REP. NO. 94-1476, at 66 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5680 (noting that the Act “endorses the purpose and general scope of the judicial doctrine of fair use” without intending to “freeze the doctrine in the statute, especially during a period of rapid technological change”); *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1510 (2020) (concluding that recodification of the word “author” preserved the government edicts doctrine).

29. See, e.g., H.R. REP. NO. 94-1476, at 52 (noting that the new Act’s broad definition of “fixation” is “intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908)”; *id.* at 87 (“This basis for the decision [in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975)] is completely overturned by the present bill and its broad definition of ‘perform’ in section 101.”).

Consistent with this expectation, very few of the Supreme Court's pre-1976 precedents have sustained currency in the courts of appeals. Among all the copyright cases decided by the Supreme Court between 1916 and 1976, only ten have been cited more than ten times in the last twenty-six years of circuit court decisions.³⁰ And to be clear, this is not a demanding test for precedential relevance. To a case, and no matter how obscure, every Supreme Court decision between 1976 and 2019 has been cited at least ten times (and most have been cited substantially more than that).³¹ Perhaps unsurprisingly, the sweeping revisions of 1976 have sent the majority of the Court's earlier precedents to the dustbin.³²

For all of these reasons, the first circuit court to confront a new question of copyright law is unlikely to have much in the way of Supreme Court guidance. And that initial circuit court decision is similarly unlikely to prompt any new Supreme Court guidance in its wake. For it to do so, two things would have to happen. First, the party disappointed in the court of appeals would need to determine that the issue justifies the cost and potential delay of filing a petition for certiorari. That should not be taken for granted—some copyright litigants choose not to seek certiorari, even in cases that seem to be promising candidates.³³ And, second, that petition would have to be successful. This is a tall order in virtually any case, as the Court typically grants

30. See *infra* Appendix. Curiously, however, a number of circuit courts have continued to apply their own pre-1976 precedents, notwithstanding their apparent abrogation. See Litman, *supra* note 26, at 859-61.

31. See *infra* Appendix. The Court's post-2019 decisions certainly have precedential currency too. They simply have not had an adequate opportunity to accumulate citations.

32. While we have not attempted a comprehensive study of every Supreme Court case before 1916, at least a few "classic" cases have retained their currency under the metric used above. See, e.g., *Wheaton v. Peters* 33 U.S. 591 (1834) (cited in sixteen court of appeal decisions in the last twenty-five years (as of 2022)); *Baker v. Selden*, 101 U.S. 99 (1879) (thirty-three citations); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (twenty-eight citations); *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903) (thirty-eight citations). But famous cases like these appear to represent a small share of the Court's total copyright jurisprudence, especially considering that, during this era, a litigant had a right to appeal to the Supreme Court. Deeper cuts from the same time periods do not enjoy the same modern popularity. See, e.g., *Backus v. Gould*, 48 U.S. 798 (1849) (zero citations); *Merrill v. Tice*, 104 U.S. 557 (1881) (two citations); *Mifflin v. R.H. White Co.*, 190 U.S. 260 (1903) (zero citations).

33. For example, in 2016 the Ninth Circuit explicitly broke with the Sixth Circuit's rule for the de minimis sampling of sound recordings, creating a circuit conflict that split the music capitals of Nashville and Detroit from Los Angeles and Bakersfield. See *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016). Dozens of law review articles have been written about this circuit split, but the losing plaintiff did not file a petition for certiorari.

about one percent of the petitions for certiorari it receives.³⁴ And the Court's usual considerations for certiorari are unlikely to reflect favorably on a copyright question of first impression.

As a general rule, the most reliable way to win a grant of certiorari is to show a "circuit split"—that is, open disagreement among the courts of appeals on an outcome-determinative question.³⁵ But that path is obviously unavailable in the very first case to address a question. There is no way for the circuit courts to split until at least two of them have issued opinions. Requiring a circuit split as a precondition of certiorari means waiting for another day.³⁶

The other potentially promising path to certiorari is to show that a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court."³⁷ But that approach requires there *to be* a Supreme Court precedent with which the court of appeal's decision could possibly conflict. Some areas of federal law have received more attention than others in recent years,³⁸ and the effect of this rule is to make the rich richer and the poor poorer.³⁹ When it comes to copyright law in particular, the dearth of Supreme Court precedent has the potential to become self-reinforcing, disabling one of the only ways to reliably win certiorari in the absence of a circuit split.

In sum, then, a case involving a novel question of copyright law will typically yield (at most) a single circuit opinion. That initial opinion will rarely be guided by any relevant Supreme Court precedent, and it will almost never be a candidate for certiorari. For a while, at least, the lower courts will be left to go it alone.

B. Circuit Law Becomes Industry Standard

In the absence of Supreme Court precedents, participants in the copyright system form their expectations around circuit law. Even

34. See JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 2019 II (2020), <https://www.supremecourt.gov/orders/journal/Jnl19.pdf> [<https://perma.cc/TQ6X-G2MJ>] (reporting 5,408 non-original jurisdiction cases docketed and 60 petitions for certiorari granted); JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 2018 II (2019), <https://www.supremecourt.gov/orders/journal/Jnl18.pdf> [<https://perma.cc/TAW7-TCL2>] (reporting 6,440 non-original jurisdiction cases docketed, 83 petitions for certiorari, and 3 appeals granted).

35. SUP. CT. R. 10(a); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246-52 (1991).

36. And because copyright litigation is heavily concentrated in the Second Circuit and the Ninth Circuit, see *infra* Section I.B, the wait for a circuit split can be very long indeed.

37. SUP. CT. R. 10(c).

38. See *infra* Section III.B.

39. When the Court has a long history in a particular field of law, it can be substantially easier to show that a lower court has departed from the Court's teachings. This is the primary method for obtaining certiorari in patent cases, where it is not uncommon for petitioners to claim that the Federal Circuit has departed from precedents more than a century old. See Christa J. Laser, *Certiorari in Patent Cases*, 48 AIPLA Q.J. 569, 608 (2020).

though a circuit court's decision is formally binding only within the same circuit, an appellate decision on a novel question of copyright law tends to have a powerful influence on industry practice and litigation nationwide. It is not just that circuit courts seem primed to follow their sisters' guidance. In many instances, they are not even asked to do otherwise.

When it comes to depth of docket and authority, not all circuits are created equal. Copyright litigation is heavily concentrated in the Second Circuit and the Ninth Circuit, which together render more than half of all appellate copyright decisions annually. No other circuit decides more than ten percent.⁴⁰ And the influence of the two courts is even greater than the numbers might suggest. Because they decide so many copyright cases, the Second and Ninth Circuits are seen to have expertise, and their decisions can exert substantial influence on other courts. Indeed, in a rare compliment paid to its northeastern sister, the Fifth Circuit once called the Second Circuit "the *de facto* Copyright Court of the United States."⁴¹ As the Nimmer treatise puts it, "Ordinarily a copyright decision by the prestigious Second Circuit Court of Appeals stands as unquestioned law."⁴²

The outsized role of the Second and Ninth Circuits is no accident. At least one reason copyright cases are concentrated in these circuits is that copyright industries are concentrated there too.⁴³ Much as corporate bondholders will expect the Third Circuit's law to be the one that matters in the event of bankruptcy, those working in publishing, art, or music will look with particular interest to the law of the Second Circuit. So too will those working in film, television, or software look to the decisions of the Ninth Circuit. Though the copyright system creates rights and liabilities of nationwide scope, a prospective litigant playing the odds will often be well advised to conform her conduct to the circuit law of the relevant industry.

Sometimes litigation involving a particular issue is concentrated for other reasons. For example, if the initial circuit court decision on a question is especially friendly to one side or the other, savvy litigants

40. To roughly approximate the depth of each circuit's docket, we searched for all court of appeals decisions tagged in the Lexis+ Copyright Practice area that contained the word "copyright" and that were decided between January 2016 and December 2020. This search returned 401 distinct results. From most decisions to least, the circuits ranked as follows: Ninth (158), Second (63), Eleventh (33), Sixth (26), Third (21), Fifth (19), DC (19), Seventh (15), Federal Circuit (13), Tenth (10), Fourth (9), Eighth (9), and First (6).

41. *Easter Seal Soc'y v. Playboy Enters.*, 815 F.2d 323, 325 (5th Cir. 1987).

42. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.07[A][2] (Matthew Bender rev. ed. 2022).

43. In the case of the music industry, the Second Circuit plays a particularly important role for a different reason as well: open-ended antitrust consent decrees under the perpetual supervision of the Southern District of New York. See *Petition for a Writ of Certiorari at 26-27, Am. Soc'y of Composers, Authors, & Publishers v. United States*, 565 U.S. 929 (2011) (No. 10-1337) (noting that the S.D.N.Y. consent decree ensured that no other circuit would ever have an opportunity to reach the question).

may find ways to ensure future cases presenting the same issue come back to the same circuit. This isn't some theoretical possibility. In a recent high-profile episode, forum-shopping plaintiffs denied other circuits an opportunity to weigh in for nearly twenty years.⁴⁴ But litigants may opt in to a particular circuit's law even if the substance of that law does not so obviously favor them. As David Strauss has observed in the context of common law constitutionalism, "[I]n many disputes in society, although each faction has a different preferred outcome, all might prefer an expeditious resolution to prolonged conflict."⁴⁵ So too in copyright. When it comes to many legal questions, an author, publisher, or distributor who hopes to make her way in the copyright system may be more inclined to have her disputes resolved—for better or worse—under Second or Ninth Circuit case law, rather than hoping to litigate in a circuit with no law at all.

Even when cases are brought in circuits without a decision on point, many copyright litigants choose not to dispute the law of other circuits. In theory, a decision of another circuit court is not controlling, and so represents only persuasive authority. But in practice, the power of that persuasion can be substantial. When a litigant takes a position contrary to the law of a different circuit, her path to victory depends on persuading her local circuit court to create a split. That is hard to do anywhere, but it can be particularly challenging without any Supreme Court precedent to cast doubt on the other circuit's decision. And even if the litigant succeeds in that task, she then faces the prospect of the Supreme Court granting certiorari to resolve the split—adding further cost and delay to the issue's resolution. In some cases, this perilous path may be worth its risks, especially when a litigant has significant resources, the issue is of exceptional importance to some group, or the legal arguments are sufficiently strong. But often, the shrewder tack may simply be to accept an out-of-circuit decision (even an unfavorable one) and move on.

For all of these reasons, many objectively debatable questions of copyright law are effectively settled by a decision of a single circuit court. To provide one example among many, consider *MAI Systems Corp. v. Peak Computer, Inc.*,⁴⁶ a 1993 Ninth Circuit case involving infringement of copyright software code. The case involved an important question of first impression—whether the temporary transfer of computer code from long-term storage to short-term memory (RAM) constituted a potentially infringing reproduction of the software code. The Ninth Circuit held that it did.⁴⁷

44. See *infra* Section II.B.

45. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 910-11 (1996).

46. 991 F.2d 511 (9th Cir. 1993).

47. *Id.* at 518-19.

That decision had far-reaching consequences, giving owners of software copyrights substantial control over how their code could be used by customers and competitors. An immediate result—though hardly the only important one—was that computer manufacturers now had a monopoly in the aftermarket for service and maintenance of their systems. Third-party service providers would infringe copyright law the moment they turned on a customer's computer system since doing so would cause copyright firmware and operating system code to be loaded into RAM.⁴⁸

This result was subject to swift criticism⁴⁹ and was at least debatable as a matter of statutory interpretation.⁵⁰ And yet, for more than a decade, no one sought to challenge the Ninth Circuit's rule.⁵¹ Indeed, a computer service company litigating similar facts just two years later in the Seventh Circuit—which had no circuit law on point—did not even bother to “dispute[] that loading software into a computer constitutes the creation of a copy under the Copyright Act.”⁵² Instead, both parties cited *MAI* as if it were a precedent of the Supreme Court.⁵³

Even more telling was what the third-party service companies *did* do: lobby Congress for a fix. Five years after *MAI*, the legislature created a narrow exception to permit the making of RAM copies of software for the purpose of computer maintenance or repair.⁵⁴ The Conference Report explained that this “clarification” was necessary “in light

48. *Id.* at 517-19.

49. Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 39-43 (1994); Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1446, 1476 n.39 (1995) (collecting criticism).

50. Indeed, Peak's Petition for Certiorari foresaw exactly the statutory argument that would persuade the Second Circuit fourteen years later. See Petition for Writ of Certiorari at 14-15, *Peak Computer, Inc. v. MAI Sys. Corp.*, 510 U.S. 1033 (1994) (No. 93-809) (arguing that RAM storage does not satisfy the requirement of being “sufficiently ‘permanent or stable’ so as to be perceived ‘for a period of more than transitory duration’” (citing 17 U.S.C. § 101)); *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121, 129-30 (2d Cir. 2008) (concluding that “the definition of ‘fixed’ imposes both an embodiment requirement and a duration requirement”).

51. The first cracks in *MAI*'s foundation seems to have come in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004), where the Fourth Circuit held that temporary copies made in the course of Internet transmission do not count as reproductions. At the same time, the court did not openly dispute either *MAI*'s reasoning or its conclusion about end-user RAM copies. It was not until *Cablevision* that another circuit court read a duration limitation into *MAI*. See 536 F.3d at 129-30.

52. *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 235 (7th Cir. 1995); see also *DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600-01 (5th Cir. 1996) (noting that the defendant “does not dispute that a copy is made when the microprocessor cards are booted up” but instead invoked a copyright misuse defense).

53. One might argue that litigants in other circuits did not challenge *MAI* because it appeared ineluctably correct. But later litigants *did* succeed in limiting *MAI*. See *Cablevision*, 536 F.3d at 128-30.

54. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (amending 17 U.S.C. § 117).

of judicial decisions” holding that copying software into RAM constituted infringing reproduction.⁵⁵ Of these “decisions,” it cited only *MAI*.⁵⁶ For those adversely affected by the new rule, it seems it was more tenable to obtain a statutory fix than to litigate the issue in the federal courts of appeals. Until Congress intervened, the Ninth Circuit’s decision was treated as the law of the land.

MAI is memorable for prompting such an early legislative response. But there are many other cases quite like it, in which a single court of appeals opinion quickly came to be recognized as the national authority on an important copyright question. For example, the leading case on the Digital Millennium Copyright Act (DMCA)’s “safe harbor” provision is a Second Circuit decision.⁵⁷ So is the leading opinion when it comes to public performance royalties for digital music sales.⁵⁸ The leading case on the scope of the public display right for online images comes from the Ninth Circuit.⁵⁹ In each case, the relevant industries have adapted their practices to conform with the decision of the respective court of appeals. Each one of these opinions has affected the flow of billions of dollars of potential royalties. And aside from a few chestnuts, such as the importance of “begin[ning] with the language of the statute,”⁶⁰ not one of them can claim footing in a decision of the Supreme Court. In the absence of such guidance, the copyright industries look to circuit law.

C. The Supreme Court Grants Certiorari and Reviews De Novo

Sometimes, however, the Court *does* take copyright cases. The Court rarely explains its certiorari decisions, so the reasons for any particular grant of certiorari remain opaque.⁶¹ But once every year or two, cert is granted and the Court proceeds to consider a question of copyright law on the merits. And, at this point, any interests that may have developed in reliance on circuit law suddenly become quite vulnerable. Indeed, the Court has repeatedly overturned leading circuit cases that the copyright industries had long considered to be settled law.

55. H.R. REP. NO. 105-796, at 76 (1998) (Conf. Rep.), as reprinted in 1998 U.S.C.C.A.N. 639, 652.

56. The report also disclaimed any intent to “alter the law with respect to the scope of the term ‘reproduction’ as it is used the [sic] Copyright Act.” *Id.*

57. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012); see also *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).

58. *United States v. Am. Soc’y of Composers, Authors, & Publishers*, 627 F.3d 64, 71 (2d Cir. 2010) (holding that online music downloads do not constitute an infringing “public performance”).

59. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160-62 (9th Cir. 2007).

60. See, e.g., *Viacom*, 676 F.3d at 30 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

61. See PERRY, *supra* note 35, at 221-22.

On paper, the Court claims to afford substantial deference to prior statutory interpretations. “Overruling precedent is never a small matter,” the Court recently explained.⁶² And “*stare decisis* carries enhanced force when a decision . . . interprets a statute.”⁶³ On top of that, in cases “involving property and contract rights,” the “[c]onsiderations in favor of *stare decisis* are at their acme”⁶⁴ because the affected groups are “especially likely to rely on such precedents when ordering their affairs.”⁶⁵ When these factors combine, they yield a “superpowered form of *stare decisis*,” one that requires a kind of “superspecial justification to warrant reversing.”⁶⁶ Interpretations of the Copyright Act would seem to check every single one of these boxes.⁶⁷

But there is an important caveat lurking here: only *the Court’s* decisions count as precedents. These grand pronouncements—that it is “more important that the applicable rule of law be settled than that it be settled right,” that “*stare decisis* means sticking to some wrong decisions,” and that expectations around property rights should not be overturned absent “superspecial justification”—are reserved for occasions where a prior decision of the Supreme Court is under attack.⁶⁸ The Court has never suggested that the courts of appeals are privileged to settle the law, to stick to wrong decisions, or to require “superspecial” justifications to do what the law requires. Just as “it is [the Supreme] Court’s prerogative alone to overrule one of its precedents,”⁶⁹ it is the Court’s prerogative alone to create them.

So, if they are not *precedents*, what is the role of lower court decisions once a question arrives at the Supreme Court? Unfortunately, and as Professor Aaron-Andrew Bruhl has observed, “[t]he Supreme Court has neither a solid theory nor a steady practice” regarding the use of these opinions.⁷⁰ On a handful of occasions, the Court has claimed to be persuaded by lower courts’ interpretations of a statute.⁷¹

62. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015).

63. *Id.* at 456.

64. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

65. *Kimble*, 576 U.S. at 457.

66. *Id.* at 458.

67. Some have questioned whether these particular boxes have any sound relationship to the force of precedent. See Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1144 (2019); Lee Epstein et al., *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1146 (2015). But whatever we might say about the comparative strength of constitutional versus statutory *stare decisis*, it is clear that circuit law is something much weaker still.

68. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455, 458 (2015).

69. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

70. Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 853 (2014).

71. See *United States v. Tinklenberg*, 563 U.S. 647, 657 (2011); see also *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94 (2004) (“The very strength of this consensus is enough to rule out any serious claim of ambiguity . . .”).

In other cases, the Court has seemed to reject the notion of deferring to lower courts.⁷² And, in still others, the Court simply ignores the opinions below, or else notes their conclusions “in passing, as if casually observing a coincidence.”⁷³

From the Court’s inconsistent practices, one can discern three potential justifications for Supreme Court deference to lower court decisions. First, there is the epistemic value of the decisions themselves—that is, “the fact that they have ruled a certain way tends to show that their favored position is actually correct.”⁷⁴ Second, there is the public interest in the stability of law, which may be upset by overruling longstanding lower court decisions.⁷⁵ Third, there is the possibility of congressional acquiescence. If Congress is aware of lower court decisions and declined to abrogate them, then one might infer that Congress has tacitly ratified those interpretations.⁷⁶

These arguments are rarely successful in any context.⁷⁷ Tellingly, the most common place to find them is in dissents.⁷⁸ But whatever thin reed they might provide elsewhere, they are particularly unlikely to succeed in a copyright case. Begin with the epistemic value of lower court decisions. At a high point, the Court once seemed to embrace this reason for deference, noting that “unanimity among the lower courts . . . is itself entitled to strong consideration, particularly when those courts have maintained that interpretation consistently over a long period of time.”⁷⁹ On another occasion, a majority seemed to reject

72. *Milner v. Dep’t of Navy*, 562 U.S. 562, 576-77 (2011).

73. Bruhl, *supra* note 70, at 853-54.

74. *Id.* at 861. A similar justification occasionally arises in the Court’s consideration of its own precedents, often framed in the language of judicial humility. See, e.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (“[Stare decisis] is grounded in a basic humility that recognizes today’s legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them.”).

75. Bruhl, *supra* note 70, at 879-82.

76. Professor Bruhl observes a fourth potential justification for the Court to look to lower courts’ interpretations: what he calls “modest pragmatism” justification—the idea that “[once] a certain view of the law has been established within a jurisdiction for some time, one can see how things have played out.” *Id.* at 874. This is a reason the Court might *look* to lower court decisions, but it is not really an argument for the Court to *defer* to them as precedents. In any event, when copyright litigants have advanced this pragmatic argument, the Supreme Court has been similarly unpersuaded. See *infra* Section II.B.

77. Indeed, in his careful study of this question, Professor Bruhl found only a handful of examples where the Court appeared to adopt one of these justifications, and for each of those there is a counterexample in which the Court rejected the same justification. See Bruhl, *supra* note 70, at 911-15.

78. Bruhl, *supra* note 70, at 915; *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 471 (2008) (Thomas, J., dissenting) (“The Court has never suggested that rejection of a view uniformly held by the courts of appeals violates some principle of *stare decisis*. . . . Indeed, it has become something of a dissenter’s tactic to point out that the Court has decided a question differently than every court of appeals to have considered it.”).

79. *United States v. Tinklenberg*, 563 U.S. 647, 657 (2011).

the theory outright.⁸⁰ By its own terms, however, this argument is predicated on near or actual unanimity of the circuit courts. That is hard to show when—as is often the case in copyright law—the affected groups have only bothered to litigate the question in a circuit or two. Without a history of nationwide litigation to draw from, this already perilous path to deference never begins.

Nor is a reliance argument likely to win any deference to a lower court decision. It sounds promising: As noted above, the copyright industries have often arranged their affairs around circuit law, and overturning that law can upset these settled expectations. But, at most, the Court has recognized a protected reliance interest in circuit courts' interpretations of Supreme Court decisions.⁸¹ It has never suggested that lower courts' statutory interpretations themselves, uninformed by Supreme Court precedents, should be handled gently in the interest of legal stability. So what sounds like a viable argument for copyright litigants turns out to be largely unavailable in the vast majority of copyright cases. Without a Supreme Court decision in the neighborhood, there is simply nothing to be reasonably relied upon.

The third argument for giving weight to a prior interpretation is that, by failing to abrogate the earlier decision, Congress has acquiesced to it. Unlike the arguments just discussed, this one has long been controversial even as applied to the Court's own decisions,⁸² and recently the Court has questioned whether the lack of congressional

80. *Milner v. Dep't of Navy*, 562 U.S. 562, 576 (2011) (“[W]e have no warrant to ignore clear statutory language on the ground that other courts have done so.”).

81. See *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 699 (2011) (noting that “the understanding of *Rogers* we here affirm ‘has been accepted as settled law for several decades’” (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005))); *S. Union Co. v. United States*, 567 U.S. 343, 360 (2012) (“Nor, in our view, does applying *Apprendi*'s rule to criminal fines mark an unexpected extension of the doctrine. Most Circuits to have addressed the issue already embrace this position . . .”).

82. Compare *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) (“Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.”), and *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (“The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.”), with *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines.”), and *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (“The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible.”). See also *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (“[W]e should admit that vindication by congressional inaction is a canard.”); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95 (1988) (“Acquiescence arguments are almost never persuasive indicia of actual legislative intent . . .”); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 B.U. L. REV. 737, 745-54 (1984).

action has any interpretative value at all.⁸³ (Importantly, the acquiescence argument should be distinguished from the argument that congressional reenactment of a term codifies its established meaning, which remains a widely invoked and generally accepted rule of interpretation.⁸⁴) The case for extending the doctrine to a lower court decision is weaker still. It so happens that the leading academic treatment of this question was written by a current member of the Court. As Justice Barrett observed in her days before the bench, the “persuasive criticisms” against inferring congressional acquiescence to a Supreme Court decision “have even more force when considered at the circuit level.”⁸⁵ After carefully surveying the grounds on which circuit law might claim Congress’s blessing, she concluded that “the argument that congressional silence raises an inference of acquiescence in a court of appeals decision is simply unsustainable.”⁸⁶

Despite all this, there are a few recent decisions in which the Court has seemed to infer congressional acquiescence based on circuit law.⁸⁷ In every case, however, the Court also relied on subsequent amendments to neighboring provisions, suggesting that at least *some* intervening congressional action is now necessary for acquiescence to become plausible.⁸⁸ What’s more, in every case in which the Court found congressional acquiescence, the circuit law at issue was very old and

83. See *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (“[W]hen, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the Court’s statutory interpretation.” (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989))); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (“[A]rguments [based on congressional inaction] deserve little weight in the interpretive process.”).

84. See Eskridge, *supra* note 82, at 69 (drawing this distinction and noting that the argument about reenactment is not subject to the same textualist objections). For a recent example in which the Court found Congress had codified the circuit law of copyright, see *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 948 (2022) (“When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts[.]” (quoting *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 813 (1989))).

85. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 330-31 (2005).

86. *Id.* at 336.

87. See *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 113 (2011) (“We find ourselves in no position to judge the comparative force of these policy arguments. For nearly 30 years, the Federal Circuit has interpreted § 282 as we do today.”); *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 535 (2015) (“In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988. By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims.”).

88. See *Microsoft*, 564 U.S. at 113; *Tex. Dep’t of Hous. & Cmty. Affs.*, 576 U.S. at 521.

widely established.⁸⁹ The combination of all of this—a dubious theoretical footing, the need for an intervening amendment, and an apparent preference for a multicircuit consensus—makes this yet another long-shot path for a litigant seeking to preserve a settled understanding of copyright law.

We will save for later the question whether the Court *ought* to defer to lower courts' copyright decisions cases on any of these grounds. As a descriptive matter, it doesn't. Among the twenty-three occasions the Court has interpreted the copyright laws since 1976, it overturned at least some circuit law on every outing but one.⁹⁰ Among all these decisions, the Court did not once afford any overt deference, recognize a reliance interest on circuit law, or find that Congress had acquiesced to the established meaning of its laws. On every occasion, the Court treated the question as one of first impression.

* * *

In sum, those who rely on the copyright system often have no choice but to look to circuit law. Because the Supreme Court largely avoids copyright law, lower courts are the leading authorities when new questions arise under the statute. This circuit law is surprisingly stable, at least because copyright litigation is heavily concentrated in just a few courts. But while stable, that circuit law is ultimately unreliable in the event the Supreme Court grants certiorari. At the merits stage, the Supreme Court does not afford overt deference to anything the lower courts might have done in copyright law in the years or decades the Court was absent. As a result, litigants will usually find themselves battling a question of first impression, notwithstanding the substantial investments they may have made in reliance on a particular understanding of the law.

II. EXAMPLES

To see how these features of our copyright system interact in practice, it is helpful to consider a few historical case studies. The examples that follow span several decades and involve very different provisions of the Copyright Act. But they share the common features outlined above: an initial absence of Supreme Court case law, filled in by circuit law that was accepted and relied upon by industry, only to have that circuit law unsettled many years later by a fresh-eyed Supreme Court.

89. In the case of *Microsoft*, the relevant precedent came from the Federal Circuit, which enjoys nearly exclusive jurisdiction over patent appeals. *Microsoft*, 564 U.S. at 97-98; 28 U.S.C. § 1295(a)(1) & (4). In the case of *Texas Department of Housing & Community Affairs*, the rule at issue had been adopted by nine courts of appeals. 576 U.S. at 535.

90. See *infra* Appendix. The lone exception is *Tasini*, in which the Court granted certiorari without a true circuit split and affirmed. *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

These episodes illustrate how the Supreme Court's certiorari and merits practice interact to make our copyright system less certain—more fragile—than it might otherwise be.

A. *Dead Authors*

We will start with a closer look at the example mentioned in the Introduction—the question of whether the owner of an authorized derivative work (such as a film) can lose the right to exploit that work when the author of the work on which it was based unexpectedly dies. This surprising result was made possible by a longstanding feature of copyright law, which until 1978 awarded authors two distinct copyrights: an initial copyright that ran from publication and an optional “renewal” copyright that could run for an additional term of years following that initial copyright.

When producing a derivative film during a book's initial term, a studio would typically bargain for the right to exploit the film in perpetuity. A contract to assign the renewal term was legally effective, provided the author lived to see that renewal term.⁹¹ But if the author died before renewal, the renewal copyright would descend directly to the author's heirs, who typically lacked any contractual relationship with the studio.⁹² The question, then, was whether a studio could continue to exploit a derivative movie made with permission during the initial copyright term of a book without separately negotiating a license for the renewal term from the author's heirs.

For more than a decade, the leading case on this question was the unanimous Second Circuit decision in *Rohauer v. Killiam Shows, Inc.*⁹³ Judge Friendly's opinion was admirably transparent about the difficulty of the question, noting that none “of the Supreme Court decisions discussed . . . in the briefs . . . has any real bearing on the issue here before us, either in holding or in opinion.”⁹⁴ The statute wasn't much help either: “[N]either an affirmative nor a negative answer is completely satisfactory. A court must grope to ascertain what would have been the thought of the 1909 Congress on an issue about which it almost certainly never thought at all.”⁹⁵ In the end, the tie went to the studio, if only because “the equities lie preponderantly in favor of the proprietor of the [film] copyright.”⁹⁶ After all, “a person who with the consent of the author has created an opera or a motion picture film will often have made contributions literary, musical and economic, as great

91. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 656 (1943).

92. 17 U.S.C. § 304(a)(1)(C); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 374-75 (1960) (describing this scheme).

93. *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977).

94. *Id.* at 490.

95. *Id.* at 486.

96. *Id.* at 493.

as or greater than the original author.”⁹⁷ And these creators “[have] no truly effective way to protect [themselves] against the eventuality of the author’s death before the renewal period.”⁹⁸

Reasonable minds could disagree about whether this answer was right on the merits. But it seems obvious that the question at least merited an answer. After all, even the great Judge Friendly found the question to be a difficult one, with no clear answer to be found in the statute, case law, or even commentary. And not just difficult, but a question “of considerable importance despite the small amount of money here at stake.”⁹⁹ These statements were, of course, featured prominently in the losing side’s petition for certiorari.¹⁰⁰ In support, an amicus brief from the Authors League of America urged the Court to review the case, noting its “enormous importance to the spouses and children of authors who have sold motion picture rights.”¹⁰¹ But, in opposition, the studios noted that the decision below presented no direct conflict with either a decision of the Supreme Court or any other court of appeals.¹⁰² In reply, the petitioners didn’t disagree; instead, they “rest[ed] their case on the enormous importance of the legal question that is here squarely presented, apparently for the first time.”¹⁰³ The Supreme Court denied cert just two weeks later.¹⁰⁴

Perhaps that denial was itself an act of deference to the leading copyright court and its leading copyright jurist. It may well have been the Court’s plan to allow *Rohauer* to become the law of the land. Plan or no, that’s exactly what *did* happen. For a decade, no court ruled any differently,¹⁰⁵ and the affected industries conformed their practices to *Rohauer*’s guidance.¹⁰⁶ Rather than tracking down the heirs of deceased authors from whom they’d already purchased licenses—or

97. *Id.*

98. *Id.*

99. *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484, 485 (2d Cir. 1977).

100. Petition for Writ of Certiorari at 5, *Rohauer v. Killiam Shows, Inc.*, 431 U.S. 949 (1977) (No. 76-1376). The petitioners further noted that the Second Circuit’s decision was inconsistent with forty years of lower court decisions and itself a shock to the expectation interests of authors and their heirs. Reply Brief for Petitioners in Support of Application for Writ of Certiorari at 3-4, *Rohauer*, 431 U.S. 949 (No. 76-1376).

101. Motion for Leave to File a Brief Amicus Curiae at i, *Rohauer*, 431 U.S. 949 (No. 76-1376); see also Brief of the Authors League of America at 3, *Rohauer*, 431 U.S. 949 (No. 76-1376).

102. Brief in Opposition to Petition for a Writ Certiorari at 8, *Rohauer*, 431 U.S. 949 (No. 76-1376).

103. Reply Brief for Petitioners in Support of Application for Writ of Certiorari, *supra* note 100, at 3.

104. *Rohauer v. Killiam Shows, Inc.*, 431 U.S. 949 (1977).

105. 1 NIMMER & NIMMER, *supra* note 42, §3.07[A][3].

106. See Petition for Writ of Certiorari at 18-19, *Stewart v. Abend*, 493 U.S. 807 (1989) (No. 88-2102), 1989 U.S. S. Ct. Briefs LEXIS 1230; Brief Amicus Curiae Submitted by Columbia Pictures Industries, Inc. et al. in Support of Petition for Writ of Certiorari, *supra* note 1, at 6-12 (noting that “Industrywide Practices [were] Established Over a Dozen Years Ago in Reliance on *Rohauer*”).

shelving films lawfully made before the author's death—the studios operated on the understanding that their original license would allow them to continue to exhibit the film in the renewal term. This not only allowed them to continue promoting and distributing their back catalogs, but also to create new films, secure in the knowledge that their copyrights stood on something firmer than a single human life.

But then something surprising happened: the Ninth Circuit created a circuit split. The facts of *Stewart v. Abend* were remarkably similar to those of *Rohauer*: a film based on a literary work, with an agreement to permit continued use of the film during the renewal term, which was interrupted by the premature death of the author. Over a dissent, the Ninth Circuit panel revisited *Rohauer's* reasoning and concluded that the great Judge Friendly got it wrong. In the eyes of the majority, “based on well-settled principles of copyright law . . . the defendants do not have the unrestricted right to use the ‘old matter’ . . . (i.e., the material taken from the underlying work) during the underlying work’s copyright renewal period.”¹⁰⁷ Without a separate license to the renewal term secured from the authors’ heirs, a studio was no less infringing than if it had pirated the work from the start.¹⁰⁸

The rights to hundreds of films were now at stake—including, in the instant case, Alfred Hitchcock’s Oscar-nominated *Rear Window*. The upshot for the affected industries was that they now had the circuit split they needed to garner the attention of the Supreme Court. When the Court granted cert in 1989,¹⁰⁹ it might have seemed that the studios’ position was only stronger than it had been a decade before. The film industry could claim that it had long accepted *Rohauer* as law, and that its studios had since “distributed hundreds of derivative motion pictures produced under licenses from authors of underlying works who died before commencement of the renewal copyright term.”¹¹⁰ They had done so “relying on *Rohauer*, without obtaining

107. *Abend v. MCA, Inc.*, 863 F.2d 1465, 1476 n.14 (9th Cir. 1988), *aff’d sub nom. Stewart v. Abend*, 495 U.S. 207 (1990).

108. The blow in *Abend* itself was mitigated somewhat at the remedies stage, with the Ninth Circuit determining that the equities of the case precluded an injunction. Nonetheless, the studio faced the prospect of damages and accounting for profits for future showings of the film. See 863 F.2d at 1478-80. And nothing in the Supreme Court’s opinion precluded injunctive relief in other cases. See 495 U.S. at 236 (“[C]ontinued use would be infringing; whether the derivative work may continue to be published is a matter of remedy, an issue which is not before us.”).

109. *Stewart v. Abend*, 493 U.S. 807 (1989).

110. Brief Amicus Curiae Submitted by Columbia Pictures Industries, Inc. et al. in Support of Petition for Writ of Certiorari, *supra* note 1, at 7.

new licenses from the current owners of the underlying works' renewal copyrights."¹¹¹ For these "longstanding distribution activities," they now faced "enormous potential liability"—unless, of course, the Court restored the status quo.¹¹²

But however influential and important *Rohauer* might have been for industry practice, it was not a Supreme Court decision entitled to deference or stare decisis. Instead, the Court took up the question afresh, splitting 6-3 over three separate writings. And despite this difference, none of these opinions seemed to find any epistemic value or stability interest in preserving *Rohauer*. Judge Friendly's work might as well have been a law review article: some interesting arguments, to be sure, but certainly nothing constituting legal authority.¹¹³

The point here is not that the Court should have been bound to affirm *Rohauer*. It may have been that *Rohauer* was flagrantly wrong. But by declining to afford any overt deference, the Court signaled a willingness to overrule *Rohauer* even if it was just a *little* wrong. No matter that the precedent was a decade old, from an esteemed jurist of the first order, and of the type that would obviously engender significant reliance interests. The circuit law seemed to carry no influence once the Court granted certiorari.

B. Sales of Foreign Copies

For a more recent example, consider the question of whether a copyright owner can prohibit the importation of copies lawfully manufactured and sold abroad. The question has significant economic consequences because it determines whether a publisher can price discriminate across borders. A textbook publisher, for example, might wish to set one price for a book in the United States and a lower price for the same book in a developing country. That two-price regime will collapse, however, if copies can cheaply flow across the U.S. border. A right to prohibit importation of copies lawfully sold abroad allows a publisher to offer lower prices in foreign markets without cannibalizing its U.S. sales.

As a general rule, a copyright owner has little ability to control the resale or movement of copies that she lawfully sold into the stream of

111. *Id.*

112. *Id.*; see also Brief for the Petitioners at 86, *Stewart*, 495 U.S. 207 (No. 88-2102), 1989 U.S. S. Ct. Briefs LEXIS 1228; Reply Brief by Petitioners at 8, *Stewart*, 495 U.S. 207 (No. 88-2102), 1989 U.S. S. Ct. Briefs LEXIS 1225.

113. Remarkably, the majority opinion even cited other Second and Ninth Circuit decisions to show there was a "well-settled rule" that "the full force of the copyright in the pre-existing work is preserved despite incorporation into the derivative work"—circuit law that happened to be bad for the studios. *Stewart v. Abend*, 495 U.S. 207, 223-24 (1990) (citing *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979); *Gilliam v. ABC*, 538 F.2d 14, 20 (2d Cir. 1976)). *Rohauer* was decided squarely in the middle of these, yet its holding was not afforded any overt deference.

commerce. The “first sale” doctrine—now codified in § 109(a)—provides that “the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy.”¹¹⁴ If § 109(a) applies to copies the copyright owner manufactured and sold abroad, then she would be powerless to prohibit the importation and resale of those copies in the United States.¹¹⁵ On the other hand, if it does not apply to copies made and sold outside the United States, the copyright owner would enjoy her usual rights to prohibit their importation, distribution, and sale—the same as if the publisher’s foreign-made copies were pirated knock-offs.

The Ninth Circuit was the first court of appeals to reach this question in a published decision. In *BMG Music v. Perez*, the court held that a copyright owner had the right to prohibit importation of copies she had manufactured and sold abroad.¹¹⁶ The key were those middle words of § 109(a), “lawfully made under this title.” The Ninth Circuit reasoned that, because U.S. copyright law only applies in the United States, “[t]he words ‘lawfully made under this title’ in § 109(a) grant first sale protection only to copies legally made and sold in the United States.”¹¹⁷ As a result, the statute provided no defense when the copies or phonorecords in question were manufactured and sold abroad.

Perez immediately filed a petition for certiorari, urging the Court “put an end to [an] interpretation of . . . [§] 109(a) which has been used to circumvent the first sale doctrine . . . at the expense of the U.S. listening public.”¹¹⁸ At the same time, he acknowledged that the question was one of first impression and that any conflict among the circuits was “sparse.”¹¹⁹ The Court swiftly denied that petition.¹²⁰ It was the summer of 1992.

Just two years later, another copyright defendant tried the same arguments. Drug Emporium—a national retailer accused of selling perfume with imported labels—first tried to distinguish *BMG Music* and, failing that, asked the Ninth Circuit to reconsider it.¹²¹ When the

114. 17 U.S.C. § 109(a).

115. Section 109(a) expressly refers to the exclusive right to sell copies. Its application to the exclusive importation right is slightly more circuitous. See *Quality King Distribs., Inc. v. Lanza Rsch. Int'l, Inc.*, 523 U.S. 135, 144 (1998) (holding that § 602(a)'s exclusive right to import copies is limited by the first sale defense provided in § 109(a)).

116. *BMG Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991). Many years earlier, the Third Circuit had affirmed a district court that reached the same conclusion. See *CBS, Inc. v. Scorpio Music Distribs., Inc.*, 569 F. Supp. 47 (E.D. Pa. 1983), *aff'd*, 738 F.2d 424 (3d Cir. 1984) (table decision without opinion).

117. *BMG Music*, 952 F.2d at 319.

118. Petition for Writ of Certiorari at 26, *Perez v. BMG Music*, 505 U.S. 1206 (1992) (No. 91-1758).

119. *Id.* at 4.

120. *BMG Music*, 505 U.S. at 1206.

121. *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 482 (9th Cir. 1994).

Ninth Circuit declined to do so, Drug Emporium sought certiorari, noting the question “involves a fundamental area of federal law . . . potentially affect[ing] . . . [a]n exceptional amount of commerce.”¹²² A number of amici joined the chorus, predicting that the Ninth Circuit decision threatened to have “immediate nationwide impact,”¹²³ that it could “potential[ly] . . . destroy an entire industry of . . . economic significance,”¹²⁴ and that it had created “considerable uncertainty” affecting “billions of dollars of commerce.”¹²⁵ Drug Emporium and its amici urged the Court not to wait for a circuit split. That was unlikely to happen, they pointed out, since no “future plaintiffs will be uninformed enough to file their lawsuits elsewhere than in the Ninth Circuit.”¹²⁶ Because “copyright owners have every incentive to forum shop,”¹²⁷ no split would ever arise. Despite these arguments, the result was the same: the Court denied the petition in the spring of 1995.¹²⁸

Though it lost its bid for certiorari, Drug Emporium’s prediction proved correct. For decades, litigation involving this issue was heavily concentrated in the Ninth Circuit, and no other circuit court had occasion to address the question.¹²⁹ But in 1998, the Supreme Court itself provided some guidance—albeit by answering a slightly different question. In *Quality King Distributors v. L’anza Research*, a unanimous Court held that a copyright owner had no further rights over a copy manufactured in the United States and sold abroad (the inverse of the *Drug Emporium* scenario).¹³⁰ Critically though, the Court’s reasoning seemed to suggest that the first sale would *not* apply to a copy manufactured and sold outside the United States.¹³¹ Justice Ginsburg

122. Petition for a Writ of Certiorari at 14-16, *Drug Emporium, Inc. v. Parfums Givenchy, Inc.*, 514 U.S. 1004 (1995) (No. 94-1249).

123. Brief of AFTA et al. as Amici Curiae in Support of the Petition for Writ of Certiorari at 8, *Drug Emporium*, 514 U.S. 1004 (No. 94-1249).

124. *Id.* at 9.

125. Brief of Amici Curiae Costco Wholesale Corp. et al. in Support of Petitioner at 3, 10, *Drug Emporium*, 514 U.S. 1004 (No. 94-1249).

126. Petitioner’s Reply Brief at 8, *Drug Emporium*, 514 U.S. 1004 (No. 94-1249).

127. *Id.*

128. *Drug Emporium, Inc. v. Parfums Givenchy, Inc.*, 514 U.S. 1004 (1995).

129. On the rare occasions when litigation *did* arise outside the Ninth Circuit, district courts nonetheless looked to that court’s precedents for guidance. *See, e.g.*, *Living Media India Ltd. v. Parekh*, No. 92 CIV. 8079 (TPG), 1994 WL 68193, at *2 (S.D.N.Y. Feb. 28, 1994); *Microsoft Corp. v. Cietdirect.com LLC*, No. 08-60668-CIV, 2008 WL 3162535, at *5 (S.D. Fla. Aug. 5, 2008); *Lingo Corp. v. Topix, Inc.*, No. 01 CIV. 2863 (RMB), 2003 WL 223454, at *4 (S.D.N.Y. Jan. 31, 2003). No other circuit court reached this question on the merits until *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 217 (2d Cir. 2011), *rev’d and remanded*, 568 U.S. 519 (2013)—*after* the Court had granted certiorari in *Costco Wholesale Corp. v. Omega, S.A.*, 559 U.S. 1066 (2010).

130. *Quality King Distribs., Inc. v. L’anza Rsch. Int’l, Inc.*, 523 U.S. 135, 145 (1998).

131. *Id.* at 148 (“[P]resumably only those made by the publisher of the United States edition would be ‘lawfully made under this title’ within the meaning of § 109(a).”).

wrote separately to emphasize precisely this distinction.¹³² Lower courts read *Quality King* as suggesting—albeit in dicta—that *BMG Music* had been correct all along.¹³³

A decade later, another defendant, Costco Wholesale, asked the Ninth Circuit yet again to reconsider *BMG Music*.¹³⁴ As before, the Ninth declined to do so, and as before, the losing copyright defendant sought certiorari. Despite the intervening years, Costco still could not point to a circuit split on the question. But *Quality King* provided a fresh foothold. Unlike its predecessors, Costco could argue that Ninth Circuit law was inconsistent with Supreme Court precedent. This was a stretch—at most, the petition suggested the Ninth Circuit had failed to fully appreciate *Quality King's* rationale. But it worked. Eighteen years after denying certiorari in *BMG Music*, the Court granted certiorari in a case presenting precisely the same question—that is, whether § 109(a)'s first sale defense applies to foreign manufactured copies.¹³⁵

A recusal forced the Court to affirm that particular judgment without opinion and search for an alternative vehicle.¹³⁶ This procedural twist gave the Second Circuit a chance to reach the question—and, in a divided opinion, it too accepted the position long taken by the Ninth.¹³⁷ A petition for certiorari soon followed, and the Court granted, in *Kirtsaeng v. John Wiley & Sons*.¹³⁸

At last in the Supreme Court, the textbook publisher Wiley sought to defend the longstanding rule that copies made and sold abroad could not be imported or sold in the United States without its permission. Among other arguments, Wiley insisted that the question “ha[d] been settled by Congress’s acquiescence in nearly [thirty] years of consistent case[]law holding that the statute does not apply to foreign-made copies.”¹³⁹ It noted that “Congress has frequently responded to lower-court decisions with which it disagrees by amending the Copyright Act.”¹⁴⁰

132. *Id.* at 154 (Ginsburg, J., concurring).

133. See *Kirtsaeng*, 654 F.3d at 217; *Microsoft Corp.*, 2008 WL 3162535, at *4-5.

134. Petition for Writ of Certiorari at i, *Costco Wholesale Corp. v. Omega, S.A.*, 559 U.S. 1066 (2010) (No. 08-1423).

135. *Costco Wholesale Corp. v. Omega, S.A.*, 559 U.S. 1066 (2010). Compare Petition for Writ of Certiorari, *supra* note 134, at i, with Petition for Writ of Certiorari, *supra* note 118, at i.

136. *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010).

137. *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 211-12, 224 (2d Cir. 2011).

138. 566 U.S. 936 (2012).

139. Brief for Respondent at 7, *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) (No. 11-697).

140. *Id.* at 7.

In fact, Congress had amended § 109(a) itself immediately following *BMG Music*. Despite these many amendments, Wiley noted, Congress “has never rejected the lower courts’ interpretation of ‘lawfully made under this title.’”¹⁴¹

The Supreme Court did exactly that, ruling 6-3 that § 109(a)’s first sale defense does apply to copies the copyright owner manufactured and sold abroad. The Court spent a few paragraphs explaining why the “pure . . . unnecessary dictum” in *Quality King* did not decide the case in Wiley’s favor.¹⁴² And once that was out of the way, the Court treated the question as one of first impression. Neither the majority nor the dissent found any reliance interest in a rule that the Ninth Circuit had repeatedly affirmed over the course of more than twenty years. Nor did the Justices suggest the opinions of the Second or Ninth Circuit—which between them decide more than half of all copyright appeals in the country—possessed any particular epistemic value. Indeed, across the three opinions accompanying the decision (a majority, concurrence, and a dissent), no one even bothered to mention Wiley’s argument for congressional acquiescence. It was almost like circuit law never existed.

Almost. The dissent *did* draw on circuit law in a tangential way. Responding to a parade of horrors conjured by the majority, the dissent noted that experience in the lower courts suggested otherwise. “Three decades have passed since a federal court first published an opinion reading § 109(a) as applicable exclusively to copies made in the United States,” and none of the supposed dire consequences of that rule had yet to be seen.¹⁴³ Even this was not an argument for deference to the lower courts—really, it was a pragmatic answer to a pragmatic objection that the dissent’s rule would prove unworkable.

Though the Court did not address the reliance, epistemic, or acquiescence arguments for deferring to lower court decisions, the majority’s response to this pragmatic argument perhaps revealed something larger about its view of circuit law. We could glean nothing from the prior decades; the Court concluded, because “the law has not been settled for long.”¹⁴⁴ In support, the majority principally cited a 1988 Third Circuit decision, which, in a footnote self-identified as dicta, “confess[ed] some uneasiness” with a geographic limitation on the first sale doctrine.¹⁴⁵ In twenty-five years, no circuit court ever followed that footnote or reduced it to a holding. The Court also found two district courts, twenty-three years apart from each other, that had come out the other way. (Both were eventually overruled, on one ground or

141. *Id.* at 7-8.

142. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013).

143. *Id.* at 585 (Ginsburg, J., dissenting).

144. *Id.* at 544 (majority opinion).

145. *See Sebastian Int’l, Inc., v. Consumer Confs. (PTY) Ltd.*, 847 F.2d 1093, 1098 n.1 (1988).

another, by their respective circuit courts.¹⁴⁶) These three non-controlling statements—rendered over three decades of litigation—were apparently enough to unsettle the law and reduce the entire question to one of first impression.

Perhaps the real weakness in Wiley's argument was the small number of circuit courts to have actually reached the question. True, the Ninth Circuit had clung to its rule for twenty years, despite national media coverage and the pleas of major retail chains.¹⁴⁷ But copyright owners' successful forum shopping forestalled further appellate percolation for more than twenty years. Even then, they had circuit law from only two circuits, the Second and the Ninth. These may be the leading copyright courts in the country, but they could not produce by themselves the kind of nationwide consensus that has permitted an inference of acquiescence in other areas.¹⁴⁸

We could speculate about exactly how many circuit courts must reach a question before their weight begins to matter, and query whether *any* copyright question would ever enjoy such robust percolation.¹⁴⁹ But there is one thing *Kirtsaeng* makes clear: Time alone cannot substitute for a decision of the Supreme Court.

C. Cloud DVRs

Neither of the examples discussed so far involve any kind of disruptive technology. The hard questions in *Abend* and *Kirtsaeng* arose from the statute itself, not because of the arrival of some unforeseen technical marvel. In other cases, though, the advent of a new technology is at least partly to blame for introducing a certain amount of copyright uncertainty. But even here, the Supreme Court's certiorari and merits practices can significantly exacerbate the disruption set in motion by technological progress.

For example, consider the gradual migration of TV "time-shifting" technology—first from analog video cassette recorders (VCRs) to set-top digital video recorders (DVRs), and then from set-top DVRs to the cloud. VCRs came to market in the 1970s under a shroud of legal uncertainty, given that they permitted home users to create libraries of

146. See *Red Baron-Franklin Park, Inc. v. Taito Corp.*, No. 88-0156-A, 1988 WL 167344, at *3 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 275, 281 (4th Cir. 1989); *Pearson Educ., Inc. v. Liu*, 656 F. Supp. 2d 407, 416 (S.D.N.Y. 2009), *overruled by John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210, 224 (2d Cir. 2011), *rev'd and remanded*, 568 U.S. 519, 554 (2013).

147. Brief of Amici Curiae Costco Wholesale Corp. et al. in Support of Petitioner, *supra* note 125, at 2-3; Brief of AFTA et al. as Amici Curiae in Support of the Petition for Writ of Certiorari, *supra* note 123, at 7-8.

148. *Cf. Texas Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 535 (2015).

149. See *supra* Section I.B (observing that copyright litigation is heavily concentrated in the Second and Ninth Circuits, and that courts and litigants often defer to those circuits on questions of copyright law).

copyright material captured from broadcast television. Following a single court of appeals decision, the Supreme Court granted certiorari and, in the landmark case of *Sony v. Universal*, conclusively absolved VCR manufacturers and their users of copyright liability.¹⁵⁰

In the early 2000s, analog VCRs gave way to a digital successor, the DVR. But for copyright purposes, the device's basic functionality remained the same: when a user pushed "record," the set-top device made a local copy, which could then be played back within the home.¹⁵¹ A few years later, a company called Cablevision pioneered an important change. Rather than leasing set-top DVRs for use in customers' homes, Cablevision built thousands of virtual "cloud" DVRs, which could record and play back content from the cable company's side of the network. This saved on equipment costs and permitted a user to access her recordings anywhere—from a friend's house, a mobile phone, and so on. An important limit, however, was that she could only access her own recordings. So if she forgot to record a show, or deleted it to save space in her cloud storage, she would be unable to view it.

These new cloud DVRs raised questions well beyond those settled for old-school VCRs and DVRs. For one, it was now a closer question whether it was the customers or the cable company that was *doing* the copying. Unlike a traditional VCR or DVR manufacturer that shipped the box and left the user to their devices, cable companies actively maintained and operated these cloud DVRs, and so they had more visibility into and control over which programs subscribers were actually recording. What's more, because playback of a recorded show required streaming data from the cloud to the user's device, the cloud DVR potentially implicated copyright owners' exclusive right to "publicly perform" their works. This statutory right, distinct from the right to prohibit copying, wasn't addressed in *Sony*, since nothing about a traditional VCR even arguably involved a public performance.

In a lengthy 2008 opinion, the Second Circuit carefully evaluated the new cloud DVR and concluded that Cablevision could not be directly liable for providing such a system to its customers.¹⁵² In the court's view, the location of the DVR was irrelevant, since it was still the end customer who was choosing what to record. Citing a test in use since 1991 and widely adopted in the circuit courts, the Second Circuit concluded that an equipment provider could be directly liable only if it

150. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Note that even with this comparatively swift grant of certiorari, the litigation took eight years from the filing of the complaint until the rendering of the Court's decision.

151. See Brief for the United States as Amicus Curiae at 15 n.8, 16 n.9, *CNN v. CSC Holdings, Inc. (Cablevision)*, 557 U.S. 946 (2009) (No. 08-448) (noting that first DVRs were released in 1999, and that content owners seemed to assume that selling or leasing a DVR was shielded by *Sony's* rule).

152. *Cartoon Network LP v. CSC Holdings, Inc. (Cablevision)*, 536 F.3d 121, 131-32 (2d Cir. 2008). Note that the plaintiffs did not advance secondary liability claims, so the court's holding was limited to the question of direct liability.

engaged in some “volitional conduct that causes the copy to be made.”¹⁵³ Merely “designing, housing, and maintaining” a system for making copies was insufficient.¹⁵⁴ The copyright owners fared no better with their argument that the cable company was engaged in a public performance. Based on a close reading of the statute and a detailed look at the technology, the court concluded that, because the cloud DVR “only makes transmissions to one subscriber using a copy made by that subscriber,” the performance was not public at all.¹⁵⁵ In the Second Circuit’s view, the DVR had migrated from the living room to the cloud without stumbling on any copyright tripwires.

Copyright owners rushed to the Supreme Court, insisting that the Second Circuit’s *Cablevision* opinion was at odds with the rulings of other circuits and the Supreme Court.¹⁵⁶ Both of these were a stretch, at least when it came to the specific questions posed by cloud DVRs.¹⁵⁷ But the networks made another argument too:

The Court should not accept Cablevision’s invitation to stand by while . . . the further harmful repercussions of this flawed decision become an entrenched reality. . . . The Second Circuit’s decision provides a blueprint for new automated businesses seeking windfall profits by providing copyrighted works to consumers without the long-accepted obligation to obtain a license. Once these parasitic business models become widespread, they will be virtually impossible to uproot by post-hoc judicial decisions. Lower courts and industry leaders need a definitive ruling on the law now, as the boundaries of permissible automated services are being drawn.¹⁵⁸

A number of amici supported certiorari based on variations of this “blueprint for disruption” argument. The performing rights organizations noted that the “Second Circuit ha[d] provided a roadmap . . . to avoid paying for . . . transmissions of music.”¹⁵⁹ This “easily exploited loophole . . . threaten[ed]” to “destabilize” music licensing markets worth almost \$2 billion dollars a year.¹⁶⁰ Another group of amici similarly argued that, “[i]f left undisturbed, the court of appeals’ erroneous

153. *Id.* at 130-31.

154. *Id.*

155. *Id.* at 137.

156. Petition for a Writ of Certiorari at 21, *Cablevision*, 557 U.S. 946 (No. 08-448) (claiming a circuit split and conflict with *New York Times Co. v. Tasini*, 533 U.S. 483 (2001)).

157. As then Solicitor General Elena Kagan noted, the alleged circuit splits involved very different technologies and were at least potentially distinguishable on their facts. Brief for the United States as Amicus Curiae, *supra* note 151, at 8-11. The alleged conflict with the Supreme Court was weaker still. For this, Cartoon Network gestured towards *Tasini*—a case that was simply irrelevant here. *See id.* at 8-9. Indeed, when the Court later took up the same questions, no one thought that *Tasini* held the answer. *See ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 453 n.1 (2014) (Scalia, J., dissenting).

158. Reply Brief at 4, *Cablevision*, 557 U.S. 946 (2009) (No. 08-448) (footnote omitted).

159. Brief for Amicus Curiae Broadcast Music, Inc. and American Society of Composers, Authors & Publishers in Support of Petitioners at 3, *Cablevision*, 557 U.S. 946 (No. 08-448).

160. *Id.* at 3, 11.

decision creates strong legal incentives for Cablevision and others to create comparable systems for wholesale copying, dissemination, and performance of copyrighted works without license or compensation to their authors.”¹⁶¹ These were not abstract future harms. As the major record labels warned, the Second Circuit’s ruling had “potentially sweeping consequences” for “settled licensing practices,” making the “Court’s review . . . urgently needed.”¹⁶² All of this lent credence to the networks’ claim that the decision “undercuts investments in established licensed services made in reliance on settled law.”¹⁶³

These arguments seemed to catch the Court’s attention—at least enough to call for the views of the Solicitor General. A few months later, Solicitor General Elena Kagan advised the Court to deny certiorari, noting that the case did not “[s]atisfy [t]he Court’s [t]raditional [c]riteria.”¹⁶⁴ Because this was the “the first appellate court to address the copyright implications of the shift from a set-top-based to a network-based” DVR, there was no direct conflict between “this case and any previous decision.”¹⁶⁵ As for the networks’ argument that the decision jeopardized existing business models and created significant licensing uncertainty, the government urged patience. Though *Cablevision* was the first appellate decision to address network-based recording services, it was “unlikely to be the last.”¹⁶⁶ Time would allow for further technological change and additional litigation in the lower courts.¹⁶⁷

After the Court denied certiorari, *Cablevision* became a leading case on at least two questions—the need for volitional conduct to create direct liability *and* the meaning of “public performance.” As the government had cheerfully predicted, cloud technology continued to develop as more and more content moved from users’ local devices into network storage.¹⁶⁸ And, as the networks had (rather less cheerfully) predicted, “clever intermediaries [began] to design and operate automated computer systems so as to evade the need for copyright licenses.”¹⁶⁹

161. Brief of Amici Curiae The Picture Archive Council of America, Inc. et al. in Support of the Petition for a Writ of Certiorari at 5, *Cablevision*, 557 U.S. 946 (No. 08-448).

162. Brief of Amici Curiae Sony BMG Music Entertainment et al. in Support of Petitioners at 21, *Cablevision*, 557 U.S. 946 (No. 08-448).

163. Petition for a Writ of Certiorari, *supra* note 156, at 3 (emphasis omitted); *see also* Brief of Amici Curiae Sony BMG Music Entertainment et al. in Support of Petitioners, *supra* note 162, at 21.

164. Brief for the United States as Amicus Curiae, *supra* note 151, at 7.

165. *Id.*

166. *Id.*

167. *Cf.* E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977) (positing “the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals”).

168. Brief Amici Curiae of Center for Democracy & Technology et al. in Support of Neither Party at 22-23, *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014) (No. 13-461).

169. Petition for a Writ of Certiorari, *supra* note 156, at 3.

One such clever intermediary was a venture-backed start-up called Aereo. Founded in 2012, Aereo's plan was to adapt Cablevision's cloud DVR for over-the-air broadcast. Taking pains to follow *Cablevision's* guidance, the company installed thousands of dime-sized antennas on rooftops in major media markets.¹⁷⁰ There was no technical benefit to installing thousands of tiny antennas rather than a single antenna—the entire system was designed from the ground up to comply with circuit law.¹⁷¹ Based on this business plan, Aereo raised nearly \$100 million of private equity, which it used to launch its service in more than twenty American cities.¹⁷²

Surprising no one, the broadcast networks immediately sued Aereo for copyright infringement. But their efforts to shutter Aereo ran headlong into circuit law. Recognizing that the broadcasters were likely to suffer irreparable harm, the district court nonetheless denied preliminary relief on the grounds that Aereo's system was indistinguishable from Cablevision's. Whether that case was rightly decided was beside the point; the court observed that "Aereo has made substantial investments of money and human capital in its system, all in reliance on the assumption that the Second Circuit meant what it said in *Cablevision*."¹⁷³ The Second Circuit agreed, noting that "[s]tare decisis is particularly warranted here in light of substantial reliance on *Cablevision*."¹⁷⁴ After all, it was not just Aereo's future that was at stake. "[M]any media and technology companies have relied on *Cablevision* as an authoritative interpretation" of the law.¹⁷⁵

The content owners again took their argument to the Supreme Court. This time, they did not even try to claim that the decision below conflicted with any decision of the Supreme Court or the courts of appeals—five years after *Cablevision*, there was still no "split."¹⁷⁶ Instead, their petition focused entirely on the Second Circuit's "[e]rroneous [r]esolution" of an "[e]xceptionally [i]mportant [q]uestion."¹⁷⁷ Having been denied cert in favor of percolation once before, the networks did not mince words. "The broadcast television industry has invested

170. Petition for Writ of Certiorari at 13-14, *Aereo*, 573 U.S. 431 (No. 13-461).

171. See *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting) ("The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna . . ."); Transcript of Oral Argument at 30-33, *Aereo*, 573 U.S. 431 (No. 13-461).

172. See Transcript of Oral Argument, *supra* note 171, at 33-34; J.J. Colao, *If Aereo Loses in the Supreme Court, Can It Rise Again?*, FORBES (May 7, 2014, 12:01 PM), <https://www.forbes.com/sites/jjcolao/2014/05/07/if-aereo-loses-in-the-supreme-court-can-it-rise-again/?sh=56da0d821b77> [<https://perma.cc/W8RF-NSJH>].

173. *ABC, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 395 (S.D.N.Y. 2012).

174. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 695 n.19.

175. *Id.*

176. The networks did note, however, that several district courts had found similar systems to be infringing. Petition for Writ of Certiorari, *supra* note 170, at 25.

177. *Id.* at 32.

billions of dollars producing and assembling high-quality and creative entertainment and news programming in reliance” on copyright.¹⁷⁸ The continued survival of *Cablevision*, they argued, threatened to upend traditional licensing models and scuttle these settled expectations.¹⁷⁹ “Industry participants will not and cannot afford to wait for something of this magnitude to percolate before responding to new business realities.”¹⁸⁰ For that reason, they argued, “the need for th[e] Court’s review [is] urgent and acute.”¹⁸¹

This time, the Court granted certiorari. But now the reliance and settled expectations arguments ran both ways. Aereo had spent millions of dollars launching a system designed from the ground up to comply with circuit law. *Cablevision* too resurfaced, noting that it had spent “hundreds of millions of dollars” expanding its cloud DVR offerings in light of its own Second Circuit victory six years prior.¹⁸² And these reliance interests were merely the tip of the iceberg. The Computer & Communications Industry Association warned that “numerous businesses . . . have relied upon the Second Circuit’s interpretation of [the relevant statutes] as a basis for investing enormous resources in the development and operation of innovative products and services . . . that are now in widespread use by businesses and individual consumers.”¹⁸³ Various amici cited an (industry-funded) empirical study suggesting that, as a direct result of *Cablevision*, U.S. cloud computing firms had raised “between \$728 million and \$1.3 billion” of incremental investment.¹⁸⁴ The Software Alliance similarly warned that overturning *Cablevision* “would be fatal for cloud computing”—a nascent industry promising to create jobs and save many billions of dollars of IT costs in the near future.¹⁸⁵

But there was a familiar flaw in these claims of settled expectations: *Cablevision* was not a precedent of the Supreme Court. As such,

178. *Id.* at 1.

179. *Id.* at 33-35. A number of amici advanced their own versions of this argument. See Brief of the National Association of Broadcasters et al. as Amici Curiae in Support of Petitioners and Reversal at 20-25, *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014) (No. 13-461); Brief of Amici Curiae The American Society of Composers, Authors and Publishers et al. in Support of Petitioners at 9-12, *Aereo*, 573 U.S. 431 (No. 13-461); Brief of National Football League and Major League Baseball as Amici Curiae in Support of Petitioners at 4, *Aereo*, 573 U.S. 431 (No. 13-461).

180. Petition for Writ of Certiorari, *supra* note 170, at 32.

181. *Id.*

182. Brief of *Cablevision* Systems Corporation as Amicus Curiae in Support of Petitioners at 2, *Aereo*, 573 U.S. 431 (No. 13-461).

183. Brief of Computer & Communications Industry Association and Mozilla Corporation as Amici Curiae in Support of Respondent at 2, *Aereo*, 573 U.S. 431 (No. 13-461).

184. Brief Amici Curiae of Center for Democracy & Technology et al. in Support of Neither Party, *supra* note 168, at 23; Brief of Computer & Communications Industry Association and Mozilla Corporation, *supra* note 183, at 9 (citing a 2011 study by Harvard Business School Professor Josh Lerner).

185. Brief of BSA | The Software Alliance as Amicus Curiae in Support of Neither Party at 12-15, *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014) (No. 13-461).

the Court simply ignored it, reversing the Second Circuit in a 6-3 opinion.¹⁸⁶ Once again, the Court did not seem to find any epistemic value or protected reliance interest in the relevant circuit law.¹⁸⁷ Rather, it was sufficient that, from a consumer perspective, Aereo bore an “overwhelming likeness” to the traditional cable companies, which must pay license fees to carry broadcast channels.¹⁸⁸ *Cablevision* was overturned at least on the facts of *Aereo*—though the limits of the Supreme Court’s new rule were left for another day.

It is not surprising that an argument found persuasive in one court might end up carrying less weight in another. But it *is* surprising that an argument that carried the day in a court of appeals could, once presented to the Supreme Court, simply vanish into that rarified air. After all, the Second Circuit had specifically noted that the industry’s substantial reliance on *Cablevision* weighed heavily against overruling it.¹⁸⁹ The investments made in reliance on that decision credibly ran into the millions, if not billions, of dollars. But in a closely divided case, not a single member of the Court considered the reliance-on-circuit-law argument even worthy of an answer.¹⁹⁰ Investors had no more of a protected interest in *Cablevision* than if they’d gone to a casino and bet on black.

* * *

The common thread in these examples is that circuit law, long accepted by industry, provides no leg to stand on in the Supreme Court. *Abend*, *Aereo*, and *Kirtsaeng* present the phenomenon most cleanly, but they are hardly the only recent examples.¹⁹¹ In each case, the Court passed on an initial opportunity to settle the issue, instead allowing the question to linger in the courts of appeals for years or decades before granting certiorari.

The Court’s reluctance to decide is understandable, given that each case involved a legitimately difficult question that would closely divide

186. See *Aereo*, 573 U.S. at 431, 451.

187. Indeed, the majority did not cite *Cablevision* even once—the name appears only as part of a citation to the decision below. *Id.* at 438.

188. *Id.* at 443-44.

189. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 695 n.19 (2d Cir. 2013).

190. As dissents do, the minority seemed to find epistemic value in the circuit law supporting its position. *Aereo*, 573 U.S. at 453 (Scalia, J., dissenting) (noting that “[e]very Court of Appeals to have considered [the question of] an automated-service provider’s direct liability for copyright infringement” had adopted a volitional act requirement). But even the dissent said nothing about the industry’s claimed reliance on circuit law.

191. See, e.g., *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414-15 (2017) (announcing the test for copyrightability of useful articles without references to decades of circuit law on the question); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003) (holding that the Lanham Act does not supplement copyright law’s limited attribution right, contrary to more than a decade of circuit law to the contrary); *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that phone books are not copyrightable, despite circuit law to the contrary dating to 1937).

the Court. But after sitting on the sidelines for years or decades, the Court seems to reset the clock upon a grant of certiorari. It would be an understatement to say that circuit law is vulnerable once a question finally arrives at the Court. It is practically invisible. Even when parties directly advance an argument rooted in epistemic deference, reliance interests, or congressional acquiescence, the Court does not bother to offer a rebuttal. It simply ignores the argument.

In sum, not one of the Court's post-1976 copyright decisions expresses any overt hesitation to overturn circuit law. The Court's practice seems to be just the opposite. When certiorari is granted on the meaning of the Copyright Act, the single most likely outcome is that the Court will overrule circuit law that stood unopposed for many years before.

III. LOOKING FORWARD

Reading these old Supreme Court cases, it is hard to avoid at least a bit of hindsight bias. We know which circuit cases the Court deemed correct and which it did not. We also know which lower court decisions it simply chose to leave alone. Viewed in these lights, the extent of disruption caused by the Court might seem quite small. The Court, after all, does not take very many copyright cases. So what's a dozen or two circuit cases overturned in the course of forty years?

But real-time participants in the copyright system do not have the benefit of such clairvoyance. A hypothetical author looking to navigate the copyright system in, say, 1990, would have no way of knowing which questions would pique the Court's interest and which would not. Indeed, she would not even have a reliable way of predicting the total number of copyright cases the Court would decide in the coming years. It was just as plausible that the Court would take up every serious statutory ambiguity as it was that the Court would sit out the decade. The safest bet—that the Court would take some path vaguely in between—would not be particularly conducive to planning.

The easiest way to avoid this bias is to jump to the present and ask: How many important tenets of copyright law are today enshrined only in circuit law? And what would stop the Court from overturning those cases, if it was inclined to review them?

The answers, as we will see, are *quite a few* and *not much*.

A. *The Circuit Law of Copyright*

Even a casual survey of doctrine makes it abundantly clear that the yeoman's work of copyright law is performed by the circuit courts. With the Supreme Court largely absent, many questions of critical importance have been settled—for now—by a circuit opinion or two. This Section will introduce several examples, but it is hardly exhaustive.

Any copyright attorney could surely name dozens more. As could a first-year copyright student, if she happened to notice just how much of the syllabus is credited to West's F.3d. The law of copyright lives in the circuit courts.

1. *Infringement by Non-Identical Copies*

One of the most important rights of a copyright owner is the exclusive right to reproduce the work.¹⁹² That right is plainly infringed when a defendant makes a complete and identical copy of the original. But the reproduction right likely goes further than that. As Judge Learned Hand observed, "It is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law . . ." ¹⁹³ Consistent with that principle, courts have long recognized liability for making "substantially similar" copies—in other words, for borrowing without reproducing the original identically and in its entirety.¹⁹⁴

The Copyright Act of 1976 does not mention the words "substantial similarity," much less explain how courts should go about applying that test. So, in the absence of statutory guidance, circuit courts have busily filled in the blanks. For example, a number of courts have created a practical exception for the passing appearance of copyright material in the background of a larger work—such as when a pinball machine appears on the set of a movie or an actress walks past public artwork on a New York City street.¹⁹⁵ In these cases, the resulting recording contains a complete reproduction of the original. But, provided

192. See 17 U.S.C. § 106(1).

193. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930); see also *Folsom v. Marsh*, 9 F. Cas. 342, 348 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4,901) ("It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance.").

194. See *Nutt v. Nat'l Inst. Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929); *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) ("The question . . . is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."); *Heim v. Universal Pictures Co.*, 154 F.2d 480, 487 (2d Cir. 1946) ("[The] plaintiff, to make out his case, must establish two separate facts: (a) that the alleged infringer copied from plaintiff's work, and (b) that, if copying is proved, it was so 'material' or 'substantial' as to constitute unlawful appropriation."); *Comptone Co. v. Rayex Corp.*, 251 F.2d 487, 488 (2d Cir. 1958) ("The copying need not be of every detail so long as the copy is substantially similar to the copyrighted work.").

195. See *Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 634-35 (S.D.N.Y. 2008); *Gayle v. Home Box Off., Inc.*, No. 17-CV-5867 (JMF), 2018 WL 2059657, at *2-3 (S.D.N.Y. May 1, 2018).

the original “appear[s] fleetingly”¹⁹⁶ and is “not displayed with sufficient detail,”¹⁹⁷ courts have excused the copying as falling below some judicially created “quantitative threshold” for infringement liability.¹⁹⁸

These circuit decisions have immediate practical significance for photographers and filmmakers. Copyright works are everywhere, and capturing any one, even on accident, could potentially trigger a right to statutory damages and disgorgement of profits.¹⁹⁹ Absent a reliable defense, it would seem reckless to capture images anywhere beyond a carefully controlled environment. Indeed, Congress has created several statutory exceptions relevant to photographers and filmmakers working in public spaces: a right to portray useful articles in news reports or in order to comment on them,²⁰⁰ a right to capture images of copyright-protected buildings ordinarily visible from a public space,²⁰¹ and a right for public broadcast entities to obtain a compulsory license to display any published pictorial, graphical or sculptural work.²⁰² But each of these statutory exceptions is limited by its own terms, and even in combination, they provide no general defense to inadvertent reproductions caused by taking pictures or filming in public. A generation of visual works have been created on the belief that the fleeting or unfocused appearance of copyright material does not constitute infringement. Right or wrong, that belief has no footing in the statute.²⁰³

Courts have not only weakened the protection afforded by the plain language of the Copyright Act. In other ways, they have strengthened it. For example, consider whether copyright protects particular characters separately from the literary works or films in which they appear. Character copyrights cannot be found in the statute’s list of categories of original works of authorship,²⁰⁴ and the Copyright Office

196. *Gordon v. Nextel Commc’n*, 345 F.3d 922, 924-25 (6th Cir. 2003).

197. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998).

198. *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997). Sometimes this particular argument for non-liability is referred to as the “de minimis” exception. *Id.* at 74-75. But on fact patterns like the ones described above, it is more precise to say that the plaintiff has failed to satisfy the quantitative threshold for substantial similarity. *See id.*; 2 NIMMER & NIMMER, *supra* note 42, § 8.01[G].

199. 17 U.S.C. § 504.

200. *Id.* § 113(c).

201. *Id.* § 120.

202. *Id.* § 118.

203. It is possible that fair use (codified in § 107) could provide an alternative redoubt for filmmakers and photographers who inadvertently capture copyright work in public settings. *See Ringgold*, 126 F.3d at 81 (remanding to consider fair use after de minimis argument failed). But the de minimis exception is explicitly rooted in substantial similarity, not fair use, and the leading treatise is skeptical that fair use provides a reliable fallback. *See* 2 NIMMER & NIMMER, *supra* note 42, § 8.01[G]. In any event, removing the quantitative substantial similarity requirement would subject filmmakers and photographers to significant and additional legal uncertainty.

204. 17 U.S.C. § 102(a).

refuses to register them.²⁰⁵ Nor does the word “character” appear anywhere in the Act’s text.²⁰⁶ Nonetheless, a number of circuit courts have created a distinct category of character rights that “receive protection apart from the copyrighted work.”²⁰⁷

The economic significance of character copyrights is enormous. Once a character becomes a work of authorship in its own right, that character’s mere appearance can infringe copyright, even in a context that bares no other similarity to the literary work or film where that character first appeared.²⁰⁸ Without such a conception, it is difficult to explain how a functioning Batmobile can be a copy of a comic book,²⁰⁹ or a lunchbox can be a copy of a movie,²¹⁰ or how a costume princess taking pictures with children is possibly “performing” an animated film.²¹¹ These are no cottage industries.²¹² Billions of dollars of annual licensing revenues turn on the understanding that a character’s creator enjoys the exclusive right to any future appearances of that character.²¹³

Foundational as they are to industry practice, none of these rules can claim any support in Supreme Court precedent. When it comes to the scope of copyright protection for non-identical copies, there are approximately three pertinent sentences to be found in the U.S. Reports.

205. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 313.4(H), 618.8(A)(8) (2021), <https://www.copyright.gov/comp3/docs/compendium.pdf> [<https://perma.cc/RU5N-MNDB>].

206. See 1 NIMMER & NIMMER, *supra* note 42, § 2.12.

207. Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003) (“While characters are ordinarily not afforded copyright protection, characters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work.” (citations omitted)); 1 NIMMER & NIMMER, *supra* note 42, § 2.12[A][2] nn.17.1-18 (collecting cases that “fail to comport with [the sound solution] and instead treat the character *per se* as copyrightable subject matter”).

208. Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753 (9th Cir. 1978) (upholding liability for “bawdy depiction of the Disney characters as active members of a free thinking, promiscuous, drug ingesting counterculture” (citation omitted)).

209. DC Comics v. Towle, 802 F.3d 1012, 1018 (9th Cir. 2015).

210. Warner Bros. Ent. v. X One X Prods., 644 F.3d 584, 590, 597 (8th Cir. 2011).

211. Disney Enters. v. Kool Klown Party People, Inc., No. 5:08-cv-326-Oc-10GRJ, 2010 U.S. Dist. LEXIS 149897, at *4 (M.D. Fla. Mar. 2, 2010); Lyons P’ship, L.P. v. D & L Amusement & Ent., Inc., 702 F. Supp. 2d 104 (E.D.N.Y. Mar. 25, 2010).

212. To give one example, the Marvel Comic Universe—essentially a bundle of character copyrights—served as the collateral for a \$525 million loan. Today, that property is valued in the billions. See *The Economics Behind the Marvel Cinematic Universe*, BUS. REV. BERKELEY (Nov. 15, 2019), <https://businessreview.berkeley.edu/the-economics-behind-the-marvel-cinematic-universe/> [<https://perma.cc/PM3B-L8R3>].

213. Some circuits have held that trademark law provides additional protection against the use in commerce of recognizable characters without authorization. See, e.g., Warner Bros. v. Gay Toys, Inc., 658 F.2d 76, 79 (2d Cir. 1981). That rule not only lacks support in Supreme Court precedent but is already in tension with it. See Mark P. McKenna, *Dastar’s Next Stand*, 19 J. INTELL. PROP. L. 357, 363 (2012) (arguing that *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 25 (2003), “should be understood, or at least should be extended, to rule out categorically Lanham Act claims that are based on the content of the defendant’s creative work”).

First, in a 1991 case involving the copyrightability of phone books, the Court explained that “[t]o establish infringement, two elements must be proven: (1) ownership of a valid copyright[] and (2) copying of constituent elements of the work that are original.”²¹⁴ The Court did not elaborate as to what counts as a “constituent element” or how many of those “elements” are necessary to establish infringement. For any further guidance, one would have to look back to an 1878 case holding that a color-coded map of Philadelphia did not infringe a color-coded map of New York. On the way to that conclusion, the Court observed that “[a] copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy of the whole or of a material part must be produced.”²¹⁵ Because the only commonality between the two works at issue was an unprotectable system of color-coding, the Court had no occasion to explain what might constitute a “material part.”

Nearly one hundred and fifty years later, the question is still percolating.

2. *The Limits of Direct Liability*

When an infringing reproduction is made by a single human hand, it is easy to identify the person responsible for that reproduction. But when a copy is made by a machine—or, as is often the case on the Internet, emerges unbidden from a mesh of interconnected and automated systems—it is hardly obvious where to assign liability for the resulting copy. Copyright law navigates this problem by channeling potentially responsible parties into two tracks: (1) those who actually performed the infringing acts and (2) those who assisted, encouraged, or profited from the infringement in some way. The first group is responsible under a theory of direct liability, the latter under a theory of secondary liability.

The Copyright Act is vague when it comes to theories of secondary liability.²¹⁶ With little text to go on, the Supreme Court has instead relied on background common law principles to extend copyright liability to “certain parties who have not themselves engaged in the infringing activity.”²¹⁷ It has done so cautiously, reserving secondary

214. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Two earlier Supreme Court cases are arguably relevant to the scope of the reproduction right, though not to the question of substantial similarity. More than a century ago, the Court held that a player piano roll could not constitute an infringing copy of a musical composition, and that exhibiting a film based on a book *could* infringe the book's dramatization right. See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908); *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62 (1911). Those cases have, respectively, been abrogated and codified.

215. *Perris v. Hexamer*, 99 U.S. 674, 675-76 (1878).

216. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984).

217. *Id.* at 435; *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

liability for cases where the defendant intentionally induces or encourages infringement, or otherwise chooses to profit from infringement rather than exercising a right to stop it.²¹⁸ Wrongful intentions cannot be inferred for the sale of a tool useful for infringement if it also has “significant noninfringing uses.”²¹⁹ The Court has set these bars high for a reason: “to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.”²²⁰ An extensive body of circuit law has applied and developed these precedents on the scope of indirect liability.²²¹

All of this implies that there must be some limit on the conduct that can constitute direct liability. There would be little point to secondary liability’s “breathing room for innovation”²²² if the same defendants would be liable anyway under a direct theory. The Copyright Act itself implies a distinction between direct liability and secondary liability.²²³ But besides an apparently purposeful choice of active verbs,²²⁴ there is nothing in the text to indicate exactly where the limits of direct liability might be found.²²⁵

Much like the rules for secondary liability, the requirements for direct liability have emerged from decades of gradual judicial development. Since the first cases involving online copyright infringement, the trigger for direct liability has been an “element of volition” directed at infringing material.²²⁶ At a minimum, a defendant cannot be liable without some proximate connection or nexus between his affirmative acts and the resulting infringement. This test is satisfied when the defendant curates, arranges, or provides the content to be copied. But it fails when the defendant simply provides an automated copying system for a user to do as he will.²²⁷ To prevail against such a defendant, the copyright owner will need to grapple with the more nuanced standards for secondary liability.

The volitional act requirement plays a critical role in the development of new online services. Without such a limitation, an online real

218. *Grokster*, 545 U.S. at 930.

219. *Id.* at 932-33 (citing *Sony*, 464 U.S. at 442).

220. *Id.* at 937.

221. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21 (9th Cir. 2001); *Perfect 10, Inc. v. Visa Int’l Serv., Ass’n*, 494 F.3d 788, 796 (9th Cir. 2007); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007).

222. *Grokster*, 545 U.S. at 933.

223. 17 U.S.C. § 106 (distinguishing between exclusive rights “to do” and “to authorize”).

224. *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 453 (2014) (Scalia, J., dissenting) (observing the Act’s use of “active, affirmative terms”).

225. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984).

226. *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995).

227. See, e.g., *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067-68 (9th Cir. 2014); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130-31 (2d Cir. 2008); *Co-Star Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549-50 (4th Cir. 2004).

estate service like Zillow would face potentially devastating copyright liability for its use of photos taken by third parties. Professional real estate photographs are subject to complicated license agreements about how the images may be used. Zillow relies on representations from third-party listing services to determine which images it is permitted to display, in which market, and for how long.²²⁸ But it has no access to—nor would it be practical to review—the many thousands of license agreements entered between individual photographers and individual real estate agents. Because Zillow performs no moderation or selection function, the Ninth Circuit has held it cannot be held liable as a direct infringer when images are uploaded by others acting beyond the scope of their licenses.²²⁹

To be clear, this direct liability rule does *not* immunize Zillow from liability entirely. Under the law of indirect liability, the company's obligations will ebb and flow in harmony with its knowledge of actual infringement and technical capabilities to stop it.²³⁰ But without a volitional act requirement, a platform like Zillow could not even access the "breathing room" afforded by these doctrines. It would face the prospect of undifferentiated strict liability the moment its servers inadvertently ingest an unauthorized photograph.²³¹

The same rule makes it possible for end users to exercise their fair use rights in online environments. For example, Cablevision's original cloud DVR was possible only because the volitional act test shifted the infringement inquiry to Cablevision's subscribers. These subscribers almost certainly enjoyed a fair use defense to make individual copies for personal, non-commercial use under *Sony*.²³² This, in turn, protected Cablevision from secondary liability because there can be no secondary liability without primary liability.²³³ But all of this would have collapsed if Cablevision could have been held liable as a direct infringer. From the Cablevision-as-copyist perspective, the reproductions were large scale and for profit, which would counsel heavily against a finding of fair use. The volitional act requirement makes it tenable for a profit-minded actor to provide end users the tools they need to actually make use of fair use.²³⁴

228. *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 733 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

229. *Id.*

230. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159-62 (9th Cir. 2007).

231. *Cf. Netcom*, 907 F. Supp. at 1369-70.

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

233. *See MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005).

234. *Cf. Brief of 36 Intellectual Property and Copyright Law Professors as Amici Curiae in Support of Respondent at 6-17, ABC, Inc., v. Aereo, Inc.*, 573 U.S. 431 (2014) (No. 13-461).

The volitional act test was created by a district court in 1991,²³⁵ and it has since been adopted by every circuit court to confront the question.²³⁶ But it has never been adopted by the Supreme Court. In fact, the Supreme Court has considered direct liability for automated systems on only one occasion. That was *Aereo*, and in that case, the majority specifically declined to adopt the volitional act requirement. Instead, *Aereo* was directly liable because it was “substantially similar” to a cable company.²³⁷ Three Justices would have decided the case on the grounds that *Aereo* lacked a volitional act of infringement. They were in dissent.

Notwithstanding this dismal showing for the rule in *Aereo*, lower courts have continued to apply the volitional act requirement.²³⁸ It’s a reasonable response, given the substantial reliance interests built upon that rule and the fact that the *Aereo* majority did not explicitly reject it. But if the Court ever granted cert on this question, this circuit law would—at best—arrive in a defensive crouch. A litigant seeking to rely on the volitional act requirement could not plausibly claim the rule had a basis in Supreme Court precedent. Rather, the first half of the merits brief would be spent arguing that the rule was not *already* foreclosed by *Aereo*. And yet the rule soldiers on, the law of the land, unless and until the Court more clearly says otherwise.

3. DMCA Safe Harbors

The importance of the volitional act requirement would be even greater were it not for the DMCA’s “safe harbor” provision, codified at 17 U.S.C. § 512. This defense was enacted in 1998 for the express purpose of “provid[ing] greater certainty to service providers concerning their legal exposure for infringement[].”²³⁹ Because of its broad shield against money damages and most equitable relief, § 512(c) is an online service provider’s primary defense against claims of copyright liability.

A service provider must satisfy a number of requirements to obtain the safe harbor’s protection.²⁴⁰ Practically every aspect of this law is

235. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1369-70 (N.D. Cal. 1995).

236. See *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); *Parker v. Google, Inc.*, 242 F. App’x 833, 836 (3d Cir. 2007); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008); *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 444 (5th Cir. 2017); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017). *But see* *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 912 (D.C. Cir. 2018) (“Our court has yet to decide whether to read such a volitional conduct or proximate cause requirement into the Copyright Act, and we need not do so today.”).

237. *Aereo*, 573 U.S. at 44.

238. *BWP Media USA Inc. v. Polyvore, Inc.*, 922 F.3d 42, 49 (2d Cir. 2019) (Walker, J., concurring); *T & S Software Assocs.*, 852 F.3d at 442.

239. H.R. REP. NO. 105-551, pt. 2, at 49-50 (1998).

240. There are four basic requirements to obtain this protection. First, the service provider must designate a DMCA agent to receive takedown notices and expeditiously remove

graced by some ambiguity or the other—a topic that could easily span multiple law review articles. In the interest of brevity, we will focus on just two questions: (1) the safe harbor’s requirement that a service provider not receive a direct financial benefit profit from infringing activity that it has the “right and ability to control”²⁴¹ and (2) the scope of the resulting immunity for a provider who satisfies the terms of the safe harbor.²⁴²

First, consider the requirement that the service provider must not directly profit from infringing activity while having the “right and ability to control” that activity. This language closely tracks the vicarious liability standard that had been used for decades before the DMCA,²⁴³ and it could be read as a (somewhat clumsy) codification of that circuit law.²⁴⁴ But no court has read this provision that way. Instead, the Second and Ninth Circuits have held that the larger structure of the safe harbor “ ‘dictates’ a departure from the common law vicarious liability standard.”²⁴⁵ So it is not enough to show that the defendant

any material once such a notice is received. 17 U.S.C. § 512(c)(1)(A)(iii), (c)(2). Second, the service provider must otherwise lack disqualifying knowledge about infringing material contained on its platform. *Id.* § 512(c)(1)(A)(i), (c)(1)(A)(ii). Third, the service provider must not receive a direct financial benefit profit from infringing activity in a case where it has the “right and ability to control” that activity. *Id.* § 512(c)(1)(B). Fourth, the service provider must accommodate industry standards to protect copyrighted works and have a policy for terminating users who are repeat infringers. *Id.* § 512(i). A service provider who satisfies these conditions will have no damages liability “for infringement of copyright by reason of the storage at the direction of a user of material that resides” on the provider’s computer systems. *Id.* § 512(c)(1).

241. 17 U.S.C. § 512(c)(1)(B).

242. *Id.* § 512(c)(1).

243. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (“When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials . . . the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.”); *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (“[E]ven in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”).

244. Compare “receive[s] a financial benefit directly attributable to the infringing activity,” 17 U.S.C. § 512(c)(1)(B), with “has a direct financial interest in such activities,” *Gershwin*, 443 F.2d at 1162. Likewise, “right and ability to control such activity,” 17 U.S.C. § 512(c)(1)(B), seems to be drawn from “right and ability to supervise the infringing activity,” *Gershwin*, 443 F.2d at 1162. The formulation of this latter prong varied under pre-DMCA law. See *Shapiro*, 316 F.2d at 306 (using “under the effective control and supervision of [the defendant]”); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 312 F. Supp. 581, 583 (S.D.N.Y. 1970) (“[The defendant] caused the copyright infringement here by organizing, supervising, and controlling . . .”); *RCA/Ariola*, 845 F.2d at 781 (noting the “right and ability to supervise” test, and then concluding that “[defendant] is liable because it exercised control”).

245. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 37-38 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1026-27 (9th Cir. 2013).

“certainly had the physical ability to control any and all infringing activity.”²⁴⁶ To lose the safe harbor on these grounds, a service provider must do “something more”²⁴⁷—such as exert “high levels of control over activities of users”²⁴⁸ or wield “substantial influence . . . over . . . users’ infringing activities.”²⁴⁹ As a result, a service provider can stand idly by as its site is used for rampant infringement, even withholding the technical capability to immediately end that infringement, so long as it does not actively encourage the infringing activities.

The courts adopting this interpretation have been the first to acknowledge its difficulty. Out of the gate, it requires overcoming the presumption that when “Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of [those] terms.”²⁵⁰ And the interpretation fares no better under the plain language of the statute. In effect, the circuit courts have turned a passive disqualifier—“in a case in which the service provider has the right and ability to control such activity”²⁵¹—into something requiring active encouragement or exertion of substantial influence.²⁵² In short, the prevailing circuit law departs from both the ordinary meaning and the common law of vicarious liability from which that language was apparently borrowed.

But taking the statute at its word presents problems too. If “right and ability to control” codifies the law of vicarious liability, then it would seem to disqualify any for-profit service provider with the technical ability to comply with the *other* requirements of the DMCA. This “predicament” or “catch22” has been the circuit courts’ justification for departing from the plain language of the statute.²⁵³ As the Ninth Circuit explained, “‘Congress could not have intended for courts to hold that a service provider loses immunity under the safe harbor provision of the DMCA because it engages in acts that are specifically required by the DMCA’ to obtain safe harbor protection.”²⁵⁴ Instead, the

246. *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 613 (9th Cir. 2018).

247. *Viacom*, 676 F.3d at 38.

248. *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1058 (9th Cir. 2017) (quoting *Viacom*, 676 F.3d at 38).

249. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1046 (9th Cir. 2013).

250. *Neder v. United States*, 527 U.S. 1, 21 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)).

251. 17 U.S.C. § 512(c)(1)(B).

252. *Fung*, 710 F.3d at 1046.

253. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 37 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1027 (9th Cir. 2013).

254. *UMG Recordings*, 718 F.3d at 1027 (quoting *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1113 (C.D. Cal. 2009)). What’s more, another provision of the DMCA makes clear that the defense does not depend on a service provider “monitoring its service or affirmatively seeking facts indicating infringing activity.” 17 U.S.C. § 512(m)(1).

circuit courts have set out to develop a new rule, one defined primarily by the need to require “something more” than vicarious liability, and with little statutory text to guide them on their way.²⁵⁵

None of this bodes well for the inevitability of this interpretation. It is not that the circuit courts are necessarily wrong, but they have sent every signal that the question is one on which reasonable jurists might disagree. By its own terms, the interpretation adopted by the lower courts depends on a conflict between plain language and statutory structure, requiring a new body of judge-made law that departs from pre-codification precedents. Such is the stuff of circuit splits and 6-3 decisions.

Another important ambiguity in § 512 relates to the scope of the safe harbor once acquired. The statute provides a defense to liability for “infringement of copyright by reason of the storage at the direction of a user.”²⁵⁶ Obvious examples include things like “providing server space for a user’s web site, for a chatroom, or other forum in which material may be posted at the direction of users.”²⁵⁷ But courts have construed this language to cover additional “accessibility-enhancing activities,” such as changing the format of user-posted videos, splicing ads into them, algorithmically recommending them to specific users, and even autoplating content without any user action.²⁵⁸ These are the steps that weave user-generated content into a seamless experience for other users—they are what make sites like YouTube, Instagram, and TikTok more interesting to browse than, say, Dropbox. Without latitude to manipulate and repackage content sourced from users, these services would not be the same highly curated and monetized platforms that they are today.

Other services have invoked the safe harbor even more creatively. For example, companies like eBay and Amazon rely on the DMCA as a defense to liability for arranging sales of tangible infringing materials, such as when an auction seller posts an ad for a pirated DVD.²⁵⁹ And user-generated apparel sites like TeePublic and Redbubble invoke the DMCA not just to immunize their website operations, but also to protect backend operations such as printing and shipping t-shirts across the country.²⁶⁰

Is all of this infringement “by reason of the storage at the direction of a user”? It depends on the meaning of those three leading words: by reason of. The good news is that these exact words appear in other

255. *Viacom*, 676 F.3d at 38.

256. 17 U.S.C. § 512(c)(1).

257. S. REP. NO. 105-190, at 43 (1998).

258. *See Viacom*, 676 F.3d at 39-40; *UMG Recordings*, 718 F.3d at 1027.

259. *See Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1087-88 (C.D. Cal. 2001).

260. *See Gardner v. CafePress Inc.*, No. 3:13-cv-1108-GPC-JMA, 2014 U.S. Dist. LEXIS 25405 (S.D. Cal. Feb. 26, 2014); *Greg Young Publ’g, Inc. v. Zazzle, Inc.*, No. 2:16-CV-04587-SVW-KS, 2017 U.S. Dist. LEXIS 100268 (C.D. Cal. May 1, 2017).

statutes, where they have been the subject of multiple Supreme Court cases.²⁶¹ The bad news is that those cases tell us to expect trouble. Everyone agrees that “[t]he phrase ‘by reason of’ denotes some form of causation.”²⁶² But, as a divided Court recently warned, “the law recognizes several types of causation.”²⁶³ When a statute does not specify which causal tests to use, courts are instructed to “look to context to decide whether the statute demands only but-for cause as opposed to proximate cause or sole cause.”²⁶⁴

The DMCA does not specify which causal test should be used to define the outer limits of the safe harbor. And entire business models could rise or fall depending on the applicable test. For example, if “by reason of the storage” means that user storage must be the sole cause of the resulting infringement,²⁶⁵ then the DMCA likely does not shield services that initiate further acts of infringement, such as by streaming videos automatically (a public performance), splicing in ads (preparing a derivative work), or selling t-shirts (distributing an unauthorized copy). On the other hand, if § 512(c) implies a simple but-for causation test, then there is effectively no limit on what a service provider can do with content that was once uploaded by users—apparel sales, remixes, even exhibition in theaters all appear to be fair game.²⁶⁶ And if, as seems likely, the statute contains at least some limitation based on proximate cause, then one must confront *that* “elusive concept,”²⁶⁷ begging more questions about how the safe harbor should be construed to advance “convenience, . . . public policy, [or] a rough sense of justice.”²⁶⁸

A significant share of the Internet economy is built upon these foundations. Just imagine how the experience of visiting (or creating content for) YouTube would change if the site could no longer splice ads or suggest videos without risk of infringement liability. Or consider if the major social media sites became vicariously liable for any user post that provided a direct financial benefit. This is not to say the sky would

261. See, e.g., *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 641 (2008); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018).

262. *Husted*, 138 S. Ct. at 1842.

263. *Id.*

264. *Id.*

265. *Cf. Id.* at 1843 (applying the “sole causation” test to the “Failure-to-Vote” clause of the Help America Vote Act of 2002).

266. *Cf. CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688 (2011) (allowing liability if “negligence played any part in bringing about the injury”).

267. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1843 (2018).

268. *CSX Transp.*, 564 U.S. at 692-93 (quoting *Palsgraf v. Long Island R. Co.* 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

fall. With no shortage of talent at their disposal, these platforms could surely be reengineered or reimaged to comply with a newly reinterpreted DMCA.²⁶⁹ But the resulting ecosystem could be quite different indeed.

Despite the significant economic stakes riding on these interpretations, the Supreme Court has not yet decided a single case involving the DMCA. Any question it took relating in any way to the safe harbor would necessarily be one of first impression.

B. *It Could Happen Here*

Some might hope to dismiss all of this as hysteria. With so much riding on circuit law, isn't it unlikely that the Court would disrupt such economically important and settled expectations? Perhaps. But for these assurances to rest on more than a hope and a prayer, the sanguine defender of the status quo must tell us what exactly would stop the Court from upending these circuit precedents. Upon examination, the arguments for serenity are not only weak on their own terms, but they are directly contrary to recent experience at the Court.

First, one might think that prior denials of certiorari in some way constrain the Court's ability to grant certiorari on the same question in the future. Perhaps the likelihood of certiorari goes down once a question has become frequently denied. But, as a formal matter, nothing prevents the Court from taking a different view of cert-worthiness down the road. As the Court has repeatedly emphasized, a prior denial of certiorari "has no legal significance," no matter how many times repeated.²⁷⁰ And, in practice, the Court *has* taken up important questions of copyright law after initially declining to hear them. The studios and publishers who relied on the holdings of *Rohauer* and *BMG Music*, for example, were no doubt told that the Court "probably" would not reconsider that circuit law after denying certiorari. These predictions provided little comfort when the Court reversed course a decade or two later.

Contemporary litigants understand this and continue to urge the Court to take copyright questions it has previously avoided. For example, in recent years, the Court has received (and denied) well-lawyered

269. In the first quarter of 2018 alone, Facebook reported that it removed nearly 900 million posts, most of them spam but others related to nudity, graphic violence, hate speech, and terrorism. At that time, at least, the company was publicly optimistic about its ability to control the site algorithmically. See Sheera Frenkel, *Facebook Says It Deleted 865 Million Posts, Mostly Spam*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/facebook-removal-posts-fake-accounts.html> [<https://perma.cc/AT26-4BTN>] ("If we do our job really well, we can be in a place where every piece of content is flagged by artificial intelligence before our users see it" (quoting Facebook vice president of data analytics)).

270. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 n.56 (2020) (plurality opinion); *id.* at 1428 n.10 (Alito, J., dissenting); *Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting).

petitions relating to the volitional act requirement,²⁷¹ character copyrights,²⁷² the test for infringement of non-identical copies,²⁷³ and the DMCA.²⁷⁴ All but one of these petitions gathered multiple amici in support. These issues are live and important, and the Court has no shortage of vehicles to address them should it wish.

Short of a formal obstacle, one might hope that the Court would simply know better than to take up a case in which the reliance interests are too great. Accepting that *Abend*, *Kirtsaeng*, and *Aereo* jeopardized millions of dollars of investments, perhaps the result would be different when the reliance interests at stake run into the billions.

The problem with this argument is that the Court has not announced any rule or doctrine counseling against certiorari due to prior reliance on circuit law. Perhaps it should. But as the matter now stands, the economic importance of a case is an argument *in favor of* certiorari. Without a recognized form for the argument, it could be counterproductive (if not outright insulting) for a party opposing certiorari to claim that the circuit law at issue is simply too important for the Court to be trusted with it. Reliance on circuit law has no presently recognized role to play at the cert stage.

Experience in adjacent areas of law further belies the suggestion that the Court would judiciously avoid certiorari if the reliance interests were sufficiently serious. For example, the Court stood silent while the Federal Circuit permitted patents on software, business methods, and diagnostic methods—only to dramatically reverse those rules in a series of decisions more than a decade later.²⁷⁵ This change in law resulted in the loss of thousands of patents protecting many billions of dollars of investment in research and development. If the Court is willing to upend the patents protecting life-saving diagnostics for breast cancer,²⁷⁶ it seems unlikely to shy away from the copyrights protecting Batman.

Finally, one might hope that the infrequency with which the Court hears copyright cases will bound the magnitude of any resulting copyright uncertainty. After all, in the last century, the Court has heard an average of just one copyright case every two years. How much upheaval could the Court really cause by deciding less than one copyright case every year?

271. *VHT, Inc. v. Zillow Grp., Inc.*, 140 S. Ct. 122 (2019) (cert. denied).

272. *Moodsters Co. v. Walt Disney Co.*, 141 S. Ct. 1050 (2021) (cert. denied).

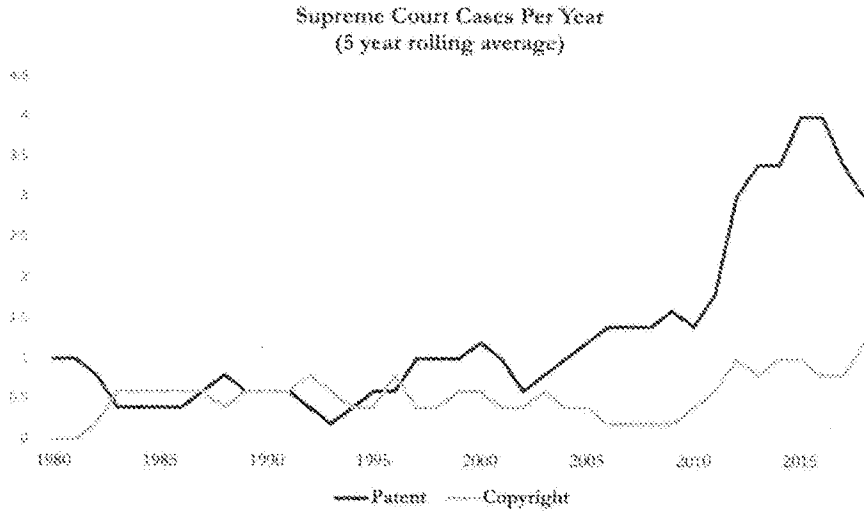
273. *Rentmeester v. Nike, Inc.*, 139 S. Ct. 1375 (2019) (cert. denied).

274. *Lenz v. Universal Music Corp.*, 137 S. Ct. 2263 (2017) (cert. denied).

275. *Bilski v. Kappos*, 561 U.S. 593, 602-09 (2010); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 77-80 (2012); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 217-26 (2014).

276. *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 582-83 (2013).

The problem with this argument is nothing requires the rate of copyright cert grants to remain constant. Indeed, until recently, one could have said the same thing about patent law.



This graph illustrates the number of patent and copyright cases the Court has decided per calendar year, smoothed using a five-year rolling average.²⁷⁷ As shown above, throughout the 1980s, patent law and copyright were indistinguishable—the Court heard roughly one patent and one copyright case every two years. That continued until the mid-1990s, when the number of patent grants doubled to roughly one per year. This increased rate of grants held steady for about a decade, then began steadily increasing around 2006. Throughout the 2010s, the Court decided an average of more than three patent cases a year—six times the rate observed throughout the '80s and early '90s.

By these lights, copyright looks something like patent law circa 1995. For decades, the Court decided roughly one copyright case every two years. But in the most recent years, that has jumped to about one case every single year. That could be a blip, or it could be the new normal. But, most importantly, it is hardly the limit of what the Court might do. No one can say whether the Court will hear zero copyright cases next year or five.

²⁷⁷ The copyright cases included in this chart are listed in the Appendix. The patent cases are based on a list collected by Lisa Guellote. See Lisa Larrimore Guellote et al., *Supreme Court Patent Cases*, WRITTEN DESCRIPTION, <https://writtendescription.blogspot.com/p/patents-scotus.html> [<https://perma.cc/7Q4R-FTU6>] (last visited Dec. 15, 2022). From her list, we have excluded five cases that were tangential to the Patent Act or that did not result in a decision of the Court: *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995); *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124 (2006); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009); *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399 (2012); and *Gunn v. Minton*, 568 U.S. 251 (2013). We applied analogous criteria when compiling the list of copyright cases in the Appendix.

One could speculate endlessly about the reasons for specific variations in cert grants across time. (The uptick in patent cases in the mid-1990s, for example, is commonly attributed to Justice Breyer joining the Court in 1994.²⁷⁸) But it is not difficult to understand why such variation is possible. Four votes are sufficient to grant certiorari, and sometimes a Justice will provide a courtesy fourth vote when three colleagues are inclined to grant.²⁷⁹ The power of a minority to take any particular case significantly increases the Court's sensitivity to the preferences of individual Justices.

This effect is compounded by the Justices' unbridled discretion at the certiorari stage. Though the Court's Rules suggest some factors the Justices may consider when deciding whether to grant certiorari,²⁸⁰ the Rules also warn that those factors are provided merely to "indicate the character of the reasons the Court considers" and "neither control[] nor fully measur[e] the Court's discretion."²⁸¹ So certiorari is not only unconstrained by the Court's prior decisions, but it is also unhemmed by the very factors the Court itself has announced. In the absence of precedent or rules, all that ultimately stands between circuit law and certiorari is the will of four Justices.

And the will of those Justices can change. For example, in 2020, Justice Thomas penned a lengthy statement respecting the denial of certiorari in a case involving § 230 of the Communications Decency Act.²⁸² Noting that a number of circuit courts "have . . . departed from the most natural reading of the text,"²⁸³ he concluded that "in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms."²⁸⁴ The "dubious" circuit law construing this provision dated to 1997, and had been the subject of at least five prior cert petitions, each denied without comment.²⁸⁵ Much like the

278. See John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 525 (2010).

279. PERRY, *supra* note 35, at 41-49.

280. SUP. CT. R. 10 (discussing situations such as circuit splits, conflict with Supreme Court precedent, and important questions not yet settled by the Supreme Court).

281. *Id.*

282. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 13-14 (2020) (citing 47 U.S.C. § 230).

283. *Id.* at 16.

284. *Id.* at 14.

285. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004); *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *Herrick v. Grindr LLC*, 765 F. App'x 586 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019).

DMCA, § 230 had not once been interpreted by the Supreme Court, despite two decades of litigation about its meaning.²⁸⁶ The Court granted certiorari in a § 230 case just a few years later.²⁸⁷

To be clear, certiorari does not always mean disruption. Some cases involve procedural issues unlikely to involve significant reliance interests.²⁸⁸ On other occasions, the Court swiftly intervenes to correct an error made by a single circuit court.²⁸⁹ But when this occurs, it seems to be by happenstance, rather than out of concern for the stability of circuit law. Indeed, there does not seem to be a single modern example in which the Court has upheld a questionable interpretation of a statute on the grounds that some had come to rely on circuit law. While lower court decisions are occasionally mentioned in Supreme Court decisions, their most common fate is to simply disappear.

* * *

The vulnerability of circuit law is especially remarkable when one considers just how much hangs on it. Entire firms—some entire industries—derive much of their value from a particular understanding of what copyright law requires and permits. These understandings often rest on a circuit decision or two, with not a single Supreme Court decision even arguably on point. And they often bear the indicia of questions upon which reasonable jurists might disagree—tension between plain meaning and statutory structure, for example, or an undefined standard entrusted to judicial development. It is anyone's guess whether the Court would adopt the same conclusions if forced to decide. The best hope for anyone relying on this circuit law is that the Supreme Court will remain disinterested.

But that is a hope, not a strategy, and disinterest can turn to passion in an instant. When it does, central tenets of our copyright system—the rules of authorship, the scope of character protection, the boundaries of online safe harbors—could simply vanish, leaving those who have come to rely on those principles to fight a Supreme Court battle of first impression. That is not to say they would necessarily lose. But the risk is there, and the Court has shown no hesitation to review and reject principles of circuit law, no matter how longstanding.

No legislation would be necessary to trigger this disruption. Nor would it even require a majority of the Court. Four Justices would be enough. These four would not need to find a “superspecial justification”

286. Section 230 was enacted as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The DMCA was enacted just two years later. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2680 (1998).

287. See *Gonzalez v. Google LLC*, 143 S. Ct. 80 (2022) (granting certiorari).

288. See, e.g., *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

289. See, e.g., *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

for overruling precedent²⁹⁰—they would simply be exercising their boundless discretion to pick and choose their cases. They would have no obligation to explain their sudden interest. They would not even have to put their names on the order. The circuit law on which industries have been built could crumble without reason or warning. It would only take nine words:

The petition for a writ of certiorari is granted.

IV. REVISITING COPYRIGHT UNCERTAINTY

Courts and scholars have long recognized that copyright law is uncertain. But they have consistently placed the blame for this on a story of technological progress. The incompleteness of the prevailing account typically excuses the Court's own role in unsettling copyright law. Still, identifying this additional source of copyright uncertainty ultimately leads to hope. A certain amount of fragility attributed to external sources may be inevitable. But fragility rooted in the judicial process could be more plausibly addressed by procedural or substantive reforms.

A. *The Conventional Account*

Once one recognizes the centrality of circuit law in copyright doctrine—and the Supreme Court's willingness to later revisit that circuit law—the Court's role in creating copyright uncertainty might seem obvious. But this phenomenon has been absent from prior accounts of copyright uncertainty, which have focused almost exclusively on a story of technological disruption.

In the conventional telling, innovation is the archnemesis of stable copyright law. At root, the problem is that there is just no way to write a copyright law that adequately anticipates the march of technological progress. This results in opportunism, as participants in the copyright system exploit loopholes created by technologies that the drafters of the latest statute never contemplated. And, ultimately, courts must either close these loopholes through creative reading of statutes or wait for Congress to update the law. All of this understandably takes time. And before these various actors even have the chance to settle one unforeseen question, the next one inevitably arises, leaving the copyright system in a state of perpetual uncertainty.

This account pervades the copyright literature, so much that it would be impossible to summarize it with anything approaching completeness. To provide just a few examples, in a highly influential article published in 1989, Professor Jessica Litman explained: "Throughout its history, copyright law has had difficulty accommodating technological change. . . . Whatever copyright statute has been on the books

290. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

has been routinely, and justifiably, criticized as outmoded.”²⁹¹ Likewise, as Professors Shyamkrishna Balganes and Gideon Parchomovsky more recently argued: “Very few legal areas are as profoundly affected by technological change as is copyright law. This reality of constant technological change . . . has required copyright law to update the applicability of its core goals and ideals to new situations.”²⁹² And the same story features prominently in *Copyright’s Highway*, the widely cited book by treatise author and professor Paul Goldstein:

As the pace of technological change quickens, Congress seems less and less able to adjust copyright laws to the changes. In the two centuries since it passed the first American copyright act, Congress has been playing catch-up with new technologies—first photographs, then phonograph records, motion pictures, radio, broadcast television, and cable television—usually about twenty years behind the new technology.²⁹³

Similar explanations abound. It seems that nearly every prominent copyright scholar has at some point embraced or echoed the sentiment.²⁹⁴

291. Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 277 (1989).

292. Shyamkrishna Balganes & Gideon Parchomovsky, *Equity’s Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1861-62 (2015).

293. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM THE PRINTING PRESS TO THE CLOUD* 21 (2d ed. 2019).

294. See, e.g., Ginsburg, *supra* note 49; Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 64 (2002) (“It would be a mistake, however, to view copyright as a static body of law. Its very contours have been shaped by advances in the technologies of creating, reproducing, and disseminating such works.”); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 552 (2007) (“Virtually every week a new technology issue emerges, presenting questions that existing copyright rules cannot easily answer.”); Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1835 (2009) (“Whenever technological advances create new means of making copies or communicating copyrighted works, difficult questions arise as to how boundaries should be drawn around new uses of content created by the new technology.”); Shyamkrishna Balganes, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1572 (2009) (“An overwhelmingly large number of copyright cases, both historically and in the recent past, have involved markets for new uses—most prominently, uses involving new technologies.”); Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 176 (2012) (“New disputes at the intersection of copyright and technology arise every single year as new technologies and new business practices challenge the status quo.”); Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891; Kristelia A. Garcia, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 215-16 (2019) (“[T]he rapid pace with which these technologies evolve makes it difficult for copyright law to adequately address—or, in some cases, to address at all—the myriad legal concerns they present.”); see also BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 110 (1967) (“But even after the utmost efforts at optimal legislative answers on these or other lines, there will remain a danger of freezing into permanent law provisions unduly indefinite or merely adventitious or wildly anticipatory.”).

For its part, the Supreme Court has not only recognized the possibility that technological change can disrupt copyright law, but it has invoked that phenomenon as a reason *not* to settle that law any more than necessary.²⁹⁵

Because it rings of the inevitable, this view of copyright uncertainty ends up being quite sympathetic to all involved. It is not that Congress has failed to write good copyright laws (though many scholars have argued that too). Rather, *any* copyright law is doomed to be outdated from the start.²⁹⁶ No matter how valiantly the legislature might seek to grab the reins of the unwieldy technological beast, it will inevitably be foiled by the very next contortion. The same observation suggests that any reform to settle copyright law is doomed to fail as well. Unless we are to halt the march of technological progress, we must accept the uncertainties of copyright law as an inexorable fact of life.

But the conventional account is incomplete. A first sign of trouble is that this explanation for copyright law's uncertainty does a surprisingly poor job describing the Supreme Court's modern copyright jurisprudence. Reviewing the cases the Court has decided since 1976, one finds little evidence of technological change, even in cases that seem to involve the pinnacle of copyright uncertainty. For example, consider *Stewart v. Abend's* whiplash ruling about the ability to continue using derivative works following an author's death.²⁹⁷ Nothing about this conundrum—resolved, remember, in 1990—could be blamed on unanticipated technology. Films had been around since 1888, and Congress amended the Copyright Act in 1912 to ensure they received copyright protection.²⁹⁸ Indeed, the very statute at issue in *Abend* specifically contemplated distinct copyrights for dramatizations, novelizations, and translations based on existing works.²⁹⁹ It simply failed to explain how the rights to these derivative works would be affected by an author's death.

Or consider *Kirtsaeng's* 2013 reversal of the longstanding rule that the first sale doctrine did not apply to copies sold outside the United States. Again, one struggles to discern the technological change motivating the controversy. The practice of trading books across international borders predated the Copyright Act of 1976 by several thousand years. In fact, the statute explicitly empowered copyright owners to

295. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (“Given the rapidly changing technological, economic, and business-related circumstances, we believe we should not answer more than is necessary to resolve the parties’ dispute.”).

296. See Litman, *supra* note 291, at 277-78; Balganesch & Parchomovsky, *supra* note 292, at 1861.

297. 495 U.S. 207, 227 (1990).

298. See 1912 Townsend Amendment, Act of August 24, 1912, Pub. L. No. 62-303, ch. 356, § 5(l)-(m), 37 Stat. 488 (adding motion pictures to the acts respecting copyrights).

299. An Act to Amend and Consolidate the Acts Representing Copyright, Pub. L. No. 60-349, ch.320, §§ 1(b), 6, 35 Stat. 1075, 1075, 1077 (1909).

prevent the importation of foreign-produced copies across the U.S. border. It just wasn't clear if that prohibition could apply to foreign-produced copies sold by the copyright owner herself.

These are only examples. But, in this regard, *Kirtsaeng* and *Abend* are representative of the Court's modern jurisprudence. Among all Supreme Court copyright decisions since 1976, one can find only three cases in which the technological disruption account even plausibly fits: *Aereo* (discussed above), *Tasini*³⁰⁰ (involving the collection of newspaper articles into an electronic database), and *Grokster*³⁰¹ (involving a software maker's liability for peer-to-peer file sharing). The other twenty-three involved technology that was either known in 1976 or was simply irrelevant to the question before the Court.³⁰² In other words, fewer than fifteen percent of the Court's recent copyright decisions involve any form of technological disruption. The pace of these decisions is glacial—not even one per decade. And, contrary to the view that any copyright statute will be “immediately obsolete,” the first disruption case did not reach the Court until the 1976 Act was at least twenty years old.³⁰³

To be sure, there is some truth to the conventional view. When new technologies emerge, they often do raise new questions under the Copyright Act—as a large body of circuit law can attest. But the interaction between circuit law and the Supreme Court's certiorari practices can introduce uncertainty all by itself. Hence the longstanding doubt surrounding such lo-fi matters as character copyrights,³⁰⁴ the definition of

300. *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001). Whether even this development was unforeseeable in 1976 is debatable, as electronic research services such as Lexis had launched several years before. CHARLES P. BOURNE & TRUDI BELLARDO HAHN, A HISTORY OF ONLINE INFORMATION SERVICES 1963-1976, at 257 (2003).

301. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

302. Some might think that *Sony v. Universal* belongs on this list because it involves an important technology not specifically addressed by the statute. But that case was filed shortly after the law's passage in 1976. See *Universal City Studios Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979). And, in any event, the legislative history demonstrates that Congress was aware of VCRs. *Prohibiting Piracy of Sound Recordings: Hearing on S. 646 and H.R. 6927 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92nd Cong. 22-23 (1971) (statement of Barbara A. Ringer, Assistant Register of Copyrights). Likewise, though *Google v. Oracle* involved copyright protection for application program interfaces (and hence technology), these interfaces were in use well before the 1976 Act. See, e.g., Ira W. Cotton & Frank S. Groatorex, Jr., *Data Structures and Techniques for Remote Computer Graphics*, 33 AFIPS Conference Proceedings 533, 535 (1968), <https://dl.acm.org/doi/pdf/10.1145/1476589.1476661> [<https://perma.cc/59WT-ET9X>]. In both cases, Congress failed to answer important questions about the copyright treatment of a particular technology, but in neither case can the failure be excused by later-occurring technological developments.

303. Arguably, the first case in which the Court confronted a new question of statutory interpretation following technological disruption was *Lotus v. Borland*, which involved the copyrightability of user interface designs. But after briefing and argument, the decision below was affirmed by an equally divided Court. See *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 516 U.S. 233, 233 (1996).

304. See *supra* Section III.A.1.

authorship,³⁰⁵ and the scope of the first sale defense.³⁰⁶ For this mechanism to operate, one needs only a statutory ambiguity, an initial absence of Supreme Court guidance, and industry reliance on the resulting circuit law. No shiny new technology required.

While this mechanism can operate independent of technological change, the two can also interact and compound. For example, consider the cloud DVRs at issue in *Aereo*.³⁰⁷ Viewed in isolation, the question before the Court seems to fit quite squarely within the conventional story of technological change disrupting copyright law. It is fair to assume that Congress in 1976 did not foresee the possibility of streaming live television over the Internet, much less an array of microantennas smaller than a fingernail. But while a new technology may have been the root cause of the uncertainty at issue, we should not overlook the Court's own role in propagating that uncertainty. Recall that the Court had a perfectly good opportunity to answer the *Aereo* question five years earlier in *Cablevision*, a case it considered close enough to call for the views of the Solicitor General. Reasonable minds could debate whether the benefits of percolation can justify the significant reliance interests upset in *Aereo*, but it would be facile to dismiss the entire saga as the inevitable product of technological change.

Indeed, the fact that the Supreme Court so infrequently confronts questions involving new technologies suggests that the interaction between these two phenomena may be substantial. As technological developments open new statutory ambiguities, lower courts are almost inevitably operating without Supreme Court guidance. And the Supreme Court almost always allows circuit law to stand as the interim answer to these questions of first impression, without confirming or denying that the lower courts have gotten it right. In other words, there seems to be no shortage of future *Aereos* waiting in the wings.

B. *The Possibility of Improvement*

As a descriptive matter, the technology-focused account of copyright uncertainty is not wrong; it is simply incomplete. But its incompleteness has important consequences for the possibility of copyright reform. Simply put, there is more hope for a reliable and predictable copyright system than has been previously assumed.

305. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (holding that coauthorship turns on "objective manifestations of . . . shared intent"); see also *Brown v. Flowers*, 196 F. App'x 178, 188 (4th Cir. 2006) (unpublished) (Gregory, J., concurring in the judgment and dissenting in part) ("Thus, as it stands today, there is a division of authority as to whether a joint-work claimant must make an independently copyrightable contribution in order to satisfy the authorship requirement.").

306. See *supra* Section II.B.

307. See *supra* Section II.C.

Copyright scholars' nearly exclusive focus on technological disruption seems to have engendered a sense of despair about the possibility of creating a reliable copyright system. Because innovation will inevitably upset expectations around copyright law, there is little point in trying to moderate the frequency or magnitude of the resulting disruption. Neither Congress nor the judiciary can be blamed for failing to predict the unimaginable. We should expect law to flail, given the ever-shifting nature of the technologies it hopes to regulate.

But this gives the courts a pass they do not deserve. Accepting that technological change may provoke new questions for copyright law should not obscure the distinct matter of how effectively the legal system confronts and answers those new questions. To illustrate, just imagine two decisionmaking systems, each of which is tasked with the job of applying an old statute to a new legal question. The first deliberates modestly and soon gives a conclusive answer about how a new technology will interact with copyright law. The other deliberates for decades, sometimes forever, and provides only weak interim signals about the answer it may or may not someday give. The two are not equally competent decisionmaking systems. Accepting that there is real work to be done in determining how copyright law should regulate a previously unknown technology, that work can be done well or poorly. It would be pure excuse-making for a defender of the latter system to throw up her hands and exclaim, "Technology!"

It may seem counterintuitive that the identification of a new and different problem for copyright law could be cause for hope. This is possible only because defenders of the current arrangement have cast the blame so consistently on external forces. Recognizing that a significant amount of copyright uncertainty is endogenous—that it comes from the legal system, not the laboratory—reveals a path to reducing that uncertainty. Courts may be powerless to stem the tide of technological change. But answering legal questions? That they can do.

At the same time, recognizing the Supreme Court's disrupting role in copyright law has important consequences for the direction that future reform should take. Scholars have produced no shortage of proposals to rewrite the copyright laws to make them more capable of adapting to new technological developments.³⁰⁸ But there are limits to the certainty that any legislation might hope to provide, so long as the Supreme Court continues its destabilizing practices at the apex of the copyright system. In short, substantive reform should be preceded, or

308. See, e.g., Litman, *supra* note 291, at 333; Sheldon W. Halpern, *The Art of Compromise and Compromising Art: Copyright, Technology, and the Arts*, 50 J. COPYRIGHT SOC'Y U.S.A. 273, 290-91 (2003); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1228 (2010); Garcia, *supra* note 294, at 259-64.

at least accompanied, by procedural reform. Otherwise, rewriting the copyright laws would risk losing what little Supreme Court precedent we have, restarting the glacial process of percolating to nowhere.

V. IS COPYRIGHT SPECIAL?

Having established that copyright is vulnerable to disruption by certiorari, it is reasonable to wonder whether the same phenomenon arises in other areas of the law as well. After all, many of the practices described here are facially trans-substantive. There is not a special certiorari rule for copyright cases, for example, or a doctrine that would single out the circuit law of copyright for special scrutiny. Perhaps rather than describing something specific to copyright, we are simply observing copyright's share of a larger juridical phenomena.

But there does appear to be something copyright-specific happening here. While other areas of law surely have their own *Aereos* and *Abends*, copyright law has several distinctive features that make it particularly susceptible to this form of disruption. In short, these are: (1) copyright's sprawling and ambiguous statute, (2) an atypical geographic concentration of copyright litigation, (3) decades of comparative disinterest in copyright at the Supreme Court, and (4) the use of economically significant, multigenerational reliance interests as a means to the law's ends. While some of these features can be found in one area of law or the other, in copyright they combine in a particularly pernicious way.

Begin with the statute itself. The Copyright Act of 1976 was originally enacted as a 33,000-word behemoth. But despite its length, the 1976 Act manages to lack specificity or clarity on a number of points. The law was drafted in an era when purposivism and pragmatism still reigned supreme. Many important details are essentially baked into the legislative history, rather than being spelled out in statutory text.³⁰⁹ Other ambiguities in the law seem to be the product of hastily forged industry compromises, with an intended meaning shared by those "in the room," but somewhat clumsily translated to enacted law.³¹⁰

Ordinarily, one might expect a sprawling, ambiguous, and economically significant statute would be answered by a significant body of Supreme Court precedent. But this brings us to a second distinctive

309. For example, secondary liability for copyright infringement is hung on two cryptic words of the statute—"to authorize"—with the details left to legislative history and judicial development. See 17 U.S.C. § 106; H.R. REP. NO. 94-1476, at 61 (1976). For other commentary on copyright law's ambiguity, see 1 NIMMER & NIMMER, *supra* note 42, § 2.03[A] ("All that can be said by way of summary is that the concept 'works of authorship' is intentionally left vague under the Act."); Litman, *supra* note 26, at 881 ("The statute is facially ambiguous, complicated, and confusing.").

310. See, e.g., Garcia, *supra* note 294, at 250; Litman, *supra* note 26, at 881 ("The statute is facially ambiguous, complicated, and confusing. Courts' attempts to apply the plain meaning rule have left them perplexed.").

feature of copyright: a highly skewed geographic distribution of precedent-producing litigation. As others have documented, the Court principally relies on nationwide percolation in the lower courts to identify difficult and important questions of statutory interpretation.³¹¹ In theory, easy or insignificant questions will produce circuit harmony on their own. A circuit split, by contrast, signals that the question was important enough to generate significant nationwide litigation *and* that reasonable minds could disagree about the answer. This makes a question a prime candidate for a spot on the Court's crowded docket.

But a central assumption of this percolation model—that important questions will be the subject of robust national litigation—simply does not hold for copyright law. For one, copyright litigation is intensely concentrated in just two circuits, the Second and the Ninth.³¹² Moreover, even when a case does arise elsewhere, other circuits have paid overt deference to these “de facto copyright courts” of the United States.³¹³ So unlike the typically rigorous percolation found around a statute of similarly national significance, difficult questions of copyright law are often only seriously contested before a single circuit or two.

The lack of circuit splits may explain the third distinctive feature of copyright—a persistent lack of attention by the Supreme Court. As noted above, the Court has interpreted the 1976 Act on only twenty-three occasions.³¹⁴ To put that number in context, consider the attention the Court has given two neighboring statutes, the Patent Act and the Bankruptcy Code. Like copyright, these statutes seek to engender long term reliance by private actors. But Supreme Court decisions construing the current Patent Act outnumber precedents involving the current Copyright Act by a factor of almost four to one.³¹⁵ The current Bankruptcy Code enjoys an even greater advantage, with ninety-four Supreme Court decisions decided since the Code was overhauled in 1978.³¹⁶ Copyright law seems affirmatively neglected by comparison.

311. See generally PERRY, *supra* note 35.

312. See *supra* note 40 and accompanying text.

313. See *supra* note 41 and accompanying text.

314. See *infra* Appendix.

315. This count is based on Lisa Ouellette's list with the handful of exclusions described above. See *supra* note 277.

316. See RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 31 (2017) (reporting eighty-two cases between 1978 and October Term 2015). Since Mann's study, the Court has decided another twelve bankruptcy cases. See *Husky Int'l Elec., Inc. v. Ritz*, 578 U.S. 356 (2016); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115 (2016); *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017); *Midland Funding, LLC v. Johnson*, 581 U.S. 224 (2017); *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018); *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018); *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960 (2018); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019); *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019); *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713 (2020); *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020); *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021).

Finally, reliance matters for copyright law. This is not the case for every question of statutory interpretation. Procedural issues and questions of public rights tend to implicate smaller reliance interests, as the Court's own rules for *stare decisis* recognize.³¹⁷ Substantive questions of copyright law, on the other hand, implicate reliance concerns of the first order. Reliance interests are *the* central means by which copyright law fulfills its constitutionally commanded goal of "promot[ing] the Progress of Science and useful Arts."³¹⁸ The need to create and manage these reliance interests is not simply a "plus factor"—as they might be when interpreting, say, a bill to update pension benefits.³¹⁹ For copyright, these interests are the entire ballgame.

Other areas of law share some of these features. For example, the Armed Career Criminal Act (ACCA) certainly has its share of ambiguities.³²⁰ But because ACCA is regularly the subject of criminal appeals nationwide, these ambiguities have resulted in circuit splits, which in turn have been answered by a raft of Supreme Court decisions.³²¹ As another example, patent law likewise deploys private reliance interests to promote progress, and even has an unusual distribution of circuit case law. But Supreme Court clerks understand that patent law does not "percolate," and so deploy different *certiorari* criteria when reviewing petitions in that domain.³²² Copyright law is stuck in the middle—it looks like ACCA but litigates more like patent law.

Obviously, a scholar courts controversy by suggesting that his or her particular area of the law is special. Perhaps those working in other areas will argue that similar or even more problematic features can be found in their domains as well. But even if they are right, the existence of a worse problem somewhere else would do little to help the creators and creative industries who must rely on the copyright system. For them, the significance of copyright's fragility does not turn on its uniqueness.

In any event, we should not be under the illusion that the Court's facially neutral procedures have substantively neutral effects. Copyright's vulnerability turns on the drafting style of the statute, the geo-

317. See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

318. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, § 8, cl. 8. To this end, copyright assures authors the right to their original expression" (citation omitted)).

319. See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 743 (1984).

320. See 18 U.S.C. § 924.

321. See, e.g., *Borden v. United States*, 141 S. Ct. 1817 (2021); *Shular v. United States*, 140 S. Ct. 779 (2020); *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Johnson v. United States*, 559 U.S. 133 (2010).

322. See Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1347-49 (2018).

graphic distribution of litigation, and the Justices' apparent disinterest in its subject matter. Even if some of these features can be found elsewhere, there is something of a domain-specific process at work here, not simply the predictable effects of general-purpose Court procedures.

CONCLUSION

The claims here are ultimately modest: that the Supreme Court lacks a framework for balancing legal certainty against decisional accuracy in areas it infrequently visits, and that our copyright system is less reliable as a result. The significance of these effects and potential reforms to address them will be the subject of future work.

For the moment, however, we emphasize that the problem is not the mere presence of uncertainty in the copyright system. There is an inherent tradeoff between specificity and flexibility in any area of law, a question that has been theorized in many different forms and that arises in the choices between rules versus standards, civil law versus common law, judicial maximalism versus judicial minimalism, and strong versus weak theories of stare decisis.³²³ As this robust literature can attest, it is hardly desirable to eliminate uncertainty at any cost—indeed, some amount of uncertainty may even be beneficial.³²⁴ Much the same here, the optimal balance between the stability and flexibility of law defies an easy answer.

The crux of the problem identified here is that there seems to be no framework for mitigating these concerns at all. Though reasonable minds might disagree about the optimal strength of stare decisis, for example, no one would dispute that the Court *should* have a mechanism for evaluating arguments from precedent. But when it comes to the Supreme Court's relationship to the circuit law of copyright, the balance between flexibility and stability appears to be left entirely to ad hoc decisionmaking at best, or chance at worst. At the certiorari stage, the Court looks for circuit conflict—a tactic that often breaks down because copyright litigation is concentrated in two highly influential circuits. At the merits stage, the Court considers the question de novo, unless it happens to find a precedent of its own to be relevant,

323. See generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643 (2000); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459 (2013); Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179 (2014).

324. See Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985, 993 (1999).

in which case it reviews with substantial deference to that precedent. Though the Court occasionally defers to circuit law in other areas, its reasons for doing so rarely apply in copyright. Indeed, there is not a single modern example in which the Court has expressed any deference to a lower court copyright decision. As a result, there is no point in this process in which the Court openly considers the reliance interests that either will form or have already formed around lower court copyright decisions. The unmanaged interaction of these two discrete decisionmaking steps threatens to produce disruption that is both unconsidered and unintended.

There are a number of ways these concerns could be brought into Supreme Court practice. At bottom, certainty in the copyright system could be increased in one of three ways: (1) granting certiorari more readily when a new question of copyright law emerges; (2) granting certiorari more *reluctantly* after reliance interests have grown around circuit law; and (3) at the merits stage, deferring to lower court interpretations that have engendered reliance. Each of these could be implemented either legislatively or judicially, though with substantial variation in the balance between flexibility and credible commitment. And, to be clear, not every instance of industry reliance on circuit law merits protection. An ideal solution would likely include some mechanism for weighing the value of a correct decision against the disruption caused by reversing a longstanding circuit precedent.

Finally, the design of procedural reform should also consider the possibility that variations of this problem can be found in other areas of law as well. Perhaps copyright has it worst—a tangle of multigenerational property rights, an ambiguous but sprawling statute, lopsided influence among the circuit courts, and a century of only intermittent interest from the Supreme Court. But even if copyright law is an outlier, the same procedural reforms that stabilize the copyright system could potentially offer collateral benefits for other domains.

APPENDIX

SUPREME COURT COPYRIGHT DECISIONS 1916-1975

Case		Citations in Courts of Appeals (COA) (1996-2022)
<i>Herbert v. Shanley Co.</i>	242 U.S. 591 (1917)	0
<i>International News Service v. Associated Press</i>	248 U.S. 215 (1918)	26
<i>L.A. Westermann Co. v. Dispatch Printing Co.</i>	249 U.S. 100 (1919)	7
<i>Manners v. Morosco</i>	252 U.S. 317 (1920)	0
<i>Fox Film Corp. v. Knowles</i>	261 U.S. 326 (1923)	1
<i>Lumiere v. Mae Edna Wilder, Inc.</i>	261 U.S. 174 (1923)	0
<i>Buck v. Jewell-LaSalle Realty Co.</i>	283 U.S. 191 (1931)	3
<i>George v. Victor Talking Machine Co.</i>	293 U.S. 377 (1934)	0
<i>Douglas v. Cunningham</i>	294 U.S. 207 (1935)	10
<i>Washingtonian Publishing Co. v. Pearson</i>	306 U.S. 30 (1939)	2
<i>Sheldon v. Metro-Goldwyn Pictures Corp.</i>	309 U.S. 390 (1940)	28
<i>Fred Fisher Music Co. v. M. Witmark & Sons</i>	318 U.S. 643 (1943)	13
<i>F.W. Woolworth Co. v. Contemporary Arts</i>	344 U.S. 228 (1952)	33
<i>Mazer v. Stein</i>	347 U.S. 201 (1954)	45
<i>De Sylva v. Ballentine</i>	351 U.S. 570 (1956)	50
<i>Miller Music Corp. v. Charles N. Daniels, Inc.</i>	362 U.S. 373 (1960)	11
<i>Public Affairs Associates, Inc. v. Rickover</i>	369 U.S. 111 (1962)	18
<i>Fortnightly Corp. v. United Artists Television, Inc.</i>	392 U.S. 390 (1968)	9
<i>Goldstein v. California</i>	412 U.S. 546 (1973)	26
<i>Teleprompter Corp. v. Columbia Broadcasting System, Inc.</i>	415 U.S. 394 (1974)	5
<i>Twentieth Century Music Corp. v. Aiken</i>	422 U.S. 151 (1975)	33

SUPREME COURT COPYRIGHT DECISIONS SINCE 1976

Statutory Decisions

Case		COA Overturned	Citations in COA (1996-2022)
<i>Sony Corp. of America v. Universal City Studios, Inc.</i>	464 U.S. 417 (1984)	9th ³²⁵	174
<i>Harper & Row Publishers, Inc. v. Nation Enterprises</i>	471 U.S. 539 (1985)	2d ³²⁶	194
<i>Mills Music, Inc. v. Snyder</i>	469 U.S. 153 (1985)	2d ³²⁷	21
<i>CCNV v. Reid</i>	490 U.S. 730 (1989)	2d, 7th ³²⁸	239
<i>Stewart v. Abend</i>	495 U.S. 207 (1990)	2d ³²⁹	76
<i>Feist Publications, Inc. v. Rural Telephone Service Co.</i>	499 U.S. 340 (1991)	10th ³³⁰	374
<i>Campbell v. Acuff-Rose Music, Inc.</i>	510 U.S. 569 (1994)	6th ³³¹	145
<i>Fogerty v. Fantasy</i>	510 U.S. 517 (1994)	9th ³³²	328
<i>Feltner v. Columbia Pictures Television, Inc.</i>	523 U.S. 340 (1998)	9th ³³³	79*
<i>Quality King Distributors, Inc. v. Lanza Research International, Inc.</i>	523 U.S. 135 (1998)	9th ³³⁴	16*
<i>New York Times Co., Inc. v. Tasini</i>	533 U.S. 483 (2001)	—	31*

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

326. *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195 (2d Cir. 1983).

327. *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733 (2d Cir. 1983).

328. *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984); *Evans Newton, Inc. v. Chi. Sys. Software*, 793 F.2d 889 (7th Cir. 1986).

329. *Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir. 1977).

330. *Rural Tel. Serv. Co. v. Feist Publ'ns*, 916 F.2d 718 (10th Cir. 1990); *see also Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo.*, 768 F.2d 145 (7th Cir. 1985); *Hutchinson Tel. Co. v. Fronteer Directory Co. of Minn., Inc.*, 770 F.2d 128 (8th Cir. 1985).

331. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992).

332. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524 (9th Cir. 1993); *see also Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010 (7th Cir. 1991).

333. *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997).

334. *Lanza Rsch. Int'l, Inc. v. Quality King Distribs., Inc.*, 98 F.3d 1109 (9th Cir. 1996).

Case		COA Overturned	Citations in COA (1996-2022)
<i>MGM Studios Inc. v. Grokster, Ltd.</i>	545 U.S. 913 (2005)	9th ³³⁵	104*
<i>Reed Elsevier, Inc. v. Muchnick</i>	559 U.S. 154 (2010)	1st, 2d, 4th, 5th, 6th, 10th, 11th ³³⁶	266*
<i>Kirtsaeng v. John Wiley & Sons, Inc.</i>	568 U.S. 519 (2013)	2d, 9th ³³⁷	33*
<i>American Broadcasting Companies, Inc. v. Aereo, Inc.</i>	573 U.S. 431 (2014)	2d ³³⁸	13*
<i>Petrella v. MGM, Inc.</i>	572 U.S. 663 (2014)	9th ³³⁹	72*
<i>Kirtsaeng v. John Wiley & Sons, Inc.</i>	579 U.S. 197 (2016)	2d, 4th, 5th ³⁴⁰	44*
<i>Star Athletica, L.L.C. v. Varsity Brands, Inc.</i>	580 U.S. 405 (2017)	2d ³⁴¹	31*
<i>Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC</i>	139 S. Ct. 881 (2019)	5th, 9th ³⁴²	15*
<i>Rimini Street, Inc. v. Oracle USA, Inc.</i>	139 S. Ct. 873 (2019)	9th ³⁴³	30*
<i>Georgia v. PRO, Inc.</i>	140 S. Ct. 1498 (2020)	2d, 9th ³⁴⁴	7*

335. *MGM Studios Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

336. *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994); *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281 (11th Cir. 2000); *Murray Hill Publ'ns, Inc. v. ABC Commc'ns., Inc.*, 264 F.3d 622 (6th Cir. 2001); *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003); *Positive Black Talk Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357 (5th Cir. 2004); *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195 (10th Cir. 2005); *Muchnick v. Thomson Corp. (In re Literary Works in Elec. Databases Copyright Litig.)*, 509 F.3d 116 (2d Cir. 2007).

337. *John Wiley & Sons, Inc. v. Kirtsaeng*, 605 F. App'x. 48 (2d Cir. 2015).

338. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

339. *Petrella v. MGM, Inc.* 695 F.3d 946 (9th Cir. 2012).

340. *Hogan Sys. v. Cybresource Int'l, Inc.*, 158 F.3d 319 (5th Cir. 1998); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); *John Wiley & Sons, Inc. v. Kirtsaeng*, 605 F. App'x. 48 (2d Cir. 2015).

341. *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005); *see also Galiano v. Harrah's Operating Co., Inc.*, 416 F.3d 411 (5th Cir. 2005); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913 (7th Cir. 2004).

342. *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984); *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612 (9th Cir. 2010).

343. *Twentieth Century Fox Film Corp. v. Ent. Distrib.*, 429 F.3d 869 (9th Cir. 2005).

344. *Prac. Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997); *Cnty of Suffolk v. First Am. Real Est. Sols.*, 261 F.3d 179 (2d Cir. 2001).

Case		COA Overturned	Citations in COA (1996-2022)
<i>Google LLC v. Oracle America, Inc.</i>	141 S. Ct. 1183 (2021)	Fed. Cir. ³⁴⁵	16*
<i>Unicolors, Inc v. H&M Hennes & Mauritz, L.P.</i>	142 S. Ct. 941 (2022)	9th ³⁴⁶	3*

Constitutional Decisions

Case		COA Overturned	Citations in COA (1996-2022)
<i>Eldred v. Ashcroft</i>	537 U.S. 186 (2003)	None	59*
<i>Golan v. Holder</i>	565 U.S. 302 (2012)	None	22*
<i>Allen v. Cooper</i>	140 S. Ct. 994 (2020)	None	17*

* Indicates a decision announced between 1996 and 2022. As a result of time-window bias, the reported citation count may understate the significance of more recent decisions.

345. Oracle Am., Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018).

346. Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 595 F.3d 1194 (9th Cir. 2020).

