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Taming the "Frankenstein Monster": Copyright Claim Compatibility with the Class Action Mechanism

Renee G. Stern*

INTRODUCTION

In a 2013 opinion denying class certification to a putative class of copyright holders in *Football Association Premier League Ltd. v. YouTube, Inc.*, Judge Stanton of the Southern District of New York wrote:

Generally speaking, copyright claims are poor candidates for class-action treatment. They have superficial similarities Thus, accumulation of all the copyright claims, and claimants, into one action will not simplify or unify the process of their resolution, but multiply its difficulties over the normal one-by-one adjudications of copyright cases.¹

Judge Stanton went on to characterize the case as a "Frankenstein monster posing as a class action"—that is, as an unnatural attempt to unify mismatched parts.² Given the individualized inquiries involved in resolving copyright infringement claims, Judge Stanton's position against certifying such classes makes intuitive sense. If class actions aim to resolve common claims, questions that address only a single class member would push against the efficiency of the class action mechanism and an attempt to unite those claims would only lead to judicial disaster. However, copyright infringement can occur in a sweeping manner through a single act or identical course of conduct involving a broad set of works.³ In these cases, the tension between copyright law and the class action mechanism can be overstated. The danger of such overstatement is the potential for judges to give such wholesale treatment to all putative copyright-holder classes instead of assessing them on a case-by-case basis.⁴

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1. *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 65–66 (S.D.N.Y. 2013).

2. See "Frankenstein," in *THE AMERICAN HERITAGE NEW DICTIONARY OF CULTURAL LITERACY* (3d ed. 2005) (describing Dr. Frankenstein's monster as "a manlike monster from parts of cadavers [brought] to life by the power of an electrical charge").

3. For instance, an infringer may copy and upload hundreds of copyrighted films to an online streaming platform. The action is exactly the same across the entire set of works, though each work has unique attributes.

4. See, e.g., *Blagman v. Apple Inc.*, No. 12 Civ. 5453(ALC)(JCF), 2013 WL 2181709, at *8 (S.D.N.Y. May 20, 2013) (agreeing with the *Football Association* court that "copyright claims are poor candidates for class-action treatment" but dismissing defendant's motion to strike because it is

To put this point in context, assume the following hypothetical set of facts: two members of a local photography guild, Arnold and Beth, approach a lawyer in their home city of New York about the possibility of bringing a copyright infringement claim against an online gallery, PhotogaPub, on behalf of a worldwide class of photographers. PhotogaPub initially went about obtaining authorization from various photographers to post their work to the site—Arnold even granted the site a nonexclusive license to make digital copies of five of his photos and to display them online to users within the United States. However, many photographers, such as Beth, did not grant any such permission and believe that PhotogaPub's reposting of their work constitutes an infringement. Even though Arnold granted the site a limited license as to some of his work, PhotogaPub went on to repost unlicensed copies of his work and refused to limit access to the licensed photos to users within the United States. Arnold and Beth are convinced that thousands of pictures on PhotogaPub's site are infringements. Their lawyer instinctively believes their claims would be well-suited for class-wide adjudication, but she is wary of the implications of the *Football Association* court's stance.

Contrary to Judge Stanton's assertion, this Note will argue that certifying a class of copyright holders—such as the one Arnold and Beth seek to represent in the PhotogaPub hypothetical—is not presumptively impossible, but that putative copyright holder classes and types of copyright claims may lie at various points along a spectrum of certifiability. To guide this argument, this Note will periodically revisit the PhotogaPub fact pattern to work through the different ways that a putative class of copyright holders can tailor itself to meet the class certification requirements.

Part I.A. will start the discussion with an overview of current class certification jurisprudence. It will explain how the Supreme Court has heightened the requirements necessary to certify a class by strengthening commonality and expanding the more difficult Federal Rule of Civil Procedure 23(b)(3) certification standard to encompass more types of classes than it previously did. Part I.B. will then discuss how certain aspects of copyright law can come into direct conflict with the uniformity required by Rule 23 and undermine a putative class's attempt at certification.

Part II will step back from the theoretical framework set out by Part I and analyze actual attempts by copyright holders to certify their claims on a class-wide basis. First, Part II.A. will demonstrate why Judge Stanton's *Football Association* case was a particularly poor candidate for class certification, properly characterized as a Frankenstein monster posing as a class action. However, as this Part will discuss further, *Football Association* represents the outer, non-certifiable end of the class certification spectrum. By looking at other cases, Part II.B. will demonstrate how claimants can limit and streamline their putative classes into manageable, certifiable groups. Part II.B. will then address *Authors Guild v. Google, Inc.* (*Google Books*), and the middle of the spectrum between *Football Association* and

procedurally errant to strike a class allegation for failure to satisfy the class certification requirements) (citing *Football Ass'n*, 297 F.R.D. 64).

Napster, where the claim appears to be fit for class-wide resolution but the class itself has some arguably non-certifiable aspects. Part II.C. will suggest that the Second Circuit's unease with making a definitive determination on the close call of class certification in *Google Books* led the court to push the assessment of a discrete issue—fair use—to avoid having to decide the class certification issue. The Second Circuit's quasi-issue certification move presents an alternative path for putative copyright holder classes that straddle the same lines as the putative *Google Books* class, rather than rolling the dice with the sometimes unpredictable class certification doctrine as to an entire claim.

I. CLASS ACTION AND COPYRIGHT INFRINGEMENT: AN OVERVIEW

A. THE GROWING BAR TO CLASS CERTIFICATION

Before considering the fitness of the class action mechanism for copyright infringement claims, it is important to revisit the class certification requirements. Rule 23(a) lays out the prerequisites to establishing class certification—numerosity, commonality, typicality of the representative parties' claims and adequacy of representation.⁵ In addition to these basic requirements, copyright holder classes must also satisfy one of the Rule 23(b) requirements; of these requirements, Rule 23(b)(3) establishes the greatest roadblock to putative classes, requiring that common questions of law or fact predominate over questions that are individualized to certain class members and that class-wide adjudication is superior to other available methods of resolving the controversy.⁶

Because 23(a)'s numerosity and typicality requirements present lesser bars to classes of copyright holders, which are often large and subject to the stringent standards of Rule 23(b)(3), I will devote less attention to these elements. Generally, courts have resisted defining strict numerical limits on class size and have instead focused on the ascertainability of the class size and prudential concerns such as judicial economy.⁷ In addition to concerns about judicial

5. FED. R. CIV. P. 23(a).

6. FED. R. CIV. P. 23(b)(3). While a putative class of copyright holders may theoretically utilize 23(b)(1) and 23(b)(2) as grounds for certification, these provisions of Rule 23 will not be the focus of this Note. Rule 23(b)(1) is typically used in cases where a defendant, if sued separately by each member of the class, might be ordered to take different types of actions to remedy the harm done. *See* FED. R. CIV. P. 23(b)(1). Because remedies in copyright infringement cases are fairly standard and do not involve different shades of injunctive relief, 23(b)(1) is not of great utility here. Similarly, copyright holder classes typically seek monetary damages, negating the utility of 23(b)(2) claims for injunctive relief for copyright holder classes. *See* FED. R. CIV. P. 23(b)(2).

7. *See, e.g.,* *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (Although the court noted that classes below a certain size would raise a presumption against numerosity and vice versa, it stressed that certain factors should still be considered, including "judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." (internal citations omitted)); *Rex v. Owens ex rel. Oklahoma*, 585 F.2d 432, 436 (10th Cir. 1978) ("In class action suits there must be presented some evidence of

economy, Rule 23 is also concerned with providing a fair resolution for each member of the class. Therefore, typicality asks whether the named plaintiff's claim is so "interrelated" with the class's claims that the named plaintiffs will fairly protect the absent class members.⁸ This concern overlaps with commonality and adequacy, which I will take in turn.⁹

With its decision in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court recast the commonality requirement and caused disagreement in the lower courts over the rigor of the commonality analysis. In *Wal-Mart*, a putative class of current and former Wal-Mart employees brought a Title VII action against Wal-Mart for alleged discrimination against women.¹⁰ Below, the Northern District of California certified the class, which included all female Wal-Mart employees nationwide, and the Ninth Circuit affirmed.¹¹ The Supreme Court reversed, reasoning that plaintiffs failed to establish commonality because they could not identify a uniform practice of discrimination that would provide a common answer to the claims presented by class members, who held positions at different levels throughout myriad regions across the United States.¹² Quoting Professor Nagareda, the Court concluded that commonality is not satisfied by "the raising of common 'questions' . . . but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."¹³ Therefore, plaintiffs' "claims must depend upon a common contention . . . of such a nature that is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."¹⁴

In dissent, Justice Ginsburg noted that the majority raised the threshold of the Rule 23(a) commonality requirement so that it now resembles Rule 23(b)(3)'s predominance requirement.¹⁵ If Justice Ginsburg's assertion is accepted, *Wal-Mart* has clear implications for putative 23(b)(1) and (b)(2) classes, which previously did not need to prove that common issues predominate over individual ones.¹⁶ This presumptive upsetting of the pre-*Wal-Mart* commonality standard has caused disagreement among lower courts. Where some lower courts take Justice Ginsburg's reading, others have taken narrower views of *Wal-Mart*'s effect on the commonality requirement. Such courts have certified classes even where

established ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement. There is, however, no set formula to determine if the class is so numerous that it should be so certified. The determination is to be made in particular circumstances of the case.").

8. Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982).

9. See *id.*

10. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2544 (2011).

11. See *id.* at 2546.

12. See *id.* at 2555–56.

13. *Id.* at 2551 (internal citations omitted).

14. *Id.*

15. See *id.* at 2566 (Ginsburg, J., dissenting).

16. See FED. R. CIV. P. 23(b)(1)–(2).

individualized actions had more of a hand in the alleged wrongdoing than a common course of action did.¹⁷ Yet other courts have shifted their focus away from *Wal-Mart's* purported transformation of commonality into predominance, holding that the decision heightened the commonality requirement but not to the level of predominance.¹⁸

However, even in such jurisdictions that do not read the decision as transforming commonality into a question of predominance, *Wal-Mart* still raised the class certification bar. The *Wal-Mart* Court held that claims for monetary relief that are not incidental to the requested injunctive relief cannot be certified under 23(b)(2) and must instead be certified under 23(b)(3).¹⁹ This holding makes claims for mixed injunctive and monetary relief subject to the predominance requirement where they otherwise would not have been.

Adequacy is the second major 23(a) hurdle. To satisfy the adequacy requirement, "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members."²⁰ The Supreme Court took up this requirement in *Amchem Products, Inc. v. Windsor*, where it affirmed the Third Circuit's order vacating the certification of a settlement class.²¹ Though *Amchem* involves a settlement class, its analysis of the adequacy requirement is accepted as the standard for non-settlement classes under Rule 23 as well.²² In *Amchem*, plaintiffs sought to certify a global settlement class of current and future asbestos-related claims.²³ The Court concluded that the representation was inadequate because plaintiffs sought to represent class members who suffered injuries due to asbestos exposure and those who were already exposed to asbestos but had yet to suffer any harm because of it.²⁴ Because these class members' claims were not on par with each other, the class should have been divided into subclasses, each with a representative that fell into the same category of past or future injury as his or her respective class's members.²⁵ Two years later, in *Ortiz v.*

17. See, e.g., *McReynolds v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488 (7th Cir. 2012) (Posner, J.) (reversing denial of class certification on plaintiffs' Title VII claim where defendant had a policy of giving local branches broad discretion, even though local branches' policies differed, and holding that *Wal-Mart* was decided on the fact that the class had no common issues at all); *Floyd v. City of New York*, 283 F.R.D. 153, 173 (S.D.N.Y. 2012) (granting class certification to a class of plaintiffs targeted for stop and frisk by individual officers because stop and frisk was a department-wide policy; noting that "even after *Wal-Mart*, Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member").

18. See, e.g., *In re Live Concert Antitrust Litigation*, 863 F. Supp. 2d 966 (C.D. Cal. 2012) (reconsidering a certification order because *Wal-Mart* created a new, stricter legal standard for commonality requiring rigorous analysis of the pleadings).

19. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011).

20. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) (citing *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977)).

21. See *id.* at 629.

22. See 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:58 (5th ed. 2011) (noting that *Amchem's* adequacy holding is uniformly accepted).

23. See *Amchem*, 521 U.S. at 598.

24. See *id.* at 626.

25. See *id.* at 627 ("Where differences among members of a class are such that subclasses must be

Fiberboard Corp., the Supreme Court elaborated on *Amchem*, holding that an undivided class of individuals exposed to asbestos whose claims had drastically different values because of defendant's changing insurance coverage was inadequately represented by the named plaintiffs.²⁶ As demonstrated by these two similar cases, there are many circumstances that can differentiate class representatives from class members and render them inadequate advocates.

However, just because class members are differently situated does not mean that a putative class necessarily cannot satisfy the adequacy requirement: "Only conflicts that are *fundamental* to the suit and that go *the heart of the litigation* prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement."²⁷ As noted by the First Circuit, "to forestall class certification the intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole."²⁸ In addition to the temporal and value differences noted above, such fundamental conflicts that overbalance the common interests include whether some class members benefit from the same facts alleged to be harmful to their co-class members.²⁹ This type of harm/benefit conflict may present a bar to class certification in copyright infringement cases, as this Note will discuss below.

Finally, copyright infringement classes often seek monetary damages and are thus subject to Rule 23(b)(3)'s predominance and superiority requirements, as noted above.³⁰ Per the *Wal-Mart* discussion, predominance presents a high bar to class certification where the defendant must approach certain aspects of class members' claims on individualized bases.³¹ Predominance asks whether putative classes are "sufficiently cohesive to warrant adjudication by representation."³² One type of question that might undermine a predominance finding is an individualized question of injury-in-fact. But an inquiry into injury-in-fact or a similarly individualized question will not defeat a motion to certify a class unless it is more substantial than the issues that are subject to common, generalized proof.³³ That said, plaintiffs cannot prevail by merely asserting that general issues may exist. As the Supreme Court recently decided in *Comcast Corp. v. Behrend*, courts may look into the merits of plaintiffs' claims to determine whether the generalized proof has bearing on the theory of the claims.³⁴ What it ultimately comes down to, as driven

established . . . the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." (internal quotation marks omitted).

26. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856–57 (1999).

27. 1 RUBENSTEIN, *supra* note 22, § 3:58 (emphasis added).

28. *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012).

29. See, e.g., *Grimes v. Fairfield Resorts, Inc.*, 331 Fed. Appx. 630, 626–33 (11th Cir. 2007) (affirming the district court's denial of class certification); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp. L.P.*, 247 F.R.D. 156, 177 (C.D. Cal. 2007).

30. See FED. R. CIV. P. 23(b)(3).

31. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2265 (2011) (Ginsburg, J., dissenting).

32. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

33. See *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108–09 (2d Cir. 2007); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002).

34. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1429 (2013) (decertifying a 23(b)(3) class because plaintiffs did not present a damages calculation that correlated to a generalized theory of

home by the superiority requirement, is that adjudicating the claim as a class action must be more fair to the litigants, more manageable for the courts and more efficient all around to justify a grant of class certification.³⁵

Given the high standards set by Rule 23 and the Supreme Court's narrow interpretation of them in its recent jurisprudence, class certification has become more difficult for putative classes bringing virtually any type of claim.³⁶ The newly rigorous inquiry into commonality and the changing attitude about assessing the merits of plaintiffs' claims at the class certification stage, without a jury, implies that there is a strong presumption against the class-wide adjudicability of claims.³⁷ While some claims lend themselves more easily to the production of a uniform class, the area of law under which a claim is brought has less of a connection to its certifiability than do the sheer breadth of the class and the complexity of the issues the class presents.³⁸ The following section will discuss some of the aspects of copyright claims that might make a court skeptical of certifying a class of copyright holders and lay the foundation for understanding why *Football Association* was an extreme case.

B. WHERE CLASS CERTIFICATION AND COPYRIGHT CLAIMS COLLIDE

While Rule 23's requirements ensure that there is enough cohesion between a class's various claims such that it would be more efficient to hear them collectively rather than separately, many of the inquiries that arise during a copyright infringement case are individualized and sound in the incentive-based nature of copyright. These issues include determination of ownership and damages, analysis of individual cases of alleged infringement and evaluation of defenses. As with any other class-wide claims, just because there are individualized questions for the court to address does not mean that a well-crafted class cannot overcome these barriers. This Note will later discuss in Part II.B how various plaintiffs have crafted successful copyright holder classes in the past and demonstrate through the PhotogPub hypothetical how such plaintiffs can best tailor their putative classes going forward.

Copyright classes are especially susceptible to failing for a lack of

liability). This represents a change in the Court's attitude from the proposition that the Court "find[s] nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

35. See FED. R. CIV. P. 23(b)(3).

36. See Jenna C. Smith, "Carving at the Joints": *Using Issue Classes to Reframe Consumer Class Actions*, 88 WASH. L. REV. 1187, 1187 (2013).

37. See A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 476 (2013).

38. Take, for example, the claim at issue in *Wal-Mart*. It seems that, to the Court, a class consisting of all of the female employees in a single district where there was a district-wide policy that discriminated against women would be easily conceivable and fit for certification. It was because the class was so large as to encompass all of Wal-Mart's female employees nationwide that the Court became suspicious of how disparate the claim's actual breadth would prove to be on the merits from the size of the purported class.

predominance and commonality in cases where an affirmative defense such as fair use is at issue. Congress has codified four statutory fair use factors,³⁹ but has done little to define the contours of the factors, leaving that task for each court to determine on a case-by-case basis.⁴⁰ Consequently, a fair use analysis involves a subjective evaluation of proof that has the ability to spiral out into deeper and deeper factual inquiries regarding the status of the copyrighted work and the particulars of each asserted use.⁴¹

Variations in the applicability of the fair use defense could cut to the core of a putative class's purported commonality. The fair use factors not only require individualized inquiries, but they also yield unpredictable results. That is to say, the same type of use could be fair in some works but unfair in the case of others. A finding of commonality is jeopardized whenever some aspect of two seemingly identical infringing uses is distinguishable. For example, in our hypothetical case, Arnold and Beth's lawyer can convincingly argue that all of her clients are similarly situated with regard to the third fair use factor, "the amount and substantially of the portion used," because each work has been copied in its entirety. However, a slam-dunk on this factor may not alone be sufficient to show commonality. For instance, the second fair use factor requires courts to evaluate the nature of the work, which involves an assessment of the strength of each work's copyright and the effect an alleged infringement has on the copyright's world market.⁴² The more varied the original works are, the more likely it is that the applicability of the fair use defense will vary as to individual members of the putative class. This second fair use factor presents a bigger problem in Arnold and Beth's case—PhotogaPub's lawyer might be able to convince a court that each photo presents a different analysis as to originality of composition and the extent of the artist's creative efforts displaying in each photograph.

In addition, fair use's fourth factor—the effect on the market for the copyrighted work—may cause the court to doubt the adequacy of a class's representation. While a fair use defense does not hinge on whether a copyright holder benefits from a defendant's unauthorized use of his work,⁴³ it is true in some cases that the unauthorized use of copyrighted material incidentally confers such benefit on the

39. See 17 U.S.C. § 107 (2012). These factors are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the copyrighted work's potential market.

40. See H.R. REP. NO. 94-1476, at 66 (1976) ("[Section 107] endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

41. See David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 281 (2003).

42. See 17 U.S.C. § 107(2) (2012). With regard to the fourth fair use factor, effect on the market for the original work, the court must analyze whether defendant's use usurps the market for the copyrighted work. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). This involves an evaluation of whether the markets, or potential markets, for the two works intersect rather than a mere analysis of whether demand for the copyrighted work has been reduced.

43. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 485 (1984).

copyright holder and that some copyright holders may even encourage the unauthorized use of their work.⁴⁴ In our hypothetical, for example, it would not be surprising if some photographers were okay with PhotogaPub's use because it brought more widespread attention to their works. Incentives are bound to vary from creator to creator, and such variance could be fatal to class certification because courts view copyright as an individualized right which speaks to a particular maker's incentives to create and disseminate his work.⁴⁵

Like a fair use determination, determining copyright ownership can cause tension between individual concerns and class-wide resolution. Section 501(b) of the Copyright Act requires that plaintiffs prove legal or beneficial copyright ownership to establish standing to sue.⁴⁶ Because "ownership" is a broad concept, it can be difficult to pin down.⁴⁷ Establishing ownership in the first instance includes questions of authorship. Furthermore, because copyright is divisible, there might be confusion as to who can claim ownership to the particular right at issue. Determining whether an author can claim copyright ownership in his work or whether a contributor can claim copyright ownership in the whole work—and untangling the issue of beneficial ownership on top of all that—is often subject to the types of factual determinations that could undermine predominance.

For example, when someone creates a work on behalf of another it is sometimes unclear who has a claim to the copyright. Under the Copyright Act, a work made for hire is a work that is: (1) "prepared by an employee within the scope of his or her employment" or (2) "specially ordered or commissioned for use" in one of the types of works enumerated in the definition *if* the parties agreed in writing that the work would be for hire.⁴⁸

The Supreme Court took up the first definition of work made for hire in *Community for Creative Non-Violence v. Reid*, which involved a dispute over the ownership in the copyright of a sculpture that James Earl Reid produced for Community for Creative Non-Violence's (CCNV's) use.⁴⁹ Looking to agency law, the Court invoked a "non-exhaustive" list of factors to be considered in determining whether an author acted in the capacity of an employee, including:

[T]he skill required; the source of the instrumentalities and tools; the location of the

44. See, e.g., Defendant Google Inc.'s Opposition to Motion for Class Certification at 3–4, *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (No. 05 Civ. 08136 (DC)), 2012 WL 1615910 [hereinafter Google's Opposition to Class Certification] (discussing the results of Google's survey of authors regarding Google's digitization project, which showed that while a percentage of authors opposed Google's project, others supported it).

45. See U.S. CONST. art. I, § 8, cl. 8; *Sony*, 464 U.S. at 450 ("The purpose of copyright is to create incentives for creative effort.")

46. 17 U.S.C. § 501(b) (2012); see also *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (noting that even though the Copyright Act does not expressly limit standing to sue for copyright infringement to the legal or beneficial owner of an exclusive right, Congress's explicit enumeration of who may sue for copyright infringement should be read to exclude all others).

47. See Christopher M. Newman, *An Exclusive License Is Not an Assignment: Disentangling Divisibility and Transferability of Ownership in Copyright*, 74 LA. L. REV. 59, 67–68 (2013).

48. 17 U.S.C. § 101 (2012).

49. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 733 (1989).

work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁵⁰

Critics of the Court's analysis have noted that consideration of these factors opens the door to exhausting factual disputes over copyright ownership that involve overly-complex and detailed analyses of foregone work relationships.⁵¹

To counteract the Supreme Court's decision in *CCNV*, the Senate considered an amendment to the definition of "work made for hire."⁵² By specifying that an "employee" for the purposes of this section would only encompass "formal salaried employee[s]," this amendment would have negated the need to turn to agency law or to engage in a long list of indeterminate factors.⁵³ Though the amendment never passed, its proposal demonstrates how convoluted and complex the determination of original ownership is under the Court's doctrine.

But even if the fact-intensive nature of determining whether an author was acting as an employee during his work were eased, in many situations there would still be a set of individualized questions left over for a court. After determining that Reid was an independent contractor because he used his own tools, worked in his own studio and was retained for a short duration to create only the specific project at issue, the Supreme Court still could not make a final determination on who owned copyright in the work.⁵⁴ Though *CCNV* conceded that § 101(2)'s writing requirement under the work for hire definition was not satisfied,⁵⁵ there remained questions as to whether *CCNV* or the "dozen different people" Reid hired to help complete the work were joint authors of the work and thus had a claim to copyright ownership as well.⁵⁶

Under § 201(a) of the Copyright Act, copyright vests in the author or authors of

50. See *id.* at 751–52 (internal citations omitted).

51. See, e.g., 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1][a][iii] (rev. ed. 1978–date); Alexandra Duran, Community for Creative Non-Violence v. Reid: *The Supreme Court Reduces Predictability by Attributing an Agency Standard to the Work for Hire Doctrine of the 1976 Copyright Act*, 56 BROOK. L. REV. 1081, 1103 (1990) (noting that the Court's failure to provide a bright line rule to determine employment status "portend[s] litigation" by requiring fact finding in the first instance); Carolyn M. Salzman, *You Commissioned It, You Bought It, but Do You Own It? The Work for Hire: Why Is Something so Simple, so Complicated?*, 31 U. TOL. L. REV. 497, 498 (2000).

52. See S. 1253, 101st Cong. § 101 (1989).

53. *Id.*; see also *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks*, 101st Cong. 204 (1989) (statement of Ralph Oman, Register of Copyrights, U.S. Copyright Office) (stating that the S. 1253 amendment was necessary after the Court's decision in *CCNV* because the decision "introduces uncertainty into the business relationship by setting out 11 different interrelated criteria that should be examined [and] makes many ownership determinations ad hoc and post hoc because we cannot evaluate many of the criteria until after the work is completed").

54. See *Community for Creative Non-Violence*, 490 U.S. at 752–53.

55. See *id.*

56. *Id.* at 734; see also 1 NIMMER, *supra* note 51, § 5.03[B][1][a][iii].

a work.⁵⁷ But determining whether someone claiming authorship is actually an author is not always as simple as it sounds. Disputes often arise as to whether multiple authors have joint ownership in the copyright of a work or whether one author can lay claim to the entire copyright despite additions by other parties. Congress defines a "joint work" as one "prepared by two or more authors with the *intent* that the *contributions* be merged into inseparable or interdependent parts of a unitary whole."⁵⁸ Individualized questions of fact and law enter in determining intent to create a joint work and whether the contribution of an alleged joint author can support a claim of authorship. As with the work for hire doctrine, joint work determinations may present a bar to class certification where the putative class is so widely defined that class members' copyright ownership is not a given.

Where the parties do not agree to joint ownership in writing, establishing intent, like establishing employment under the work for hire doctrine, involves an in depth evaluation of the parties' circumstances at the time the work was created.⁵⁹ To determine whether intent to be joint authors was present, courts will look to whether a party had decisionmaking authority over the work, whether a party was credited as a co-author of the work, whether a party was considered a co-author in agreements with third parties and whether the parties regarded themselves as co-authors or one of the parties took a firm stance of sole authorship.⁶⁰ Intent to merge multiple parties' contributions in this way is so fact intensive because the court is effectively asking whether there was a meeting of the minds, whether a reasonable person would have understood that he was entering into a joint venture for joint credit and, more importantly for the sake of this discussion, for joint ownership of copyright.⁶¹ Furthermore, because these determinations are often made well after the work was created and when arguments between parties as to whether they were co-authors have worn at their relationships, proof of intent is not necessarily easy to come by and can make the inquiries even more demanding.⁶²

A court's inquiry into whether the contribution was substantial enough to satisfy § 101's requirements is similarly individualized. For a contribution to warrant co-authorship in a work for its creator, all circuits agree that it must be more than a de minimis contribution and that the contribution must be one of authorship, not one of financing or inexpressive labor.⁶³ This inquiry is individualized enough;

57. See 17 U.S.C. § 201(a) (2012).

58. 17 U.S.C. § 101 (2012) (emphasis added).

59. See *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

60. See *Thomson v. Larson*, 147 F.3d 195, 204–05 (2d Cir. 1998).

61. See Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 150–51 (2002).

62. See 1 NIMMER, *supra* note 51, § 6.07[C].

63. See *id.* § 6.07[A]. To this end, guidelines for writers of scientific research articles stress that writers should not name as authors individuals who have administrative authority over the researchers or who procure funding for the research because these contributions, though worthy of non-authorial credit, do not constitute authorship and misnaming such individuals as authors can be misleading. See Jason W. Osborne & Abigail Holland, *What Is Authorship, and What Should It Be? A Survey of Prominent Guidelines for Determining Authorship in Scientific Publications*, 14 PRAC. ASSESSMENT RES. & EVALUATION 1, 2–4 (July 2009).

however, virtually all of the circuit courts have an additional requirement that the contribution be independently copyrightable, creating an even more invasive inquiry into questions of law.⁶⁴ For example, in *Childress v. Taylor* the Second Circuit adopted the independent copyrightability requirement to prevent frivolous claims by contributors of material whose contributions do not constitute authorship.⁶⁵ Though the Second Circuit determined that the parties lacked the requisite intent to establish co-authorship and thus did not go into a deep analysis of the copyrightability of Taylor's contribution, the court's later decisions have confirmed that a party's independent contributions would be subject to the same copyrightability inquiries as would a whole work.⁶⁶ This includes a determination that the work is original, fixed in a tangible medium of expression and possesses "at least some minimal degree of creativity."⁶⁷ Once again, the absence of a formal written agreement as to each party's relationship to the work can make the ownership inquiry a trial in itself.

In some cases it may be easy to establish whether a party is an initial owner of the copyright in a given work, but copyright's divisibility may require further inquiry into whether a party owns the particular right at issue. Section 106 of the Copyright Act lists the discrete rights that come along with copyright ownership.⁶⁸ Under the 1976 Act, copyright is thus a bundle of rights that can be divided among non-authors through licenses and assignments of ownership.⁶⁹ Because copyright ownership can be transferred in whole or in part,⁷⁰ conflicts arise over ownership of particular rights when the extent of the transfer is not made clear at the outset.⁷¹

The difficulty in determining the extent of ambiguous grants is illustrated by the disagreement before the Supreme Court in *New York Times Co. v. Tasini*.⁷² There, freelance writers and publishers disagreed as to whether an agreement to include an article in a newspaper or magazine—i.e., a collective work—gave the periodical

64. Compare 1 PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW AND PRACTICE § 4.2.1.2 (1989), with 1 NIMMER, *supra* note 51, § 6.07[A][3] (rejecting the holdings of several circuit courts that the contribution must be independently copyrightable). The Seventh Circuit is the remaining holdout that does not require that each author's contribution be independently copyrightable in order to sustain a claim of joint copyright ownership. See *Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) ("Gaiman's contribution may not have been copyrightable by itself, but his contribution had expressive content without which [the character] Cogliostro wouldn't have been a character at all, but merely a drawing. The expressive work that is the comic-book character Count Nicholas Cogliostro was the joint work of Gaiman and McFarlane—their contributions strike us as quite equal—and both are entitled to ownership of the copyright.").

65. See *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

66. See *Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 107 (2d Cir. 2002).

67. *Id.* (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

68. See 17 U.S.C. § 106 (2012).

69. See *Newman*, *supra* note 47, at 61.

70. See 17 U.S.C. § 201(d) (2012).

71. See, e.g., *Leisure Time Entm't v. Cal. Vista*, No. 94-56407, 1996 U.S. App. LEXIS 5751, at *4 (9th Cir. Mar. 14, 1996) (holding that the term "exploit" in an agreement giving defendant "the exclusive right, under copyright, to exhibit, to distribute, sell and otherwise deal in and exploit" plaintiff's works could be understood broadly to allow defendant the right to create derivative works or narrowly to limit defendant's rights to distribution and sale).

72. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001).

publisher the right to license the article for use in searchable electronic databases.⁷³ At the core of this case was a disagreement over the extent of the "privilege" that § 201(c) of the Copyright Act grants to owners of a collective work. Section 201(c) provides that the owner of a collective work has acquired "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."⁷⁴

While the district court interpreted the § 201(c) privilege as constituting a non-exclusive license to reproduce and distribute the articles themselves within certain limits,⁷⁵ both the Second Circuit and the Supreme Court held that the privilege under § 201(c) does not implicate the rights of the initial copyright owner.⁷⁶ Under this view, the right to reproduce revisions of the collective work did not allow the publishers to transfer to the electronic databases the § 201(c) privilege to reassemble the articles at will.

Tasini demonstrates how the extent of the transfer of rights is not always clear. Even though the freelance writers were the initial owners of the copyright in the individual articles because they authored the pieces, once they signed freelance agreements with other parties the ownership of particular rights became uncertain. This is not only true of § 201(c) grants of privilege, but of direct licenses and assignments of the divisible rights under § 106 as well. While a contract that expressly denoted the boundaries of the publishers' rights would have precluded the need for the courts' intervention on this issue in the first place, parties to an arrangement do not necessarily have the foresight or ability to make their agreements so clear, necessitating individualized, ex post inquiries into ownership at the onset of the litigation.

Because unclear or implied agreements with regard to initial ownership and transfer of rights are not unusual, it is easy to understand why in *Football Association* Judge Stanton took such a strong position against the certifiability of copyright holder classes. As Judge Stanton noted, copyright claims often have only the appearance of similarity:

The nature of their legal requirements and analyses are similar: plaintiff must prove ownership of a copyright and the copyright work was infringed by [an unauthorized use of it] But that merely identifies some of the issues, each of which must be resolved upon facts which are particular to that single claim of infringement, and separate from all other claims.⁷⁷

If, before reaching the merits of a claim, a court would have to sort through

73. *See id.*

74. *See* 17 U.S.C. § 201(c) (2012).

75. *See* *Tasini v. N.Y. Times Co.*, 972 F. Supp. 804, 824 (S.D.N.Y. 1997) (holding that tagging each independently retrievable article with the publication title, issue and page number where it appeared constitutes a sufficient step to identify it as part of a particular collective work).

76. *See Tasini*, 533 U.S. at 493–94.

77. *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 65–66 (S.D.N.Y. 2013).

individual determinations regarding initial ownership and the extent of transferred ownership, it would take equal resources to have every class member bring an individual claim and prove that he actually owns the right at issue. However, as discussed in further detail below, not every copyright holder class will present these issues, and, even if a class does present these issues, it is possible that the class's claim is so sweeping that it easily predominates over these individual concerns and thus should be heard on a class-wide basis for the sake of judicial economy and uniformity of outcome.

II. WHAT IT TAKES TO BRING A CLASS COPYRIGHT INFRINGEMENT CLAIM

Thus far, this Note has focused on the obstacles that a putative class of copyright holders may encounter at the class certification stage. As noted, this focus on where these classes may fail is not included to suggest that the *Football Association* court's ardent position against certifying copyright holder classes is unqualifiedly correct. Instead, it shows that Judge Stanton correctly identified the *Football Association* putative class as a Frankenstein's monster, doomed to fail under current class action jurisprudence. This section explores the factors that made the *Football Association* putative class a particularly poor candidate for certification. However, continuing with the PhotogaPub hypothetical, this section will also show how copyright holder plaintiffs can escape the apparent obstacles of class certification by carefully crafting their classes and by bringing undeniably uniform claims.

A. FOOTBALL ASSOCIATION: A MONSTER OF TOO MANY PARTS

In the opening of his decision to deny class certification in *Football Association*, Judge Stanton described the case as a "Frankenstein monster posing as a class action."⁷⁸ This description was surely apt. Plaintiffs brought a secondary copyright infringement claim against YouTube for hosting allegedly infringing copies of plaintiffs' work on its website.⁷⁹ They brought their claim on behalf of two worldwide classes: (1) the "repeat infringement class," a class of copyright owners who had sent YouTube notices of infringement in the past and had succeeded in removing unauthorized copies of their work from the site, but who suffered additional infringement through subsequent uploads and (2) the "music publisher class," whose musical compositions defendants allegedly "tracked, monetized, or identified and allowed to be used without proper authorization."⁸⁰ Because these classes are so broadly defined, plaintiffs' attempt at class certification immediately raises flags with regards to commonality, adequacy, predominance and superiority. Furthermore, because plaintiffs' claim is for

78. *Id.* at 65 (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting)).

79. *See id.*

80. *Id.*

secondary liability against an online storage provider, defendant can invoke the safe harbor provisions of the Digital Millennium Copyright Act (DMCA).⁸¹ These provisions add additional individualized inquiries to the assessment of each putative class member's claim, pushing the limits of the predominance requirement even further.

As discussed above, the more expansive a putative class is, the more likely it is that plaintiffs will run into problems when trying to certify it. That was the case with *Football Association*, where plaintiffs did not carefully limit the contours of the two proposed classes. For example, instead of limiting their claims to a class of plaintiffs who held copyright under a uniform set of laws, plaintiffs purported to represent all similarly situated copyright holders worldwide.⁸² This would not have been a problem if there were uniform international copyright law, but copyright law differs from country to country such that a court would not be able to apply a single set of laws to prove each purported class member's copyright ownership.⁸³

Proving ownership in such a large class presents obstacles to class certification even if a uniform set of laws is applied. Plaintiffs did not limit the class by an easily identifiable mark of copyright ownership—such as copyright registration or written proof of assignment—so ascertaining each purported class member's actual membership in one of the two classes would require the highly individualized analysis of facts described above, which could hinder a finding of predominance. Issues of ascertainability are exacerbated in the case of a secondary liability claim because each class member would also have to show that the third party uploader infringed on the work's copyright before the court could come to the merits of the instant claim.⁸⁴ Furthermore, because the purported class is not limited to individuals whose work was uploaded in full and includes those whose copyrighted works were only used in part—for example, ten seconds of a song interpolated over a home video—the infringement and fair use inquiries regarding the third parties' actions would necessarily vary from class member to class member.⁸⁵

Football Association is also a unique case because it implicates the safe harbor provisions of the DMCA, which involve individualized questions of fact. The difficulty of certifying a class that involves the safe harbor provisions of the DMCA can be better understood by looking to the Second Circuit's reversal of the dual-captioned summary judgment for Viacom and the Football Association Premier League against YouTube.⁸⁶ There, the Second Circuit demonstrated that the DMCA requires proof of every instance of alleged secondary liability. Because there is no joint proof of YouTube's knowledge, the DMCA safe harbor analysis would necessarily undermine an attempt at class certification in this case.

81. See 17 U.S.C. § 512 (2012).

82. See *Football Ass'n*, 297 F.R.D. at 65.

83. See *id.* at 67. With foreign works, the courts must look to the law of the source country to determine issues of ownership rights. See, e.g., *Itar-Tass Russian News Agency v. Russian Kurier*, 153 F.3d 82, 90 (2d Cir. 1998).

84. See *Football Ass'n*, 297 F.R.D. at 65.

85. See *id.* at 65–66.

86. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 42 (2d Cir. 2012).

Under § 512 of the DMCA, a safe harbor is available to a defendant on a plaintiff's copyright infringement claims where those claims involve "information residing on systems or networks at the direction of users" (hereinafter referred to as "user upload claims").⁸⁷ The safe harbor provisions kick in after a defendant establishes that it is a "service provider" under the DMCA and has implemented mechanisms to punish infringers and to work with copyright owners to protect their works.⁸⁸ Section 512(c)(1)(A) only provides a safe harbor for user upload claims if the service provider:

- (i) does not have *actual* knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of *facts or circumstances* from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.⁸⁹

Because § 512(c)(1)(A)(iii) requires that the service provider block the infringing material in order to gain the safe harbor, the Second Circuit determined that § 512(c) requires the defendant have "knowledge or awareness of *specific* infringing activity" to be liable.⁹⁰ The court made the same deduction from the text of § 512(c)(1)(A)(ii), explaining that so-called "red flag" awareness requires that the provider have subjective awareness that made *specific* infringement "objectively obvious."⁹¹

To determine whether there was enough factual evidence to bring the claims to trial in light of the DMCA's specificity requirements, the court looked to correspondence between YouTube's co-founders evincing their belief that specifically identified clips were infringing and their intent to keep those clips on the website.⁹² On the basis of the evidence at hand, the court remanded to the lower court for a determination of "whether YouTube had knowledge or awareness of any specific instances of infringement" of the clips expressly identified in the suit.⁹³

Through its elucidation of the DMCA's safe harbor provision for user upload

87. See 17 U.S.C. § 512(c) (2012). Note that § 512 technically falls under the Online Copyright Infringement Liability Limitation Act (OCILLA) subdivision of the DMCA, but this Note will refer to it by the more commonly used parent title of DMCA.

88. See generally 17 U.S.C. § 512(i)–(k) (2012). The term "service provider" as used in § 512(c) is "a provider of online services or network access, or the operator of facilities therefor . . ." *Id.* § 512(k)(1)(B).

89. *Id.* § 512(c)(1)(A)(i)–(iii) (emphasis added).

90. *Viacom*, 676 F.3d at 30–31. For example, the Southern District of New York recently concluded that proof of Internet service provider (ISP) interaction with a user profile cannot satisfy the specific knowledge requirement. Plaintiffs must show that an employee of the ISP viewed or otherwise interacted with the allegedly infringing material itself. See *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 543 (S.D.N.Y. 2013).

91. *Viacom*, 676 F.3d at 31–32.

92. *Id.* at 34.

93. *Id.* at 41.

claims, the Second Circuit made clear that the *Football Association* plaintiffs must provide proof that is specifically tailored to each individual claim of secondary liability. Given the court's reasoning, even though each class member would present the court with the same question—did YouTube have actual knowledge of infringing activity and allow it to continue?—there is no readily available generalized proof that could address all of their claims in a single sweep.⁹⁴ In sum, plaintiffs must: (1) prove every class member's claim to copyright ownership; (2) identify allegedly infringing clips; (3) prove that those allegedly infringing clips actually infringe despite defendant's potential claims of authorization and fair use, and (4) provide evidence that YouTube had objective knowledge that each identified clip was infringing and subsequently failed to block access to it. There is nothing simple about this task. Addressing it on a class-wide basis would only give the illusion of expediency and tax the court with the burden of hearing thousands of individual claims under the guise of a cohesive set of circumstances.

As far as claims go, *Football Association* was a particularly poor candidate for class-wide resolution because YouTube did not commit a single, identifiable act. YouTube did not have a policy of supporting infringing activity by its users and was responsive to notices from copyright holders.⁹⁵ Therefore, there was no getting around the need to analyze each class member's claim on an individual basis under the DMCA. The only way for plaintiffs to minimize the issues presented by the DMCA analysis—not to mention the threshold ownership and direct infringement analyses—would be, to borrow Judge Stanton's Frankenstein monster analogy, to lob off the class's mismatched limbs. As a start, this would mean limiting the class to U.S. copyright holders whose copyrights were registered by a specific date, streamlining questions of initial ownership. It would also mean limiting the classes to those who had similar proof that the clip at issue was infringing, such as a formal acknowledgment from YouTube.⁹⁶

To strike at the issues presented by the DMCA, plaintiffs would have to pare the classes down even further to individuals whose works were infringed by clips that plaintiffs brought to YouTube's attention in a single set of notices or that YouTube expressly acknowledged as likely infringements in a single form of proof. Though the remaining classes would be a miniscule part of the original whole that the plaintiffs originally attempted to certify, if plaintiffs' goal is to seek resolution for as many of these claims as it can at once, then plaintiffs need to present the court with a single, unitary limb of the original class instead of a poorly-sewn-together

94. For the sake of argument, one could imagine a memo or database that identifies every infringing clip on YouTube. However, absent proof that such a listing exists, it is safe to assume that there is not one set of proof that could address every class member's claim given the scope of the proposed classes.

95. This is apparent in the case itself. Plaintiffs sought to certify a "repeat infringement class" that had succeeded in working with YouTube to remove infringing materials from the website in the past. See *Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 297 F.R.D. 64, 65 (S.D.N.Y. 2013).

96. If a large number of class members obtained formal acknowledgments from YouTube that specific clips infringed on class members' copyrights, there would be common proof to create a presumption that those clips indeed infringed. This common proof would arguably lessen the burdens on the court and weigh in favor of granting classification.

monstrosity of claims. At the same time, it is important to remember the incentives for maintaining a sizeable class. First, plaintiffs want to amass a large class to create pressure on defendants to settle the claim and, if the alleged infringement is continuing, stop their allegedly infringing behavior. Second, class counsel is only compensated for its work if fees are court-ordered or agreed to in a settlement.⁹⁷ Therefore, putative class counsel will necessarily balance narrowing the class to a manageable whole against the possibility that a class may become so limited that the value of its collective claims would not match the value of the lawyer's time.

B. CRAFTING A NARROW CLASS OF COPYRIGHT HOLDERS

Unlike *Football Association*, some copyright holder claims lend themselves naturally to class-wide adjudication. The remaining sections in Part II will demonstrate how the very claim at issue can help to contour a manageable plaintiff class. Such a manageable class can come about where plaintiffs' claims arise under a form contract, where all class members are represented by the same agency or where defendant's conduct is so uniform across the class that generalized proof is easily obtained. These remaining sections will also engage more directly with the PhotogPub hypothetical to show how a putative class can work within the case law's framework moving forward.

Disputes over widely-used form contracts are healthy breeding grounds for class certification.⁹⁸ Even though each contract at issue is discrete, since most of their terms are identical they can be easily dealt with in the aggregate and do not present the court with unmanageable issues of proof.⁹⁹ But, where the contract terms are ambiguous or are not expressly written, individual variations on those contracts have bearing on the underlying copyright claim. In those cases, predominance re-emerges as a barrier to certification because generalized proof is no longer accessible and state law differences in contract interpretation may fracture an otherwise cohesive class.¹⁰⁰ This split between a cohesive copyright contract claim and a non-cohesive one is illustrated in *Wu v. Pearson Education, Inc.*¹⁰¹

Photographer Norbert Wu attempted to certify two classes based on two distinct claims: the first claim (*Wu I*) alleged that the publisher Pearson specified particular print-runs for its books in licensing agreements and then exceeded the agreed-upon print-runs; the second claim (*Wu II*) alleged that Pearson printed copyrighted photographs in their books and only obtained licensing agreements after the fact.¹⁰² The differences between the certifiability of these two claims came out during the

97. See FED. R. CIV. P. 23(h).

98. See David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 433 (2009) (citations omitted).

99. See generally *id.*

100. See *id.* at 433–34.

101. See *Wu v. Pearson Educ., Inc.*, 277 F.R.D. 255 (S.D.N.Y. 2011).

102. See *id.* at 260–61; see also Complaint and Demand for Jury Trial, *Wu v. Pearson Educ. Inc. (Wu I)*, No. 09 Civ. 6557 (S.D.N.Y. July 23, 2009), 2009 WL 2402328; Complaint and Demand for Jury Trial, *Wu v. Pearson Educ. Inc. (Wu II)*, No. 10 Civ. 6537 (S.D.N.Y. Sept. 20, 2010), 2010 WL 3533624.

predominance inquiry into each one. Based on the limited evidence before the court at the time, the *Wu I* class was fit for certification because the claim was based on the single contract provision that only varied slightly from contract to contract as to the exact size of each print-run.¹⁰³ Furthermore, unlike some of the cases discussed above, *Wu I* was not susceptible to intense analyses of copyright ownership because the existence of a contract between defendant and each class member presupposes ownership. While *Wu II* shared in this avoidance of common copyright holder class barriers, it failed on predominance because there was no form contract common to all of the agreements that Pearson made with each copyright owner. Though each written licensing agreement was dated, Pearson alleged that it was industry practice to make informal arrangements to publish photographs before formalizing an agreement and that a number of the agreements contained integration clauses to merge these otherwise informal arrangements into the written agreements.¹⁰⁴ Because oral evidence regarding every single arrangement would be necessary in order to assess the *Wu II* claims, it was not fit for adjudication on a class-wide basis.¹⁰⁵

This same pervasive individuality of each contract ultimately became a problem for *Wu I* after the initial discovery stage, when defendants moved to decertify the class. On defendant's motion to decertify the *Wu I* class, the court noted that the contractual relationships were not as simple as they were presented to the court at the certification stage.¹⁰⁶ A more developed record showed that the form contracts were, in many cases, accompanied by additional written contracts and oral agreements and that the relationships between the copyright holders and Pearson were not always direct, but mediated by a photo agency.¹⁰⁷ Therefore, the contracts themselves could no longer support a finding of predominance and the basic legitimacy of each contract was questioned because, unlike where the copyright owner makes the agreement himself, photo agencies without complete rights to each photo could have granted licenses they were unauthorized to allow.¹⁰⁸

Though it may not have gone well for the putative *Wu* classes, the *Wu* litigation provides a few helpful takeaways for classes of copyright holders. First, just because a claim is based in copyright does not mean that a class cannot be certified. Like any putative class, the more cohesive and unified a class's set of claims is, the more likely that class of copyright holders is to meet the certification requirements. One way to do this, as *Wu I* seemed to do before discovery proved otherwise, is to abstract out individual issues by bringing all class members under a unified umbrella, such as a common form contract. Another helpful tactic is subdividing classes into distinct groups. In *Wu*, this meant dividing the *Wu I* claims from the *Wu II* claims instead of attempting to certify an entire class under a jumbled group

103. *See id.* at 265, 273.

104. *See id.* at 274–75.

105. *See id.* at 275.

106. *See Wu v. Pearson Educ. Inc.*, No. 09 Civ. 6557 (KBF), 2012 WL 6681701, at *7 (S.D.N.Y. Dec. 12, 2012).

107. *See id.* at *7–8.

108. *See id.* at *7.

of claims.¹⁰⁹ This helps to highlight the commonalities between class members and to build a stronger case for predominance than would proposing an obviously non-homogenous class.

Wu v. Pearson has specific applicability for the PhotogaPub putative class. First, the PhotogaPub class can be split into two distinct subclasses: (1) a subclass of photographers like Arnold who directly contracted with PhotogaPub to allow limited copying of their work (Subclass A), and (2) a subclass of photographers like Beth who have no contractual relationship with PhotogaPub (Subclass B). Dividing the class in this way distinguishes class members by the types of claims they can bring—Subclass A having the additional breach of contract claim—and by the type of proof that is likely available to them. For example, while Subclass B will have a more difficult time bringing common proof of copyright ownership, Subclass A's contracts can at least raise a uniform presumption of each subclass member's copyright ownership by virtue of the fact that these similar contracts with PhotogaPub exist. If the contracts are in fact similar, Subclass A can also make a strong case that they, combined with PhotogaPub's uniform course of conduct, provide common proof of liability that would not be better addressed on a case-by-case basis. Subclass B will have a more difficult time demonstrating the existence of common proof, but just because Subclass B does not have a breach of contract claim does not mean its bid for class certification is doomed.

One example of a class that managed to fit all the pieces together without a contract-based claim, and to narrow the definition of the class down enough that the cohesiveness of the claim warranted class certification despite the possibility that individualized questions may arise, was the plaintiff class involved in the *Napster* litigation.¹¹⁰ Like the cases against YouTube, *Napster* involved claims of secondary liability against Napster for allegedly facilitating users' unauthorized reproduction and distribution of copyrighted sound recordings.¹¹¹

Plaintiffs sought to certify a 23(b)(3) class of "music publisher-principals of the Fox Agency that own or control at least one copyrighted musical work that has without their permission been made available through the Napster service on or after October 30, 2000."¹¹² Though the *Napster* class rooted its claims in hyper-

109. Note that Wu proposed even further subdivided classes that would include only individuals on the same invoice or in the same publications as Wu himself to insulate his class certification claims. See *Wu*, 277 F.R.D. at 262.

110. See *In re Napster, Inc. Copyright Litig.*, No. C MDL-00-1369 MHP, 2005 WL 1287611 (N.D. Cal. June 1, 2005). Even though this case was decided prior to the *Wal-Mart* ruling, the Northern District of California's balance of common and individual issues has been affirmed post-*Wal-Mart*. See, e.g., *In re Toyota Motor Corp. Unintended Acceleration Mktg, Sales Practices, & Prods. Liab. Litig.*, No. 8:10ML2151 JVS (FMOx), 2012 WL 7802852, at *5 (C.D. Cal. Dec. 28, 2012); *Walker v. Life Ins. Co. of Southwest*, No. CV 10-9198 JVS (RNBx), 2012 WL 7170602, at *17 (C.D. Cal. Nov. 9, 2012).

111. See *Napster*, 2005 WL 1287611, at *1.

112. *Id.* at *3. The Harry Fox Agency serves as a licensing agent for thousands of copyright holders in musical works. See *id.* at *5; *What Does HFA Do?*, HARRY FOX AGENCY, <http://perma.cc/AAF8-XHTF> (last visited Apr. 21, 2015). Also note that the class was ultimately certified as "consisting of music publisher-principals of the Fox Agency that owned or controlled at least one copyrighted musical work at the time that it was made available without their permission through the Napster service on or after October 30, 2000." See *Napster*, 2005 WL 1287611, at *12 (emphasis

individualized aspects of copyright, plaintiffs were able to abstract some of those individualized inquiries away from the case by limiting the class to Fox Agency principals. For example, though there would be questions as to ownership and registration, because the Fox Agency had close relationships with every class member it would be able to expedite those determinations instead of leaving the court to wade through the evidence.¹¹³ Defining the class based on class members' relationships with the Fox Agency also allowed for the production of generalized proof when it came to the DMCA safe harbor analysis, as part of the Agency's job was to identify infringing material and bring it to the attention of the Internet service provider, here Napster. Therefore, the Fox Agency was able to produce letters that identified thousands of specific infringements on behalf of class members, taking the burden of management off of the court.¹¹⁴ Finally, the court considered the fact that by delegating licensing authority and copyright enforcement duty to the Fox Agency, the class members expressed a willingness to have their claims adjudicated in their absence instead of interjecting individual concerns into each separate claim.¹¹⁵

Though the court conceded that there would be difficulties managing the class simply because of its size, the court ultimately decided that the case was cohesive enough that it warranted class-wide adjudication.¹¹⁶ Invoking policy rationales for class actions, the court decided that, as compared to other methods of adjudication, "a class action is clearly the most efficient and in all likelihood the most equitable method for resolving the parties' dispute."¹¹⁷ The *Napster* plaintiffs did not present the court with an unintelligible "Frankenstein monster" like the proposed *Football Association* class, but instead provided the court with the common filter of the Fox Agency to help yoke each attendant aspect of the case into a manageable whole.

This is not to say that membership to a common agency or similar representative institution is *required* for a putative class to obtain certification. Such membership is just one way for putative class members to streamline the evidence and demonstrate to the court that class adjudication will actually prove more efficient than adjudication of individual suits. Individual copyright holders could produce common evidence identifying putative class members, demonstrating that each putative class member has ownership in the copyright at issue, and that the defendant infringed each copyright at issue; the task simply becomes more realistically attainable when a single individual or institution maintains that evidence.

Returning to the PhotogaPub hypothetical, limiting the subclasses by membership in Arnold and Beth's guild could help with commonality in a manner similar to how working with the Fox Agency made the class more manageable in *Napster*. As noted above, Subclass A may be able to provide the court with near-

omitted).

113. See *Napster*, 2005 WL 1287611, at *9.

114. See *id.* at *3.

115. See *id.* at *8.

116. See *id.* at *12.

117. *Id.* at *9.

identical PhotogaPub contracts as common proof of presumed copyright ownership, while Subclass B does not have such contractual proof. However, if Arnold and Beth's guild maintains records of its members' copyright registrations, then association with the guild can provide common proof of a presumption of copyright ownership just as well. Subclass A will still have a better chance at certification because the contracts help to provide common proof of PhotogaPub's liability, while membership in the guild is not likely to provide Subclass B with such proof. However, defining Subclass B by membership in the guild would at least help the subclass to overcome commonality as to questions of initial ownership that could otherwise undermine the class's chances at certification from the outset. Narrowing both subclasses as to members' association with a guild also provides the court with a filter to help maintain a baseline of class commonality, thereby maintaining the judicial efficiency goals of the class action mechanism.

C. ISSUE CLASSIFICATION: COHESION WITHOUT NARROWING

While defining the PhotogaPub subclasses narrowly has its benefits, Arnold, Beth and their lawyer might have concerns about limiting the class too far if their guild is small or if not many putative class members entered into common contracts with PhotogaPub. Arnold and Beth want to represent as many photographers as possible, and their lawyer wants the stakes to be high enough for there to be sufficient incentive to take the case. This is an earnest concern of putative classes arising in the increasingly digital age: because digitization allows infringement to occur in broad-sweeping ways that were not previously possible, narrowly defining a class is not always practical, possible or necessarily the best way to ensure proper representation of all those affected by the conduct. At the same time, copyright infringement claims against direct infringers for conduct involving digitization often concern identical patterns of conduct that make them ideal for class treatment, much like the conduct at issue in the PhotogaPub hypothetical. This duality presents courts with a conundrum that continues to play out in perhaps one of the most followed copyright cases in recent years, *Google Books*. Filed as a class action case, the Authors Guild brought a copyright infringement suit against Google for its unauthorized practice of copying books and making searchable "snippets" of the text available to users.¹¹⁸ Following the court's rejection of a class-wide settlement, the parties moved forward with the litigation and the Authors Guild filed its motion for class certification.

Google Books is a unique case because it lies on the spectrum between *Napster* and *Football Association*; the defendant's conduct appears to be identical across all class members, creating a manageable class in one sense, but at the same time the class is so broad that it is not obviously cohesive. The Authors Guild defined the plaintiff class as "all persons residing in the United States who hold a United States copyright interest in one or more Books reproduced by Google as part of its Library

118. See *Authors Guild v. Google, Inc. (Google Books I)*, 282 F.R.D. 384, 386 (S.D.N.Y. 2012) (certification of *Google Books* class).

Project"¹¹⁹ They projected that this class would include "many thousands of authors."¹²⁰ As discussed above, managing a copyright class of this size can undermine the efficiency that class actions are supposed to bring to the courts.

However, sometimes the questions common to all class members are so targeted and would bring such efficiency to the courts if litigated in one fell swoop that the individualized issues will not predominate and a 23(b)(3) class can be certified. Here, plaintiffs identified three common questions that penetrate the core of Google's liability: (1) whether Google distributed and publicly displayed content as alleged; (2) if these actions constitute copyright infringement; and (3) whether Google's actions constitute a fair use of the works, thereby mooted any claims against Google on this issue.¹²¹ Though Google argued that questions of fair use are typically individualized,¹²² as discussed above, here Google's conduct was so uniform that analyzing the entire class, or subclasses which take into account variations in the nature and markets for subsets of books, is not unimaginable.¹²³ There is a clear tension here between the rational understanding that each class member's claim is best contextualized as part of Google's group project and the pull of class action jurisprudence to only certify the most homogeneous classes.

This tension is what appears to have motivated the Second Circuit to vacate the district court's certification of the *Google Books* class on appeal.¹²⁴ Reasoning that "resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot [its] analysis of many class certification issues," the court remanded the case for a decision on whether Google's conduct constituted fair use before class certification could be considered.¹²⁵ Though the court stated that consideration of fair use would only work to inform class certification, the remand was also a sly way of using one issue to decide the contentious aspects of class certification without getting the court's hands dirty with a definitive stance on the class's viability. That is to say, there were a limited set of ways the case could have come out on remand: (1) that Google's conduct constituted fair use in the case of all class members, as the court did decide;¹²⁶ (2) that Google's conduct could not constitute fair use under any circumstance; (3) that Google's conduct constituted fair use in the case of certain subclass members; or (4) that fair use needs to be considered on a case-by-case basis. No matter the outcome, it would all but decide the issue of class certification without forcing the Second Circuit to

119. See Reply Memorandum of Law in Support of Plaintiffs' Motion for Class Certification at 1–4, *Google Books I*, 282 F.R.D. 384 (No. 05 Civ. 08136) [hereinafter Authors Guild's Reply Motion for Class Certification].

120. *Id.* at 9.

121. See *id.* at 10.

122. See Google's Opposition to Class Certification, *supra* note 44, at 17–21.

123. In fact, Judge Chin suggested analyzing fair use on a sub-class basis in his opinion granting class certification. See *Google Books I*, 282 F.R.D. at 395.

124. See Authors Guild, Inc. v. Google Inc. (*Google Books II*), 721 F.3d 132 (2d Cir. 2012) (decertification of *Google Books* Class).

125. *Id.* at 134.

126. See Authors Guild, Inc. v. Google Inc. (*Google Books III*), 954 F. Supp. 2d 282, 289 (S.D.N.Y. 2013).

make difficult determinations as to what issues should predominate over others or to weigh the competing policy considerations in such a close call of a case.¹²⁷ It was a sharp move to hone in on the controversy's core issue and to try to resolve the nearly decade-long case.¹²⁸

By remanding the case for a consideration of the fair use issue, the Second Circuit effectively forced the parties to litigate the certification of a discrete issue without saying as much. Under Rule 23, a plaintiff can bring a suit as an "issue class action" to resolve an issue that is common to all claimants.¹²⁹ An issue class action is exactly as it sounds—where one issue, not an entire claim, meets all class certification requirements under Rules 23(a) and 23(b), the court can make a class-wide judgment on this common issue to prevent having to decide on that issue time and time again as each individual plaintiff brings her claim.¹³⁰ This helps to balance the tension that arises where litigating a claim would require individualized inquiries even though there is an overarching common course of conduct that should be decided uniformly across all claimants, securing the advantages of adjudicating common issues on a class-wide basis while still giving each individualized issue its due attention on a case-by-case basis.¹³¹

This appears to be the type of move the Second Circuit forced because even though, on the one hand, the court stated that class certification was premature because the questions of commonality, typicality and predominance were too obfuscated, on the other hand, the court implied that if fair use was taken separately from the rest of the issues it would be clear whether the discrete issue of fair use could be applied class-wide.¹³² Each party hoped to engulf the entire claim under one of two competing narratives. In contrast, the Second Circuit hoped to secure

127. The Second Circuit relied on the fact that a fair use determination would effectively decide all issues of typicality, commonality, and predominance. Only questions of adequacy, relating to some authors' desire to have Google's project continue because of the benefit they derive from it, would remain. See *Google Books II*, 721 F.3d at 134.

128. It is notable that in October 2012, Judge Baer of the Southern District of New York dismissed the Authors Guild's case against a group of libraries that obtained digital scans of works in their collections through Google's digitization project, holding that the libraries' actions constitute fair use. See *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 465–66 (S.D.N.Y. 2012). Given that the case against Google Books was near identical to the HathiTrust case in many respects, it made sense for the Second Circuit to push the case down the path to a quick fair use determination rather than try to sort out the messy class certification doctrine.

129. See FED. R. CIV. P. 23(c)(4); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.2d 910, 911 (7th Cir. 2011) ("[C]lass action treatment is appropriate and is permitted by Rule 23 when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury. Often, and as it seems to us here, these competing considerations can be reconciled in a 'mass tort' case by carving at the joints of the parties' dispute. If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings." (Posner, J.)).

130. See *id.*

131. See Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 263 (2002).

132. See *Google Books II*, 721 F.3d at 132.

judicial economy and showed an understanding of the fact that some aspects of the case are more appropriate for class-wide resolution than others. It demonstrated that just because a claim presents complex issues does not mean that a court should bar itself from efficiently dealing with the claim's simpler issues on a class-wide basis. At the same time, just because a claim presents issues that can be decided on a class-wide basis does not mean that the court should bind itself to deciding the more complex aspects of that claim in the same manner. Instead, there is a middle ground around which the court can divide each aspect of the claim and then certify or not certify the class as to an individual issue based on the class's ability to meet the Rule 23 requirements as to that issue, rather than based on the class's ability to meet Rule 23's requirements as to a related yet distinct issue.

Though there are obvious reasons why plaintiffs such as Arnold and Beth would want to certify classes as to the entirety of their claims; where copyright infringement claims are subject to questions of copyright ownership, licensing and the like, it may be in the best interest of the putative class to attempt issue class certification instead. This is particularly true in a case such as Arnold and Beth's, where it would be too expensive for most class members to bring their claims individually and where class-wide pressure could be enough to encourage settlement or deter PhotogPub from continuing its allegedly malicious behavior.¹³³

In the majority of circuits, including the Second, Ninth, and Seventh, where copyright infringement claims are often brought, an issue class can be certified even if a claim on the whole could not be certified under Rule 23.¹³⁴ This means that even if there are individualized questions as to copyright ownership a plaintiff class can still be certified to determine whether a common scheme of alleged copyright infringement is actually infringing. If it is, individual members of that class can then bring their own claims to prove individual ownership and collect damages without a fear that courts will analyze liability differently from case to case. This type of issue class action is a "partial class action" and allows the joint resolution of all common claims for the sake of judicial economy.¹³⁵ There is no rule for how the issues are split¹³⁶ as long as individualized questions do not predominate on that particular issue and thereby preclude any efficiency gains that issue classification might provide.¹³⁷ Because issue classes are so flexible and can, in many cases, be easily carved out, those wary of 23(b) classification have looked to issue classes as the future of class action litigation, as they are the classes that are

133. See Smith, *supra* note 36, at 1191.

134. See *id.* at 1188–89. The Fifth Circuit rejects this view of Rule 23(c)(4) and requires that the entire claim satisfy Rule 23 before an issue class may be certified, while the Third Circuit uses a balancing test to determine whether Rule 23(c)(4) is applicable. See *id.*

135. See *id.* at 1204.

136. See *Hydrite Chem. Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 891 (7th Cir. 1995) (“[T]here is no rule that if a trial is bifurcated, it must be bifurcated between liability and damages. The judge can bifurcate (or for that matter trifurcate, or slice even more finely) a case at whatever point will minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication.”).

137. See Smith, *supra* note 36, at 1221 (internal citations omitted).

most consistent with the reasons for class actions in the first place.¹³⁸

Issue class certification can be particularly helpful when it comes to copyright holder classes because, as copyright infringement becomes more entwined with the digital world, these classes can often be defined in broad, if not global, terms. Dealing with discrete aspects of these claims on a class-wide basis can help class members to access justice where it would otherwise be too costly or, if issue classification did not exist, where class members' claims would be too disparate. At the same time, stepping back for a moment to *Football Association*, the case that prompted this discussion, courts do not need to worry that broader use of issue classification will open the floodgates of copyright class litigation. Some claims, like *Football Association*, are unfit for class-wide adjudication no matter how they are sliced. There, class members' claims are bound together only in theory, without bonds of common fact. Rule 23(c)(4) does not allow such claims to masquerade as a united cause, ensuring judicial efficiency but not at the cost of adequate representation for every class member. Through the use of issue classes, common *theories* of copyright infringement liability, which are properly barred by Rule 23(b), would not overrun common *instances* of copyright infringement, which can be unduly barred by a cautious court if plaintiffs pursue classification under Rule 23(b) instead.

Stepping back to the PhotogaPub hypothetical, Arnold and Beth may be best off attempting to certify the class on the fair use issue instead of paring down the subclasses to what could impractically narrow denominators. With issue class certification as to the question of fair use, Arnold and Beth have the opportunity to maintain the entire worldwide class they originally envisioned because the core of what matters is PhotogaPub's conduct. Though the fair use analysis may vary as to each work at issue, as discussed in Part I.B., the analysis here is likely to be as uniform as that in *Google Books* because PhotogaPub copied, displayed, and monetized every work on its site in a uniform way, taking the entire work in each case. Arnold and Beth may have difficulty demonstrating that there is common proof as to the nature of each work and to the market effect of PhotogaPub's conduct on each work; however, given the *Google Books* precedent in deciding fair use as to all claims, PhotogaPub's interest in photographs that have enough artistic merit to support gallery shows, and the fact that most of the putative PhotogaPub class members are at a similar point in their careers and cater to a limited market, Arnold and Beth have a strong case to argue that common, class-wide evidence as to the issue of fair use is available and that the issue is better suited for class-wide adjudication than case-by-case determinations.

If they are able to certify the class as to this issue, Arnold and Beth will then be in a better position to leverage their claim into a settlement for the entire class or, if PhotogaPub resists settlement, to make the case for certifying the class as to the entire claim down the line. This way, Arnold and Beth can avoid over-narrowing the subclasses—Subclass B in particular—upfront and approach what may be a

138. See, e.g., Romberg, *supra* note 131, at 261–63 (referring to Rule 23(c)(4) as “the hero of this story”).

class-skeptical court with a group that is cohesive despite its size.

III. CONCLUSION

In light of the Supreme Court's arguable strengthening of the commonality requirement and its shift of classes seeking monetary relief to the stringent Rule 23(b)(3) requirements, it is difficult to identify an area of law under which a claim would be a natural shoe-in for class-wide resolution. While copyright infringement claims lend themselves to individualized inquiries, to single out copyright holder classes as particularly unfit for class treatment can overlook the efficiency to be gained by grouping together copyright infringement claims that arise out of a single course of conduct, such as mass digitization. Overstating the individualized aspects of copyright infringement can also undermine sound attempts at bringing a copyright infringement claim on a class-wide basis. Not every putative copyright holder class is defined by the same parameters; some are defined by pre-established copyright ownership or by association with common evidence of infringement, obviating the usefulness of the class action mechanism. Rather than assessing a class's fitness for class certification by reference to the type of law under which a claim is brought, it is important to take each putative class on its own terms.

On the other side, it is important for plaintiffs seeking class certification to be mindful of the reasons for the class action mechanism. If the Supreme Court's recent class action jurisprudence is clear on one thing, it is that the class action mechanism should be maintained as a tool of judicial efficiency. Therefore, plaintiffs must be realistic about the breadth of their claims and tailor their requests for class certification to the aspects of their claims that are clearly common. As demonstrated through the PhotogPub hypothetical, in some cases this means attempting to certify only a small subclass of the originally conceived class or a subset of issues instead of the entire claim. By doing this, classes will not be viewed as Frankenstein monsters, but as cohesive units that are intuitively best addressed on a class-wide basis.