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DO NOT CITE OR CIRCULATE

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DO NOT CITE OR CIRCULATE

Lee Anne Fennell

SPEND A LITTLE TIME around legal academia and you will notice something strange.¹ Law professors, who are generally quite enamored of their own words and not especially reluctant to toss around their own half-baked ideas, commonly attach some variant of this essay's title (hereinafter "DNCC") to early versions of their work products before sending them out into the world. Indeed, I have done it myself. But I have never seen the point of the practice, and the disadvantages are plain enough.² Perhaps most puzzling is the prevalence of the DNCC label on papers publicly available on the internet.³ Surely this is a bit like closing the barn door after the horses are out. The paper can already be read by every man, woman, and child on the planet who has access to an internet connection. Where else could it possibly be circulated *to*? After considering possible rationales for the DNCC practice, I have concluded that we would all be better off if legal scholars would cut back significantly on the use of DNCC labels. This essay is devoted to convincing you of that proposition.

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¹ I do not mean to suggest that the practice I describe is unique to legal academia (it clearly isn't), only that this is the place where I have encountered it. Nor do I mean to suggest that the practice I describe is the only strange thing about legal academia.

² Still, I will spell them out briefly in Part II, below.

³ To get a sense of the magnitude of this phenomenon, try running a few searches in your favorite search engine. Instructions not to cite without permission even appear in the star notes of several published law review articles.

I. WHY DNCC?

We can start by asking why anyone would ever slap a DNCC label on their work. Doing so is unnecessary to activate copyright protection and would seem to have little or no effect on the scope of those protections.⁴ The apparent goal is to make readers feel duty-bound to refrain from using the work in otherwise permissible ways. But why? I can think of a number of possibilities, but few of them hold much water. Those that do cannot account for the great majority of DNCC labeling that goes on.

The Absent-Minded Friend. In this scenario, the writer believes that the document is not ready to be seen by anyone other than a particular trusted friend, spouse, colleague, or research assistant. Said friend or associate has been enlisted to help look for the most egregious and glaring of the errors contained therein. The nervous writer readies a cover email that explains the situation and prepares to attach the hideously unfinished document. She hesitates. What if the friend prints out or saves the document, forgets the reason he has it, and begins distributing it all over the place, causing it to get cited derisively by hundreds of strangers who collectively bring the writer's career to a cataclysmic halt? Better affix a DNCC label to the document itself, just in case, before hitting "send." This precaution, which will keep the absent-minded (but thoughtful and literate) friend from inadvertently misusing the document, seems like a valid, if slightly paranoid, use of the convention. However, most of the documents bearing the DNCC label, especially those freely available on the internet, were evidently not entrusted (just) to such a friend.⁵

⁴ Copyright protections attach automatically and require no printed plea. Although a copyright notice is relevant to obtaining damages, DNCC is not a copyright notice. See 17 U.S.C. § 401. Rather, it seems to fall in the category of "restrictive legends." See, e.g., Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281, 287-88 (2003). Whether such a legend could have any effect on the rights of users in this setting is questionable, but even if it did, we would still need an explanation for why an academic author would view that effect as desirable. See *infra* notes 10-13 and accompanying text (discussing potential interactions between copyright law and DNCC).

⁵ Of course, the fact that there are many drafts circulating with the DNCC label in

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The Misdirected Email. A variation on the point above, and on the disclaimers that are routinely appended to law firm email messages, is that the label affixed to the paper alerts any chance recipient to the fact that they received the document only by mistake, or as a result of misfeasance or malfeasance on the part of the person to whom it was initially conveyed. But this seems unlikely to explain much of the DNCCing we see. Very few law review articles are of much interest outside of the tiny enclave of people working in the same subject area. The odds of a random recipient caring enough to circulate or cite the piece seems vanishingly small.

The Impending Presentation. A more likely explanation for DNCC labeling is that the writer signed up to give a paper at a workshop or conference that seemed blessedly far away at the time of commitment but is now bearing down on her like a freight train. The organizers are on her every minute of the day asking for the draft, and she has to give them something. She cobbles together a misshapen draft, adds a DNCC label, and sends it on, hoping for the best. While an impending presentation coupled with poor time management skills explains why someone might end up circulating shoddy work, it does not (on its own) explain what good the DNCC label is expected to do. This explanation, then, must be parasitic on one of the explanations that follow, such as “the reputational hedge.”

The Reputational Hedge. It seems likely that some people put DNCC labels on their work in an effort to hedge their reputational bets. Their hope is that the paper will be very well-received. Their fear is that the paper will be viewed as utter garbage. They would like to have a way to indicate that the paper isn’t really *done* yet and that it will probably get a whole lot better in the future, so that they can limit the downside risk, without cutting into the upside potential. The question is whether the DNCC helps at all in this regard. I think

semi-public fora and even on the internet does not establish that they were not initially conveyed to then-trusted friends in just the manner described above. Perhaps those “friends” didn’t bother to read the DNCC label before widely circulating the draft, or actually circulated it on purpose against the writer’s wishes (after seeing how poorly crafted it was), in hopes of ending the writer’s career. This seems unlikely, however.

it does not. It is unrealistic to assume that bad impressions of work will be magically counteracted by a DNCC label. Few people will reread a paper after having read an early draft, and all one will really gain is an increased chance that the paper will be ignored.

The Future Appointee. Some academics may have aspirations of a future political appointment to the bench or to some other lofty position. In the confirmation hearings that would surround such an event, the appointee might expect her political enemies to brandish snippets that put her intelligence, judgment, views, or grammatical skills in a poor light. But suppose that one or more such snippets come from a paper bearing a DNCC label. Is it plausible to suppose that the appointee's enemies will hesitate to use it? And, if they do use it, is it plausible to suppose that the appointee will be able to effectively use the DNCC label as a shield?

The Edgy Empiricist. I do not do empirical work, so this one is pure speculation. I understand that data arrive raw and have to be "cleaned" or even "scrubbed." Regressions and robustness checks are run. This all takes time, and because small changes in methodology can make large differences in results, the careful empiricist might affix a DNCC warning to unfinished drafts lest anyone rely to their detriment on results that are tentative and in need of further checks or manipulations. This seems reasonable, at least if one posits some reason why the early-stage paper needs to be out there in the first place (see, e.g., "the impending presentation" *supra*).

The Cautious Coauthor. Sometimes coauthors are in different places and on different schedules, communicating scattershot by email and phone, as a deadline approaches that requires putting the paper into the hands of others. Editing progresses, redlining begets bluelining, purplelining, and greenlining, and finally, the time is at hand – the paper must be turned in. If not all coauthors have had a reasonable opportunity to review all of the changes, the submitting coauthor might add a DNCC label to the paper as a kind of disclaimer. Sure, a coauthor could write something more forthright, like "Last Edited by Jones. Don't Blame Smith!" or "Warning! This Draft Contains Edits Smith Never Even Saw" but that might puncture the illusion that the coauthors are a team working deliberately and coopera-

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tively toward a unified goal, rather than a loosely allied band of procrastinators.

The Updater. With few exceptions, everyone who uses the DNCC formulation plans to update the draft at some point. Sure, some papers fall by the wayside, but strong pressures toward squeezing publication lemonade out of even the most lemon-like of drafts make paper abandonment a less common phenomenon than one might expect. Thus, one function of the DNCC formulation might be to induce the reader to find, and cite, a later draft or even the published version of the piece, if one exists. The idea is that the reader will say to herself, “Gee, it says not to cite it, but I really want to. I wonder if there’s a version somewhere that *doesn’t* say that.” If pursued, this line of reasoning might put the reader on the trail of the author’s finished masterpiece. But will the trail be followed, and, if so, is the DNCC notice the reason?

I am skeptical on both counts. Unless the paper’s contribution is truly essential to the researcher’s project, the DNCC may cause the paper to get set aside or passed over in the rough and tumble of drafting. If the paper is really important enough to cite, however, most researchers would carefully look into whether there is a later draft or publication that would represent a more authoritative cite – even without the goad of the DNCC. If due diligence can’t turn up a later version when the researcher’s own work is being readied for the world, the DNCC presents a problem – the researcher may feel forced to leave out the cite, raising the risk that the cite won’t make it back in. Without a DNCC notice, the researcher can insert a cite to the working paper into her draft as a placeholder until such time as a more authoritative version comes into being.

The Demanding Publisher. Closely related to the explanation above is the possibility that some publishers might insist on DNCC notices or refuse to consider submissions that have been previously distributed without such a notice attached. The student-edited law reviews in which many DNCCing legal scholars routinely publish have never, in my experience, expressed a DNCC preference. But even if some publishers and journals had such a requirement, it would merely push the puzzle back an additional level. If the publisher’s concern is

with readers accessing content without purchasing a book or a subscription, then it seems as if the prohibition should be on posting or circulating work in the first place; adding a requirement of a DNCC notice clearly does nothing on its own to keep the content off the internet, for example. If, instead, the concern is with garnering proper citations to the published versions, it again seems questionable that a DNCC notice would produce a net increase in proper citations, rather than merely throw researchers off the trail.

The Untimely Death. Could the DNCC notice instead represent an author's attempt to arrange an advance communication from beyond the grave in the event of her sudden demise? If the author were to perish en route to a conference with the paper itself in tow, for example, first responders on the scene would know not to cite or circulate the draft. Perhaps more relevantly, the notice might provide some information to the decedent's family and colleagues about how to treat the work. Yet given that even express requests to destroy works have been famously disregarded,⁶ it seems unlikely that the DNCC would carry very much weight. Those truly concerned with how their work will be treated posthumously would do better to make more comprehensive arrangements, as the DNCC isn't really up to testamentary work.

The Neophyte Networker. Although I have primarily focused on the prohibitions contained in DNCC labels, they usually contain a kind of backhanded invitation as well: the stated bans can be dissolved by obtaining the author's permission. Some legal scholars new to academia might view a DNCC notice as a networking opportunity. Instead of waiting around to meet people in your field, they might reason, just post compelling articles on the internet with DNCC labels, and let the luminaries come to you. Perhaps, along with a plenitude of requests for citation permission, you will receive tips on how to improve the article, adulation, friendship, conference invitations – maybe even offers to visit or interview at other schools.

⁶ See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 830-35 (2005) (describing and analyzing Kafka's request to have his work destroyed upon his death, which his executor ignored).

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While anything is possible, it seems safe to assume that if you would have been ignored absent the DNCC label, you will be ignored with equal or greater force after adding it, other things being equal. A better bet is to send out your article to people in your area for feedback. Some will ignore you, but surprisingly many will not.

II. THE PRICE

DNCC labels are not costless. In thinking about the price they exact, it is helpful to address the prohibitions on citing and quoting separately from those on circulation. In thinking about whether the DNCC imposes any marginal burden, it is also useful to consider copyright law and fair use.

No Citing, No Quoting. As online access makes early drafts more and more accessible, the fraction of citations to works in progress can be expected to increase. If everyone puts a DNCC note on every draft, the costs of producing a new draft will rise accordingly, if permission must be sought for each use.⁷ Academics are producing new drafts all the time, so the costs are borne by all of us. This would be a tragedy of the commons if each of us were actually internalizing some benefit from DNCCing that made it individually rational, if collectively foolish, to engage in the practice. But my sense is that, except in some limited cases, it is individually foolish as well. The DNCC provides scholars very little protective cover, while introducing an impediment between ideas and those who would use them. Most of us need all the publicity we can get for our work, and the DNCC works at cross-purposes with that goal. This is made painfully obvious when a blogger drawing attention to a draft feels forced to limit what can be said about it due to a DNCC notice.⁸

⁷ This mirrors “anticommons” arguments raised in other contexts. See, e.g., MICHAEL A. HELLER, *THE GRIDLOCK ECONOMY* (2008).

⁸ See, e.g., Larry Solum, lsolum.typepad.com/legaltheory/2009/06/shaman-on-originalism.html (explaining, after providing the abstract of an article recently posted on the Social Science Research Network, “I would like to have included some excerpts, but this paper has a do not quote or cite request.”).

Not only does the audience miss a chance at a potentially relevant and interesting idea, the author is deprived of free publicity.⁹

No Circulating. Academics may hesitate to share DNCC-marked drafts that they have in their possession with their colleagues who are working on similar issues, to the detriment of both the draft author and the potential sharees. Sure, it's possible to contact the author and ask permission to share the work, but that's a pain. Why should academics want to make it harder for others to do them favors?

What About Copyright? In assessing the cost of DNCC, it is important to know whether it purports to restrict readers from engaging in conduct that would otherwise be permissible. Could it be that the DNCC notice merely reiterates the copyright protections that already sheathe these nascent works, effectively performing a public service by warning academics against accidentally turning themselves into infringers? Copyright protects expression, not ideas,¹⁰ so merely citing a work and referring to its thesis or arguments (without quoting or closely paraphrasing) would not implicate copyright law. Quoting and copying unpublished work does fall within the domain of copyright, but the fair use defense remains available.¹¹ To the extent that ordinary academic quoting and sharing count as fair use, the DNCC notice looks like an attempt to narrow the fair use privi-

⁹ Although citations and quotations are not invariably flattering to the author, they are usually good news. See Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 387 (2000) (“Negligible work is more likely to be ignored than to be cited. A negative citation often indicates that a work has gotten under the skin of the critic, perhaps because it mounts a powerful challenge to established positions or ways of thinking.”).

¹⁰ 17 U.S.C. § 102(b).

¹¹ Fair use is determined under a four-factor test, and one of the factors is “the nature of the copyrighted work.” 17 U.S.C. § 107. The fact that work is unpublished can enhance the protection it receives. See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 564 (1985) (“the scope of fair use is narrower with respect to unpublished works” given “the author’s right to control the first public appearance of his expression”). But Congress has subsequently made clear that the fair use defense remains potentially available even for unpublished works. See 17 U.S.C. § 107 (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).

lege for work that the author has (in many cases) already made available to the entire world. Even if the label could play some role in copyright analysis, whether by removing an argument that an implied license had been granted,¹² or by providing evidence about the nature of the work that might be pertinent to the fair use determination,¹³ this still does not explain why an author should view such an effect as serving her interests.

There remains the question of whether merely removing the DNCC label goes far enough to address the costs noted here. If some routine academic uses of some manuscripts would exceed fair use, then DNCC is not the (only) problem. Here, we might build on the Creative Commons model to add an “Academic Circulation Encouraged” (“ACE”) label to the lexicon of draft writers – assuming we could come up with a coherent idea of what academic circulation entails. In the meantime, academics should avoid hobbling each other beyond the legal scope of copyright protection by refraining from unnecessary DNCC labels.

III. THE FIX

The DNCC has an appealingly risk-averse quality that seems to exude a high degree of care, and it is easy to understand why academics, myself included, have fallen into using it. Perhaps, for those of us who practiced before teaching, it is a throwback to our days at the law firm, when caution reigned.¹⁴ Even then, I recall one

¹²The law surrounding implied licenses is highly murky, making it difficult to provide any definitive pronouncements here. See, e.g., Christopher Newman, “What Exactly Are You Implying?: The Elusive Nature of the Implied Copyright License,” 32 *CARDOZO ARTS & ENT. L.J.* 501 (2014).

¹³For example, the DNCC might be evidentiary on a question that at least one commentator has deemed important to a fair use claim: “whether, at the time the putative infringement occurred, the creator considered her work finished.” William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659, 1780 (1988) (proposing that the fair use defense be unavailable where unfinished works are involved). But even if courts were to adopt this approach, labels like “preliminary and incomplete” or “draft” would work just as well.

¹⁴That inexplicable DNCC-like practices are not limited to academia is illustrated by the EPA’s use of the phrase “do not quote or cite” on freely available public

administrative assistant making fun of our obsessive practice of stamping DRAFT on every copy of a brief that was in progress. “What, you think we’re going to just run off to the courthouse and file it?” Well, you can’t be too careful, we thought to ourselves. Accidents can happen. But when the apparently risk-averse choice does little to avert risk and adds costs to the system as well, it is time for a change. The stakes, admittedly, are fairly puny. Still, this is an everyday irritant that could easily be removed, making the world an incrementally better place for legal academics. Let’s make it happen. Here’s how.

Think Before You DNCC. Ask yourself whether you really mean it, what you hope to achieve by it, and whether those hopes are well-founded. If the DNCC gains you nothing, do us all a favor and leave it off. We will all be better off for it – including, probably, you.

Popularize Narrower Alternatives. If a draft still needs a lot of work, the phrase “preliminary and incomplete” might be added. It signals that there’s a later draft to come, but doesn’t tell readers what to do with the draft in their hands. Another alternative is something like this: “Draft [date]; contact author at [email] for the most recent version.” This works well too, assuming one does eventually generate a more recent version. Best of all is to indicate where the paper is forthcoming, once one knows. This does a world of good in inducing accurate updating without reducing the chance that you’ll be cited at all. The use of an “Academic Circulation Encouraged” or “ACE” label would also be helpful in clarifying how the work can be used.

Fight DNCC Abuse. Norm entrepreneurship¹⁵ is needed in this area. It is probably unnecessary to create “Stop DNCC Abuse” buttons

documents. See Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEORGETOWN L.J. 2025, 2028 n. 13 (1999) (“Although every page of the EPA’s draft guidelines says “Draft – Do Not Cite or Quote,” I have chosen to cite the draft guidelines because they are a readily available public document, and because they provide the most extensive elaboration to date of the EPA’s position on discounting.”).

¹⁵ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996) (“norm entrepreneurs can alert people to the existence of a shared complaint and can suggest a collective solution”).

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and bumper stickers. But perhaps we should create norms against DNCC use where the draft in question is on the internet and appears to have been posted there by the author herself. Academics are sensitive creatures and if a few bloggers out there could start a trend of mild, good-natured mocking of inappropriately-used DNCC labels, we could turn this thing around.

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