

COPYRIGHT AS TRADE REGULATION

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This Article identifies conflicting strands of the public interest in copyright, then proposes to mediate those conflicts by conceiving of copyright law as a prohibition against acts of unfair competition. Under this conception, copyright infringement would consist of the infliction of competitive harm in a “relevant market,” a market this Article proposes to define by asking what rights creators are entitled to expect when they engage in the act of creation. As regards “printed works” (that is, works created for the purpose of existing in copies), this Article argues that creators are not entitled to expect the right to exclude others from engaging in acts of private copying, acts which, standing alone, do not serve as market substitutes to any significant extent. Instead, creators are entitled to expect only the right to distribute those copies to the public—for only acts of public distribution are behaviors that threaten to cause the sorts of competitive harms that Congress should seek to redress. This Article concludes by revealing how such a copyright law might help to resolve a few of the issues at the very center of the copyright debate: the pervasiveness of personal copying, the rise of contractual and technological access controls, and, of course, the “death” of the fair use defense.

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INTRODUCTION

In section 107 of the Copyright Act, Congress codified the defense known as “fair use,” under which qualifying, unauthorized uses of copyrighted works “for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research [are] not . . . infringement[s] of copyright.”¹ Scholars have described fair use, variously, as a remedy for “market failure,”² and therefore a temporary substitute for functioning markets;³ a doctrine slouching toward irrelevance⁴

¹ 17 U.S.C. § 107 (2000).

² Professor Wendy Gordon articulated this theory more than twenty years ago, and her work has inspired dozens of responses—too many to cite here. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1616 (1982) (“[F]air use implies the consent of the copyright owner by looking to whether the owner would have consented under ideal market conditions.”).

³ See Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC’Y U.S.A. 113, 125 (2003) (“[T]he ‘market failure’ genre of fair use should fade away in a world of perfect price discrimination”); Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC’Y U.S.A. 149, 155 (2003) (noting that the “excuse” type of fair use “should and does disappear if, because of institutional or technological change, the excusing circumstances disappear”); Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem “Transformed”: Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC’Y U.S.A. 251, 265 (1998) (“Implicit in Professor Gordon’s [market-failure] approach to fair use, however, is an element of temporal instability.”).

⁴ See Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC’Y U.S.A. 133, 137 (2003) (“For the great bulk of uses previously excused because of transaction costs, the [fair use] doctrine will simply become irrelevant.”).

and even death⁵ as markets become more sophisticated; a tool for advancing social goals when a finding of infringement promises to produce “bad results”;⁶ and a doctrine that is empty of substance⁷ and therefore “dangerous”⁸ because it creates the illusion that there are limits to an increasingly unlimited entitlement. In other words, copyright scholars cannot agree on what, exactly, the fair use defense is *for*. What hope is there for the courts?

Nowhere is this disagreement more apparent than in the dispute over the Google Library Project, in which Google proposes to scan every book owned by several university libraries and the New York Public Library.⁹ The resulting digital images would constitute a powerful research tool: not only would the images be searchable by keyword but researchers also could view the results of their searches online in image form—along with bibliographic information enabling them to purchase (or borrow) the books of greatest interest.¹⁰ In

⁵ See Wendy J. Gordon, *Fair Use: Threat or Threatened?*, 55 CASE W. RES. L. REV. 903, 906 (2005) (describing the “common claim, that fair use is dead”); cf. Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. COPYRIGHT SOC’Y U.S.A. 193, 193-95 (2000) (discussing the death of copyright in the context of the death of other areas of law); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814 (2001) (arguing that “[c]opyright is dead”).

⁶ Since publishing her groundbreaking article, *supra* note 2, Professor Gordon has defined “market failure” more broadly to take into account considerations of social justice. She now believes that “it makes sense to use the term ‘market failure’ broadly, whenever we have grounds to believe that bad results will follow from adhering to the rule of owner deference.” Gordon, *supra* note 3, at 164; see also Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 44 (2001) (“The 2 Live Crew case thus is emblematic of a second type of market failure in which the value of socially beneficial uses of copyrighted works is not fully internalized.”).

⁷ See Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 396, 402 (2005) (arguing that “the statute itself has become not the embodiment of copyright’s blended nature, as Professor Weinreb argued, but a placeholder for all manner of arguments about limits” and that “[t]he substantive emptiness of fair use makes it something of a dumping ground for copyright analysis that courts can’t manage in other areas”).

⁸ See Gordon, *supra* note 5, at 904 (discussing why fair use might be considered “dangerous”); see also Jessica Litman, *Copyright and Information Policy*, LAW & CONTEMP. PROBS., Spring 1992, at 185, 205 (criticizing the notion that “[w]e do not have to worry about the use of copyright to impede the dissemination of ideas and information . . . because fair use is there to privilege such uses”).

⁹ See JONATHAN BAND, AM. LIBRARY ASS’N, OITP TECHNOLOGY POLICY BRIEF: THE GOOGLE LIBRARY PROJECT: THE COPYRIGHT DEBATE 1 (2006), <http://www.policybandwidth.com/doc/googlepaper.pdf>.

¹⁰ *Id.*

short, “[t]he Library Project [would] make it easier than ever before for users to locate the wealth of information buried in books.”¹¹ Because some of those books would be copyrighted, Google has announced that if a search produced a “hit” on a copyrighted work, researchers could view only a few sentences from that work, in the form of “snippets” surrounding the search term.¹²

When Google announced its project, authors and publishers objected, arguing that Google would be engaging in repeated acts of infringement via the wholesale copying (scanning) of works in which it did not own the copyrights.¹³ This was a valid objection, for the Copyright Act, in section 106, gives copyright owners the “exclusive right[] . . . to reproduce the copyrighted work in copies” and to authorize others to do the same.¹⁴ The word “copies” is defined broadly, in section 101, to include any “material objects . . . in which a work is fixed by any method now known or later developed.”¹⁵ Because computer memory (whether volatile or nonvolatile¹⁶) is a “material object,” digital scans of books stored in computer memory are “copies” for the purposes of section 106. In response to these objections from authors and publishers, Google proposed a change to its policy under which copyright owners who did not wish their works to be scanned could “opt out” by November 1, 2005, the date on which Google planned to begin the expensive process of digitization.¹⁷ Unsatisfied with this solution, a group of authors sued Google on September 20, 2005,¹⁸ and a group of publishers filed a similar lawsuit a month later, on October 19.¹⁹ The cases (together, “the *Google* case”) are pending in the United States District Court for the Southern District of New York.²⁰

¹¹ *Id.* at 9.

¹² *Id.* at 1-2. If a search revealed a work in the public domain, researchers could browse the work in its entirety. *Id.* at 1.

¹³ *Id.* at 3-4.

¹⁴ 17 U.S.C. § 106 (2000).

¹⁵ *Id.* § 101.

¹⁶ The information in volatile memory, such as “random access memory” (or “RAM”), is lost when power to the computer is interrupted. By contrast, nonvolatile memory, such as a hard disc drive or a flash memory device (“thumb drive”), can retain stored information even when the computer or device is not powered.

¹⁷ BAND, *supra* note 9, at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ See Complaint, Author’s Guild v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005), available at <http://news.findlaw.com/hdocs/docs/google/aggoog92005cmp.pdf>;

Because the acts in which Google has engaged almost certainly constitute prima facie infringement, the fate of its library project likely depends on the application of the fair use defense. Section 107 of the Copyright Act instructs courts to decide whether a disputed use is fair by evaluating four statutory factors.²¹ The Supreme Court has placed the most emphasis on the first (the commerciality of the use) and the fourth (the effect of the use on the market for the original), and it is easy to see why: commercial uses are more likely than noncommercial ones to compete with sales of the copyrighted work. Further, any such competition is likely to result in lower prices and reduced market share for everyone, and these market effects, in turn, are likely to diminish the profits of those erstwhile monopolists, the creators (and their assigns). Faced with the prospect of earning lower profits, at least some potential creators are likely to forego the act of creation in favor of other, more profitable pursuits, thus leading to a decline in the number or the quality of works created. Nobody wants that.

The fair use defense would be easy to apply if commercial uses usurped the market for the copyrighted work, while noncommercial (“nonprofit educational”)²² ones did not. But there are two problems with a fairness test for which commerciality is the linchpin: First, the definition of “commercial” is becoming increasingly broad. One might think that scholarly activities, at least, would be comfortably on the gratis side of the line. Yet courts have found even the activities listed in section 107—including scholarship—to be commercial when users gain an indirect economic advantage by failing to pay the copyright owner for a license, thus depriving her of potential licensing revenue.²³ As a number of scholars have noted, this inquiry is circu-

Complaint, *McGraw-Hill Cos. v. Google Inc.*, No. 05 CV 8136 (S.D.N.Y. Oct. 19, 2005), available at <http://www.publishers.org/press/pdf/40%20McGraw-Hill%20v.%20Google.pdf>.

²¹ They are the following:

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

17 U.S.C. § 107 (2000).

²² *See id.* § 107(1).

²³ *See Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994); *see also Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1388 (6th Cir. 1996) (holding that “the potential for destruction of this [licensing] market by widespread circumvention of the plaintiffs’ permission free system is enough . . . ‘to negate fair use’” (quoting *Harper & Row, Publishers., Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985))).

lar.²⁴ If depriving the copyright owner of licensing revenues were enough to make a use “unfair,” then the fair use defense would be no defense at all, for by definition, the fair use defense comes into play only when a defendant fails to pay for a license. Recognizing this,²⁵ courts have asked whether the defendant has deprived the copyright owner of licensing revenues only in “traditional, reasonable, or likely to be developed markets.”²⁶ The problem with this seemingly narrower inquiry, however, is that copyright owners themselves can define whether markets for their works are “likely to be developed” by developing those markets themselves. In other words, copyright owners themselves can define away the market failure for which fair use is the remedy.

The only exception to this rule appears to be that “[c]opyright owners may not preempt exploitation of transformative markets,”²⁷ which reveals the second problem with using commerciality as a test of

²⁴ See Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHL-KENT L. REV. 1257, 1277 n.98 (1998) (“In both cases, the courts adopted circular arguments that because a use *could* be licensed, it was no longer a fair use and must be licensed.”); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 41 (1997) (arguing that the *Texaco* court’s “circular reasoning of ‘lost’ permission fees will become conclusive on the fourth . . . [and] most important fair use factor” and that, “[t]herefore, allowing circular reasoning to determine [that] factor will often result in circularity dictating the outcome of a fair use case”); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1021 (2002) (asserting that the Second Circuit employed circular reasoning when, following the market failure approach to fair use, it held in *Texaco* that copying articles from scientific journals at the request of, and for use by, researchers qualified as copyright infringement); see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4], at 13-197 (2006) [hereinafter NIMMER] (writing of the fourth statutory fair use factor, “how can one prove a potential [impact on the market for the copyrighted work] without simply degenerating into the tautology that defendant occupied a certain niche, which itself proves a potential market to exist and to have been usurped?”).

²⁵ See *Texaco*, 60 F.3d at 929 n.17 (“[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.”).

²⁶ *Id.* at 930; see also *id.* (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.” (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994))); *id.* (observing that “the fourth factor [is] concerned with “use that supplants any part of the normal market for a copyrighted work”” (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (quoting S. REP. NO. 94-473, at 65 (1975)))).

²⁷ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (alteration in original) (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145 n.11 (2d Cir. 1998)).

fairness: commerciality (or lack thereof) does not appear to be dispositive of fairness either way. As the Supreme Court warned in *Campbell v. Acuff-Rose Music, Inc.*, “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”²⁸ The “purpose and character” of the use in *Campbell* was a 2 Live Crew parody of the Roy Orbison classic “Oh, Pretty Woman,” but it was commercial nonetheless: the song was being offered for sale in music stores nationwide, and 2 Live Crew (or more likely, its record company) was making money.²⁹ Whether the rap group also was competing with Roy Orbison and his music publisher was another question. Although it remanded this question to the district court, the Supreme Court seemed to think the answer was no. “[A]s to parody pure and simple,” the Court wrote, “it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.”³⁰ Why not? Because a parody is *transformative*, not competitive. It does not “supersede[.]” the original, but instead “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message.”³¹ According to the Court, “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works”³²—even commercial ones.

What does this mean for Google? Under existing law, Google must show either market failure³³ or transformation in order to prove its entitlement to the fair use defense. This presents a considerable challenge. Consider market failure first: knowing that the district court is likely to ask whether Google has entered a market that is “likely to be developed” by the plaintiffs,³⁴ at least one of the plaintiffs has hastened to develop such a market by announcing a searchable library of its own. On December 12, 2005, HarperCollins issued a

²⁸ 510 U.S. 569, 584 (1994).

²⁹ *Id.* at 573.

³⁰ *Id.* at 591.

³¹ *Id.* at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

³² *Id.*

³³ See Gordon, *supra* note 2, at 1613 (arguing that “[i]n the ordinary copyright case, the court assumes that the defendant could have, and therefore should have, proceeded through the market”).

³⁴ See *supra* note 26 and accompanying text.

press release in which it stated its intention to “create a digital warehouse for all of its content” that would both “satisfy[] the demands of the marketplace” and “allow[] the publisher to remain in control of its digital files and intellectual property.”³⁵ HarperCollins also has described its goal as the “monetization” of its content.³⁶ While the district court might refuse to credit evidence of markets developed post hoc, it would be perfectly justified in holding that Google is depriving the plaintiffs of potential licensing revenues by providing the public with the means to search “monetiz[ed]” content for free. Google used copyrighted works to enter a market, it did not pay to license rights in those works, and the market it entered was “likely to be developed” by the owners of copyright because at least one owner has actually developed it.³⁷

Google faces a similar challenge in defining (or redefining) “transformative.” While a handful of lower courts have stretched the definition to include mere reproductions,³⁸ the Supreme Court in *Campbell* seems to have intended that “transformative” apply only to those derivative works in which a user takes expression from a copy-

³⁵ Press Release, Erin Crum, Commc’ns Manager, HarperCollins Publishers, HarperCollins Publishers To Create Digital Content Warehouse (Dec. 12, 2005), *available at* <http://www.harpercollins.com/footer/release.aspx?id=399&year=2005>.

³⁶ Press Release, Erin Crum, Dir. Corp. Commc’ns, HarperCollins Publishers, HarperCollins Publishers Selects Newsstand, Inc. To Develop Global Digital Warehouse (Apr. 10, 2006), *available at* <http://www.harpercollins.com/footer/release.aspx?id=445&year=2006>.

³⁷ To be sure, the market for permissions fails with respect to those works for which rights holders are difficult (if not impossible) to identify—as with, for example, books that have gone out of print. *See Eldred v. Ashcroft*, 537 U.S. 186, 250 (2003) (Breyer, J., dissenting) (noting that “the permissions requirement can inhibit or prevent the use of old works . . . because the [copyright] holder may prove impossible to find”).

³⁸ In *Kelly v. Arriba Soft Corp.*, for example, the Court of Appeals for the Ninth Circuit found transformation in the reproduction of digital photographic images as part of a search engine. 336 F.3d 811, 819 (9th Cir. 2003). Even though the images themselves were unchanged, except in size, the court noted that the defendant was using the images to “serve[] an entirely different function” than was the plaintiff—that is, “improving access to information on the internet versus artistic expression.” *Id.* at 818-19. The court also found it unlikely that anyone using the search engine would be able to substitute the “thumbnail” reproductions for the original images, since “enlarging them sacrifices their clarity.” *Id.* at 819; *see also* *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1118 (D. Nev. 2006) (listing reasons why “Google’s presentation of ‘Cached’ links to the copyrighted works at issue . . . does not serve the same functions” as did the original work). *But see* *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 847 (C.D. Cal. 2006) (distinguishing *Kelly* because “Google’s use of thumbnails on its image search [is] far more commercial than Arriba’s use” and “Google’s thumbnails lead users to sites that directly benefit Google’s bottom line” through advertising revenues).

righted work and adds expression of her own—creating, in the end, “something new,”³⁹ like a biography, an editorial, or a parody.⁴⁰ At the very least, according to the Court, a transformative work must “alter[]” a copyrighted work with “new expression, meaning, or message”;⁴¹ it would be difficult (although not impossible) to add new meaning or message without adding new expression, too.⁴² Judge Pierre Leval, whose article on fair use appears to have inspired the Supreme Court, probably had very much the same thing in mind. As he wrote a few years before *Campbell*, a transformative work is one that “adds value to the original . . . in the creation of new information, new aesthetics, new insights and understandings.”⁴³

Google is not doing any of these things; it simply is proposing to reproduce books in digital form, thus making them searchable online. It is engaging in unauthorized and untransformative, though unquestionably beneficial, copying.⁴⁴ The benefits for researchers are obvious, but the publishing industry stands to gain as well. If scanning

³⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁴⁰ In taking expression from a copyrighted work, the user should take care not to create a satire instead of a parody. For at least one Justice,

[i]t is not enough [for the purposes of fair use] that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).

Id. at 597 (Kennedy, J., concurring).

⁴¹ *Id.* at 579.

⁴² In *New York Times Co. v. Roxbury Data Interface, Inc.*, decided under the Copyright Act of 1909, one court did hold that the publishers of a “personal name index to the annual New York Times Index” had engaged in a fair use, in part because their activities “appear[ed] to have the potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information.” 434 F. Supp. 217, 219, 221 (D.N.J. 1977). In that case, however, the defendants did not engage in the wholesale copying of protected works; indeed, they copied only the names of those persons appearing in the *New York Times* from 1851 through 1974. *Id.* at 219. Those names likely would not be held protectable today. See 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any . . . discovery . . .”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (“Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.”).

⁴³ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

⁴⁴ See Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1143 (1990) (“A use may serve an important, socially useful purpose without being transformative, simply by making the copied material available.”).

books and making them searchable online leads researchers to find books that they otherwise might not have found, then a searchable library might help to expand the readership of books, thus leading to increased sales and increased borrowing from libraries (which, in turn, leads to increased sales). Google also is providing these benefits at very low cost to the public, in significant part because nothing that Google proposes to do has the least chance of preventing writers from writing, or publishers from publishing. Google is not *competing* with the publishing industry—as if, for example, it were enabling consumers to read copyrighted books online. In fact, it is not engaging in any activity in which the publishing industry—until now—has shown the remotest interest. Unfortunately, however, none of these observations is particularly relevant to the current fair use inquiry.

The late Professor L. Ray Patterson once observed that “[m]ost discussions of the fair use of copyrighted works provide answers without ever asking the right question. That question is not ‘what is fair use?’ but ‘what is copyright?’”⁴⁵ If fair use has become “a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly,”⁴⁶ the fault lies not in the defense itself, but in the “grand conception”: an increasingly proprietary copyright law that overwhelmingly equates the public interest with the private interests of copyright owners. Those private interests, in turn, largely are held by the very companies that control the market for copyrightable works. Is it any coincidence that the new economics of copyright places so much emphasis on private ordering,⁴⁷ in which the government plays no significant part?

⁴⁵ L. Ray Patterson, *Understanding Fair Use*, LAW & CONTEMP. PROBS., Spring 1992, at 249, 249; see also Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 365 (2002) (“Whether to impose a complicated legal regime on individual consumer consumption of copyrighted works is a crucial question on which reasonable people might differ violently. Resolving it requires us to decide what we have a copyright law for.”).

⁴⁶ Leval, *supra* note 43, at 1110. In proposing that fair use assessments depend “primarily on whether, and to what extent, the challenged use is *transformative*,” *id.* at 1111, Judge Leval has argued that fair use should *not* be seen as merely an occasional exception to the copyright monopoly, *id.* at 1110. Yet this is precisely what fair use has become, in part because of courts’ emphasis on transformation itself.

⁴⁷ See Julie E. Cohen, Lochner in *Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462, 492 (1998) (“Market ordering presupposes some *ex ante* distribution of entitlements. The cybereconomists take existing entitlements as given, and do not inquire as to the welfare effects of alternative entitlement structures.” (footnote omitted)).

Professor Julie Cohen has argued that “we need a theory of the ordinary user: a theory of what conduct is private.”⁴⁸ To date, however, such a theory has been elusive. Because the law described by any such theory must “promote the Progress of Science,”⁴⁹ I begin, in Part I, by locating and examining a few of the strands of the public interest in copyright—the inducement of creation, access to the products of creation, and the promotion of open and populous markets in copyrighted expression. In Part II, I describe a copyright law that would serve these interests by identifying and punishing methods of unfair competition in the relevant markets. Because, in this Article, I focus on the exclusive rights of reproduction and distribution (but *not* adaptation, performance, or display), I define the relevant markets to include only the markets for *copies* of copyrighted works. In these markets, I argue, acts of copying are not “unfair,” in themselves, because they do not inflict significant competitive harms. Accordingly, I argue that copyright owners should not enjoy the exclusive right of reproduction (which implicates private conduct), but should enjoy only the exclusive right to distribute copies of their works to the public. In Part III, I reveal how such a copyright law might help to resolve a few of the issues at the very center of the debate: the pervasiveness of personal copying; the rise of contractual and technological access controls; and, of course, the “death”⁵⁰ of the fair use defense. I also examine how such a law might affect the *Google* case.

I. LOCATING THE PUBLIC INTEREST IN COPYRIGHT

Among copyright scholars, a debate of sorts is raging as to whether copyrights were or are “property,” and as to what the answer might mean for copyright law.⁵¹ While these are interesting questions,

⁴⁸ Julie E. Cohen, *Copyright's Public-Private Distinction*, 55 CASE W. RES. L. REV. 963, 967 (2005).

⁴⁹ U.S. CONST. art. I, § 8, cl. 8 (granting to Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

⁵⁰ See *supra* note 5 and accompanying text.

⁵¹ See, e.g., Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1008 (2006) (“American legal minds in the late nineteenth and early twentieth centuries were using ‘literary,’ ‘artistic,’ and ‘intellectual’ virtually interchangeably to refer to a kind of ‘property’ in expressive works.”); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895 (1997) (book review) (“[O]nly recently has the term ‘intellectual property’ come into vogue.”); see also L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 60 (1987) (“The Constitution creates no property rights.”).

they might not be very useful ones. Contrary to what Blackstone famously wrote,⁵² to describe something as “property” is not to say that one has unlimited rights in it. Property rights are subject to limits, which the government imposes in furtherance of the public welfare. As a consequence, it might not matter very much whether copyrights are “property” or are, instead, limited grants made for limited times, effected through enactments of positive law “according to the will and convenience of the society.”⁵³ If the ownership of property is characterized by the right to exclude others, then copyrights do indeed create property rights. But copyright law also regulates; in granting rights, it describes the range of acceptable behaviors among those having an interest in copyrighted works—that is, creators, publishers, users, consumers, and the public. When Professor Patterson wrote that copyright has “both a proprietary and a regulatory basis,”⁵⁴ he was right, although not, perhaps, in the way he intended. Property and regulation are two sides of the same coin: to the extent the law creates property rights in creators and their assigns, it regulates the behavior of the rest of us.

The most useful observation about copyrights as property might be that characterizing copyrights as “property” risks conveying the impression that copyrights are more exclusive than they really are. The word “property” connotes a broad right—that is, a right with few, if any, exceptions. It also connotes a durable right. At a fundamental level, the question whether copyrights are property revolves around the extent to which the government can and should tinker with the exclusive rights that copyright owners have come to enjoy. Most would agree that the government has the power to do this. For the most part, however, scholars have elided the question of what interests the government should consider when it decides whether and how to exercise this power.⁵⁵ Obviously, the government should seek to “pro-

⁵² According to Blackstone, “[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other.” WILLIAM BLACKSTONE, 2 COMMENTARIES *1-2.

⁵³ Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THOMAS JEFFERSON: WRITINGS 1286, 1291-92 (Merrill D. Peterson ed., 1984).

⁵⁴ Patterson, *supra* note 51, at 32.

⁵⁵ *But see* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 289 (1996) (suggesting that “our fundamental, nonmonetizable interests in expressive diversity and informed citizenship” should underlie copyright law).

mote the Progress of Science,”⁵⁶ but this injunction is so vague as to be almost completely unhelpful. What, exactly, are the interests underlying copyright law?

The law itself is ambivalent on the subject. Consider the fair use defense: the fact that a use can be *prima facie* infringing and nonetheless be “fair” suggests that the government does have the power to shrink the property right. Courts exercise this power to safeguard the public interest in cases in which upholding the exclusive rights of the copyright owner would undermine the purposes of copyright law.⁵⁷ Does the public interest lie in providing copyright owners with exclusive rights that may be invaded only when the First Amendment requires it? Or, in codifying the fair use defense, did Congress delegate to courts the authority to grant the public access to copyrighted works when the public benefit outweighs the private harm to the copyright holder? Courts have not provided consistent answers to these questions, and as a result, the constituencies of copyright are locked in a struggle to define “fair use” and thus to determine the meaning of copyright itself. At the heart of this struggle is the definition of the “public interest.”

In the balance of this Part, I locate and examine a few strands of the public interest in copyright: (1) the inducement of creation through the grant of exclusive rights, (2) access to the products of creation, and (3) the promotion of open and populous markets in copyrighted expression.

A. *The Inducement of Creation*

In pursuing private interests, private actors sometimes engage in behaviors that threaten the public interest. The government responds by seeking to modify those behaviors, whether legislatively (by enacting statutes) or administratively (by rulemaking and enforcement). Indeed, copyright law itself is a response to behavior that threatens the public interest: because copyrightable works may be copied and distributed without consuming the original, creators who released their work to the public without the protection of copyright law soon would find themselves competing with others for sales of copies of

⁵⁶ U.S. CONST. art. I, § 8, cl. 8.

⁵⁷ See Leval, *supra* note 43, at 1110-11 (“The [statutory] factors . . . direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.”).

their own works. Unable, as a result, to recoup the costs of their labors, creators might reduce their investments in creation, thus leading to the creation of fewer copyrightable works. To prevent this harm, Congress has acted legislatively under its constitutional power to “secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings.”⁵⁸ In granting exclusive rights to creators, the Copyright Act has aimed to promote the public interest by promoting “the encouragement of learning”⁵⁹ through the inducement of creation—a goal that surely is consistent with the constitutional invocation to “promote the Progress of Science.”⁶⁰

For the foregoing reasons, the grant of exclusive rights to creators is widely thought to promote the public good. As courts are fond of reminding litigants, James Madison wrote in 1788 that “[t]he public good fully coincides . . . with the claims of individuals” in the copyright context.⁶¹ But this statement is only partly correct. To be sure, the enterprise of creation depends on granting creators the right to prevent others from making at least *some* uses of their works, and accordingly, the public good flows from granting at least *some* individual claims in works of authorship. But as Madison likely would acknowledge today, the public good does not always or only reside in the grant of exclusive rights.⁶² The phrase “encouragement of learning” itself suggests as much: if the enterprise of learning depends upon the creation of copyrightable works, it also depends on the quality and diversity of those works, as well as on their proliferation and distribution throughout society. It may even depend on their proliferation and distribution in the form of tangible copies. It certainly depends on giving the public the opportunity to respond to those works in sundry ways. And none of these things is possible without allowing the public at least some unauthorized access to copyrighted works.

⁵⁸ U.S. CONST. art. I, § 8, cl. 8.

⁵⁹ Act of May 31, 1790, ch. 15, 1 Stat. 124, 124 (1790).

⁶⁰ U.S. CONST. art. I, § 8, cl. 8. By “‘Science’ . . . the Framers meant learning or knowledge.” *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) (citing EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125-26 (2002)).

⁶¹ THE FEDERALIST NO. 43, at 279 (James Madison) (Isaac Kramnick ed., 1987); see also *Eldred*, 537 U.S. at 212 n.18 (quoting the same line from THE FEDERALIST NO. 43).

⁶² See Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 629 (2006) (discussing how at the founding of the United States, Madison understood “the benefits of a limited term of copyright, both as a means of promoting utility (i.e., encouraging creation) and as a means of rewarding authors for their labors”).

B. *Access to the Products of Creation*

In determining whether a defendant has engaged in copyright infringement, courts first establish whether the defendant copied a copyrighted work; in the absence of any direct evidence of copying, courts ask whether the defendant had “access” to the original.⁶³ This stands to reason, for it would be impossible to copy a work without having seen it (or, in the case of music, having heard it). For this purpose, courts have defined “access” as the “reasonable opportunity” to view (or hear) a copyrighted work.⁶⁴ One can imagine having perfectly legal access to that work, as if, for example, one were to buy a copy of a copyrighted novel. But buying a copy of a novel does not give the buyer the right to use the copyrighted work “fixed” in that copy—that is, the creative expression itself—however she wishes. As section 202 of the Copyright Act provides, “[o]wnership of a copyright . . . is distinct from ownership of any material object in which the work is embodied.”⁶⁵ The copy is one thing; the expression is quite another. Thus, for most purposes, the word “access” indicates an interaction between a human being and the expression contained within a copy of a copyrighted work.

Obviously, copyright owners want human beings to interact with their expression, but they also want to control the terms of such interactions. About one hundred years ago, in testifying before Congress, Arthur Steuart, Chairman of the Copyright Committee of the American Bar Association, talked of binding the reading public by a contract placed on the first page of a book, “prohibiting [them] from doing anything with [the] book except reading it themselves.”⁶⁶ Authors

⁶³ See *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (stating that “indirect evidence” of copying can include showing that the defendant had “access to the copyrighted work” (quoting *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992))).

⁶⁴ *Judith Ripka Designs, Ltd. v. Preville*, 935 F. Supp. 237, 246 (S.D.N.Y. 1996) (citing, *inter alia*, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998 (2d Cir. 1983) (noting that access could have been found “because of the wide dissemination of [the song “He’s So Fine”],” the copyrighted work at issue, during the period in question)).

⁶⁵ 17 U.S.C. § 202 (2000).

⁶⁶ *Arguments on S. 6330 and H.R. 19853 Before the S. and H. Comms. on Patents*, 59th Cong. 164 (1906) (statement of Arthur Steuart, Chairman, ABA Copyright Comm.). Steuart was quite clear in his responses to his congressional questioners:

Mr. Walker. According to this bill as you understand it, would it be competent for an author to print under his copyright notice a reservation prohibiting people from doing anything with that book except reading it themselves? Would it be competent for the author to prohibit the sale of that book by the

and publishers want the same thing today: they want people to buy and read copies of their books, but they do not want people to share those books, or worse, to engage in any further interaction with the expression inside. To quote Professor Yochai Benkler, authors and publishers want people to be “consumers” of copyrighted expression—not “users” of it.⁶⁷

To a significant extent, copyright law gives authors and publishers what they want. Section 106 of the Copyright Act gives a copyright owner “the exclusive rights . . . (1) to reproduce the copyrighted work in copies . . . ; (2) to prepare derivative works based upon the copyrighted work; [and] (3) to distribute copies . . . of the copyrighted work to the public.”⁶⁸ An owner of copyright in a qualifying type of work (including books) also receives “the exclusive rights . . . (4) . . . to perform the copyrighted work publicly; [and] (5) . . . to display the copyrighted work publicly.”⁶⁹ Any such access to a copyrighted work must be bought and paid for—or, in the alternative, may be had only after the expiration of the copyright. As the Supreme Court has instructed, “copyright law *ultimately* serves the purpose of enriching the general public through [unauthorized] access to creative works.”⁷⁰ The public benefits from such access, however, only “*after* the limited period of exclusive control has expired.”⁷¹ For the du-

purchaser?

Mr. Steuart. Yes, sir. . . . [U]nder the absolute right of the author, he could make any reservation he pleased. In other words, this so-called sale would be nothing but a license to read.

Mr. Mckinney. May I ask a question, Mr. Steuart? Was it the object of the draftsmen of this bill to break up the second-hand book business?

Mr. Steuart. Not at all.

Id.

⁶⁷ As Professor Benkler explained, “[u]sers are individuals who are sometimes consumers, sometimes producers, and who are substantially more engaged participants, both in defining the terms of their productive activity and in defining what they consume and how they consume it.” Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1268 (2003).

⁶⁸ 17 U.S.C. § 106(1)-(3) (2000). In this Article, I focus on the first and third section 106 rights.

⁶⁹ *Id.* § 106(4)-(5). The final subsection provides a copyright owner with “the exclusive right[] . . . (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” *Id.* § 106(6).

⁷⁰ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (emphasis added).

⁷¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added); *see also Eldred v. Ashcroft*, 537 U.S. 186, 241 (2003) (Stevens, J., dissenting) (“[U]ltimate public access is the overriding purpose of the constitutional provision.”); *Stewart v. Abend*, 495 U.S. 207, 228 (1990) (holding that in “balanc[ing] . . . the artist’s right to control the work during the term of the copyright protection and

ration of the copyright term, copyright owners have the right to require payment in return for access, or even to refuse access to the work altogether.⁷² Indeed, courts have a word for unauthorized access to a work during its copyright term: “infringement.”⁷³

So far as courts are concerned, construing access as “access, eventually” is the easiest way in which to “enrich[] the general public through access”⁷⁴ while promoting “the encouragement of learning.”⁷⁵ On the one hand, copyright law is supposed to induce creation (and therefore encourage learning) by giving copyright owners the right to exclude the public from interacting with their works in statutorily prohibited ways. On the other hand, copyright law is supposed to grant the public the opportunity to interact with copyrightable works. While these purposes may not “oppose each other with exactly equal force,”⁷⁶ as Professor Glynn Lunney has argued, they are at least partly contradictory. Courts have responded to this “paradox” by placing a finger on the scale, “implicitly presuming that more incentives are desirable in the absence of some unusual need for access”⁷⁷ during the copyright term. In other words, in the tug of war between inducement and unauthorized access, inducement almost always wins.⁷⁸

the public’s need for access to creative works . . . [t]he copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors.”).

⁷² See *Stewart*, 495 U.S. at 228-29 (“[N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright.”).

⁷³ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (“Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work.”).

⁷⁴ *Fogerty*, 510 U.S. at 527.

⁷⁵ Act of May 31, 1790, ch. 15, 1 Stat. 124, 124.

⁷⁶ Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 486 (1996).

⁷⁷ *Id.* at 487.

⁷⁸ There are exceptions to this rule. In *Meeropol v. Nizer*, the district court found that the distribution of a book about Julius and Ethel Rosenberg “serve[d] the public interest in the free dissemination of information,” even though it contained portions of their copyrighted letters. 361 F. Supp. 1063, 1068 (S.D.N.Y. 1973) (quoting *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (1966)). Similarly, in *Time Inc. v. Bernard Geis Associates*, the district court refused to halt the publication of a book containing copies of frames of the Zapruder film, holding, in part, that “[t]here is a public interest in having the fullest information available on the murder of President Kennedy.” 293 F. Supp. 130, 146 (S.D.N.Y. 1968). As precedents, however, these cases are exceptionally weak. Not only did they both arise from events of unusual historic importance, but courts have questioned whether they were rightly decided, even on their unusual facts. See, e.g., *New Era Publ’ns Int’l v. Henry Holt & Co.*, 873 F.2d 576, 589-90 (2d Cir. 1989) (“The district court [in *Bernard Geis*] . . . may not have properly evaluated the potential economic harm to the owner of the copyright in

If providing the public with unauthorized access to copyrighted works is, like fair use, a “bizarre . . . departure”⁷⁹ from the preference for more incentives (which is to say, more rights), then one cannot help but feel that the courts are missing something very important about access: access is not something that inherently must be withheld entirely from the public until the end of the copyright term. Access, very much like property itself, is not absolute; it is qualified. That is, unauthorized access to *some* of a copyrighted work can be granted to *some* of the public for *some* purposes without sacrificing the public interest in inducing creation. The limited nature of the grant of rights in section 1 of the Copyright Act of 1909 supports this notion.⁸⁰ More recent examples include sections 107 through 122 of the Copyright Act of 1976, as amended, in which Congress has enacted pages of limitations on the broad rights enumerated in section 106.⁸¹ For the most part, Congress has defined those limitations very narrowly, but it need not have done so. Instead, Congress could have provided creators with fewer rights, thus providing the public with increased access to the fruits of creation.⁸² Congress also could have asked whether there might be other strands of the public interest in copy-

granting summary judgment to the defendants.” (citing WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 98-100 (1985)); *Jackson v. MPI Home Video*, 694 F. Supp. 483, 489 (N.D. Ill. 1988) (“To the extent [*Bernard Geis*] rests upon the idea that copyright must yield where ‘there is a public interest in having the fullest information available in [sic] the murder of President Kennedy’, it is probably inconsistent with [*Harper & Row*].” (quoting *Bernard Geis Assocs.*, 293 F. Supp. at 146)).

One other case bears mentioning. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court cited a finding by the district court that copying television programs for later viewing “served the public interest in increasing access to television programming.” 464 U.S. 417, 425 (1984). According to the district court, that interest was “consistent with the First Amendment policy of providing the fullest possible access to information through the public airwaves.” *Id.* (internal quotation marks omitted). Ultimately siding with the district court in its holding, *id.* at 456, the Supreme Court seemed convinced by this analysis. As Professor Jessica Litman has chronicled, however, *Sony* was an exceptional case in every way. See Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 929-30 (2005) (discussing how the Justices reacted to the first oral argument of *Sony* before the Supreme Court).

⁷⁹ See *supra* note 46 and accompanying text.

⁸⁰ See Ch. 320, § 1, 35 Stat. 1075, 1075-76 (listing the particular rights enjoyed by owners of copyright in particular types of works).

⁸¹ 17 U.S.C. §§ 107-122 (2000).

⁸² See Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1815 (2000) (“[T]hose who favor a system more closely resembling traditional copyright law need to explain why a regime of complete entitlements plus compulsory limitations is not functionally equivalent to a regime of incomplete entitlements.”).

right, such as the existence of open and populous markets in copyrighted expression.

C. Open and Populous Markets in Copyrighted Expression

To date, Congress has not focused on the public benefit to be gained by promoting competition in copyright “markets,” but it has described this value in general by enacting a host of other federal statutes. These include the Sherman Act of 1890,⁸³ the Clayton Act of 1914,⁸⁴ the Federal Trade Commission Act of 1914,⁸⁵ the Communications Act of 1934,⁸⁶ the Lanham Act of 1946,⁸⁷ the Cable Television Consumer Protection and Competition Act of 1992,⁸⁸ and the Telecommunications Act of 1996.⁸⁹ To be sure, the foregoing statutes were not enacted pursuant to Article I, Section 8, Clause 8 of the Constitution,⁹⁰ nor do they create rights in “original works of authorship.”⁹¹ They do, however, regulate the behavior of participants in the markets in which copies of copyrighted works are bought and sold. As a consequence, I believe these statutes to be instructive, not only with respect to how Congress has served the interests of creators, publishers, users, consumers, and the public in general, but also with respect to how Congress has described those interests.⁹² Those descriptions converge to a surprising degree.

In 1890, Congress enacted the Sherman Act, which prohibits companies from monopolizing trade or from entering into any “contract, combination . . . , or conspiracy, in restraint of trade or [inter-

⁸³ Ch. 647, 26 Stat. 209.

⁸⁴ Ch. 323, 38 Stat. 730.

⁸⁵ Ch. 311, 38 Stat. 717.

⁸⁶ Ch. 652, 48 Stat. 1064.

⁸⁷ Ch. 540, 60 Stat. 427.

⁸⁸ Pub. L. No. 102-385, 106 Stat. 1460.

⁸⁹ Pub. L. No. 104-104, 110 Stat. 56.

⁹⁰ *Cf.* The Trade-Mark Cases, 100 U.S. 82, 93-94 (1879) (holding that Congress did not have the authority to promulgate trademark legislation pursuant to that clause).

⁹¹ 17 U.S.C. § 102(a) (2000) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

⁹² See Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1181 (2000) (“[I]ntellectual property law is part of a larger framework that includes other public and private law, including, particularly, anti-trust.”).

state] commerce.”⁹³ Congress expanded its reach in the Clayton Act of 1914, which proscribes specific acts, such as mergers and acquisitions, that either “substantially lessen competition” or “create a monopoly in any line of commerce.”⁹⁴ In 1914, Congress also created the Federal Trade Commission to investigate and prosecute “unfair methods of competition in commerce”⁹⁵—that is, acts “which if left untouched would probably create the evils prohibited by the Sherman . . . Act.”⁹⁶ While scholars disagree as to the legislative intent behind these enactments,⁹⁷ Professor Herbert Hovenkamp has suggested that, “consistent with nineteenth century American ideology generally, . . . the antitrust laws were passed out of a pervasive fear of private ‘bigness’ and the political power that it engendered.”⁹⁸

“[P]rivate ‘bigness’” also can lead to market power: large companies (and combinations of companies) have greater resources than their competitors, thus giving them the ability to price their goods below the cost of production—at least for a time.⁹⁹ Competitors who do not have the resources to lower their own prices soon find themselves with reduced shares of the market. As the large companies gain market share by squeezing out competitors, they also gain the ability to return prices to higher levels. Consumers, who are forced to pay those higher prices, experience a reduction in what economists term “consumer’s surplus.”¹⁰⁰ Consumers also lose the opportunity to purchase

⁹³ Ch. 647, § 1, 26 Stat. 209, 209.

⁹⁴ Ch. 323, §§ 2, 3, 7, 38 Stat. 730, 730-32; *see also* *Dictograph Prods. v. FTC*, 217 F.2d 821, 826 (2d Cir. 1954) (“Congress, in passing the Clayton Act, sought to bring within the scope of its proscriptive provisions, conduct and practices which though dangerous to the competitive structure, were not covered at all or only inadequately covered by the provisions of the Sherman Act.”).

⁹⁵ Federal Trade Commission Act of 1914, ch. 311, §§ 1, 5, 38 Stat. 717, 717, 719-21.

⁹⁶ *Butterick Publ’g Co. v. FTC*, 85 F.2d 522, 526 (2d Cir. 1936) (citing *FTC v. Raladam Co.*, 283 U.S. 643 (1931); *FTC v. Sinclair Co.*, 261 U.S. 463 (1923)).

⁹⁷ *See* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 2.1a, at 47-51 (2d ed. 1999) (describing the historical background of antitrust regulation under the Sherman Act).

⁹⁸ *Id.* § 2.1a, at 50-51.

⁹⁹ This practice is known as “predatory pricing.” *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117-18 (1986) (“Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. It is a practice that harms both competitors *and* competition.”).

¹⁰⁰ *See* THE MIT DICTIONARY OF MODERN ECONOMICS 79 (David W. Pearce ed., 3d ed. 1986) (defining “consumer’s surplus” as “a measure of the benefit to a consumer,

products from those companies that never enter the market because of predatory pricing or other barriers to entry. Congress has enacted the antitrust laws in order to “protect the public against [these] evils commonly incident to monopolies”:¹⁰¹ higher prices, products or services of lesser quality, and fewer choices as a result of competitors exiting the market.¹⁰² As the Ninth Circuit put it, “[w]hen a producer is shielded from competition, he is likely to provide lesser service at a higher price; the victim is the consumer who gets a raw deal. This is the evil the antitrust laws are meant to avert.”¹⁰³

In addition to addressing “bigness,” Congress also has expressed its concerns about “concentration,” or the tendency of an industry to consolidate through mergers, acquisitions, and other such transactions.¹⁰⁴ In 1890, Senator Sherman himself indicated that, in proposing legislation, he was motivated by a “desire to put an end to great aggregations of capital because of the helplessness of the individual before them.”¹⁰⁵ And in 1950, Congress amended section 7 of the Clayton Act because it “fear[ed] . . . what was considered to be a rising tide of economic concentration in the American economy.”¹⁰⁶ Congress did not target industry concentration simply because concentration leads to higher prices, although this concern would have been

net of the sacrifice he has to make, from being able to buy a commodity at a particular price”).

¹⁰¹ *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923) (explaining the purpose of the Sherman Act).

¹⁰² *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (“The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . .”); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940) (noting that the Sherman Act was intended to prevent “restraint to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury”); *Beal Corp. Liquidating Trust v. Valleylab, Inc.*, 927 F. Supp. 1350, 1367 (D. Colo. 1996) (“The federal antitrust laws seek to prevent manufacturers and sellers of products from exiting the market.”).

¹⁰³ *United States v. Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990).

¹⁰⁴ *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979) (noting that section 2 of the Sherman Act is designed to prevent “a pernicious market structure in which the concentration of power saps the salubrious influence of competition”).

¹⁰⁵ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

¹⁰⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962); *see also Monfort of Colo., Inc. v. Cargill, Inc.*, 761 F.2d 570, 576 (10th Cir. 1985) (noting that “Congress intended section 7 of the Clayton Act to prevent” industry concentration, which likely results in “substantially lessened [competition] because of tacit collusion”).

sufficient justification for congressional action. Congress also wished to “perpetuate and preserve, for its own sake *and in spite of possible cost*, an organization of industry in small units which can effectively compete with each other.”¹⁰⁷ Such competition yields a host of benefits including product diversity, which is particularly important when the “product” is information.¹⁰⁸ As the Supreme Court famously wrote in *Associated Press v. United States*, “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”¹⁰⁹

As the foregoing discussion should make clear, the antitrust laws target *public* evils, not private ones. Accordingly, the antitrust laws exist not to “protect deserving private persons, but to vindicate the public interest,”¹¹⁰ which the case law describes as “paramount.”¹¹¹ Courts have described the nature of that interest in several ways. First and foremost, the consuming public has an interest in the existence of “fair price competition in an open market”¹¹² characterized by that particularly American value, “equality of opportunity.”¹¹³ Second, the

¹⁰⁷ *Aluminum Co. of Am.*, 148 F.2d at 429 (emphasis added).

¹⁰⁸ See *Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . .”); *United States v. W. Elec. Co.*, 673 F. Supp. 525, 586 (D.D.C. 1987) (“[I]n promoting diversity in sources of information, the values underlying the First Amendment coincide with the policy of the antitrust laws.” (quoting *United States v. AT&T*, 552 F. Supp. 131, 184 (D.D.C. 1982))); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (observing that Congress enacted the Sherman Act to create an environment “conducive to the preservation of our democratic political and social institutions”).

¹⁰⁹ 326 U.S. 1, 20 (1945); see also *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (observing that the media serve “one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible”), *aff’d*, 326 U.S. 1 (1945).

¹¹⁰ *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1003 (9th Cir. 1972) (citing *N. Pac. Ry.*, 356 U.S. at 4; *D.R. Wilder Mfg. Co. v. Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915)).

¹¹¹ *Columbia River Packers Ass’n v. Hinton*, 34 F. Supp. 970, 975 (D. Or. 1939) (citing *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930)).

¹¹² *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979).

¹¹³ See *William Goldman Theatres v. Loew’s, Inc.*, 150 F.2d 738, 743 (3d Cir. 1945) (“The purpose of the anti-trust laws [was] an intendment to secure equality of opportunity . . .”); *Prairie Farmer Publ’g Co. v. Ind. Farmer’s Guide Publ’g Co.*, 88 F.2d 979, 982 (7th Cir. 1937) (“Clearly, the purpose of the Sherman Anti-Trust Act is to secure equality of opportunity . . .” (citing *Paramount*, 282 U.S. at 42)); *El Aguila Food Prods. Inc. v. Gruma Corp.*, 301 F. Supp. 2d 612, 627 (S.D. Tex. 2003) (characterizing “an equal opportunity to engage in business, trade, and commerce” as “the primary feature of the private free enterprise system” that antitrust laws seek to safeguard).

public interest lies in the existence of a populous market in which “small units,” including individuals, can have an impact.¹¹⁴ These market structures, in turn, are likely to facilitate public access to a diversity of products.

These conceptions of the public interest are not unique to the antitrust laws. In regulating the communications industries, Congress repeatedly has stated its wish to open markets to increased competition. In some cases, these statements may seem hypocritical; as Professor Timothy Wu has observed, Congress supported the oligopolistic broadcast industry in the industry’s fight to exclude cable companies from the market.¹¹⁵ On the whole, however, there are plenty of indications that Congress does believe in the benefits flowing from competitive markets, including lower prices, higher quality, and diversity of expression. As part of the Telecommunications Act of 1996, for example, Congress required telecommunications carriers to provide competing local telephone companies with “nondiscriminatory access” to networks and equipment.¹¹⁶ Similarly, in the Cable Television Consumer Protection and Competition Act of 1992, Congress sought to reverse the effects of industry concentration¹¹⁷ by requiring cable companies to dedicate some of their television channels to local and nonprofit broadcast stations,¹¹⁸ which Congress viewed as “critical to an informed electorate.”¹¹⁹ In holding these “must-carry” provisions constitutional, the Supreme Court identified several “important governmental interests” that the provisions aimed to serve, including “promoting fair competition in the market for television programming” and “promoting the widespread dissemination of information from a multiplicity of sources.”¹²⁰

¹¹⁴ See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945).

¹¹⁵ Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 311-24 (2004) (chronicling the conflict between the broadcast and cable television industries and Congress’s role in it).

¹¹⁶ Pub. L. No. 104-104, § 101(a), 110 Stat. 56, 62 (codified as amended at 47 U.S.C. § 251(b)(3), (c)(3) (2000)).

¹¹⁷ See Pub. L. No. 102-385, § 2(a)(4), 106 Stat. 1460, 1460 (“The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.”).

¹¹⁸ *Id.* §§ 4-5, 106 Stat. 1471-81.

¹¹⁹ *Id.* § 2(a)(11), 106 Stat. 1461.

¹²⁰ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189-90 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

To date, copyright law has not embraced these goals, or at least has not done so expressly. One reason, perhaps, is that copyrights are meant to be solutions to the *problem* of competition;¹²¹ they are legal monopolies¹²² under which copyright owners enjoy the right to exclude competitors from using their works in various ways. If they choose to exercise that right, copyright owners can market fewer copies of their works to fewer consumers at higher prices. “Thus,” as the First Circuit pointed out, “at least in a particular market and for a particular period of time, the Copyright Act tolerates behavior that may harm both consumers and competitors.”¹²³ This produces what seems to be a direct conflict between copyright law and the antitrust laws: copyright law gives copyright owners the right to inhibit competition, but “[i]ntellectual property rights do not confer a privilege to violate the antitrust laws.”¹²⁴ Courts are left to balance the two statutory schemes, producing inconsistent results.¹²⁵

Copyright scholars have sought to minimize this conflict by tinkering with how they define the “relevant market” for antitrust purposes. Instead of defining a product market to include, for example, a particular book or books by a particular author, scholars might broaden the definition to include books of a particular type. If, as Professor Christopher Yoo has argued, “substitutes are readily available for most works,”¹²⁶ then copyrights do not create market power at all: competitors can create or purchase their own copyrighted works, or use works in the public domain. To quote Professor Richard Epstein, “[n]o one has to use any particular song or story for a particular project, but can draw on a rich culture, including items that have fallen out of copy-

¹²¹ See Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 170 (1999) (“Intellectual property is a deliberate, government-sponsored departure from the principles of free competition, designed to subsidize creators and therefore to induce more creation.”).

¹²² See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (discussing the “copyright monopoly”).

¹²³ *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1184-85 (1st Cir. 1994).

¹²⁴ *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000); see also *Data Gen.*, 36 F.3d at 1185 (“Although creation and protection of original works of authorship may be a national pastime, the Sherman Act does not explicitly exempt such activity from antitrust scrutiny . . .”).

¹²⁵ See 4 NIMMER, *supra* note 24, § 13.09[A][2][a], at 13-295 to -296 (discussing the range of conflicting approaches that courts have taken to balancing antitrust and copyright principles).

¹²⁶ Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 218 (2004).

right protection.”¹²⁷ As for consumers, if they lack the resources to buy a novel about Harry Potter, they can buy a novel about Oliver Twist instead.

As the foregoing example suggests, there may be problems with this approach. While some works may readily be substituted for others, some (like Harry Potter novels) almost certainly may not. Other examples abound. Moreover, even if Professor Yoo is correct, it does not follow, as Professor Epstein has concluded, that potential uses lost to the copyright monopoly are “of little consequence for any dynamic development of the arts.”¹²⁸ The reason lies in the structure of those industries in which market participants are most likely to hold copyrights. As Professor Benkler has explained, “strong” copyrights are especially beneficial “to organizations that own large inventories of existing information and cultural goods.”¹²⁹ In addition to marketing existing works, such organizations can adapt existing works into new ones, thus integrating the creation function with the inventory management and marketing functions.¹³⁰ Using the returns from this vertical integration, they also can acquire other organizations, increasing the number of copyrighted works in their inventories. Competitors who lack inventories of their own thus find themselves increasingly marginalized.¹³¹ Not only does this arms race lead to industry concentration through acquisitions, but it also perpetuates itself by creating “incentives systematically to misapply human capital to information resources” in the foregoing ways.¹³² In addition, it subjects consumers to rising prices, diminishing supply, and a wearying homogeneity of

¹²⁷ Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 23 (2005).

¹²⁸ *Id.*

¹²⁹ Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173, 181.

¹³⁰ See Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT’L REV. L. & ECON. 81, 83 (2002) (“[I]ncreased protection benefits commercial information producers that vertically integrate new production with management of large-scale owned inventories of existing information . . .”).

¹³¹ See Wu, *supra* note 115, at 329 (discussing how vertical integration threatens innovation); see also Cohen, *supra* note 82, at 1811 (“An imbalance may result if a particular content provider has a dominant market share, or a unique and nonsubstitutable work.”).

¹³² Benkler, *supra* note 130, at 83; see also *id.* at 93 (positing that “inventory owners will systematically misallocate human creativity to reworking owned-inventory rather than to utilizing the best information inputs available to produce the best new information product”).

expression.¹³³ If Disney is not “repackaging Mickey Mouse cartoons,”¹³⁴ it is buying Winnie the Pooh and making deals with Pixar, and in the end, everything looks the same.¹³⁵ Thus, if copyright law is not opposed to open and populous markets per se, it is not particularly productive of them, either.

Lawmakers appear to have assumed that the public must tolerate these evils in order to induce creation, which is thought to be more important than promoting competition. In fact, however, the conflict between these values is overstated. Like copyright law, antitrust and communications laws recognize that *some* return on investment, including the grant of property rights, is necessary to induce investments of capital and labor in the first place. Yet the existence of those rights does not prevent the government from regulating the behavior of those who enjoy them. Congress has not hesitated to place limits on property rights in order to protect the public interest—requiring telephone companies, for example, to provide their competitors with access to lines and switches so that consumers could enjoy the benefits of price competition in the market for local and long distance ser-

¹³³ See *id.* at 93 (“The differential effects of increases in intellectual property protection on divergent strategies suggest that such increases lead to commercialization, concentration, and homogenization of information production.” (footnote omitted)); see also Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 121, 142 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (“[T]he greater cultural standardization likely to occur under conditions of pervasive commodification is cause for substantial concern.” (citing Benkler, *supra* note 130, at 81-99)).

As Professor Lunney has put it, “[s]eeking the common denominator among a wider audience leads almost inevitably to a lower common denominator. As a result, striving for popularity may produce not a wonderful, cacophonous variety, but a dulling, repetitive sameness as works include over and over the same elements intended to cater to popular tastes.” Lunney, *supra* note 5, at 888-89; see also Netanel, *supra* note 55, at 360 (“[G]iven market dictates and institutional risk-averseness, media conglomerates share, at least to some extent, corporate patrons’ proclivities toward prosaic and safe products.”). This cloud may have a silver lining. As Professor William Fisher has speculated, “[t]he less attractive the menu of material ‘on the air,’ the more time people would probably spend in more active leisure activities.” William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1778 (1988).

¹³⁴ Benkler, *supra* note 130, at 83.

¹³⁵ Worse, perhaps, “increased prevalence of Miceys should lead to increased investment in forming preferences for their products. This should increase relative demand for their products. Repackaging the Mouse becomes not only cost effective, but also responsive to demand.” *Id.* at 97-98; see also Netanel, *supra* note 55, at 352 (“The public communication of fixed original expression will support a democratic civil society only if such expression is autonomous and diverse.”).

vice.¹³⁶ Yes, the regulated companies enjoy property rights in their infrastructure, but as the Supreme Court wrote in a case brought under the Sherman Act, “rights . . . may be pushed to evil consequences, and therefore restrained” by law.¹³⁷

Copyright law operates under the same principles, for rights in copyrightable works are also perfectly capable of being “pushed to evil consequences.” Imagine, for example, how it would affect competition in the publishing industry if J.K. Rowling could prevent other novelists from writing about boy wizards who engage in epic struggles with dark lords. The Copyright Act prevents this competitive harm by providing, in section 102(b), that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.”¹³⁸ In extending protection to creative expressions of ideas but not to the ideas themselves, “Congress balanced the competing concerns of providing incentive to authors to create and of fostering competition in such creativity.”¹³⁹ There are other ways in which copyright law has fostered competition: the mechanical license is an ancient example;¹⁴⁰ the defense of “copyright misuse” is a recent

¹³⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, § 101(a), 110 Stat. 56, 62 (codified as amended at 47 U.S.C. § 251(b)(3), (c)(3) (2000)).

¹³⁷ *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940) (internal quotation marks omitted). In *United States v. Microsoft Corp.*, the Court of Appeals for the District of Columbia Circuit similarly explained:

[Microsoft] claims an absolute and unfettered right to use its intellectual property as it wishes: “[I]f intellectual property rights have been lawfully acquired,” it says, then “their subsequent exercise cannot give rise to antitrust liability.” Appellant’s Opening Br. at 105. That is no more correct than the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability. As the Federal Circuit succinctly stated: “Intellectual property rights do not confer a privilege to violate the antitrust laws.”

253 F.3d 34, 63 (D.C. Cir. 2001) (second alteration in original) (quoting *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000)).

¹³⁸ 17 U.S.C. § 102(b) (2000).

¹³⁹ *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990).

¹⁴⁰ As a part of the Copyright Act of 1909, Congress narrowed the performance right in musical works by requiring songwriters to accept a compulsory royalty of two cents per mechanical reproduction (known as the “mechanical license”). Ch. 320, § 1(e), 35 Stat. 1075, 1075-76; see also U.S. Copyright Office, Copyright Royalty Rates: Section 115, the Mechanical License, <http://www.copyright.gov/carp/m200a.html> (last visited Feb. 15, 2007) (listing the updated royalty rates from 1909 through 2007). Congress believed this provision to be necessary to prevent the Aeolian Music Company from gaining a monopoly in the market for player piano rolls. See H.R. REP. NO. 60-2222, at 7-8 (1909).

one.¹⁴¹ But these examples are not evidence that Congress views the Copyright Act as an adjunct to the antitrust laws.¹⁴² In fact, the evidence points the other way. The oligopolistic structure of the copyright industries and their resistance to technological change are indications that Congress has given too much weight to inducement at the expense of providing access to both competitors and the public.

In striking the balance at the heart of copyright law, Congress must begin by locating the several strands of the public interest. First, the public interest is served by granting creators the right to prevent others from making at least *some* uses of their works, so as to provide those creators with the level of exclusivity necessary to induce creation. Second, the public interest is served by granting the public the opportunity to interact with copyrightable works for at least *some* purposes, even if copyright owners object to the terms of that interaction. And third, the public interest is served through “the widespread dissemination of information from a multiplicity of sources,”¹⁴³ which requires the government to promote at least *some* forms of competition in the markets for expression. These strands need not contradict each other; they can, and should, be woven into a coherent fabric that “promote[s] the Progress of Science.”¹⁴⁴ What is needed is a guide by which lawmakers and courts can mediate the seemingly conflicting demands of exclusive rights and unauthorized access, of legal monopolies¹⁴⁵ and open markets, of inventory management and “expres-

¹⁴¹ The defense of copyright misuse is analagous to the patent misuse defense. *See* Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 493 (1942) (recognizing the defense of patent misuse). In the copyright context, the misuse defense “forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which it is contrary to public policy to grant.” *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990) (alterations in original); *see id.* at 976 (“We are of the view . . . that since copyright and patent law serve parallel public interests, a ‘misuse’ defense should apply to infringement actions brought to vindicate either right.”); Lemley, *supra* note 121, at 151-58 (discussing the doctrine and noting that it “is of relatively recent vintage”); *infra* note 281 and accompanying text.

¹⁴² *Cf.* Joseph Scott Miller, *Patent Ships Sail an Antitrust Sea*, 30 SEATTLE U. L. REV. (forthcoming 2007), available at <http://papers.ssrn.com/abstract=923931> (suggesting that, though antitrust and intellectual property laws may share the goal of wealth maximization, “these two regimes pursue their shared goal through quite different means, one by fostering competition (antitrust) and one by curtailing it (intellectual property”).

¹⁴³ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

¹⁴⁴ U.S. CONST. art I, § 8, cl. 8.

¹⁴⁵ *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) (discussing the “copyright monopoly”).

sive diversity,”¹⁴⁶ and of private reward and public benefit. Fortunately, that guide already exists; it is the law of unfair competition, and its spirit already resides at the heart of copyright law.¹⁴⁷

II. TOWARD A THEORY OF UNFAIR COMPETITION IN COPYRIGHT

Professor Patterson once observed that “[t]he law of copyright can be viewed most usefully as statutory unfair competition” because the law “function[s] . . . to protect the copyrighted work against predatory competitive practices.”¹⁴⁸ Copyright law does function in this way (although it has other functions, too). As we have seen, copyright law exists *at least* for the purpose of punishing acts that might diminish incentives to create—as if, for example, a creator were forced to stand by as others sold infringing copies of her works. By proscribing such anticompetitive acts, copyright law serves one strand of the public interest: the inducement of creation. Unfortunately, copyright law also proscribes a host of other acts that tend to *promote* competition. The result is a statute that serves one aspect of the public interest while frustrating others. It does so not only by restricting access to copyrighted expression, but also by contributing to the concentration of markets in that expression.

This Part proceeds as follows. After describing the law of unfair competition, I compare it to the law of copyright, noting a few similarities and differences between the two bodies of law. The comparison is a complicated one, in part because copyright law does not speak of “competition” per se, and the law does not do a good job of defining “markets” in copyrighted works. I begin by examining how lawmakers might decide which harms constitute competitive harms in which relevant markets. By using those definitions, and by identifying the competitive harms in the markets for *copies* of copyrighted works, I conclude that acts of reproduction, standing alone, do not constitute

¹⁴⁶ This phrase is associated with Professor Neil Netanel, who has written extensively on the subject. *See, e.g.*, Netanel, *supra* note 55, at 289 (arguing that neoclassical economists have “import[ed into copyright] a theory of property that fails adequately to account for our fundamental, nonmonetizable interests in expressive diversity and informed citizenship”).

¹⁴⁷ It also resides at the heart of patent law. *See* *United States v. Parker-Rust-Proof Co.*, 61 F. Supp. 805, 812 (E.D. Mich. 1945) (“The general objectives of the Patent Laws and the Anti-Trust Laws are the same. Both are intended to prevent unfair competition.”).

¹⁴⁸ Patterson, *supra* note 51, at 6.

the sorts of “predatory competitive practices”¹⁴⁹ that copyright law should seek to remedy. Accordingly, I argue that copyright owners should not enjoy the reproduction right, but instead should enjoy *only* the exclusive right of public distribution. I conclude by examining the contours of that right.

A. *Of Copyright and Public Acts*

The law of unfair competition has its roots in the belief that, on the whole, competition is good; that is, “[t]he freedom to . . . compete for the patronage of prospective customers is a fundamental premise of the free enterprise system.”¹⁵⁰ Sometimes, of course, this competition causes harm in the form of “divert[ed] business,”¹⁵¹ but the law concerns itself with that harm only when competitors use “particular methods of competition determined to be unfair.”¹⁵² Among those methods is the tort of “passing off,” which occurs when “a producer misrepresents his own goods or services as someone else’s.”¹⁵³ The usual way in which a producer commits this wrong is by marking his goods with a trademark that confuses consumers as to the origin of the marked goods.¹⁵⁴ By punishing this wrong, the law of unfair competition (and in particular, trademark law) protects producers and consumers alike: while the law exists to safeguard the investments of trademark owners by giving them exclusive rights,¹⁵⁵ it also exists to

¹⁴⁹ *Id.*

¹⁵⁰ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 27 n.1 (2003); see also *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 530-31 (1924) (holding that because “petitioner sought to avail itself of the favorable repute which had been established for respondent’s preparation in order to sell its own. . . . The charge of unfair competition [was] established”).

¹⁵⁴ See *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916) (“[T]he common law of trade-marks is but a part of the broader law of unfair competition.”). Thus, “[t]he primary and proper function of a trade-mark is to identify the origin or ownership of the article to which it is affixed.” *Id.* at 412. When a producer has established rights in such a mark, “others are debarred from applying the same mark to goods of the same description, because to do so would in effect represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods.” *Id.*

¹⁵⁵ See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. (forthcoming 2007) (manuscript at 3), available at <http://www.ssrn.com/abstract=889162> (arguing that “trademark law traditionally was not intended primarily

serve the public interest in avoiding confusion.¹⁵⁶ The latter principle, in turn, confines the scope of the trademark right. Congress has codified these principles in the Lanham Act of 1946.¹⁵⁷

Like the property right in copyrights, the property right in trademarks is limited.¹⁵⁸ Under the Lanham Act, rights in trademarks flow from the use of those marks in interstate commerce to identify the source of the marked goods. This trademark use is the prerequisite to protection because consumers cannot form the mental association between a trademark and the goods it identifies—known as “secondary meaning”—unless those goods are released into the stream of commerce.¹⁵⁹ In the absence of such an association, another producer would be free to use the trademark to identify her own products because that use would not engender any confusion. Thus, by conditioning the property right on the use of trademarks in commerce, trademark law encourages producers to distribute goods bearing those marks to the public.¹⁶⁰

to protect consumers” but “sought to protect producers from illegitimate diversions of their trade by competitors”).

¹⁵⁶ See *Coach House Rest., Inc. v. Coach & Six Rests., Inc.*, 934 F.2d 1551, 1564 (11th Cir. 1991) (“[T]he public interest in preventing confusion around the marketplace is paramount . . .”); *James Burrough, Ltd. v. Sign of the Beefeater, Inc.*, 540 F.2d 266, 274 (7th Cir. 1976) (observing, in a trademark infringement action, that “[a] third party, the consuming public, is present and its interests are paramount”).

¹⁵⁷ Ch. 540, 60 Stat. 427, 444 (codified as amended at 15 U.S.C. §§ 1051-1141n (2000)); see also S. REP. NO. 79-1333, at 1 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1274-75 (stating that the Lanham Act concerns itself with “securing to the owner the good will of his business and protecting the public against spurious and falsely marked goods”). The Lanham Act thus complements the Federal Trade Commission Act of 1914, which empowers the Commission to bring enforcement actions against those “persons, partnerships, and corporations” engaging in “unfair methods of competition in commerce,” ch. 311, § 5, 38 Stat. 717, 719.

¹⁵⁸ See *Hanover Star Milling Co.*, 240 U.S. at 413 (“Common-law trade-marks, and the right to their exclusive use, are of course to be classed among property rights; but . . . the right grows out of use, not mere adoption.” (citation omitted)).

¹⁵⁹ See 15 U.S.C. § 1127 (2000) (defining “trademark” and “use in commerce”). But see 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 16:13 (4th ed. 2006) (describing cases in which courts “somewhat tentatively and cautiously” have held that “some form of pre-sales publicity or sales solicitation may suffice to prove priority over a rival user”).

¹⁶⁰ Copyright law used to impose a similar requirement known as publication, which occurs when a copyright owner makes her work “available to members of the public regardless of who they are or what they will do with it.” *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1452 (9th Cir. 1991); see also *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 n.3 (11th Cir. 1999) (“[T]he word ‘publication’ is ‘a legal word of art, denoting a process much

Once a producer has established rights in a mark, she has the right to prevent others from marking their goods with symbols that are likely to confuse consumers as to the source of those goods. Courts determine whether such a likelihood of confusion exists by weighing several factors, including “the strength of [the] mark, the degree of similarity between the two marks, the proximity of the products” in the marketplace, “the sophistication of the buyers,” and, of course, the existence of any “actual confusion.”¹⁶¹ Thus, for the purposes of infringement law, two producers can adopt and use the same trademark, so long as they use the mark on different goods, in different markets, or in different places. And while courts ask whether the defendant acted in “good faith in adopting its own mark,”¹⁶² bad faith, standing alone, is not enough to support the imposition of liability. Instead, courts inquire into the existence of competitive harm: in making purchasing decisions, are consumers likely to be misled as to which product comes from which source, so as to deprive the trademark owner “of the profit he might make through the sale of the goods which the purchaser intended to buy?”¹⁶³

Copyright law and the law of unfair competition (including trademark law) have a number of things in common. First, both bodies of law modify market outcomes by providing producers with limited property rights as against competitors, or those who would behave in ways that the law wishes to discourage.¹⁶⁴ In trademark law, those competitors are likely to be producers themselves, while in copyright law, the word “competitor” includes users and consumers along with producers, each of whom enjoys the technological means by which to engage in anticompetitive acts. Second, both bodies of law create property rights as inducements to investment in the production or use of intangibles that benefit the public. As we have seen, copyrights benefit the public by “promot[ing] the Progress of Science”¹⁶⁵ in several important ways. And while Congress does not wish to encourage

more esoteric than is suggested by the lay definition of the term.” (quoting Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 185 (1956)).

¹⁶¹ *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

¹⁶² *Id.*

¹⁶³ *Hanover Star Milling Co.*, 240 U.S. at 412.

¹⁶⁴ One might argue that unlike copyright law, the law of unfair competition exists to *facilitate* market outcomes, but this argument begs the question: what outcomes would the market produce, absent the intervention of law? Both copyright law and the law of unfair competition modify the functioning of voluntary exchanges between buyers and sellers.

¹⁶⁵ U.S. CONST. art I, § 8, cl. 8.

the proliferation of trademarks per se, trademarks benefit the public by enabling consumers to distinguish between goods sold by rival producers.

While these similarities are significant, copyright law and the law of unfair competition also differ in several ways. Among the most significant of these is the degree to which the creation and invasion of the property right depends on whether parties engage in what one might describe as “public acts.”¹⁶⁶ While there may be exceptions to this rule, copyright law tends to ascribe legal significance to private acts, while the law of unfair competition does not.

Consider the creation of rights. Under copyright law, if a producer wishes to obtain rights, she must either create an “original work[] of authorship fixed in any tangible medium of expression”¹⁶⁷ or negotiate a transfer of copyright from somebody who has created one.¹⁶⁸ Both of these acts can be conducted entirely in private, and indeed they often are. Most of the time, the public has no idea that somebody, somewhere, has created or purchased or licensed a copyrightable work. These covert (for want of a better word) events have a public impact only when a copyright owner decides to publish her work, by which time the property right already exists. By contrast, under trademark law, a producer wishing to obtain rights in a mark must engage in the “bona fide use of [that] mark in the ordinary course of trade.”¹⁶⁹ Trade ordinarily is “overt,” whether on the wholesale or retail level. When producers have tried to obtain rights in marks before engaging in “commercial transactions,” courts have rejected those efforts as “bad faith attempt[s] to reserve a mark.”¹⁷⁰ The two bodies of

¹⁶⁶ The Merriam-Webster Online Dictionary defines “public” as, *inter alia*, “exposed to general view,” “of or relating to business or community interests as opposed to private affairs,” and “accessible to or shared by all members of the community.” Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/public> (last visited Feb. 15, 2007). I do not use “public” to indicate “public law.” *See id.* (defining “public” as “of, relating to, or affecting all the people or the whole area of a nation or state,” and “of or relating to a government”).

¹⁶⁷ 17 U.S.C. § 102(a) (2000).

¹⁶⁸ *See id.* § 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . .”). A producer also may obtain rights in a copyrightable work by being the “employer or other person for whom the work was prepared” under the “works made for hire” doctrine. *Id.* § 201(b).

¹⁶⁹ 15 U.S.C. § 1127 (2000). In some circumstances, an intent to use can give rise to trademark rights. *Id.*

¹⁷⁰ *See, e.g.,* Blue Bell, Inc. v. Farah Mfg. Co., 508 F.2d 1260, 1267 (5th Cir. 1975) (holding that a single shipment of pants with a “secondary label attached to an older

law also diverge when it comes to the invasion of rights. A person can infringe a copyright by engaging in an entirely private act, for section 106 provides copyright owners with “the exclusive right[] . . . to reproduce the copyrighted work in copies,” regardless of where that reproduction takes place.¹⁷¹ To be guilty of infringement under section 32(1) of the Lanham Act, however, a person must use a confusingly similar mark “in commerce . . . in connection with the sale, offering for sale, distribution, or advertising of . . . goods.”¹⁷²

Copyright law used to accord more significance to public acts than it does today.¹⁷³ Until January 1, 1978, the effective date of the Copyright Act of 1976, creators obtained rights under the federal statute only when they engaged in the act of general publication, which happened when at least one member of the general public obtained at least one copy of the work without being restricted from further distributing it.¹⁷⁴ In most cases, this meant that rights were created upon “publication in print.”¹⁷⁵ In 1976, however, Congress revised the statute to provide for the creation of rights at the moment a work was “fixed in any tangible medium of expression”¹⁷⁶—regardless of whether the work was published. As I have noted elsewhere, “[t]his ‘fundamental’¹⁷⁷ change led to an explosion in the number of [copyrightable works], fixed works being far more numerous, by definition, than published works.”¹⁷⁸ But it also meant that, for the first time, exclusive rights could be created in private, giving the public no way of knowing whether, and when, those rights were being created.

line of goods” was not sufficient to establish the use in commerce required for trademark protection).

¹⁷¹ 17 U.S.C. § 106(1) (2000).

¹⁷² 15 U.S.C. § 1114(1)(a) (2000); *see also id.* § 1125(a) (describing infringing acts with respect to unregistered marks).

¹⁷³ *See Cohen, supra* note 48, at 963-64 (“Copyright’s public-private distinction used to be clearly stated on the surface of the law and transparently visible in the law’s operation. . . . [but i]ncreasingly, for users, it seems that the law no longer recognizes conduct in private.”).

¹⁷⁴ *See supra* note 160 (describing the publication requirement).

¹⁷⁵ *Keene v. Wheatley*, 14 F. Cas. 180, 185 (C.C.E.D. Pa. 1861) (No. 7644).

¹⁷⁶ Copyright Act of 1976, Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2544-45 (codified as amended at 17 U.S.C. § 102(a) (2000)).

¹⁷⁷ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859 (1987) (“[T]he new statute makes a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself.” (quoting Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977))).

¹⁷⁸ *Stadler, supra* note 62, at 641.

Changes to the law have also enabled courts to punish private violations of those rights. Before July 8, 1870, when Congress added the word “copying” to the list of exclusive rights in the statute,¹⁷⁹ copyright owners enjoyed only the exclusive rights of “printing, reprinting, publishing, and vending” their works.¹⁸⁰ Because those rights related to publication *in print*, the exercise of those rights tended to involve public acts. Today, by contrast, section 106 of the Copyright Act provides copyright owners with the exclusive right of reproduction, which—unlike the exclusive rights of “printing, reprinting, publishing and vending”—is violated whenever the work is “fixed” in a “material object[.]” (such as the memory devices of a home computer).¹⁸¹ The invasion of rights under copyright law, like the creation of those rights, is now, in many cases, a private act.

In extending the reach of copyright into the world of private acts, lawmakers have broadened the property right, thus promoting the inducement of creation at the expense of other strands of the public interest. Conceiving of copyright as a form of “statutory unfair competition”¹⁸² would solve this problem, at least in part, because it would focus the inquiry on the marketplace, which is a uniquely public (i.e., overt) institution. Before we can begin this inquiry, however, we must learn to speak the language of competition.

B. *The Language of Competition*

If lawmakers wished to punish only those invasions of the property right that threaten to cause competitive harm in the relevant markets in copyrighted works, they would have to begin by defining a few terms, including, of course, “competitive harm” and “relevant market.” Consider, first, the concept of competitive harm. Competitive harm is not *any* harm. Under the antitrust laws, courts require in-

¹⁷⁹ Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.

¹⁸⁰ Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436; Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171; Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124. Professor Patterson believed that Congress inserted the word “copying” intending it to apply only to works of the fine arts, Patterson, *supra* note 45, at 259, to which Congress extended copyright in 1870, Act of July 8, 1870, § 86, 16 Stat. at 212. If this were true, it would mean that most copyright owners enjoy the exclusive right of reproduction only by accident. *Cf.* Patterson, *supra* note 51, at 12 (describing how the 1909 Copyright Act “unwittingly enlarged the copyright owner’s rights”).

¹⁸¹ See 17 U.S.C. § 101 (defining “copies”); *id.* § 106(1) (providing copyright owners with the exclusive right “to reproduce the copyrighted work in copies”).

¹⁸² See Patterson, *supra* note 51, at 6.

jured parties to demonstrate that their injuries were caused by an anticompetitive practice “of the type the antitrust laws were intended to prevent,”¹⁸³ such as predatory pricing.¹⁸⁴ Because “[t]he antitrust laws . . . were enacted for ‘the protection of *competition* not *competitors*,’ [i]t is inimical to the purposes of [those] laws to award damages for the type of injury” that flows merely from vigorous competition.¹⁸⁵ The law of unfair competition imposes a similar requirement. According to the *Restatement*, “[t]he freedom to compete necessarily contemplates the probability of harm to . . . other participants in the market,”¹⁸⁶ as when, for example, a producer lowers prices, raises quality, or otherwise satisfies consumer desires better than its rivals do. The law exists to remedy only those “harm[s] resulting from particular methods of competition determined to be unfair,” including trademark infringement and other practices likely to have a negative impact on the public.¹⁸⁷

Copyright law, too, recognizes that *some* harms are not cognizable. As the Supreme Court pointed out in *Campbell v. Acuff-Rose Music, Inc.*, for example, the fact that a parody may suppress demand for the original does not make the use “unfair.”¹⁸⁸ According to the Court, “the only harm” with which courts need concern themselves “is the harm of market substitution.”¹⁸⁹ Echoing this language, a number of courts have suggested that substitutive works cause competitive harms, while complementary works do not.¹⁹⁰ As Judge Richard Posner ob-

¹⁸³ *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

¹⁸⁴ *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 118 (1986) (“In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition.”).

¹⁸⁵ *Brunswick*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

¹⁸⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995).

¹⁸⁷ *Id.* § 1 & cmt. a.

¹⁸⁸ 510 U.S. 569, 591-92, 594 (1994).

¹⁸⁹ *Id.* at 593; *see also* *On Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (observing that fair use would be found, notwithstanding market harm, “[i]f the harm resulted from a transformative . . . use that lowered the public’s estimation of the original (such as a devastating review of a book that quotes liberally from the original to show how silly and poorly written it is)”); *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983) (“A court would not find it relevant . . . that [a] devastating critique had diminished sales by convincing the public that the original work was of poor quality.”).

¹⁹⁰ *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (“The Nation’s use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder’s commercially valuable right of first publica-

served in *Ty, Inc. v. Publications International, Ltd.*, “copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws) . . . is not fair use.”¹⁹¹ “If the price of nails fell,” Judge Posner wrote, “the demand for hammers would rise The hammer manufacturer *wants* there to be an abundant supply of cheap nails.”¹⁹²

The problem with this argument is that unlike hammers and nails, copyrighted works can change in form and substance, giving them the ability to exist in several markets at the same time. As Judge Posner recognized, copyright owners want courts not only to enjoin those copies that substitute for their works, but also those copies that “substitute . . . for derivative works from the copyrighted work.”¹⁹³ In other words, copyright owners want exclusivity not only in the existing markets for their works, but also in derivative markets they may (or may not) develop in the future.¹⁹⁴ In *Ty*, the owner of copyrights in Beanie Babies wanted to control not only the market in Beanie Babies themselves, but also the markets in photographs of and books about Beanie Babies. Judge Posner elided the issue of derivative markets by holding that at least some of the books about Beanie Babies were not “derivative works”¹⁹⁵—thus answering a slightly different question.¹⁹⁶ In fact,

tion.”); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1277 (11th Cir. 2001) (Marcus, C.J., specially concurring) (“[T]he preliminary record . . . suggests that *The Wind Done Gone* will not act as a substitute for Mitchell’s original. . . . [F]urther factfinding may well reveal that these two books will act as complements rather than substitutes.”); *On Davis*, 246 F.3d at 175-76 (“If . . . the secondary use, by copying the first, offers itself as a market substitute and in that fashion harms the market value of the original, this factor argues strongly against a finding of fair use.”); *Consumers Union*, 724 F.2d at 1051 (“The fourth fair use factor will come into play if too much is copied or if the entire plot is revealed, thereby usurping the demand for the original work.”).

¹⁹¹ 292 F.3d 512, 517 (7th Cir. 2002).

¹⁹² *Id.*

¹⁹³ *Id.* (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[B][1], at 13-193 (2002)).

¹⁹⁴ Judge Posner explained:

A photograph of a Beanie Baby is not a substitute for a Beanie Baby. No one who wants a Beanie Baby, whether a young child who wants to play with it or an adult (or older child) who wants to collect Beanie Babies, would be tempted to substitute a photograph. But remember that photographs of Beanie Babies are conceded to be derivative works, for which there may be a separate demand that Ty may one day seek to exploit

Id. at 518-19.

¹⁹⁵ *Id.* at 520-21.

¹⁹⁶ *Id.* at 520. He also declined to address the question of whether Ty was engaging in copyright misuse by using its copyrights to squelch criticism of the company. *Id.*

however, there was no way for Judge Posner to know whether the copies at issue were complements or substitutes (and thus whether there was competitive harm) without deciding, first, whether the markets in which Ty claimed exclusivity were relevant markets to which it should have been entitled.

This is a question for Congress, not the courts, but Congress has not yet answered it. Worse, in failing to define the “relevant markets” in copyrighted works, lawmakers are giving copyright owners the power to define the scope of their own property rights by enabling them to occupy those markets in which they wish to exercise exclusivity. Consider what would happen if courts gave monopolists the power to define the relevant market in antitrust law: if the market were defined broadly enough, even Microsoft would have an insignificant share of it. Similarly, in copyright law, if the market for a copyrighted work were defined broadly enough, every unauthorized use of that work would give rise to infringement liability because every such use would be “competing”—whether in original or derivative markets. The result would be a copyright law that provided creators with plenty of inducement to create (in the form of exclusive rights), but that neglected other strands of the public interest, such as the existence of open and populous markets in copyrighted expression. In other words, the result would be the copyright law we have today.

How might lawmakers define (and confine) the relevant markets in copyrighted works? The answer is not to ask, as lawmakers have done, whether giving creators this or that exclusive right in this or that market would provide them with an enhanced inducement to create. As I have argued elsewhere, changes in the law have conditioned creators to expect an increasing reward for engaging in the act of creation—and creators have formed incentives accordingly.¹⁹⁷ Lawmakers hasten to safeguard those incentives by granting more rights, those rights create higher expectations among creators, and the result is a cycle in which the property right grows increasingly broad.¹⁹⁸ The

¹⁹⁷ Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 439 (2007).

¹⁹⁸ *Id.*; see also James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. (forthcoming 2007) (manuscript at 4), available at <http://papers.ssrn.com/abstract=918871> (explaining how the “practice of unneeded licensing feeds back into doctrine,” creating “a steady, incremental, unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users”).

only way to escape the cycle is for lawmakers to ask not what creators have come to expect in the way of rights, but what creators are entitled to expect given the nature of the public interest in copyright.¹⁹⁹

C. *The “Predatory Competitive Practice” of Public Distribution*

Because the public interacts with different types of works in different ways, the rights that creators are entitled to expect from copyright law are likely to vary with the type of work at issue.²⁰⁰ When it comes to printed works²⁰¹ such as books, however, the answer is reasonably clear: most authors write books so that others might pay to read them. To accomplish this goal, authors (or their publishers) make copies of those books and release those copies to the public in return for money.²⁰² The publication of books implicates the exclusive rights of reproduction and distribution, but of the two rights, the public distribution right is the one on which profit depends.²⁰³ It is no accident that Congress once conditioned the grant of statutory protection on the fact of publication; not only does publication benefit

¹⁹⁹ Stadler, *supra* note 197, at 476-77.

²⁰⁰ Consider the case of works that exist in a single copy, such as original paintings and sculpture: for many “collectors of fine art, there [is] no substitute for the original,” making the relevant market in those works so narrow that the benefits of copyright might not be worth the costs of granting protection. Stadler, *supra* note 62, at 651.

²⁰¹ *See id.* at 634 (defining “printed works” as “works that could be replicated without diminishing their market value among intended users making intended uses”). Professor Landes and Judge Posner use the term “easily copied works.” William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 335 (1989).

²⁰² Authors might write books for other reasons, of course. Some of those reasons might have nothing to do with money—as if, for example, authors were motivated to write books in the hopes of becoming famous. Other motivations might be more mercenary: authors might write books so they can demand a royalty whenever their books are sold by used bookstores or loaned by libraries, or even shared among friends. As strange as it may seem, some authors might be motivated to write books so they can demand a royalty in the event an Internet services company (like Google) decides to scan their books and make the resulting digital images searchable on the Internet. But just how relevant is each of these motivations? Given that *some* types of harms are not “competitive harms” in “relevant markets,” harms to these markets might not be cognizable, which is another way of saying that satisfying the foregoing expectations of reward might not serve the public interest. Thus, even if some authors would not create without being granted the right to exclude these uses, copyright law does not (and should not) respond by providing an inducement here.

²⁰³ Patterson, *supra* note 51, at 7 (“[I]f copyright encourages creation, it does so only for the purpose of profit. Profit, however, cannot be obtained without distribution.”).

authors, but “intellectual conceptions benefit the public only when they are released.”²⁰⁴ In providing authors (and their publishers) with the exclusive right of public distribution, copyright law secures this public benefit by enabling authors and their publishers to prohibit others from competing “unfairly”—by marketing the products of creation in which they did not invest. In other words, by granting creators the distribution right, copyright law holds that unauthorized public distributions are acts of unfair, even “predatory” competition.²⁰⁵

What of unauthorized reproductions? Professor Patterson once described the right to copy as “a predicate right”;²⁰⁶ that is, one cannot distribute copies of a work to the public without making those copies in the first place. In other words, the act of public distribution requires a predicate act of reproduction, but acts of reproduction can (and indeed, do) happen without the results being distributed to the public. Indeed, as we have seen, many (if not most) acts of copying are done in private. Do these private acts of copying constitute acts of unfair competition? Alternatively, do they cause competitive harms in the relevant markets to which authors and their publishers are entitled? At first blush, the answer might seem to be “yes” because these acts, if unauthorized, might deprive copyright owners of sales—as when, for example, friends lend each other books, hoping to share a literary experience.²⁰⁷ Even if sharing among friends causes “harm” in the form of lost sales, however, that harm might not be one that the law should characterize as “competitive” because, on balance, such sharing might benefit the public. Copyright law does not (and should not) exist to internalize every externality that affects the public in a positive way. To quote Professor Mark Lemley, “part of the point of intellectual property law is to *promote* uncompensated positive externalities, by ensuring that ideas and works that might otherwise be kept secret are widely disseminated.”²⁰⁸ Indeed, as Professor Lemley has observed, giving copyright owners the right to capture the value of

²⁰⁴ Stadler, *supra* note 62, at 632.

²⁰⁵ See Patterson, *supra* note 51, at 7.

²⁰⁶ Patterson, *supra* note 45, at 262; see also Patterson, *supra* note 51, at 42 (“If the courts had perceived the dilemma, they could have avoided it easily by recognizing that the right to copy was, in fact, the right to copy and vend.”).

²⁰⁷ But see Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1429 (2004) (describing sharing that occurs only “among small groups of friends, rather than open sharing with strangers” as a “major victory” for “copyright enforcers”).

²⁰⁸ Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1052 (2005).

every use (i.e., to eliminate free riding) would impose significant costs—not only on society, but also on creators themselves.²⁰⁹

If, as I argue, copyright owners suffer “competitive harms” only when others engage in acts of public distribution, then granting creators the exclusive right of reproduction provides them with a greater benefit than they are entitled to expect. In other words, granting creators (and their assigns) the reproduction right denies the public the opportunity to access copyrighted works in ways that pose no significant threat to inducement—and indeed, might provide the public with other benefits, such as expressive diversity. Suppose, however, that Congress were to remove subsection (1) from section 106 of the Copyright Act, which provides copyright owners with the exclusive right of reproduction, leaving subsection (3), which provides the exclusive right “to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”²¹⁰ If copyright owners enjoyed the distribution right, but not the reproduction right, then copyright owners would enjoy the exclusive right to release copies of their works to the public, as they do today. Copyright owners could not prevent others from copying their works, but they *would* have the right to exclude those unauthorized copies from the marketplace.

The distribution right has its limits, of course. Notwithstanding the fact that at least *some* people might create so as to earn a royalty every time a copy of their work changes hands, Congress has determined that creators are not entitled to expect those royalties, at least insofar as authorized copies are concerned. Under the first sale doctrine, the first public distribution of a work in copies exhausts the dis-

²⁰⁹ See *id.* at 1058-65 (describing the economic costs of granting creators absolute rights). Justice O’Connor has similarly observed:

It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforeseen byproduct of a statutory scheme.” It is, rather, “the essence of copyright,” and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.”

Feist Publ’ns. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (citations omitted).

²¹⁰ At present, section 106 provides copyright owners with “the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; . . . [and] (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 106(1), (3) (2000). As noted in Part I above, I do not address the other section 106 rights in this Article. See *supra* notes 68-69 and accompanying text.

tribution right as to those copies.²¹¹ In adopting this limitation almost a century ago,²¹² Congress clearly believed that the first sale doctrine would provide the public with more benefits than costs. Accordingly, Congress defined the relevant market in printed works so as to limit that market to “first sales,” thus encouraging competitors to engage in the further distribution of lawful copies that already had reached the public. The last hundred years suggests that Congress was right to do so: encouraging competition in secondary markets for copyrighted works promotes the proliferation of copies, and it does so without exposing creators to the kind of competition that likely would threaten their incentives to create.

Perhaps the most significant limitations on the right, however, are found in the terms “public” and “distribution.” Under section 106(3), copyright owners do not enjoy the right to prevent private distributions, nor do they have the right to exclude others from making uses that do not qualify as distribution in the first place. Congress has not defined these terms in section 101, but in defining the word “publicly” (as it relates to performances and displays), Congress seems to have suggested that a public act necessarily involves a “substantial number of persons outside of a normal circle of a family and its social acquaintances.”²¹³ The definition of “distribution” is more elusive. As section 106(3) provides, distribution can occur “by sale or other transfer of ownership, or by rental, lease, or lending.”²¹⁴ In general, courts hold that distribution requires the “actual dissemination” of copies,²¹⁵ which means, in the digital world, “the transfer of a file from one

²¹¹ See 17 U.S.C. § 109(a) (providing that “the owner of a particular copy . . . lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”). If section 106 were amended to remove the exclusive right of reproduction, then section 109(a) would have to be amended as well, for at least the reason that *all* copies would be “lawfully made”—even those copies made without the authorization of the copyright owner.

²¹² See Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075, 1084 (1909) (providing that copyright owners cannot “forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained”).

²¹³ 17 U.S.C. § 101.

²¹⁴ *Id.* § 106(3); see also 2 NIMMER, *supra* note 24, § 8.11[A], at 8-148 (“The copyright owner thus has the exclusive right publicly to sell, give away, rent or lend any material embodiment of his work.” (footnote omitted)).

²¹⁵ 2 NIMMER, *supra* note 24, § 8.11[A], at 8-149; see also *Nat’l Car Rental Sys., Inc. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (stating that “even with respect to computer software, the distribution right is only the right to distribute copies of the work”); *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 802 (N.D. Cal. 2005) (noting support for the “view that distribution of a copyrighted work requires the transfer of an identifiable copy of that work”).

computer to another.”²¹⁶ Thus, in *New York Times Co. v. Tasini*, Justice Ginsburg observed for the Court that, “by selling copies of the [copyrighted] Articles through the NEXIS Database,” defendant LEXIS/NEXIS “‘distribute[d] copies’ of the Articles ‘to the public by sale.’”²¹⁷ Mere transmissions that do not involve a file transfer, however, likely do not constitute distribution (although they may qualify as a performance or display).²¹⁸

Taken together, these limitations shed considerable light on the scope of the right that copyright owners would enjoy if, as I have proposed, Congress were to provide them with the distribution right, but not the reproduction right. As under existing law, copyright owners would enjoy the exclusive right to release copies of their works to the public, but they could not control later distributions of those copies, nor could they control how members of the public interacted with those copies in private. This means, necessarily, that a consumer who

²¹⁶ Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 844 (C.D. Cal. 2006).

²¹⁷ 533 U.S. 483, 498 (2001). Alternatively, as Justice Stevens suggested in dissent, the NEXIS service may have constituted nothing more than an offer to distribute copies. *Id.* at 518 n.14 (“Perhaps it would be more accurate to say that NEXIS makes it possible for *users* to make and distribute copies.”).

Would such an offer constitute “distribution?” The Court of Appeals for the Fourth Circuit has suggested that the answer is yes. In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997), the court held that when a public library “adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public,” the library has engaged in public distribution—even if there is no evidence that copies of the work changed hands. But this cannot be right. There is ample evidence that Congress intended “distribution” to overlap with the concept of “publication,” which section 101 defines as *either* (1) “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending”; or (2) “[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display.” 17 U.S.C. § 101 (2000); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985) (observing that section 106(3) “recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works”). Under this definition, an offer to distribute copies of a work to the public for the purpose of *reproduction* would not constitute publication—and arguably would not constitute distribution, either. *See Napster*, 377 F. Supp. 2d at 803 (“[T]o the extent that *Hotaling* suggests that a mere offer to distribute a copyrighted work gives rise to liability under section 106(3),” that suggestion was contrary to case law and “inconsistent with the text and legislative history of the Copyright Act of 1976.”). Even so, “courts have not hesitated to find copyright infringement by distribution” in cases involving peer-to-peer (p2p) networks. *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 968 (N.D. Tex. 2006).

²¹⁸ *See* 2 NIMMER, *supra* note 24, § 8.11[A], at 8-149 (“Given that transmissions qualify as public performances, liability for that conduct lies outside the distribution right.” (footnotes omitted)).

purchased an authorized copy of a copyrighted work could sell or give that copy to a total stranger, toss it in the street, or “otherwise dispose” of it²¹⁹—even if that copy existed in digital form.²²⁰ That consumer could make unauthorized copies of the work for herself, to use in private, as she chose. She also could give those copies to family and friends for their private use. She probably should refrain from offering to distribute copies of the work to those who might engage in “further distribution, public performance, or public display.”²²¹ Regardless, she would have a considerable range of uses to which she could put the work. She simply could not distribute copies of the work to the public; that is, she could not seek to compete with the copyright owner in the marketplace for copies.

If this were the law, what result? In providing creators with exclusive public distribution rights, but not exclusive reproduction rights, Congress would enable copyright owners to capture the value in *some* uses of their works without forcing the public to sacrifice other interests that copyright law was meant to promote. Creators would continue to enjoy adequate incentives to create, and the public would gain increased access to copyrighted works and would reap a number of other significant benefits. Part III examines those benefits.

III. ON THE UTILITY OF COPYRIGHT AS TRADE REGULATION

A. Solving the “Problem” of Personal Copying

Most copyright scholars agree that almost nothing poses a greater threat to the enterprise of creation than the “problem” of unauthorized copying. To quote Professor Marshall Leaffer, the “‘copying problem’ presents challenges that transcend qualitatively anything in history, and the economic stakes are greater than ever.”²²² Scholars have responded to these challenges by proposing a number of solu-

²¹⁹ 17 U.S.C. § 109(a) (2000); *see supra* note 211.

²²⁰ *But see* 2 NIMMER, *supra* note 24, § 8.12[E], at 8-179 to 8-183 (discussing whether the first sale doctrine applies to digital copies).

²²¹ 17 U.S.C. § 101 (defining “publication”); *see also supra* note 217 and accompanying text. In other words, given the relationship between distribution and publication, she probably should refrain from engaging in a “general publication”—that is, from making copies of the work “available to members of the public regardless of who they are or what they will do with it.” *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1452 (9th Cir. 1991).

²²² Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 850 (2001).

tions, of which Professor Peter Yu has documented no fewer than eight. As he warns, however, there is “no panacea.”²²³ One way to solve the “copying problem,” of course, is to remove the right of reproduction from the list of exclusive rights in section 106—thus making copying perfectly legal. According to Professor William Patry and Judge Richard Posner, however, this solution “would be the undoing of copyright.”²²⁴ Why? To be sure, the word “copyright” signifies the “right” to “copy,” but any exclusive grant of the reproduction right should rest upon a stronger foundation than semantics.

Scholars have competing theories as to why copying so threatens the enterprise of creation. One theory (to which Patry and Posner subscribe) is that reproduction forces down prices of copyrighted works, thus depriving copyright owners of profits and thereby reducing their incentives to create.²²⁵ As Professor Raymond Ku has observed, “[i]f competition from copiers drives the price of a work down to the marginal costs of the copier, it threatens the incentives to distribute the work in the first place.”²²⁶ Even Professor Lunney, who advocates some private copying, has warned that instances of private copying, “[a]lthough individually trivial, . . . in the aggregate could radically reduce the incentive to create any given work of authorship.”²²⁷

Yet acts of copying alone would not produce these results. Only the distribution of unauthorized copies would tend to increase supply, thus resulting in decreased prices (at least in a competitive market). Further, only the *public* distribution of unauthorized copies would tend to increase supply enough to have any appreciable effect on prices. The private distribution of unauthorized copies might deprive copyright owners of at least *some* profits as consumers shared purchased copies within “normal circle[s] of . . . family and . . . social acquaintances.”²²⁸ But given how broadly the courts have construed the

²²³ Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 698-740 (2005).

²²⁴ William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1644 (2004).

²²⁵ *See id.*

²²⁶ Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539, 548 (2003).

²²⁷ Lunney, *supra* note 5, at 818; *see also* Patry & Posner, *supra* note 224, at 1644 (arguing that “unlimited” copying “would make it difficult and in some cases impossible for authors of expressive works to recoup their expenses in creating [their] work[s]”).

²²⁸ 17 U.S.C. § 101 (defining “publicly”).

statutory definition of “publicly,”²²⁹ private distributions would likely involve relatively few copies, which means that any lost profits would be unlikely to have a significant effect on the inducement to create.²³⁰ This may be why “[c]opyright owners in the twentieth century sued counterfeiters but generally did not sue end users even if they were making illegal copies”:²³¹ the benefits of enforcement did not justify the costs.²³² Unfortunately, this approach seems increasingly anachronistic.²³³

If copying is thought to pose more of a threat to copyright owners today, it is because technological advances are enabling copiers to make “perfect copies” (and “perfect copies of the copies”) at “massive[ly] declin[ing]” costs.²³⁴ As before, however, the problem is not

²²⁹ As the court wrote in *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, “[t]he Copyright Act . . . does not require that the public place be actually crowded with people. A telephone booth, a taxi cab, and even a pay toilet are commonly regarded as ‘open to the public,’ even though they are usually occupied only by one party at a time.” 800 F.2d 59, 63 (3d Cir. 1986). The court went on to hold that a video rental store performed copyrighted audiovisual works “publicly” by permitting patrons to watch videocassettes in private screening rooms. *Id.*; see also *Columbia Pictures Indus., Inc. v. Redd Home, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (holding that a video rental store performed copyrighted audiovisual works “publicly” by transmitting those works to private screening rooms).

²³⁰ Even public distribution may not have as significant an effect on inducement as previously feared. See Daniel Gross, *Does a Free Download Equal a Lost Sale?*, N.Y. TIMES, Nov. 21, 2004, at Business 4 (discussing a recent study showing only a “small correlation” between music downloads and lost sales).

²³¹ Lemley & Reese, *supra* note 207, at 1374.

²³² See Wu, *supra* note 115, at 338 (“While this point is complicated by improved technologies of copy protection, so long as there exist rights that would be extremely expensive to enforce, the model of broad initial grants cannot be a complete answer.”).

²³³ In 1970, for example, Stephen Breyer (then a law professor) complained that “[a] law-abiding user wishing to copy only a portion of a book or article . . . [would] have to buy the whole book at a store or face the difficulty and cost of contacting the copyright owner, bargaining with him, and arranging for payment.” Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 316 (1970); see also Litman, *supra* note 78, at 932 (“When Congress extended copyright protection to sound recordings in 1971, it had repeatedly affirmed that the Copyright Act did not then reach consumer home taping of music, and would not reach it as amended.”). Today, copyright owners are likely to take the position that a “law-abiding user” can never copy, even if the user purchased the book from which she wishes to copy. *But see* Gordon, *supra* note 3, at 190 (describing a “judicial and legislative unwillingness to impose copyright liability on individual at-home users”).

²³⁴ Lemley & Reese, *supra* note 207, at 1376; see also Lunney, *supra* note 5, at 849 (“Digital technology has fundamentally altered copyright doctrine by making widespread public copying possible.”).

one of reproduction, but rather of distribution. The most significant impact of technological advancement has been the transformation of consumers into public distributors. With the click of a mouse, a person can use her computer to send thousands of “perfect copies” of copyrighted works to thousands of strangers, or to make those copies available for downloading by thousands more. Previously, this kind of distribution required a significant amount of investment, and the resulting barriers to entry created the very oligopolies that are so quick to blame reproduction technologies for their problems.

A second theory as to why copying causes harm is that copying forces copyright owners to *raise* the prices of copies of their works, presumably because competition from copiers leads to fewer sales for copyright owners, thereby forcing copyright owners to maintain revenues by charging higher prices.²³⁵ According to the laws of economics, however, if copyright owners were losing market share to copiers, then raising prices would be counterproductive. Copyright owners who insisted on charging higher prices in such a competitive market would, in the end, watch their market share erode considerably. Regardless, it would be unfair to blame copying alone for these competitive harms. Consider an example from the music industry: one suspects that record companies decided to give consumers the (legal) opportunity to download individual songs at reasonable prices by participating in the iTunes music store only because online “distributors” forced those companies to change the way in which they distributed music. A guy in his basement can copy thousands of copyrighted songs onto his hard drive, but he only inflicts competitive harm on copyright owners when he makes those copies available to the public. Record companies may love the reproduction right because it enables them to threaten litigation against (and thus frighten away) as many members of the public as possible,²³⁶ but this is not a good enough reason to retain a right that Professor Julie Cohen has described as “recogniz[ing] few boundaries,” “drafted extraordinarily broadly in

²³⁵ See Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 222 (“Prices would be lower in the absence of copying . . .”).

²³⁶ See Cohen, *supra* note 48, at 965 (noting that the Copyright Register’s proposal urging copyright holders to “adopt voluntary norms of self-restraint” requires “[a]ppropriate norms to govern the public conduct of users [to] be publicly inculcated through a combination of persuasion and fear, which means that judiciously targeted lawsuits against users still have a role to play”).

the first instance, and . . . extended even more broadly by the courts.”²³⁷

If the “predicate right”²³⁸ of reproduction provides copyright owners with few benefits, there are significant public benefits to be gained by withholding such a right. First, as we have seen, giving members of the public the right to make copies of copyrighted works would increase access to those works during the copyright term without subjecting copyright owners to the kind of unfair competition that might reduce their incentives to create. That access, in turn, would lead to the creation of thousands of tangible copies—copies whose creation the law now seeks both to prevent and to punish, regardless of whether those copies are being used to compete unfairly with the copyright owner. Not only are there significant archival benefits to be gained by the proliferation of tangible copies,²³⁹ but as I have argued, the proliferation and distribution of copyrighted works in tangible form also promote the enterprise of learning. In fact, copyright law always has recognized this relationship.²⁴⁰ Article I, Section 8, Clause 8 of the Constitution gives Congress the authority to provide authors with exclusive rights only in “Writings,”²⁴¹ and, accordingly, Congress has defined copyrightable works as only those “original works of authorship fixed in any tangible medium of expression.”²⁴² If the fixation requirement serves other purposes—including evidentiary on-

²³⁷ Cohen, *supra* note 133, at 160.

²³⁸ Patterson, *supra* note 45, at 262; *see also* Patterson, *supra* note 51, at 42 (“If the courts had perceived the dilemma, they could have avoided it easily by recognizing that the right to copy was, in fact, the right to copy and vend.”).

²³⁹ Professor Gregory Lastowka has observed that “[c]opies of the past were valuable objects,” and if anything happened to the power grid, copies of the future would be valuable objects, too. F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 RUTGERS COMPUTER & TECH. L.J. 293, 300 (2001); *see also* Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1061 (1998) (“Books and other information in physical form, however, continue to play an important role.”).

²⁴⁰ The House Report on the Digital Millennium Copyright Act noted the Committee’s concern that “marketplace realities may someday dictate . . . less access, rather than more, to copyrighted materials,” and that this “result could flow from a confluence of factors, including the elimination of print or other hard-copy versions.” H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

²⁴¹ U.S. CONST. art I, § 8, cl. 8. In the *Trade-mark Cases*, the Supreme Court defined “writings” to mean “*the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like.*” 100 U.S. 82, 94 (1879).

²⁴² 17 U.S.C. § 102(a) (2000).

es²⁴³—it also provides the public with a tangible benefit in return for the impediment to access that the grant of exclusive rights represents.²⁴⁴

Granting the public more access to copyrighted expression also might promote expressive diversity in surprising ways. To the extent that the law today requires members of the public to be “consumers” instead of “users,” copyright owners can train the public to satisfy its demand for expression by looking to the copyright industries alone. As Professor Benkler has argued (using Disney as an example), “increased prevalence of Mickeyes should lead to increased investment in forming preferences for their products. This should increase relative demand for their products. Repackaging the Mouse becomes not only cost effective, but also responsive to demand.”²⁴⁵ In time, the public tends to forget that the copyright industries are not the only sources of creative expression. If, however, the public enjoyed the right not only to “experience” copyrighted works,²⁴⁶ but also to make copies of those works for private use, people might begin to interact with copyrighted works in ways that raised the “common denominator,”²⁴⁷ at least in their own lives (and the lives of family and friends). Meaningful access to creative works inspires creativity. Further, if the public began to view copyrighted works not only as finished products, but also as raw materials, demand for those works might even increase. So might the value of the copyrights themselves, as users seek to license the right to market their improvements.²⁴⁸

Yet another significant benefit of withholding the exclusive right of reproduction relates to derivative liability. Since the Supreme Court grappled with the issue of contributory liability in *Sony Corp. of*

²⁴³ See Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 730-34 (2003) (examining the evidence rationales for the fixation requirement).

²⁴⁴ See Wu, *supra* note 115, at 361 (“[F]ixed media has the advantage of the fixed form, packaging, and in some cases a superior product (real books are beautiful, very portable, and operate without batteries).”).

²⁴⁵ Benkler, *supra* note 130, at 97-98.

²⁴⁶ See generally Ginsburg, *supra* note 3, at 115-16 (discussing how new media influences how people experience works, and how copyright law responds to new media).

²⁴⁷ See Lunney, *supra* note 5, at 888-89 (“Seeking the common denominator among a wider audience leads almost inevitably to a lower common denominator.”).

²⁴⁸ See generally Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993-1000 (1997) (arguing that intellectual property laws help inventors and the public by providing incentives for improving inventions).

America v. Universal City Studios, Inc.,²⁴⁹ copyright owners have brought copyright infringement actions against manufacturers of copying technologies that enable consumers to engage in unauthorized acts of reproduction. In *Sony*, the Court held that under the “staple article of commerce” doctrine, “the sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.”²⁵⁰ “Indeed,” the Court added, that product “need merely be capable of substantial noninfringing uses.”²⁵¹ In the last twenty years, however, copyright owners have convinced courts repeatedly to distinguish the holding in *Sony*, and the Court itself did so in 2005.²⁵² These days, manufacturers of copying devices may be guilty of contributory infringement if they distribute those devices “with the object of promoting [their] use to infringe copyright”²⁵³—even if those devices are “capable of substantial noninfringing uses.”²⁵⁴ As Professor Jessica Litman has observed, “[d]efining an appropriate boundary between contributory infringers and innovators in digital technology seems even more crucial today than it did when the Court decided *Sony*.”²⁵⁵ Although that boundary promises to remain elusive, it cannot be drawn if acts of copying alone are punishable as copyright infringement.

²⁴⁹ 464 U.S. 417 (1984). For a description of the aftermath of *Sony*, see Litman, *supra* note 78, at 947-60.

²⁵⁰ 464 U.S. at 442.

²⁵¹ *Id.*

²⁵² The Supreme Court in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* instructed that “[w]here evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*’s staple-article rule will not preclude liability.” 125 S. Ct. 2764, 2779 (2005). The Court observed that “the summary judgment record [was] replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in *Sony*, acted with a purpose to cause copyright violations by use of software suitable for illegal use.” *Id.* at 2781.

²⁵³ *Id.* at 2767; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021-22 (9th Cir. 2001) (holding that Napster knew of specific infringing material on its system, could have blocked it, failed to purge it, and therefore could be liable for contributory infringement). The holdings in *Sony*, *Napster*, and *Grokster* are not limited to new technologies, of course. As Judge Leval once asked, “why not also enjoin the use of the camera, the audio-tape recorder, the photocopier, and the computer—perhaps even pen and paper, or the printing press[?]” Pierre N. Leval, *Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997).

²⁵⁴ See *Grokster*, 125 S. Ct. at 2775 & n.12 (citing and distinguishing *Sony*, 464 U.S. at 442).

²⁵⁵ Litman, *supra* note 78, at 960.

If copyright owners were unable to exclude others from copying their works, then by definition they could not bring infringement actions against manufacturers of copying technologies (like the one in *Sony*) for enabling those acts of copying. Liability for contributory infringement derives from acts of direct infringement, which means there can be no derivative liability absent a violation of the Copyright Act.²⁵⁶ The benefit of withholding the reproduction right would be obvious for manufacturers of devices, such as computers, that cannot function without making copies. But that benefit also would be obvious for consumers, who would have the opportunity to purchase those copying technologies without funding payments of royalties. In the end, contributory liability would continue to be a threat only to those companies (like Napster and Grokster) that enable and induce²⁵⁷ users to engage in the public distribution of unauthorized copies of copyrighted works, thus causing competitive harm. If this is not a perfect boundary “between contributory infringers and innovators in digital technology,” it certainly is an appropriate one.²⁵⁸

B. *Preempting the End Run Around Copyright*

In addition to forcing third parties (such as manufacturers of copying technologies) to police infringements, copyright owners also have used other laws to control the ways in which the public interacts with their works: first, by seeking to enforce restrictive “end user license agreements” under contract law, mostly for computer software, and second, by persuading lawmakers to enact new laws (such as the Digital Millennium Copyright Act (DMCA)²⁵⁹) prohibiting users from circumventing the encryption of copyrighted works—even in purchased copies.²⁶⁰ Scholars have characterized both of these end runs

²⁵⁶ *Subafilms Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1092-93 (9th Cir. 1994).

²⁵⁷ *See Grokster*, 125 S. Ct. at 2779 (defining “inducement of infringement” as “advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged”).

²⁵⁸ Litman, *supra* note 78, at 960. Professor Litman argues that the need for a coherent boundary is still a pressing one, but that the *Sony* line “makes more policy sense” than the line drawn by “any of its competitors.” *Id.*

²⁵⁹ Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863-76 (1998) (codified at 17 U.S.C. §§ 1201-1205 (2000)).

²⁶⁰ *See, e.g.*, 17 U.S.C. § 1201(a) (2000) (prohibiting the circumvention of any “technological measure that effectively controls access to a work protected under [title 17]”).

around copyright as serious, even devastating blows to the public interest in copyright, in part because neither contract law nor anticircumvention law makes exception for fair uses of copyrighted works.²⁶¹ As Professors Dan Burk and Julie Cohen have articulated the problem, “[w]here technological constraints substitute for legal constraints, control over the design of information rights is shifted into the hands of private parties, who may or may not honor the public policies that animate public access doctrines such as fair use.”²⁶²

Notwithstanding the importance of these public policies, most courts have upheld efforts to enforce exclusive rights by means of contractual or technological controls. In *ProCD, Inc. v. Zeidenberg*, for example, the court was asked to consider the enforceability under contract law of a “shrinkwrap” license prohibiting buyers from engaging, inter alia, in the public distribution of databases containing telephone directories.²⁶³ (The distribution of the contents of those databases would not constitute copyright infringement because under section 102(b) of the Copyright Act, protection does not extend to facts such as telephone numbers.²⁶⁴) Writing for the court, Judge Frank Easterbrook held that the Copyright Act (in section 301(a)) did not preempt the enforcement of that license under contract law because the “rights created by contract [were not] ‘equivalent to any of the exclusive rights within the general scope of copyright.’”²⁶⁵ As for technological controls, the Court of Appeals for the Second Circuit held in *Universal City Studios, Inc. v. Corley* that the prohibition in section 1201(a) of the DMCA is not subject to the fair use provisions of sec-

²⁶¹ See Gordon, *supra* note 5, at 915 (“[O]verbroad contract rules and the DMCA are the true threats. They threaten the culturally-viable practices that fair use has historically sheltered.”); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 513 (1997) (“If these [shrinkwrap] ‘licenses’ are uniformly enforceable, all of the users’ rights of copyright will soon disappear.”); Lunney, *supra* note 5, at 814-15 (arguing that the DMCA promotes the private interests of copyright holders over the public interest). *But see* Goldstein, *supra* note 4, at 146-47 (arguing that “[b]oth the critics and the proponents of anti-circumvention rules have probably overstated the capacity of encryption measures to close off access to literary and artistic works” and noting that “[a]ny signal that can be seen or heard can also be copied, and without circumventing any encryption technology”).

²⁶² Burk & Cohen, *supra* note 6, at 51. *But see* Ginsburg, *supra* note 3, at 125 (“[T]he ‘market failure’ genre of fair use should fade away in a world of . . . direct enforcement of copyright through access controls.”).

²⁶³ 86 F.3d 1447, 1448-49 (7th Cir. 1996).

²⁶⁴ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (holding that the alphabetical arrangement of telephone numbers in a directory was not original and therefore not subject to copyright).

²⁶⁵ *ProCD*, 86 F.3d at 1454 (quoting 17 U.S.C. § 301(a) (2000)).

tion 107.²⁶⁶ As the court observed, “[w]e know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.”²⁶⁷

These decisions contain echoes of grievance, as if courts perceive the remedies under copyright law to be inadequate to punish invasions of the property right, most of which involve acts of copying. The result is a “law of control” that violates the spirit, if not the terms, of section 301(a) of the Copyright Act, which provides that those “legal or equitable” rights equivalent to copyright are to be “governed exclusively by [title 17].”²⁶⁸ On the subject of contractual controls, scholars have urged courts to invigorate the doctrine of preemption,²⁶⁹ but the solution is not without its problems: how much of the state law on contracts do federal courts have the stomach to preempt? As Professor Lemley put it, “[u]sing preemption doctrine against contracts is something like swinging a sledgehammer at a gnat: you are likely to hit the target, but you may do some serious damage to the things around it.”²⁷⁰ Worse, perhaps, “you might decide not to swing the hammer at all, for fear of hitting the wrong thing.”²⁷¹ If preemption seems tricky, try this proposed solution to the problems posed by technological controls: Professors Burk and Cohen have suggested that the federal government create (and fund) an “escrow agent” whose sole job would be to issue “keys,” case by case, to users who could demonstrate a need for access to encrypted works.²⁷² A far simpler solution, of course, would be enacting “an explicit . . . fair use exemp-

²⁶⁶ 273 F.3d 429, 458-59 (2d Cir. 2001).

²⁶⁷ *Id.* at 459.

²⁶⁸ 17 U.S.C. § 301(a) (2000).

²⁶⁹ *See, e.g.,* Burk & Cohen, *supra* note 6, at 52 (“Where enforcement of a state law contract would violate the public policy inherent in the federal intellectual property scheme, or that embedded in the Constitution itself, such contractual provisions are preempted.”). Professor Gordon predicts that “if such contracts become so ubiquitous that they attach to virtually all copies, the result will be so property-like that courts will subject the contracts to copyright preemption.” Gordon, *supra* note 5, at 912.

²⁷⁰ Lemley, *supra* note 121, at 145; *see also* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1269 (1995) (noting the “complex question of whether and how to preempt certain parts of contract law without bringing down the whole edifice”).

²⁷¹ Lemley, *supra* note 121, at 145.

²⁷² Burk & Cohen, *supra* note 6, at 59-70. “Rights holders that opt not to deposit keys with the escrow agent would be unable to invoke legal protection against circumvention.” *Id.* at 66. To their credit, Professors Burk and Cohen admit that their proposal “is a second-best solution designed to make the best of a bad situation.” *Id.* at 80.

tion from the anticircumvention provisions” of section 1201 of the DMCA, as Professor Benkler has suggested.²⁷³ As we have seen, however, fair use has its problems, too.

Amending the copyright statute to withhold the exclusive right of reproduction would do what these proposals would not: it would eliminate much of the claimed need for access controls by erasing many of the harms thought to justify those controls in the first place. Consider the DMCA. Both the House and Senate reports issued in support of passage contain language suggesting that the DMCA is necessary because of the threats posed by both unauthorized reproduction and unauthorized public distribution. The language in the Senate report is typical: “Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.”²⁷⁴ Of the reproduction and distribution rights, however, the former has drawn the most notice. For example, the Senate report instructs that section 1201(b) is meant to “prohibit[] devices primarily designed to circumvent . . . measures that limit the ability of the copyrighted work *to be copied*, or otherwise protect the copyright rights of the owner of the copyrighted work.”²⁷⁵ In *Corley*, too, the court focused almost exclusively on the threat posed by copying. It did so, in part, by remonstrating “pirates” and “thieves,” whom it described as those “who want to *acquire* [i.e., copy] *copyrighted material* (for personal use or resale) without paying for it.”²⁷⁶

²⁷³ Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 53 FED. COMM. L.J. 561, 578 (1999-2000).

²⁷⁴ S. REP. NO. 105-190, at 8 (1998); see also H.R. REP. NO. 105-551, pt. 2, at 25 (1998) (“In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate.”); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001) (“Fearful that the ease with which pirates could copy and distribute a copyrightable work in digital form was overwhelming the capacity of conventional copyright enforcement to find and enjoin unlawfully copied material, Congress sought to combat copyright piracy in its earlier stages, before the work was even copied.”).

²⁷⁵ S. REP. NO. 105-190, at 12 (emphasis added); see also *Corley*, 273 F.3d at 441 (“[T]he focus of subsection 1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of subsection 1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright.” (citing S. REP. NO. 105-190, at 11-12 (1998))).

²⁷⁶ 273 F.3d at 435 (emphasis added); see also *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 345 (S.D.N.Y. 2000) (“[T]aking what is not yours and not freely offered to you is stealing.”).

If the exclusive right to make copies were not among those rights listed in section 106 of the Copyright Act, then it would not be a wrongful act to make copies of copyrighted works, so long as one did not *also* distribute those copies to the public. Whither the rhetoric about piracy and thievery? Copyright owners, of course, would continue to demand (and receive) protection against circumvention of those technologies designed to hinder distribution. They might even continue to demand hindrances to copying, but one hopes, at least, that lawmakers would hesitate to grant copyright owners the right to prohibit the public from engaging in acts of copying that would be perfectly lawful under copyright law, in the service of which the DMCA was enacted in the first place.²⁷⁷ Of course, if Congress were to amend section 1201(a) of the DMCA to prohibit the circumvention of only those measures that “effectively control the public distribution of a work protected under Title 17,” the change probably would not stop copyright owners from using technological measures to try to prevent copying. But it also would not stop users from employing technological measures of their own. As Professor Cohen has argued, “[c]opyright owners cannot be prohibited from making access to their works more difficult, but they should not be allowed to prevent others from hacking around their technological barriers.”²⁷⁸ This solution is only as good as the hackers that might provide it, but it may be good enough (for now).

In the case of contracts, too, withholding the exclusive right of reproduction would deprive copyright owners of many of their justifications for imposing restrictive terms on purchasers of copies (e.g., of software). Copyright owners likely would continue to require that users agree not to engage in acts of copying. Because copying alone would be perfectly legal, however, copyright owners would be guilty of using contracts not to enhance their rights under copyright law, but to create new rights. This effort to deny the public the benefits of legalizing reproduction would present a strong case for preemption, for as the Supreme Court warned in *Sears, Roebuck & Co. v. Stiffel Co.*,

²⁷⁷ See *Corley*, 273 F.3d at 435 (noting that Congress enacted the DMCA in 1998 “to strengthen copyright protection in the digital age”).

²⁷⁸ Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed To Protect Them*, 12 BERKELEY TECH. L.J. 161, 178 (1997). Professors Burk and Cohen have argued that “[i]n some instances of overreaching via technological controls, the Constitution may even demand a limited . . . ‘right to hack,’ to surmount privately erected technological barriers to information that the Constitution requires be publicly accessible.” Burk & Cohen, *supra* note 6, at 52.

“[w]hen state law touches upon the area of [the copyright and patent] statutes, it is ‘familiar doctrine’ that the federal policy ‘may not be set at naught, or its benefits denied’ by the state law.”²⁷⁹ But even if courts would be hesitant to use the “coarser tools” of preemption, Professor Lemley has argued that the “better tool” might be the doctrine of copyright misuse.²⁸⁰ Copyright misuse consists of the use of a copyright “in a manner violative of the public policy embodied in the grant of a copyright”—as when, for example, a licensor attempts to prevent its licensee from implementing the (unprotectable) ideas expressed in the licensed works.²⁸¹ Contract terms that sought to prevent licensees from exercising their right to engage in copying *sans* public distribution likewise would “violat[e] . . . the public policy embodied in the grant of a copyright,”²⁸² and therefore would render the offending copyright unenforceable “‘during the period of misuse.’”²⁸³ Again, this would not be a perfect solution, but it would result in a more equitable balance between “the claims of individuals” and “[t]he public good.”²⁸⁴

C. *Breathing Life into the Fair Use Defense*

If, as Professor Patterson argued, the “question is not ‘what is fair use?’ but ‘what is copyright?’”²⁸⁵ then one cannot make sense of fair use without first deciding, as Professor Litman put it, “what we have a copyright law *for*.”²⁸⁶ Not surprisingly, there is a lack of agreement on this point. While two hundred years ago copyright may have been a modest instrument of quid pro quo, today the “grand conception”²⁸⁷ of copyright no longer can satisfy the demands that its many constitu-

²⁷⁹ 376 U.S. 225, 229 (1964) (citation omitted).

²⁸⁰ Lemley, *supra* note 121, at 157-58; *see also id.* at 163 (suggesting, too, that courts might place “federal public policy limits on contract enforcement” without “invoking the mechanisms of preemption”).

²⁸¹ *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990).

²⁸² *Id.*

²⁸³ *Buena Vista Home Entm’t, Inc. v. Video Pipeline, Inc.*, 342 F.3d 191, 204 (3d Cir. 2003) (quoting *Practice Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 520 n.9 (9th Cir. 1997) (citing *Lasercomb*, 911 F.2d at 979 n.22)).

²⁸⁴ THE FEDERALIST NO. 43, *supra* note 61, at 279 (asserting that “[t]he public good fully coincides [in the case of both the “copyright of authors” and the “right to useful inventions”] with the claims of individuals”), *quoted in* *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

²⁸⁵ Patterson, *supra* note 45, at 249.

²⁸⁶ Litman, *supra* note 45, at 365.

²⁸⁷ Leval, *supra* note 43, at 1110.

encies have placed upon it. Professor Lunney may have described the doctrine of fair use as “a central and vital arbiter between two competing public interests”²⁸⁸—namely, inducement and access—but in fact, that doctrine plays a minor role in the drama of copyright.

There are two reasons for this. First, an influential group of scholars has convinced many courts that the public interest is best served when rights in copyrighted works can be acquired, parceled, and sold as if they were tangible property.²⁸⁹ The resulting commodification of creative expression is thought to serve the purposes of copyright law by enabling the market to distribute that expression to more people than it otherwise might reach. Scholars who embrace this principle argue that the market, as opposed to the government, is best equipped to locate the most productive ways to exploit copyrightable works.²⁹⁰ As Professor Wendy Gordon once wrote, the primacy of the market means that fair use should exist only when the commodities market in expression “fails,” either because transaction costs are too high to facilitate a transaction, or because there is reason to believe that no market exists in the first place.²⁹¹ If, in time, computer technology enables transactions with the click of a mouse, then fair use must shrink, as must the power of the government to diminish the rights that copyright holders enjoy. In the words of Professor Paul Goldstein, “[f]or the great bulk of uses previously excused because of transaction costs, the doctrine will simply become irrelevant.”²⁹²

The second reason for the marginalization of fair use is that a distinguished jurist has convinced his fellow judges that the doctrine

²⁸⁸ Lunney, *supra* note 24, at 977.

²⁸⁹ See, e.g., Weinreb, *supra* note 44, at 1148 (“To a considerable extent, primary resort to the market vindicates the copyright owner’s claim that the copyright is his property, to do with as he chooses; so long as a transfer may occur, he is allowed to obtain as large a share of the profit as he can.”).

²⁹⁰ See Netanel, *supra* note 55, at 309 (“For neoclassicists, copyright enables owners to charge users for access to creative work public goods not so much to preserve author incentives as to determine what creative works are worth and thus to create a guide for resource allocation.”).

²⁹¹ See Gordon, *supra* note 2, at 1601. Specifically, Professor Gordon has proposed to apply the fair use doctrine “[w]here (1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner’s incentives would not be substantially impaired by allowing the user to proceed.” *Id.* (footnotes omitted).

²⁹² Goldstein, *supra* note 4, at 137; see also Ginsburg, *supra* note 3, at 125; Lunney, *supra* note 24, at 976 (“Interpreted as an exceptional instance of market failure, *Sony* has become its own limitation.”).

should be reserved for “transformative” works—that is, derivatives that “add[] value to the original . . . in the creation of new information, new aesthetics, new insights and understandings.”²⁹³ Ironically, Judge Leval proposed this test so that fair use would “*not* be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly.”²⁹⁴ It has not worked out that way. As Professor Diane Zimmerman has observed, “[c]ourts now feel obliged to discuss the plausibility of virtually all fair use claims, at least in the first instance, in terms of whether or not they involve transformative uses.”²⁹⁵ Not surprisingly, for litigants, the name of the game is to redefine “transformative” as the facts of the case demand, rendering the concept increasingly meaningless.²⁹⁶ Meanwhile, the test was never that much of a guide. As Professor Lloyd Weinreb has pointed out, “[a] use may serve an important, socially useful purpose without being transformative, simply by making the copied material available.”²⁹⁷ The Google Library Project is a perfect example.

The problem underlying these interpretations of “fair use” is that the property rights to which the doctrine creates an exception have grown increasingly, even unmanageably, broad. As those rights have broadened, courts have come under increasing pressure to preserve the “breathing space within the confines of copyright.”²⁹⁸ But the doctrine of fair use alone cannot provide that breathing space. First, courts have many reasons for wishing to confine property rights, but one doctrine cannot account for those reasons in any coherent way.²⁹⁹ Second, the fourth factor in section 107 of the Copyright Act—“the effect of the use upon the potential market for or value of the copy-

²⁹³ Leval, *supra* note 43, at 1111; *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (describing a transformative work as a work that “adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message”).

²⁹⁴ Leval, *supra* note 43, at 1110 (emphasis added).

²⁹⁵ Zimmerman, *supra* note 3, at 260.

²⁹⁶ *See id.* at 262 (“Rather than adding certainty to the fair use analysis, [the transformative use test] seems . . . merely to have pumped more silt into already muddy waters.”).

²⁹⁷ Weinreb, *supra* note 44, at 1143; *see also* Lunney, *supra* note 24, at 977 (“Merely increasing access to a work, even unauthorized access, represents a sufficient public interest to invoke the fair use doctrine. A transformative or ‘productive’ use is not required.”).

²⁹⁸ *Campbell*, 510 U.S. at 579.

²⁹⁹ *See* Madison, *supra* note 7, at 402 (“The substantive emptiness of fair use makes it something of a dumping ground for copyright analysis that courts can’t manage in other areas.”).

righted work”³⁰⁰—prevents courts from disappointing existing expectations to any significant degree. Over time, copyright owners have come to believe that they are, indeed, “ordinarily entitled to revenue for all substantial uses of [their] work[s] within the statutorily protected categories.”³⁰¹ Having come to expect to enjoy that property right (and those revenues), copyright owners form incentives to create accordingly.³⁰² Thus, it does not help to say that courts should find fair use “[w]hen no incentive purpose would be served by giving plaintiff protection, and where no disincentive would be created by allowing defendant free use.”³⁰³ Increasing the reach of the fair use doctrine itself would create such a disincentive,³⁰⁴ thus trapping the defense in a circularity of expectation.

The solution to the problem of fair use is to make the defense *less* central to the enterprise of creation, not more.³⁰⁵ The problem with fair use is not that the defense is too narrow, but that the rights to which it makes an exception are too broad. Say Congress were to narrow these rights by amending section 106 of the Copyright Act to give copyright owners only the exclusive right “to distribute copies of the copyrighted work to the public.”³⁰⁶ Acts of copying, standing alone,

³⁰⁰ 17 U.S.C. § 107(4) (2000).

³⁰¹ Gordon, *supra* note 2, at 1651.

³⁰² See Cohen, *supra* note 47, at 509 (“Self-evidently, this broad property-as-profit rule protects the status quo distribution of entitlements and wealth; a right insulated by a penumbra of monetary expectation will be relatively impervious to legislative change.”).

³⁰³ Gordon, *supra* note 2, at 1618; see also Fisher, *supra* note 133, at 1687 (“The fair use doctrine enables the judiciary to permit unauthorized uses of copyrighted works . . . when doing so will result in wider dissemination of those works without seriously eroding the incentives for artistic and intellectual innovation.”); Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 777 (2003) (“[T]here is recognition that permitting too much adverse economic impact under fair use would undermine copyright’s incentive structure.”); Weinreb, *supra* note 44, at 1150 (noting the “broad agreement that a determination of fair use should depend largely, if not exclusively on . . . utilitarian assumptions about the copyright scheme,” including the question of whether “the use interfere with copyright incentives to creative authorship”).

³⁰⁴ See Goldstein, *supra* note 4, at 141 (“Copyright owners will invest no more in producing copyrighted works than they can expect to profit from them, and if the profit horizon is systematically lowered by fair use, investment will be correspondingly lower.”).

³⁰⁵ But see Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61, 89 (1998) (“[T]he role of fair use is broader and more central to the overall structure of copyright law.”).

³⁰⁶ Cf. 17 U.S.C. § 106(1), (3) (2000) (granting “the exclusive rights . . . (1) to reproduce the copyrighted work . . . ; [and] (3) to distribute copies . . . of the copyrighted work”).

would not constitute prima facie infringement, and therefore acts of copying, standing alone, would be legal without resort to the fair use defense. This would be of obvious benefit to Google and its Library Project: while Google has reproduced copyrighted works in their entirety, it has not provided the public with anything more than a few “snippets” of those works, rendering any public distribution de minimis. In other words, because Google has not caused the publishers any competitive harm in the relevant market (here, in books), its actions would not violate section 106 as amended. With the publishers unable to make a prima facie case of copyright infringement, Google would prevail without having to invoke the fair use defense, and without having to argue for a tortured interpretation of the word “transformative.”

If the Copyright Act had looked like this in 1976, when Universal Studios sued Sony in the district court,³⁰⁷ then Universal, too, would have failed to make its prima facie case because Sony was accused of contributing to acts of copying—not acts of public distribution.³⁰⁸ Universal having failed to prove copyright infringement, Sony would not have pressed the fair use defense; the Supreme Court would not have grappled with the question of whether home taping of television programs was “fair”; Justice Powell, who “felt that home use should be deemed fair use,”³⁰⁹ would not have cobbled together an opinion to that effect; litigants, judges, and scholars would have been spared the burden of trying to distinguish or breathe life into the holding in *Sony*; and hundreds of copyright articles never would have been written. Some of these consequences might not be beneficial, of course; I leave it for the reader to decide.

³⁰⁷ See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 429 F. Supp. 407 (C.D. Cal. 1977).

³⁰⁸ Thus, Professor Stacey Dogan is correct in stating that “*Sony*’s exemption for noncommercial copying . . . would not have shielded the vast majority of unauthorized file sharing at issue in today’s peer-to-peer wars.” Sony, *Fair Use, and File Sharing*, 55 CASE W. RES. L. REV. 971, 971-72 (2005). *Sony* involved private copying via home video recorders, not the sort of public distribution that so characterizes p2p. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 419-20 (1984).

³⁰⁹ Litman, *supra* note 78, at 929. Unfortunately, scholars would be deprived of Professor Litman’s wonderful article telling the story of the *Sony* case before the Supreme Court.

CONCLUSION

In this Article, I have argued that in the name of “encourag[ing] . . . learning”³¹⁰ by inducing acts of creation, lawmakers are using copyright law to satisfy demands for private rights at the expense of other public interests in copyright. Those other public interests include, of course, public access to copyrighted expression, but they also include open and populous markets in expression as well as expressive diversity. At times, some of these interests may conflict: giving creators (and their assigns) the right to exclude the public from using copyrighted works necessarily would inhibit at least some access; yet promoting free competition in the market for copyrighted works likely would undermine the inducement of creation. I have proposed to mediate these conflicts by conceiving of copyright law as a prohibition against acts of unfair competition, whether by producers or consumers.

Under this conception, copyright infringement would consist of the infliction of “competitive harm” in a “relevant market.” I have defined these terms by asking what rights creators are entitled to expect to enjoy when they engage in the act of creation. Those rights would vary by type of work. As regards “printed works” (i.e., works created for the purpose of existing in more than one copy), I have argued that creators are not entitled to expect the right to exclude others from engaging in acts of private copying because these acts, standing alone, do not create market substitutes to any significant extent. Instead, I have argued that those creators are entitled to expect *only* the exclusive right to distribute copies of those works to the public—as if, for example, section 106 of the Copyright Act were to provide copyright owners *only* with the exclusive right “to distribute copies of the copyrighted work to the public.” As Professor Patterson once put it, “if copyright encourages creation, it does so only for the purpose of profit. Profit, however, cannot be obtained without distribution.”³¹¹

Because this profit depends on public distribution, acts of public distribution are behaviors that threaten to cause competitive (i.e., public) harms. But acts of copying are not. For too long, lawmakers have sought to punish private behaviors (like acts of copying) on the theory that copyright exists to maximize the earnings, and therefore the incentives, of the producers who subsidize acts of creation. As we

³¹⁰ Act of May 31, 1790, ch. 15, 1 Stat. 124, 124 (1790).

³¹¹ Patterson, *supra* note 51, at 7.

have seen, however, copyright also exists to provide the public with meaningful access to diverse forms of expression from an abundance of sources. Google is proposing to provide such meaningful access, and there are thousands of ordinary users who might provide such diversity and abundance. The only thing standing in their way is a copyright law that presently ascribes legal significance to public and private acts alike, regardless of the impact of those acts on the market in copies of copyrighted works. It is time for lawmakers to conceive of copyright law not as a means of granting property rights, but as a means of *using* property rights to promote fair competition in the marketplace of expression.