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Article

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Copyright's derivative right gives an author the exclusive right to prepare adaptations of copyrighted works, preventing competitors from preparing unauthorized sequels and other transformations. Competition among authors for consumers interested in the same subject matter thus exists only where the derivative right does not extend. No one can hold a copyright on broad plot themes, and so there was no violation of copyright when Hollywood studios in 1998 produced two separate movies about asteroids hitting the earth.[1] Similarly, no one can hold a copyright on historical figures,[2] and Hollywood plans eventually to produce three movies about Alexander the Great,[3] plus as many as four about Ernesto Che Guevara.[4] No one holds the copyright anymore on the French novel *Les Liaisons Dangereuses*, a book which has led to at least four movies so far.[5] And because no one held a copyright on Amy Fisher, television net-

1. *See* DEEP IMPACT (Paramount Pictures 1998). *But don't see* ARMAGEDDON (Touchstone Pictures 1998).

2. The right of personality may provide some limited protection for recent historical figures, though there is controversy over whether the right of personality should survive the death of the person. *See* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 93–94 (1988) (discussing whether the right of personality passes to heirs after death).

3. *See* Dana Harris, *Alexander the Grating:* Another *Macedonian on the March*, VARIETY, Nov. 24–30, 2003, at 5.

4. *See* Dana Harris, *Four Guevaras? Che Sera!*, VARIETY, July 21–27, 2003, at 5.

5. *See* CRUEL INTENTIONS (Columbia Pictures 1999); DANGEROUS LIAISONS (Warner Bros. 1988); VALMONT (MGM, Inc. 1989); LES LIAISONS DANGEREUSES (Les Films Marceau 1959).

works produced three different dramatizations about the Long Island Lolita.[6]

If the derivative right did not exist, these would not be isolated anecdotes. Instead, there would be far more examples of competition for consumers interested in similar subject matter. While Warner Brothers may produce one *Harry Potter* movie for each book in the series,[7] competitors cannot produce an additional three or four movies per book. Similarly, the derivative right ensures that while J.K. Rowling may fulfill her promise to create seven books in the series if she so desires,[8] other authors will not be able to create alternative sequels without her permission.[9] The literature on the derivative right has treated the reduction in the number of works using the same copyrighted expression as a loss, though perhaps a justifiable incentive for authors to create works that might spawn derivatives. This Article argues, however, that the suppression of competition in creating adaptations of copyrighted works might instead be the derivative right's chief economic virtue.

The argument is counterintuitive, because from the perspective of consumer welfare, more is merrier. No consumer is required to read or view any of the *Harry Potter* books or movies, and a consumer could decide to consume only the officially authorized works. Harry's most ardent fans might be delighted if every major movie studio made its own version of each *Harry Potter* book. Consumers, however, might well be better-off without such competition. First, while some of these films might be of high quality, the rush to create *Harry Potter* adap-

6. Linda Saslow, *The Victim Forgives. Others Wish to Forget. Freedom Looms for Amy Fisher, and the Island Groans*, N.Y. TIMES, April 11, 1999, § 14LI, at 1.

7. So far, there has been one movie for each of the first four books in the series. *See* HARRY POTTER AND THE SORCERER'S STONE (Warner Bros. 2001); HARRY POTTER AND THE CHAMBER OF SECRETS (Warner Bros. 2002); HARRY POTTER AND THE PRISONER OF AZKABAN (Warner Bros. 2004); HARRY POTTER AND THE GOBLET OF FIRE (Warner Bros. 2005).

8. The books so far are J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1997); J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS (1998); J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (1999); J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (2000); J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (2003); and J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (2005).

9. Indeed, at least one court has held that the derivative right extends far enough to bar a book involving another character whose experiences seem similar to Harry Potter's. *See JK Wins 'Tanya Grotter' Court Case*, BBC NEWSROUND, Apr. 3, 2003, http://news.bbc.co.uk/cbbcnews/hi/uk/newsid_2914000/2914331.stm.

tations might lower quality, as each studio makes sacrifices to get its product onto the screen quickly. Second, substantial time lags may maximize consumer excitement; a movie version of *Harry Potter* shortly following publication might have reduced the benefits of anticipation.[10]

The derivative right thus can be defended as a tool that allows authors to take their time. Less obviously, but perhaps just as importantly, the derivative right may enhance social welfare, even placing aside the potentially destructiveness of copyright races. The resources that are invested in copyrighted works sometimes might produce greater social returns if invested in other copyrighted works or elsewhere in the economy.[11] Movie studios presumably have limited budgets, and so they would have to sacrifice some other films to make the additional *Harry Potter* movie adaptations. Even if a *Harry Potter* adaptation presented a profit opportunity for which the studios could raise additional capital and expand their production budgets, the funds for producing an additional *Harry Potter* movie must come from somewhere. With more investment in *Harry Potter* derivatives, we will have less investment elsewhere in the economy.

Would we be better off in a world with more *Harry Potter* and less of everything else? The question is, of course, an empirical one. Nonetheless, there is a strong theoretical reason to expect that, as a general matter, producers of works sometimes have inefficient incentives to create close substitutes of existing works rather than more original works. Suppose, for example, that a movie studio expects to make just a little more profit from producing yet another *Harry Potter* adaptation than from producing a movie based on a script involving some new character, call him Troy P. Rather (an anagram for Harry Potter). In a world without the derivative right, the producer will choose the *Harry Potter* movie. But many viewers of this movie might have been almost as content to see one of the other adap-

10. The maxim that good things come to those who wait seems even more obvious for the *Lord of the Rings* trilogy. *See, e.g.*, John Marks, *Goodbye, Darth Vader. Hello, Gandalf: Will* Lord of the Rings *Be the Next Retro Hit?*, U.S. NEWS & WORLD REP., Mar. 10, 1997, at 56 (reporting that film rights to the trilogy were finally on the verge of being licensed). Studios might not have been willing to devote the enormous investment this project required if numerous cheaper unauthorized adaptations of the work had already existed.

11. *See* Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 487–88 (1996) (noting that to create additional works, resources must be stripped from other sectors of the economy).

tations if this additional adaptation had not been created. As a result, the new adaptation may result in a lower increment to consumer welfare than the project with Troy P. Rather. The general problem is that, in a world without the derivative right, unauthorized derivative works will tend to be close substitutes for the authorized derivative works. And they will tend to be even closer substitutes for other unauthorized derivative works. Thus, sales of unauthorized derivative works are more likely than sales of original works to come at the expense of other works, and there will be an incentive that nudges authors toward inefficiently high levels of imitation.

There are possible objections to this argument, but none can refute the possibility that by suppressing the production of close economic substitutes beyond the number that the copyright owner agrees to allow, the derivative right might improve consumer welfare. One objection is that the most die-hard fans of *Harry Potter* will see and presumably benefit from all of the *Harry Potter* adaptations, and they may receive consumer surplus well above the cost of admission. An objection on the flip side is that some of the viewers of the Troy P. Rather movie presumably would see this movie instead of other movies that would have made them almost equally happy.

The answer to both objections is the same. At least as a general matter, the greater the extent to which a product has close economic substitutes, the less consumers will benefit from the introduction of the additional product. The percentage of viewers of the zillionth *Harry Potter* adaptation who would have been almost as happy with some other movie will probably be greater than the corresponding percentage of viewers of the first Troy P. Rather film. To be sure, this is not an inevitable fact. Perhaps the Troy P. Rather movie, though involving a new character, will in fact be so unoriginal that it will have more close substitutes than the new *Harry Potter* adaptation. At least on average, however, adaptations will be closer economic substitutes for one another than other works will be for one another. When a movie studio or other creator of copyrighted works is choosing between two possible marginal works, if one work would be an adaptation of another work and the second work would not be, on average the adaptation will have closer economic substitutes than the nonadaptation. The two works might appear to promise roughly equal profit, but the adaptation is likely to reduce the profits of other works by more and have lesser social value. The derivative right pre-

vents the creation of an unauthorized adaptation and steers creators of copyrighted content to more original, more socially valuable works.

The possibility that copyright law might result in the production of too many works has received considerable attention in recent years, as recognized by at least six different scholars.[12] My analysis in this Article, however, does not depend on the premise that there are too many copyrighted works. Even if we conclude that we have few copyrighted works overall, in the absence of the derivative right there might be excessive use of particular instances of copyrighted expression, such as popular fictional characters. The production of unauthorized derivatives may produce relatively little social value while steering creative resources from more original applications and causing the original author to rush official adaptations that will be lower quality than they otherwise would be. Authors may still authorize a large number of adaptations. The derivative right, however, may prevent much greater redundancy at relatively little cost to free speech.[13]

The derivative right to prepare sequels and adaptations, I will argue, is best understood not solely as a means of furthering the incentive to create works, but more significantly as a means of providing an author control over the release of adaptations and limiting the production of adaptations that would be close substitutes for one another. An important corollary to this explanation of the derivative right is that it may provide some justification for the long copyright term. The derivative right is just one of the rights of copyright, and the most important right is the reproduction right, the exclusive right to prepare copies of copyrighted works; it is this right that, at least in theory, prevents pirates from selling exact copies of copyrighted works without prior permission from the copyright owner. The derivative right increases in its importance relative to the reproduction right later in the copyright term, when fewer people will tend to be interested in the original work and more people will tend to be interested in sequels and other adaptations.[14]

12. *See infra* Part I.A.

13. I consider the free speech issue below but leave open the possibility that free speech might demand abolition of the derivative right even if this would have negative welfare consequences. *See infra* Part I.C.

14. I do not mean to suggest that the reproduction right lacks value late in the copyright term. Even an old movie might still make some money from DVD sales and perhaps even occasionally from a limited theatrical rerelease.

This Article's theory, unlike an incentive justification, could justify even retroactive extensions of the copyright term. At the least, preservation of the derivative right likely reflects the actual motivation of companies that sought the long copyright term. Of course, this Article's theory can contribute to a justification only of a long copyright term for the derivative right. Perhaps the derivative right and the reproduction right, which have become essentially interchangeable in copyright doctrine, should be more clearly separated, and the copyright term should be longer for the derivative right than for the reproduction right.

This seems unlikely in the near future, but the analytical exercise of distinguishing the derivative and reproduction rights could have immediate doctrinal benefits. By providing an economic foundation for the derivative right, borrowing from the rent dissipation literature that has proven analytically useful in patent analysis, this Article's analysis points to a straightforward doctrinal test for the derivative right. This test focuses on competition among potential derivative works rather than on competition between such works and the original work. Even assuming the copyright term remains the same for both the derivative and the reproduction right, this test at least has the potential to resolve significant doctrinal confusion concerning the derivative right's scope. At the same time, the Article's analysis suggests that a doctrinal test for the reproduction right should insist, as a prerequisite to protection, that there be some competition between the allegedly infringing work and the allegedly infringed work. By more clearly delineating the derivative from the reproduction right, we may avoid applications of each that fail to reflect the underlying purposes of these rights.

Part I of this Article explains and questions the conventional justification of the derivative right, that the right provides incentives to create copyrighted works. The derivative right probably greatly decreases the number of derivative works, and so the right is unlikely to maximize the total num-

Once a number of viewers have already experienced the original work, however, the proportion of value attributable to the reproduction right will decline. Suppose the copyright on a movie is initially worth $100 million, including $50 million attributable to expected sales of the movie itself and $50 million attributable to expected sales of sequels. After $40 million in tickets are sold, only $10 million of the remaining $60 million unrealized value of the movie copyright will be attributable to the reproduction right.

ber of works. The conventional argument can be salvaged, Part I argues, only by recognizing that some works may be more important than others, in part because works that are close substitutes for one another are of relatively little value. Part I also shows that copyright's reproduction right not only bans exact copying, but has been interpreted sufficiently broadly such that it substantially overlaps the derivative right. This Part concludes by critiquing Jed Rubenfeld's suggestion for differentiating the reproduction and derivative rights, an approach that would replace the derivative right with a liability rule.

Part II reviews the recent literature applying product differentiation theory to copyright and points to an additional area of the economic literature that may provide a more fruitful model for considering the derivative right. The copyright-and-product-differentiation literature reveals that authors sometimes will have an incentive to create a work, thus entering a market for some genre of copyrighted works, even if the entry reduces social welfare. The intuition underlying this point is that the primary effect of some works will be to effect "demand diversion," that is to divert consumers from other products from which they might have received almost as much utility, rather than to satisfy untapped demand. The insights of the literature so far have been applied to copyright in general, and the theory alone cannot tell us whether we have too many works or too few in total.

The logic, however, may apply particularly forcefully to discrete submarkets in which there would be a large amount of demand diversion, as would be the case if no derivative right existed. Rent dissipation theory, which previously has proven useful for analyzing the dynamics of innovation in the patent system, also can serve as a useful vehicle for exploring the derivative right. Rent dissipation theory relaxes two assumptions of the copyright-and-product-differentiation literature: that product space is of constant density, and that there are no races to place products in particular points in product space. Product space may become particularly crowded in some areas, and the derivative right will tend to even out the density of product space, resulting in fewer works exploiting the same expression and more relatively original works. The derivative right also eliminates copyright races to create adaptations, allowing the original author time to create a relatively high-quality work

and to build audience anticipation. Other doctrines, such as copyright's protection of characters and the long copyright term, also make more sense given this justification.

Part III suggests doctrinal implications of the theory developed. Regardless of whether the derivative right in its current form ultimately is normatively justified, the right needs a conceptual economic foundation to restrict its doctrinal contours. The conventional justification of the derivative right, that it encourages production of new works, has no limiting principle. This Article's account, by contrast, casts the derivative right itself as the limiting principle to the general rule allowing free entry into markets for copyrighted works. By clarifying that the danger against which the *derivative* right guards is *not* primarily reduction in authors' incentives, the theory can counsel against applications of the derivative right that do not serve a significant economic function. In turn, by clarifying that the danger against which the *reproduction* right guards *is* reduction in authors' incentives, the theory can counsel against applications of that right that do not advance such a goal. Part III thus offers a doctrinal approach for assessing the derivative and reproduction right, justifies that approach with attention to the wording of the Copyright Act itself, applies the test to some actual cases and other controversies, and comments on the related doctrine concerning the standard for copyrightability of derivative works.

I. AN INTRODUCTION TO THE DERIVATIVE RIGHT

Under the Copyright Act, a copyright owner has, among rights, both the right to "reproduce the copyrighted work in copies or phonorecords,"[15] and the right "to prepare derivative works based upon the copyrighted work."[16] The phrase "derivative work" is defined in the Act's definition section as follows:

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".[17]

15. 17 U.S.C. § 106(1) (Supp. II 2002).
16. *Id.* § 106(2).
17. *Id.* § 101.

The definition thus leaves little doubt that a movie version of a book would be covered, and it is uncontroversial that a sequel to a book or movie similarly would count as a transformation or an adaptation.[18]

In the vast majority of cases, the scope of these rights is clear, and many of the interesting questions concern whether someone can claim "fair use" in violating these rights.[19] The derivative right, however, does raise two important questions: First, what is its purpose? And second, how can it be distinguished from the reproduction right in cases in which the creation of an adaptation also involves the copying of some expression from the original work? Part I.A will argue that the classic defense of the derivative right, that it provides incentives to create new works, is at least overstated. Part I.B will note that the reproduction right has been interpreted to extend beyond exact reproductions and to overlap the derivative right substantially. The derivative right's breadth also demands some justification.

A. THE PUZZLING DERIVATIVE RIGHT

Commentators explain the derivative right with the same incentive rationale generally applied to justify copyright as a whole.[20] Paul Goldstein, for example, uses *Gone with the Wind*[21] to explain how the derivative right extends copyright's basic logic.[22] Copyright's reproduction right provided Margaret

18. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1274 (11th Cir. 2001) (noting that a book sequel counts as a derivative work).

19. *See* 17 U.S.C. § 107 (2000) (providing for a fair use defense); *infra* note 81 and accompanying text (considering whether a parody is protected as a "fair use").

20. *See, e.g.*, Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 428 (2002) ("The primary policy justification for copyright protection in the United States is the incentive justification."). The Supreme Court has recognized the need to provide incentives to create copyrighted works as justifying the exclusive right. *See, e.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that copyright is "intended to motivate the creative activity of authors and inventors by the provision of a special reward"). The right cannot be unlimited, however, because of the need to ensure access to copyrighted works. *See, e.g.*, *id.* (noting that the limited copyright term eventually ensures "the public access to the products of their genius"); *see also* Alireza Jay Naghavi & Gunther G. Schulze, *Bootlegging in the Music Industry: A Note*, 12 EUR. J.L. & ECON. 57, 62–63 (2001) (providing an economic explanation of the tension between static and dynamic efficiency in copyright).

21. MARGARET MITCHELL, GONE WITH THE WIND (1936).

22. *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 216–17 (1983); *see also* PAUL GOLD-

Mitchell and her publisher an incentive to "invest time and money in writing, editing, producing and promoting the popular novel, . . . knowing that no one may copy the work's expressive content without their consent."[23] In contrast, the derivative right "enables prospective copyright owners to proportion their investment in a work's expression to the returns expected not only from the market in which the copyrighted work is first published, but from other, derivative markets as well."[24] Mitchell and her publisher "can hope to monopolize not only the sale of the novel's hardcover and paperback editions, but also the use of the novel's expressive elements in translations, motion pictures and countless other derivative formats."[25] The copyright owner's ability to exploit a copyrighted work not just through exclusive reproduction, but also through adaptation to various derivative formats, increases the potential returns from creation of a copyrighted work. The derivative right thus allows a prospective copyright owner to "proportion . . . investment" accordingly.[26]

There are two ways that the derivative right might increase investment in the creation of copyrighted works, though in each case the effects of the derivative right on investment may be small. First, the derivative right could lead someone who otherwise would not have created a copyrighted work to create one. For someone who is unsure of whether to write a book, the possibility of royalties from adaptations conceivably could be the decisive consideration. A problem with this explanation is that revenues from adaptations ex ante may be far more significant for some works than others. The works most likely to be adapted—John Grisham novels, for example[27]—are

STEIN, COPYRIGHT § 5.3 (2d ed. Supp. 2002) (repeating the analysis). Goldstein's choice of an example anticipates a later case, *Suntrust Bank*, that considered the circumstances in which the fair use doctrine can overcome the derivative right, 268 F.3d at 1257. *See infra* note 80 and accompanying text (discussing this case in detail).

23. Goldstein, *supra* note 22, at 216.

24. *Id.*

25. *Id.*

26. *Id.*

27. It is possible, of course, that Grisham would have written fewer books if he were able only to exploit the books themselves. Whether John Grisham would have produced fewer or more books if he received no compensation for movie rights depends on the balance of income and substitution effects. *Cf.* J. E. Stiglitz & P. Dasgupta, *Differential Taxation, Public Goods, and Economic Efficiency*, 38 REV. ECON. STUD. 151, 159 (1971) (claiming that income tax increases sometimes lead workers to work more rather than less). In effect, the

likely to be so successful in and of themselves that they will be inframarginal works, i.e., works that would be produced anyway, not works where financial factors make authors close to indifferent about whether to create them. Of course, sometimes works of which little is expected end up being bestsellers, and the fantasy of fame, fortune, and film adaptations may drive some yet unheralded writers.[28] Publishers, moreover, may implicitly factor in the possibility of revenues from derivative rights even where these revenues are unlikely; even if an author retains film rights, adaptation might increase sales of the original, perhaps explaining the lamentable practice of placing movie stills on the covers of books that have been adapted. In sum, derivative rights presumably do have some effect on the number of works created, but probably a large number of works, and especially a large number of the works most likely to be adapted, would be created even in the absence of derivative rights.

Second, the derivative right might lead someone to invest more in a copyrighted work to preserve and maximize opportunities for adaptation. Consider, for example, Laura Hillenbrand, whose nonfiction best-seller *Seabiscuit*[29] became a movie.[30] Hillenbrand insists that in developing the initial book proposal for *Seabiscuit*, which was based in turn on an earlier article that she had written,[31] the possibility of a movie never occurred to her,[32] suggesting that she would have written the book even in the absence of the derivative right to film adapta-

existence of the derivative right increased Grisham's revenues per book, and it is possible that Grisham might have made so much money from his first few works that he chose to allocate more time to leisure than he would have if he had made less money. The Grisham example, however, also suggests that if copyright law were suddenly to eliminate derivative rights, authors who have previously profited from them might no longer see it as worth their while to keep writing, as the expected royalties from subsequent works would be only a small percentage of royalties already received.

28. Markets for copyrighted works are sometimes described as winner-take-all markets, in which the most successful contributors receive a high portion of total profits. *See* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 9 (1995) ("Book publishing is a lottery of the purest sort, with a handful of best-selling authors receiving more than $10 million per book while armies of equally talented writers earn next to nothing.").

29. LAURA HILLENBRAND, SEABISCUIT: AN AMERICAN LEGEND (2001).

30. SEABISCUIT (Universal Studios 2003).

31. *See* Laura Hillenbrand, *Four Good Legs Between Us*, AM. HERITAGE, July/August, 1998, at 39.

32. *See* Michael Neff, *An Interview with Laura Hillenbrand*, WEB DEL SOL, 2002, http://webdelsol.com/f-SolPix.htm (last visited Nov. 5, 2005).

tion. Hillenbrand, however, ended up with a movie contract before writing the book,[33] and it is plausible to imagine that she devoted more time to researching and writing the book once she knew that the book would become a movie. Of course, Hillenbrand would have had incentives to write a strong book in any event, so it is difficult to ascertain the extent of the effect. More generally, the derivative right may tend to steer investment of both time and money to works that are most likely to be adapted, potentially increasing the quality both of those works and of the adaptations as well.

Though these effects are modest, if they were the only consequences of the derivative right, the incentives case for the derivative right would remain strong. The derivative right, however, can also decrease the number of new works by reducing the number of adaptations. If there were no derivative right, anyone could write a sequel to a book or adapt the book into a film, and we might end up with numerous adaptations rather than with just a small number. Uncopyrighted works often result in more adaptations than copyrighted works.[34] While we cannot be sure how many movie versions of *Harry Potter* would exist in the absence of the derivative right, it seems plausible that there might be a fair number, and *Harry Potter* aficionados would argue about which movie was the best one. At least, it is certain that there would be many written adaptations of *Harry Potter*, as amateur authors presumably would create a large number of unauthorized sequels and adaptations to other cultural contexts.[35]

The incentives justification for the derivative right thus rests on an enthymematic and uncertain empirical claim, that the increase in the number and quality of original works that the derivative right effects more than offsets any decrease in the number of derivative works. That is possible, but there are reasons to think that it is unlikely. The derivative right provides only one factor in the calculus of a prospective writer of an original work, but it provides an absolute bar to creating and commercializing unauthorized adaptations. Even in the

33. *Id.*

34. *See supra* notes 1–5 and accompanying text.

35. A recent lawsuit charged a Russian author for creating an unauthorized adaptation of Harry Potter and inserting him into a Russian cultural context, even though the book did not use the name of Potter. *See 'Russian Harry Potter' Courts Trouble with JK Rowling*, EVENING STANDARD (London), Nov. 7, 2002, at 8, *available at* 2002 WLNR 3029707.

absence of an exclusive derivative right, authors of original works would have some ability to exploit derivative works, assuming that trademark law would prevent unauthorized adapters from passing off their derivative works as created by the authors of the original.[36] The only reason that abolition of the derivative right would decrease authors' incentives to create original works is that others also would have incentives and ability to create adaptations. It thus seems unlikely that the derivative right encourages the creation of more works than it discourages.[37]

In the absence of an empirical study refuting this logic, is there any way to salvage the incentives justification for the derivative right? One approach might be to view the derivative right as a backup to the reproduction right. If the copyright holder did not hold an exclusive derivative right, then a would-be copier would change just enough of the original work to ensure that the copying was beyond the scope of the reproduction right. If the reproduction right covered only literal copies and trivial variations, this defense of the reproduction right might seem sensible. But the reproduction right goes much further than this, covering even the borrowing of characters and plots, as we shall see in Part I.B. The reproduction right is thus so

36. In *Dastar Corp. v. Twentieth Century Fox Film Corp.* the Supreme Court held that federal trademark law does not prevent someone from distributing an uncopyrighted work without attribution. 539 U.S. 23, 39 (2003). The Court's rejection of this "reverse passing off" claim does not mean that trademark law would countenance an attempt to make an unauthorized work appear to be an authorized work by the original author, which would constitute the more familiar act of "passing off." *See id.* at 27–28 (distinguishing "reverse passing off" from "passing off" under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(2000)).

37. I do not mean to imply that it is impossible for the eliminated incentives to be greater than the new incentives. One possible story is of second-mover advantages. *See generally* F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 708–09 (2001) (explaining how second-mover advantages may provide a justification for patent protection). Imagine a world in which books are inherently money-losing ventures, but book sales help determine which books would make profitable movies. Books are thus in essence the first stage of investment toward development of a movie. In the absence of a derivative right, no one would want to undertake this first stage, because if a book were successful, the producer of the book would not be able to capture the rents from production of the movie. In this world, the derivative right is essential to both the market for books and thus indirectly for movies adapted from books. Similar less extreme dynamics may well operate in real markets, but because many books are themselves profitable, this seems insufficient by itself to provide a defense of the derivative right.

expansive that it leaves little unprotected for the derivative right to back up. And even if the reproduction right were narrowed, the derivative right extends considerably further than necessary to make it economically prohibitive for pirates to avoid liability by making modest changes to works. Moreover, if the concern were simply to solidify the reproduction right, the logical course would seem to be expansion of that doctrine, rather than creation of a new one. It is legitimate to be concerned with discouraging the making of changes solely to avoid copyright liability,[38] but this concern cannot save the incentives justification of the derivative right.

An alternative approach to saving the incentives rationale might be to argue that although the derivative right may not result in copyright law's maximizing the number of works, it provides the strongest incentives for the most important works. Even if the incentives rationale results in the creation of only a few more original works, some of these works may result in the production of a large number of derivative works. The derivative right may prevent the production of many derivative works, but these derivative works will be of less importance, because they themselves will not likely lead to creation of many derivative works. An original work is more likely to lead to a derivative work than a derivative work is to lead to a second-order derivative work. This explanation is closer to the correct one, but ultimately it is just a reformulation of the same empirically tendentious claim. The argument equates importance with the total number of derivative works that will flow from a particular work, and any argument that a law constraining production of derivative works will increase the number of derivative works at least demands some empirical support. In all likelihood, we could obtain more derivative works by eliminating the derivative right, because then prospective creators of derivative works rights would have a vastly greater number of works that they could adapt without authorization, even if there might be slightly fewer original works overall.

To solidify the argument that the derivative right can be justified by the importance of the works that it encourages relative to those that it discourages, we must recognize that the relative importance of a work depends not solely on whether it will generate derivative works, but also on the extent to which it contributes value to consumers. This anticipates the analysis

38. *See infra* notes 73–74 and accompanying text.

of Part II, that value to consumers depends on the extent to which a work has close market substitutes. If most consumers of a work alternatively would have consumed some other work or works that provided almost as much value, then the value of the new work is relatively low. The more redundant a copyrighted work would likely be with other works, the stronger the case for copyright law to prevent the creation of that work by declaring it an infringement on an existing work. In general, derivative works will tend to be among the most redundant of works because they borrow not the ideas, but some aspect of the expression of the original works. Whether or not derivative works tend to be so redundant that they reduce consumer welfare, copyright law may well maximize social welfare by incentivizing a smaller number of original works rather than a larger number of derivative works.

B. THE EXPANSIVE REPRODUCTION RIGHT

Even in the absence of the derivative right, the reproduction right may be robust enough to discourage the most blatantly redundant transformations. Perhaps the most surprising aspect of copyright law to the uninitiated is that individual components of works can enjoy independent copy protection that extends far beyond literal copying. At the beginning of the semester, students in my intellectual property law class generally believe that copyright law prevents them from copying music cassette tapes or taping television shows,[39] but they are skeptical of the possibility that copyright law might extend to protection of characters, plots, or themes. Perhaps those might receive protection under trademark, students who have a rudimentary sense of the distinction between copyright and trademark might remark,[40] but not under copyright. They may back down when asked whether a minor change to a word or a note is sufficient to escape a charge of copyright infringement,

39. It does not clearly prevent them from doing either of these things. *See* Audio Home Recording Act, 17 U.S.C. § 1008 (2000) ("No action may be brought under this title alleging infringement of copyright based on . . . [a digital or analog audio recording device] or medium for making digital musical recordings or analog musical recordings."); Sony Corp. v. Universal City Studios, 464 U.S. 417, 454–55 (1984) (finding "time shifting" by taping programs for later use on a Betamax not to violate fair use).

40. Indeed, there is substantial overlap between copyright and a variety of other doctrines in these areas. *See, e.g.*, Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429 (1994).

but only a bit. The savviest students, indeed, will suggest that while the law in considering infringement may not forgive an infringer who seeks to evade the law through minor modifications, that does not mean that an author can receive protection for characters, plots, or themes. These intuitions, however, are wrong. Although copyrightability will often be a close legal question, it is at least clear that copyright protection does extend beyond direct reproduction.

Consider, for example, *Anderson v. Stallone*.[41] The plaintiff wrote a thirty-one page outline for a possible *Rocky IV*.[42] Unfortunately, there was a *Rocky IV*,[43] and even more unfortunately, it was quite similar to the plaintiff's proposal, but the plaintiff received no compensation.[44] Sylvester Stallone tellingly did not defend on the ground that the plot outlined in the plaintiff's treatment was uncopyrightable. Instead, Stallone slyly argued that the outline was not entitled to copyright protection because it infringed Rocky Balboa and the other characters from the series.[45] Stallone won this fight.[46] More significantly, the strategy reflected what had long been clear, that characters are potentially the subject of protection. Judge Learned Hand recognized this in his famous opinion in *Nichols v. Universal Pictures Corp.*,[47] in which the principal allegation was that the plot infringed.[48] Judge Hand found no infringement, but he did

41. No. 87-0592, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989).

42. *Id.* at *1.

43. *Really don't see* ROCKY IV (United Artists 1985).

44. *Anderson*, 1989 WL 206431, at *1–2.

45. *Id.* at *5–6. Copyright cannot be obtained for any part of a work using preexisting material unlawfully. 17 U.S.C. § 103(a) (2000) ("[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."). Although § 103(a) denies protection only to "any part of the work" containing unauthorized material, it is broader than a refusal to extend copyright protection to the unauthorized material itself. A refusal of that nature would be redundant with § 103(b), which provides that copyright in a derivative work "does not imply any exclusive right in the preexisting material." Section 103(a) thus requires courts to determine the meaning of the word "part."

46. *Anderson*, 1989 WL 206431, at *8. The critics concluded that *Rocky IV* was derivative. *E.g.*, Almar Haflidason, *Film Reviews: Rocky IV*, BBC, Mar. 12, 2001, http://www.bbc.co.uk/films/2000/06/11/rocky_iv_review.shtml ("[T]his derivative and shallow sequel might weaken the credibility of the series . . . .").

47. 45 F.2d 119 (2d Cir. 1930).

48. "The only matter common to the two," Judge Hand summarized, "is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation." *Id.* at 122. That was not enough.

conclude that both plots and characters could infringe, noting for the latter "that the less developed the characters, the less they can be copyrighted."[49]

Protection of characters and plots is difficult to understand on any traditional rationale. If the plot of *Rocky* is a good one, why shouldn't we allow someone else to borrow that plot in another context? If Balboa is an interesting character, then why shouldn't United Artists's competitors be allowed to use the character in their own movies? The best answer based on the incentive theory might be that there will be less investment in developing movies if third parties can steal the plots or characters in subsequent films. This seems specious, though, for the same reason that incentive justifications of the derivative right seem specious: any decrease in investment would probably at least be offset by the increase in investment in the derivative movies. An alternative theory might be that judges protect characters and plots based on some intuitive sense that reusing them amounts to misappropriation. But why does borrowing of characters and plots trouble some jurists, when other forms of borrowing and allusion do not?

What may be more puzzling, however, is why the *Stallone* court relied on the theory that the *Rocky* characters are copyrighted.[50] The proposed sequel was unquestionably a derivative work, and the court indeed also justified its decision on this ground.[51] As Jed Rubenfeld recently noted, "Under present law, the copyright owner's 'reproduction right' (the exclusive right to reproduce) is viewed as already encompassing much of what would otherwise be covered by the 'derivative works right' (the exclusive right to prepare derivative works)."[52] It is not merely that the rights are overlapping, or that those who commit the sin of transformation cannot resist the sin of reproduction. Rather, the tests for violation of the derivative right and violation of the reproduction right are themselves almost redundant. When a violation of the derivative right occurs, the reproduction right is likely violated as well. Although courts sometimes

49. *Id.* at 121.

50. *Anderson*, 1989 WL 206431, at *7–8.

51. *Id.* at *8.

52. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 50 (2002). Rubenfeld adds, "[I]ndeed, it has been claimed that the derivative works right, expansive though it might seem, is completely superfluous," commenting that the "claim is an exaggeration, but a surprisingly modest one." *Id.* (internal quotation marks and citations omitted).

will return to the statutory definitions of the exclusive rights,[53] "substantial similarity" has emerged as an element of the infringement inquiry for alleged violations of both the reproduction right and the derivative right.[54] A violation of the derivative right will almost automatically entail a violation of the reproduction right, because a derivative work will borrow some aspect of the original, and that aspect will be independently copyrightable.

In part, the similarity in definitions of the reproduction right and the derivative right may reflect that courts often simply do not have to distinguish them. A litigant simply does not care whether the basis for an infringement finding is the violation of one right or the other. There may, however, be a deeper explanation, which is that the justification for the reproduction right and the derivative right has essentially been the same, maximizing incentives to produce new works. Without identification of separate purposes for the two rights, the courts have no theoretical foundation for distinguishing them. A doctrine that distinguishes the rights more clearly would be useful, in part because there are rare cases in which one right but not the other is implicated. This may occur, for example, when reproduction of a work has been authorized or is protected by fair use, but creation of a derivative work has not been.[55] More importantly, the near congruence of the definitions suggests that the current approach may be inadequate for both rights, because it indicates that copyright doctrine has failed to appreciate the distinctive nature of each, and therefore an alternative definition may be needed.

C. RUBENFELD'S APPROACH

I am not the only commentator to suggest that copyright law might distinguish more clearly between the reproduction and derivative rights. Professor Rubenfeld has made a similar proposal,[56] although his motive could not be more different. This Article's project is to justify a relatively strong derivative

53. *See* 17 U.S.C. § 106 (Supp. II 2002).

54. *See, e.g.*, Well-Made Toy Mfg. Corp. v. Goffa Int'l. Corp., 354 F.3d 112, 117 (2d Cir. 2003) (following an earlier case that the court characterized as drawing "no distinction between the two forms of infringement," and noting that the "substantially similar" test applied to both forms of infringement).

55. *See infra* Part III.B.1.

56. Rubenfeld, *supra* note 52, at 50–52.

right,[57] while questioning the breadth of the reproduction right. Rubenfeld, by contrast, is particularly concerned about the derivative right and neither endorses nor questions copyright's reproduction right. A consideration of Rubenfeld's analysis will be useful for two reasons. First, it will provide an opportunity to consider the most prominent attack on the derivative right, as Rubenfeld is one of few scholars to pay the derivative right sustained attention.[58] Second, it will allow for an examination of Rubenfeld's doctrinal proposal as a prelude to my own suggested formulation of a derivative works test.

Rubenfeld's approach to copyright follows from a broader theory of the First Amendment. Rubenfeld's starting point is his observation that the First Amendment's protection of art[59] cannot be explained by "[g]iant-sized First Amendment theories" based on some theory of either democracy or expressive autonomy.[60] Art has too small of an influence on the formation of political opinion for democratic theories to explain it,[61] and an expressive autonomy view fails to account for the significance of the right to view art.[62] Rubenfeld's alternative is to

57. I say "relatively strong" because my approach would impose meaningful limits on the right. *See infra* Part III.B.1.

58. For another thoughtful critique of the derivative right, see Naomi Abe Voegtli, Note, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213 (1997). Voegtli argues that appropriation historically has been important in art and other expressive activities, and that the derivative right inhibits it. *Id.* at 1216. Although my primary ambition is to defend the breadth of the derivative right, I reach similar conclusions to Voegtli on some issues, such as sound sampling. *See id.* at 1221–26; *infra* Part III.B.2.

59. *E.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602 (1998) ("It goes without saying that artistic expression lies within this First Amendment protection."); Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (indicating that literature and arts are "unquestionably shielded" by the First Amendment); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 601–04 (1982) (discussing First Amendment protection of art).

60. Rubenfeld, *supra* note 52, at 30.

61. *Compare* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256–57 (arguing that literature and art help voters acquire "knowledge," "intelligence," and "sensitivity to human values," all of which contribute to decisions at the ballot box), *with* Rubenfeld, *supra* note 52, at 33 ("Suppose someone said that prayer contributes to the formation of political opinion. This statement . . . would exaggerate prayer's political significance while instrumentalizing it, making it carry democracy's water.").

62. Rubenfeld recognizes that "[e]xpression requires an expressee as well as an expresser," but he complains that "[t]he self-expression view of art comes to audience rights as a derivative thing, a kind of logical necessity implied secondarily if we are going to give artists the freedom to which they are entitled." Rubenfeld, *supra* note 52, at 34.

propose that the First Amendment protects a "freedom of imagination,"[63] which includes "the freedom to explore the world not present, creatively and communicatively."[64] This reconceptualization, Rubenfeld argues, both explains the protection of art and reflects the foundational point "that state actors cannot jail a person for holding the wrong political opinion or for believing in the wrong god."[65]

Rubenfeld's endorsement of the freedom of imagination, however, is subject to the same criticism that he levied at expressive autonomy theories,[66] that the freedom is one of the author rather than of the consumer of expressive works. Perhaps anticipating this, Rubenfeld insists that the communication of imagination is central to the freedom of imagination,[67] but he does not explain why we should accept this view while rejecting the views of those who insist that the right to have a listener is essential to expressive autonomy. I make this criticism not to attack Rubenfeld's constitutional theory, which is beyond my scope here, but to identify the fundamental difficulty in applying it. The question is to what extent the law must protect communication of imagination to honor the broader First Amendment freedom. Rubenfeld's answer is that "[i]f the alleged harms that the state seeks to redress by prohibiting or prosecuting the conduct in question can be fully, persuasively explained without any reference to anything the person communicated through that conduct, then the person is not punished for speaking."[68] A "creative murderer" thus cannot escape prosecution, because "to prosecute him is not to punish him for what he dared to imagine."[69]

This explanation, however, cannot adequately distinguish the reproduction right from the derivative right, because if the reproduction right is not to be easily evaded, the courts must consider the content of allegedly infringing works that are not identical to the originals. "[N]ot just any change in the original work should suffice to evade the copyright holder's reproduc-

63. *Id.* at 37–43.
64. *Id.* at 38.
65. *Id.* at 39.
66. *Id.* at 33–35.
67. *Id.* at 42.
68. *Id.* at 41.
69. *Id.* at 42.

tion right," Rubenfeld acknowledges.[70] "Trivial or obvious modifications, or changes that involve no substantially new act of imagination, especially if introduced to evade the reproduction right, should not qualify."[71] This threshold, however, is so low that courts either would have to inquire into motive[72] or allow works with only relatively modest injections of originality to qualify as derivative works. Rubenfeld takes the latter approach, recommending that copyright import into the definition of derivative works the separate case law concerning when a derivative work is sufficiently original to qualify for its own copyright.[73] "The required quantum of creativity is not large," Rubenfeld notes, adding that "any 'substantial' or 'distinguishable variation' from the preexisting work will be sufficient."[74]

This test, however, cannot be squared with Rubenfeld's concern about "trivial or obvious modifications" if triviality is to be measured against the work as a whole.[75] Consider, for example, a version of *Gone with the Wind* in which a paragraph or a chapter was replaced with an alternative. Such a change surely would involve an act of imagination, and a paragraph or chapter can be sufficiently long to merit independent copyright protection, yet it seems inconceivable that copyright law would or should tolerate distribution of such a work.[76] Under Rubenfeld's approach, even very minor substantive changes, as long as they are not "trivial," would entitle a work to derivative status, and thus under his proposal, to exemption from the reproduction right.[77] This is an absolutist position, an insistence

70. *Id.* at 55.

71. *Id.*

72. In other writing, Rubenfeld has shown sympathy for judicial consideration of motives. *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 452–54 (1997) (justifying the school desegregation cases on the ground that the purpose, and not merely the effect, of the statutes was to degrade black people).

73. Rubenfeld, *supra* note 52, at 53–55. This standard is usually viewed as quite low. *See infra* Part III.C.

74. Rubenfeld, *supra* note 52, at 55 (citing cases allowing relatively small variations to be sufficient, including Matthew Bender & Co. v. W. Publ'g Co., 158 F.3d 674, 680 (2d Cir. 1998); and Norma Ribbon & Trimming, Inc. v. Little, 51 F.3d 45, 47 (5th Cir. 1995)).

75. *Id.*

76. One could imagine a copyright law that would tolerate distribution of the new portions alone, along with indications of what text they should replace. But Rubenfeld wisely does not suggest this caveat and thus appears to envision incorporation of expression into transformative works.

77. Rubenfeld, *supra* note 52, at 55.

that copyright law cannot block the use of a large amount of previous authors' expression to support a relatively modest exercise of imagination.

This criticism might seem a picky quibble about where to draw the constitutional line, but the objection is not a minor one, for if Rubenfeld does not take his absolutist position, he can offer no conclusive attack on the current state of the derivative right. Once we accept that it is sometimes proper to limit use of preexisting expression, then we need some rule determining just how much of previous authors' expression can be copied in works that independently display imagination. Copyright law draws such a line, allowing authors to use without authorization the ideas but not the expression of their predecessors.[78] Perhaps this is not the best line. Admittedly, it is notoriously imprecise.[79] But creating a more precise test, or a narrower but still not absolutist test, would require considerable effort. Moreover, the idea-expression dichotomy does pay some attention to the freedom of imagination. It allows anyone to exercise imagination as long as she does so without using others' expression. No unauthorized party can distribute books containing alternative endings to *Gone with the Wind*,[80] but an author could express the same underlying ideas using different sets of characters. In addition, an author would remain free to criticize the original either directly or in a parody meeting the requirements of the fair use test.[81]

78. *See, e.g.*, Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 395–96 (1989) (noting that courts have found the idea/expression dichotomy to justify copyright law under the First Amendment, but questioning whether the distinction is adequate to ensure copyright's constitutionality).

79. As Judge Hand noted in developing the abstractions test for distinguishing ideas from expression, "[n]obody has ever been able to fix that boundary, and nobody ever can." Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

80. *See* Sun Trust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1384 (N.D. Ga. 2001), *vacated*, 252 F.3d 1165 (11th Cir. 2001) (per curiam), *order vacated and opinion substituted*, 268 F.3d 1257 (11th Cir. 2001) ("When the reader of *Gone with the Wind* turns over the last page, he may well wonder what becomes of Ms. Mitchell's beloved characters and their romantic, but tragic, world. . . . The right to answer those questions . . . legally belongs to Ms. Mitchell's heirs . . . ."), *quoted in* Rubenfeld, *supra* note 52, at 54.

81. *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U.S. 569, 572 (1994) (holding that parody may be protected as fair use). Rubenfeld argues that fair use cannot save the derivative right: "No court in the United States should need to wrestle through a set of complicated statutory factors (the factors of

In the end, I cannot say whether the First Amendment concern with the freedom of imagination is so weighty as to render the existing regime inadequate. How to weigh the freedom of imagination with the Constitution's encouragement of copyright depends on historical, value-laden, and empirical concerns. Rubenfeld suggests that economic factors should necessarily yield to constitutional concerns. Although economic interests and speech interests often may be aligned, because speech has economic value, Rubenfeld observes that the First Amendment would and should strike down a ban on speech, even if that ban were thought likely to maximize the amount of speech produced overall.[82]

Absolutism, however, is not the prevailing approach in First Amendment jurisprudence,[83] and given the Constitution's grant of the copyright power, economic concerns seem at least tangentially relevant to the constitutional analysis. Perhaps anticipating this, Rubenfeld suggests an administrative scheme that he seems to believe would allow the freedom of imagination to exist without undue economic repercussions. Rather than allow free licenses to create derivative works, Rubenfeld suggests that a copyright holder "would have an action for profit allocation."[84] Though Rubenfeld does not explain just

the fair use defense) before deciding whether to suppress a book like *The Wind Done Gone*. We don't suppress books in this country." Rubenfeld, *supra* note 52, at 54. Rubenfeld, however, does not justify the premise that the complexity of copyright law itself constitutes a First Amendment violation. If copyright law creates a satisfactory line between permitted and prohibited uses of others' expression, it should not matter that this line arises from the interaction of doctrine concerning the idea-expression dichotomy with the fair use test. Rubenfeld may believe that the parody exception may not be broad enough, a concern that I share. But if that is so, his criticism should be directed at fair use, not at the derivative right.

82. Rubenfeld invokes a slippery slope argument against the position that the First Amendment should seek to maximize the amount of speech:

> Perhaps offensive speech and copyright infringement really do have a "silencing" effect, ultimately producing less speech overall. Come to think of it, perhaps a knockdown argument is also silencing . . . . Are we to understand that a person can be jailed for making too good an argument against copyright law, an argument so good it brings debate to an end, leaving its audience with little or nothing to say?

Rubenfeld, *supra* note 52, at 22–23 (emphasis omitted).

83. *See, e.g.*, Solveig Singleton, *Reviving a First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279, 280 (1999) ("[T]he First Amendment doctrine associated with Justice William O. Douglas and Justice Hugo Black known as 'First Amendment absolutism' is presently unfashionable." (footnotes omitted)).

84. Rubenfeld, *supra* note 52, at 55 (emphasis omitted).

how profits would be allocated,[85] he argues that such an action leaves "the author [of a derivative work] no worse off than he would have been had he chosen not to commercialize the derivative work."[86] Such an author, after all, could choose to "offer[] the work for free."[87]

Rubenfeld is presumably correct that derivative work authors would be no worse off under his approach than under the current regime, but authors who might make derivative works of their own may be considerably worse off. Ordinarily, such authors will be willing to sell the right to create derivative works at some price, and so Rubenfeld's regime will make a difference only when the profit allocation adjudication can be expected to allow use at some lower price. Rubenfeld purports to offer no policy defense of the profit allocation scheme,[88] but his approach effectively strikes a compromise between the current derivative right and a regime with no derivative right at all, and the degree of compromise would depend on the mechanisms of the profit allocation approach.[89] Even if we assume that there is some feasible way of apportioning profits based on the degree of contribution, we must still ask whether social welfare would be increased by decreasing an author's control over the creation of adaptations, resulting in copyright races and a

85. As Rubenfeld recognizes, "Apportioning profits in such cases would not be an obvious proposition; the share of profits owing to the original author might be very considerable." *Id.* at 58.

86. *Id.* at 57.

87. *Id.* Allowing authors to exercise their imagination but not commercialize the results (in the sense of themselves profiting from the expression resulting from the imagination) would be one means of vindicating the freedom of imagination without abolishing the derivative right. A profit allocation suit would not be necessary; copyright law could simply provide that the author of an unauthorized derivative work is not liable for damages, but forfeits the reproduction right for that work. Even with such an approach, however, copyright law would need to ensure that the derivative works do not violate the original work's reproduction right, properly, but not trivially conceived.

88. *Id.* at 58–59 ("I make no claim about whether this result would be good or bad policy. The result is not supposed to follow from policy considerations. It is supposed to follow from constitutional considerations . . . . [C]opyrights act as prior restraints.").

89. It is thus possible that the profit allocation approach might demand so much in payment that it would make no difference at all. A liability rule can function like a property rule if liability for taking property is sufficiently high. *See* David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1, 13–17 (1990) (offering a model in which supercompensatory damages define the difference between a property rule and a liability rule). If payments are trivial, on the other hand, then the profit allocation approach amounts to elimination of the derivative right.

greater number of derivative works being created. The answer is empirical, but the next part explains why elimination of the derivative right might reduce social welfare.

II. A RENT DISSIPATION THEORY OF THE DERIVATIVE RIGHT

Although the economics of product differentiation are complex, there is a simple underlying idea that is relevant to a consideration of redundancy of copyrighted works, that of demand diversion or business stealing. Part II.A will review the recent literature noting the existence of this possibility and describing the countervailing forces that act against overentry. Part II.B describes an alternative theoretical framework for understanding copyright redundancy, and that is the phenomenon of rent-dissipating races by private parties. Not only does this framework provide an intuitive basis for applying the core theoretical insight of the copyright-and-product-differentiation literature, but it also emphasizes two key theoretical points: first, that product space may be more crowded in some areas than others; second, competing authors of derivative works might aim for roughly the same spot in product space at the same time, producing inefficiencies associated with racing. After reviewing the literature on rent dissipation in other areas of law, this Part will imagine a hypothetical copyright regime with a stronger derivative right. This hypothetical regime would limit rent dissipation, but it would introduce other problems and concerns, particularly about freedom of speech. Finally, Part II.C will use the rent dissipation approach to offer a renewed assessment of the derivative right, the reproduction right, and the copyright term.

A. PRODUCT DIFFERENTIATION THEORY

In models of competitive markets, goods are often assumed to be homogeneous.[90] This model is effective for commodities like wheat, and for many products sold monopolistically, such as electricity, but many consumer products are differentiated. Restaurants all serve food, but they may serve different types of food, with appropriate or inappropriate decor, and varying levels of quality and service. And while books all share some-

90. *See, e.g.*, GEORGE J. STIGLER, THE THEORY OF PRICE 87–88 (3d ed. 1966) (defining perfect competition).

thing in common, they describe different subjects and tell their stories in different ways. Markets for books and other copyrighted works, like markets for restaurants, are thus markets for differentiated products. Economists analyze such markets with a framework called imperfect competition,[91] relaxing (among other assumptions) the assumption of perfect competition models that competing goods are homogeneous. This imperfect competition framework has spawned a literature on product differentiation that considers, among other questions, the welfare effects of producer entry into imperfectly competitive markets.[92]

Although the literature on product differentiation was well developed by the end of the twentieth century, it received no attention in the copyright literature until recently. In 2001, Michael Meurer noted the possibility of production of redundant copyrighted works in a brief discussion in an article on price discrimination in markets for copyrighted works.[93] "[M]ultiple producers," Meurer observed, "sometimes race to get to the market first with essentially duplicative works."[94] Excessive entry into a market is particularly dangerous "when there are close substitutes for a new . . . [p]roduct in a market niche already crowded with other similar products."[95] The possibility of excessive production of copyrighted works was relevant for Meurer's project because Meurer was evaluating an argument that price discrimination by copyright owners is welfare increasing, allowing copyright owners to obtain greater profits and thus inducing them to produce more works. As Meurer correctly observed, we cannot assume that more is necessarily

91. For a significant early article, see, Edward H. Chamberlin, *Monopolistic or Imperfect Competition?*, 51 Q.J. ECON. 557, 566 (1937). For an overview, see generally JAN KEPPLER, MONOPOLISTIC COMPETITION THEORY: ORIGINS, RESULTS, AND IMPLICATIONS (1994).

92. For some extended treatments, see generally SIMON P. ANDERSON ET AL., DISCRETE CHOICE THEORY OF PRODUCT DIFFERENTIATION (1992); JOHN BEATH & YANNIS KATSOULACOS, THE ECONOMIC THEORY OF PRODUCT DIFFERENTIATION (1991); and 1–2 THE ECONOMICS OF PRODUCT DIFFERENTIATION (Jacques Francois Thisse & George Norman eds., 1994).

93. Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 96–97 (2001). For an article that touches on the possibility that there might be an excessive number of content producers, though not necessarily an excessive amount of content, see C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 339–40 (1997).

94. Meurer, *supra* note 93, at 97.

95. *Id.*

merrier in markets for copyrighted works, and therefore it is not clear whether doctrine encouraging price discrimination raises social welfare by increasing incentives to produce new works.[96]

Though made to evaluate copyright's treatment of price discrimination, Meurer's point about the value of incentives has broader resonance, potentially applying to any copyright issue that might affect incentives to produce copyrighted works, and possibly to areas besides copyright. Indeed, in a 2002 article, Richard Markovits argued that a range of governmental policies might produce excessive research expenditures.[97] Markovits distinguished two types of such expenditure: production-process research, designed to decrease the cost of producing goods, and quality-and-variety investments, designed to increase the quality and variety of products.[98] Markovits argued that we may have too little of the former and too much of the latter.[99] Although Markovits's analysis took into account some factors not explicitly considered by Meurer, such as the effects of monopoly distortions, the central insight was similar, that marginal investments in improving product quality and variety withdraw resources from other projects.[100] If the social benefits of the improvements are small, then the social costs of such research may exceed the benefits. Markovits concluded his discussion with a two-page analysis of intellectual property law, noting the possibility that "broadening . . . copyright protection will increase misallocation by increasing the allocative excessiveness of the investments we make in the relevant types of . . . artistic creation."[101]

To see concretely how copyright law might produce excessive entry incentives, consider the following example. Suppose that you are the author of the world's only vegetarian cookbook, and if no one enters the market, your future profits, in expected value terms, will be $100,000. Let us suppose that I am considering writing another cookbook, different enough for purposes

96. *Id.*

97. Richard S. Markovits, *On the Economic Efficiency of Using Law to Increase Research and Development: A Critique of Various Tax, Antitrust, Intellectual Property, and Tort Law Rules and Policy Proposals*, 39 HARV. J. ON LEGIS. 63, 67–69 (2002).

98. *Id.* at 68–69.

99. *Id.*

100. *Id.* at 80.

101. *Id.* at 118.

of copyright law, but similar enough so that no consumer would ever care to buy both cookbooks, and so that all consumers essentially would be indifferent between the two. If I expect that my entry will not affect the price of cookbooks, then I would be willing to spend up to $50,000 (including the opportunity cost of my time) to take away half of your market and half of the expected profits. From a social perspective, my $50,000 investment is wasteful, with no consumer benefiting and another producer $50,000 worse off, a loss that the literature refers to as "demand diversion" or "business stealing."[102] Society would be better off if I had put this investment to alternative uses, for example by becoming a cook instead of a cookbook writer.

This is a stylized example, because in real markets, there are more works in any given subgenre and each work is sufficiently different from every other such that no two works are perfect substitutes. There are, however, more elaborate models that can produce the same result. Steven Salop, for example, created a model in which different firms located around a circle.[103] The circle represented the geographical space analogue of product space, and Salop's model recognized that larger numbers of firms would reduce both prices and the "transport costs" that consumers bear when there is no product that exactly matches what they want.[104] Under fairly general assumptions,[105] Salop showed that twice as many firms enter the market as is socially optimal because each entrant does not take into account that entry will harm rivals.[106] Salop's analysis, however, provided just one way of modeling product diversity, and in other models, overentry is less likely to occur.[107]

102. *See, e.g.*, N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND. J. ECON. 48, 49 (1986).

103. Steven C. Salop, *Monopolistic Competition with Outside Goods*, 10 BELL J. ECON. 141, 143–44 (1979).

104. *See id.* at 144.

105. Though Salop's assumptions given the circular model are general, Salop acknowledged that the circular model itself may not be robust to alternative specifications. *Id.* at 156.

106. *See id.* at 152.

107. *See, e.g.*, Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297, 299–300 (1977). For a critique of the Dixit-Stiglitz approach, see John S. Pettengill, *Monopolistic Competition and Optimum Product Diversity: Comment*, 69 AM. ECON. REV. 957 (1979), and for a response to the critique, see Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity: Reply*, 69 AM. ECON. REV. 961 (1979).

Recognizing this complexity, in *An Industrial Organization Approach to Copyright Law*, I established an analytical foundation for the present project by explaining product differentiation theory's relevance for copyright law's incentives-access paradigm,[108] the oft-noted trade-off between increasing incentives to produce new works and access to existing works.[109] If there is excessive production of copyrighted works, then there is no trade-off from a social welfare perspective. My intent, however, was not to suggest that there indeed was excessive production, but rather to note that even if production incentives are the paramount goal of copyright law, such incentives are less important at the margin and that policies producing slight decreases in the number of works produced might nonetheless be welfare increasing. The article includes a simulation model suggesting that markets for copyrighted works might have excessive or inadequate investment, but that either way, under certain conditions increasing access to copyrighted works by allowing greater noncommercial copying could increase social welfare.[110] The analysis thus strengthens the case for placing considerable weight in the policy calculus on access to existing copyrighted works, for example making legalization of peer-to-peer file-sharing seem more attractive than it otherwise might appear.[111]

Reinforcing the observation that product space can be crowded, Christopher Yoo apparently observed the connection between copyright and product differentiation at about the same time as I did, and indeed he won the "copyright race" by publishing his article first.[112] Yoo's thesis is that the product differentiation literature helps to explain several puzzles arising from theories treating copyrighted works as public goods, which imply that copyrighted works should sell at constant marginal cost and that markets for copyrighted works should exhibit natural monopoly properties.[113] Yoo also notes that demand diversion could lead to production of an excessive number of copyrighted works, but, like me, he recognizes that such a

108. *See* Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33 (2004).

109. *See generally* Lunney, *supra* note 11 (discussing the trade-off).

110. *See* Abramowicz, *supra* note 108, at app.

111. *See id.* at 97–103.

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

113. *Id.* at 231–34, 246–51.

result is not inevitable.[114] Both Yoo's analysis and my previous analysis recognize that copyrighted works may be substitutes for one another and thus imply that copyright redundancy may have benefits and costs for consumers.[115]

The product differentiation literature ultimately can serve as only a preliminary model of copyright markets, however, for at least two reasons. First, the literature fails to take into account the variable density of product space. The product differentiation approach is difficult to apply to concrete doctrinal problems because every copyrighted work faces a different set of substitutes, and even identifying that set of substitutes proves to be a complicated problem.[116] Even if we have too few works overall, and indeed even if we have the optimal number or too few derivative works, it remains possible that if we eliminated the derivative right, we would have too many. We therefore must consider not copyright markets as a whole, but specifically the competition that would exist in the absence of the derivative right between the original author and the authors of unauthorized derivatives, as well as among the authors of unauthorized derivatives. Rent dissipation theory will provide an approach that allows more direct focus on such competition, in an analytically more tractable framework.

Second, the product differentiation literature fails to take into account the dynamics of the process through which prospective copyright owners situate their works in product space. Salop's model assumes that different producers simultaneously situate themselves, evenly spaced, in product space.[117] Other models allow for sequential positioning in product space,[118] but this too is unrealistic. In the absence of the derivative right, rival exploiters of a single work would not queue up, each waiting for the last to finish work before proceeding. To the contrary, rivals might well seek to aim for approximately the same point in product space, and because being first matters in copy-

114. *Id.* at 260–64.

115. *See id.* at 271–72; *supra* note 108, at 37.

116. *See generally* Shubha Ghosh, Rights of First Entry in "Derivative Markets": Exploring Market Definition in Copyright (Aug. 8, 2003) (unpublished manuscript, on file with author) (considering the implication of the product differentiation literature for derivative works).

117. Salop, *supra* note 103, at 144.

118. *See, e.g.*, Jonathan Eaton & Henryk Kierzkowski, *Oligopolistic Competition, Product Variety, Entry Deterrence, and Technology Transfer*, 15 RAND J. ECON. 99, 99 (1984) (offering a model in which entry by one producer may deter entry by others).

right markets, the rivals might make decisions about how much time to invest in improving their copyrighted works based in part on their anticipation of rivals' progress. Rent dissipation theory has previously shed light on the welfare implications of patent races,[119] and it can do the same for copyright races.

B. RENT DISSIPATION THEORY

1. An Introduction to Rent Dissipation

Economic rents are "returns in excess of the opportunity cost" of specific resources, and quasi rents are "returns in excess of the short-run opportunity cost" of resources.[120] To the extent that a copyright owner earns a profit that will vanish once competitors enter the relevant market by creating substitute works, the profit is a quasi rent. Because entrants are seeking a portion of existing rents, the activities they undertake to enter the market are called "rent seeking," and the tendency of entry costs to reduce rents is called "rent dissipation."[121] Rent-seeking activity is not inherently inefficient. All those who create works for profit are rent seeking, but their activity may nonetheless increase social welfare, as new creative works increase consumer surplus. The rent dissipation literature makes clear, however, that rent-seeking activity can reduce social welfare.[122] In the copyright context, this is particularly likely whenever many new entrants are close substitutes for one another, as would be the case in the absence of the derivative right.

The most familiar example of rent seeking in the legal and public-choice literatures is the lobbying of public officials to secure a private monopoly,[123] a source of inefficiency that may even exceed the deadweight loss associated with monopoly pric-

119. *See infra* Part II.B.2.

120. *E.g.*, Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 323 n.2 (1986).

121. For an excellent discussion of rent seeking and rent dissipation, see Aditya Bamzai, Comment, *The Wasteful Duplication Thesis in Natural Monopoly Regulation*, 71 U. CHI. L. REV. 1525, 1534–40 (2004).

122. The seminal works identifying the potential welfare-reducing consequences of rent seeking are Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974), and Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

123. *See, e.g.*, Krueger, *supra* note 122, at 292–93.

ing.[124] Any investment by a private party to capture rents, protect rents, or take rents enjoyed by another party can constitute rent seeking, however.[125] An example not involving lobbying is that of the gold rush.[126] Suppose that I have found a gold mine worth $100,000, but because of an absence of property rights, anyone who is willing to pay $1000 for equipment can get an equal share of the mine's gold at no further cost. Then, 100 people will enter, for a total fixed cost of $100,000. Society is thus no better off than if the gold mine had never been found, as the rents that I would have earned if I were able to remove all the gold myself are dissipated away. A similar example is that of a valuable shipwreck.[127] When anyone can salvage the ship, the societal investments to find it will approach the value of the ship. If the social investments equal the value, even if the party to reach the ship is allowed to keep it in its entirety, society as a whole is no better off than if the treasure had never even existed.[128]

Competition, however, may not entirely dissipate a rent, for several reasons. First, if some of the participants are risk averse, as behavioral economics would predict at least when individuals are racing to capture a gain rather than avoid a loss,[129] then the total investment in the search will be less than the prize.[130] Second, because rent dissipation reflects in part

124. *See* Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 807 (1975).

125. A related expense is rent defending, where individuals seek to prevent the rent-seeking activities of others. *See, e.g.,* John T. Wenders, *On Perfect Rent Dissipation*, 77 AM. ECON. REV. 456, 456–58 (1987).

126. For a study of how emerging property rights helped prevent rent dissipation during the California gold rush, see John Umbeck, *The California Gold Rush: A Study of Emerging Property Rights*, 14 EXPLORATIONS ECON. HIST. 197 (1977). For an explanation of how rent dissipation may occur with any nonexclusive resource, see Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49, 58–64 (1970).

127. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 41 (5th ed. 1998).

128. *See id.*

129. *See* Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, *in* CHOICES, VALUES, AND FRAMES 1, 20–22 (Daniel Kahneman & Amos Tversky eds., 2000) (summarizing experimental evidence indicating that individuals are generally risk averse as to gains and risk seeking as to losses); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 176–81 (2000) (explaining that prospect theory in the litigation context shows that choices between gains induces risk aversion, and choices between losses encourages risk seeking).

130. *See generally* Arye L. Hillman & Eliakim Katz, *Risk-Averse Rent Seekers and the Social Cost of Monopoly Power*, 94 ECON. J. 104 (1984) (offering a

opportunity costs, a rent will be entirely dissipated only if each participant is indifferent between participating in the activity and in some other activity.[131] Third, if the parties are not identically situated, rent dissipation may be reduced or eliminated.[132] To take an extreme example, if it is apparent that, regardless of the efforts of others, one party will definitely arrive first and capture all of the gold, then no one else will enter the race.[133] Fourth, rent-dissipating races can lead to earlier achievement of a goal, resulting in an end to rent-dissipating activities.[134] Fifth, rent dissipation may produce third-party benefits. Those participating in the California Gold Rush may have provided positive externalities to other settlers of California, and treasure hunts may result in benefits to archaeologists.[135]

These caveats suggest that in real-world settings, rent dissipation will be incomplete. Perhaps the most significant factor reducing rent dissipation, however, is property rights. If, for example, the law specifies that a unique party has the rights to a sunken vessel,[136] then no one else will enter, thus entirely avoiding the rent-dissipating race. The owner of the vessel then

careful analysis on the effect of risk aversion on rent dissipation).

131. *Id.* at 104 ("[B]ecause of intrinsic second-best considerations[,] resources used in rent seeking may not have positive shadow prices, implying that individuals' quests to secure biddable rents need not always entail socially wasteful activity.").

132. *See, e.g.*, Christopher Harris & John Vickers, *Perfect Equilibrium in a Model of a Race*, 52 REV. ECON. STUD. 193, 294–295 (1985); Wing Suen, *Rationing and Rent Dissipation in the Presence of Heterogeneous Individuals*, 97 J. POL. ECON. 1384 (1989). Full analysis of the dynamics of rent-dissipating races where the parties are not identically situated requires game theory. *See, e.g.*, Drew Fudenberg & Jean Tirole, *Understanding Rent Dissipation: On the Use of Game Theory in Industrial Organization*, 77 AM. ECON. REV. (PAPERS & PROC.) 176 (1987) (providing a game-theoretic approach to rent dissipation analysis).

133. For a game-theoretic analysis underscoring the possibility of incomplete rent seeking, see Gordon Tullock, *Efficient Rent Seeking*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97 (James M. Buchanan et al. eds., 1980).

134. *See, e.g.*, POSNER, *supra* note 127, at 41 (noting that entry by multiple parties to find a shipwreck might lead to the wreck being found earlier).

135. Archaeologists, however, argue that treasure hunters have generally caused archaeological damage. *See, e.g.*, Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 110–11 (2001).

136. The law attempts to do this. *See* Abandoned Shipwreck Act, 43 U.S.C. §§ 2101–2106 (2000) (granting title of applicable shipwrecks to the United States).

has an incentive to raise the vessel when the benefits of doing so are greater than the costs. The owner, for example, may wait if technology for the task is expected to improve or become cheaper to overcome considerations of the time value of money. Similarly, consider the example of public fisheries.[137] The existence of rent dissipation in the absence of property rights is particularly apparent here, as competition may lead to overfishing and the destruction of the fishery. The problem, however, is broader than overfishing. If the government, for example, permitted fishing each year until a sustainable 1000 fish were harvested, an inefficiently high number of fishermen would still enter the market, dissipating the value of each harvest. But if the right to the 1000 fish were granted to a single fisherman, perhaps through an auction, then the fisherman's private incentive would be to maximize the value of this rent by minimizing the cost of seeking the 1000 fish. Similarly, if the entire fishery were sold, then the owner would have both static and dynamic incentives to engage in the optimal amount of fishing. That is, the owner will have appropriate incentives to choose the number of fish to extract in a year and to select a technology, and thus a speed, at which those fish will be extracted in a particular year.

2. Rent Dissipation in Patent Law

Although rent dissipation has received little attention in copyright law, the potential of property rights to reduce rent dissipation animates Edmund Kitch's prospecting theory of patent law.[138] Research into potential innovations can be a form of rent dissipation.[139] If there were a million dollars in potential profit to be made in developing an invention, for example, by marketing and improving the light bulb, then in the absence of patent protection, producers would dissipate away this potential profit. Such rent dissipation is less obvious than the rent dissipation of the gold rush, because the competition is likely to increase consumer welfare, but it is possible that the costs of such rent dissipation may exceed the benefits.[140]

137. *See, e.g.*, H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954) (discussing the absence of rents in the fishing industry).

138. Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

139. *See id*. at 276–77.

140. Rent dissipation theory is thus insufficient to make a priori welfare

Kitch's observation is that patent law does for innovation policy what a prospecting system does for a gold rush,[141] providing property rights that reduce the possibility of rent dissipation. In the absence of property rights in the gold context, no one has an incentive to prospect for gold, unless a discovery can at least temporarily be kept secret, because others will immediately converge to share in any reward. Just as a property right solves this problem, so too does patent law provide an incentive to generate innovation despite the possibility of second-mover advantages.[142] That point is a twist on the traditional incentive rationale for patent law,[143] but Kitch also emphasized that a patent improves postinvention incentives,[144] because there is no risk of a rent-dissipating race to improve a patented product. In the absence of patent protection, such a race might result in excessive, partly redundant research. More inventors may pursue a particular line of research than is socially optimal.[145]

Patents, however, cannot eliminate rent dissipation altogether, as Donald McFetridge and Douglas Smith pointed out shortly after Kitch.[146] Rather, patent protection pushes rent-dissipating entry to an earlier stage. Instead of competing to improve and market an existing innovation, private parties in a patent regime will compete to obtain the patent.[147] The result is

assessments, a task which industrial organization attempts. *See* Abramowicz, *supra* note 108, at 110–11 (noting the need for careful empirical analysis of markets for copyrighted works). For a further discussion of the rent dissipation problem in patent law, see Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115, 181–93 (2003).

141. Kitch, *supra* note 138, at 271–75.

142. First-mover advantages may give some incentive to innovate even absent patent protection. *See, e.g.*, Cecelia A. Conrad, *The Advantage of Being First and Competition Between Firms*, 1 INT'L J. INDUS. ORG. 353, 363 (1983); Paul Klemperer, *Entry Deterrence in Markets with Consumer Switching Costs*, 97 ECON. J. 99, 115–16 (Supp. 1987); Richard Schmalensee, *Product Differentiation Advantages of Pioneering Brands*, 72 AM. ECON. REV. 349, 360–61 (1982).

143. *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 497 n.2 (1974) (Douglas, J., dissenting) ("[T]he basic economic function of the patent system is to encourage the making and commercialization of inventions . . . .").

144. Kitch, *supra* note 138, at 285–86.

145. *See* JACK HIRSHLEIFER & JOHN G. RILEY, THE ANALYTICS OF UNCERTAINTY AND INFORMATION 259–60 (Mark Perlman ed., 1992).

146. Donald G. McFetridge & Douglas A. Smith, *Patents, Prospects, and Economic Surplus: A Comment*, 23 J.L. & ECON. 197, 198 (1980).

147. Patents do not, however, eliminate postpatent rent-dissipating races, because inventors may still seek to invent around existing patents. The courts have embraced inventing around as an important benefit of the patent system.

a patent race. That patent races are examples of rent dissipation may seem counterintuitive, because scientific races, whether or not for patents, often accelerate the pace of innovation.[148] Yet, patent races can also produce redundancy, especially if different competitors run down the same blind alleys, unaware of their competitors' successes and failures.[149] Thus, patent races are a useful example of rent dissipation that has some benefit for third parties, consumers who eventually will receive surplus from the invention.[150] The ultimate cost-benefit balance is theoretically indeterminate, and presumably varies from one patent race to the next. Even more theoretically com-

See, e.g., Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1520 (Fed. Cir. 1995) (stating that inventing around is "one of the important public benefits that justify awarding the patent owner exclusive rights to his invention"); State Indus., Inc. v. A.O. Smith Corp., 751 F.2d 1226, 1235–36 (Fed. Cir. 1985) (arguing that inventing around "bring[s] a steady flow of innovations to the marketplace"). Yet inventing around can be redundant too, especially if the new invention offers no advantage over the previous one. *See, e.g.*, Louis Kaplow, *The Patent-Antitrust Intersection: A Reappraisal*, 97 HARV. L. REV. 1813, 1869 (1984); Donald F. Turner, *The Patent System and Competitive Policy*, 44 N.Y.U. L. REV. 450, 455 (1969). A recent analysis suggests that "between-patent" competition, i.e., competition from others with similar products, may cost an innovator as much as "within-patent" competition, i.e., competition from generic products after a patent expires. *See* Frank R. Lichtenberg & Tomas J. Philipson, *The Dual Effects of Intellectual Property Regulations: Within and Between Patent Competition in the US Pharmaceutical Industry* (Harris Sch. of Pub. Pol'y, Working Paper No. 02.09, 2002).

148. Competition in sequencing the human genome provides a recent example. *See* Eliot Marshall, *Rival Genome Sequencers Celebrate a Milestone Together*, 288 SCIENCE 2294, 2294 (2000) (reporting on the early completion of an initial sequence). For an argument that patent races often accelerate innovation and lead to inventions entering the public domain earlier than they otherwise would, see John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 443–44 (2004).

149. While patent races may accelerate the point at which a patent is awarded, they also can delay that period. Participants in a patent race may reveal enough information to prevent their competitors from obtaining a patent first, in effect moving the end point of the race farther away. *See, e.g.*, Douglas Lichtman et al., *Strategic Disclosure in the Patent System*, 53 VAND. L. REV. 2175, 2197–99 (2000) (providing a model of the incentive to engage in strategic disclosure); Gideon Parchomovsky, *Publish or Perish*, 98 MICH. L. REV. 926 (2000) (discussing the possibility of strategic disclosure). Such strategic disclosure can enhance efficiency, by limiting the scope of patents and thus reducing deadweight costs, but also may decrease the incentives to obtain patents in the first place. *See id.* at 944–45.

150. Robert Merges and Richard Nelson argued that Kitch understated the value of competition among researchers. *See* Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 872 (1990).

plex is a comparison of the harm from pre-patent and post-invention rent dissipation. Though an important qualification, the McFetridge-Smith analysis thus does not entirely undermine Kitch's suggestion that patent law's concentration of prospecting rights promotes efficiency.[151]

Mark Grady and Jay Alexander extended Kitch's analysis while acknowledging this point by arguing that patent law seeks to provide a balance between the inefficiencies of patent races and the competitive development of existing innovations.[152] "Sometimes the threat of improvement-stage rent dissipation calls for broad protection; sometimes no such threat exists, making patent protection less important," argued Grady and Alexander,[153] who were the first to elaborate a connection between the patent and rent dissipation literatures.[154] Patent law grants broad protection when an "invention *signals* a set of improvements," and patents in such cases preclude "any possibility of a rent-dissipating rush to discover the modifications."[155] Patent law limits protection where patent races present the greater rent dissipation danger. For example, Grady and Alexander suggested that patent law's utility requirement[156] precludes patenting of compounds that have no known use because "a rule allowing chemicals to be patented before a use could be demonstrated would prompt a race to claim as many chemicals as possible, in the hope that some would prove useful during the patent term."[157]

151. Another argument in favor of prospect theory is that there may be another means of reducing rent dissipation that is not socially inefficient. In particular, patent races reduce the effective patent term, resulting in a transfer from inventors to society. *See* Duffy, *supra* note 148, at 444.

152. Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 317 (1992) ("[A] full accounting of the effects of the patent system must balance the savings in reduced follow-on investment against the losses from accelerated pioneering investment. It may be that the avoidance of follow-on rent dissipation more than makes up for the consequences of the race to be first."). This account thus balances the costs of both types of rent dissipation. A broader theory might also consider the benefits, such as the extent to which competition is likely to increase the amount of innovation.

153. *Id.* at 318.

154. Kevin Rhodes briefly made such a connection before Grady and Alexander. *See* Kevin Rhodes, Comment, *The Federal Circuit's Patent Nonobviousness Standards: Theoretical Perspectives on Recent Doctrinal Changes*, 85 NW. U. L. REV. 1051, 1088 (1991).

155. Grady & Alexander, *supra* note 152, at 318.

156. 35 U.S.C. § 101 (2000).

157. Grady & Alexander, *supra* note 152, at 339.

Regardless of whether Grady and Alexander's rent dissipation theory of patent law accurately captures both doctrine and actual judicial decision making,[158] their approach recognizes the possibility of excessive and redundant innovative activity at both the patenting and the improvement stages. The rent dissipation literature, however, is important not only because it focuses attention on the amount of innovative activity, but also on the possibility that competition may force deployment, either of an original invention or of follow-on inventions, at an earlier than optimal time. Because inventors want to obtain market share, they may commercialize inventions before it would be socially efficient for them to do so. Patent protection, if sufficiently broad, can prevent earlier than optimal deployment of inventions, albeit possibly at the risk of later than optimal deployment. This theme dates back to an article by Yoram Barzel,[159] which in turn inspired Kitch's work,[160] and may be of even greater relative salience in the copyright context.

3. A Preliminary Rent Dissipation Model of Copyright

At first, it might appear that copyright law fails to curb rent-dissipating activity, because the property rights of copyright law are much weaker than those of patent. While a patent prevents follow-on innovation, copyright, in both doctrine and rhetoric, encourages authors to take earlier authors' ideas and improve upon them, as long as they do so with original expression.[161] If copyright law were designed single-mindedly, with minimization of rent dissipation as a goal, it likely would not allow this. Instead, copyright law might grant the first author in a particular genre the derivative right to that genre, at least

158. For evaluations of the Grady-Alexander thesis, see Donald L. Martin, *Reducing Anticipated Rewards from Innovation Through Patents: Or Less Is More*, 78 VA. L. REV. 351 (1992); Robert P. Merges, *Rent Control in the Patent District: Observations on the Grady-Alexander Thesis*, 78 VA. L. REV. 359 (1992); and A. Samuel Oddi, *Un-Unified Economic Theories of Patents—The Not-Quite-Holy Grail*, 71 NOTRE DAME L. REV. 267, 284–86 (1996).

159. *See* Yoram Barzel, *Optimal Timing of Innovations*, 50 REV. ECON. & STAT. 348, 354 (1968) (discussing the possibility of earlier-than-optimal deployment of an invention).

160. Kitch, *supra* note 138, at 265.

161. *See* Baker v. Selden, 101 U.S. 99, 102 (1879) ("To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright.").

for some period of time. And so, J.K. Rowling might have to pay royalties to J.R.R. Tolkien, or the first cookbook to illustrate recipes with step-by-step pictures might be able to prevent publication of subsequent works.

A copyright law with such broad rights, call it a "supercopyright" regime, is almost certainly unattractive. Authors who obtained supercopyrights would have an incentive to license works beyond their own, but the result would be a far lower number of works than currently exists, likely at least by an order of magnitude. The product differentiation and rent dissipation literatures recognize that there is some benefit to product diversity that market entrants cannot capture.[162] Although providing individual copyright owners control over entire genres of works would limit rent seeking, it would prevent not only attempts to obtain rents by producing relatively redundant works, but also attempts to obtain rents by producing creative works that would add substantially to consumer surplus. Supercopyright owners would have relatively little incentive to innovate, and copyright offerings would thus generally be boring. Authors, moreover, would set relatively high prices for their works,[163] producing deadweight loss.

The supercopyright regime, moreover, would be difficult to administer. Patent offices and courts make judgments about the scope of patent rights, but the universe of ideas that would be copyrightable subject matter would be larger than the universe of patentable subject matter.[164] It is, of course, the specter of a supercopyright office making substantive assessments that would be the greatest concern, even if we had confidence

162. *See, e.g.*, Yoo, *supra* note 112, at 256–59 (arguing that copyright law should seek to increase authors' ability to appropriate surplus).

163. If copyright is a natural monopoly, some form of natural monopoly regulation might be used to control prices. *See generally* POSNER, *supra* note 127, at 377–96 (describing the economic justification for price regulation of natural monopoly common carriers). The task might be far more difficult given the number and diversity of copyrighted works, however.

164. The number of copyrights (under current rules at least) dwarfs the number of patents. In 2001, the Copyright Office registered 601,659 claims. *See* U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS: COPYRIGHT LAW ADMINISTRATION (2001), *available at* http://www.copyright.gov/reports/annual/2001/law.pdf. In the same year, 326,508 patent applications were filed with the U.S. Patent and Trademark Office. *See* U.S. PAT. & TRADEMARK OFFICE, U.S. PATENT ACTIVITY CALENDAR YEARS 1790 TO THE PRESENT (2005), http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm. This understates the difference between the number of copyrights and patents, however, as registration is not required for copyright protection.

that the relevant officials had all the tools they would need to make copyright run smoothly. Freedom of speech may not be absolute, but preventing someone from expressing an idea in any form or writing in a particular genre would seem to be a paradigmatic violation of freedom of speech. First Amendment doctrine, of course, tolerates the current copyright regime,[165] but granting the copyright office or even the courts the power to determine whether an idea is original or derivative would be dangerous, as would a copyright regime that allows the initiator of an idea to prevent others from repeating it.

For these reasons, then, this supercopyright regime is intolerable. Copyright law must allow a great deal of rent-dissipating production of copyrighted works, because we cannot have agencies and courts making case-by-case determinations of the value that individual works provide. That does not, however, mean that copyright law should necessarily give up on limiting rent dissipation. There may be some relatively easy-to-apply rules that can limit some forms of rent dissipation, without undue affront to other values that copyright seeks to protect. The following two modifications, for example, might make the supercopyright regime palatable: First, we might allow free copying of ideas. Second, we might limit the genres over which a copyright owner could exert control to those in which the genre is encapsulated by the copyright owner's expression (for example, in delineating a particular character) rather than by an idea. These are significant exceptions, but ones that might limit competition among works using substantially similar expression. What would such a copyright system look like? Much like the one that we actually have.

C. APPLICATION TO THE DERIVATIVE RIGHT AND RELATED DOCTRINES

1. The Derivative Right Reconsidered

Rent dissipation theory provides a straightforward explanation of the derivative right. Critically, the central concern is not that derivative works may be redundant with the original.

165. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (detailing the interaction between First Amendment and the fundamental principles of copyright); Roy Export Co. v. CBS, Inc., 672 F.2d 1095, 1099 (2d Cir. 1982) ("No circuit . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from any accommodation embodied in the 'fair use' doctrine.").

If redundancy between the original and derivative works were the concern, then copyright law could employ additional strategies to discourage even the original author from creating derivative works, for example by providing that derivative works do not enjoy the protection of copyright's reproduction right. Under such a bizarre rule, J.K. Rowling would have exclusive rights to write a *Harry Potter* sequel, but anyone would be able, subject only to trademark restrictions,[166] to sell pirated copies of that work. Such a rule would be not only unjust but also unwise, because derivative works are rarely redundant with the corresponding original works in the critical sense of competing for the same market share. A derivative work will rarely steal much business from the earlier original work,[167] so even if a derivative work and the original work share many similarities, the later work will almost never be a substitute for the earlier one.[168]

The concern, rather, is that derivative works will be redundant with one another. If anyone were allowed to create derivative works, entry would come close to dissipating entirely the rents associated with commercial exploitation of the relevant expression. Rent dissipation may not be complete; moviegoers may prefer the authorized *Harry Potter* sequel or movie to those produced by unofficial imitators, so the original author would still be able to exploit the work through transformations to some extent.[169] But the competition among the unauthorized

166. The Supreme Court recently showed some reluctance to allow trademark doctrine to protect works no longer protected by copyright. *See* Dastar Corp. v. Twentieth Century Fox Film, Corp., 539 U.S. 23, 36–37 (2003) (holding that the Lanham Act does not require copiers of an uncopyrighted work to credit the original authors of the work).

167. There may be exceptions. For example, someone might decide to rent a mobster movie and choose between *The Godfather* and *The Godfather II*. The films, however, are more often likely to be complements than substitutes.

168. In some contexts, it may be straightforward to imagine knockoff derivative works that would steal business, for example, purses that borrow themes from designer models. Fashion designs, however, are ordinarily not protected by copyright. *See generally* Leslie J. Hagin, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341 (1991) (discussing copyright's treatment of fashion design). At the same time, it is difficult to think of knockoffs in categories of derivative works. Even if *Harry Potter* leads to the creation of some additional books about wizards, it seems unlikely that many customers who otherwise would have purchased *Harry Potter* would have purchased these books instead.

169. *See supra* note 132 and accompanying text (noting that rent dissipation will not be complete where parties are not identically situated).

creators probably would at least dissipate any rents for unauthorized versions, because unauthorized entry would continue until expected profits are zero. In addition, the unauthorized works would dissipate a portion of the rent that the original author would otherwise enjoy from authorized derivatives, though rent dissipation here will be incomplete because unauthorized authors will never be able to create authorized derivative works. Once again, the concern here is not with redundancy in an informal sense, for derivative works will generally bear more resemblance to an original than to one another. Rather, it is with redundancy in an economic sense, the danger of excessive entry into product space. Even if a group of derivative works differs in ways that seem relevant from a literary or aesthetic perspective, they may all be targeting the same consumer demand.

Some derivative works will have high social value, but copyright law does not prevent the production of such works. Rather, it places the decision whether to produce derivative works associated with a particular instance of expression in a single actor, the copyright holder, who has incentives to consider both the demand diversion associated with the new work as well as demand creation, the demand that otherwise would go unsatisfied. The copyright holder's incentive is to maximize the rent and thus to minimize wasteful rent dissipation. Of course, there are circumstances in which a copyright holder might seek to block a derivative work not because the copyright holder fears business stealing, but because the derivative work entails a message that the copyright holder dislikes or fears will undermine the original work. These circumstances, however, are for the fair use doctrine to take into account.[170]

Perhaps even more importantly, the derivative right may reduce rent dissipation not only by reducing the number of

170. The Supreme Court held that this type of harm alone cannot serve as the basis of a claimed copyright violation. Campbell v. Acuff-Rose Music, 510 U.S. 569, 591–92 (1994) ("[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act."). The problem is that there may be works that both compete with authorized derivative works *and* entail a message that the copyright holder dislikes. *See generally* Laura Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705 (2005) (arguing that copyright theorists have paid insufficient attention to attempts by copyright owners to block works that may undermine the message of the original). Whether the fair use doctrine should protect such works is beyond the scope of this Article.

relatively redundant works, but also by eliminating the suboptimally early release of adaptations. The problem is partly that consumers would have been harmed by a release of a movie version of *Harry Potter* almost simultaneously with publication of the book.[171] An owner of a derivative right has an incentive to take into account that a long period in which consumers anticipate an adaptation may increase consumers' enjoyment of the adaptation, but in the absence of the derivative right, first-mover advantages would produce a copyright race. More importantly, the race to create adaptations may result in higher costs and lower quality. Lower quality works may take less time to complete and hit the market first, and the consumers who purchase these works may have less of an appetite for future derivatives than they would have had if the initial works were of higher quality.[172] No doubt, J.K. Rowling would have had many readers for her authorized sequels even if dozens of unauthorized sequels had appeared in the interim, but it is not implausible that her publisher would have rushed her to minimize consumer fatigue.

A derivative right greatly reduces the possibility of inefficient races after the initial creation of copyrighted expression. Of course, patents solve postinvention rent dissipation only at the expense of races to obtain patents, so we must assess whether the derivative right could produce races to obtain copyrights.[173] The derivative right, however, is not so broad as to make such races possible. Because the derivative right covers only expression and not ideas, and because the number of

171. *See supra* note 10 and accompanying text (noting that time lags may increase consumer excitement and thus enjoyment of the copyrighted works).

172. A recent example occurs beyond the scope of the derivative right as one television network hastily produced a boxing reality show to beat a rival to the punch. *See* Dave Walker, *Do the Fight Thing: Fox's Reality Rip-Off Proves That All Is Fair in Love and Boxing*, TIMES–PICAYUNE, Sept. 7, 2004, at D1, *available at* 2004 WLNR 1555138.

173. Copyright races are rare under current copyright law because the first person to obtain a copyright does not obtain a copyright on the genre as a whole. If patent law were also nonexclusive, there similarly would likely be fewer patent races, and indeed one commentator has suggested a nonexclusive patent system for this reason. *See* John S. Leibovitz, Note, *Inventing a Nonexclusive Patent System*, 111 YALE L.J. 2251, 2253 (2002). The difficult question is whether a nonexclusive patent system would lead to more or less redundant development. *Id.* at 2268–72. Leibovitz points out that inventors would have an incentive to license their technological advances to firms lagging behind them in development, since those firms would be able to obtain patent rights as well. *Id.* at 2272. But laggards might be less likely to drop out of a patent race for precisely this reason.

ways that themes can be expressed is virtually infinite, the protection of the derivative right provides no incentive to race. There may still be races, for example, to produce the first asteroid movie, but the derivative right will not make such races any more fierce. The existence of the derivative right may well increase total investment in works from which derivative rights might follow, but this seems unlikely to increase the total number of works created.[174] The derivative right thus does not demand the subtle balancing of alternative forms of rent dissipation assessed by Grady and Alexander in the patent context.[175] The derivative right eliminates racing to develop adaptations of existing expression, without fostering races to create expression in the first place. Increases in patent scope, by contrast, reduce rent dissipation in seeking improvements, but increase the inefficiency of patent races to obtain the invention initially.

The breadth of the derivative right, however, is not without social cost. The copyright holder may be able to charge more for derivative works because of the exclusive derivative right, thus increasing deadweight loss.[176] It is possible that this social loss could exceed the benefit of minimizing rent dissipation, but Congress has plausibly struck the right balance. Allowing monopolization of genres defined by ideas might create a great deal of market power, but allowing monopolization of genres defined by expression seems likely to create less market power, because the relevant markets will be smaller. Not anyone can make a Freddy Krueger film, but Freddy at least has to compete with Jason for ticket and video sales.[177] Even the most popular derivative works are generally priced at approximately the same level as other works,[178] so it seems doubtful that

174. *See supra* Part I.A.

175. *See supra* notes 152–57 and accompanying text.

176. *See generally* Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 99–100 (1997) (explaining how copyright law may create deadweight loss).

177. Unless, of course, the owners of the respective copyrights authorize a joint derivative work. *See* FREDDY VS. JASON (New Line Cinema 2003).

178. All 870 pages of one of the most recent *Harry Potter* books, J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (2003), could have been yours in hardcover at the time of this publication for just $19.20, and it was priced at $29.99 upon release. *See* http://www.amazon.com (search for "Harry Potter and the Order of the Phoenix") (last visited Nov. 5, 2005). This pricing strategy may seem surprising, considering the number of people who likely would be willing to pay $40 for the book. The strategy, however, may be dictated by a large number of anticipated marginal buyers. Or perhaps the publisher worries that a high price would lead even some who value *Harry Potter*

deadweight loss from high pricing is unusually high.

The greater concern is that the derivative right may overcompensate for the problems it fixes. Because copyright owners cannot capture the full social value of their creations, they may have a tendency to produce too few derivative works. A copyright owner will keep producing derivatives until the marginal private benefit is equal to the marginal private cost. The marginal private benefit of creating a derivative work may be lower than the social benefit. This effect, however, seems likely to be small, because as long as there is consumer interest in new derivative works, authors (or at least publishers) in due time will have incentives to oblige. Conceivably, copyright owners might wait an inefficiently long time between adaptations, but this too seems to be an unlikely concern. In patent law, waiting may lower production costs as the price of inputs falls, but for copyrighted works, production costs will not necessarily go down over time.[179]

It is possible, of course, that some compromise between the derivative right as it currently exists and a regime without such a right would be optimal. Perhaps a profit-allocation approach along the lines suggested by Rubenfeld could help achieve an appropriate balance,[180] but the transaction costs of such a system might well be sufficiently great to offset any increase in efficiency that it might provide. Moreover, rent dissipation theory shows that the approach might be little different from a regime of no derivative right. If anyone could make a derivative work, then entry would be expected to dissipate away economic profit in any event. So on average, each author of an unauthorized derivative work would earn zero economic profit. Zero economic profit is shorthand for a normal rate of return.[181] Therefore, depending on the accounting scheme employed, the original author might actually receive something, especially since the author would enjoy a portion of the upside benefit of derivative works, without assuming any of the risk

at more than that price not to buy because they may believe they are being cheated.

179. Even in film, technology improvements do not necessarily make movies any cheaper, as consumers have higher expectations for special effects. *See, e.g.*, Paul Vlahos, The Zbig Movie Miracle, http://zbigvision.com/MovieMiracle.html (last visited Nov. 5, 2005) (noting that the cost of producing movies has not fallen over time, even after adjusting for inflation).

180. *See supra* notes 84–89 and accompanying text.

181. *See, e.g.*, Abramowicz, *supra* note 108, at 51 nn.48–49 and accompanying text.

that a derivative work might suffer a loss. But depending on the profit percentage, such royalties may well be quite small.

Does the derivative right provide the optimal copyright law? Certainly the derivative right leaves many forms of redundancy, including redundant development of uncopyrighted works.[182] At the same time, the derivative right might be narrower. For example, copyright law might explicitly consider the number of existing or planned derivative works to determine the extent of redundancy and allow works where derivative rights in essence have been abandoned.[183] Just because rent dissipation concerns help explain portions of copyright doctrine, however, does not mean that copyright doctrine would be improved if rent dissipation concerns were considered explicitly on a case-by-case basis. The expense and uncertainty associated with such analyses may not be worth the benefits. Copyright law generally and the derivative right specifically are blunt instruments, but at least in an approximate way they reflect rent dissipation concerns.

2. The Reproduction Right Reconsidered

Rent dissipation theory applies equally to explain the breadth of the reproduction right: if there is a rent from further development of a particular character or plot line, the law can eliminate dissipation of that rent by providing a property right to that development. It is one thing for Sylvester Stallone to subject us to *Rocky II–V*, and possibly even a dreaded *Rocky VI*,[184] but quite another if several other studios got into the act. Such a development seems unlikely for the *Rocky* series, given that a *Rocky* movie without Stallone would likely not sell well, but Stallone can prevent the use of his image only because of present technological limitations[185] and because the right of

182. *See supra* notes 1–6 and accompanying text (providing examples).

183. Lawrence Lessig has argued for requiring de minimis copyright renewal fees to ensure that abandoned works are placed in the public domain. *See* Lawrence Lessig, The Public Domain Enhancement Act FAQ, http://eldred.cc/ea_faq.html (last visited Nov. 5, 2005) (proposing the Eric Eldred Act); *Capitol Hill*, WASH. INTERNET DAILY, June 25, 2003, *available at* http://www.lexis.com (noting Lessig's involvement).

184. *See* Josh Grossberg, *Stallone Ready for "Rocky" Redux*, EONLINE, Dec. 12, 2002, http://www.eonline.com/News/Items/0,1,10969,00.htm?newsrellink.

185. *But cf.* Rod Easdown, *Digital Stars*, THE AGE, Jan. 16, 2002, at B1, *available at* 2002 WLNR 11861306 (describing the use of digital effects to put dead actors in new movies). *See generally* Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Cen-*

publicity may similarly prevent rent dissipation.[186] In any event, copyright law can save us from innumerable unauthorized sequels to *The Lion King* or unauthorized James Bond movies starring a new actor as Bond,[187] even if trademark law somehow should turn out not to be up to the task. Copyright law can save us from unauthorized *Lion King* stuffed animals and 007 martini glasses as well.

Rent dissipation theory, of course, does not apply as far as it might. Sylvester Stallone did not receive a monopoly on boxing movies, and not just because pictures like *On the Waterfront*[188] established the genre before Stallone's involvement. Copyright law does not extend property rights so far that subsequent authors' freedom to express ideas and pursue broad themes is limited. This is reflected, for example, in the *scènes à faire* doctrine, which allows the use of "stock" literary devices, such as scenes in a beer hall and the singing of the German national anthem in a film about the Nazis,[189] even though some copyrightable work must have been the first to use such a device. Case law on parody, allowing some parodies to count as fair use even though they infringe, provides another important limit on copyright protection.[190] Once again, though, my claim is not that rent dissipation is copyright's only concern. To the extent that copyright protection for characters is surprisingly broad, rent dissipation theory provides an explanation.

The challenge for courts is determining whether a finding that a copyright exists would amount to giving a monopoly over a genre, or whether it would only prevent rent dissipating uses of the plaintiff's work. Copyright is relatively difficult to obtain for literary characters, because these characters are less developed and thus copyright might amount to a monopoly in a par-

tury Challenge for Intellectual Property Law, 8 HIGH TECH. L.J. 101 (1993) (considering the intellectual property consequences of reanimation).

186. *See* Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 111–12 (1994).

187. The possibility that competitors might produce different Bondses is not altogether hypothetical. Keith Poliakoff, Note, *License to Copyright: The Ongoing Dispute Over the Ownership of James Bond*, 18 CARDOZO ARTS & ENT. L.J. 387, 388 (2000) (describing a controversy over ownership of the James Bond character).

188. ON THE WATERFRONT (Columbia Pictures 1954).

189. Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980) (finding this expression not to be copyrightable).

190. For a discussion of parody doctrine, see Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991).

ticular type of person.[191] A close case not involving copyright on characters is *Roulo v. Russ Berrie & Co.*[192] The case concerned the copyrightability of a series of greeting cards.[193] The allegedly infringing greeting cards were stylistically similar to the originals, with respect to variables such as size, border, and script typeface, and both sets of cards included sentimental phrases, including the use of ellipses,[194] but the phrases themselves were not copied.[195] The court found copyrightability in the arrangement and found infringement as well.[196] This case is troubling because it appears to give a monopoly over the most obvious style for implementing the idea of sentimental phrase greeting cards. The court's emphasis on alternative styles that the infringer might have adopted,[197] however, reveals that the court at least was convinced that it was not granting a monopoly over the genre as a whole.

The questions of copyright law are often fact-specific, and rent dissipation theory cannot provide general answers. Even where inquiries are not fact-specific, cases can be close. Consider, for example, whether software manufacturers should be able to protect user interfaces. The case law is inconsistent,[198]

191. Paul Goldstein suggests the following test for a literary character:

> A literary character can be said to have a distinctive personality, and thus to be protectible, when it has been delineated to the point at which its behavior is relatively predictable so that, when placed in a new plot situation, it will react in ways that are at once distinctive and unsurprising.

PAUL GOLDSTEIN, COPYRIGHT § 2.7.2 (1998). This test is not entirely satisfying. Certain stereotyped characters can be scarcely delineated and yet have predictable behavior, while others may be well delineated and yet part of their delineation may be that they are unpredictable. Rent dissipation theory suggests that the test should simply be whether the presence of the character is a significant factor in why people purchase the book. With this approach, an unauthorized *Rocky* movie would infringe, but a two-minute peripheral scene involving Rocky Balboa would not.

192. 886 F.2d 931 (7th Cir. 1989).

193. *Id.* at 934.

194. A particularly awful example: "'I want to shout and tell the world how much I love you . . . but instead I'll just . . . whisper.'" *Id.* at 935.

195. *Id.*

196. *Id.* at 940.

197. *See, e.g.*, *id.* ("Berrie could have produced a non-infringing card with colored stripes, but Berrie used similar stripes flanking the verse on both the left and right side from top to bottom just as the FS cards did.").

198. *Compare* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 807 (1st Cir. 1995) (finding that Lotus 1–2–3's menu command hierarchy was not copyrightable and thus not infringed by rival spreadsheet program Quattro Pro), *with* Mitel, Inc. v. Iqtel Inc., 124 F.3d 1366, 1371–73 (10th Cir. 1997) (rejecting

and so is the rent dissipation analysis.[199] On one hand, once a company has developed an effective user interface, allowing other software companies to take it is likely to dissipate the rent from the interface. On the other hand, software companies would still be able to dissipate the rent by offering competing programs with alternative user interfaces, and requiring companies that will enter the market anyway to develop an alternative interface will increase the fixed costs of entry and thus rent dissipation. An additional consideration is the burden on users having to learn multiple interfaces. It is unclear which way this cuts. While the burden itself is a form of redundancy and thus akin to rent dissipation, it also may limit the number of firms that will choose to enter if a property right is found.[200] Given this complicated balancing, it is perhaps unsurprising that this remains a controversial area of copyright law.[201]

3. The Copyright Term Reconsidered

A perhaps surprising corollary to rent dissipation theory's explanation of the broad derivative and reproduction rights is that rent dissipation theory can help provide an explanation for the long copyright term.[202] The Sonny Bono Copyright Term

Lotus and finding command codes protectible). The technical issue in these cases was whether the menu commands were a "method of operation" and thus not copyrightable under 17 U.S.C. § 102(b) (2000). *Lotus*, 49 F.3d at 816; *Mitel*, 124 F.3d at 1371–72. The *Mitel* court argued that even if the commands were a method of operation, the expression within them could still be copyrighted. *Id.* at 1372.

199. An additional complicating factor in some cases is the difficulty of separating the user interface from the underlying functionality. *See, e.g.*, Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614–19 (7th Cir. 1982) (addressing whether a game similar to Pac Man was infringing), *superceded by statute on other grounds*, FED. R. CIV. P. 52(a), *as recognized in* Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429 (7th Cir. 1985).

200. A reverse balance exists in assessing the social welfare consequences of network externalities. *See* Abramowicz, *supra* note 108, at 86–88 (discussing network externalities and copyright). On one hand, network externalities confer a direct benefit on consumers, but they also may hurt consumers if they discourage new innovations. The twist here is that learning a new interface imposes a cost on consumers, but it may benefit society indirectly by discouraging redundant entry.

201. For recent assessments of protection for software, see generally Bruce Abramson, *Promoting Innovation in the Software Industry: A First Principles Approach to Intellectual Property Reform*, 8 B.U. J. SCI. & TECH. L. 75, 122–23 (2002), and Robert W. Gomulkiewicz, *Legal Protection for Software: Still a Work in Progress*, 8 TEX. WESLEYAN L. REV. 445, 448 (2002).

202. A separate puzzle concerning the copyright term is that it is ordinarily based on the life of the author. Sonny Bono Copyright Term Extension Act,

Extension Act (CTEA) granted a twenty-year term extension for both existing and future works,[203] providing a term of life of the author plus seventy years, or, in the case of works made for hire, a fixed term of the lesser of ninety-five years from the year of first publication or 120 years from creation.[204] The Supreme Court upheld the CTEA in *Eldred v. Ashcroft*,[205] though even if the Court had struck it down, the copyright term would still be quite long, both by historical standards[206] and in comparison to the patent term.[207]

The copyright term seems almost impossible to justify on traditional incentives grounds. A brief by prominent economists in support of the challenge to the term extension calculated that the term extension would produce a 0.33 percent increase in present value for a new work protected by copyright,[208] and even that is generous, given the economists' assumption that the work produces equal revenues each year. Perhaps publishers are savvy enough to incorporate such anticipated future revenues into the payments they offer authors, but the amount is so small that it could lead to only a very small increase in the number of works.[209] The small increase in present value for

Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.). For a behavioral economics resolution of this puzzle, see Avishalom Tor & Dotan Oliar, *Incentives to Create Under a "Lifetime-Plus-Years" Copyright Duration: Lessons from a Behavioral Economic Analysis for* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 437 (2002). Rent dissipation theory offers a complementary explanation, that a work is less likely to be commercialized far beyond the author's death and that the author's life thus helps identify the period in which use would likely amount to rent dissipation. Because authors often do not own copyrights in their creations, this factor will often not be significant, but it may have been more significant in earlier times.

203. Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 301–304 (2000)).

204. *Id.* § 102(b) (codified at 17 U.S.C. § 302(a)–(c)).

205. 537 U.S. 186, 194 (2003).

206. For a brief history of the copyright term, see Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 315–21 (1996).

207. *See* 35 U.S.C. § 154 (2000) (providing for a term of twenty years from the date the patent application was filed). For a criticism of this disparity, see Edward C. Walterscheid, *The Remarkable—and Irrational—Disparity Between the Patent Term and the Copyright Term*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 233 (2001).

208. Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 6, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

209. This consideration helps identify a problem with what might appear to be a case based on rent dissipation theory for a *short* copyright term. At first blush, a rent dissipation theory of copyright might seem to predict a relatively

new works, as the economists' brief recognized, may not be dispositive, because the costs of a term extension would be borne in the future and thus should be discounted as well.[210] The ratio of deadweight loss to consumer surplus may be roughly comparable for both old and new works, if the demand and marginal revenue curves do not change shape over time. But other costs, particularly the "tracing costs" of identifying copyright owners and seeking permission to reproduce works,[211] will become considerably higher over time.

An incentives argument in any event cannot justify a retroactive term extension, because a copyright term extension cannot increase incentives to create works that already exist. At best, a retroactive term extension might lead publishers to anticipate future retroactive term extensions, but simply granting an even longer prospective extension would appear on an incentives rationale to be a more direct, if still flawed, approach. Meanwhile, there might appear to be several costs of a retroactive extension, as the economists' brief argued. First, the term extension will produce deadweight loss from monopoly pricing.[212] Second, the extension will reduce innovation by restricting the production of new creative works using existing materials.[213] Third, the property right will lead to costly bargaining and contracting.[214]

The economists' conclusion that the first and third arguments imply costs seem accurate, but the second argument is

short term. If many copyrighted works are redundant, then a short term would result in the production of fewer works, and rent dissipation theory suggests that the decrease in incentives to produce new works might be welfare improving, or at least not as welfare reducing as would appear in the absence of the theory. This consideration, however, is small, because the present discounted value of revenues from copyright many years in the future are small.

210. Brief of George A. Akerlof et al., *supra* note 208, at 2 ("With respect to the term extension for new works, the present value of the additional cost is small, just as the present value of incremental benefits is small."). Landes and Posner identify the possibility of an argument that the appropriate discount rate for the costs might be lower than that for the benefits. *See* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 481 n.22 (2003).

211. See Landes & Posner, *supra* note 210, at 477–78.

212. Brief of George A. Akerlof et al., *supra* note 208, at 10–11.

213. *Id.* at 12–13 ("If the later innovator must pay for use of the earlier work, this will raise the innovator's cost of making new works, reducing the set of new works produced.").

214. *Id.* at 13–14.

more problematic.[215] The economists seem to assume that production of new works using existing materials necessarily will be socially beneficial,[216] but they do not even acknowledge the industrial organization literature that points out the possibility of excessive entry.[217] Nor do they recognize the possibility that even if entry is not excessive, new creative works produced from existing materials, even if representing commercially significant improvements over those materials, may tend to be redundant with one another. And the economists do not acknowledge that in the rare cases when a work remains valuable as a source for adaptations when its copyright expires, a rent-dissipating race to produce adaptations might result. Rent dissipation theory, by contrast, identifies unrestricted use of existing materials to produce new ones, i.e., the unauthorized creation of derivative works as precisely the type of use most likely to be economically inefficient.

The debate on the CTEA has focused intensely on just such a use, as commentators have recognized that Disney has lobbied in favor of the extension in order to protect its copyright on Mickey Mouse.[218] The assumption that Mickey Mouse's entry into the public domain would be welfare enhancing is perplexing, even absent the analysis in this Article. Should Mickey Mouse enter the public domain, there might be reduced monopoly pricing of Steamboat Willie, but that benefit seems trivial and is not the focus of the statute's critics.[219] The more significant effect would be to allow, subject to trademark limita-

215. An additional complication is that the copyright extension may encourage investment in existing works, for example in the colorization of a black-and-white movie. *See* Landes & Posner, *supra* note 210, at 490–91. For an argument that the Copyright Clause is not concerned with this class of public goods problems, see Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 165 (2002).

216. The assumption is also clear elsewhere in the brief. *See, e.g.*, Brief of George A. Akerlof et al., *supra* note 208, at 8–9 ("One might argue that the windfall to authors of existing copyrights has a positive consequence, by providing them with more resources for additional creative projects.").

217. *See supra* Part II.A.

218. *See, e.g.*, Dinitia Smith, *Immortal Words, Immortal Royalties? Even Mickey Mouse Joins the Fray*, N.Y. TIMES, Mar. 28, 1998, at B7 (discussing the relevance of Mickey Mouse to the debate over the copyright extension).

219. A proponent of the term extension makes a similar point. *See* Scott M. Martin, *The Mythology of the Public Domain: Exploring the Myths Behind Attacks on the Duration of Copyright Protection*, 36 LOY. L.A. L. REV. 253, 317–18 (2002) ("Is there a huge market anxiously awaiting the royalty-free distribution of a 1928 black-and-white cartoon over the Internet?").

tions,[220] anyone to insert Mickey Mouse into their own films and comic books. Do we really need even more Mickey Mouse movies and comic books than we already have? The term extension critics seem to assume that we do, and perhaps they are right. Parodic uses of Mickey Mouse especially might be enriching,[221] but encouraging such uses seems more relevant to fair use analysis, which already considers parody.[222]

Rent dissipation theory, however, suggests that the benefits of increased production to even devoted fans of Mickey are likely to be relatively small.[223] Consumer welfare might well rise from the availability of additional sources for Mickey products, even though many consumers would probably have interest only in Disney-certified products. But if there were a rent to be made from unauthorized Mickey Mouse T-shirts, comic books, and movies, the competition among Disney competitors to produce such materials likely would dissipate that rent almost completely.[224] Moreover, the competition would lead to a race to produce derivative works, possibly lowering quality. Disney, of course, recognized this and presumably feared it, as royalties from Steamboat Willie seem unlikely to be sufficient to justify Disney's lobbying. These costs are at least what animated Disney and explain the long copyright term, regardless of whether they produce a sufficiently strong normative justification for it.

Even with the benefit of rent dissipation theory, the term extension question is not easy. The deadweight costs of monopoly pricing for existing works and the transactions costs of negotiating licenses may make the copyright term extension inefficient, and rent dissipation theory cannot prove that increases to consumer welfare from increased production of derivative

220. *See id.* at 317 n.184 (asserting that Disney has trademark rights to use of Mickey Mouse for numerous products).

221. *But see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 752 (9th Cir. 1978) (involving the use of Mickey Mouse in adult comic books). Perhaps the more accurate statement would be that parodic uses of Mickey Mouse especially have the potential to be enriching, even if one concludes that the particular parodic use in *Air Pirates* was more prurient than enriching.

222. *See supra* note 81 and accompanying text.

223. It is possible that entry could produce price competition, allowing Mickey fans to obtain products at lower prices and reduce deadweight cost as well. Casual empiricism, however, suggests that such effects are likely to be small—all movies rent for the same price at Blockbuster.

224. *See supra* Part II.B.1 (introducing rent dissipation).

works will be less than the harm borne by producers. Rent dissipation theory provides a plausible defense of a long copyright term,[225] but I mean only to suggest that rent dissipation theory provides a better explanation, not that it provides a convincing one.[226]

Rent dissipation theory, however, can provide, at best, only a defense of the lengthy protection that the derivative right enjoys. It cannot explain why there also is a long copyright term for the reproduction right (or, more specifically, for the reproduction right's prohibition on direct copying of copyrighted works). A superficially simple answer is that copyright law provides a single copyright term for all of the exclusive rights. Given that constraint, the determination of the copyright term, which requires a balancing of factors at different possible terminal dates, should depend more on the economics associated with the derivative right than the economics associated with the reproduction right. The derivative right's relative importance increases throughout the copyright term, as the Mickey Mouse example usefully illustrates. Rent dissipation theory provides some support for a copyright term that lasts until drawbacks, like high tracing costs, become overwhelming.[227]

225. In the absence of a rent dissipation theory, the long copyright term seems explainable only as the worst form of political rent seeking. *See, e.g.*, Richard Epstein, *All Roads Lead to Rome*, FIN. TIMES, Sept. 4, 2002, *available at* 2002 WLNR 6722325 (calling the CTEA "a state giveaway of public domain property, pure and simple"). Arguably, the term extension might *reduce* costs associated with political rent seeking since the enactment of the statute will leave advocates with nothing more to lobby for. *See* Landes & Posner, *supra* note 210, at 483–84. The success of the term extension movement, however, might encourage other rent seekers.

226. It seems particularly problematic that the term extension even covers works that are no longer being exploited by their owners, for use of such works is not likely to be rent dissipating. Individually, such works are generally of little commercial value, but collectively they might have considerable value, and a regime requiring frequent modest payments to renew copyrights, as suggested recently by Landes and Posner, seems sensible. *See generally* Landes & Posner, *supra* note 210. Landes and Posner note that most copyrights become valueless by the time of the first renewal period, as evidenced by the high percentage of copyright holders who fail to pay the small renewal fee. *See id.* at 501–03. I criticize the argument that they raise in favor of a long copyright term in Abramowicz, *supra* note 108, at 82–86.

227. This might provide a defense of a copyright term that becomes longer over time, as modern technology is likely to reduce the importance of tracing costs. There may well be competing considerations, however, and elsewhere I argue that there are strong reasons that copyright law should generally become weaker over time. *See* Abramowicz, *supra* note 108, at 108–09.

This analysis, however, rests on the assumption that copyright law provides the same term for the reproduction and derivative rights. Providing a different term for the different rights would be simple as a matter of legislative drafting, but that masks an underlying complication. For copyright law to provide different reproduction and derivative terms, it would need to find a conceptual means of distinguishing the reproduction and derivative rights. We will now turn to that project.

III. REDEFINING THE REPRODUCTION AND DERIVATIVE RIGHTS

Rent dissipation theory provides a straightforward basis for distinguishing the derivative right from the reproduction right, to the extent that the latter extends beyond direct copying. The purpose of such a project, of course, is not to help Congress should it ever choose to mandate separate copyright terms, an unlikely prospect. Rather, in distinguishing the rights, we may be able to clarify their scope, and such clarification may help in hard cases. In particular, such clarification may help prevent applications of those rights that do not advance their underlying purposes, best conceived. Though this Article praises the derivative right, I write also in part to bury some of its more aggressive applications.

A. ECONOMIC TESTS

1. The Tests

Rent dissipation theory provides for straightforward, though not mechanical, definitions of the reproduction and derivative rights. Recall that while the central concern of the reproduction right is that an unauthorized reproduction might compete with the original, rent dissipation theory suggests that a central concern of the derivative right is that unauthorized derivative works might compete with one another.[228] Rent dissipation alone cannot provide definitions of either right, as many works that clearly do not violate either right compete with both original works and their derivatives. For example, a new action movie will compete with other previously released action movies and with the sequels to those action movies.

228. *See supra* text accompanying notes 166–69.

Once it is established, however, that an allegedly infringing work is substantially similar to an original work,[229] consideration of demand diversion can help determine whether the reproduction right, the derivative right, both, or neither are violated. If the allegedly infringing work would be expected to cause significant demand diversion from the original, then the work would indeed infringe the reproduction right. If the allegedly infringing work would be expected to cause significant demand diversion from actual or hypothetical transformations that the original author plausibly might make, then it would infringe the derivative right.[230]

2. Preliminary Illustrations

To clarify the definition and the type of evidence that litigants might introduce in litigation, let us start with a simple illustration. Suppose that someone created an unauthorized sequel to the *Harry Potter* books, with the usual group of characters and the familiar if unpredictable setting of Hogwarts, but an entirely new plot. It seems far-fetched to imagine even a well-executed sequel taking away more than an insignificant amount of business from the original *Harry Potter* book. Even if the new work were priced at considerably less than the original, only an unusual customer would decide not to buy the original because there existed a cheap imitation. In this respect, books are not like handbags. It is quite plausible, however, to imagine that a sequel might interfere with sales of authorized sequels as customers grow tired of reading *Harry Potter* sequels, especially if the unauthorized sequel were to beat an authorized one to market. Similarly, an unauthorized movie version of *Harry Potter* probably would steal only a modest amount of business from the book, but it might steal a great deal of business from the authorized movie.

This analysis may seem to succeed only at taking exceptionally easy cases and making them more complicated. The copyright statute explicitly identifies a "motion picture version"

229. *See supra* note 54 and accompanying text.

230. The central concern with the derivative right is rent dissipation among all derivative works, including unauthorized derivative works. A test of the derivative work concept, however, should relate semantically to the original work. Practically, this is essential too, as a court might need to assess whether a work is a derivative work before other alleged derivative works are even produced. Considering whether there would be significant demand diversion from authorized transformations provides a straightforward way of testing whether there is likely to be rent dissipation among derivative works.

of a work as a derivative work,[231] and a book sequel fits squarely within the more general definition of a derivative work, which includes "a work based upon one or more preexisting works."[232] My purpose, however, is to offer an economic cast to the definition for a derivative work. Because competition will always be a matter of degree, economic assessments will always be a matter of degree too, but this adds little uncertainty. A test seeking to identify substantial similarity will not be mechanical in any event, and adding one subjective assessment into an already subjective inquiry will not greatly compound the problem. It is at least reassuring that paradigmatic examples of derivative works, such as movie sequels or book translations, appear to fit within this economic approach.

Let us now consider a slightly more difficult example. Suppose that someone without authorization took the movie *Harry Potter and the Sorcerer's Stone* and electronically transformed it, creating a black-and-white version. There is no doubt that the black-and-white version would be substantially similar to the original. The release would be a violation of the reproduction right, because a significant portion of any revenues from the decolorized movie would likely come at the expense of the original.[233] That the black-and-white version might draw only a few customers is not relevant. The proper inquiry is whether these customers otherwise would have purchased the original. Some customers might choose the black-and-white version because they thought that it was truer to the theme, while others might favor the decolorized version because its producers sold it for less money to undercut the original. Either way, demand diversion seems likely to be substantial relative to sales of the black-and-white version. Intuitively, the modification of the original seems to be an attempt to evade the reproduction right. The above definition of the reproduction right, however, makes it possible to identify such attempts without any direct inquiry into motive. Perhaps the decolorization reflects solely artistic sensibilities, but that would not save the black-and-white version from violation of the reproduction right.

That is enough for the copyright holder to win, but let us consider the derivative right as well. Of course, if anyone were allowed to create decolorized videos and sell them, there would

231. 17 U.S.C. § 101 (2000).

232. *Id.*

233. *See supra* note 230 and accompanying text.

be rent-dissipating entry of decolorized versions and cut-rate prices. But that is why the definition above looks for competition with actual and plausible authorized transformations, even though the overall concern of the derivative right is demand diversion among all derivative works.[234] Similarly, if the *Harry Potter* producers did release a black-and-white version, the two black-and-white versions might compete with one another for that very small market segment. That is why the definition above considers only hypothetical transformations that the original author plausibly might make. The inquiry thus avoids tautology and demands a practical consideration of the relevant market.

In this case, it seems unlikely that the black-and-white *Harry Potter* would compete with other authorized transformations, in part because decolorization seems like a poor vehicle for commercial exploitation of *Harry Potter*. The result is based on empirical considerations, though, as it is possible to imagine evidence that decolorization was a plausible means of exploiting the original. In a world in which movie producers regularly released black-and-white versions to satisfy some portion of the viewing public, the black-and-white version would violate the derivative right as well as the reproduction right. The line admittedly is imprecise. There probably are a few customers who would buy a black-and-white version. The challenge for the court is to assess whether there are enough such customers to make release of a black-and-white version a sensible means of exploiting the copyright. Any evidence as to the movie studio's actual intent would be admissible, as would be evidence generated from market surveys. Such surveys, however, would need to assess not simply how many consumers would prefer a black-and-white version, but also how many who would not purchase the original would be interested in a black-and-white version. If that number is sufficiently high, then the black-and-white version is a plausible transformation.

The decolorization example may appear to present a problem for this approach. Colorized versions of movies generally are considered to be derivative works, so why should decolorized versions not automatically be treated in the same way? The economic answer is that colorization, however artistically objectionable, often is a logical way to exploit a movie commercially. Decolorization, on the other hand, seems far less likely to

234. *See supra* note 230 and accompanying text.

be commercially viable, as indicated by the lack of decolorized authorized versions of movies at video rental stores. The result is that unauthorized colorized versions plausibly might compete with authorized derivative adaptations, while unauthorized decolorized versions will not. As a result, decolorization would violate the reproduction right, but not the derivative right. This rent dissipation answer, however, may seem problematic from the perspective of the copyright statute. The definition of "derivative work" includes any "form in which a work may be recast, transformed, or adapted."[235] If colorization is a recasting, transformation, or adaptation, shouldn't decolorization count as such as well?

An apparently easy answer may be that decolorization requires less originality or skill than colorization. Originality of the modification made to a work might appear to be all that is required under conventional glosses on the definition of "derivative work."[236] Rubenfeld endorses this definition as well.[237] But if I accept this answer, then the rent dissipation approach that I have suggested seems misplaced. The conventional approach scrutinizes the modifications themselves, not the effect of the modifications on the work.[238] The rent dissipation approach, in contrast, considers the effect of the modifications, specifically by assessing the demand diversion that the new work will effect from other authorized transformations (for the derivative right) or from the original work (for the reproduction right).[239] Let us thus assume that colorization and decolorization are equally difficult tasks, both requiring a fair amount of specifically applied artistic expertise. Given this assumption, can we find some way of reconciling the economic test that I have proposed with the statutory text?

3. Textual Defenses

I believe that we can, and indeed, that a reading of the definition of "derivative right" that considers effects is *more* consistent with the statutory text than one that seeks to iden-

235. 17 U.S.C. § 101.

236. *See generally* Steven S. Boyd, *Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work*, 40 SANTA CLARA L. REV. 325 (2000).

237. *See* Rubenfeld, *supra* note 52 at 53–55.

238. *See, e.g.*, Well-Made Toy Mfg. Corp. v. Goffa Int'l. Corp., 354 F.3d 112, 117 (2d Cir. 2003) (employing the conventional "substantial similarity" test).

239. *See supra* note 230 and accompanying text.

tify originality in modifications alone.[240] Consider first the second sentence of the definition of "derivative work": "A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"[241] The words "represent an . . . original work of authorship" indicate what Congress implicitly envisioned.[242] The modifications to a work must themselves be original, for a nonoriginal modification can never create something original. But that is not enough. The word "represent" recognizes that modifications are not of interest in and of themselves, but only in that they point to or symbolize something broader. To consider whether modifications make a derivative work, we cannot just look at the modifications themselves, but must look at whether the modifications represent an original work.

Return now to the first sentence of the definition of "derivative right," which reads in full: "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[243] This sentence also emphasizes the process of transformation. None of the examples envisions a simple injection of expression. Although two of the examples—"abridgment" and "condensation"—envision a removal of expression, those words are different from "deletion" and plausibly can be read to exclude, for example, a version of a novel with a few carefully selected words removed. A holistic

240. For the statutory definition, see 17 U.S.C. § 101.

241. *Id.*

242. The approach of examining the modifications themselves for originality might appear to find support in the words "as a whole." This phrase, however, simply makes clear that the effect of modifications on the original work must be examined as a whole. If the phrase meant only that all modifications must be considered together, then the phrase would be superfluous. *See, e.g.*, Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878) (applying the canon that "a legislature is presumed to have used no superfluous words"). In the absence of the phrase "as a whole," the sentence would refer to "modifications which represent an original work of authorship." *See* 17 U.S.C. § 101. This is grammatically distinct from "modifications which represent original works of authorship." The structure of the sentence thus already makes clear that the modifications must be considered cumulatively, and the phrase "as a whole" reflects that the cumulative effect of modifications can be assessed only through consideration of the work itself.

243. 17 U.S.C. §107 (2000).

approach similarly can give significance to the words "recast, transformed, or adapted" in the first sentence of the definition of "derivative work," serving to distinguish them from weaker alternatives like "modified" or "changed." Here as well, Congress's word choice suggests that legislators imagined both that the transformation would involve some degree of originality and that the result would be more than merely an altered work.

The most powerful argument, however, for considering the effects of modifications rather than the modifications alone, is based on logic rather than linguistic analysis. It is nonsensical to assess modifications without at least some consideration of the original work. Modifications have meaning only with respect to what is being modified, and whether modifications cumulatively represent an original work necessarily depends on the degree to which the modified work is transformed. An approach that assesses whether modifications are sufficient without considering the effect of those modifications on the work in effect looks at editing marks as if they were written on pages formed in invisible ink that has since disappeared. Such an analysis may be enough to determine whether the modifications themselves are original, but this is irrelevant when what someone seeks to protect is not a set of modifications but a derivative work.

Copyright law may protect a haiku as completely as it protects an encyclopedia.[244] And a haiku may be sufficiently original on its own that when added to another haiku, the collection amounts to a derivative work of each haiku. But that does not mean that when a haiku is added to an encyclopedia, we have a new encyclopedia. Adding a haiku to an encyclopedia and then reselling the product surely would violate the reproduction right, but it should not be seen as violating the derivative right.

As both a matter of language and logic, the derivative right has been misconceived by focusing solely on what is added rather than on what is being added to. My analysis suggests new definitions of both the derivative right and the reproduction right. As currently interpreted, the definition of reproduction would cover most derivative works because unauthorized sequels and movies would probably count as unauthorized reproductions of characters, and possibly settings, under current

244. Some phrases may be so short that they are denied copyright protection. *See, e.g.*, Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541, 544 (2d Cir. 1959) (requiring an "appreciable amount of original text").

law.[245] In my definition, however, unauthorized sequels and movies probably would not be covered by the reproduction right because the adaptations will tend to compete only minimally with the original work.[246] A textual case for this redefinition of the reproduction right is consistent with the textual case for the redefinition of the derivative right. The reproduction right is a right "to reproduce the copyrighted work in copies or phonorecords."[247] It is a stretch to consider the individual characters, rather than a *Harry Potter* book as a whole to, count as a "work."[248] My definition thus offers a more plausible reading of the statutory text for both rights.

B. APPLICATIONS

My suggested approach would not require wholesale repudiation of case law. Courts have adopted overlapping definitions of the reproduction and derivative rights in part because litigants have had little incentive to encourage more precision in separating the rights. In the vast majority of cases, distinguishing the rights would not make a difference in the ultimate determination of whether there is a copyright violation. The courts likely will never consider whether a decolorized movie violated the derivative right, because it would violate the reproduction right.[249] There are thus relatively few cases that squarely force the courts to distinguish the rights. Fixing the doctrine in this area might require the lower courts to repudiate statements in earlier cases, but not in a way that would af-

245. *See supra* Part I.B.

246. *See supra* text accompanying note 230.

247. 17 U.S.C. § 106(1) (Supp. II 2002).

248. An implication of my approach is thus that characters ordinarily would not be independently copyrightable. Note that this would have little effect in the *Stallone* case, because in that case the script would have been an unauthorized derivative work. *See supra* notes 41–49 and accompanying text. The economic approach does not rule out altogether the possibility of copyright on characters, however. Suppose, for example, that some people were in the business of creating characters, which they would then sell to authors to incorporate in books. In that case, a character would be a work unto itself, but in the absence of independent marketing and sale of characters, characters would be part of other works. Moreover, this approach does not foreclose the possibility that independent parts of a work, such as frames of a movie, would be independently copyrightable. While a "character" does not seem to meet the plain language definition of a "work," see 17 U.S.C. § 106(1), a movie still plausibly counts as an independent "work." While an individual character ordinarily cannot be marketed independently of a broader work, a movie still can be marketed independently.

249. *See supra* Part III.A.2.

fect the result of the vast majority. The Supreme Court, in any event, has had no occasion to clarify the difference between the reproduction and derivative rights, and might usefully clarify the difference between the doctrines.

1. The Derivative Right

Because of the overlap in existing doctrine governing the reproduction right and the derivative right, much of the case law concerning derivative works arises from unusual situations in which the reproduction right is not violated, but the derivative right is not in issue. This can occur, for example, when someone purchases the original work, alters it, and resells it. Purchasing a work and reselling it unaltered would be protected by the first sale doctrine,[250] so the copyright holder relies on the derivative right instead. Such cases often seem to reflect novel forms of intellectual property protection in search of a textual hook in copyright law, and the derivative right may serve as a substitute for European-style moral rights. Perhaps the derivative right should serve a number of functions, though it also may be that the derivative right serves such functions only because it otherwise would seem to lack an independent justification. My purpose here, in any event, is to consider application of the derivative right pursuant to the core justification that I have developed here, not to contemplate the possibility that the derivative right might serve as the basis of a very different argument.

Let us start with the different results in *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*,[251] and *Lee v. A.R.T. Co.*[252] In both cases, the defendant A.R.T. was in the business of cutting up art reproductions, mounting the reproductions individually onto ceramic tiles, and selling the resulting tile art.[253] In *Mirage*, the reproductions came from a commemorative book collecting the work of a single artist,[254] while in *Lee*, the reproductions appeared individually on notecards and lithographs.[255] The Ninth Circuit found a violation of the derivative right in

250. *See* 17 U.S.C. § 109(a) (2000) (allowing an individual who purchases a copyrighted work to resell that work without violating the copyright).

251. 856 F.2d 1341 (9th Cir. 1988).

252. 125 F.3d 580 (7th Cir. 1997).

253. *Id.* at 580; *Mirage*, 856 F.2d at 1342.

254. *Mirage*, 856 F.2d at 1342.

255. *Lee*, 125 F.3d at 580.

Mirage,[256] but the Seventh Circuit did not in *Lee*.[257] Although Judge Easterbrook in the Seventh Circuit explicitly declined to follow the Ninth Circuit,[258] the analysis in this paper provides a plausible, though not definitive, basis for harmonizing the two cases.

The plaintiffs in *Mirage* presumably were not concerned about the tiles interfering with sales of the book, but rather about the loss of possible sales from other derivative works of the underlying art.[259] This fits squarely within the proposed test for violation of the derivative right. In *Lee*, however, the concern presumably was that the tiles might compete directly with the original notecards and lithographs, perhaps even making the originals seem like cheaper, less attractive products.[260] A ceramic tile artwork may be a close substitute for a lithograph, which, unlike a book, a consumer is likely to hang on the wall. Such substitution is directly relevant under this Article's test only for analysis of the reproduction right, but the reproduction right was irrelevant because no actual reproduction occurred.[261]

So far as the facts of *Lee* reveal, the only derivative works of the underlying art that Lee hoped to shield from competition were the notecards and lithographs themselves,[262] but this type of competition is no greater than would have existed if A.R.T. had simply resold the notecards and lithographs, a type of competition that the first sale doctrine protects.[263] While in *Mirage* the plaintiffs appear to have been genuinely concerned with

256. *Mirage*, 856 F.2d at 1344.

257. *Lee*, 125 F.3d at 583.

258. *Id.*

259. The Ninth Circuit noted that the artist's work had appeared in many different forms. *Mirage*, 856 F.2d at 1342 ("Patrick Nagel was an artist whose works appeared in many media including lithographs, posters, serigraphs, and as graphic art in many magazines . . . ."). There was no similar statement in *Lee*.

260. *Lee*, 125 F.3d at 582.

261. *Id.*

262. *Id.* at 580–81.

263. Judge Easterbrook explicitly indicated concern that Lee's theory seemed to imply that it would make criminals out of art purchasers who framed prints that they had bought. *Id.* ("If mounting works a 'transformation,' then changing a painting's frame or a photograph's mat equally produces a derivative work. Indeed, if Lee is right about the meaning of the definition's first sentence, then *any* alteration of a work, however slight, requires the author's permission.").

business stealing from authorized adaptations,[264] in *Lee*, the plaintiffs appear to be attempting to use the derivative right only as a backstop to the reproduction right.[265] A.R.T.'s actions might have seemed more troubling if Lee had separately been marketing tile versions of the art, or if such marketing would have been a likely avenue of commercial exploitation in the absence of A.R.T.'s adaptation. Under this hypothetical, there would be a violation of the derivative right as defined here, but the possibility of such business stealing from authorized adaptations is not as apparent in *Lee* as in *Mirage*.

This analysis helps identify what should be the focus of the current controversy regarding CleanFlicks,[266] a company that purchases and then alters VHS and DVD movies to eliminate content such as foul language, nudity, and violence that some consumers find offensive, and rents the videos to consumers.[267] Because the company purchases the videos, there is no violation of the reproduction right.[268] Whether there is a violation of the derivative right as conceived here depends on whether the sanitized films might compete with alternative transformations that the copyright owners plausibly might create to generate profits. Where this is so, there is at least a possibility of economic harm. The copyright owner has an interest in controlling investments in improvements and alterations, and CleanFlicks plausibly might prevent a copyright owner from selling clean versions, including perhaps made-for-television versions, at as high a premium as it otherwise would be able to obtain. As always, there are benefits to such competition, but copyright law plausibly maximizes social welfare by preventing redundant creation of derivative works. If creation of an authorized clean version is unlikely to be a profitable means of exploiting the

264. *See Mirage*, 856 F.2d at 1342–43.

265. *See Lee*, 125 F.3d at 582.

266. *See* Clean Flicks Home Page, http://www.cleanflicks.com (last visited Nov. 5, 2005).

267. For a discussion of litigation relating to this practice, see Mary Meehan, *Cleaning Agents: Rental Companies 'Scrub' DVDs for G-Rated Viewing While the Issue Plays Through the Courts*, LEXINGTON- HERALD LEADER, July 12, 2003, at H1; see also Rick Lyman, *Hollywood Balks at High Tech Sanitizers; Some Video Customers Want Tamer Films, and Entrepreneurs Rush to Comply*, N.Y. TIMES, Sept. 19, 2002, at E1 (discussing filmmakers' reactions to the proliferation of companies that produce 'sanitized' versions of Hollywood films).

268. *See supra* note 250 and accompanying text.

original movie, and if the unauthorized clean version would not interfere with other potential authorized transformations, then the danger of rent dissipation from redundant adaptations is much lower.

Even more offensive to many consumers than sex and violence is advertising, and the scope of derivative works was an issue in the controversy over the automatic ad-skipping feature of ReplayTV.[269] Content producers feared this feature even more than they feared the remote control and the fast-forward button.[270] Those features similarly allow consumers to skip commercials but require television watchers to lift their fingers to achieve the desired effect and therefore may often be too much trouble.[271] While the content producers' real concern was that consumers would not pay the time price that they levy for access to their content, they did not focus on alleged violation of their reproduction right.[272] The content producers claimed that the ReplayTV created an unauthorized derivative work, producing a television show minus the ads.[273] Does ReplayTV compete with plausible authorized transformations of television shows? Television networks do repackage content into ad-free DVDs, but these typically appear sufficiently after the original air date that competition seems likely to be minimal. In theory, content producers might offer ad-free versions of programming on alternative premium cable television stations, but they do not appear on the verge of doing this. Thus, the ad-skipping feature likely should not count as contributing to creation of infringing derivative works under current market conditions, but this might change in the future.

269. ReplayTV's manufacturer eventually resolved the lawsuit by removing the ability to skip commercials automatically. *See* Eric A. Taub, *ReplayTV's New Owners Drop Features that Riled Hollywood*, N.Y. TIMES, July 21, 2003, at C1. Owners of ReplayTV units filed a declaratory judgment suit against the plaintiffs in the original action. Newmark v. Turner Broad. Network, 226 F. Supp. 2d 1215, 1217–18 (C.D. Cal. 2002) (discussing the lawsuit that also involved other copyright issues, and resolving threshold motions).

270. *See* Taub, *supra* note 269, at C1.

271. *Id.*

272. The argument here would need to be that the ReplayTV contributorily infringed by encouraging consumer taping, but this argument has little to do with the ad-skipping feature. Moreover, it seems a stretch given *Sony Corp. v. Universal City Studios*, which held that "time shifting" (recording a televised program to watch later) on a Betamax video tape recorder was fair use. 464 U.S. 417, 454–56 (1984).

273. *See* Taub, *supra* note 269, at C1.

As a final example of the scope of the derivative right, consider the permissibility of unauthorized appropriation art,[274] which incorporates artistic or other images into new contexts, often in an effort to comment critically on the original.[275] A recent case, for example, considered whether a sculpture of a photograph of puppies infringed the photograph.[276] The rent dissipation approach would emphasize that the copyright owners were extremely unlikely to exploit their photograph by creating a sculptural work that would make a presumably ironic comment on the original, and therefore no rent dissipating competition resulted. With other photographs—for example, the now famous photograph of firemen lifting the American flag at the World Trade Center site[277]—exploitation by the author might have been more likely. It is irrelevant that the puppy photograph copyright owners might have been willing to license the sculpture, for the concern is with destructive competition, not with the original copyright owners' profits per se. It is also possible, of course, that the puppy sculpture might be protected under fair use, but my analysis makes it unnecessary to even consider whether fair use applies.

2. The Reproduction Right

Just as my approach to the derivative right could save appropriation art, so too might this Article's approach to the reproduction right save artistic and musical genres that involve the combination of large numbers of copyrighted works. Consider, for example, collages of copyrighted works, where the assembled works are owned by many copyright owners. There is a strong case based on transaction costs for allowing such works without permission, because it might be very expensive to con-

274. For a discussion of copyright issues associated with appropriation art, see William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach* 15 (Chi. John M. Olin Law & Econ., Working Paper No. 113, 2001), *available at* http://ssrn.com/abstract=253332 (follow "Document Delivery" hyperlink; then follow "Download the document from: Social Science Research Network" hyperlink).

275. For examples of appropriation art, see MNAC Artist Registry, Metropolitan Nashville Arts Commission, http://www.artsnashville.org/registry/index.php?scan=msst&main=style&offset=0&id=19 (last visited Nov. 5, 2005).

276. Rogers v. Koons, 960 F.2d 301, 301 (2d Cir. 1992).

277. *See* Christine Temin, *Memorializing an Iconic Moment*, BOSTON GLOBE, Jan. 16. 2002, at D1 (discussing the photograph and the controversy over a plan to turn it into a sculpture).

tact the many copyright owners of each of the included works for permission and to change a work should permission not be granted. Furthermore, an application of fair use, infused with transaction costs considerations, might save such an art form anyway.[278] In the ordinary case, however, collages will not substitute for the original copyrighted work, and the reproduction right would not be violated under this Article's test, even though direct copying was involved. At the same time, few copyright owners will exploit copyrighted works by creating or licensing collages, so the derivative right is not violated either. Similarly, this interpretation could save "sound sampling,"[279] at least where the sound sampling combines a sufficiently large number of songs to make the end product neither a substitute for, nor a competitor with, any authorized transformation of any single work. The interpretation thus calls into question, for example, the Sixth Circuit's recent decision in *Bridgeport Music, Inc. v. Dimension Films*,[280] which concluded that a sound recording owner had an exclusive right to sample his own recording.

C. INDEPENDENT COPYRIGHTABILITY OF DERIVATIVE WORKS

Although my primary purpose in developing this economic approach is to help determine whether the derivative and reproduction rights have been violated, the analysis also may be of direct use in case law considering the amount of originality required for a derivative work to obtain an independent copyright. Such cases typically arise when works are created from material in the public domain.[281] They may also arise when a copyright owner copyrights a derivative work of an already copyrighted work, and the first copyrighted work subsequently enters the public domain, or when the creator of the new work has a license to use preexisting work and seeks to obtain an in-

278. *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, 1628–30 (1982) (discussing the transactions cost approach to fair use doctrine).

279. *See generally* Erick J. Bohlman, Comment, *Squeezing the Square Peg of Digital Sound Sampling into the Round Hole of Copyright Law: Who Will Pay the Piper?*, 5 SOFTWARE L.J. 797 (1992) (reviewing copyright law concerning sound sampling).

280. 383 F.3d 390, 397 (6th Cir. 2004), *aff'd*, 410 F.3d 792 (6th Cir. 2005).

281. *See, e.g.*, L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491–92 (2d Cir. 1976) (en banc).

dependent copyright.[282] The doctrine in this area has been inconsistent. While some courts have required no more than a "distinguishable variation" from the original for a work to obtain copyright,[283] others have emphasized that merely trivial variations will not be enough.[284]

The analysis above suggests one possibility: an authorized work should count as an independently copyrightable derivative work if, had it not been authorized and had the earlier work been protected by copyright, the new work would violate the derivative right but not the reproduction right under this Article's proposed definitions. Thus, an authorized work would be entitled to a copyright as a derivative work if it was sufficiently different from the original that it would not significantly compete with the original and yet sufficiently similar that it might compete with authorized transformations of the original.[285] Ensuring that a work would not be within the reproduction right may seem to be an obvious way of preventing trivial modifications from entitling a work to an independent copyright. Under current doctrine, however, the reproduction and derivative rights overlap to such an extent that this definition would mean that virtually no works would qualify. Regardless of whether courts enact this Article's proposed reformulation of the reproduction right, they could use its conceptualization of that right to identify works that are too similar to the original to qualify for an independent copyright.

Consider, for example, *Gracen v. Bradford Exchange*, in which Judge Posner found insufficient originality in a painting, intended for use in a collector's plate, combining characters and settings drawn from the movie *The Wizard of Oz*.[286] Judge Pos-

282. *See, e.g.*, Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 909–11 (2d Cir. 1980) (concluding that the originality requirement has "particular significance in the case of derivative works based on copyrighted preexisting works").

283. *See* Dam Things from Denmark v. Russ Berrie & Co., 290 F.3d 548, 565 (3d Cir. 2002); Donald v. Zack Meyer's T.V. Sales & Serv., 426 F.2d 1027, 1029 (5th Cir. 1970); Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2d Cir. 1951).

284. *See* Boyd, *supra* note 236, at 353–61.

285. The consequence of failing the second part of the test would be less severe than the consequence of failing the first. If a transformation were so radical that the new work would not compete with either the original or with authorized transformations of the original, then it would be entitled to a copyright as an independent work.

286. 698 F.2d 300, 305 (7th Cir. 1983).

ner concluded that "a derivative work must be substantially different from the underlying work to be copyrightable."[287] Judge Posner, however, did not provide a framework for determining what counts as "substantially different." A collector's plate with an image adapted from the movie would not effect substantial demand diversion from the movie itself, so it would not violate the reproduction right, even though it would be a derivative work. Under the test proposed here, it therefore would be entitled to an independent copyright.[288] Of course, if owners of copyright in *The Wizard of Oz* previously had created a similar collector's plate that would be a market substitute for the new collector's plate,[289] then the new plate might well infringe the original plate, if the substantial similarity requirement is met.[290]

287. *Id.*

288. The same result probably would not obtain if the plate merely consisted of a frame from the movie, for two reasons. First, although the economic approach rejects the proposition that adding original content is sufficient to create a derivative work, it does not question the proposition that some originality is necessary for creation of a derivative work. Slapping a movie still on a plate encompasses only trivial originality. Second, each frame of a movie itself would be an independently copyrighted work. *See supra* note 248. It seems plausible that collectors' plates would interfere directly with any efforts to market individual movie stills in any form, and not solely with efforts to market transformations of these frames onto plates.

289. Indeed, in *Gracen*, the *Wizard of Oz* copyright owners did market a separate collector's plate, although it is not clear whether that plate was created first. 698 F.2d at 304. The issue was probably irrelevant in *Gracen* itself, because the court suggested, without reaching the issue, that Gracen, the creator of the purportedly derivative work, did not have the necessary permission to seek an independent copyright on the derivative work. *Id.* at 305 ("[W]e do not think the difference is enough to allow her to copyright her painting even if, as we very much doubt, she was authorized by Bradford to do so.").

290. Posner justified the "substantially different" requirement by citing courts' evidentiary need to determine whether subsequent works built on the original, the purportedly derivative work, or on other derivative works. *Id.* at 304. Judge Posner thus might lament that it will be necessary to consider the type of evidentiary question that he had sought to avoid. What he did not acknowledge, however, is that it often will be necessary to consider whether derivative works infringe one another or merely build on the original, when the original is in the public domain. He may have ignored this point only because of the unusual posture of *Gracen* itself, where Gracen's purported derivative work was an authorized licensee of the original. Id. at 301. Judge Posner was understandably concerned that the *Wizard of Oz* copyright holders would have to defend themselves against allegations that they had copied Gracen's plate, rather than making their own. *Id.* But Gracen would bear the burden of proof on an infringement claim, and this factual scenario is sufficiently unusual that it should not determine the broader doctrine determining copyrightability of a derivative work.

CONCLUSION

Abolition of the derivative right would have large consequences, quite possibly negative. Copyright races would force authors to hurry creation of adaptations of their own works. Unauthorized adaptations, meanwhile, might provide some value to consumers, but these works might simply reflect shifts in resources from production of more original copyrighted works, as well as from other markets. The derivative right, of course, is in no great danger, and indeed the larger danger is that the derivative right will be interpreted too broadly. This Article's task has been to defend the existence of the derivative right, but the theoretical apparatus that the Article has supplied may, in practice, be most important for constraining aggressive interpretations of the derivative and reproduction rights. Courts should not extend the derivative right to works that would not compete with plausible authorized transformations, nor should they extend the reproduction right to works that would not compete with the original.