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# Redundancy in Copyright Law

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# Redundancy in Copyright Law

**by Michael Abramowicz***

*At first glance, copyright law might appear to reflect little concern with redundancy, allowing creation of works expressing similar ideas as long as their expression is different. In this Article, Professor Abramowicz argues that copyright law should pay attention to redundant works, and moreover that it already does so. New works that are close substitutes for old works add less economic value than more original works equally profitable for authors. First Amendment and pragmatic constraints prevent copyright law from awarding authors monopolies to particular ideas, but in a variety of ways, copyright law seeks to reduce the costs associated with production of relatively redundant works. The most important of these is the broad derivative right, along with associated doctrines that give authors exclusive rights in characters and plots that they create. Concerns about redundancy provide a more plausible explanation than incentive and other theories of this right. The importance of the broad derivative right in turn provides a stronger justification of the long copyright term, because the derivative right increases in importance relative to the reproduction right late in the copyright term. Concerns about the costs associated with redundant production independently help justify a wide range of copyright doctrines, ranging from fair use to the originality requirement.*



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## INTRODUCTION

The consumer of copyrighted works buys in markets overflowing in variety. Hollywood offers two separate movies about asteroids hitting the earth.[1] Radio stations play songs by both the Backstreet Boys and 'N Sync.[2] Every television network has offered a reality program in which contestants are gradually eliminated until a sole winner remains.[3] A law professor can choose from at least a dozen civil procedure casebooks,[4] and a reader of romance novels faces a far wider selection.[5] A well-stocked newsstand carries multiple magazines on almost every hobby or interest. An Internet user can surf on Internet Explorer, Netscape Navigator, or

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

[2] *But cf.* Lauren Armstrong, *Move Over, 'N Sync: The Backstreet Boys Are the Best Boy-Band Around*, GREENSBORO NEWS & REC., June 29, 2000, at 12 (purporting to identify some differences between the two bands).

[3] CBS inaugurated the genre with *Survivor* and *Big Brother*. NBC integrated the concept with a dating show in *Chains of Love* and with a game show in *The Weakest Link*. ABC offered *The Mole*. Fox's *Boot Camp* prompted a lawsuit by CBS, which alleged that *Boot Camp* infringed its copyright on *Survivor*. *See* Phil Rosenthal, *Reality Shows Wage Turf War*, CHI. SUN-TIMES, April 11, 2001, at 55.

[4] *See, e.g.*, JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS (8th ed. 2001); ROBERT M. COVER ET AL., PROCEDURE (1988); DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE (4th ed. 2001); RICHARD H. FIELD ET AL., CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE (7th ed. 1997); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (3d ed. 2001); JOEL WILLIAM FRIEDMAN ET AL., THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS (2002); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL—CASES AND MATERIALS (8th ed. 1999); A. LEO LEVIN ET AL., CIVIL PROCEDURE: CASES AND MATERIALS (2d ed. 2000); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH (3d ed. 2000); JEFFREY A. PARNESS, CIVIL PROCEDURE FOR FEDERAL AND STATE COURTS (2001); MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE (5th ed. 1990); STEPHEN C. YEAZELL, CIVIL PROCEDURE (5th ed. 2000). For a recent critique of textbook publishers for producing too many textbooks and charging too much for them, see Erwin V. Cohen, *Same Book, New Look*, N.Y. TIMES, Dec. 2, 2003, at A31. Although Cohen suggests that "the industry should stop producing books that merely duplicate old ones," *id.*, he does not acknowledge that no individual textbook company has an incentive to stop producing duplicative books if each duplicative book takes business away from earlier publications.



[5] The publisher Harlequin estimates that heroines in the romance novels that it alone has produced since 1949 have married at least 8000 times. *See* Lynn Van Matre, *Harlequin and Gowns Enjoy Perfect Marriage*, CHI. TRIB., Feb. 8, 2001, at 7.

countless imitators, each of which will allow browsing of the same news story from any of a number of media outlets. While validating copyright law's success in providing an incentive to generate new works,[6] such diversity might appear to indicate that copyright law embraces redundancy, or at least does nothing to stem it. This Article will argue, however, that copyright law in fact is concerned with reducing the costs associated with production of redundant copyrighted works.

From the consumer's perspective, the wide variety of copyrighted works, though perhaps annoying on occasion, seems more like beneficial product diversity than wasteful product redundancy. Some adolescents will count themselves as better off for being able to listen to both the Backstreet Boys and 'N Sync instead of just one of these groups. While few law professors will dare assign their classes two civil procedure casebooks, one text might match a particular professor's style and pedagogy better than its competitors. And some Internet users find Explorer useful for some tasks and Navigator, for others. In all of these areas, competition may spur innovation and lower prices.[7] Past a certain point, though, the benefits to consumers of similar copyrighted works may be small. Law professors and their students probably would not be much worse off if they had to pick from six casebooks instead of twelve. Most of those who chose to see both asteroid movies would have been almost as satisfied if one of those movies simply had never existed, and movie buffs perhaps might have substituted other natural disaster flicks. And though many readers were presumably upset when *Mademoiselle* magazine folded,[8] they probably found solace in alternatives like *Allure*, *Cosmopolitan*, *Glamour*, *In Style*, *Jane*, *Marie Claire*, and *Self*.[9]

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[6] The purpose of providing such an incentive is arguably enshrined in the Constitution itself. *See* U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). As the Supreme Court has noted, "[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). *See also* 1 PAUL GOLDSTEIN, COPYRIGHT § 1.1 (1998) (stating that copyright law attempts "to encourage the widest possible production and dissemination of literary, musical and artistic works"). The Constitution, however, does not specify that its goal is to maximize production of literary works, only that its goal is to promote progress.

[7] Edmund Kitch has noted the price effect. "[C]opyrights do not prevent competitors from creating works with the same functional characteristics, as evidenced, for example, by the numerous dictionaries available, by the many television shows, novels, and movies with similar themes and characteristics, or by the many competing software programs," Kitch observes. Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1730 (2000). Such redundancy, Kitch explains, helps explain why copyrights are not monopolies. *See id.* at 1729-38.

[8] *See* Alex Kyczynski, *Goodbye to* Mademoiselle*: Conde Nast Closes Magazine*, N.Y. TIMES, Oct. 2, 2001, at C2.

[9] I do not mean to suggest that women buy more redundant magazines than men. The success of *Maxim*, after all, spurred a large number of imitators. *See* Matthew Castellan, *Magazines Jump on Maxim's Bandwagon*, FOX NEWS, July 30, 2002, *at* http://www.foxnews.com/story/0,2933,59051,00.html.

The production of even a relatively redundant copyrighted work will always increase consumer welfare at least a bit, but it may reduce social welfare. The more works that exist, the more likely a consumer will be able to find a work that is just what she is looking for, and at a lower price because of greater price competition. The more crowded the market, however, the weaker these effects; once there are already 1341 books on how to use Microsoft Word,[10] the 1342nd is less likely to fill a unique niche or have a significant effect on prices. Meanwhile, production of each copyrighted work consumes real economic resources, and as Glynn Lunney has pointed out, the resources that are invested in copyrighted works sometimes might produce greater social returns if invested elsewhere in the economy.[11] The sales of the most redundant copyrighted works come largely at the expense of other copyrighted works. It might be in the private interest of the author and publisher to create such a work, because profits from sales taken from other works are just as good as profits from sales to consumers who otherwise would not have purchased a copyrighted work at all. The work, however, can still reduce social welfare, if the cost of creating the work is greater than the increase in consumer welfare that it produces. The divergence between private and social incentives is possible because the producer of a copyrighted work does not care about the losses that publication will inflict on competing authors and publishers.

This insight has received considerable attention recently. In *An Industrial Organization Approach to Copyright Law*,[12] I explained that as a result of this divergence between private and social incentives, the social value of marginal copyrighted works, i.e. those that authors and publishers are most unsure about whether to create in the first place, will be relatively low on average.[13] Other commentators have recently made related points in passing, relating the economic literature on product differentiation to markets for copyrighted works.[14] The product differentiation literature, however, addresses markets as a whole, and although it models product

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[10] This is the number of books on Microsoft Word listed in a recent search on Amazon. *See* http://www.amazon.com/exec/obidos/tg/browse/-/4192/ref=br_bx_1_c_2_6/103-9771097-3974227 (last visited July 25, 2003).

[11] Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 487-88 (1996).

[12] *See* Michael Abramowicz, An Industrial Organization Approach to Copyright Law (2003) (unpublished manuscript, on file with author).

[13] This analysis makes more attractive copyright policies that increase consumers' access to digital works at the expense of a modest decrease in incentives to produce new works. *See id.* For example, peer-to-peer file sharing technology appears less dangerous to the copyright system, because any reduction in the number of new works that it causes may be of relatively little significance.

[14] *See infra* Part I.A.

diversity by imagining products distributed in "product space,"[15] it generally assumes that products are uniformally distributed in thatspace.[16] A convenient assumption for most purposes, this obscures an important phenomenon, that some copyrighted works are more redundant than others, meaning in effect that some portions of product space are more crowded than others. The more crowded a particular portion of product space, the more likely it is that a marginal work in that portion of product space will reduce rather than increase social welfare.

This Article thus applies an additional theoretical apparatus, rent dissipation theory, to copyright. Entry into markets for copyrighted works can dissipate the rents, or profits, that the owners of existing copyrights enjoy. A copyright law that maximizes social welfare from an economic perspective should prevent entry when the rent-dissipating effects of entry are greatest. Copyright law can seek to attain this goal only under many constraints, including noneconomic concerns such as free speech and indirect economic effects such as the administrability of the copyright regime. This Article argues, however, that within those constraints, copyright law to a surprising extent does represent the fundamental insights of rent dissipation theory. A number of features of copyright law prevent or discourage some of the most flagrantly rent-dissipating entry, a phenomenon that I will call *entry deterrence*.

The Article's primary task is to show that entry deterrence can explain some of the most perplexing aspects of copyright law. Most significantly, rent dissipation theory provides a foundation for the derivative right. A straightforward incentive theory cannot easily explain the derivative right or such expansive copyright scope, because that right plausibly discourages the creation of as many works as it encourages. Permitting unlimited unauthorized exploitation of derivative works would be likely to lead to a large number of particularly redundant works, however, as publishers would compete in adapting successful works. Though each unauthorized adaptation would contain unique expression, different adaptations of the same work would be strong substitutes for one another and thus relatively unlikely to benefit consumers enough to offset the competitive harm to producers. Relatedly, rent dissipation explains copyright's

[15] The literature uses geographical space as a metaphor for product space. The most famous article on spatial competition generally is Harold Hotelling's, which considers decisions of where to locate along a straight line. See Harold Hotelling, *Stability in* Competition, 39 ECON. J. 41(1929), *reprinted in* 1 PUBLIC CHOICE THEORY J. 3 (Charles K. Rowley, 1993). This can be viewed most easily as geographical space, for example with the producers as ice cream sellers deciding where along a beach to place their carts. It can also be viewed, however, as representative of decisions to choose product characteristics. For example, the straight line could be viewed as corresponding to the visible portion of the electromagnetic spectrum, and the producers as bathing suit manufacturers deciding what color to make bathing suits.

[16] *See infra* note 28 and accompanying text (discussing a model that assumes uniform distribution of products in product space).

protection of elements of copyrighted works, such as characters and plots. Because competitors would create adaptations as long as they expected profits, such entry would tend to eliminate the rent that a copyright owner in a regime with the derivative right and related rights can extract from sequels and other transformative uses of the original work.

An important corollary to rent dissipation theory's explanation of the derivative right is that rent dissipation theory helps explain the long copyright term. The derivative right increases in its importance relative to the reproduction right later in the copyright term, and so rent dissipation theory, unlike an incentive justification, can explain even retroactive extensions of the copyright term. At the least, rent dissipation theory reflects the actual motivations of companies that sought the long copyright term. Of course, rent dissipation theory can explain only why there is a long copyright term for the derivative right and suggests that perhaps the derivative right and the reproduction right, which have become essentially interchangeable in copyright doctrine, should be more clearly separated. By providing an economic foundation for the right, however, rent dissipation theory points to a straightforward doctrinal test for the derivative right, which focuses on competition among potential derivative works rather than 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.

The scope of derivative rights is the most important application of rent dissipation theory and entry deterrence in particular to copyright law because the need for a foundation is so desperate. Many features of copyright law, however, may make more sense once rent dissipation considerations are taken into account. Rent dissipation theory can also help explain limits on the scope of copyright's exclusive rights. The first sale doctrine, for example, helps minimize the costs associated with producing a sufficient number of copyrighted works to meet consumer demand. Similarly, rent dissipation theory can help explain some sui generis features of copyright law, such as the unique treatment of sound recordings. Music may be unique from a copyright perspective because consumers may benefit more from what might seem to be redundant performance by different artists of the same work than consumers would benefit from analogous competition in other areas. Rent dissipation theory also informs fair use doctrine. The first fair use factor as interpreted by the courts explicitly considers an aspect of redundancy by

evaluating the extent to which the use is transformative, and other aspects of the fair use calculus also can be understood in rent dissipation terms. Rent dissipation theory not only suggests that parodies should fit within the fair use exception, but also account for the Supreme Court's otherwise puzzling indication that parodies might not be fair use where they sufficiently interfere with nonparodic derivative works that the copyright owner might exploit.

Rent dissipation theory also may help understand doctrine concerning copyrightable subject matter, but the theoretical picture is more complicated and less certain here. Copyright law at times may reduce rent dissipation by facilitating entry that would occur anyway, for example by permitting copying of preexisting works, a concept that I will call *entry facilitation*. Where copyright law cannot prevent entry and thus eliminate all rent dissipation with entry deterrence, for example because of free speech concerns, it can use entry facilitation to reduce the fixed cost of entry and thus the magnitude of rent dissipation. Because entry deterrence and entry facilitation are opposite strategies for achieving the same goal, we must be cautious in assessing whether doctrine concerning copyrightable subject matter is consistent with the rent dissipation goal. This Article will offer a tentative argument, however, that doctrine concerning copyrightable subject matter reflects considerations of both entry deterrence and entry facilitation, and that the most difficult cases are those in which it is hardest to determine which consideration is the weightier. Entry deterrence, for example, can help explain why works that require very little investment, such as many unartistic photographs, are copyrightable, while entry facilitation can explain why other works that require a great deal of investment, such as phonebooks, perhaps should not be.

Part I of the Article reviews the recent literature on product differentiation and copyright, and it introduces rent dissipation theory as a complementary theoretical apparatus. Part II offers a positive theory of copyright's derivative right and related doctrines, and it offers a refinement of derivative rights that flows from this theory. Part III uses rent dissipation theory to explain doctrine on use of copyrighted works, and Part IV explains how rent dissipation theory might help explain doctrine on copyrightable subject matter. In all of these sections, I do not intend to provide comprehensive normative defenses of the relevant policies. While rent dissipation theory makes copyright law less puzzling from a positive standpoint, whether rent dissipation concerns are sufficiently weighty to justify policies such as the long copyright term is beyond my

immediate scope. A more generous treatment of parody might well be justified on free speech grounds, and this Article's analysis is intended only to crystallize identification of the competing policy interest, not to validate that competing interest as sufficient. Rent dissipation theory provides a new theoretical lens for evaluating copyright policy, but the challenge of balancing various aims of copyright law remains.

## I. A RENT DISSIPATION THEORY OF COPYRIGHT LAW

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 I.A will review the recent literature noting the existence of this possibility and describing the countervailing forces that act against overentry. Part I.B describes an alternative theoretical framework for understanding copyright redundancy, and that is the phenomenon of rent-dissipating races by private parties. Given the subject of this Article, it is worth noting that this framework is not redundant. Not only does it provide an intuitive basis for applying the core theoretical insight to legal doctrine, but it also makes it possible to imagine product space that is more crowded in some areas than others, which will prove central to the later analysis. After reviewing the literature on rent dissipation in other areas of law, this Part will imagine a hypothetical copyright regime with stronger property rights. This hypothetical regime would limit rent dissipation, but it would introduce other problems and concerns, particularly about freedom of speech.

### *A. Product Differentiation Theory*

In models of competitive markets, goods are often assumed to be homogeneous.[17] This model is effective for commodities like wheat, and homogeneity may also be an appropriate assumption 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 something 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. Economics analyzes such markets with a framework



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

called imperfect competition,[18] and that framework has spawned a literature on product differentiation that considers, among other questions, the welfare effects of producer entry into imperfectly competitive markets.[19]

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.[20] "[M]ultiple producers," Meurer observes, "sometimes race to get to the market first with essentially duplicative works."[21] Excessive entry into a market was particularly dangerous "when there are close substitutes for a new product in a market niche already crowded with other similar products."[22] 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 induces them to produce more works. As Meurer correctly observes, we cannot assume that more is necessarily 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.

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 argues that a range of governmental policies might produce excessive research expenditures.[23] Markovits distinguishes two types of such expenditure: production-process research, designed to decrease the cost of producing goods,

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

[19] For some extended treatments, see Simon P. Anderson et al., Discrete Choice Theory of Product Differentiation (1992); JOHN BEATH & YANNIS KATSOULACOS, THE ECONOMIC THEORY OF PRODUCT DIFFERENTIATION (2002); and 1-2 JACQUES FRANCOIS THISSE & GEORGE NORM, THE ECONOMICS OF PRODUCT DIFFERENTIATION (1994);

[20] 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).

[21] Meurer, *supra* note 20 at 96.

[22] *Id.* at 97.

[23] 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 (2002).

and quality-and-variety investments, designed to increase the quality and variety of products.[24] Markovits argues that we may have too little of the former and too much of the latter. Although Markovits's analysis takes into account some factors not explicitly considered by Meurer, such as the effects of monopoly distortions, the central insight is similar, that marginal investments in improving product quality and variety withdraw resources from other projects.[25] If the social benefits of the improvements are small, then the social costs of such research may exceed the benefits. Markovits concludes 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."[26]

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 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 rent dissipation, with no consumer benefiting and another producer $50,000 worse off, a loss that the literature refers to as "demand diversion" or "business stealing."[27] 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.[28]

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[24] *Id.* at 68-69.
[25] *Id.* at 80.
[26] *Id.* at 118.
[27] *See, e.g.*, N. Gregory Mankiw & Michael D. Winston, *Free Entry and Social Inefficiency*, 17 RAND. J. ECON. 48 (1986).
[28] *See* Steven C. Salop, *Monopolistic Competition with Outside Goods*, 10 BELL J. ECON. 141 (1979).

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.[29] Under fairly general assumptions,[30] Salop shows that twice as many firms enter the market as is socially optimal because each entrant does not take into account the effect of entry on rivals.[31] Salop's analysis, however, provides just one way of modeling product diversity, and in other models, overentry is less likely to occur.[32]

Recognizing this complexity, in *An Industrial Organization Approach to Copyright Law*, I offer a systematic treatment of product differentiation theory's relevance for copyright law's incentives-access paradigm,[33] the oft-noted tradeoff between increasing incentives to produce new works and access to existing works. If there is excessive production of copyrighted works, then there is no tradeoff 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 margins. 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.[34] 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.[35]

Reinforcing the observation that product space can quickly become crowded, Christopher Yoo apparently observed the connection between copyright and product differentiation at about the same time as me and distributed a working paper[36] shortly after I distributed mine.[37]

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[29] *Id*. at 144.

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

[31] *Id*. at 152.

[32] *See, e.g.*, Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297 (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).

[33] *See* Abramowicz, *supra* note 12

[34] *See id.* at app. 1.

[35] *See id.* at 58-62.

[36] *See* Christopher S. Yoo, Copyright and Product Differentiation (2003) (unpublished manuscript, on file with author).

Fortunately for us, our articles were not redundant and thus they would cause little business stealing if law review articles were a type of copyrighted work that generated business. Yoo does briefly consider demand diversion, calling it a "countervailing consideration" to the main thrust of his argument.[38] Yoo's thesis is that the products 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.[39] Though we focus on quite different things, both Yoo's analysis and my earlier one recognize that copyrighted works may be substitutes for one another and thus imply that copyright redundancy may have benefits and costs for consumers.

While both my previous analysis and Yoo's allow for generalizations about copyright law, neither they nor the works they are based on 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. Shubha Ghosh has written a working paper that makes progress in this direction, considering the challenges of exploring market definition in copyright law.[40] Though more familiar to antitrust analysis, Ghosh notes that market definition is at least implicitly relevant in a number of copyright doctrines, including fair

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[37] That version initially encompassed both that article and parts of this one. *See* Michael Abramowicz, Copyright Redundancy *available at* http://papers.ssrn.com/ abstract_id=374580 (last visited Dec. 2, 2003).

[38] Yoo, *supra* note 38 (manuscript at 41 -45). Yoo argues that "the differentiated products approach undercuts the conventional understanding that any measure that enhances dynamic efficiency necessarily reduces static efficiency by showing how encouraging entry can promote both considerations simultaneously." In other words, Yoo argues that if copyright can increase incentives to create new works (thus, Yoo assumes, enhancing dynamic efficiency), that change will also increase static efficiency, because additional entry will drive down prices and thus benefit consumers. The simulation analysis in my article offers a similar finding. There is an important difference in emphasis between Yoo's approach and mine, however. Yoo notes correctly that changes in copyright law may increase authors' ability to appropriate surplus, and he suggests that these changes will in effect increase dynamic efficiency by lowering prices and thus increasing access to consumers. What Yoo does not discuss is that a policy increasing the appropriability of consumer surplus may have other direct consequences, which might decrease consumer access with a potentially negative effect on social welfare. Consider, for example, a law facilitating crackdowns on file sharers. Yoo's analysis emphasizes that the law will increase appropriability, indirectly leading to a greater number of works and thus lower prices. My analysis would also emphasize that the increase in the number of works may only contribute slightly to consumer welfare, even taking into account lower prices, as in the Salop model; meanwhile, the direct effect of the law would be to limit consumer access to copyrighted works by discouraging file sharing.

[39] *Id.* (manuscript at 15-20, 28-33). While Yoo's project shows successfully that the public goods model does not fully explain markets for copyrighted works, my earlier analysis focuses on the observation that once copyrighted works are produced, they have many of the characteristics of public goods, namely nonrivalrous consumption.

[40] Shubha Ghosh, Rights of First Entry in "Derivative Markets": Exploring Market Definition in Copyright (2003) (unpublished manuscript, *available at* http://www.serci.org/congress/papers/ghosh.pdf).

use[41] and copyright misuse.[42] Perhaps in the long term work such as Ghosh's will allow for copyright analysis that is extraordinarily sensitive to the particular nuances of individual markets for copyrighted works.[43] In the meantime, a theoretical apparatus is needed that reflects the basic insights of product differentiation theory and still allow us to make at least some tentative generalizations about how copyright law might encourage useful and discourage wasteful redundancy. To such an apparatus we shall now turn.

### *B. Rent Dissipation Theory*

#### *1. The Rent Dissipation Literature*

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,[44] a source of inefficiency that may even exceed the deadweight loss associated with monopoly pricing.[45] Any investment by a private party to capture rents, protect rents, or take rents enjoyed by another party can constitute rent-seeking, however.[46] An example not involving lobbying is that of the gold rush.[47] 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.[48] 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

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[41] *Id.* (manuscript at 4).

[42] *Id.* (manuscript at 5).

[43] Economists have done some work in creating empirical models of particular markets for copyrighted works, but there are substantial methodological complications. *See, e.g.*, *See* MARC RYSMAN, COMPETITION BETWEEN NETWORKS: A STUDY OF THE MARKET FOR YELLOW PAGES (Boston Univ. Industry Studies Project Working Paper No. 104, Feb. 12, 2002).

[44] The seminal works 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).

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

[46] A related expense is by individuals seeking to prevent the rent-seeking activities of others. *See* John T. Wenders, *On Perfect Rent Dissipation*, 77 AM. ECON. REV. 456, 456-58 (1987).

[47] 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 IN ECON. HIST. 197 (1977). *See also* Stephen N.S. Cheung, *The Structure of a Contract and the Theory of a Non-Exclusive Resource*, 13 J.L. & ECON. 49 (1970) (explaining how rent dissipation may occur with any non-exclusive resource).

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

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.

Even for those who are familiar with those examples, the stark conclusion that society will entirely waste rents in seeking them may seem counterintuitive. The California Gold Rush may have been counterproductive, but surely, one might insist, the country was better off than if there had been no gold in California. Indeed, there are a number of reasons that competition may not entirely dissipate a rent. 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,[49] then the total investment in the search will be less than the prize.[50] Second, because rent dissipation reflects in part opportunity costs, a rent will be entirely dissipated only if each participant is indifferent between participating in the activity and in some other activity.[51] Third, if the parties are not identically situated, rent dissipation may be reduced or eliminated.[52] To take an extreme example, if it is apparent that no matter what the efforts of others one party will definitely arrive first and capture all of the gold, then no one else will enter the race.[53] Fourth, rent-dissipating races can lead to earlier achievement of a goal, resulting in an end to rent-dissipating activities.[54] 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.[55]

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[49] *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 indication that individuals are generally risk-averse as to gains and risk-averse as to losses); *see also* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 177 (2000) (explaining prospect theory and applying it to the litigation context).

[50] *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 careful analysis on the effect of risk aversion on rent dissipation).

[51] *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.").

[52] *See, e.g.*, Christopher Harris & John Vickers, *Perfect Equilibrium in a Model of a Race*, 52 REV. ECON. STUD. 193 (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 & PROCEEDINGS) 176 (1987).

[53] For a game theoretic analysis underscoring the possibility of incomplete rent-seeking, see Gordon Tullock, *Efficient Rent-Seeking*, *in* JAMES M. BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97 (1980).

[54] *See, e.g.*, POSNER, *supra* note 48, at 41 (noting that entry by multiple parties to find a shipwreck might lead to the wreck being found earlier).

[55] 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 (2001).

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 a unique party thathas the rights to a sunken vessel, [56] then no one else will enter, thus entirely avoiding the rent-dissipating race. The owner of the vessel then 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.[57] 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 by an auction proceeding, 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.

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.[58] Research into potential innovations can be a form of rent dissipation. 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.[59] Kitch's observation is that patent law does for innovation policy what a prospecting system does for a gold rush,[60] providing property rights that reduce the possibility of rent dissipation. In the absence of

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[56] The law attempts to do this. *See* Abandoned Shipwreck Act, 43 U.S.C. §§ 2101 et seq (2000).

[57] *See, e.g.*, H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

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

[59] Rent dissipation theory is thus insufficient to make a priori welfare assessments, a task which industrial organization attempts. *See infra* Part II.A.

[60] Kitch, *supra* note 58 at 271 -75.

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.[61] That point is a twist on the traditional incentive rationale for patent law,[62] but Kitch also emphasized that a patent improves post-invention incentives,[63] 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, as well as earlier than optimal deployment of an invention.[64] More inventors may pursue a particular line of research than is socially optimal.[65]

Patents, however, cannot eliminate rent dissipation altogether, as Donald McFetridge and Douglas Smith pointed out shortly after Kitch.[66] 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.[67] The result is 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.[68] Yet patent races can

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

[62] *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 . . . .").

[63] Kitch, *supra* note 58 at 285-86.

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

[65] *See* JACK HIRSHLEIFER & JOHN G. RILEY, THE ANALYTICS OF UNCERTAIN TY AND INFORMATION 260 (1992).

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

[67] Patents do not, however, eliminate post-patent 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. *See, e.g.*, Hilton Davis Chem. Co. v. Warner-Jenkinson Co., Inc., 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).

[68] A recent example was competition in sequencing the human genome. *See* Eliot Marshall, *Rival Genome Sequencers Celebrate a Milestone Together*, 288 SCIENCE 2294 (June 30, 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 Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. (forthcoming 2004).

also produce redundancy, especially if different competitors run down the same blind alleys, unaware of their competitors' successes and failures.[69] 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.[70] The ultimate cost-benefit balance is theoretically indeterminate, and presumably varies from one patent race to the next. Even more theoretically complex 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 necessarily seriously undermine Kitch's suggestion that patent law's concentration of prospecting rights promotes efficiency.

Kitch's argument, in any event, is more positive than normative, as he identifies various features of patent law that are consistent with reducing rent-seeking. For example, just as a prospector in a gold rush does not have to establish that mining is likely to be productive in a particular area to obtain a prospecting right, so too does an inventor not have to prove commercial significance to obtain a patent.[71] Mark Grady and Jay Alexander extend this positive insight by arguing that patent law seeks to provide a balance between the inefficiencies of patent races and of competitive development of existing innovations.[72] "Sometimes the threat of improvement-stage rent dissipation calls for broad protection; sometimes no such threat exists, making patent protection less important," argue Grady and Alexander,[73] who are the first to elaborate a connection between the patent and rent dissipation literatures.[74] Patent law grants broad protection when an "invention signals a set of improvements," and patents in such cases

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[69] 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.*, Gideon Parchomovsky, *Publish or Perish*, 98 MICH. L. REV. 926 (2000) (discussing the possibility of strategic disclosure); Douglas Lichtman et al., *Strategic Disclosure in the Patent System*, 53 VAND. L. REV. 2175 (2000) (providing a model of the incentive to engage in 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* Parchomovsky, *supra*, at 944-45.

[70] Robert Merges and Richard Nelson argue that Kitch understates 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).

[71] Kitch, *supra* note 58, at 271-75.

[72] 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.

[73] Grady & Alexander, *supra* note 72, at 318.

[74] Kevin Rhodes briefly makes 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).

preclude "any possibility of a rent-dissipating rush to discover the modifications."[75] Patent law limits protection where patent races present the greater rent dissipation danger. For example, Grady and Alexander suggest that patent law's utility requirement[76] 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."[77]

### *2. A Preliminary Rent Dissipation Model of Copyright Law*

The extent to which Grady and Alexander's rent dissipation theory of patent law accurately captures both doctrine and actual judicial decisionmaking is beyond the scope of this Article.[78] The central observation for present purposes is that it is possible that legal doctrine may seek to minimize the sum of various forms of rent-seeking, while paying attention as well to independent policy goals. At first, it might appear that copyright law does not attempt such an accommodation, because the property rights of copyright law are much weaker. 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.[79] 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 right to that genre, at least for some period of time. And so, J.K. Rowling might have to pay royalties to J.R. Tolkien, or the first cookbook to illustrate recipes with step-by-step pictures might be able to prevent publication of subsequent works.

Such a copyright law is not attractive, but let me offer a brief endorsement before I point out the obvious flaws. In a copyright regime with strong copyrights, there would be far less redundancy. If I created the illustrated cookbook genre with an Italian cookbook, for example, I

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[75] *Id.*

[76] 35 U.S.C. § 101 (2000).

[77] Grady & Alexander, *supra* note 72, at 339.

[78] 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).

[79] *See* Baker v. Selden, 101 U.S. (11 Otto) 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.").

might refuse to allow a large number of illustrated Italian cookbooks with similar recipes. At the same time, I would have strong incentives to license the right to copy my innovation for somewhat different products, so I likely would permit illustrated cookbooks for other cuisines. It might even be profitable to license (or create myself) an illustrated Italian cookbook that offered different recipes or addressed in detail a subset of Italian cooking. Thus, there would almost certainly be fewer works, probably dramatically fewer, but copyright holders would still author or license a range of works to appeal to a range of consumers and to encourage some consumers to buy more than one. In short, I would have incentives to create new works but not redundant works, just as a patent holder has an incentive to improve on the patented product but not to develop a product with a similar function through a different mechanism.

Of course, just as patents solve post-invention rent dissipation only at the expense of races to obtain patents, the value of such a robust copyright would produce races to obtain these copyrights.[80] Yet it seems likely that any rent dissipation here would be less harmful to the public. Such a copyright system would place a premium on originality, for it would only be by executing an idea for a new genre of work that one would receive protection. The result might well be many works that are junk, but there would be little of the redundancy often associated with patent races. In the patent context, the desired outcome is often obvious—a cure to a disease, for example—but the means to obtaining that outcome mysterious, and experimentation thus results. With copyright, though, there is less guesswork (though considerable elbow grease) involved in transforming idea to expression, and so while it is possible that there sometimes might be a race to get out the first work in a newly created genre, that possibility is much less of a concern. This robust copyright would thus stimulate the creation of truly original works, while giving copyright owners appropriate incentives to develop new works.

The first piece of bad news is that the system might still be very inefficient, probably far more inefficient than the copyright system that we have. Copyright would confer power not only to control the number of new works, but also to set the price of existing works.[81] The owner of

[80] Copyright races are rare under the 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 (2002). The difficult question is whether the nonexclusive patent system would lead to more redundant development or less. Leibovitz points out that inventors would have an incentive to license their technological advances to firms lagging beyond 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.

[81] If copyright is a natural monopoly, some form of natural monopoly regulation might be used to control prices. *See generally*

the copyright to illustrated cookbooks would set a relatively high price for cookbooks, acting as a monopolist. Thus, the robust form of copyright would allow producers to obtain rents only at the cost of limiting consumer surplus. While in theory it is possible that the increase in producer welfare would offset the decrease in consumer welfare, it seems likely that this would not be so, for the familiar reason that monopoly pricing produces a deadweight loss. A world with very few copyrighted works and very high prices seems sure to hurt consumers more than it would help producers. Whether this holds, however, might depend on how robust the copyright was. If there were thousands of different copyright holders with rights to make different types of cookbooks, for example, the copyright holders would need to compete against one another, and so perhaps the system might produce relatively little deadweight loss while still substantially reducing redundancy.

This observation, however, points to an equally fundamental problem of this hypothetical copyright regime, that it would be difficult to administer. How robust would a copyright be? Would the first illustrated cookbook provide a copyright over all future illustrated cookbooks, or only an illustrated cookbook for the same type of cuisine, or only a cookbook with the illustrations arranged in the same way? Moreover, how innovative would a new work have to be to obtain copyright protection? Would the new work need to create a new genre or sub-genre, as the above examples seem to suggest? Or would merely a new idea suffice, so that the first Italian cookbook to suggest a new technique for rolling out pizza dough could prevent others from adopting that technique?[82] How clearly would a new idea need to be stated to be entitled to a copyright? Patent law confronts such questions, and perhaps a copyright office could make such assessments. But the universe of ideas that would be copyrightable subject matter would be larger than the universe of patentable subject matter, and the number of copyrights (under current rules at least) dwarfs the number of patents.[83] The challenges of developing this robust copyright law accordingly likely would be greater than in the patent context.

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POSNER, *supra* note 48 at 377-96 (describing the regulation of common carriers). The task might be far more difficult given the number and diversity of copyrighted works, however.

[82] Current copyright law would not allow the cookbook to monopolize the technique, even if other cookbooks' descriptions of it might seem to reflect copying of the original. *See, e.g.*, Baker v. Selden, 101 U.S. at 107 (refusing to allow the owner of a copyright in a book describing a new accounting system and providing forms for execution of the system to prevent others from selling similar forms).

[83] In 2001, the Copyright Office registered 601,659 claims. *See* ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS at 1 (2001), *available at* 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. PATENT ACTIVITY CALENDAR YEARS 1790-2001 (updated yearly), available at http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm. This understates the difference between the number of

It is, of course, the specter of such a copyright office that would be the greatest concern, even if we had confidence 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 or writing in a particular genre would seem to be a gross violation of freedom of speech. First Amendment doctrine, of course, tolerates the current copyright regime,[84] 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 be a copyright regime that allows the initiator of an idea to prevent others from repeating it. For this reason and the others, then, this robust copyright regime is unimaginable. At least, modifications would need to be made to make such a regime palatable. For example, we might modify the regime to allow free copying of ideas. Similarly, 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. We might carve out special exceptions for speech that would be infringing but produce substantial social value that could not be achieved without allowing some borrowing. These are big exceptions but they would not eliminate copyright law's concern with redundancy altogether. What would such a copyright system look like? Much like the one that we actually have.

### *C. Toward a Positive Theory of Copyright Law*

A recognition of the normative significance of both rent dissipation theory and the possibility of overentry, though important for analysis of particular doctrinal issues in copyright, need not lead to wholesale reform of copyright law. To the contrary, the remainder of this article will argue that copyright law already substantially reflects concerns about wasteful rent dissipation. More precisely, *copyright law generally minimizes the fixed costs associated with redundant entry*. There are several important aspects of this statement. First, copyright law is particularly concerned with fixed costs, such as the cost of producing and marketing a copyrighted work. If books could be written and marketed with no effort, then copyright law would present no problems of rent dissipation. Second, copyright law seeks to avoid fixed costs

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copyrights and patents, however, as registration is not required for copyright protection.

[84] *See, e.g.*, Eldred v. Ashcroft, No. 01-618, slip op. at 28-31 (U.S. Jan. 15, 2003); 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.").

only when those fixed costs would produce relatively redundant works. As the above discussion suggests, copyright law cannot eliminate all redundancy, but this section will show that some aspects of copyright law consider redundancy. Third, copyright law may minimize fixed costs either by providing a broad or narrow scope of protection. Broad protection may prevent entry, but where entry is inevitable, narrow protection may make entry less expensive.

That copyright might already reflect a principle that has received no direct attention by copyright theorists or in copyright case law may seem too good to be true. There is, however, a simple public choice reason that copyright law should take into account rent dissipation. Authors and publishers have a strong incentive to seek a legal regime that will prevent others from cannibalizing their profits. Those who would engage in such cannibalization, by contrast, have little incentive to engage in lobbying, because there is little profit in being a second mover if third, fourth and fifth movers will immediately follow.[85] At the same time, no one has an incentive to support an expansive copyright rule where the copyright holder would not gain from the property right.[86] Private parties' incentives will thus tend to induce policymakers who seek contributions implicitly to take into account rent dissipation concerns.

I do not mean to suggest that private lobbying in general will lead to optimal results, or even that copyright law is optimal as a result of private parties pursuing their own legislative interests. Some organizations may serve as proxies for consumers in legislative bargaining,[87] and legislators should be expected to take consumer welfare somewhat into account in all but the most cynical theories of public choice, but producers have an obvious lobbying advantage.[88] Thus, deviations of copyright doctrine from a hypothetical optimum that would take into account consumer welfare as well as rent dissipation should be expected, and indeed I will point out instances in which copyright law seems to protect producers at the expense of consumers. The analysis here, however, suggests simply that legislators seek to avoid rent dissipation and that

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[85] William Landes and Richard Posner have noted that a relatively weak copyright may benefit authors, because it allows them to use others' work more. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332-33 (1989). Authors' incentives in general, however, are to seek a copyright law that allows use of others' work only where such use will not result in direct competition with those whose work is used. There is not much profit in engaging along with many others in such direct competition, and there is a substantial rent to protect in preventing it.

[86] For a historical analysis of copyright lobbying, see Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPR. SOC'Y 109, 127 (1989).

[87] *See, e.g.*, *infra* note 266.

[88] *See, e.g.*, John Borland, *RIAA Boosts Anti-Napster Lobbying Efforts*, CNET News.com, Feb. 27, 2001, *available at* http://news.com.com/2100-1023-253215.html?legacy=cnet (reporting on the Recording Industry Association of America's lobbying efforts).

some aspects of copyright law that might seem either to be giveaways to content producers or to be strange exceptions to such giveaways at least have some economic foundation.

Even where rent dissipation is relevant, copyright doctrine might deviate from the policy recommendation that rent dissipation theory would make. There are at least two reasons for this. First, copyright doctrine reflects many considerations, both economic and noneconomic, and as the analysis of the hypothetical copyright regime above demonstrated, at times these considerations will be in tension. I do not mean in introducing this positive theory of copyright to deny the relevance of other possible positive considerations. Rent dissipation theory helps to resolve some of copyright law's puzzles, but these are only puzzles in the first place because they reflect deviations from some hypothetical copyright law that reflects the considerations that we already know are important. Moreover, there may be alternative, sometimes complementary explanations for these puzzles. Douglas Lichtman has recently argued, for example, that copyright doctrine seeks to save the courts from decisions of evidentiary complexity.[89] This helps to explain, among other things, copyright law's requirement of creativity,[90] which rent dissipation also helps to explain. My theory is merely that rent dissipation is an important consideration in a copyright law that is also influenced by other considerations and constraints.

Second, copyright law is made by both legislators and judges, and the political economy of the legislative process is absent in the independent judiciary. There are, however, some reasons to think that judges would take into account rent dissipation as well. Copyright doctrine is at least in theory an exercise in statutory interpretation, and so case law roughly may reflect legislative purpose.[91] In addition, many judges may adopt a vaguely natural law approach to copyright,[92] believing that authors generally should have control over development of their work, and this reasoning happens to cohere with rent dissipation theory. More important, some aspects of rent dissipation theory are quite intuitive. Judges may intuitively see works that are largely redundant as less valuable than works that are more distinct. Similarly, judges may recognize that it is inefficient to require authors to duplicate the work of others if ultimately they will be

[89] *See* Douglas Lichtman, *Copyright as a Rule of Evidence*, 2003 DUKE L.J. (forthcoming) (manuscript on file with author).

[90] *Id.* (manuscript at 23-29).

[91] Similarly, judges may seek to make decisions that Congress is relatively unlikely to overturn, and of course "good law" consists of judge-made law that has not been overturned. *Cf.* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) (assessing the extent to which legislative inaction validates past interpretations).

[92] For a more explicit natural law approach to copyright, see Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

allowed to enter the market anyway. Thus, while judges may not make rent dissipation theory an explicit basis of their decisions, the intuitive pull of rent dissipation concerns may affect the conclusions that they reach. I do not, however, mean to ascribe copyright's accommodation of rent dissipation concerns entirely to motivation, even to subconscious motivation. Some of the compatibility of copyright with rent dissipation concerns may be coincidence, and this contribution to the positive theory of copyright is not primarily a causal one.

## II. THE DERIVATIVE RIGHT AND RELATED DOCTRINES

Copyright law routinely allows entry of works that will dissipate the rents of earlier works by using their ideas, but it prevents entry of works that would dissipate the rents of earlier works by using too much of their expression, even when the new works would divert little business from the works being copied. Copyright theory has offered no persuasive justification for this distinction, embodied in copyright's derivative right. This Part offers a new theoretical justification for the derivative right, following straightforwardly from the rent dissipation theory sketched above. Copyright law must tolerate the general crowding of product space,[93] but the derivative right, complemented by the reproduction right as applied to particular aspects of a work such as characters and plots, prevents the extreme local crowding of product space that would exist if anyone could create an unauthorized adaptation of any other work. After introducing this theory in Parts II.A and II.B, Part II.C explains how the theory may strengthen the case for a long copyright term, and Part II.D shows how the theory may help reduce incoherence in doctrine concerning the scope of both the derivative and the reproduction rights.

### *A. ThePuzzling Derivative Right*

Commentators explain the derivative right with the same incentive rationale generally applied to justify copyright as a whole. Paul Goldstein, for example, uses *Gone with the Wind*[94] to explain how the derivative right extends copyright's basic logic[95] Copyright's reproduction right[96] provided Margaret Mitchell and her publisher an incentive to "invest time and money in

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[93] *See supra* Part I.B.2.

[94] MARGARET MITCHELL, GONE WITH THE WIND (1936). Goldstein's choice of an example anticipates a later case considering the circumstances in which the fair use doctrine can overcome the derivative right. *See infra* note 320.

[95] *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209 (1983); *see also* PAUL GOLDSTEIN, COPYRIGHT § 5.3 (2002) (repeating the analysis).

[96] 17 U.S.C.A. § 106(1) (2002).

writing, editing, producing and promoting the popular novel, . . . knowing that no one may copy the work's expressive content without their consent."[97] In contrast, the derivative works 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."[98] Mitchell and 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."[99] 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.

There are two ways that the derivative right might increase investment, though in each case the effects 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 may 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, and the works most likely to be adapted—John Grisham novels, for example[100]—are likely to be so successful in and of themselves that they will be inframarginal 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.[101] Publishers, moreover, may implicitly factor in the

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[97] Goldstein, *supra* note 95, at 214.

[98] *Id.*

[99] *Id.*

[100] 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. See* Joseph E. Stiglitz & Partha S. Dasgupta, *Differential Taxation, Public Goods, and Economic History*, 38 REV. ECON. STUDS. 151, 159 (1971) (claiming that income tax increases sometimes have lead workers to work more rather than less). In effect, the 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.

[101] 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)

possibility of revenues from derivative rights even where these rights are rare; even if an author retains film rights, adaptation is likely to increase sales of the original, 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*[102] became a movie.[103] Hillenbrand insists that in developing the initial book proposal for *Seabiscuit*, which was based in turn on an earlier article that she had written,[104] the possibility of a movie never occurred to her,[105] suggesting that she would have written the book even in the absence of the derivative right to film adaptation. Hillenbrand, however, ended up with a movie contract before writing the book,[106] 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. Consider, for

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("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.").

[102] LAURA HILLENBRAND, SEABISCUIT: AN AMERICAN LEGEND (2001).

[103] SEABISCUIT (Universal Studios 2003).

[104] *See* Laura Hillenbrand, *Four Good Legs Between Us*, AMERICAN HERITAGE, July 1, 1998, at 39.

[105] *See* Michael Neff, *An Interview with Laura Hillenbrand*, *available at* http://www.webdelsol.com/SolPix/sp-laurainterview.htm (last visited Aug. 1, 2003).

[106] *Id.*

example, the four movie versions of the uncopyrighted *Les Liaisons Dangereuses*,[107] or the three television dramatizations of the Amy Fisher saga.[108] While we cannot be sure how many movie versions of *Harry Potter*[109] would exist in the absence of the derivative right, it seems plausible that there might be several, 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.[110]

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 absence of an exclusive derivative right, authors of original works would have some ability to exploit derivative works, assuming that trademark law will prevent unauthorized adapters from passing off their derivative works as created by the authors of the original. 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, so it seems unlikely that the eliminated incentives could be greater than the new incentives created.[111]

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

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[107] *See* CRUEL INTENTIONS (Columbia/Tristar Studios 1999); DANGEROUS LIAISONS (Warner Studios 1989); VALMONT (MGM, Inc. 1989); LES LIAISONS DANGEREUSES (Wellspring Media, Inc. 1959).

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

[109] *See, e.g.*, J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1998).

[110] A recently lawsuit charged a Russian author for creating an unauthorized adaptation of Harry Potter 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 WL 101326209.

[111] I do not mean to imply that it is impossible for the eliminated incentives to be greater than the new incentives. One possible story if 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,

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 this, covering even the borrowing of characters and plots, as we shall soon see,[112] so the derivative right has little 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 through transformation. 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,[113] 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 are less likely to lead to creation of second-order derivative works. 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 works 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.



[112] *See infra* Part II.B.

[113] *See infra* notes 192-193 and accompanying text.

To make the importance argument work, 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 to consumer surplus directly. That depends in turn on the extent to which revenues from the work are attributable to demand diversion rather than demand creation. If the revenues are largely the product of demand diversion, then in the absence of the work, consumers might have satisfied themselves almost as much with some substitute, but where the revenues are largely the product of demand creation, consumers who otherwise would not have made a purchase will do so. The more redundant a copyrighted work is likely to be, 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 just the ideas but also 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.

Rent dissipation theory thus provides a straightforward explanation of the derivative right. Note that the central concern is not that derivative works may be redundant with the original. 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 writing a *Harry Potter* sequel, but anyone would be able, subject only to trademark restrictions,[114] to sell pirated copies of that work. Such a rule would be not only unjust but also unwise, because derivative works are rarely redundant in the critical sense with the corresponding original works. A derivative work will rarely steal business from the earlier original work, 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.[115]

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[114] 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, 123 S. Ct. 2041 (2003) (holding that the Latham Act does not require copiers of an uncopyrighted work to credit the original authors of the work).

[115] 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*

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 might not be complete; moviegoers might prefer the authorized *Harry Potter* sequel or movie to unofficial imitators, so the original author would still be able to exploit the work through transformations to some extent.[116] But the competition among the unauthorized creators probably would at least dissipate any rents for unauthorized versions, plus a portion of the rent that the original author otherwise would enjoy from authorized derivatives. Once again, the concern here is not with redundancy in an informal sense, for derivative works will general bear more resemblance to an original than to one another. Rather, it is with redundancy in an economic sense. Even if a group of derivative works differ in dramatic ways, 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 internal 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.[117]

Even where the derivative right does lead to maximization of the rent, the provision of the derivative right 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. It is possible that this social loss even exceeds the benefit of minimizing rent dissipation, but Congress at least plausibly has struck the right balance. Allowing monopolization of genres

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leads to 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.

[116] *See supra* note 52 and accompanying text (noting that rent dissipation will not be complete where parties are not identically situated).

[117] *See infra* Part III.B (discussing the fair use test).

defined by ideas might create too much market power, but allowing monopolization of genres defined by expression seems less likely to do so. Not any one can make a Freddy Krueger film, but Freddy at least has to compete with Jason for ticket and video sales.[118] Even the most popular derivative works are generally priced no higher than other works,[119] but in a world in which all Italian cookbooks shared a publisher, considerably higher prices would result.

Does the derivative right provide the optimal copyright law? Certainly the derivative right leaves many forms of redundancy, including redundant development of uncopyrighted works.[120] Perhaps a copyright law single-mindedly devoted to stomping out redundancy would provide a mechanism for placing the derivative right to uncopyrighted works in private hands. This would be logistically complicated, however, and even if some form of auction could be used to revitalize expired derivative rights, at some point copyrighted expression becomes so foundational that the costs of forcing authors to avoid it might be unacceptably great. 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.[121] That rent dissipation concerns cohere with copyright doctrine, however, does not mean that copyright doctrine would be improved if rent dissipation concerns were considered explicitly in each case. The expense and uncertainty associated with such analyses might not be worth any benefits. Copyright law generally and the derivative right specifically are blunt instruments, but at least in an approximate way they reflect rent dissipation concerns.

### *B. Related Doctrines*

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

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

[119] All 870 pages of the most recent *Harry Potter* book can be yours in hardcover at the time of this writing for just $17.99. *See* http://www.amazon.com (search for "Harry Potter and the Order of the Phoenix") (last visited Aug. 5, 2003). 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* at more than that price not to buy because they believe they are being cheated.

[120] *See supra* text accompanying notes 107-108.

[121] Lawrence Lessig has argued for requiring de minimis copyright renewal fees to ensure that abandoned works are placed in the public domain. *See* http://eldred.cc/ea_faq.html (proposing the Eric Eldred Act); 4 WARREN'S WASH. INTERNET DAILY (June 25, 2003), *available at* 2003 WL 16117616 (noting Lessig's involvement).

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 compact disks or taping television shows,[122] 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,[123] 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, 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 reproduction.

Consider, for example, *Anderson v. Stallone.*[124] The plaintiff wrote a thirty-one page outline for a possible *Rocky IV*. Unfortunately, there was a *Rocky IV*,[125] and it was quite similar to the plaintiff's proposal, but the plaintiff received no compensation. 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 itself infringed Rocky Balboa and the other characters from the series.[126] Stallone won this fight.[127] More significant, the strategy reflected what had long been clear, that characters are potentially the subject of protection. Judge Learned Hand had recognized this in

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[122] Of course, it doesn't clearly prevent them from doing either of these things. *See infra* Part I.B.2.d.

[123] 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).

[124] 1989 WL 206431 (C.D. Cal. 1989).

[125] *Really don't see* ROCKY IV (United Artists 1985).

[126] Copyright cannot be obtained for any part of a work using preexisting material unlawfully. *See* 17 U.S.C. § 103(a) (2002) ("[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."

[127] 1989 WL 206431, *8. The critics concluded that *Rocky IV* was derivative. *See, e.g.*, 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 . . . .").

his famous opinion in *Nichols v. Universal Pictures Corp.*,[128] in which the principal allegation was that the plot infringed.[129] Judge Hand found no infringement, but he did conclude that both plots and characters could infringe, noting for the latter "that the less developed the characters, the less they can be copyrighted."[130]

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 should not United Artists' 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 that begs the question. Why does borrowing of characters and plots trouble some jurists, when other forms of borrowing and allusion do not?

Rent dissipation theory squarely applies: 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*,[131] 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[132] and because the right of publicity may similarly prevent rent dissipation.[133] In any event, copyright law can save us from unauthorized sequels to *The Lion*

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[128] 45 F.2d 119 (2d Cir. 1930).

[129] "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.

[130] *Id.* at 121.

[131] *See* Josh Grossberg, *Stallone Ready for "Rocky" Redux*, EONLINE, Dec. 12, 2002, *at* http://www.eonline.com/redirect;http://ad.doubleclick.net/adi/N2870.eo/B961809;sz=720x300;ord=10533?&seed=orbitz030101.

[132] *But cf.* Rod Easdown, AGE, Jan. 16, 2002, at 1, *available at* 2002 WL 6616628 (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 Century Challenge for Intellectual Property Law*, 8 HIGH TECH. L.J. 101 (1993) (considering the intellectual property consequences of reanimation).

[133] *See* Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97 (1994).

*King* or unauthorized James Bond movies starring a new actor as Bond,[134] even if trademark law somehow should turn out not to be up to the task. It can save us as well from unauthorized *Lion King* stuffed animals and 007 martini glasses. If free competition were allowed, additional studios would produce such derivative products until zero economic profit were expected, with marginal revenues equal to marginal cost. The property right ensures production of the number of adaptations that maximizes the difference between total revenues and total cost.

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* established the genre before Stallone's involvement. Copyright law will 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,[135] even though some copyrightable work must have been the first to use such a device. As I will discuss below, case law on parody provides another important limit.[136] 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 particular type of person.[137] A close case not involving copyright on characters is *Roulo v. Russ*

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

[135] Hoehling v. Universal Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980).

[136] *See infra* Part I.B.2.c.

[137] 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). The 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 may suggest 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, any unauthorized *Rocky* movie would infringe, but a two-minute peripheral scene involving Balboa would not.

*Berrie & Co., Inc.*[138] The case concerned the copyrightability of a series of greeting cards. 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,[139] but the phrases themselves were not copied. The court found copyrightability in the arrangement and found infringement as well. The reason this case seems troubling is that it might seem 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,[140] 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,[141] and so is the rent dissipation analysis.[142] On one hand, once one 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 that might make this case different from others exhibiting a similar pattern[143] is the burden on users having to learn multiple interfaces. It is unclear which way this cuts. While the burden is itself a form of redundancy and thus akin to rent dissipation, it also may limit the number of firms that

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[138] 886 F.2d 931 (7th Cir. 1989).

[139] 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.

[140] *See, e.g., id.* at 940 ("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.").

[141] *Compare* Lotus Development Corp. v. Borland Int'l, Inc., 49 F.3d 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, 124 F.3d 1366 (10th Cir. 1997) (rejecting *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). The *Mitel* court argued that even if the commands were a method of operation, the expression within them could still be copyrighted. 124 F.3d at 1372.

[142] 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. North Am. Philips Consumer Electronics Corp., 672 F.2d 607 (1982) (addressing whether a game similar to Pac Man was infringing).

[143] *See infra* notes 405–408 and accompanying text. In these cases, no copyright was found.

will choose to enter if a property right is found.[144] Given this complicated balancing, it is perhaps unsurprising that this remains a controversial area of copyright law.[145]

The graphical user interface problem provides an example of a problem for which the reproduction right may be broader than the derivative right. Although it might be plausible to argue that Microsoft Excel's user interface infringes Lotus 1-2-3's, it seems less plausible to view Excel as a derivative work of 1-2-3. In many of the other examples discussed in this section, the derivative and reproduction right are overlapping. In the *Stallone* case, for example, the unauthorized script not only infringed the copyright in Rocky Balboa and others, but also infringed the derivative right to the work as a whole.[146] While rent dissipation theory can provide explanations of both the derivative right and the broad scope of what in a work can be copyrighted, it cannot offer an explanation of the need for redundant protections against redundancy. I will return to this point below, by explaining how the derivative right and the reproduction right might be separated to serve distinct functions.[147]

### *C. The Copyright Term*

A corollary to rent dissipation theory's explanation of the derivative right and of related issues of copyrightable subject matter is that rent dissipation theory can help provide an explanation for the long copyright term.[148] The Copyright Term Extension Act of 1998 granted a 20-year term extension both for existing and future works,[149] providing a term of life of the author plus 70 years, or, in the case of works made for hire, a fixed term of the lesser of 95 years

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[144] A reverse balance exists in assessing the social welfare consequences of network externalities. *See infra* Part III.A.2.c. 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.

[145] For recent assessments of protection for software generally, see Bruce Abramson, *Promoting Innovation in the Software Industry: A First Principles Approach to Intellectual Property Reform*, 8 B.U. J. SCI. & TECH. L. 75, 123 & n.185 (2002); and Robert W. Gomulkiewicz, *Legal Protection for Software: Still a Work in Progress*, 8 TEX. WESLEYAN L. REV. 445, 448 (2002).

[146] Anderson v. Stallone, 1989 WL 206431, *8 (C.D. Cal. 1989).

[147] *See infra* Part II.D.2.

[148] A separate puzzle concerning the copyright term is that it is ordinarily based on the life of the author. 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.

[149] Pub. L. No. 105-298, 112 Stat. 2827.

from the year of first publication or 120 years from creation.[150] The Supreme Court upheld the Act in *Eldred v. Ashcroft*,[151] though even if the Court had struck it down, the copyright term would still be quite long, both by historical standards[152] and in comparison to the patent term.[153]

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% increase in present value for a new work protected by copyright,[154] 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.[155] The small increase in present value for new works, as the economists' belief 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.[156] The ratio of deadweight loss to consumer surplus may be roughly comparable for both old and new works. But other costs, particularly the "tracing costs" of identifying copyright owners and seeking permission to reproduce works,[157] will become considerably higher over time.

It is thus the increase in certain costs, rather than the relatively small benefits to current producers, that makes an incentives justification of a long copyright term vulnerable. It is, however, even more straightforward to conclude that the retroactive term extension cannot be

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[150] 17 U.S.C. § 302(a), (c).

[151] 537 U.S. 186 (2003).

[152] 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).

[153] *See* 35 U.S.C. § 154 (2000) (providing for a term of 20 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).

[154] Brief of George A. Akerlof, Kenneth J. Arrow, Timothy F. Bresnahan, James M. Buchanan, Ronald H. Coase, Linda R. Cohen, Milton Friedman, Jerry R. Green, Robert W. Hahn, Thomas W. Hazlett, C. Scott Hemphill, Robert E. Litan, Roger G. Noll, Richard Schmalensee, Steven Shavell, Hal R. Varian, and Richard J. Zeckhauser as Amici Curiae in Support of Petitioners at 6, Eldred v. Ashcroft (No. 01-618).

[155] 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 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.

[156] *Id.* 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* Landes & Posner, *supra* note 360, at 9 n.20.

[157] Landes & Posner, *supra* note 85, at 361-62.

supported by an incentives argument. A retroactive 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.[158] Second, the extension will reduce innovation by restricting the production of new creative works using existing materials.[159] Third, the property right will lead to costly bargaining and contracting.[160]

The economists' conclusion that the first and third arguments imply costs seem accurate, but the second argument is more problematic.[161] The economists seem to assume that production of new works using existing materials necessarily will be socially beneficial,[162] but they do not even acknowledge the industrial organization literature that points out the possibility of excessive entry.[163] 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. 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 term extension act 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.[164] The assumption that Mickey Mouse's entry into the

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[158] Landes & Posner, *supra* note 360, at 10-11.

[159] *Id.* at 12-13 ("[T]he 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.").

[160] *Id.* at 13-14.

[161] 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 360, at 15-22. 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 (2002).

[162] The assumption is also clear elsewhere in the brief. *See, e.g.*, *id.* 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.").

[163] *See supra* Part I.A.

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

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.[165] The more significant effect would be to allow, subject to trademark limitations,[166] 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,[167] but encouraging such uses seems more relevant to fair use analysis.

Rent dissipation theory, however, suggests that the benefits to even devoted fans of Mickey of increased production are likely to be relatively small.[168] 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. At the same time, these unauthorized derivative works would compete with the authorized Disney derivative works, and the rent that Disney earns would be dissipated as well. 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 thus at least what animated Disney and thus 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. It is possible that the deadweight costs of monopoly pricing for existing works and the transactions costs of negotiating licenses make the copyright term extension inefficient, and rent dissipation theory cannot prove that increases to consumer welfare from increased production of derivative

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[165] 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, 309-10 (2002) ("Is there a huge market anxiously awaiting the royalty-free distribution of a 1928 black-and-white cartoon over the Internet?").

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

[167] *But see* Walt Disney Productions v. Air Pirates, 581 F.2d 751 (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.

[168] It is possible that entry could produce price competition, allowing Mickey fans to obtain products at lower prices and reducing 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, and comic book producers compete more on quality than on price.

works will be less than the harm borne by producers. More generally, rent dissipation theory seems unlikely by itself to serve as a general purpose justification of monopolies. Allowing competition among utilities surely dissipates the rent that a single utility otherwise could enjoy, and the fixed costs associated with redundant plants has figured in some justifications of governmental regulation of utilities.[169] But there is at least a plausible empirical case that consumers benefit from electricity competition,[170] and few favor unregulated monopolies over the alternatives of regulation and competition. The rent dissipation consideration is strongest where there are high fixed costs, where products face at least indirect competition, and where entry seems likely to have only modest price effects. This seems plausible in the case of derivative works, and rent dissipation theory provides a plausible defense of a long copyright term, [171] but I mean only to suggest that rent dissipation theory provides a better explanation, not that it provides a convincing one.[172]

Rent dissipation can provide at best only a defense of the lengthy protection that the derivative right enjoys. The rent dissipation cannot explain why there is also a long copyright term for reproduction. 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

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[169] John Duffy has recently noted parallels between the utility regulation literature and a more recent literature in patent law. *See* John Duffy, *The Marginal Cost Controversy in Intellectual Property*, U. CHI. L. REV. (forthcoming 2004).

[170] For an analysis of some of the difficulties inherent in electricity deregulation, see Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435 (2002).

[171] 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 WL 25245660 (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 360, at 10-11. The success of the term extension movement, however, might encourage other rent seekers.

[172] It seems particularly problematic that the term extension covers even works that are no longer being exploited by their owners, for use of such works is not likely to be rent dissipating. Such works individually 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* Landes & Posner, *supra* note 360. 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 26. I criticize the argument that they raise in favor of a long copyright term *infra* Part III.A.2.b.

tracing costs become overwhelming.[173] All of this, however, is on the assumption that it would be impossible to imagine a copyright law that provides a different tem 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. Development of an apparatus for making such a distinction is useful even if Congress continues to provide a single term for all rights, and we will now turn to that project.

*D. Redefining the Derivative Right*

We have already seen that the reproduction and derivative rights are closely related, often both applying on the same facts.[174] As Jed Rubenfeld has 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)."[175] 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. Although courts sometimes will return to the statutory definitions of the exclusive rights,[176] substantial similarity has emerged as an element of the infringement inquiry for alleged violations of both the reproduction right and the derivative right.[177] Except in cases in which reproduction is authorized,[178] 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.

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[173] 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 12 (manuscript at 67-69).

[174] *See supra* Part II.B.

[175] Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 50 (2002). Rubenfeld adds, "Indeed, 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).

[176] *See* 17 U.S.C. § 106.

[177] *See, e.g.*, Well-Made Toy Mfg. Corp. v. Goffa Intern. Corp, --- F.3d --- (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).

[178] *See infra* notes 220-227 and accompanying text.

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. Presumably, if Congress did ever create copyright terms of different lengths for the two rights, the courts would try harder to determine when each was implicated. There may be, however, 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. Once rent dissipation theory provides an alternative basis, it may become possible to distinguish these rights. 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 be of use in hard cases.

### *1. Rubenfeld's Approach*

I am not the only commentator to suggest that copyright law could distinguish more clearly between the reproduction and derivative rights. Professor Rubenfeld has made a similar proposal, although his motive could not be more different. My argument above suggests that copyright's protection of derivative rights might be justified even if the length of its protection of the reproduction right is not. 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 force a confrontation between the partial defense of the derivative right that this Article has developed so far and the attacks on the derivative right from Rubenfeld and others.[179] Second, it will allow for an examination of Rubenfeld's doctrinal proposal as a prelude to my own suggested formulation of a test for derivative works.

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[180] cannot be explained by "giant-sized First Amendment theories"[181] based on some theory

[179] For another thoughtful critique of the derivative right, see Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOKLYN L. REV. 1213 (1997).

[180] *See generally* National 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 and 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).

[181] Rubenfeld, *supra* note 175, at 30.

of either democracy or expressive autonomy. Art has too small of an influence on the formation of political opinion for democratic theories to explain it,[182] and an expressive autonomy view fails to account for the significance of the right to view art.[183] Rubenfeld's alternative is to propose that the First Amendment protects a "freedom of imagination,"[184] which includes "the freedom to explore the world not present, creatively and communicatively."[185] 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."[186]

A potential criticism of Rubenfeld is that his endorsement of the freedom of imagination is subject to the same criticism that he levied at expressive autonomy theories. Perhaps anticipating this, Rubenfeld insists that the communication of imagination is central to the freedom of imagination, 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 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."[187] A "creative murder" thus cannot escape prosecution, because "to prosecute him is not to punish him for what he dared to imagine."[188]

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[182] Alexander Meiklejohn argued that literature and art help voters acquire "knowledge," "intelligence," and "sensitivity to human values," all of which contribute to decisions at the ballot box. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256-57. Rubenfeld counters with an analogy to the First Amendment's protection of religion: "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." Rubenfeld, *supra* note 175, at 33.

[183] Rubenfeld recognizes that "[e]xpression requires an expressee as well as an expresser," Rubenfeld, *supra* note 175, at 34, 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," *id.*

[184] *Id.* at 37.

[185] *Id.* at 38.

[186] *Id.* at 39.

[187] *Id.* at 41.

[188] *Id.* at 42.

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 reproduction right," Rubenfeld acknowledges.[189] "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."[190] This threshold, however, is so low that courts either would have to inquire into motive[191] 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.[192] "The required quantum of creativity is not large," Rubenfeld notes, adding that "any 'substantial' or 'distinguishable variation' from the preexisting work will be sufficient."[193]

This test cannot be squared with Rubenfeld's concern about "trivial or obvious modifications" if triviality is to be measured against the work as a whole. Consider, for example, a version of *Gone with the Wind* in which a paragraph or a chapter was replaced. 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.[194] When Rubenfeld says "trivial," he apparently means it, presumably counting even very minor substantive changes as enough to entitle a work to derivative status. This is an absolutist position, an insistence that copyright law cannot block

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[189] *Id.* at 54.

[190] *Id.*

[191] 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).

[192] This standard is usually viewed as quite low. *See, e.g.*, Alfred Bell & Co. v. Catalda Fine Arts, Inc., 74 F. Supp. 973, 976-77 (S.D.N.Y. 1974) (finding a derivative works copyright in mezzotint engravings of works by old masters, because of the skill required for making the transformation). Some cases, however, apply a stricter standard. *See, e.g.*, Batlin & Son, Inc., v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (refusing to find an independent copyright in a transformation of an Uncle Sam bank from one medium to another).

[193] Rubenfeld, *supra* note 175, at 55 (citing Matthew Bender & Co. v. W. Publ'g Co., 158 F.3d 674, 680 (2d Cir. 1998); Norma Ribbon & Trimming, Inc. v. Little, 51 F.3d 45, 47 (5th Cir. 1995)).

[194] 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 appears to envision incorporation of expression into transformative works.

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. Perhaps this is not the best line. Admittedly, it is notoriously imprecise.[195] But creating a more precise test, or a narrower but still not absolutist test, at least 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*,[196] 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.[197]

In the end, I cannot say whether the constitutional concern with the freedom of imagination is so weighty to render the existing regime inadequate. How to weigh the freedom of imagination with the Constitution's encouragement of copyright generally depends on historical, value-laden and empirical concerns. Rubenfeld suggests that economic factors should necessarily yield to constitutional concern. Although economic interests and speech interests often may be aligned, Rubenfeld observes that the First Amendment would and should strike down a ban on

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[195] As Judge Hand noted in developing the abstractions test for distinguishing ideas from expression, "Nobody 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).

[196] *See* SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1384 (N.D. Ga.), *vacated*, 252 F.3d 1165 (11th Cir.) (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 175, at 54.

[197] *See infra* Part IV.C. 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 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 175, 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. *See infra* text accompanying note 320. But if that is so, his criticism should be directed at fair use, not at the derivative right.

speech even if that ban were thought likely to maximize the amount of speech produced overall.[198] In contrast to Rubenfeld's accurate account of the general law-and-economics approach to copyright,[199] this Article's economic approach suggests that the goal of maximizing social welfare is not equivalent to the goal of maximizing speech. This qualification only strengthens Rubenfeld's point, though. Suppose that product differentiation theory implied that welfare, construed in a narrowly economic sense, would be maximized by a governmentally imposed limit on the number of newspapers. This economic conclusion seems unlikely,[200] but even if it were an uncontroversial empirical observation, we presumably would view such a governmental effort as a paridigmatic First Amendment violation.

Absolutism, however, is not the prevailing approach in First Amendment jurisprudence, 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."[201] Though Rubenfeld does not explain just how profits would be allocated,[202] 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."[203] Such an author, after all, could choose to "offer[] the work for free."[204] Rubenfeld purports to offer no policy defense of the profit-

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[198] 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 . . . law, an argument so good it brings debate to an end, leaving its audience with little or nothing to say?

Rubenfeld, *supra* note 175, at 22-23.

[199] *See id.* at 21 ("Copyright does not violate the First Amendment, the economic argument goes, because (and to the extent that) it provides incentives that maximize overall production of valuable speech. . . [E]x post restrictions are necessary to get the ex ante incentives right, and the result is an overall net First Amendment gain.").

[200] In *An Industrial Organization Approach to Copyright*, I argue that if economics did suggest that there were too many works, First Amendment scholarship would not offer a definitive basis for ignoring this conclusion. *See* Abramowicz, *supra* note 12 (manuscript at 49-58). It is not clear that First Amendment values are best advanced by copyright doctrine that maximizes the number of works either, in part because ensuring access to existing copyrighted works also may be important for free speech. My point, however, was that changes to copyright law such as allowance of more copying could not be rejected immediately on First Amendment grounds, not that more active government intervention limiting the number of works would be acceptable.

[201] Rubenfeld, *supra* note 175, at 54.

[202] As Rubenfeld recognizes, "[a]pportioning 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.

[203] *Id.* at 56.

[204] *Id.* at 57. Allowing authors to exercise their imagination but not commercialize the results (in the sense of profiting

allocation scheme,[205] though presumably he presents the scheme as a concession to those who worry that elimination of the derivative right would allow some unfairly or inefficiently to profit from the works of others.

The rent dissipation approach suggests that this profit allocation approach would have little effect. If anyone could make a derivative work, then entry would be expected to dissipate away economic profit in any event, so on average, unless there are other factors minimizing the dissipation of rents from unauthorized works, each author of a derivative work would earn zero economic profit. Profit allocations from creators of derivative works who average zero economic profit would not be high. Of course, zero economic profit is just a shorthand for a normal rate of return, so depending on the accounting scheme employed, the original author might receive something, especially since the author would enjoy a portion of the upside benefit of derivative works without assuming any of the risk that a derivative work might suffer a loss. Moreover, the original author might earn some rent by virtue of consumers' preference for that author over others, assuming that trademark law allows the author to establish some reputation. But such royalties would generally be a fraction of the current economic value of the derivative right, and Rubenfeld's approach thus cannot satisfy an incentive theorist. Nor can it alleviate rent dissipation concerns, which identify the right of exclusion as central to the derivative right. For those concerns to be vindicated, the derivative right demands clarification but not elimination.

### *2. An Alternative Approach*

Rent dissipation theory provides for straightforward, though not mechanical, definitions of the reproduction and derivative rights. Recall that while the central concern of the

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themselves 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. The approach that I suggest below, *see infra* Part II.D.2, provides one means of doing this and would not be inconsistent with a rule allowing noncommercial exploitation of unauthorized derivative works.

[205] "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. . . . Copyrights acts as prior restraints." *Id.* at 58-59. Rubenfeld may well be correct that injunctions are inappropriate in copyright cases. *See* Mark A. Lemley & Eugene Volokh, *Free Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (arguing that the existence of intellectual property rights should not exempt copyright law from First Amendment scrutiny). To conclude that an author can receive no more than damages or unjust enrichment remedies, however, makes the common mistake of equating the distinction between property and liability rules with the distinction between injunctive and damage remedies. In theory, a property rule can be enforced with high monetary damages rather than injunctions. *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).

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

Let us begin with a simple application of the framework. 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. But it is quite plausible to imagine that a sequel might interfere with sales of authorized sequels, especially if the unauthorized sequel were to beat an authorized one to market, as customers grow tired of reading Harry Potter sequels. 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" of a work as a derivative work,[207] 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."[208] My

[206] *See supra* text accompanying note 115
[207] 17 U.S.C. § 101 (2002).
[208] *Id.*

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, 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 appear to fit within this economic approach. Moreover, the definition of reproduction does important work, because the unauthorized sequels and movies would probably count as unauthorized reproductions of characters and possibly settings under current law.[209] The economic test that I have offered is more consistent with the statutory text in this regard. The reproduction right is a right "to reproduce the copyrighted work in copies or phonorecords,"[210] and it is a stretch to consider the individual characters rather than the *Harry Potter* book as a whole to count as a "work."[211]

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. This 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. That the black-and-white version might draw only a few customers is not relevant, as 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, however, makes it possible to identify such attempts without any direct inquiry into

[209] *See supra* Part II.B.

[210] 17 U.S.C. § 106(1).

[211] 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 124-130 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," 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.

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 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. 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. But that is why the definition above considers only hypothetical transformations that plausibly might have a significant effect on the original author's profits. 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.

The decolorization example may appear to present a problem for this approach. Colorized versions of movies are generally 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, while decolorization seems, at least to me, far less likely to be commercially viable. The result is that unauthorized colorized versions plausibly might compete with authorized derivative adaptations, while unauthorized decolorized versions will not. 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."[212] If colorization is a recasting, transformation, or adaptation, shouldn't decolorization count as such as well?



[212] 17 U.S.C. § 101.

What might appear to make for an easy answer would be to reply that decolorization requires less originality or skill than colorization. Originality of the modification or modifications made to a work might appear to be all that is required under conventional glosses on the definition of "derivative work,"[213] and Rubenfeld endorses this definition as well.[214] 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. 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). 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?

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 identify originality in modifications alone. 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.'"[215] The words "represent . . . original work of authorship" are important indications of what Congress implicitly envisioned.[216] The modifications to a work must themselves be original, for a nonoriginal modification can never create something original. But that is not

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[213] *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).

[214] *See supra* note 192 and accompanying text.

[215] *Id.*

[216] The approach of examining the modifications themselves for originality might appear to find support in the words "as a whole." This phrase means that all of the modifications should be read together, not that the modifications should be read in isolation. Indeed, the phrase advances the interpretation here. The phrase "as a whole" makes clear that the effect of modifications must be examined as a whole on the original work. If the phrase meant only that all modifications must be considered together, then the phrase would be superfluous. *See generally* Platt v. Union Pacific R. Co., 99 U.S. 48 (1879) (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." Had the definition simply read "which represent original authorship," then the phrase "as a whole" would clarify, but "modifications which represent an original work of authorship" is already 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.

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. That something cannot just be an accumulation of incomprehensible expression, but itself must be an "original work of authorship." 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."[217] This sentence too emphasizes the process of transformation. None of the examples envisions a simple injection of expression, and although two of the examples—"abridgment" and "condensation"—envision a removal of expression, those words are themselves different from "deletion" and plausibly can be read to exclude, for example, a version of a novel with a word removed. A holistic 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 appeared to imagine both that the transformation would involve some degree of originality and that the result would be more than a merely altered work.

The most powerful argument, however, for considering the effects of modifications rather than the modifications alone is based on logical 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



[217] *Id.*

work. Copyright law may protect a haiku as completely as it protects an encyclopedia.[218] 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 might violate the reproduction right, but it should not be seen as violating 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,[219] 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.*,[220] and *Lee v. A.R.T. Co.*[221] In both cases, the defendant A.R.T. Co. was in the business of cutting up art reproductions, mounting the reproductions individually onto ceramic tiles, and selling the resulting tile art. In *Mirage*, the reproductions came from a commemorative book collecting the work of a single artist,[222] while in *Lee*, the reproductions appeared individually on notecards and lithographs.[223] The Ninth Circuit found a violation of the derivative right in

[218] 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"). Such pronouncements may reflect an intuition similar to that animating the merger doctrine. *See infra* Part IV.C.

[219] *See infra* notes 254–256 and accompanying text.

[220] 856 F.2d 1341 (9th Cir. 1988).

[221] 125 F.3d 580 (7th Cir. 1997).

[222] *Mirage*, 856 F.2d at 1342.

[223] *Lee*, 125 F.3d at 580.

*Mirage*,[224] but the Seventh Circuit did not in *Lee*.[225] Although Judge Easterbrook in the Seventh Circuit explicitly declined to follow the Ninth Circuit, the analysis in this paper provides a plausible, though not definitive, basis for distinguishing 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.[226] 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. 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. 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, 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.[227] While in *Mirage* the plaintiffs appear to have been genuinely concerned with business stealing from authorized adaptations, in *Lee* the plaintiffs appear to be attempting to use the derivative right only as a backstop to the reproduction right. 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*.

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[224] *Mirage*, 856 F.2d at 1344.

[225] *Lee*, 125 F.3d at 583.

[226] 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*.

[227] Judge Easterbrook explicitly indicated concern that Lee's theory seemed to imply that it would make criminal art purchasers who framed prints that they had bought. *Lee*, 125 F.3d at 583 ("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.").

This analysis helps identify what should be the focus of the current controversy regarding CleanFlicks,[228] a company that purchases and then alters VHS and DVD movies to eliminate content that some consumers find offensive, such as foul language, nudity, and violence, and rents the videos to consumers.[229] Because the company purchases the videos, there is no violation of the reproduction right. 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 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.[230] Content producers feared this feature even more than they feared the remote control and the fast-forward button. 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. The content producers' real concern, of course, was that consumers would not pay the time price that they levy for access to their content, but they did not focus on alleged violation of their reproduction right.[231] The content producers claimed

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[228] *See* http://www.cleanflicks.com (last visited Aug. 10, 2003).

[229] For a discussion of the litigation, 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, *Some Video Customers Want Tamer Films, and Entrepreneurs Rush to Comply*, Sept. 19, 2002, at E1.

[230] ReplayTV's manufacturer eventually resolved the lawsuit by removing the ability to skip commercials automatically. *See* Eric A. Taub, *New Owners Dropped Features That Riled Hollywood*, N.Y. TIMES, July 21, 2003, at C3. Owners of ReplayTV units, however, have filed a declaratory judgment suit against the plaintiffs in the original action. *See* Newmark v. Turner Broadcasting Network, 226 F. Supp. 2d 1215 (C.D. Cal. 2002) (discussing the lawsuit, which also involved other copyright issues, and resolving threshold motions).

[231] 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*,

that the ReplayTV created an unauthorized derivative work, producing a television show minus the ads. Yet there could be little concern that this derivative work would interfere with any content producers might develop, except possibly as to content also available ad-free at the local video store. Thus, the ReplayTV would seem not to create an unauthorized derivative work on this Article's analysis, though that conclusion would change if content producers began offering ad-free versions of programming on alternative premium cable television stations.

As a final example of the scope of the derivative right, consider the permissibility of unauthorized appropriation art,[232] which involves "incorporation of an existing image into a context different from the original in order to alter its meaning and to comment on originality."[233] A recent case, for example, considered whether a sculpture of a photograph of puppies infringed the photograph.[234] 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[235]—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. We will see some of the same tensions recur in the context of parody doctrine,[236] but this Article's conceptualization of the derivative right might make it unnecessary to consider whether the fair use exception even applies.

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 transactions costs for allowing such works without permission, and perhaps

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464 U.S. 417 (1984), which held that "time shifting" on a Betamax was fair use.

[232] For a discussion of copyright issues associated with appropriation art, see WILLIAM M. LANDES, COPYRIGHT, BORROWED IMAGES AND APPROPRIATION ART 15 (Chicago John M. Olin Law & Economics Working Paper No. 113, 2001), *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_101-25/113.WML.Copyright.pdf.

[233] http://www.artsnashville.org/registry/stylendx/ appropriation_art0.html (last visited Aug. 10, 2003).

[234] *See, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

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

[236] *See infra* Part III.C.

an application of fair use infused with transactions costs considerations might save such an art form as well.[237] 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,"[238] 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.

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,[239] though they also could 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 independent copyright.[240] 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,[241] others have emphasized that merely trivial variations will not be enough.[242]

The article 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

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[237] *See infra* notes 270–271 and accompanying text (discussing the transactions cost approach to fair use doctrine).

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

[239] L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491-92 (2d Cir.1976) (en banc).

[240] *See, e.g.*, Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980).

[241] Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102-03 (2d Cir. 1951); *see also* Dam Things from Denmark v. Russ Berrie & Co., 290 F.3d 548, 565 & n.25 (3d Cir. 2002); Donald v. Zack Meyer's T.V. Sales & Serv., 426 F.2d 1027, 1029 (5th Cir. 1970).

[242] *See* Boyd, *supra* note 213, at 353 & nn.193-94 (summarizing cases).

would not significantly compete with the original and yet sufficiently similar that it might compete with authorized transformations of the original.[243] 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*,[244] 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*. Judge Posner concluded that "a derivative work must be substantially different from the underlying work to be copyrightable."[245] 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.[246] 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

[243] 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.

[244] 698 F.2d 300 (7th Cir. 1983).

[245] *Id.* at 305.

[246] 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 211. It seems plausible that collector's 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. That the company might choose not to market certain frames is of no relevance to assessment of the reproduction right, even though the implausibility of hypothetical derivative markets is of relevance to the derivative right, for the same reason that a copyright owner in general need not market a work to claim an infringement of the reproduction right.

plate,[247] then the new plate might well infringe the original plate, if the substantial similarity requirement is met.[248]

## III. USE OF COPYRIGHTED WORKS

### *A. Copyright's Exclusive Rights*

Copyright law provides owners a range of exclusive rights in their works, including the right to reproduce the work,[249] to prepare derivative works,[250] to distribute copies,[251] to perform the work publicly,[252] and to display the work publicly.[253] We have already seen that rent dissipation provides a strong account of the derivative right. The rent dissipation perspective can provide an explanation of the other rights as well. Placing aside digital duplication, reproduction and marketing copies of an existing work entails considerable fixed costs; by placing control of reproduction in a single property owner, these fixed costs are reproduced. Simlarly, there may be large fixed costs associated with staging a play or creating an artistic exhibition, and the performance and display rights provide corresponding protections of rent dissipation. Of course, rent dissipation theory adds little value here, as these rights are consistent with a standard incentive theory of copyright law. Without the reproduction right, in particular, the incentive to produce copyrighted works would be markedly reduced. It is at least reassuring, however, that rent dissipation theory coheres with and does not contradict the central rights that copyright law provides.

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[247] 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.").

[248] 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 thus be necessary to consider the type of evidentiary question that he had sought to avoid. What he does 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 ignore this point only because of the unusual posture of *Gracen* itself, where Gracen's purported derivative work was an authorized licensee of the original. 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. 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.

[249] 17 U.S.C. § 106(1) (2000).

[250] *Id.* § 106(2).

[251] *Id.* § 106(3).

[252] *Id.* § 106(4). There is a separate right to perform a sound recording publicly "by means of a digital audio transmission." *Id.* § 106(6).

[253] *Id.* § 106(5).

What is perhaps more impressive than the breadth of copyright protection is the number of exceptions, and rent dissipation theory can help explain the limits on the exclusive rights. A significant exception to the distribution right is the first sale doctrine,[254] which allows the purchaser of a copy or phonorecord of a copyrighted work to sell that work in turn.[255] Sales of used books cut into the profits of the copyright owner, thus adversely affecting incentives to produce copyrighted works (unless the right of resale sufficiently increases the sales price of new books to make up for resale competition).[256] There are, however, no fixed costs associated with producing copies that already exist, so rent dissipation theory accurately predicts that copyright law should be less concerned with this form of unauthorized competition than with others. Indeed a regime that did not allow resale likely would result in redundant production of new works, so the first sale doctrine succeeds in reducing rent dissipation by the copyright owner. Not surprisingly, perhaps the most difficult cases under the first sale doctrine are those in which it is in tension with the broad derivative right. Recall the cases in which courts have reached different conclusions where legal purchasers of books have cut out individual pictures and mounted them, competing with the original copyright owner in a different market.[257] In such a case, the production of the new work does involve the expenditure of fixed costs, and indeed such fixed costs may be higher than those undertaken by the initial copyright owner.

Rent dissipation theory can also help explain what would otherwise seem to be anomalies. Consider the idiosyncratic treatment of sound recordings. The owner of a copyright in a sound recording does not enjoy an exclusive performance right.[258] Moreover, the reproduction right is limited to direct duplication of "the actual sounds fixed in the recording."[259] If Yo Yo Ma performs the uncopyrighted Bach Cello Suites and sells a compact disk of the performance, I am

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[254] The distribution right is often seen as simply reinforcing the reproduction right. *See, e.g.*, Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1280 & n.124 (2001). If this is correct, then the distribution right also combats rent dissipation. Given the first sale doctrine, it is not easy to conjure up scenarios in which the distribution right would be violated in the absence of a violation of the reproduction right.

[255] 17 U.S.C. § 109(a).

[256] *See, e.g.*, Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1248 (2001) ("[T]he ability to sell a copy of a book to another would appear to reduce the incentives to create works."). Liu suggests that the bundle of copyright rights "are determined in part by certain conventions and understandings that we commonly hold about the ownership of physical property," with the first sale doctrine thus reflecting the intuition that the owner of a book should have a right to dispose of it. *Id.*

[257] *See supra* text accompanying notes 220-227.

[258] 17 U.S.C. § 114(a).

[259] *Id.* § 114(b).

free to play the compact disk publicly,[260] and if I had the talent, I also would be free to record my own version of the Bach Cello Suites imitating Ma's interpretive choices.[261] By contrast, if I were to play the movie *Dangerous Liaisons* publicly or to make a new version of *Les Liaisons Dangereuses* that copied the interpretive choices of *Dangerous Liaisons*, I would be infringing the movie's copyright.[262] The statutory scheme seems to find one type of redundancy—multiple performers of the same song, sometimes imitating one another—to be less of a concern than similar redundancies in other media. Presumably this is so because music fans tend to derive more pleasure from hearing covers of a song by different performers than, say, readers would derive from reading the same plot told in a number of different writing styles.[263] Product space in effect does not become as crowded by such adaptations in music as in other areas, because the adaptations are less likely to substitute for one another and for the original. The recognition that near redundancy could be less wasteful in one medium than in others allows rent dissipation to explain a phenomenon that alternative theories of copyright, ignoring the possibility that there could ever be a difference in social value based on the distinctiveness of the work, cannot.

Rent dissipation may explain not only the exclusive rights of copyright and exceptions to them, but also may contribute to an explanation for the absence of other imaginable exclusive rights. While a more robust copyright regime presumably would lead to an increase in the number of works produced, the addition of those works to the pool of works might add little if any social value. Consider, for example, the right of libraries, public and private, to lend copyrighted works. Some critics have urged that the copyright owner should hold an exclusive public lending right,[264] and it is easy to see why publishers might favor this. Some who borrow books presumably would have purchased the works if they could not have borrowed them, and

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[260] The underlying musical work in this example is uncopyrighted. If it were copyrighted, then I would need to obtain permission from the owner of the copyright in the underlying musical work, but I also would be able to obtain a compulsory license in most cases. *See* 17 U.S.C. § 114-115.

[261] *But see* Kent Milunovich, *The Past, Present, and Future of Copyright Protection of Soundalike Recordings*, 81 J. PAT. & TRADEMARK OFF. SOC'Y 517 (1999) (arguing that soundalike recordings may infringe copyrights).

[262] *Dangerous Liaisons* would have to differ sufficiently from *Les Liaisons Dangereuses* to be itself entitled to copyright. *See generally* Gracen v. Bradford Exch., 698 F.2d 300 (7th Cir. 1983) (discussing the originality requirement for copyright in derivative works).

[263] A student commentator has criticized compulsory licenses for musical works, arguing that cover artists may unduly change the nature of the work. *See* Theresa M. Bevilacqua, Note, *Time to Say Good-Bye to Madonna's American Pie: Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285 (2001). This Article's analysis, by contrast, suggests that such changes, and more broadly the pleasure that consumers take in listening to the same work expressed in different styles, help explain the compulsory license.

[264] *See, e.g.*, PUBLIC LENDING RIGHT: A MATTER OF JUSTICE (R. Findlater ed., 1971). *But see* Jennifer M. Schneck, Note, *Closing the Book on the Public Lending Right*, 63 N.Y.U. L. REV. 878 (1988) (arguing against enactment of a public lending right).

libraries thus may reduce publishers' profits.[265] The public lending right likely cannot be justified by incentive factors alone. Presumably, Congress, prodded by lobbying from libraries,[266] concluded that the value to consumers from being able to borrow books from libraries was worth any cost.

The standard economic approach accordingly might emphasize the deadweight loss that would exist if copyright owners had an exclusive public lending right. A public lending right would increase the cost of borrowing, and high prices might prevent access for some who would have obtained some positive value from a work. The standard economic analysis, however, has trouble explaining why this deadweight loss should be sufficient to justify limiting this potential right of the copyright owner, when it is not sufficient to justify other rights of the copyright holder. Perhaps the most appealing explanation is that the public lending right is of lesser economic significance than, for example, the reproduction right. But a comparison of magnitudes is not strictly relevant under a cost-benefit analysis, because the deadweight loss associated with a public lending right is likely to be smaller than that associated with the reproduction right as well. Copyright seems puzzlingly more willing to provide copyright owners rights when those rights will have dramatic effects on incentives to produce works, even if the costs of those rights are dramatically higher too.

Rent dissipation theory, however, helps crystallize an intuition about why copyright should grant the big rights but give consumers a break on the little ones: Marginal works, those that are on the borderline of being produced or not produced, are of less economic importance than inframarginal works that will be produced under a wide range of copyright regimes. An economic methodology that considers production of new works always to be a benefit will count even marginal works, because they benefit consumers, as advancing social welfare (though perhaps not as beneficial on average as the most profitable works). Rent dissipation theory, however, recognizes that the more works that exist, the more the marginal work is likely to be similar to existing works, and thus the lower the value of the marginal work. Thus, once copyright law has already incentivized production of a large number of works with a set of

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[265] Libraries, however, sometimes must pay higher prices than private parties for academic journals. *See* Owen R. Phillips & Lori J. Phillips, *The Market for Academic Journals*, 34 APPLIED ECONOMICS 1 (Jan. 10, 2002), *available at* 2002 WL 13808678.

[266] The American Library Association has been active in supporting exceptions to copyright. *See, e.g.*, http://www.ala.org/washoff/copyright.html (last visited Dec. 16, 2002) (describing the ALA's copyright agenda).

exclusive rights to copyright holders, additional rights that might result in the production of a few more works are less attractive. This is so even if the ratio of works incentivized to increased deadweight loss is the same as for the more comprehensive rights.

This argument from rent dissipation theory, unlike some of the previous applications that honed in on one particular nuance of copyright law, is admittedly more of a complement to existing economic theories recognizing tradeoffs in copyright policy generally than a substitute for those theories. By conceptualizing an entire market for copyrighted works (such as the market for music) as offering a rent that additional entrants might dissipate, rent dissipation theory suggests that the marginal work might be of little or even negative social value, an intuition that I will develop more formally through discussion of the product differentiation literature.[267] A policy that would bring about a relatively small decrease in the number of copyrighted works, along with some benefit, thus becomes far more attractive once rent dissipation is considered. The traditional economic approach to copyright suggests that an exclusive public lending right would have a benefit (incentivizing new works) and a cost (increased deadweight loss associated with those who cannot afford to purchase the works). Rent dissipation theory indicates that the benefit is smaller than it otherwise might appear, or perhaps even a cost.[268] It would thus predict that copyright law would allow for broad use of copyrighted works, even where such use might reduce the total number of works produced. This is not a bold prediction, but we will see that rent dissipation theory can help explain the contours of the most important limitation on copyright, fair use.

### *B. The Fair Use Test*

The fair use defense excuses what would otherwise be infringement. The Copyright Act provides a nonexclusive four factor test to determine whether or not a use is fair.[269] Like most

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[267] *See infra* Part II.

[268] If lending libraries had a large effect on the market for a work, the benefit of the exclusive lending right might still be greater than the cost. This may explain why owners of copyrights in computer software do have a public lending right. *See* 17 U.S.C. § 109(B).

[269] The four factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

balancing tests, the fair use test reflects a range of policy goals, but scholars have focused on one underlying justification, first identified by Wendy Gordon,[270] as capable of explaining a wide range of fair use decisions: transactions costs.[271] The increasing ease of obtaining copyright permissions, for example through the Copyright Clearance Center[272] or through online transactions, accordingly has led some to suggest that the Internet might facilitate a sharp constriction of fair use doctrine.[273] Some critics have argued that such a conclusion neglects the low marginal cost of reproducing intellectual property,[274] but rather than enter the debate, I would suggest that rent dissipation theory can provide a complementary understanding of fair use doctrine. Fair use tends to excuse infringement where the otherwise infringing activity is less likely to result in rent dissipation associated with the production of redundant works.

The first fair use factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," provides one example of how doctrine has incorporated rent dissipation concerns. The statute's explicit dictate that "nonprofit educational uses" be considered in the first factor, along with the preamble's reference to "news reporting,"[275] suggests that Congress was concerned about whether the use was beneficial to society.[276] As one court noted, however, "publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers,"[277] and thus the statute might seem counterproductive from the view of incentive theory, discouraging production of just those

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[270] 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). Gordon's article also addresses other market failures that figure in fair use doctrine. *See, e.g.*, *id.* at 1630-31 (discussing externalities).

[271] Landes and Posner emphasize transaction cost in their analysis of fair use. *See* Landes & Posner, *supra* note 85, at 357-61.

[272] *See generally* Shannon S. Wagoner, Note, American Geophysical Union v. Texaco*: Is the Second Circuit Playing Fair with the Fair Use Doctrine?*, 18 HASTINGS COMM. & ENT. L.J. 181, 206-13 (1995) (discussing the Copyright Clearance Center and arguments that the availability of copyrighted materials from it should negate fair use).

[273] Information Infrastructure Task Force, Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, http://www.uspto.gov/web/offices/com/doc/ipnii (1995) (last visited Dec. 17, 2002); *see also* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) (considering the relevance of the Copyright Clearance Center). One concern is that content producers may be able to use rights management systems to prevent even uses that courts would count as fair. *See generally* Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001) (considering the problem and possible legal responses).

[274] *See, e.g.*, Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61 (1998).

[275] The preamble specifically lists "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as being examples of fair use. 17 U.S.C. § 107.

[276] This assessment has produced some criticism. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT § 10.2.2, at 10:33 (2d ed. 2002) ("On principle, it is far from clear that the commercial-noncommercial distinction should receive any weight at all, except perhaps as a covert subsidy to worthy nonprofit enterprises such as schools and universities…. [T]he distinction has little direct bearing on either the benefits or the losses produced by a defendant's use.").

[277] Salinger v. Random House, Inc., 650 F. Supp. 413, 425 (S.D.N.Y. 1986).

works that society might most want to encourage. Implicitly recognizing the problem, the Supreme Court has held that news reporting establishes no presumption of fair use,[278] stressing that the use was "commercial," making the touchstone of commercial speech different for copyright than for First Amendment law.[279] The key, the Court held, is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[280]

In its hesitance to equate the first fair use factor with whether the work was generally beneficial, the Court has produced an analysis consistent with both the incentive theory and rent dissipation theory. If the user profits, such profits are likely coming at the expense of the copyright holder, and this diversion of profits both decreases incentives to produce and dissipates the rent to be earned from the work. The Court's further development of the factor, however, places more emphasis on the concerns of rent dissipation theory. The Court, adopting a consideration emphasized by Judge Pierre Leval,[281] has identified the "central purpose" of the first factor as determining "whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative."[282] The first factor thus addresses not just whether the user profits, but whether the user's profits are attributable to something new and innovative. The extent to which a work is transformative seems irrelevant to incentive and transactions costs theories, but is central to rent dissipation theory, because a transformative work is less likely to be redundant. The focus on transformation is controversial,[283] because a general exception for transformative works would undo the exclusive right to create derivative works,[284] which I have

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[278] Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985).

[279] News reporting for profit is not commercial speech under First Amendment doctrine. *See* Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (explaining that the for profit nature of speech does not make it commercial speech).

[280] 471 U.S. at 562.

[281] *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[282] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (internal citations and quotation marks omitted) (alteration in original). The Court added that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.* at 579.

[283] *See, e.g.*, GOLDSTEIN, *supra* note 6, § 10.2.2, at 10:43 ("[T]he rule threatens to undermine the balance that Congress struck in section 106(2)'s derivative rights provision . . . ."); LAWRENCE LESSIG, THE FUTURE OF IDEAS 198-99 (2002); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 283 (1996).

[284] *See* 17 U.S.C. § 106(2).

already suggested reflects rent dissipation concerns.[285] I shall return to this issue in considering one particular application of fair use, parody.[286]

The second fair use factor, the nature of the copyrighted work, reflects similar concerns. "Under this factor," one treatise summarizes, "the more creative a work, the more protection it should be accorded from copying."[287] Limiting fair use by consumers tends to increase the rent available to producers and thus encourages rent-dissipating entry into copyright markets. Copyright law is more likely to restrict fair use and tolerate rent dissipating entry for creative works, which are less likely to be redundant and thus rent dissipating, than for informational works. An additional consideration is that fair use is less likely to be found under this factor when the use would directly displace the intended market for the work. Thus, reproduction for classroom use is less likely to be fair use if the reproduced work is a textbook than a newspaper.[288] Reproduction is more rent dissipating when a product already occupies the market niche that the use represents.

The relevance of rent dissipation concerns to the second factor is also manifest in the treatment of unpublished works. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[289] the Supreme Court found that the unpublished status of a manuscript counted against fair use, because "the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[290] Scooping a publication is even more rent-dissipating than duplicating an existing publication, because it creates an inefficient race to publish.[291] The Second Circuit, however, extended the Court's analysis to a context in which the rent dissipation concern was absent, because the original author had no intention of publishing the work.[292] This decision led to criticism, both in the Second Circuit[293] and elsewhere.[294] The

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[285] *See supra* Part II.

[286] *See infra* Part III.C.

[287] NIMMER & NIMMER, *supra* note 374, § 13.05[A][2], at 13-171.

[288] *See, e.g.*, Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980).

[289] 471 U.S. 539 (1985).

[290] *Id.* at 555.

[291] For a discussion of how rent dissipation may prompt earlier than optimal marketing, see *supra* note 64 and accompanying text.

[292] Salinger v. Random House, Inc., 811 F.2d 90, 95-97 (2d Cir. 1987) (involving a biography of the writer J.D. Salinger excerpting some of his letters).

[293] *See* New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 593 (2d Cir. 1989) (Oakes, C.J, concurring) (following but criticizing *Salinger*); Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991) (finding for defendant despite unpublished status of work).

concern was sufficient that Congress amended § 107,[295] with the intention of undoing the Second Circuit decision.[296] While the Second Circuit's initial action may have reflected concern about privacy rights,[297] the response to it reveals that Congress and critics were much more skeptical of privileging unpublished works where the exploitation of such works would not lead to rent dissipation.

The rent dissipation theory interpretation of the third factor, the amount and substantiality of the portion used, is straightforward. The more of a copyrighted work is taken, the greater the rent dissipation is likely to be. A book review quoting a few paragraphs of a book, for example, might substitute for the original for a few readers,[298] but the rents accruing to authors of book reviews are generally independent of the rents for writing books. Lengthier summaries of books, by contrast, are more likely to substitute for the originals, and thus demand diversion is a more prominent factor in their production than in the writing of book reviews. Copyright doctrine avoids mechanical rules for assessing the third factor, with the qualitative importance of an excerpted section relevant to the analysis.[299] Even if only a small portion of the work is excerpted, if the portion represents the heart of the work, then the excerpt may dissipate rents from the original. Rent dissipation theory would also predict that the importance of the excerpts to the defendant's work is relevant, since the defendant's work is less likely to be redundant, the less it relies on the plaintiff's. The Supreme Court has noted that "'no plagiarist can excuse the wrong by showing how much of his work he did not pirate,'"[300] recognizing that a single work conceivably could dissipate rents from multiple other works. At the same time, though, the Court has been less willing to find fair use where the plaintiff's work constitutes a large portion of the defendant's.[301]

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[294] *See, e.g.*, Catherine A. Diviney, Comment, *Guardian of the Public Interest: An Alternative Application of the Fair Use Doctrine in* Salinger v. Random House, Inc., 61 ST. JOHN'S L. REV. 615 (1987).

[295] Congress added the following sentence: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of the above factors." 17 U.S.C. § 107 (last sentence).

[296] *See, e.g.*, S. Rep. No. 102-141, 102d Cong., 1st Sess. 5-6 (1991) ("[W]e intend to roll back the virtual per se rule of *Salinger* . . . .").

[297] The opinion itself, however, nowhere mentions the word "privacy" and focuses on the potential market for Salinger's work. *See Salinger*, 811 F.2d at 99.

[298] A typical book review with limited quotations is one of the paradigmatic examples of fair use. *See, e.g.*, *Harper & Row*, 471 U.S. at 601 ("Had these quotations been used in the context of a critical book review of the Ford work, there is little question that such a use would be fair use within the meaning of § 107 of the Act.") (Brennan, J., dissenting).

[299] *See, e.g.*, *id.* at 565 (approving of the district court's "evaluation of the qualitative nature of the taking").

[300] *Id.* (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) (Hand, J.))

[301] In *Nation Enterprises*, despite having just quoted Judge Hand, the Court noted, "Stripped to the verbatim quotes, the direct

The fourth factor, the effect upon the plaintiff's potential market, has been called the "most important" of the factors,[302] and it too fits squarely within rent dissipation theory. If there is no effect on the plaintiff's potential market, there is no rent dissipation. A difficulty in applying the test is the potential for circularity; as one treatise explains, "it is a given in every fair use case that plaintiff suffers a loss of a *potential* market if that potential is defined as the theoretical market for licensing the very use at bar."[303] Rent dissipation theory, however, provides an explanation of how this circularity can be overcome. The danger, rent dissipation theory suggests, is not the loss of plaintiff's licensing revenues, but the possibility of redundant exploitation of opportunities by the plaintiff, defendant, and others. As long as the focus is on "traditional, reasonable, or likely to be developed markets,"[304] the formulation of the Second Circuit, courts can largely avoid duplicative efforts, allowing fair use where the plaintiff likely would not have exploited the opportunity in the absence of the defendant's actions and is thus unlikely to exploit the opportunity redundantly given the defendant's actions.

Perhaps the most perplexing aspect of fair use is not any of the factors themselves, but the consequence of a determination that the fair use requirements are met. Fair use is free use. This doctrinal outcome is hardly inevitable.[305] Maureen O'Rourke, for example, has advocated a fair use doctrine in patent law, but she has noted that it might be appropriate for payments to be made for a use.[306] The lack of required payment for copyright fair use is puzzling both from the perspective of a general incentive theory, since payment would improve incentives to produce copyrighted works, and from the perspective of transactions costs. Although transactions costs sometimes might prevent payment, it might seem that payment should be required if requested. At least where the defendant has bothered to bring suit, transactions costs do not seem a

takings from the unpublished manuscript constitute at least 13% of the infringing article." *Id.* at 565-66. The Court explained that "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material . . . ." *Id.* Other courts have also looked at the portion of the infringing work that was taken. *See, e.g.*, Wright v. Warner Books Inc., 953 F.2d 731, 739 (2d Cir. 1991) ("[T]his perspective gives an added dimension to the fair use inquiry.").

[302] Robinson v. Random House, Inc., 877 F. Supp. 830, 842 & n.4 (S.D.N.Y. 1995).

[303] NIMMER & NIMMER, *supra* note 374, § 13.05[A][4], at 13-184. This circularity would not exist if the test did not demand assessment of a potential market, but only of an actual market. One possible consequence of the fair use test's focus on a potential market is that uses toward the end of the copyright term may be more likely to be considered fair. *See* Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003).

[304] Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994).

[305] For a recent proposal suggesting that a profit allocation suit, similar to compulsory licenses but depending on the profitability of the work, might help save copyright law's constitutionality, see Rubenfeld, *supra* note 175, at 55.

[306] Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1209-10 (2000).

significant barrier to payment.[307] From the perspective of rent dissipation theory, however, the absence of payment is not a concern. The concern is not with harm to the plaintiff per se, but the possibility of redundant exploitation. There is thus no inconsistency between a doctrine that focuses on interference with the plaintiff's market, both in the fourth factor and indirectly through the others, yet gives no compensation at all where not quite enough interference is found.

### *C. Parody*

Fair use embraces noneconomic as well as economic values, and nowhere are the former clearer than in parody law. The seminal Supreme Court parody case, *Campbell v. Acuff-Rose Music, Inc.*,[308] involving 2 Live Crew's rap imitation of Roy Orbison's song "Oh, Pretty Woman," makes clear that "when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act."[309] This conclusion, "reflected in the rule that there is no protectible derivative market for criticism,"[310] ascribes noneconomic value to criticism. Though this embrace of free speech considerations thus acts as a constraint on economic factors, *Campbell*'s analysis nonetheless reflects the logic of rent dissipation. Indeed, it was in *Campbell* that the Court emphasized that transformative works are more likely to be found to be fair use under the first factor than nontransformative works.[311] Transformative parodies are less likely to be redundant than nontransformative parodies, and copyright law should thus be less concerned about rent dissipation from parodic derivative works.

What is perhaps most surprising about *Campbell* is not that the Court permitted a parody to engage in some borrowing from the original work,[312] but to the contrary that it refused to allow an evidentiary presumption in favor of parody[313] and remanded to the Sixth Circuit to apply the

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[307] Litigation costs, however, could be a concern. *Cf.* Lichtman, *supra* note 89, at 4 (arguing that a desire to avoid difficult evidentiary questions helps provide a positive account of copyright law).

[308] 510 U.S. 569 (1994).

[309] *Id.* at 591-92.

[310] *Id.* at 592.

[311] *See supra* notes 282-285 and accompanying text.

[312] *See, e.g.*, 510 U.S. at 580-81 ("Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination . . . .").

[313] The Court explained:

> The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its

four-factor test anew.[314] While the Court may well have not been generous enough to parody, rent dissipation theory contributes to an explanation of its lack of generosity. In applying the third factor, the Court acknowledged that "[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart," since it is the heart that "most readily conjures up the song for parody."[315] The Court, however, emphasized that no more may be taken than necessary, and remanded to permit consideration of "whether repetition of the bass riff is excessive copying."[316] By encouraging musical parodists to take only as much of the melody as needed to conjure up the original, the Court sought to prevent parodies from substituting for the original. One cannot capture the portion of the market that cares about the tune but not about the lyrics (such as non-English speakers) merely by changing the lyrics and claiming the parody label.[317]

An even more substantial obstacle to the would-be parodist emerges in the Court's analysis of the fourth factor, the effect on the market for the relevant work. The Court could have concluded that where there is a genuine parody that does not take too much of the original work, any effect on the market for the original is more likely attributable to the effect of criticism than to market substitution. Instead, the Court remanded for a determination of the extent to which the parody would interfere with the derivative market for a nonparody rap version of the original, if indeed such a market existed.[318] Even a true parody in a genre other than the original's, the Court's analysis makes clear, could be found to violate the derivative right if it interferes with the original copyright holder's ability to exploit that genre. This caveat is difficult to explain on incentive grounds,[319] and the Court's interpretation of the third and fourth factors together

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creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

*Id.* at 581.

[314] *Id.* at 594.

[315] *Id.* at 588.

[316] *Id.* at 589.

[317] Rent dissipation theory also produces a countervailing consideration. Once a parodist will be able to enter by sufficiently changing the melody, the fixed costs of entry could be lowered by allowing the parodist simply to take the melody. *See supra* text accompanying notes 403-404. Given the relatively small cost of altering the melody, however, it is plausible that the first rent dissipation effect outweighs this one.

[318] 510 U.S. at 593-94.



[319] This is so for the same reason that the derivative right is generally difficult to justify on incentive grounds. *See supra* Part II.A.

arguably place an excessive burden on socially useful parody,[320] but it does reflect rent dissipation concerns. By dissipating the rents from a potential nonparody derivative, a parody may vitiate fair use, depending of course on the other factors in the fair use test.

### *D. Copying*

Perhaps the most important issue in copyright law, at least from an economic perspective, is the extent to which copying will be permitted. The reproduction right, after all, is the most important stick in the copyright bundle. While theorists have pointed out that sharing of copyrighted works could benefit producers,[321] copyright owners are always free in any event to allow limited sharing.[322] Content producers complain often that piracy hurts their bottom line,[323] and while they may exaggerate the effect,[324] they presumably would not complain at all if copying benefited them. Copying is a particularly important issue today given technologies that make duplication, in particular digital duplication, ever easier. Lobbying on copying issues is

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[320] A recent case testing the limits of parody involved *The Wind Done Gone*, which retold *Gone with the Wind* from a slave's perspective. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001). The novel seems a paradigmatic example of parody, but the work's borrowing of extraneous material made the case close under the *Campbell* approach. *See id.* at 1270 (noting the borrowing, but concluding that the parody could not have criticized the original "without depending heavily upon copyrighted elements of that book").

[321] *See, e.g.*, Yannis Bakos et al., *Shared Information Goods*, 42 J.L. & ECON. 117, 123 (1999); Stanley M. Besen & Sheila N. Kirby, *Private Copying, Appropriability, and Optimal Copyright Royalties*, 32 J.L. & ECON. 255, 271 (1989).

[322] Some authors explicitly encourage sharing, particularly in collaborative projects like the Linux operating system, where a final product is the result of numerous voluntary contributions. *See* Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) (describing "peer production" as an alternative production model); Dennis M. Kennedy, *A Primer on Open Source Licensing Legal Issues: Copyright, Copyleft and Copyfuture*, 20 ST. LOUIS U. PUB. L. REV. 345 (2001) (discussing the "copyleft" license, which allows and encourages sharing). Collaborative projects could either reduce or increase redundancy. If a project were sufficiently successful, it might limit the need for market production; if Linux achieves a sufficient quality standard, then perhaps we won't need Windows, or at least we won't need specialized alternatives to Windows. On the other hand, collaborative projects themselves encourage redundant contributions from authors, which are then filtered into a final project. *See, e.g.*, Benkler, *supra*, at 438, 441.

[323] For recent studies claiming high dollar losses from pirating, see BUSINESS SOFTWARE ALLIANCE, U.S. SOFTWARE STATE PIRACY STUDY (2002), *available at* http://www.bsa.org/piracystudy/press/State_Piracy_Study_2001.pdf (last visited Dec. 27, 2002), which breaks down software piracy rates by region and claims $5.65 billion in U.S. revenue losses; and INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, MUSIC PIRACY REPORT (2002), *available at* http://www.ifpi.org (last visited Dec. 27, 2002), which focuses solely on losses from pirated copies.

[324] *See, e.g.*, Mary Hodder, *MacWizard's Analysis of Music Sales Refutes RIAA Arguments on Piracy* (Dec. 23, 2002), *available at* http://journalism.berkeley.edu/projects/biplog/archive/000409.html (last visited Dec. 27, 2002) (challenging the methodology used by the Recording Industry Association of America to estimate losses from online copying). The Business Software Study calculates losses to software companies by multiplying the piracy rate times the wholesale cost of the software. BUSINESS SOFTWARE ALLIANCE, *supra* note 323, at 4. This approach assumes that users of pirated software all would have purchased the software if pirating were impossible. A recent literature has suggested that illegal copying of their own products can benefit producers in the presence of network externalities, which is most likely for computer software. *See, e.g.*, Kathleen Reavis Conner & Richard Rumelt, *Software Piracy: An Analysis of Protection Strategies*, 37 MGMT. SCI. 125 (1991); Moshe Givon et al., *Software Piracy: Estimation of Lost Sales and the Impact on Software Diffusion*, 59 J. MARKETING 29 (1995); Lisa N. Takeyama, *The Welfare Implications of Unauthorized Reproduction of Intellectual Property in the Presence of Demand Network Externalities*, 42 J. INDUS. ECON. 155 (1994). It is also possible that if pirating were impossible, some consumers would not purchase computers at all, and the software industry might lose some sales from such consumers.

likely to be more one-sided than on other issues, because no content producers is likely to benefit from a regime permitting unauthorized duplication, and we should thus be less confident that rent dissipation theory will predict the law .

Rent dissipation theory complicates the standard neoclassical argument that, at least where transactions costs are low, unauthorized copying should be prohibited.[325] If the number of works in a world with no copying is too high, or even if the social value from creation of marginal works is positive but small, some copying may increase social welfare. The point is the same as that in the context of library lending.[326] Just as the reduction in deadweight loss attributable to lending seems all the more important once rent dissipation theory diminishes what otherwise would appear to be negative incentive effects from allowing lending, so too does rent dissipation theory tilt the balance toward the benefit from increasing consumers' access to works. Copying enables consumers to amass large libraries of copyrighted works, particularly audio and audiovisual works, but presumably reduces the number of new works created. Rent dissipation theory suggests that the second effect, at least up to a point, may not be a large cost, and therefore the benefits of allowing consumers to build collections loom larger in the social calculus than they otherwise would.[327]

More pervasive copying than currently exists conceivably could increase social welfare. Nonetheless, it is remarkable, given the united front of content producers, how much copying is allowed. The Copyright Act, for example, makes explicit that fair use allows "multiple copies for classroom use."[328] In addition, the Act grants libraries and archives limited rights "to reproduce no more than one copy or phonorecord of a work" and even "to distribute such copy or phonorecord."[329] The Supreme Court in the *Sony* case found that fair use entitled Betamax owners to "time-shift" by taping shows for later viewing.[330] These provisions are all instances in

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[325] *See, e.g.*, Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994) (arguing that there should generally be property rule protection for intellectual property).

[326] *See supra* notes 264-268 and accompanying text.

[327] Record companies have considered subscription plans allowing subscribers access during the subscription to unlimited music within the record companies' libraries. *See, e.g.*, Don Clark, *E-Business: Music Sites Hope to Start Humming*, WALL ST. J., July 16, 2001, at B5. Such plans, however, will not eliminate deadweight loss. Even if all content providers joined together to offer a single plan, many consumers would not be able to afford it. These consumers thus would not be able to obtain music even where the cost of reproduction was less than the value to the consumers of listening to the music.

[328] 17 U.S.C. § 107 (2000). Congress included in its conference report an agreement negotiated by publishers and advocates of an expansive fair use doctrine concerning the scope of the exemption, but these guidelines are only persuasive authority. *See* H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 69 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5810-11.

[329] 17 U.S.C. § 108.

[330] Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984). As Randal Picker argues, *Sony* does not merely allow machines

which a concentrated group in effect served as a proxy for the interest of consumers. That these groups were able to obtain exceptions, however, suggests that there is an intuitive appeal to the idea that copying sometimes may increase social welfare even if it decreases producer incentives.

Rent dissipation theory's strongest statutory reflection may be in the Audio Home Recording Act.[331] The Act was a congressionally enacted compromise among record companies, artists, and electronics companies,[332] and it allows importation and sale of digital audio recording devices.[333] The devices must contain a serial copy management system that prevents the making of copies of copies,[334] and makers of devices are required to pay royalties to artists.[335] The compromise, though criticized by some as reflecting industry control of copyright policy,[336] represented a recognition that Coasean bargaining could maximize the combined rent to be shared among the various industry groups. That the result of this bargaining was to allow home audio copying suggests that this was an efficient result despite any adverse effects on production incentives. This is a remarkable outcome especially considering that consumers were not directly represented. Perhaps even more remarkable is that the statute arguably immunizes all home audio copying,[337] including at least analog copying despite the absence of royalty payments for such copying.[338] The compromise indicates that the portion of consumer surplus that is transferred to producers through higher prices for equipment and thus royalty payments is adequate to compensate the record companies and artists for any increased copying that

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facilitating copying where the benefits exceed the costs. By finding no contributory infringement where a device has substantial noninfringing uses, the Court "removes any reason to redesign to minimize copyright infringement." Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, ANTITRUST BULL., July 1, 2002, at 13.

[331] Pub. L. No. 102-563, 106 Stat. 4244 (codified at 17 U.S.C. §§ 1001-1010).

[332] For a brief summary of the history and operation of the AHRA, see David M. Hornik, Recent Development *Combating Software Privacy: The Softlifting Problem*, 7 HARV. J.L. & TECH. 377, 405-09 (1994).

[333] 17 U.S.C. §§ 1002(a), 1008.

[334] *Id.* § 1002(a). Serial copying is defined as "the duplication in a digital format of a copyrighted musical work or sound recording from a digital reproduction of a digital musical recording." *Id.* § 1001(11).

[335] *Id.* §§ 1003-1007.

[336] Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPR. SOC'Y 497 (1998).

[337] 17 U.S.C. § 1008 ("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.").

[338] Whether the section immunizes all home copying from liability is somewhat uncertain. The principal complication is that a device may not qualify under the definition of a "digital audio recording device" and yet plainly not be an "analog audio recording device," an undefined term. This is particularly problematic given the Ninth Circuit's decision in *RIAA v. Diamond Multimedia*, 180 F.3d 1072 (9th Cir. 1999), construing "digital audio recording device" narrowly to exclude devices involving computers. The Senate Report on the bill, however, seems to suggest that Congress intended by referring to digital or analog recording to cover *all* home recording. *See* S. Rep. No. 102-294, 51 (1992), *available at* 1992 WL 133198 ("A central purpose of the Audio Home Recording Act of 1991 is conclusively to resolve [the] debate" over "audio recording for noncommercial use."). For a thorough treatment of this issue, see 2 NIMMER & NIMMER, *supra* note 374, § 8B.07[C][4], at 8B-94.

results.[339] One reason for this may be that entry into the market for sound recordings dissipates much of the rents from sound recordings, and so any decrease in entry might have only a modest effect on the rents that record companies are able to capture.

Copyright law, of course, is not uniformly friendly to copying. The Copyright Act imposes criminal sanctions on those who infringe willfully "for purposes of commercial advantage or private financial gain."[340] Piracy seems particularly likely to be rent-dissipating as pirates can produce perfect copies at lower prices than content producers and thus if legal would threaten, more than noncommercial copying, to have drastic effects on the incentive to produce and market new works.[341] More controversially,[342] the Digital Millennium Copyright Act (DMCA) criminalizes the evasion of technological measures employed by copyright owners to limit use of their works.[343] By reducing consumers' ability to copy works, the DMCA seems to ignore consumers' interests in obtaining broad access to works in favor of producers' interests. Even the DMCA, however, reflects in part some of the concerns of rent dissipation theory. In particular, in the absence of a statute, there is a danger that content producers and software companies would engage in a spy-versus-spy rent dissipating contest, with the software companies at each turn seeking to overcome the newest form of copyright protection.[344] Moreover, the effect of the DMCA on copying ultimately will be limited. There is, after all, no practical way to prevent consumers from making analog copies of digital works. What consumers can hear and see they can record, with greater or lesser fidelity depending on the sophistication of their equipment.

The combination of the various permissions and restrictions in practice mean that consumers can copy, but for-profit companies cannot facilitate piracy, and the copies sometimes

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[339] An alternative explanation is that the record companies may have concluded that they were unlikely to win in court anyway and that the statute thus simply reflected an advantageous settlement.

[340] 17 U.S.C. § 506(a)(1).

[341] Pirated copies are cheaper to produce because pirates free-ride on the marketing expenses of the record companies. *See generally* Andrew Burke, *How Effective Are International Copyright Conventions in the Music Industry?*, 20 J. CULTURAL ECON. 51 (1996) (discussing the market for pirated works).

[342] For a balanced assessment of the DMCA, see Orin Kerr, *A Lukewarm Defense of the Digital Millennium Copyright Act*, *in* COPY FIGHTS 163 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2002).

[343] Pub. L. No. 105-304, 112 Stat. 2360 (1998), *codified at* 17 U.S.C. §§ 1201-1205.

[344] It is possible that some such contests will occur despite the DMCA. *See* Ariel Berschadsky, RIAA v. Napster*: A Window onto the Future of Copyright Law in the Internet Age*, 18 JOHN MARSHALL J. COMPUTER & INFO. L. 755, 782-85 (2000) (suggesting that a similar "cat-and-mouse" game will occur between content providers and online file-sharing services).

will be of lower quality,[345] or take longer to obtain, than the originals. At the same time, some consumers will be more likely to copy than others, either because some consumers are concerned about violating the law[346] or because only some consumers own the necessary equipment.[347] Perhaps this is in the end a sensible compromise. A regime without a reproduction right at all presumably would cause a great reduction in the number and perhaps quality of sound recordings. Although there would still be some incentive to produce copyrighted works, for example to increase concert ticket sales,[348] it seems at least plausible that there would be far fewer works, perhaps so many fewer that social welfare would decline. A regime in which consumers were unable to copy, even assuming such a regime could be enforced at reasonable cost, could be equally unattractive. Though it would maximize the production of works, rent dissipation theory indicates that the marginal works produced might be of little or conceivably even negative social value, and consumers forced to pay would be able to own far fewer phonorecords than they otherwise might. The existing regime is somewhere between these two extremes.

Many regimes, however, would be between the extremes, and rent dissipation theory alone cannot offer an unambiguous prediction or prescription as to how many copying issues should be resolved. Napster and post-Napster programs[349] that facilitate file sharing pose a

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[345] A recent study has suggested that because of the relatively low quality of bootlegs relative to pirated copies of officially released CDs, the bootlegs do not substitute for officially released products. *See* Jay Naghavi & Günther G. Schulze, *Bootlegging in the Music Industry: A Note*, 12 EUR. J.L. & ECON. 57, 64-68 (2001). If it were possible to make low-quality (or inconsistent-quality) copies of CDs for free, such copying might similarly have only a modest effect on total sales and incentives to produce music.

[346] Such concern may exist because of the uncertain scope of § 1008 or, much more likely, because consumers are simply unaware of the provision. Interestingly, § 1008 is drafted in such a way that even if its scope became clear, some law-abiding consumers might be hesitant to copy. The Act specifies that "[n]o action may be brought" for home copying, providing at least a basis for an argument that home copying is forbidden even if the ban is unenforceable. 17 U.S.C. § 1008 ("No action may be brought under this title alleging infringement of copyright . . . .").

Arguably, a regime in which some consumers break the law (or appear to break the law) and copy while other consumers do not copy is harmful because it might breed a disrespect for law. *See, e.g.*, JANICE NADLER, FLOUTING THE LAW: DOES PERCEIVED INJUSTICE PROVOKE GENERAL NON-COMPLIANCE? (Northwestern Law & Econ Research Paper No. 02-9, Nov. 27, 2002) (reporting an experiment indicating that subjects exposed to laws perceived as unjust through newspaper stories reported greater likelihood of engaging in criminal activity than other subjects in what subjects believed to be a second unrelated experiment).

[347] For an economic model of copying that takes into account the possibility of differential costs of obtaining a reproduction, see Ian E. Novos & Michael Waldman, *The Effects of Increased Copyright Protection: An Analytic Approach*, 92 J. POL. ECON. 236 (1984).

[348] One commentator has suggested that copyright's reproduction right may have a *negative* effect on the output of new creations, particularly music, because copyright protection leads to large marketing expenditures. *See* Mark S. Nadel, Questioning the Economic Justification for (and thus Constitutionality of) Copyright Law's Prohibition Against Unauthorized Copying: § 106 (Aug. 18, 2002) (unpublished manuscript, *available at*www.ssrn.com/ab stract=322120).

[349] For a discussion of the evolution of these programs, see Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 510-21 (2003). Strahilevitz observes that file-swapping programs have managed to avoid a "tragedy of the digital commons" in which everyone would have an incentive to

danger to the music recording industry,[350] although there is little evidence that they have led to noticeable decreases in the number of songs produced or on sales.[351] Progress and increased availability of technology, however, conceivably could mean that if Internet file sharing were unambiguously legal, eventually no one would pay for music.[352] On the other hand, these services allow users to accumulate large libraries of works, and absent a conclusion that users' allegedly[353] illicit benefits should not count in a social welfare calculus,[354] such increased access is welfare-enhancing.[355] The uncertain empirics of technology development thus complicate what

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download files but no one would have an incentive to upload them. The programs' success in overcoming this obstacle presents the danger that file-sharing might become too attractive, as pro-file swapping norms seem to defeat anti-file swapping norms in norm competition. *Id.* at 538-47. Thus, even if Napster-like programs are socially beneficial now once product differentiation concerns are taken into account, they could become so effective that they lead to an excessive decrease in the amount of new music, outweighing any benefits.

[350] *See* Peter J. Alexander, *Peer-to-Peer File Sharing: The Case of the Music Recording Industry*, 20 REV. INDUS. ORG. 151, 160 (2002) (predicting that "major firms in the music recording industry will continue to face significant difficulties in controlling the reproduction and distribution of their products," but noting that "the potential impact of peer-to-peer file sharing on market structure is ambiguous").

[351] *See id.* at 157 ("[I]t is not obvious that sharing music files over the internet has thus far had an adverse effect on sales.").

[352] Much of the success of peer-to-peer file-sharing so far might be attributed to the fact that its beneficiaries are only a segment of consumers. *See* TIM WU, PEER NETWORKS AND OTHER RESPONSES TO REGULATION (University of Virginia School of Law Working Paper Series No. 02-13, 2002). Wu's analysis indicates that peer-to-peer file-sharing ironically might not have been as successful if it were more universally available, because "the logic of collective action suggests that the ideal strategy for an individual or sub-group under copyright law is to create a system that limits evasion of copyright to an 'in-group,' leaving everyone else to pay for the incentives to create." *Id.* at 59.

[353] The Ninth Circuit in the Napster case did not adequately address the argument that Napster users' usage of the program was protected under the Audio Home Recording Act. The Court rejected the application of § 1008 on the ground that computers are not digital audio recording devices. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024-25 (9th Cir. 2001) (following *Recording Indus. Ass'n v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999)). This argument itself is controversial, relying primarily on legislative history rather than statutory text. *See generally* 2 NIMMER & NIMMER, *supra* note 374, § 8B.02[A][3], at 8B-30 to 8B-32. But the court ignored altogether the separate argument, which has equal support in legislative history, that even if a computer is not a digital audio recording device, Congress intended to immunize all home copying. *See supra* note 346 (explaining this argument); *cf.* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 356-60 (2002) (offering a comprehensive analysis of the § 1008 issue in the Napster case, concluding that the issue was a close one given that Congress did not foresee the possibility of Napster).

Perhaps the court could have defended its ultimate resolution by arguing that the consumers' infringement could provide a basis for a contributory infringement case even if consumers' infringement is immunized. But the Act provides that "[n]o action may be brought … *based on* the noncommercial use by a consumer." 17 U.S.C. § 1008 (emphasis added). The action against Napster was surely *based on* consumers' use. The district court also offered an additional argument against the applicability of § 1008, that plaintiffs' action was not under the Audio Home Recording Act. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 916 n.19 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001). The Court of Appeals mentioned this argument without assessing it, *see* 239 F.3d at 1024, but it is clearly frivolous, as § 1008 states that "[n]o action may be brought under this title," a reference to the entire Copyright Act. *See* 2 NIMMER & NIMMER, *supra* note 374, § 8B.02[A][1], at 8B-24 (noting that the Audio Home Recording Act comprises but one chapter, namely Chapter 10, of title 17). Probably the strongest argument, not considered by the Court of Appeals in construing § 1008, is that distributing files wholesale is not a "noncommercial" use. The anonymity and volume of the exchange, however, would not seem under ordinary usage of the word "noncommercial" to be relevant, given that no money was involved.

[354] Some scholars have argued that wrongdoers' utility sometimes should receive no weight in social welfare calculations. For example, the scholars argue, any pleasure that a rapist derives from his crime should be irrelevant even if it could be shown that this pleasure were greater than the victim's pain. *See, e.g,* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM.L. REV. 1232, 1234 (1985) (disvaluing the offender's private gain in the social welfare analysis). Such arguments, however, do not extend easily to the gains an infringer obtains from copyright infringement, which is a *malum prohibitum* rather than *malum in se* offense.



[355] It is possible that much of the benefit of increased access could be obtained even if there were some fee for use of file-sharing services. Neil Netanel has argued for the legalization of such programs subject to a fee, on the model of the Audio Home

would anyway be a complex social welfare calculation.[356] Rent dissipation theory, however, at least strengthens the case of those who would argue for greater copying.

*E. Copyright Remedies*

The winner of a copyright infringement suit ordinarily has a right, in addition to damages, to enjoin distribution of the infringing work.[357] At times the right to an injunction seems comically inefficient, as when a preliminary injunction was issued against the distribution of the film *Twelve Monkeys* as a result of a single scene that allegedly infringed a copyright in the design of a chair.[358] The existence of property rule rather than liability rule protection for copyright seems inconsistent with an incentive theory of copyright, since allowing a compulsory license at a price simulating a negotiation for all use of copyrighted works would allow for more adaptations of existing works.[359] Transactions costs considerations make property rule protection seem especially unattractive, since negotiation barriers, including the difficulty of locating the copyright owner,[360] may sometimes frustrate a beneficial use of a copyrighted work. Although litigation costs argue against a liability rule regime, where compulsory licenses exist, Congress has found administrative remedies that minimize such costs.[361]

Rent dissipation theory, however, provides strong support for injunctive remedies. The justification is similar to that provided by Kitch in the patent context.[362] A prospecting system prevents a gold rush by providing property rights, and a liability rule alternative is unlikely to produce the optimal amount of entry. Perhaps the compulsory license will be too low, in which case there will still be excessive entry, or too high, in which case the liability rule in effect is a property rule, but there is little reason to expect the government to get it just right. The owner of a patent or copyright, meanwhile, has an incentive to maximize profits, the difference between

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Recording Act. *See* NEIL NETANEL, IMPOSE A NONCOMMERCIAL USE LEVY TO ALLOW FREE P2P FILE-SWAPPING AND REMIXING 22 (U. Tex. Public Law Research Paper No. 44, 2002).

[356] An additional consideration is the effort expended by consumers to make copies. *See* Novos & Waldman, *supra* note 347, at 237.

[357] *See* 17 U.S.C. § 502; *see also* Dane S. Ciolino, *Reconsidering Restitution in Copyright*, 48 EMORY L.J. 1, 6-17 (1999) (providing a comprehensive overview of copyright remedies). *But cf.* New Era Publications Int'l v. Henry Holt, Co., 884 F.2d 659, 661 (2d Cir.1989) (noting that an injunction is not an inevitable result of a finding of infringement).

[358] *See* Woods v. Universal City Studios, Inc., 920 F. Supp. 62 (S.D.N.Y. 1996).

[359] For a defense of property rule protection, see Merges, *supra* note 325.

[360] *See* William M. Landes & Richard A. Posner, Indefinitely Renewable Copyright (Aug. 1, 2002) (unpublished manuscript, on file with author) (manuscript at 5-7) (discussing tracing costs)

[361] *See, e.g.* 17 U.S.C. §§ 115-116 (providing detailed compulsory licensing schemes).

[362] *See* Kitch, *supra* note 58

revenues and expenses. In theory, a suitably set fee for a compulsory license could achieve such maximization, but the intellectual property right owner is better situated than the government to determine how much the right should be exploited. To be sure, property rules have problems associated with abuse of monopoly power, and assorted copyright law provisions seek to prevent a copyright owner from leveraging the monopoly right.[363] Rent dissipation theory, however, helps explain why compulsory licenses are not more widespread.[364]

## IV. COPYRIGHTABLE SUBJECT MATTER

We have already considered one aspect of copyrightable subject matter, the availability of copyright protection for elements of a work such as plot and characters.[365] The rent dissipation account may be most useful for these specific aspects of copyrightability, but the theory coheres more generally with the broad standards and doctrines determining whether works are eligible for copyright. The statute provides that copyright subsists "in original works of authorship fixed in any tangible medium of expression."[366] Doctrine has elaborated this requirement, and I will explore the case law by considering the fixation requirement, the originality requirement, the merger doctrine, and the copyrightability of facts and compilations. Some of my analysis will reflect the same logic of entry deterrence that animated Part II, but this part will also introduce areas in which copyright law reduces rent dissipation with the opposite strategy, entry facilitation. Because it often will be difficult to determine which of these strategies best allows copyright to minimize rent dissipation, this Article's account of copyrightable subject matter is not as explanatorily powerful as its account of the derivative right and the fair use test. It is useful, however, to see that the aspect of copyright doctrine that might seem most indifferent to reduction production at least plausibly reflect concerns about rent dissipation.

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[363] For a discussion of these provisions, see Jason S. Rooks, Note, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L. 255, 266-68 (1995). A proposal to enact a new compulsory license provision along these lines is Alan M. Fisch, *Compulsory Licensing of Blacked-Out Professional Team Sporting Event Telecasts (PTSETS): Using Copyright Law to Mitigate Monopolistic Behavior*, 32 HARV. J. ON LEGIS. 403 (1995).

[364] We have already seen a justification for compulsory licenses of musical works. *See supra* text accompanying notes 258-263 (noting that differences in presentation make covers less redundant to consumers than the equivalent in other media would be).

[365] *See supra* Part II.B.

[366] 17 U.S.C. § 102 (2000).

*A. The Fixation Requirement*

The requirement that a work be fixed in a "tangible medium of expression" is usually easily met. As the House Report on the Copyright Act makes clear, "it makes no difference what the form, manner, or medium of fixation may be."[367] The only media that are excluded are those that are not "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[368] The stuff of law school exam hypotheticals, this would appear to include works like ice sculptures, sand castles, and skywriting.[369] Aside from an interesting question concerning fixation in computer media,[370] the only significant exclusion then is for works that are not fixed at all. For example, extemporaneous speeches that are not simultaneously recorded by the speaker, even if there is a simultaneous recording by a third party,[371] are not fixed.

Rent dissipation theory provides a straightforward explanation. The failure of an author to fix a work suggests that the author does not intend to commercialize the work, and reproduction or exploitation of the work by another is thus unlikely to lead to any redundancy in commercialization efforts. This is true both for exotic media like ice sculptures, where the failure to photograph or otherwise fix one's creation suggests lack of an intent to commercialize it, and for speeches and the like. Many speakers and event organizers have no intent to commercialize their speeches or events, and indeed many may appreciate any free publicity that they receive. Such publicity often indirectly benefits other commercialization or outreach efforts that organizations may undertake. Copyright law in effect provides a default rule for unfixed works that provides the works' creators with the publicity that may follow from the works' presence in the public domain. The copyright owners remain free to override the default rule by fixing the works. This default rule makes sense given the transactions costs that would result if the default rule were that even unfixed works were copyrighted.

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[367] H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 52 (1976).

[368] 17 U.S.C. § 101.

[369] Such works may be protected by state law. The House Report specifies, "Under the bill, the concept of fixation ... represents the dividing line between common law and statutory protection." H.R. Rep. No. 94-1476, at 52.

[370] *See, e.g.*, Bradley J. Nicholson, *The Ghost in the Machine:* MAI Systems Corp. v. Peak Computer, Inc. *and the Problem of Copying in RAM*, 10 HIGH TECH. L.J. 147 (1995) (exploring the issue).

[371] Section 101 makes clear that a work is considered "fixed" only if the fixation is "by or under the authority of the author."

If copyright law were single-mindedly focused on rent dissipation, it presumably would provide that even unfixed works are copyrightable, but copyright law's attention to factors such as transactions costs leads to a rule that takes into account the various economic considerations. As a result, redundancy remains a possibility if more than one third party seeks to take commercial advantage of an unfixed work, for example if more than one radio station decides to broadcast a football game when the organizers of the game themselves did not seek to arrange for any recording of the game.[372] It will be rare, however, for the creators of a work not to exploit commercially a work so valuable that multiple other organizations will do so, unless of course the creators prefer the publicity to direct commercial exploitation. But the assumption that authors will seek to fix their works when they intend to exploit them commercially still holds, and it would be difficult to imagine a copyright regime that would choose which among the competing unauthorized radio stations should be entitled to the broadcast when the organizers of the game did not themselves select a station. Copyright law thus permits unauthorized dissemination, and provides for the attendant benefits for both the distributors and consumers of the work, in the circumstances that seem in general unlikely to produce competition that would dissipate producer rents.[373]

### *B. The Originality Requirement*

The originality requirement, sometimes called the creativity requirement,[374] imposes a low but nontrivial threshold to obtain a copyright. An author need not be particularly innovative to receive copyright protection against direct appropriation of the author's work. *Borrow-Giles Lithographic Co. v. Sarony*[375] offers a classic illustration. This case confronted a technological innovation, that of the photograph. Creation of a photograph, in the ordinary case, does not ordinarily require as much creativity or skill as creation of a painting, and the defendant

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[372] The House Report makes clear that a televised football game ordinarily would be considered to be fixed if it were transmitted live and simultaneously recorded. H.R. Rep. No. 94-1476 at 53. The third-party broadcasters would have copyright in their sound recordings, but not in the underlying game. *See* 17 U.S.C. § 114.

[373] I do not mean to suggest that rent dissipation is necessarily the best or sole explanation of the fixation requirement. A complementary explanation is that the fixation requirement serves an evidentiary purpose, saving the courts from having to entertain a difficult infringement inquiry when an allegedly copied unfixed work is unavailable. *See* Lichtman, *supra* note 89, at 29-41.

[374] A treatise offers the following distinction: 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B], at 2-86 ("Where creativity refers to the nature of the work itself, originality refers to the nature of the author's contribution to the work.").



[375] 111 U.S. 53 (1884).

accordingly emphasized that "a photograph is the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought."[376] The Supreme Court, however, concluded that a photograph of Oscar Wilde had enough creativity to enjoy copyright protection. It emphasized that the photograph emerged from the photographer's "own original mental conception" and reflected decisions about costume and composition.[377] Though the case left open the possibility that only carefully constructed photographs would receive copyright protection, case law since suggests that the photographer need not do much more than point and click to earn an entitlement to a copyright.[378]

Rent dissipation concerns provide a straightforward explanation of the relatively low threshold that an author must overcome to obtain copyright in a writing. If the creation of a copyrighted work produces a rent, then free appropriability of the work would lead to dissipation of the rent. Copyright protection for a creation of the human mind can do no harm, for if a work is so uninteresting that it produces no rent, whether or not because of lack of originality in the more general usage of the word, then there is no danger of rent dissipation. If a work is valuable, however, concentrating rights to exploit the work in the creator avoids redundancy and wasteful (though consumer-benefiting) competition. Traditional incentive theories of copyright, of course, also can provide an explanation for the low copyrightability threshold: Copyright is designed to induce production of works, and the lower the threshold, the more works that will be encouraged. The strength of this traditional theory depends on an evaluation of whether it is important for copyright to encourage production of works of relatively low originality.

A caveat to the rent dissipation explanation of the low originality requirement is that there is a competing rent dissipation effect. Just as the availability of a patent may lead to a patent race,[379] so too may the availability of copyright protection lead to excessive resources being expended in the production of copyrighted works. My explanation of the originality doctrine, one might argue, is a "just so" story; if there were a high standard for originality, the

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[376] *Id.* at 59.

[377] *Id.* at 54-55.

[378] *See, e.g.*, Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1075-77 (9th Cir. 2000) (emphasizing the low threshold photographs must meet to be deemed sufficiently creative for copyright). The Copyright Office, at least, has made clear that it will issue copyrights on photographs. *See* http://www.copyright.gov/faq.html ¶ 58 (last visited Jan. 20, 2002) (noting that although copyright law does not protect sightings of Elvis, "copyright law will protect your photo (or other depiction) of your sighting of Elvis").

[379] *See supra* notes ~~66~~ 70 and accompanying text.

argument goes, I would have suggested that the high threshold discouraged redundant production of works of low originality. The argument sounds an important caution, but the message is that we must compare the effects of rent dissipation, just as patent scholars have done.[380] Here, any increased rent seeking is minimal. Competitors will often be unable to create acceptable substitutes for low originality works, for example works that capture a particular moment in time,[381] and when they can create substitutes, the low originality ensures that the investment will be relatively low. Thus, the availability of copyright for relatively unoriginal work probably leads to little fixed cost in the production of redundant works, while limiting redundant exploitation of those few minimally original works that turn out to have enduring commercial value does reduce rent dissipation.

Rent dissipation theory therefore seems to provide an easy explanation for why many works of relatively low originality still meet the copyright threshold. The greater challenge, and the greater puzzle for scholars, is why some works are deemed insufficiently original for copyright. Consider, for example, *Magic Marketing v. Mailing Services*.[382] The case concerned the copyrightability of letters, forms and envelopes produced by a mass marketing company. For example, an envelope included the words "PRIORITY MESSAGE: CONTENTS REQUIRE IMMEDIATE ATTENTION" in large white letters on a black stripe running horizontally across the middle of the envelope.[383] The court held that the words on the envelope did "not exhibit the minimal level of creativity necessary to warrant copyright protection,"[384] and that the addition of a black stripe constituted "nothing more than a distinctive typeface, which is not protected."[385] The case is potentially troubling to an incentive theorist, because even relatively simple designs may reflect substantial investment in consumer research. The problem is of particular concern in comparison to the availability of copyright in photographs, considering that the design of the envelope may demand considerably more investment than the design of many photos.

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[380] *See supra* notes 72- 77 and accompanying text.

[381] An example of a valuable work of low originality is the Zapruder film of President Kennedy's assassination. The work simply could not be recreated, but if it were uncopyrightable, it could be commercially exploited in a way that would dissipate any rents from commercial development. Of course, the film also introduces a new wrinkle, because its newsworthiness helped advance a case that reproduction was fair use. Indeed, that is the issue on which litigation over the film focused. *See* Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (D.C.N.Y. 1968).

[382] 634 F. Supp. 769 (W.D. Pa. 1986).

[383] *Id.* at 771.

[384] *Id.* The Court added that the envelope amounted to a "mere listing of ingredients or contents, which the Copyright Office by regulation has determined to be not amenable to copyright. *See id.* at 771-72 (citing 37 C.F.R. § 202.1(a) (1985)).

[385] *Id.* at 772.

It might seem at first that the rent dissipation theory rationale for allowing copyright would apply here. If there are rents to be gained from exploitation of even these relatively generic elements of the marketing materials, awarding a copyright will prevent dissipation of the rents. The problem, however, is that the envelope in this case, and more generally short phrases and slogans, are not marketed to consumers by themselves, but instead are used in marketing other products. The absence of copyright in a work that itself can be marketed may lead multiple entrants to sell the work and dissipate the profit, but granting a copyright in these marketing materials would do little to discourage rent dissipation in exploitation of any product. The total amount of marketing activity, or even of marketing of marketing activity, depends minimally if at all on the copyrightability of such elements in the marketing materials.

The conclusion that there is little rent dissipation from exploitation of the work for copyright to prevent is once again only half the story, however. After all, the fact that there will be minimal rent dissipation whether or not copyright is allowed does not by itself provide a strong argument for or against copyright protection. We must also consider rent dissipation associated with efforts to produce the work in the first place. If there were copyright protection for a work such as this, other marketing companies would likely not be dissuaded from entering the market. They would, however, have to engage in research to develop marketing slogans and designs of their own. Such research, even if it resulted in different marketing designs, would be of little social value. In this case, the most salient form of rent dissipation stems from attempts to "design around" the initial copyright.[386] The costs associated with entry into the market are thus minimized by allowing free appropriability. When entry is likely to occur regardless of whether something is copyrightable, allowing copyright reduces rent dissipation.

### *C. The Merger Doctrine*

The rent dissipation associated with a related phenomenon, which we might term "writing around," can explain copyright law's merger doctrine. The doctrine provides that where there is only one way or a very small number of ways to express an idea, a work expressing that

[386] *See supra* note 67 (discussing how inventing around a patent can be a form of rent dissipation). Technically, there is no need to design around a copyright, as long as a work is independently created. *See infra* note 391 and accompanying text. In practice, however, concerns about litigation may lead authors to consult past works specifically so that they can ensure that their works are different.

idea will be considered to be uncopyrightable.[387] Consider the case often identified as the source of the doctrine, *Morrissey v. The Procter & Gamble Co.*,[388] in which two companies held similar sales promotional contests, entry into which required contestants to send their social security numbers to the sponsor. The plaintiff alleged that the defendant had infringed its copyright by duplicating Rule 1 of its contest rules with only a few editing changes.[389] The court held that the rule was uncopyrightable, announcing a concern that "to permit copyrighting would mean that a party or parties … could exhaust all possibilities of future use" by obtain rights over all permutations that would cover the underlying idea.

The court's explanation makes little sense, however, for two reasons. First, at least in *Morrissey* itself, and surely in many other contexts in which courts would apply the merger doctrine, there are countless ways of making even pedestrian points. Variations in syntax, word choice, and organization mean that exact identity or even very close similarity of expression almost always indicates copying, at least when more than a very small number of words is at issue.[390] The merger doctrine by its own terms applies only when expression and idea merge, but if the doctrine were really so narrow, the cases to which the doctrine applied would be an empty set. Second, and more significant, in copyright law, independent origination is sufficient to avoid infringement and obtain copyright.[391] No company would be able to monopolize the rules for a contest by writing down all permutations, because a company that wanted to hold a similar contest, even if inspired by the original contest, could set about writing its own rule, and any

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[387] Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539, 541 (1st Cir. 1905).

[388] 379 F.2d 675 (1st Cir. 1967).

[389] The defendant's rule, with modifications (other than product name substitution) indicated with italics (additions) and brackets (subtractions), read as follows:

> 1. Entrants should print name, address and Social Security number on a Tide boxtop, or *on* [a] plain paper. Entries must be accompanied by Tide boxtop (*any size*) or by plain paper on which the name 'Tide' is copied from any source. Official rules are *available* on Tide Sweepstakes packages, or *on* leaflets *at* Tide dealers, *or you can send a stamped, self-addressed envelope to:* ….

*Id.* at 678.

[390] *See* John Shepard Wiley Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 127 (1991) (noting that in *Morrissey*, "the number of equivalent rephrasings probably runs to the hundreds or thousands, but this quibble is at once digressive and fantastically tedious to verify").

[391] Judge Learned Hand famously encapsulated this rule: "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936); *see also* Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102-03 (2d Cir. 1951) ("All that is needed to satisfy both the Constitution and the statute is that the author contributed something more than a merely trivial variation, something recognizably his own.") (internal quotation marks omitted). The independent origination defense fits into rent dissipation theory, for if someone by happenstance infringes a copyright, most of the rent dissipation has already occurred, so there is no reason to prevent dissemination of the work.

coincidental similarity to the original would be irrelevant. Thus, if idea and expression truly merged, then the merger doctrine would not even be necessary, so long as the allegedly infringing author expressed the idea independently without engaging in copying.

Rent dissipation theory, however, can account for the merger doctrine. It would needlessly dissipate rents to require competitors to develop alternative formulations of a writing. Such rent dissipation may seem trivial in this context, though they could be greater elsewhere. For example, in *Kern River Gas Transmission Co. v. Coastal Corp.*,[392] the merger doctrine applied to a map illustrating a proposed route for a pipeline. The court noted that copyright law could not give the mapmakers a monopoly in the proposed route,[393] though presumably it would not have been a copyright violation if the alleged infringer had somehow found out about the proposed route by inquiring of those who produced the route. But such investigation is entirely wasteful. A counterargument is that rent dissipation might be avoided even more completely if copyright did grant a monopoly in the contest or the set of maps illustrated the proposed route. The merger doctrine, however, provides the solution that minimizes rent dissipation given the constraint that no such monopoly will be awarded. Once entry is to be allowed, it might as well be allowed at low cost.

### *D. Facts and Compilations*

Perhaps the most controversial issue concerning copyrightable subject matter is the protection of databases. Copyright law has long provided that there is no copyright in facts.[394] Compilations of facts, however, have a stronger claim on protection, as the copyright statute explicitly provides that compilations can be copyrightable subject matter.[395] In *Feist Publications, Inc. v. Rural Telephone Service*,[396] however, the Supreme Court found a telephone white pages directory, consisting of the usual information on names, addresses, and numbers, not to enjoy copyright protection. Factual compilations, the Court ruled, may be copyrighted, but only if they "possess the requisite originality,"[397] a requirement that the Court found to be

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[392] 899 F.2d 1458 (5th Cir. 1990).
[393] *Id.* at 1464.
[394] 2 NIMMER & NIMMER, *supra* note 374, § 2.11[A] ("No one may claim originality as to facts.").
[395] 17 U.S.C. § 103(a) (2000).
[396] 499 U.S. 340 (1991).
[397] *Id.* at 348.

constitutionally mandated.[398] If the "selection and arrangement are original," the Court held, "these elements of the work are eligible for copyright protection."[399] The white pages, however, "do nothing more than list Rural's subscribers in alphabetical order" and therefore are not even "remotely creative."[400]

A telephone directory might seem to be an appropriate candidate for copyright protection because of the great amount of effort that it may take to compile it.[401] The Supreme Court, however, concluded that the amount of work that it took to prepare a factual compilation was irrelevant, rejecting a "sweat of the brow" theory that would have allowed for protection. Justice O'Connor's explanation of why the Court rejected the "sweat of the brow" theory was undertheorized. The opinion noted that "[s]weat of the brow' courts . . . eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas."[402] This conclusion, however, begs the question of why a factual compilation should be treated as a fact. A typical newspaper article, after all, consists of a list of facts, and others may report the individual facts without infringing but cannot appropriate the whole article. Why shouldn't a similar rule apply to telephone directories?

Rent dissipation theory, however, offers a plausible, if empirically uncertain, explanation for rejection of the "sweat of the brow" theory. If it would require considerable sweat for the first telephone book publisher to compile a directory, then it will require considerable sweat for subsequent entrants to compile competing directories.[403] That sweat is rent dissipation. As long as new publishers are permitted to enter the market by redoing all the research of the original publisher, we can at least promote efficiency by allowing new publishers to save themselves the effort and simply copy the phone directory. The reasoning is exactly parallel to the concerns about designing or writing around that we have seen can explain case law on originality

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[398] *Id.* at 351.

[399] *Id.* at 349. The Court emphasized, however, that the principle of independent origination holds: "A compiler may settle upon a selection or arrangement that others have used; novelty is not required." *Id.* at 358.

[400] *Id.* at 363.

[401] It may have taken relatively little work to compile the directory at issue, however. "[A]s the sole provider of telephone service in its service area," the Supreme Court explained, "Rural obtains subscriber information quite easily." *Id.* at 343.

[402] *Id.* at 353.

[403] The point seems particularly strong where the amount of sweat that it would take the second publisher is greater than the amount that it would take the first publisher, as in *Feist* *See supra* note 401. The Court, however, did not seem to place any evidence on the ease with which Rural had compiled its directory.

generally and on the merger doctrine.[404] Because rent dissipation theory is concerned about minimizing the social loss attributable to the fixed cost of entry, we may be able to reduce that loss by allowing entrants a short cut that dramatically lowers the fixed cost.

*Feist* and the copyrightability of factual compilations more broadly present close cases, both for copyright doctrine generally and for rent dissipation in particular. Arguably, the Court did not pay sufficient attention to the danger that free appropriability of unoriginal factual compilations may mean that some compilations that are particularly labor-intensive to compile will no longer be compiled as a result of second-mover advantages.[405] My own view is that this is a powerful consideration, but the Court's rejection of it suggests a broader hostility to the incentive rationale for copyright protection. Even from the narrow lens of rent dissipation, the social welfare balance is unclear. Allowing copying of directories conceivably could increase social investments in redundant works, as even more publishers will enter the market and bear a variety of other fixed costs. Whether the entry deterrence or entry facilitation effect dominates the other is difficult to evaluate. That rent dissipation theory does not unambiguously predict the result in *Feist*, however, should not strike as a count against it. Perhaps the ultimate test of a positive theory of law is in its ability to predict which cases are close and therefore will be controversial. The results of borderline cases are not strong data one way or the other, for in such cases some judges presumably would have rendered the opposite decision, the Supreme Court's unanimity in *Feist* notwithstanding.

It is also a useful test of a positive theory to assess whether that theory is consistent with distinctions developed in the case law. One set of post-*Feist* cases has distinguished pre-existing facts from those that reflect some judgment on the part of the original compiler. For example, in *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*,[406] the Second Circuit found that the numbers in the *Red Book*, which consisted of listings of used car values, were protectable. The court emphasized that the "valuations were neither reports of historical prices nor mechanical derivations of historical prices or other data," but involved some independent

[404] *See supra* Part I.B.1.b-c.

[405] It is possible, however, that creators of databases may be able to find alternative means of protecting their creations. *See, e.g.*, Paul T. Sheils & Robert Penchina, *What's All the Fuss About* Feist*? The Sky Is Not Falling on the Intellectual Property Rights of Online Database Proprietors*, 17 U. DAYTON L. REV. 563 (1992).

[406] 44 F.3d 61 (2d Cir. 1994).

professional judgment.[407] A separate set of cases has established that the threshold for a compilation to qualify for copyright is not high. The Second Circuit again, in *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*,[408] found copyright protection in a telephone directory intended for use by the Chinese-American community. The selection and arrangement of 9000 listings into 260 categories was sufficient.

That facts are *created* might not seem relevant under *Feist*, especially given the Court's rejection of the sweat-of-the-brow theory. If it is not relevant that it might take time to find a fact, why should it be relevant that it took some effort and independent judgment to create a fact? The distinction might seem purely metaphysical.[409] But from a rent-seeking perspective, the efforts that go into creating facts are less likely to be redundant than the efforts that go into discovering facts. To be sure, the *Red Book* might not add much value to the *Blue Book* that does exactly the same thing but comes up with slightly different numbers. There is *some* value added, however, and competition might lead authors of both books to improve quality. Competition in finding facts, in contrast, is almost entirely redundant. While it is possible that one telephone directory might list someone's number erroneously and the other might then be useful, the requirement of independent judgment that the courts have applied does not merely prevent error but guarantees separate assessments of the fact (or, more accurately, non-fact) at issue. Copyright law thus requires duplication of effort precisely where such duplication is less likely to be duplicative.

## V. CONCLUSION

Visible costs and visible benefits have a greater effect on public policy than invisible costs and invisible benefits. The benefits of the large number of partially redundant copyrighted works are visible, and as consumers, we enjoy the low prices and wide selection that competition in copyright markets can bring us. Sometimes, such competition can amount to rent dissipation, but we do not know what the authors of largely redundant copyrighted works would have contributed economically if a more robust copyright law pushed them into other fields. Nor do

[407] *Id.* at 67. A similar case in the Ninth Circuit is *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999).

[408] 945 F.2d 509 (2d Cir. 1991).

[409] It also might seem inconsistent with case law not allowing copyright protection even over false facts where they are represented as truthful. *See, e.g.*, Nash v. CBS, 899 F.2d 1537 (7th Cir. 1990) (refusing to find copyright in the purported facts in a book that offered a conspiracy theory on John Dillinger's death, where a television show was based on the theory).

we intuitively recognize that if copyright law permitted more redundancy, for example if the derivative works right were abolished, there would be very modest negative effects in many markets as more resources were deployed to production of copyrighted works. Given the invisibility of such costs, it should not be surprising that copyright law doctrines that discourage redundancy are not more visible. This Article, however, has sought to show that many aspects of copyright law can be better understood and justified through an understanding of rent dissipation concerns. That the benefits and costs of redundancy are now theoretically visible, however, does not produce unambiguous implications for copyright law. The question remains whether the balance that copyright law strikes between rent dissipation and other concerns is the right one, and more work, both theoretical and empirical, is needed to improve on can for now be only tentative answers.