A New Uneasy Case for Copyright

*Michael Abramowicz**

INTRODUCTION

Justice Stephen Breyer's *The Uneasy Case for Copyright*[1] is justly famous for its context-sensitive empirical analysis of the effect that eliminating copyright protection would have on publishers' and authors' incentive to bring books to market.[2] Breyer's analysis is also the canonical statement of the benefits of eliminating copyright, identifying lower prices,[3] wider distribution,[4] and reduction of transaction costs[5] as the likely expected consequences. With a thorough analysis of both the benefits of copyright and its costs, Breyer's article was critical in calling the attention of policymakers and scholars to what is now the classical incentives-access paradigm of copyright law.[6] Roughly stated, the benefit of copyright law in general and a strong copyright law in particular is that it increases incentives to produce new works. But this benefit must be balanced against the cost of reduced access to those works that are produced. On this account, the more, the merrier—the more copyrighted works, the merrier, and the more access, the merrier—and the interesting problems in copyright law are those in which these goals are in tension.

Yet *The Uneasy Case for Copyright* also contains a foundation for a quite different economic approach to copyright law. In a largely

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* Professor of Law, The George Washington University.

1 Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

2 *Id.* at 293–308. Much of Breyer's analysis depends explicitly on then-prevalent market conditions and delves into issues such as the cost for a copier of warehousing and shipping a book. *See, e.g.*, *id.* at 298 n.68. One might argue that this makes Breyer's analysis a period piece that fails to account for the possibility of changed circumstances and in particular, the digital revolution. In my view, this critique is mistaken, for Breyer's lasting point is that copyright economics cannot reach firm conclusions in the abstract, but must be applied to specific markets, and Breyer's conclusion—that we should probably not abolish copyright—reflects his awareness of the potential transience of market conditions. Moreover, Breyer specifically noted the possibility of changing market conditions, especially when discussing copyright for computer programs. *See id.* at 346.

3 *Id.* at 313–16.

4 *Id.*

5 *Id.* at 316–18.

6 For an excellent treatment of this paradigm, including a careful exposition and critique of Breyer's analysis, see Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 606–27 (1996).

ignored[7] section titled "How Badly Is Copyright Needed?,"[8] Breyer makes clear that he does not believe that a reduction in the number of works necessarily should count negatively in the social welfare calculus. In discussing textbooks, for example, Breyer notes that "[i]f increased competition threatens the royalty income of their authors . . . they may turn from writing texts to scholarly articles or they may devote more time to teaching."[9] That, Breyer notes, would not necessarily "prove socially harmful," given the "spillover benefits that these other activities provide."[10] With trade books too, Breyer reasoned, "one cannot conclude that society is much worse off if some writers, discouraged by longer odds, take up some other occupation."[11] Breyer was careful not to draw a definite conclusion either way: "[O]ne simply cannot predict whether the marginal writer will produce a more or a less valuable social product in one of these other fields."[12]

For many years, virtually no attention was paid to the possibility that copyright protection might inefficiently draw resources into creation and dissemination of copyrightable works.[13] The empirical challenge that Breyer observed in assessing to what other uses creators might put their time presumably explains both why the issue did not draw more extended treatment in Breyer's article and why it did not quickly emerge as important in the literature. Yet it is not necessary to conduct a full study of alternative career paths to obtain some traction on the issue of whether excessive resources are devoted to producing copyrighted works. One can simplify by assuming that resources, if not so devoted, would earn normal returns elsewhere in

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7 The argument receives brief notice in Peter N. Fowler & Len S. Smith, *Revisiting* Williams & Wilkins v. United States*: Defining the Scope of Fair Use in Research Photocopying*, 48 J. COPYRIGHT SOC'Y U.S. 673, 721 n.303 (2001), and Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 808 n.95 (2004) ("Rewards enhanced by § 106 may also divert some creators into copyright-protected markets and away from other, more socially beneficial industry segments or industries . . . .").

8 Breyer, *supra* note 1, at 309–13.

9 *Id.* at 309.

10 *Id.* Breyer saw it as less likely that decreased profits from elementary and high school texts "would lead their authors . . . to turn to fields that are of at least equivalent social value." *Id.* at 310.

11 *Id.* at 312.

12 *Id.*

13 Others may well have occasionally noted the possibility. Indeed, at least one article before Breyer's recognized it, but that article did not substantially influence the literature. *See* Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 425 (1966),

the economy, and then focus on a different question: what benefit does society obtain from marginal copyrightable works—those that might not be created if copyright incentives were slightly less robust? If those benefits are considerably larger than normal investment returns, then the incentives-access paradigm should be largely undisturbed, but if they are considerably smaller, then the incentives-access framework must be reconsidered.

In 2004, Professor Christopher Yoo and I separately and simultaneously seized upon the economic literature on product differentiation as a basis for complicating the traditional incentives-access paradigm.[14] Our reason for applying this literature to copyright law was simple. Copyrighted works are not wholly interchangeable with one another, yet they can often substitute for one another. The degree of substitutability of any two works depends on the particular works. The extent to which one copyrighted work can substitute for another depends on many characteristics of the works, including quality. An action film tends to be a closer substitute for other action films than would a drama, for example. The economics of product-differentiation literature envisions products scattered in a multidimensional product space.[15] A consumer's choice of whether and what to consume depends on how far apart available works are from the consumer's ideal point in product space and the prices at which these works are sold.

Application of these models has two implications for the incentives-access paradigm. First, as Professor Yoo stressed, the goal of increasing access to copyrighted works can be achieved by facilitating entry of copyrighted works, for when there are many differentiated products near one another in product space, prices are likely to fall.[16] Second, as I stressed, it is possible that there may be *overentry* into a market for copyrighted works.[17] An intuition for the overentry result is simply that of decreasing marginal returns; as product space becomes denser, the entry of yet another product may provide only a

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14 Our initial publications on the topic eventually appeared as Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33 (2004), and Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004).

15 *See generally* Abramowicz, *supra* note 14, at 48–67 (providing an overview of the literature).

16 Yoo, *supra* note 14, at 221.

17 Abramowicz, *supra* note 14, at 52–53. Each of us also recognized what the other stressed. *See, e.g.*, *id.* at 112–25 (offering a formal model in which increased entry leads to lower prices); *see also* Yoo, *supra* note 14, at 260–64 (discussing "demand diversion").

slight benefit to the consumer in terms of increased variety.[18] Yet such entry may still be worthwhile to the creator of the work, if the work will win over enough customers who might have been almost as happy with other works. Overentry could occur in any market, but it is particularly likely to occur when marginal cost is low, as it was even at the time of Breyer's article, and remains today, especially for digital dissemination.[19]

Although the end result of Professor Yoo's analysis and mine was to provide a strong economic foundation to Breyer's observation that having somewhat fewer works might not be inefficient,[20] we cannot be much more confident about ultimate policy conclusions than Breyer. As Professors Yoo and John Conley noted in a more recent work extending their analysis by also considering modern public goods theory, the "theory fails to provide the type of simple policy inferences needed to provide the categorical conclusions that characterize so much of the copyright literature."[21] It is possible that we would be better off with copyright law that is somewhat weaker, not in spite of the fact that this would lead to the production of fewer works, but *because* it would do so—we might be better off with half as many books, movies, or songs and having the saved resources deployed elsewhere in the economy. Yet, just as Breyer concluded that "we should hesitate to abolish copyright protection,"[22] so too should we hesitate to make radical changes to copyright law in an effort to decrease the number of works produced.

Copyright law, of course, is not a simple on-off switch, but a detailed and complex set of doctrines. As a tribute to Justice Breyer's *The Uneasy Case for Copyright*,[23] this Article seeks to assess a wide range of copyright doctrines to determine how well they accord with the new insights learned from the economic literature on product differentiation. The analysis proceeds from the assumption that copyright law should seek to minimize the most egregious instances of crowding of copyright space—those in which effort and resources are expended to produce copyrighted works that are very close to other works in product space. This assumption is not uncontroversial; it is theoretically possible that expending resources even for a perfect sub-

18 *See* Abramowicz, *supra* note 14, at 39.

19 *See id.* at 122 tbl.3 (illustrating overentry with simulation results).

20 *Id.* at 44, 94; Yoo, supra note 14, at 257–62.

21 John P. Conley & Christopher S. Yoo, *Nonrivalry and Price Discrimination in Copyright Economics*, 157 U. PA. L. REV. 1801, 1830 (2009).

22 Breyer, *supra* note 1, at 284.

23 *Id*. at 281.

stitute of a work could increase consumer welfare by reducing prices. But it seems likely that at least in this extreme case, the benefit to consumers would be insufficient to compensate for the loss from the dissipation of producer rents.[24] And so, at least tentatively, it seems reasonable to postulate that copyright law should seek to disincentivize the creation of what otherwise would be the most redundant, rent-dissipating works. Perhaps surprisingly, at least given the incentives-access dilemma, copyright doctrine does quite well against this criterion.

Part I canvasses a comprehensive range of copyright doctrines and argues that in many cases, copyright law already seems to reflect rent dissipation concerns. That is, copyright doctrine tends to encourage the production of work that seems unlikely to be redundant and tends to discourage the production of redundant work. In some cases, the fact that copyright law is relatively strong compared to policy alternatives can be justified by rent dissipation considerations. Yet, in other cases, the fact that copyright law is relatively weak can be justified by those same considerations. In other words, the pattern of copyright law doctrine—strong in some respects and weak in others—is broadly consistent with rent dissipation concerns. That does not mean that copyright law always strikes the correct balance, and in some cases, particularly where copyright doctrine is controversial, rent dissipation considerations provide inconsistent recommendations. This analysis thus produces a new uneasy case for copyright doctrine, helping to show why many doctrines that seem suspect under an incentives-access framework become more defensible once rent dissipation concerns are added to the mixture of considerations.

Part II turns briefly to the broader project that Justice Breyer tackled: assessing copyright law as a whole. This remains an empirically challenging project. The rent dissipation literature suggests that there might well be some media for which the complete elimination of copyright might do more good than harm, though the situation is sufficiently uncertain that we should continue to hesitate before eliminating copyright. There are other areas in which copyright is on a firmer foundation, for some form of incentive will be needed to create works of sufficient quality. Yet the attack on the effectiveness of copyright protection brought by new copying technologies introduces new questions about whether copyright law remains the best approach to providing such incentives. An important question, for example, is

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[24] For a set of simulations that reinforce this conclusion, see Abramowicz, *supra* note 14, at 112–25.

whether reward systems could be designed that provide a superior alternative form of incentive for copyright.

I. Rent Dissipation and the Uneasy Case for Copyright Doctrine

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 law, need not lead to wholesale reform of copyright law. To the contrary, this Part argues that copyright law already substantially reflects concerns about wasteful rent dissipation. That copyright might already reflect a consideration that has not received direct attention by copyright theorists or the courts may seem too good to be true. There is, however, a simple public choice reason that copyright law should take rent dissipation into account. 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.[25] 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.[26]

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,[27] and legislators should be expected to take consumer welfare somewhat into account in all but the most cynical theories of public choice, though producers have an obvious lobbying advantage.[28]

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25 Professor William Landes and Judge Richard Posner have noted that a relatively weak copyright may benefit authors because it allows them to more frequently use others' work. *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.

26 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. Copyright Soc'y U.S. 109, 127 (1989).

27 *See, e.g.*, *infra* note 111.

28 *See, e.g.*, John Borland, *RIAA Boosts Anti-Napster Lobbying Efforts*, cnet News (Feb.

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 this Article points out instances in which copyright law seems to protect producers at the expense of consumers.[29] The analysis here, however, suggests simply that legislators seek to avoid rent dissipation and that 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 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 society already knows are important. Moreover, there may be alternative, sometimes complementary explanations for these puzzles. Professor Douglas Lichtman has argued, for example, that copyright doctrine seeks to save the courts from decisions of evidentiary complexity.[30] This helps to explain, among other things, copyright law's requirement of creativity,[31] 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 concerns 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 take rent dissipation into account as well. Copyright doctrine is, at least in theory, an exercise in statutory interpretation, and so caselaw may roughly reflect legislative purpose.[32] Yet there may be other reasons, not predicated on legislators' preferences, that judges

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27, 2001, 10:00 AM), http://news.cnet.com/2100-1023-253215.html (reporting on the Recording Industry Association of America's lobbying efforts).

29 *See, e.g.*, *infra* Part I.B.4 (discussing restrictions on home copying).

30 *See* Douglas Lichtman, *Copyright As a Rule of Evidence*, 52 DUKE L.J. 683 (2003).

31 *Id.* at 704–10.

32 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.*

pay attention to rent seeking. Perhaps many judges adopt a vaguely natural law approach to copyright,[33] 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.[34] Similarly, judges may recognize that it is inefficient to require authors to duplicate the work of others if ultimately they will be allowed to enter the market anyway. Thus, although judges may not make rent dissipation theory an explicit basis for 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.

A. Copyrightable Subject Matter

Copyright subsists "in *original* works of authorship *fixed* in any tangible medium of expression."[35] This Section thus considers caselaw on the fixation and originality requirements. It then considers the scope of copyright more broadly, in particular the merger doctrine, the copyrightability of facts and compilations, and the availability of copyright protection for elements embodied by that work, such as plot and characters.

1. The Fixation Requirement

The requirement that a work be fixed in a "tangible medium of expression"[36] 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."[37] The only media that are excluded are those that are not "sufficiently permanent or stable to permit [them] to be perceived, reproduced, or otherwise communi-

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William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988) (assessing the extent to which legislative inaction validates past interpretations).

33 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).

34 Michael Abramowicz, *supra* note 14, at 42.

35 17 U.S.C. § 102(a) (2006) (emphases added).

36 *Id.*

37 H.R. REP. NO. 94-1476, at 52 (1976).

cated for a period of more than transitory duration."[38] The stuff of law school exam hypotheticals, this would appear to include works like ice sculptures, sand castles, and skywriting.[39] Aside from an interesting question concerning fixation in computer media,[40] the only significant exclusion is for works that are not fixed at all.[41] For example, extemporaneous speeches that are not simultaneously recorded by the speaker, even if there is a simultaneous recording by a third party,[42] are not fixed.

Rent dissipation theory provides a straightforward explanation for the fixation requirement. 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 a lack of intent to commercialize it, and for speeches and the like. To be sure, 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 at all.[43] But the assumption that authors will seek to fix their works when they intend to exploit them commercially still holds. 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 unlikely to produce competition that would dissipate producer rents.[44]

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38 17 U.S.C. § 101 (2006).

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

40 *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, 151–54 (1995) (exploring fixation in computer programs).

41 *See* 17 U.S.C. § 102.

42 Section 101 states that a work is considered "fixed" only if the fixation is "by or under the authority of the author." *Id.* § 101.

43 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 52. The third party broadcasters would have copyright in their sound recordings, but not in the underlying game. *See* 17 U.S.C. § 114.

44 I do not mean to suggest that rent dissipation is necessarily the best or only 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

2. The Originality Requirement

The originality requirement, sometimes called the creativity requirement,[45] 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. *Burrow-Giles Lithographic Co. v. Sarony*[46] offers a classic illustration. This case confronted a technological innovation: the photograph.[47] Creation of a photograph, in the ordinary case, does not usually require as much creativity or skill as creation of a painting, and the defendant 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."[48] The Supreme Court, however, concluded that a photograph of Oscar Wilde had enough creativity to enjoy copyright protection.[49] It emphasized that the photograph emerged from the photographer's "own original mental conception" and reflected decisions about costume and composition.[50] Though the case left open the possibility that only carefully constructed photographs would receive copyright protection, caselaw since suggests that the photographer need not do much more than point and click to earn an entitlement to a copyright.[51]

Rent dissipation concerns provide a straightforward explanation of the relatively low threshold that an author must overcome to obtain copyright in a work. 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,

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inquiry when an allegedly copied unfixed work is unavailable. *See* Lichtman, *supra* note 30, at 730–34.

45 A treatise offers the following distinction: "Where creativity refers to the nature of the work itself, originality refers to the nature of the author's contribution to the work." 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][2], at 2-88 (2010).

46 Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

47 *Id*. at 53.

48 *Id.* at 59.

49 *Id*. at 60.

50 *Id.* at 54–55.

51 *See, e.g.*, Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1076–77 (9th Cir. 2000) (emphasizing the low threshold that photographs must meet to be deemed sufficiently creative for copyright protection). The Copyright Office, at least, has made clear that it will issue copyrights to photographs. *See What Does Copyright Protect?*, U.S. COPYRIGHT OFF., http://www.copyright.gov/help/faq/faq-protect.html#elvis (last visited June 25, 2011) (noting that although copyright law will not protect sightings of Elvis, "copyright law will protect your photo (or other depiction) of your sighting of Elvis").

whether because of lack of originality (in the more general usage of the word) or otherwise, 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 competition. Traditional incentive theories of copyright, of course, can also 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,[52] 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 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 one must compare the effects of rent dissipation, just as patent scholars have done.[53] Here, any increased rent seeking is minimal, as individuals producing copyrighted works of very low originality will find little motivation in the right to exclude. Thus, the availability of copyright for relatively unoriginal work probably leads to little redundancy in the production of such work, while limiting redundant exploitation of those few unoriginal 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, Inc. v. Mailing Services of Pittsburgh, Inc.*[54] The case concerned the copyrightability of letters, forms and envelopes produced by a mass marketing company.[55] For example, an envelope included the words "PRIORITY MESSAGE: CONTENTS REQUIRE IMMEDIATE ATTENTION"

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52 *Cf. infra* notes 60–68 and accompanying text.

53 *See infra* notes 69–80 and accompanying text.

54 Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc., 634 F. Supp. 769 (W.D. Pa. 1986).

55 *Id.* at 771.

in large white letters on a black stripe running horizontally across the middle of the envelope.[56] The court held that the words on the envelope did "not exhibit the minimal level of creativity necessary to warrant copyright protection,"[57] and that the addition of a black stripe constituted "nothing more than a distinctive typeface, which is not protected."[58] 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 a photograph.

It might seem at first that the rent dissipation 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 for 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.

However, the conclusion that there is little rent dissipation from exploitation of the work for copyright to prevent is once again only half the story. 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. One 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 their own research to develop marketing slogans and designs of their own. Such research, even if it resulted in different marketing designs, would

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56 *Id.*

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

58 *Id.* at 772.

be of little social value. In this case, the most salient form of rent dissipation stems from attempts to "design around" the initial copyright.[59] 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.

3. The Merger Doctrine

The rent dissipation associated with a related phenomenon, which one 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 idea will be considered to be uncopyrightable.[60] Consider the case often identified as the source of the doctrine, *Morrissey v. Procter & Gamble Co.*,[61] in which two companies held similar sales promotional contests, entry into which required contestants to send their social security numbers to the sponsor.[62] The plaintiff alleged that the defendant had infringed its copyright by duplicating Rule 1 of its contest rules with only a few editing changes.[63] The court held that the rule was uncopyrightable, citing the concern that "to permit copyrighting would mean that a party or parties . . . could exhaust all possibilities of future use" by obtaining rights over all permutations that would cover the underlying idea.[64]

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

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59 *See infra* note 66. Technically, there is no need to design around a copyright, as long as a work is independently created. *See infra* note 66 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.

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

61 Morrissey v. Procter & Gamble Co., 379 F.2d 675 (1st Cir. 1967).

62 *Id.* at 676.

63 The defendant's rule, with modifications (other than product name substitution) indicated with italics (additions) and brackets (omissions), 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.

64 *Id*. at 678–79.

very close similarity of expression almost always indicates copying, at least when more than a very small number of words is at issue.[65] 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.[66] 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 rules, and any coincidental similarity to the original rules 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 it could be greater elsewhere. For example, in *Kern River Gas Transmission Co. v. Coastal Corp.*,[67] 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,[68] 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

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65 *See* John Shepard Wiley Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 128 (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").

66 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, Inc., 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, the rent dissipation has already occurred and was unavoidable, so there is no reason to prevent dissemination of the work.

67 Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1463–64 (5th Cir. 1990).

68 *Id.* at 1464.

the set of maps illustrating 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 a low cost.

4. 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.[69] Compilations of facts, however, have a stronger claim for protection, as the copyright statute explicitly provides that compilations can be copyrightable subject matter.[70] In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[71] however, the Supreme Court found that a telephone white pages directory consisting of names, addresses, and phone numbers did not enjoy copyright protection. Factual compilations, the Court ruled, may be copyrighted, but only if they "possess the requisite originality,"[72] a requirement that the Court found to be constitutionally mandated.[73] If the "selection and arrangement are original," the Court held, "these elements of the work are eligible for copyright protection."[74] The white pages, however, "do nothing more than list [the plaintiff's] subscribers in alphabetical order" and therefore are not even "remotely creative."[75]

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.[76] The Supreme Court, however, concluded that the amount of work that it took to prepare a factual compilation was irrelevant, thereby rejecting a "sweat of the brow" theory that would have allowed for protection.[77] Justice O'Connor's explanation

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69 2 NIMMER & NIMMER, *supra* note 45, § 2.11[A], at 2-178.7 ("No one may claim originality as to facts.").

70 17 U.S.C. § 103(a) (2006).

71 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

72 *Id.* at 348.

73 *Id.* at 351.

74 *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.

75 *Id.* at 363.

76 It may have taken relatively little work to compile the directory at issue, however, because as the Supreme Court explained, the plaintiff was "the sole provider of telephone service in its service area," and therefore was able to "obtain[ ] subscriber information quite easily." *Id.* at 343.

77 *Id*. at 346.

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."[78] 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 should not a similar rule apply to telephone directories?

Rent dissipation theory, however, offers a plausible 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 would require considerable sweat for subsequent entrants to compile competing directories.[79] That sweat is rent dissipation. As long as new publishers are permitted to enter the market by replicating all the research of the original publisher, society 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, and such reasoning explains caselaw on originality and the merger doctrine.[80] Because rent dissipation theory is concerned about minimizing the social loss attributable to the fixed cost of entry, society 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 might cause: some compilations that are particularly labor-intensive to compile might no longer be compiled as a result of second-mover advantages.[81] This is a powerful consideration, but the Court's rejection of it suggests a broader hostility to the incen-

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78 *Id.* at 353.

79 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 76. The Court, however, did not seem to place any emphasis on the ease with which Rural had compiled its directory.

80 *See supra* Part I.A.2–3.

81 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, 579–84 (1992).

tive 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 fixed costs. 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 caselaw. 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.*,[82] the Second Circuit found that the numbers in the *Red Book*, which consisted of listings of used car values, were protectable.[83] 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 professional judgment.[84] 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.*,[85] 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.[86]

The *creation* of facts might not seem relevant under *Feist*, especially given the Court's rejection of the "sweat of the brow" theory.[87] 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 cre-

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82 CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61 (2d Cir. 1994).

83 *Id.* at 67–68.

84 *Id.* at 67. A similar case in the Ninth Circuit is *CDN Inc. v. Kapes*, 197 F.3d 1256, 1262 (9th Cir. 1999).

85 Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509 (2d Cir. 1991).

86 *Id*. at 514.

87 *See* Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43, 45, 73 n.161 (2007) (assessing the distinction between created facts and facts that already exist).

ate a fact? The distinction might seem purely metaphysical.[88] 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.[89] To be sure, the *Red Book* might not add much value to the *Blue Book*, which does exactly the same thing but comes up with slightly different numbers.[90] There is *some* value added, however, and competition might lead authors of both books to improve quality. Competition in finding facts, however, is almost entirely redundant. Although 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, nonfact) at issue.[91] Copyright law thus requires duplication of effort precisely when such duplication is less likely to be duplicative.

B. Use of Copyrighted Works

1. Copyright's Exclusive Rights

The law provides owners a range of exclusive rights in their works, including the right to reproduce the work,[92] to prepare derivative works,[93] to distribute copies,[94] to perform the work publicly,[95] and to display the work publicly.[96] The broad scope of these rights is consistent with theories of rent dissipation. Most notably, the right to prepare derivative works gives the copyright owner control of a range of products in different media.[97] From the perspective of an incentive

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88 The distinction might also seem inconsistent with caselaw that does not allow copyright protection even over false facts where they are represented as truthful. *See, e.g.*, Nash v. CBS, 899 F.2d 1537, 1539–43 (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).

89 *See supra* note 79 and accompanying text.

90 *See generally* CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61 (2d Cir. 1994).

91 *See supra* note 79 and accompanying text.

92 17 U.S.C. § 106(1) (2006).

93 *Id.* § 106(2).

94 *Id.* § 106(3).

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

96 *Id.* § 106(5).

97 I have previously argued in more detail that product differentiation theory helps to provide a justification for copyright law's broad derivative right. *See* Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 320–21 (2005). For an argument for a still broader right that would diminish over time, see Igor Du-

theory, the right is justified at best by an uncertain empirical claim. The possibility of adaptation will encourage the creation of some works, as the chance of income from movie rights, for example, may make the difference for some who otherwise would choose not to write.[98] The derivative right, however, prevents unauthorized adaptations and thus discourages production of new works, so the derivative right can be justified by incentive theory only if the first effect dominates the second.[99] The rent dissipation account, by contrast, recognizes that whatever their magnitudes, the first effect is more important than the second, because the works encouraged by the latter are likely to be more redundant.

What is perhaps more impressive than the breadth of copyright protection, however, is the number of exceptions. A significant exception is the first sale doctrine, which allows the purchaser of a copy or phonorecord of a copyrighted work to sell that work in turn.[100] 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).[101] 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.

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binsky, *The Race to the Box Office Leads to Cinematic Déjà Vu: Modifying Copyright Law to Minimize Rent Dissipation and Copyright Redundancy at the Movies*, 29 WHITTIER L. REV. 405, 448–49 (2007).

98 It does not make much of a difference, however, as those who are likely to benefit from such rights will ordinarily already be well compensated from book sales alone. Whether John Grisham would have produced fewer or more books if he received no compensation for movie rights depends on the balance of income and substitution effects. *Cf.* J.E. Stiglitz & P.S. Dasgupta, *Differential Taxation, Public Goods, and Economic Efficiency*, 38 REV. ECON. STUD. 151, 159 (1971) (claiming that income tax increases sometimes have lead workers to work more rather than less).

99 For a careful analysis of derivative rights and incentives, see Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S. 209, 216–18 (1983).

100 17 U.S.C. § 109(a) (2006).

101 *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."). Professor 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.*

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. For example, courts have reached different conclusions in cases in which legal purchasers of books have cut out individual pictures and mounted them, thereby competing with the original copyright owner in a different market.[102] 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.[103] Moreover, the reproduction right is limited to direct duplication of "the actual sounds fixed in the recording."[104] If Yo Yo Ma performs the Bach Cello Suites and sells a compact disk of the performance, I am free to play the compact disk publicly,[105] and if I had the talent, I would also be free to record my own version of the Bach Cello Suites imitating Ma's interpretive choices.[106] 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.[107] 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 retold in a number of different writing styles.[108] The recog-

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102 *Compare* Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1343–44 (9th Cir. 1988) (finding a violation of the derivative right), *with* Lee v. A.R.T. Co., 125 F.3d 580, 583 (7th Cir. 1997) (finding no violation in a case involving the same defendant).

103 17 U.S.C. § 114(a).

104 *Id.* § 114(b).

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

106 *But see* Kent Milanovich, *The Past, Present, and Future of Copyright Protection of Soundalike Recordings*, 81 J. PAT. & TRADEMARK OFF. SOC'Y 517, 519 (1999) (arguing that soundalike recordings may infringe copyrights).

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

108 A student commentator has criticized compulsory licenses for musical works, arguing

nition 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. Although a more robust copyright regime would lead to an increase in the number of works produced, the addition of those works to the existing 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,[109] 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 libraries thus may reduce publishers' profits.[110] The public lending right likely cannot be justified by incentive factors alone. Presumably, Congress, prodded by lobbying from libraries,[111] 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 approach, however, has trouble explaining why this deadweight loss should be sufficient to justify limiting this potential right of

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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.

109 *See, e.g.*, Lord Goodman, *Introduction to* PUBLIC LENDING RIGHT: A MATTER OF JUSTICE 13, 13–17 (Richard 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).

110 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 ECON. 1, 39–40 (2002).

111 The American Library Association has been active in supporting exceptions to copyright. *See Copyright*, AM. LIBR. ASS'N, http://www.ala.org/ala/issuesadvocacy/copyright/index.cfm (last visited June 26, 2011) (describing the American Library Association's copyright agenda).

the copyright owner when the loss 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 significant rights but give consumers a break on the insignificant 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 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. 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.[112] 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 rent dissipation theory can help explain the contours of the most important limitation on copyright, fair use.

2. 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 a use is fair.[113] Like most balancing tests, the fair use test reflects a range of policy goals, but scholars have focused on one underlying justification, first identified by Professor Wendy Gordon,[114] as capable of explaining a wide range of fair use decisions: transaction costs.[115] The increasing ease of obtaining copyright permissions, for example through the Copyright Clearance Center[116] or through online transactions, accordingly has led some to suggest that the Internet might facilitate a sharp constriction of fair use doctrine.[117]

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112 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 might explain why owners of copyrights in computer software have a public lending right. *See* 17 U.S.C. § 109(b)(1) (2006).

113 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.

114 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). Professor Gordon's article also addresses other market failures relevant to the fair use doctrine. *See, e.g.*, *id.* at 1630–31 (discussing externalities).

115 Professor Landes and Judge Posner emphasize transaction costs in their analysis of fair use. *See* Landes & Posner, *supra* note 25, at 357–61.

116 *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).

117 U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE NATIONAL

Some critics have argued that such a conclusion neglects the low marginal cost of reproducing intellectual property,[118] 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,"[119] 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,"[120] suggests that Congress was concerned about whether the use was beneficial to society.[121] As one court noted, however, "publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers,"[122] and thus the statute might seem counterproductive from the view of incentive theory, discouraging production of just those 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,[123] stressing that the use was "commercial," making the touchstone of commercial speech different for copyright than for First Amendment law.[124] The

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INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995); *see also* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930–31 (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).

118 *See, e.g.*, Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61, 73–79 (1998).

119 17 U.S.C. § 107(1) (2006).

120 The preamble specifically lists "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as examples of fair use. *Id.* at § 107.

121 This assessment has produced some criticism. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT § 10.2.2, at 10:33–:34 (2d ed. Supp. 2005) ("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.").

122 Salinger v. Random House, Inc., 650 F. Supp. 413, 425 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *supplemented on denial of reh'g*, 818 F.2d 252 (2d Cir. 1987).

123 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

124 News reporting for profit is not commercial speech under First Amendment doctrine.

key, the Court held, is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[125]

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,[126] 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."[127] 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,[128] because a general exception for transformative works would undo the exclusive right to create derivative works,[129] which I have already suggested reflects rent dissipation concerns.[130] I

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).

125 *Harper & Row*, 471 U.S. at 562.

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

127 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (alteration in original) (internal citations and quotation marks omitted). 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*.

128 *See, e.g.*, GOLDSTEIN, *supra* note 121, § 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: THE FATE OF THE COMMONS IN A CONNECTED WORLD 198–99 (2002) (lamenting the extension of copyright doctrine to prevent publication of derivative works); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 283 (1996) ("The exclusive right to create derivative works should explicitly exclude transformative uses.").

129 *See* 17 U.S.C. § 106(2) (2006).

130 *See supra* notes 98–108 and accompanying text.

shall return to this issue in considering one particular application of fair use, parody.[131]

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."[132] The logic underlying the second factor is similar to that underlying doctrine on the copyrightability of facts.[133] 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.[134] 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*,[135] 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."[136] Scooping a publication is even more rent dissipating than duplicating an existing publication, because it creates an inefficient race to publish.[137] 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.[138] This decision led to criticism, both in the Second Circuit[139] and else-

131 *See infra* Part I.B.3.

132 4 NIMMER & NIMMER, *supra* note 45, § 13.05[A][2][a], at 13-186.

133 *See supra* Part I.A.4.

134 *See, e.g.*, Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, 626 F.2d 1171, 1176–77 n.14 (5th Cir. 1980).

135 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

136 *Id.* at 555.

137 For a discussion of how rent dissipation may prompt marketing that is earlier than optimal, see *supra* note 60 and accompanying text.

138 *See* Salinger v. Random House, Inc., 811 F.2d 90, 92–93, 95–97 (2d Cir. 1987) (involving a biography of the writer J.D. Salinger that excerpted some of his letters).

139 *See* Wright v. Warner Books, Inc., 953 F.2d 731, 734 (2d Cir. 1991) (finding for defen-

where.[140] The concern was sufficient that Congress amended § 107,[141] with the intention of undoing the Second Circuit decision.[142] Although the Second Circuit's initial action may have reflected concern about privacy rights,[143] 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 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,[144] 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.[145] 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 also predicts that the importance of the excerpts to the defendant's work is relevant, because the less it relies on the plaintiff's work, the less likely the defendant's work is to be redundant. The Supreme Court has noted that "'no plagiarist can ex-

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dant despite unpublished status of work); New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 593 (2d Cir. 1989) (Oakes, C.J, concurring) (following but criticizing *Salinger*).

140 *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, 618–21 (1987).

141 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 all the above factors." 17 U.S.C. § 107 (2006).

142 *See, e.g.*, S. REP. NO. 102-141, at 5–6 (1991) ("[W]e intend to roll back the virtual per se rule of *Salinger* . . . .").

143 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.

144 A typical book review with limited quotations is one of the paradigmatic examples of fair use. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 601 (1985) (Brennan, J., dissenting) ("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.").

145 *See, e.g.*, *id.* at 565 (majority opinion) (approving of the district court's "evaluation of the qualitative nature of the taking").

cuse the wrong by showing how much of his work he did not pirate,'"[146] 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.[147]

The fourth factor, the effect upon the plaintiff's potential market, has been called the "most important" of the factors,[148] 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."[149] 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 and defendant. As long as the focus is on "traditional, reasonable, or likely to be developed markets,"[150] 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.[151] Professor Maureen O'Rourke, for exam-

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146 *Id.* at 564–65 (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) (Hand, J.)).

147 In *Harper & Row*, despite having just quoted Judge Hand, the Court noted, "[s]tripped to the verbatim quotes, the direct 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.* at 565. 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.").

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

149 4 NIMMER & NIMMER, *supra* note 45, § 13.05[A][4], at 13-194.4. 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, 778 (2003).

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

151 For a proposal suggesting that a profit allocation suit, similar to compulsory licenses but

ple, 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.[152] The lack of required payment for copyright fair use is puzzling both from the perspective of a general incentive theory, because payment would improve incentives to produce copyrighted works, and from the perspective of transaction costs. Although transaction 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, transaction costs do not seem a significant barrier to payment.[153] 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. Thus there is no inconsistency between a doctrine that focuses on interference with the plaintiff's market, both in the fourth factor and indirectly through the others, and one that gives no compensation at all when not quite enough interference is found.

3. 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.*,[154] 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."[155] This conclusion, "reflected in the rule that there is no protectible derivative market for criticism,"[156] 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

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depending on the profitability of the work, might help save copyright law's constitutionality, see Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 55 (2002).

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

153 Litigation costs, however, could be a concern. *Cf.* Lichtman, *supra* note 30, at 686 (arguing that a desire to avoid difficult evidentiary questions helps provide a positive account of copyright law).

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

155 *Id.* at 591–92.

156 *Id.* at 592.

use under the first factor than nontransformative works.[157] 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,[158] but that it refused to allow an evidentiary presumption in favor of parody[159] and remanded to the Sixth Circuit to apply the four factor test anew.[160] Although the Court may well not have 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."[161] 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."[162] 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.[163]

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157 *See supra* notes 127–130 and accompanying text.

158 *See, e.g.*, *Campbell*, 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.").

159 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 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.

160 *Id.* at 594.

161 *Id.* at 588.

162 *Id.* at 589.

163 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 79–80. Given the relatively small cost of altering the melody, however, it is plausible that the first rent dissipation effect outweighs this one.

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.[164] 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.[165] This caveat is difficult to explain on incentive grounds,[166] and the Court's interpretation of the third and fourth factors together arguably place an excessive burden on socially useful parody,[167] 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.

4. 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,[168] copyright owners are always free in any event to allow limited sharing.[169] Content producers

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164 *Campbell*, 510 U.S. at 593–94.

165 *Id*. at 592–93.

166 *See supra* notes 98–99 and accompanying text (noting that a strong derivative right may decrease incentives to produce new works).

167 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 1271 (acknowledging the borrowing, but concluding that the parody could not have criticized the original "without depending heavily upon copyrighted elements of that book").

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

169 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, 375–76 (2002) (describing "peer production" as an alternative production model); Dennis M. Kennedy, *A Primer on Open Source Licensing Legal Issues: Copyright, Copyleft and Copyfuture*,

often complain that piracy hurts their bottom line,[170] and although they may exaggerate the effect,[171] 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 likely to be more one-sided than on other issues, because no content producer is likely to benefit from a regime permitting unauthorized duplication, and one 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 transaction costs are low, unauthorized copying should be prohibited.[172] If the number of works in a world

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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 would not need Windows, or at least we would not 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.

170 Some studies claim high dollar losses from pirating. *See* BUS. SOFTWARE ALLIANCE 2, 2007 STATE PIRACY REPORT (2008), *available at* http://www.bsa.org/country/Research%20and%20Statistics/~/media/Files/statestudy07/statestudy07.ashx (claiming $4.2 billion in revenue losses from software piracy in the states studied); *see also* INT'L FED'N OF THE PHONOGRAPHIC INDUS., THE RECORDING INDUSTRY 2006 PIRACY REPORT: PROTECTING CREATIVITY IN MUSIC 4 (2006), *available at* http://www.ifpi.org/content/library/piracy-report2006.pdf (focusing solely on losses from pirated copies).

171 *See, e.g.*, Mary Hodder, *MacWizard's Analysis of Music Sales Refutes RIAA Arguments on Piracy*, BIPLOG (Dec. 23, 2002, 1:35 PM), http://journalism.berkeley.edu/projects/biplog/archive/000409.html (challenging the methodology used by the Recording Industry Association of America to estimate losses from online copying). The Business Software Alliance study employed data from a study conducted by IDC, a global market intelligence firm. BUS. SOFTWARE ALLIANCE, *supra* note 170, at 11. IDC calculated losses to software companies by multiplying the piracy rate times the wholesale cost of the software. IDC, THE ECONOMIC BENEFITS OF LOWERING PC SOFTWARE PIRACY: METHODOLOGY AND DEFINITIONS 2 (2007), *available at* http://www.bsa.org/upload/idc_methodology_final.pdf. This approach assumes that users of pirated software all would have purchased the software if pirating were impossible. Some 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 P. Rumelt, *Software Piracy: An Analysis of Protection Strategies*, 37 MGMT. SCI. 125, 125 (1991); Moshe Givon et al., *Software Piracy: Estimation of Lost Sales and the Impact on Software Diffusion*, 59 J. MARKETING 29, 34–35 (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, 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.

172 *See, e.g.*, Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2664 (1994) (arguing for property rule protection for intellectual property generally).

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.[173] 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 be a benefit or at least not so large a cost, and therefore the benefits of allowing consumers to build collections loom larger in the social calculus than they otherwise would.[174]

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."[175] 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."[176] The Supreme Court, in *Sony Corp. of America v. Universal City Studios*,[177] found that fair use entitled Betamax owners to "time-shift" by taping shows for later viewing.[178] These provisions are

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173 *See supra* notes 109–12 and accompanying text.

174 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, *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.

175 17 U.S.C. § 107 (2006). 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. REP. NO. 94-1733, at 70 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 5810, 5810–11.

176 17 U.S.C. § 108(a).

177 Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).

178 *Id.* at 421. As Professor Randal Picker argues, *Sony* does not merely allow machines 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*, 47 ANTITRUST BULL. 423, 445 (2002).

all instances in 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 ("AHRA").[179] The AHRA was a congressionally enacted compromise among record companies, artists, and electronics companies,[180] and it allows importation and sale of digital audio recording devices.[181] The devices must contain a serial copy management system that prevents making copies of copies,[182] and makers of devices are required to pay royalties to artists.[183] The compromise, though criticized by some as reflecting industry control of copyright policy,[184] 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, specifically 17 U.S.C. § 1008, arguably immunizes all home audio copying,[185] including at least analog copying despite the absence of royalty payments for such copying.[186] The compromise indicates that the portion of con-

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179 Audio Home Recording Act (AHRA), 17 U.S.C. §§ 1001–1010.

180 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).

181 17 U.S.C. §§ 1002(a), 1008.

182 *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).

183 *Id.* §§ 1003–1007.

184 *See* Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S. 497, 501 (1998).

185 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.").

186 In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Supreme Court appeared to assume either that the AHRA was irrelevant or that copies made through peer-to-peer services should not count as home copying. Whether the AHRA should in fact be read as immunizing all copying truly limited to the home 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 *Recording Industry Ass'n of America v. Diamond Multimedia System*, 180 F.3d 1072, 1076 (9th Cir. 1999),

sumer 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 results.[187] 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."[188] Piracy seems particularly likely to be rent dissipating as pirates can produce perfect copies at lower prices than content producers. Thus, if legal, piracy would threaten to have more drastic effects on the incentive to produce and market new works than noncommercial copying.[189] More controversially,[190] the Digital Millennium Copyright Act ("DMCA")[191] criminalizes the evasion of technological measures employed by copyright owners to limit use of their works. 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.[192] Moreover, the effect

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which construed "digital audio recording device" narrowly to exclude devices involving computers. The Senate Report on the bill, however, seems to suggest that Congress, by referring to digital or analog recording, intended to cover *all* home recording. *See* S. REP. NO. 102-294, at 51 (1992) ("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 45, § 8B.07[C][4], at 8B-93 to -94.

187 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.

188 17 U.S.C. § 506(a)(1)(A).

189 Pirated copies are cheaper to produce because pirates free-ride on the marketing expenses of the record companies. *See* Andrew Burke, *How Effective Are International Copyright Conventions in the Music Industry?*, 20 J. CULTURAL ECON. 51, 52-54 (1996) (discussing the market for pirated works).

190 For a balanced assessment of the DMCA, see Orin Kerr, *A Lukewarm Defense of the Digital Millennium Copyright Act*, *in* COPY FIGHTS 163, 167 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2002).

191 Digital Millennium Copyright Act (DMCA), 17 U.S.C. §§ 1201-1205.

192 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 J.

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 will be of lower quality,[193] 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[194] or because only some consumers own the necessary equipment.[195] 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,[196] it seems at least plausible that there would be far fewer works, perhaps so many fewer that social

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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).

193 One 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* Alireza 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.

194 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 disrespect for law. *See, e.g.*, Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1410–16 (2005) (reporting an experiment indicating that subjects exposed through newspaper stories to laws perceived as unjust reported greater likelihood of engaging in criminal activity than other subjects in what subjects believed to be a second, unrelated experiment).

195 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).

196 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, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 789–90 (2004).

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 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[197] that facilitate file sharing pose a danger to the music recording industry[198] even though there is little evidence that they have led to noticeable decreases in the number of songs produced or on sales.[199] 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.[200] On the other hand, these services allow users to accumulate large libraries of works, and absent a conclusion that users' allegedly[201] illicit benefits should not count in a social welfare calculus,[202]

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197 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, 510–34 (2003). Professor Strahilevitz observes that file-swapping programs have managed to avoid a "tragedy of the digital commons" in which everyone would have an incentive to download files but no one would have an incentive to upload them. *Id*. at 508. 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 547. 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.

198 *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").

199 *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.").

200 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, *When Code Isn't Law*, 89 VA. L. REV. 679, 746 (2003). Professor 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 746.

201 The Ninth Circuit in *A&M Records, Inc. v. Napster, Inc*. did not adequately address the argument that Napster users' usage of the program was protected under the AHRA. The court

such increased access is welfare enhancing.[203] The uncertain empirics of technology development thus complicate what already would be a complex social welfare calculation.[204] Rent dissipation theory, however, at least strengthens the case of those who would argue for greater copying.

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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 of Am. 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 45, § 8B.02[A][2], at 8B-31 to -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 194 (noting that § 1008 provides that no action may be brought for home copying); *cf.* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 356–60 (2002) (offering a comprehensive analysis of the § 1008 issue in *Napster*, 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 AHRA provides that "[n]o action may be brought . . . *based on* the noncommercial use by a consumer." 17 U.S.C. § 1008 (2006) (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 within the purview of the AHRA. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 915 n.19 (N.D. Cal. 2000), *aff'd in part*, *rev'd in part*, 239 F.3d 1004. The Ninth Circuit mentioned this argument without assessing it, *see Napster*, 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 45, § 8B.02[A][1], at 8B-23 to -24 (noting that the AHRA comprises but one chapter, namely Chapter 10, of Title 17). Probably the strongest argument, not considered by the Ninth Circuit 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.

202 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.

203 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. Professor Neil Netanel has argued for the legalization of such programs subject to a fee, on the model of the AHRA. *See* Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-To-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 33–34 (2003).

204 An additional consideration is the effort expended by consumers to make copies. *See* Novos & Waldman, *supra* note 195, at 237.

C. Copyright Remedies

The winner of a copyright infringement suit ordinarily has a right, in addition to damages, to enjoin distribution of the infringing work.[205] At times the right to an injunction seems comically inefficient, as when a preliminary injunction was issued against the distribution of the film *12 Monkeys* as a result of a single scene that allegedly infringed a copyright in the design of a chair.[206] The existence of property rule rather than liability rule protection for copyright seems inconsistent with an incentive theory of copyright, because allowing a compulsory license at a price simulating a negotiation for all use of copyrighted works would allow for more adaptations of existing works.[207] Transaction costs considerations make property rule protection seem especially unattractive, because negotiation barriers, including the difficulty of locating the copyright owner,[208] 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.[209]

Rent dissipation theory, however, provides strong support for injunctive remedies. The justification is similar to that provided by Professor Edmund Kitch in the patent context.[210] 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 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

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205 *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 Publ'ns Int'l v. Henry Holt, Co., 884 F.2d 659, 661 (2d Cir. 1989) (Miner, J., concurring) (noting that an injunction is not an inevitable result of a finding of infringement).

206 *See* Woods v. Universal City Studios, Inc., 920 F. Supp. 62, 65 (S.D.N.Y. 1996).

207 *But see* Merges, *supra* note 172.

208 *See* William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 477–78 (2003) (discussing tracing costs).

209 *See, e.g.*, 17 U.S.C. § 116 (providing detailed compulsory licensing schemes).

210 Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 287 (1977).

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.[211] Rent dissipation theory, however, helps explain why compulsory licenses are not more widespread.[212]

III. The Uneasy Case for the Continued Existence of Copyright Protection

The purpose of this Article is to remove the assumption that copyright law should seek to maximize the number of works and to replace it with almost the opposite assumption: that copyright law should seek to prevent redundant creation of copyrighted works. One might imagine that copyright doctrine would be dramatically misaligned given this shift, yet Part I suggests that this is not at all true. To the contrary, many nuances of copyright law make *more* sense given the assumption that copyright should seek to avoid redundancy. A partial explanation for this surprising result is that copyright doctrine's effects are largely on the margins of production decisions. The copyright system as a whole undoubtedly incentivizes the production of works, and the doctrines that arguably point in the opposite direction likely have small effects, avoiding what would be the greatest examples of rent dissipation.

That does not mean that copyright doctrine has magically arrived at a precise optimum inducement of works and minimization of rent dissipation. Indeed, because copyright law is motivated in part by noneconomic goals, it may tend to tolerate some rent-dissipating redundancy of copyrighted work. Perhaps most obviously, the owner of a copyright cannot prevent someone else from conveying the same ideas or facts. It is possible that a copyright regime that did prevent the dissemination of ideas might be more economically efficient (though there surely would be transaction costs and other serious downsides of such a regime), but in any event it is not palatable in a country that values and protects the expression of ideas for

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211 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). For a proposal to enact a new compulsory license provision along these lines, see 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).

212 We have already seen a justification for compulsory licenses of musical works. *See supra* text accompanying notes 103–08 (noting that differences in presentation make covers less redundant to consumers than would be the equivalent in other media).

noneconomic reasons. So, it is quite plausible that copyright law, from a narrow economic perspective, tolerates a greater degree of redundancy than is optimal.

But other policies would also be at least arguably consistent with valuing free expression—including the policy that Justice Breyer considered: abolition of copyright protection.[213] This Part considers the merits of abolition, again from a perspective of an economic theory that recognizes the possibility of overentry into markets for copyrighted goods. If incentives for copyright are removed altogether, then it is theoretically possible that we could end up with too few copyrighted works, just the right number, or with still too many (if indeed there are too many copyrighted works currently). Focus on the economics of product differentiation likely makes finding an apparent answer more difficult rather than easier.

Nonetheless, this Part revisits this central question, briefly considering the merits of abolition. It does so by comparing a regime of copyright with three alternative possibilities: one in which content creators can engage in self-help, one in which there is no self-help and no copyright protection, and one in which copyright protection is replaced by prizes. The tentative conclusion is that a regime of copyright is likely to be superior to any of these alternatives, at least if the relevant policy is to be applied across the board, though it is possible that for some media, one of the other regimes might be superior to copyright protection.

A. Copyright Versus Self-Help

The alternative of self-help is the easiest to dispatch. It may (or may not) be that it is efficient to allow copyright owners to engage in self-help, such as digital encryption or contract protection, in addition to taking advantage of existing copyright remedies. But it seems doubtful that a regime of self-help would be more efficient than a regime of copyright in which copyright owners may, but need not, take advantage of self-help. There are two reasons for this. First, technical forms of self-help are themselves likely to be rent dissipating.[214] If they in the end are effective, then one might as well allow copyright protection, which at least sometimes will be simpler. If they are ineffective, then one might as well have a legal regime that bans self-help (assuming this can be done cheaply) and avoids this rent dissipation.

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213 *See* Breyer, *supra* note 1.

214 *See supra* text accompanying note 192.

Second, contractual self-help may well be less effective than copyright protection, but not necessarily in a way that will reduce copyright redundancy. Contracts may offer the creator of a work no protection against third parties with whom the content creators are not in privity, yet manage to obtain access to the work. It is true, of course, that the owner of a work may sue a licensee who gives the work without authorization to a third party, or perhaps even may sue the third party on a theory of tortious interference with contract. If such a strategy is likely to be effective, then one might as well simply reduce transaction costs by allowing copyright protection against the third parties. And if it is ineffective, then one might as well have a regime in which there is no copyright and contractual provisions achieving the same result are unenforceable. In short, while the effects of self-help depend on its effectiveness, it seems likely to be a more cumbersome alternative to copyright protection, and therefore the real question ought to be whether we should have copyright protection or abolish copyright protection and simultaneously abolish technical and contractual substitutes for such protection.

B. Copyright Versus No Copyright

Perhaps the simplest way to make the case against abolition of copyright law is to point out that there are some areas where complete elimination of copyright seems likely to be disastrous. Suppose that there were no copyright on movies, for example, and no self-help for movie producers. This would mean that once a movie were made, anyone would be able to obtain unauthorized digital copies of it, including movie theaters, without paying royalties. Any movie theater chain agreeing to pay royalties would likely be driven out of business by copyists. Digital copying is virtually instantaneous, and if contract protection is not permissible, than at least some royalty payers would charge others to obtain copies, and they in turn would charge others somewhat less for copies, and quite quickly, everyone would have copies. The strongest counterargument is that perhaps some segment of the movie-going public would agree to go to authorized theaters, perhaps as a way to support the continued production of movies. But it seems unlikely that this will be anywhere near the proportion of the consumer public that refuses to download unauthorized digital movie files because they believe this to be illegal. Overall, the likely effects on movie production would be drastic, and largely negative.

This leaves ambiguous whether a substantial curtailment of copyright protection for movies would increase welfare or decrease wel-

fare. Suppose, for example, that copyright protection included only the performance right, or that the reproduction right's duration were limited to a few months. In effect, movie producers would be able to recover their costs in movie theaters and television broadcasts, not through DVD or other forms of digital sale. Undoubtedly, this would have a dramatic effect. The number of movies produced per year would decline precipitously. But there *were* movies produced before DVDs and VHS tapes. Moreover, now that digital dissemination is possible, consumers would be able to obtain greater access to all movies that are still produced. From the perspective of the classic incentives-access paradigm, the question would be whether the decrease in movies would be worth the increase in access, but rent dissipation theory suggests that the decrease in number of movies produced might be only a small social cost or even a social benefit. It is difficult to make confident projections, however, especially given the uncertain effect of limiting the reproduction right on the quality of the movies that continue to be made. And so, as Justice Breyer suggested,[215] society should perhaps continue to hesitate before abolishing copyright even in this one area.

The existence of even a single form of media for which outright abolition of copyright would likely be devastating suggests that we should almost certainly not abolish copyright across the board. There are other types of copyrighted works, however, where the case for copyright seems much more equivocal. Consider computer programs, for example. The best case for abolition would probably focus on the success of the open source software movement.[216] But the fact that open source software has produced many useful products does not mean that this model would be effective in many other areas. The diversity of software offerings would plummet if creators of software did not enjoy copyright protection (at least placing aside the possibility of patent protection). It seems at least plausible (in my subjective judgment, quite probable) that this decrease would be so great that the increase in access to existing software programs and the likely increase in the number of available open source programs would still not be sufficient to prevent a welfare loss. And so we should hesitate to abolish copyright, though once again, small reforms—such as short-

215 *See generally* Breyer, *supra* note 1.

216 The movement is so successful that some have argued that copyright may be harmful, because licenses can make it difficult to interoperate both open source and proprietary code. *See* Greg R. Vetter, *"Infectious" Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L.J. 53, 53–54 (2004). Of course, the abolition of proprietary code would likely have positive ramifications for the quality of open source software.

ening copyright duration for computer programs to a few years—might be beneficial.

Perhaps the area of copyright in which the case for abolition is strongest is music sound recordings, for the simple reason that performers would still have incentives to produce such sound recordings in order to sell concert tickets. If the product differentiation analysis implies that there is an excessive amount of music, then removing copyright would provide benefits in two ways, both by redirecting some resources out of the music field and by increasing consumers' access to whatever music is produced nonetheless. It seems plausible that the decrease in the diversity of music might be relatively small, given the relatively large number of musicians who choose to stay in the field despite making relatively little money from selling sound recordings. And the benefits to consumers of being able to play all known existing sound recordings at any time for no charge would be substantial. Of course, even here one must hesitate. It is difficult to know precisely how great a decrease in sound recordings would result and how great would be the fall in consumer surplus from this decrease. Moreover, the status quo is certainly not so bad; given even a small probability that abolition of copyright would be disastrous, it is a step that should not be taken, at least without firmer empirical evidence on the effects of copyright abolition.

Much the same can be said for the media on which Breyer focused—textbooks and tradebooks.[217] The future of reading may well be in eReaders, as well as general computing devices such as tablet computers. Arguably, far more books are produced than society needs, and a dramatic decrease in the number produced might be only a small cost or even a social positive, and an increase in access might be a considerable social benefit. But it is difficult to say for sure. Could one imagine experiments that would yield more information? Perhaps the most sensible experiments would be elimination of copyright for a few randomly selected areas; for example, microeconomics might lose copyright protection for textbooks while macroeconomics textbooks would still be copyrighted. This would allow at least anecdotal evidence of the effects of eliminating protection, though these effects would still be difficult to quantify into social costs and benefits, particularly over the long term.

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217 *See generally* Breyer, *supra* note 1.

C. *Copyright Versus Prizes*

The previous Section is an academic exercise, for it seems exceedingly unlikely that Congress will abolish copyright protection. Even if rent dissipation occurs, there are still enough content producers who earn some positive rents from the copyright system to produce considerable lobbying against any substantial reduction in copyright, and indeed, as the Copyright Term Extension Act[218] demonstrated, the balance of power may sometimes favor an increase in the scope of copyright protection.[219] Future legislative change is likely to be driven by technological change. But having already enacted the DMCA,[220] Congress may be running out of tools that it can use to combat easy copying.

For now, it seems that copyright markets have settled into an equilibrium in which some non-law-abiding people copy copyrighted works without authorization and in which many law-abiding people do not. The question is whether this is sustainable. As Internet bandwidth continues to increase[221] and as software improves, illegal copying could become just as easy as ordering music on iTunes or other authorized distributors, or perhaps even easier, for those who wish to share music they have downloaded with others without content restrictions. Purchasers of music might decide that they do not want to be the only chumps paying money and getting less than everyone else. Might there be some tipping point following which only a tiny percentage of consumers will purchase music? And might the same happen with movies and books?

My purpose is not to answer this question, but to offer some preliminary speculation about what Congress might do if this did occur. It is plausible that content creators at some point might seek direct public subsidies, perhaps in exchange for abandoning their copyright claims altogether. It is certainly not inevitable, though. First, if it turns out that there is still a vibrant supply of high quality music, movies, and books, then it seems doubtful that the remaining content cre-

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218 *See* Copyright Term Extension Act, 17 U.S.C. §§ 108, 203, 301–304 (2006) (extending the copyright term).

219 I have argued elsewhere that this particular increase might be justified, at least under the assumption that the same copyright term must apply to both the reproduction right and the derivative right, because what matters most economically late in the copyright term is the derivative right, which tends to reduce rent dissipation. *See* Abramowicz, *supra* note 97, at 366–72.

220 *See supra* notes 189–92 and accompanying text.

221 According to *Nielsen's Law*, Internet bandwidth increases about 50% per year. *See* Jakob Nielsen, *Nielsen's Law of Internet Bandwidth*, USEIT.COM (Apr. 5, 1998), http://www.useit.com/alertbox/980405.html.

ators will seek subsidies, for the simple reason that Congress is unlikely to grant such a request. This seems like the most probable outcome, at least for music and books, in part because the product differentiation analysis suggests that consumers will not be much worse off even with a great reduction in production. Second, even if there is a crisis leading to a dramatic decrease in the production of music, movies, or books, Congress has other budget priorities and might choose not to help content creators. Nonetheless, it is possible that if the decrease in production is steep enough, as it might well be in the case of movies, Congress might be willing to offer some funding to ensure continued production of these high fixed-cost copyrighted works.

The legal literature has paid relatively scant attention to the possibility of a system of copyright rewards,[222] though there is substantial literature on the possibility that a reward system might be used as a complement to or substitute for the patent system.[223] As long as copyright remains legally enforceable, the core arguments for and against reward systems are similar in these contexts. A reward system eliminates deadweight cost (increasing access), while still providing incentives for invention or creation. A copyright reward system, however, might be easier to administer than a patent reward system, because the government could use decentralized proxies to determine what subsidies to grant without making value judgments. In the film context, a simple approach would be to divide the pool of money that Congress has set aside in proportion to the number of people who saw the film, as measured by some administrative agency. This is far simpler than in the patent system, where the degree of consumer surplus that someone obtains from one invention may be far different than the degree obtained from another invention. To be sure, some movies may produce more consumer pleasure per viewer than others. But this seems like a problem of a much smaller magnitude, and the gov-

222 For a notable exception that considers the possibility of prize systems in intellectual property generally, see Steve P. Calandrillo, *An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301 (1998).

223 *See, e.g.*, Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003); Michael Kremer, *Patent Buyouts: A Mechanism for Encouraging Innovation*, 113 Q.J. ECON. 1137 (1998); James Love & Tim Hubbard, *Prizes for Innovation of New Medicines and Vaccines*, 18 ANNALS HEALTH L. 155 (2009); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001).

ernment might even find ways of addressing it, for example by giving greater subsidies to movies that receive higher consumer ratings.

Nonetheless, the product differentiation literature suggests that the case for a copyright reward system is far weaker than the case for a patent reward system, at least today. It seems doubtful that there is a socially excessive amount of research into patentable technologies, but quite plausible that there is overentry into markets for production of copyrighted works. Adding a reward system on top of the copyright system might inefficiently divert further resources into creating copyrighted works, and at the same time cost the government considerable revenue. A reward system set up as an alternative to the copyright system, or perhaps as an option only for producers that agree to give up copyright, is more difficult to evaluate. Perhaps this would lead to a decrease in the overall number of works, as it would be difficult to compete against the low-priced movies that received subsidies and have no copyright protection. But this requires at least as much speculation as analysis of eliminating copyright altogether. And so we should hesitate to replace the copyright system with a reward system or add a reward system as a further incentive to create copyrighted works. But if copyright ceases to be an effective means of protection, then society might well find out for which areas copyright protection indeed is essential, and in these areas, a reward system might turn out to be the only practical alternative.

CONCLUSION

Then-Professor Breyer ended his seminal article on copyright with the statement, "[O]ne cannot escape the conclusion that more empirical work and more thoughtful analysis is needed before the Copyright Law is significantly revised."[224] Since then, there has been a considerable amount of both thoughtful analysis and copyright revision, and yet we do not seem appreciably closer to being able to make definitive pronouncements about optimal copyright policy than Breyer was. It may thus be appropriate to again repeat Breyer's call for empirical work. Perhaps such work will indeed allow more definitive conclusions to be reached. Yet there are at least two reasons to hesitate. First, any empirical analysis may be time-sensitive. Breyer's empirical observations have not stood the test of time nearly as well as his more theoretical ones. Second, copyright markets are extraordinarily complex and not necessarily susceptible to simple empirical wel-

224 Breyer, *supra* note 1, at 351.

fare measures. The literature on the economics of product differentiation may tell us that copyrighted works are distributed across a multidimensional product space. But figuring out where actual works lie within any product space, let alone how copyright policy might change this product space, may be impossible, at least under current economic knowledge.