9-2023

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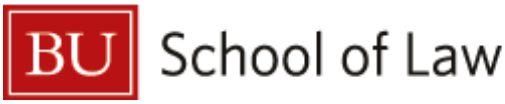
Keith N. Hylton



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Boston University School of Law
Research Paper Series No. 23-30

September 1, 2023

Keith N. Hylton
Boston University School of Law

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August 2023

Abstract: This paper is a reaction to *AWF v. Goldsmith* (*Warhol*), which finds that Warhol's adaptation of a photograph of Prince, taken by photographer Lynn Goldsmith, is not protected from copyright liability by the fair use defense. The *Warhol* dissent accuses the majority of being overly concerned with the commercial character of Warhol's use, while the dissent emphasizes the artistically transformative quality of Warhol's adaptation. These different approaches provide strong evidence that the theory of fair use remains unclear to the Court. There is a need for a simple positive theory of the fair use doctrine. That need was largely met by Gordon's article in 1982. I aim to develop the economic theory of fair use further, especially in light of case law since 1982. A theory of fair use is at the same time a theory of the scope of copyright. I clarify the economic basis for fair use, taking advantage of basic concepts in welfare economics. As a general matter, the optimal scope of copyright minimizes the sum of dynamic (having to do with incentives over time) and static (having to do with allocation at a given time) welfare costs. One proposition advanced is that the concepts of economic complementarity, substitutability, and preference correlation provide crucial analytical tools in resolving fair use disputes. This proposition may seem narrow, but it stands the approach taken in the cases on its head. I explain how the approach urged here works by applying it to several cases, including *Warhol* and *Google v. Oracle*.

Keywords: fair use, copyright, complements, substitutes, transformative, remedies

JEL Classification: K11, O34, O38

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* knhylton@bu.edu. For helpful comments on an earlier draft, I thank Henry Smith, Michael Meurer, Gary Lawson, Jack Beermann, Christopher Robertson, David Seipp, and David Walker. I thank generally participants in workshops at Boston University and University of California at Berkeley for their reactions.

I. Introduction

This paper is in large part a reaction to the Supreme Court's decision in *AWF v. Goldsmith* (*Warhol*),[1] which finds that Andy Warhol's adaptation of a photograph of Prince, originally taken by the photographer Lynn Goldsmith, is not protected from copyright liability by the fair use defense. Put another way, Warhol's Prince image is not a fair use of Goldsmith's Prince photograph. Given the similarity between the two images, the decision seems to accord with common sense, at least for many observers.[2] However, common sense is not a useful method for determining fair use.[3] The dissent in *Warhol* accuses the majority of being overly concerned with the commercial character of Warhol's use, while the dissent emphasizes the artistically transformative quality of Warhol's adaptation. The different approaches reflected in the majority and dissenting opinions provide the strongest evidence available that the theory, and fundamental doctrinal basis, for the fair use defense remains unclear and largely mystical to the Court.

There is a need for a simple and usable positive theory of the fair use doctrine. That need was largely met by Wendy Gordon in 1982, in an article that sets out a comprehensive economic theory of the fair use defense.[4] I see no reason to dispute Gordon's analysis.[5] I aim in this paper

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[1] Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 598 U.S. __ (2023).

[2] Transcript of Oral Argument at 37, *id.* (no. 21-869) (Justice Kagan, author of the dissent, noted if Andy Warhol weren't famous, people would say "All he did was take somebody else's photograph and put some color into it.").

[3] This is exemplified by Justice Kagan's about-face on the common sense test, shown in her dissent. Warhol v. Goldsmith, 143 S. Ct. at 1301 ("Ignoring reams of expert evidence—explaining, as every art historian could explain, exactly what the fuss is about—the majority plants itself firmly in the "I could paint that" school of art criticism. No wonder the majority sees the two images as essentially fungible products in the magazine market—publish this one, publish that one, what does it matter?").

[4] Wendy J. Gordon, Fair Use as Market Failure: A Structural And Economic Analysis of the Betamax Case and Its Predecessors, 82 Columbia L. Rev. 1600 (1982).

[5] I have not found a published paper that disputes Gordon's analysis. Soon after the publication of Gordon's article, William Fisher published an article that very slightly extends Gordon on the economics, by including a concern for the deadweight loss due to monopolization, but goes on to provide an alternative "utopian vision" of fair use, see William W. Fisher II., Reconstructing the Fair Use Doctrine, 101 Harv. L. Rev. 1659 (1988). The theory that copyright protection might cause deadweight loss due to monopolization was well known before Fisher and discussed in Arnold Plant, The Economic Aspects of Copyright in Books, 1 Economica 167 (1934), Robert M. Hurt and Robert M. Schuchman, The Economic Rationale of Copyright, 56 American Economic Review 421 (1966), and S. J. Liebowitz, Copyright Law, Photocopying, and Price Discrimination, in The Economics of Patents and Copyrights 181, 188 (Research in Law and Economics No. 8, J. Palmer & R. Zerbe eds. 1986). And while the reasoning of the courts, and particularly the Supreme Court, has been consistent with economic analysis, as I hope to make clear in this article, no court has adopted a utopian framework on the fair use question. One contribution that extends Gordon's analysis suggests that Gordon is largely concerned with transaction costs, as an obstacle to bargaining, as the justification for the fair use defense, see Ben Depoorter and Francesco Parisi, Fair use and copyright protection: a price theory explanation, 21 International Review of Law and Economics 453, 455 (2002). However, Gordon appears to allow for market failure due to factors other than transaction costs, see Gordon, *supra* note 4, at 1615 ("An economic justification for depriving a copyright owner of his market entitlement exists only when the possibility of consensual bargain has broken down in some way. Only where the desired transfer of resource use is unlikely to take place spontaneously, or where special circumstances such as market flaws impair the market's ordinary ability to serve as a measure of how resources should be allocated, is there an economic need for allowing nonconsensual transfer. Thus, one of the necessary preconditions for premising fair use on economic

to develop the economic theory of fair use further,[6] especially in light of the case law that has developed since 1982.[7] As a general matter, I claim, the optimal scope of copyright protection minimizes the sum of "dynamic" (having to do with incentives over time) and "static" (having to do with allocation) welfare costs.[8]

A theory of fair use and a theory of the copyright boundary are simply two sides of the same coin. A theory of the fair use doctrine is at the same time a theory of the boundary or scope of copyright. I discuss the copyright boundary and the fair use question in almost interchangeable terms in this paper, though I have tried to be clear when I am talking about one concept versus the other. I am clarifying the economic basis for the fair use doctrine, in simple terms and taking advantage of basic concepts in economics. I briefly explain concepts such as demand-side substitution, complementarity, and preference correlations, all of which have important implications for the fair use defense, and also the copyright boundary.[9] Two products in the market are economic substitutes if they satisfy the same consumer preference, so that consumers would choose to purchase one or the other, but not both – like purchasing either a Toyota Camry or Honda Accord, both cars that are nearly identical in style and function.[10] Products are

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grounds is that market failure must be present."). Before Gordon, Stephen Breyer contributed perhaps the first law review piece examining the economic case for copyright protection, but his argument was largely a speculative critique of copyright, asserting that the case for copyright protection was not an easy one, see Stephen Breyer (1970), The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, Harvard Law Review, 84: 281–355. The articles by Plant and Gordon-Schuchman, *supra*, well before Breyer, provided an analytically sound speculative critique of copyright. Posner and Landes later offered a positive economic account of copyright, see William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325 (1989). For an excellent history of economic analysis of copyright, written relatively early in the period of this literature, see Gillian K. Hadfield, The Economics of Copyright: An Historical Perspective, 38 Copyright L. Symp. 1 (1988). As a final point on the economics of fair use literature, I should note that the Fisher and Landes-Posner contributions both fail to appropriately cite Gordon. The Fisher article mentions Gordon in a late-appearing string cite noting previous economic discussions of copyright, Fisher, *supra*, at 1696, without disclosing that Gordon had provided an economic account of fair use that anticipates his discussion in virtually all important respects. The Landes-Posner article cites Gordon in a subpart discussing "book reviews," after having discussed at length, without citing Gordon, the precise transaction cost rationale for fair use that her article presents.

[6] In relation to that end, this paper could be viewed as a series of "footnotes to Gordon". I am borrowing heavily from a comment in ALFRED N. WHITEHEAD, PROCESS AND REALITY 39 (1979) ("[t]he safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato."),

[7] Obviously, there have been many cases, but I will focus on prominent Supreme Court decisions. Perhaps the most recent copyright dispute to gain public attention involves the charge that the singer Ed Sheeran copied Marvin Gaye's "Let's Get It On," in his popular song "Thinking Out Loud." Structured Asset Sales, LLC v. Sheeran, 433 F. Supp. 3d 608 (S.D.N.Y. 2020).

[8] For an argument that this general claim is the basis for a positive theory of intellectual property doctrine, see Ronald A. Cass and Keith N. Hylton, Laws of Creation (Harvard University Press, 2013).

[9] On the importance of economic complementarity to copyright, see Ty, Inc. v. Publications Intern. Ltd., 292 F. 3d 512 (7th Cir. 2002) (Posner, J.); Glynn S. Lunney Jr, Copyright, Derivative Works, and the Economics of Complements, 12 Vand. J. Ent. & Tech. L. 779 (2010).

[10] For more precise and rigorous discussions of the concept of economic substitutes, see Laurence S. Seidman, Complements and Substitutes: The Importance of Minding p's and q's, 56 Southern Economic Journal 183 (1989); John Hicks, Elasticity of Substitution Again: Substitutes and Complements, 22 Oxford Economic Papers 289 (1970); Ryuzo Sato and Tetsunori Koizumi, On the Elasticities of Substitution and Complementarity, 25 Oxford Economic Papers 44 (1973).

complements if a consumer would tend to purchase them together – as in the case of right and left shoes.[11] More generally, a complementary relationship exists if the purchase of one product by consumers tends to enhance the consumption of the other product. These concepts are not esoteric, and they are relatively easy to identify in real cases.[12]

The major proposition advanced in this paper is that the concepts of economic complementarity and substitution provide crucial analytical tools in resolving fair use disputes. In particular, probably the first concept courts should focus on is economic complementarity. If the original work and the copying work ("the use") are market complements, the starting presumption should be that the fair use defense applies.[13] The reason is that if the two works are complements, the use does in no way harm the market for the original work; quite the opposite, the use enhances the market for the original work. The purpose of copyright law is to enhance incentives to innovate, and the publication or dissemination of a complementary use does precisely that. More generally, courts should consider the correlation between preferences (or "demand curves") for the original copyrighted work and the use. Positively correlated preferences may generate either a substitutive relationship or a complementary relationship, where the fair use doctrine clearly applies in the latter case. Negatively correlated preferences are inconsistent with any substitutive impact, and the fair use defense becomes even stronger in that setting.

The major proposition of this paper may seem narrow, but it stands the approach taken in the copyright cases on its head. While the case law focuses on whether the use could serve as a substitute in some foreseeable market into which the original author might enter or license, and finds that the use is not fair if it does; the alternative suggested here is to focus on whether the use is complementary to the original use in its original market. I explain how this approach works by applying it to several cases, including *Warhol* and *Google v. Oracle*.[14]

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[11] On economic complements, see *id*.

[12] Of course, the identification of a substitute or a complement is an empirical exercise, see, e.g., A.D. Shocker et al., Product Complements and Substitutes in the Real World: The Relevance of "Other Products", 68 Journal of Marketing 28 (2004), https://doi.org/10.1509/jmkg.68.1.28.24032. One product may be a substitute for another over a given range of relative prices, but not so over a different range. In the copyright cases, substitutability is easily determined by actual practice – by the evidence that one work served as a substitute for the other work. For example in *Warhol*, the Prince image by Warhol served as an actual substitute to the Goldsmith photograph in the market of celebrity gossip magazines. *Warhol*, 143 S. Ct. at 1278 ("Both are portraits of Prince used in magazines to illustrate stories about Prince.").

[13] *Ty, Inc.*, 292 F. 3d at 517 (Posner, J., "Generalizing from this example in economic terminology that has become orthodox in fair-use case law, we may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work … is not fair use.").

[14] Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021); 593 U.S. (2021).

Another question I address is the relationship between the copyright boundary and fair use. When the fair use doctrine was created by Justice Story in *Folsom v. Marsh*,[15] it was viewed as a limitation on the copyright boundary – that is, a limitation on the property right. Specifically, Justice Story examined the case of an abridgment of a more substantial work in *Folsom*,[16] and asked whether the abridgment violated the copyright. His decision held that the abridgment was not fair, that is, that it violated the copyright. However, he treated the fairness matter as a limitation on the scope of the copyright of the original work. In modern cases, however, the fair use defense is viewed as excusing a violation of the property boundary. The assumption in cases such as *Warhol* is that the copyright holder has a presumptive claim on all derivative variations unless a court finds fair use.[17] The choice is between a regime of a narrow property boundary (with a correspondingly narrow fair use defense), and an expansive copyright boundary with a similarly expansive fair use defense. I describe the choice as analogous to a narrow conception of property, coupled with a narrow necessity defense for invasions, and an expansive notion of property coupled with a correspondingly expansive notion of necessity.

One could argue that the choice between narrow and expansive property is not important. One could get the same results under either regime.[18] However, there is a difference. Expansive property, I argue, tends paradoxically to weaken property rights. The reason is simple – and can be captured by the term *remedial modification*. An expansive definition of property enables the rights holder to assert property claims against actors who make the slightest of invasions. For example, suppose property law is defined so expansively that it enables possessors to assert trespass claims against people who have engaged in nuisance-like behavior, such as playing music too loud. Eventually, the non-possessors who are hauled into court to defend themselves against dubious trespass claims will make persuasive arguments to the courts that their interferences should not be considered serious trespasses. If the court is bound by precedent recognizing the expansive property rights, it is likely to respond by weakening the remedies available to the property holder. The decisions weakening remedies are likely, then, to be applied to all assertions of property rights, even against actors who physically invade the boundary of the possessor's property. The end result of this process is weaker property rights.

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[15] 9. F.Cas. 342 (C.C.D. Mass. 1841).

[16] *Id*. at 342 (Describing how respondents copied 388 pages of plaintiffs work, 'The Writings of George Washington,' verbatim and incorporated those pages into a work of 866 pages on the same topic.).

[17] *Warhol*, 143 S. Ct. at 1273.

[18] I should be clear that I mean you could get the same results with respect to findings of liability for violating the property boundary. This should be distinguished from the "you could get the same results" argument implied by the Coase Theorem. Under the Coase Theorem, the definition of a property boundary is unimportant, if transaction costs are low, because the parties will always bargain themselves to the same allocation. See Ronald H. Coase, The Problem of Social Cost, 3 Journal of Law and Economics 1 (1960). The Coase Theorem implies not only that you *could* get the same allocational result, but that you *will* get the same allocational result, provided transaction costs are sufficiently low. In the text, I mean to say that the actual enforceable property boundary could be the same under narrow property or expansive property.

This process of remedial modification, I argue, has already played out to some degree in the copyright field. Because of the modern expansive view of the copyright boundary, copyright claims are continually asserted against derivative uses that would have been considered well outside of the boundary of the copyright in previous generations (especially by Justice Story). This has led to a weakening of copyright rather than strengthening, as courts have started to apply the strictures of *eBay v. MercExchange*[19] to demands by copyright holders for injunctions.[20] Copyright could be strengthened by narrowing the boundary, though this is unlikely to occur. Because of its strong legislative foundations,[21] the regime of expansive copyright coupled with expansive fair use is here to stay.

Given this regime of expansive copyright and expansive fair use, it is important to have some sense of the optimal scope for fair use (or, alternatively, the copyright boundary). The four part statutory fair use test, Section 107 of the Copyright Act,[22] is certainly a useful starting point in this analysis: looking first to the nature of the use, second to the nature of the original, third to the amount of copying, and fourth to the effects of the use on the original.[23] However, rather than putting a great deal of weight on the artistic aspects of transformativeness, as the dissent does in *Warhol*, or the commercial nature of the use, as the majority does in *Warhol*, the proper approach should put more weight on the substitutive or complementary function of the use relative to the original. This proposed shift in analysis – not a wholesale abandonment of what the Court has done – should make the analysis of fair use easier to apply and to predict. The focus on artistic features of transformativeness, apparent in the *Warhol* dissent, puts Justices in the position of art critics and is clearly unworkable.[24] The focus on commercial versus nonprofit goals of the use, noticeable in the *Warhol* majority, involves relevant questions, but these are by

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[19] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).
[20] See, e.g., Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010).
[21] On the historical expansion of the scope of copyright protection, see Kindra Deneau, The Historical Development and Misplaced Justification for the Derivative Work Right, 19 B.U. J. Sci. & Tech. L. 68, 70-76 (2013) (tracing statutory recognition of derivative work rights from the 1870 Copyright Act forward in time.)
[22] Copyright Act of 1976, 17 U.S.C. § 107 (2018).
[23] 17 U.S.C. § 107 ("(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.").
[24] Art criticism is a highly subjective endeavor, and for this reason unlikely to provide a set of predictable and consistent standards for courts to use. An empiricist, by contrast, would seek consistent and replicable methods of evaluation to form the basis of legal standards. See, e.g., Jason Chin & Kathryn Zeiler, Replicability in Empirical Legal Research, 17 Annual Review of Law and Social Science 239 (2021). On the inconsistency and subjectivity of art criticism, see William Schack, A Critique of Art Criticism, 18 The Virginia Quarterly Review 93 (1942); The State of Art Criticism (James Elkins and Michael Newman, eds. 2008). One famous clash between subjective critics and empiricists is exemplified in Orley Ashenfelter, Predicting the Quality and Prices of Bordeaux Wine, 118 The Economic Journal F174 (2008). Ashenfelter's econometric method of predicting wine prices was initially condemned by subjectivist experts and almost the entire industry. However, it has turned out to be consistently accurate, and to provide a replicable method of evaluation. See, e.g., Nabil Alouani, How an Economist Cracked the Wine Business by Predicting Prices With 90% Accuracy, Entrepreneur's Handbook, https://entrepreneurshandbook.co/how-an-economist-cracked-the-wine-business-by-predicting-prices-with-90-accuracy-3bc996456f80.

no means controlling matters.[25] Analyzing the substitutive or complementary features of the use relative to the original is both a workable analysis, in the sense that it is, unlike art criticism, within the competencies of the justices, and an analysis of matters that *should* play a central role in the decision. In addition, it is the sort of analysis that is replicable and predictable to other judges.

As noted earlier, I apply this analysis to several cases: *Warhol*, *Campbell v. Acuff-Rose*,[26] *Suntrust Bank v. Houghton Mifflin* (*The Wind Done Gone*),[27] and *Google v. Oracle*. In spite of the state of confusion suggested by the majority and dissenting opinions in *Warhol*, the Court has reached defensible decisions. I argue that the notion of transformativeness in fair use analysis must be understood to involve two components: *artistic transformativeness* and *economic transformativeness*. The courts should shift more weight in the analysis to economic transformativeness, which is consistent with the Court's decision in *Warhol*. Indeed, *artistic transformative should be viewed as a necessary but not sufficient condition for finding transformativeness under fair use*.[28] A finding of transformativeness should require both artistic and economic transformativeness, where the latter generally requires an examination of complementarity or substitutability. By focusing on the complementary versus substitutive qualities of the derivative uses in the cases I examine, I am able to make sense of all of them.

Part II examines the economics of copyright and fair use, using basic concepts and diagrams from economics. In this part I develop the point that the purpose of copyright law should be to minimize the sum of dynamic and static welfare costs from copyright protection. Part III applies the "property rules and liability rules" framework, created by Calabresi and Melamed,[29] to the copyright setting. Here I make the argument that the modern copyright regime has stepped outside of the basic framework of property law, probably to the detriment of copyright holders. Part IV examines copyright as a species of property. Part V discusses applications of the theory. Part VI concludes.

II. Economics of Copyright: Diagrammatic Exposition

[25] *Google*, 141 S. Ct. at 1276.
[26] Campbell v. Acuff-Rose, 510 U.S. 569 (1994).
[27] 268 F.3d 1257 (11th Cir. 2001).
[28] It follows from this proposition that even if judges are excellent as art critics, their analysis of artistic transformativeness should not be dispositive in a fair use case. I should note that my argument is different from that of Posner in *Ty*. Posner suggests in *Ty* that economic complementarity should control the fair use transformation decision. I argue, by contrast, that both artistic and economic transformativeness are questions that must be considered.
[29] Guido Calabresi and A. Douglas Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harvard Law Review 1089 (1972).

In this section, I present a market-based welfare justification for the fair use doctrine. Of course, since the doctrine is so intimately bound up with copyright law itself, I will along the way provide (or re-tell) the welfare justification for copyright law. My aim in this part is to present the familiar basis for copyright protection in terms of basic concepts in economics.

Look at Figure 1. It shows the market for some copyrighted item, let us say it is a book. I will assume for simplicity that the seller of the book and the author of the book are the same. The demand curve for the book is shown as downward-sloping, on the standard assumption that as price falls, more consumers will purchase the book.[30] The diagram also shows the marginal cost curve (representing the cost for the marginal unit) of supplying the book to the market. One can think of the marginal cost schedule as the out-of-pocket cost for supplying a single book to the market. This is just the cost of the materials and copying (or printing). The marginal cost schedule does not include the cost to the author of writing the book. The cost to the author of writing the book is a sunk cost by the time the book enters the market, and it is not represented in this diagram.

The assumption of a downward-sloping demand curve may seem jarring to an economist who reads this. The economist might view a book as easily substitutable with any other book that covers the same material. Under this view, the demand curve for the typical book would be similar to that of any product sold in a competitive market. Such a demand curve would have what economists refer to as an "infinite demand elasticity";[31] it would be a flat horizontal line. Why is this not the case here? The assumption here is that a book, especially one that introduces novel information and is well written, constitutes a unique market. The high-quality book has no or few ready substitutes. Hence, we may view the book as creating a monopolistic market for its own content. Surely, this is true of successful authors and for high-quality textbooks.[32]

As the diagram shows, the price of the book exceeds the marginal cost of supplying it to the market. The reason for this is that copyright law enables the book seller to exclude others from copying and selling the book. If this power of exclusion were not granted by copyright, the book seller would be forced to compete with others who would simply copy the book and undercut the seller's price. The other sellers would continue to undercut until the book is being sold at

[30] On the downward sloping demand relationship, see, e.g., Jean Tirole, The Theory of Industrial Organization 8-10 (1989).
[31] See, e.g., Richard G. Lipsey and Colin Harbury, First Principles of Economics 64 (1992) (discussing infinite demand elasticity, illustrated by flat line demand curve).
[32] Stephen King, for example, receives book contracts worth millions of dollars. *See, e.g.,* Sarah Hall and Rory Carroll, King is back with a record £30m deal, The Guardian (4 Feb 2000 5:34), https://www.theguardian.com/books/2000/feb/04/stephenking.fiction. That would not be possible if King's novels were viewed as perfect substitutes to the average novel.

marginal cost. Copyright therefore is essential for the author to be able to charge a price for the book greater than the marginal cost of supplying it to the market.

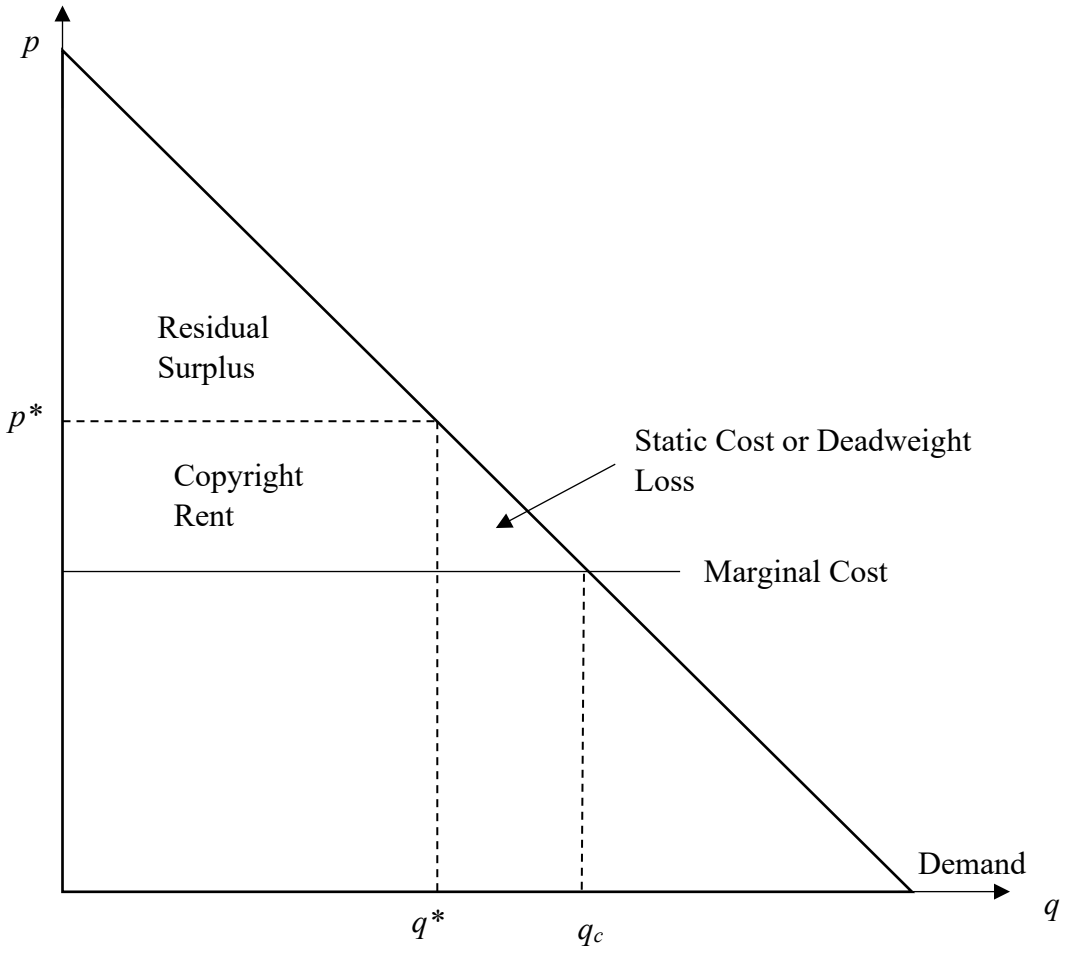

Figure 1: Economics of Copyright

Because the author, protected by copyright, can charge a price greater than marginal cost, the author is able to earn a profit, labeled Copyright Rent in the diagram. The rent is a return on the author's investment into the creation of the book.[33] If the rent is foreseeable in advance, and the author's cost of creation is less than the rent, then the author will have a positive incentive, guaranteed by copyright law, to write the book.[34] With the price set at the level shown in the diagram, p^*, the seller is able to sell the quantity q^*, determined by the market demand curve.[35]

The diagram also shows the net consumer surplus, labeled Residual Surplus, that goes to book purchasers (consumers), given price p^* and quantity q^*. Each book purchaser is willing to pay an amount shown by the points along the demand curve. Since each purchaser purchases the book at a price less than his maximum willingness to pay, each purchaser gains a surplus from the purchase of the book.

Finally, note that the diagram shows the "Static Cost" or "Deadweight Loss" from copyright protection. The static cost reflects the consumer welfare that society loses or forgoes as a result of the copyright protection. Without the copyright, the price would be driven down to a level equal to marginal cost, and the quantity sold on the market would be the competitive level q_c shown in the diagram. The Static Cost triangle shown in the diagram is actually the maximum

[33] The rent must be distinguished from the concept of "monopoly profit" observed in antitrust law. First, most intellectual property rights do not create monopolies. However, by excluding copy-cat competitors, they do enable the possessor of the intellectual property right to charge a higher price than would be possible without the protection provided by the law. The reward earned through this protection is a rent earned on the investment in creation. Monopoly profit is a different concept that arises when a firm is protected from competition simply to protect it from competition. On the concepts of rent and monopoly profit, see, e.g., Keith N. Hylton, Economics Rents and Essential Facilities, 1991 Brigham Young University Law Review 1243 (1991).

[34] There is, by the way, strong empirical evidence that copyright protection actually increases the production of copyrightable work, see Michela Giorcelli and Petra Moser, Copyright and Creativity: Evidence from Italian Opera in the Napoleonic Age, 128 Journal of Political Economy 4163 (November 2020) (copyright laws instituted by Napoleon led to an increase in the quantity and quality of Italian operas); Kai-Lung Hui and I. P. L. Png, On the Supply of Creative Work: Evidence from the Movies, 92 American Economic Review 217 (2002) (movie production increased with a 1998 increase in copyright term). Of course, this is a very different statement from saying that, *for a work already in existence*, increasing the copyright term is socially desirable. Indeed, for a work *already in existence*, increasing the copyright term could increase profits and at the same time reduce consumer surplus by a greater amount. The empirical evidence supports this statement, see Reimers, Imke. 2019. Copyright and Generic Entry in Book Publishing. American Economic Journal: Microeconomics, 11 (3): 257-84. However, this statement is true, given the work is *already in existence*. The trouble is bringing the work into existence. A reduction in the copyright reward of sufficient amount would reduce the probability of works coming into existence and thereby tend to reduce society's welfare.

[35] The reader should note that, contrary to Liebowitz (1986) and Fisher (1988), I do not assume that the copyright holder is able to charge the monopoly price. The price that results from copyright protection is assumed in Figure 1 to be greater than the competitive price (marginal cost). However, p^* may be less than the monopoly price. The reason is that the holder of the copyright may be constrained by competition to a degree that it is unable to charge the unconstrained monopoly price. For example, there may be some price level X above which the copyright holder loses all sales, so that the copyright holder must charge $p^* \leq X$. If, however, X is greater than the monopoly price, then clearly, the copyright holder will simply charge the monopoly price. Thus, Figure 1 contains the assumption of Liebowitz and Fisher as a special case.

potential static cost that might be realized, given the market equilibrium shown.[36] The actual static cost amount is likely to be smaller than the maximum static cost shown in the diagram. Indeed, in the special case where the Copyright Rent is just sufficient to cover the cost of creation, the static cost from copyright protection is zero.

Copyright protection imposes a static cost on society by preventing society from enjoying the maximum possible consumer surplus from the sale of the book. However, in the absence of the copyright protection, the author would not have had an incentive to write the book. Again, the reason is that it is costly to write a book,[37] and if the price were driven down to marginal cost by the competition of copy-cats, then the author would earn no return or "rent" on the sale of the book. It follows that society gains as a result of the copyright. What does society gain? It gains the sum of the Copyright Rent and Residual Surplus areas shown in the diagram. The total gain shown in the diagram can be referred to as the "dynamic gain" from copyright protection.[38] Conversely, one might say that the total gain area shown in the diagram is also the "dynamic cost" of refusing or failing to provide copyright protection. In the simple linear case in the diagram, it is possible to show that the dynamic cost of failing to provide copyright protection is unambiguously greater than the static cost of providing copyright protection.[39]

Now let us turn to the problem of the scope of copyright protection. Consider whether copyright should prohibit reviewers from using quotes from the published book. Would such an interpretation of the scope of the copyright be socially desirable? Under a welfare analysis, we should answer this question by considering the effects of such a rule.

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[36] The reason for this is as follows. For the book to be brought to market, the author must receive a return greater than the creation cost. That implies a necessary minimum price level greater than marginal cost. Thus, any price levels less than this minimum necessary level are inconsistent with the existence of the market. The actual static cost to society is the amount of surplus forgone for any price level greater than the necessary minimum level. Thus, the actual static cost to society is less than the triangle shown in Figure 1. See Keith N. Hylton & Wendy Xu, Error Costs, Ratio Tests, Patent Antitrust, 56 Rev. Indus. Org. 563 (2020).

[37] Of course, a disagreeable type might argue that it is not costly to write a book; all that it requires is paper, a pen, and time. But the time that an author puts into writing a book could be put to other uses that might earn the author extra income, or that the author might value more if asked to put a bid on it. This forgone income or value, or opportunity cost, probably reflects the most significant cost that an author incurs in writing a book, see, e.g., Opportunity Cost for Authors, https://write0.com/blog/2020/02/15/opportunity-cost-for-authors/. On the sacrifices that writing demands of authors, see generally Stephen King, On Writing: A Memoir of the Craft (2000).

[38] I use the term dynamic to refer to changes in incentives that occur over time or between periods of time. An increase in the second-period reward from copyright, for example, enhances investment incentives in the first period.

[39] Outside of the linear case, the comparison becomes more difficult. However, if the marginal cost schedule remains constant, as in the diagram, it can be shown that the dynamic virtually always exceeds the static cost. See Keith N. Hylton and Wendy Xu, *Error Costs, Ratio Tests, and Patent Antitrust Law*, 56 Rev. Indus. Org. 563 (2020).

Suppose, to simplify the analysis, that the impact of permitting reviewers to use quotes from the book on the market demand is exactly zero, no increase or decrease in demand results from reviewers using quotes. Under this assumption, the author has nothing to fear from the reviewers using quotes from her book. Allowing the reviewers to use quotes, therefore, has no effect on the market demand for the book. This is shown in Figure 2, where the market price and quantity are the same, p^* and q^*, and the author's rent is the same as well. There is no effect on the author's creation incentives. However, the use of quotes provides more information to the public about the book. The additional information serves to educate the public on the matters discussed in the book. If the reviewers had not used quotes, the general public may not have been able to determine if the reviewers were providing a fair assessment of the information provided in the book, and may have discounted the statements by the reviewers as a consequence.[40] The additional education provided by the use of quotes from the book improves the lot of society by enabling policy makers to make more intelligent decisions based on the information provided by the book.

How should this additional gain to society from the use of quotes be shown in Figure 2? I have shown it by including an additional line (dashed) above the demand curve. The additional line shows the gain to society (additional benefit to society) resulting from the use of quotations by reviewers.[41] The shaded area in Figure 2 shows an exact representation of this additional social gain. I should note, hopefully without causing confusion, that a decision to move in the opposite direction – that is, from permitting the use of quotes to prohibiting the use of quotes – would lead to the forfeiture of this gain, and that forfeiture could be viewed as a static cost resulting from the adoption of a more expansive scope of copyright protection.

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[40] For more on the benefits of using quotations and the effective use of quotations, see, e.g., Using Literary Quotations, The Writing Center, University of Wisconsin – Madison, https://writing.wisc.edu/handbook/assignments/quoliterature/; PESTLEanalysis Contributor, 10 Strong Reasons for Using Quotes in an Article, https://pestleanalysis.com/10-strong-reasons-for-using-quotes-in-article/amp/; Alexander D. Lee, Bart N. Green, Claire D. Johnson, and Julie Nyquist, How to Write a Scholarly Book Review for Publication in a Peer-Reviewed Journal, 24 J Chiropr Educ. 57 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2870990/. Quotation accuracy affects the social value of using quotations. See, e.g., Ard W. Lazonder and Noortje Janssen, Quotation accuracy in educational research articles, 35 Educational Research Review, February 2022, 100430, https://www.sciencedirect.com/science/article/pii/S1747938X21000531 (Quotation accuracy in educational research articles is 85 percent). If quotation accuracy were as low as 10 percent, for example, few readers would gain from the use of quotations by reviewers.

[41] I should explain the assumptions underlying the diagram a bit more carefully. The diagram assumes that the book produces an external benefit to society, which is positive for every purchaser of the book. This might be plausible if the dissemination of valuable information is directly related to the quantity of the book's consumption in the market. The use of quotes by reviewers enhances the amount of the external benefit, because the use of quotes enhances the reliability of the dissemination of valuable information. Of course, I could make an alternative set of assumptions and draw a somewhat different diagram than Figure 2. The diagram I have drawn and the assumptions I have made seem reasonable for my purposes.

Given the analysis of Figure 2, it is obvious that society gains from permitting reviewers to use quotes from the book in their reviews. There is no harm to anyone – at least as depicted in Figure 2. On the other hand, there is a general gain to society from obtaining better and more reliable information about the arguments in the book.[42]

[42] Of course, this is subject to the proviso that the quotes are reasonably accurate. If quotes are inaccurate, then the use of quotations might be harmful to society by spreading false information, seemingly supported by some authoritative source. If the quotes are inaccurate, then the use of quotations imposes an external cost on society, which could be represented by a downward shift of the demand curve in Figure 2. On the harms resulting from inaccuracy in quotations, see, e.g., V. Pavlovic, T. Weissgerber, D. Stanisavljevic, T. Pekmezovic, O. Milicevic, J.M. Lazovic, N. Milic, How accurate are citations of frequently cited papers in biomedical literature? 135 Clinical Science 671, 671 (2021), 10.1042/CS20201573 ("The most common problem was the citation of nonexistent findings (38.4%), followed by an incorrect interpretation of findings (15.4%). One-fifth of inaccurate citations were due to chains of inaccurate citations."); A. Rivkin, Manuscript referencing errors and their impact on shaping current evidence, 84 American Journal of Pharmaceutical Education 877, 877 (2020), 10.5688/ajpe7846 ("However, studies on the accuracy of references in various scientific disciplines demonstrate an error rate of 25%-54%. These errors can range from minor errors in citation accuracy to major errors that alter the original content and meaning of the material referenced.")

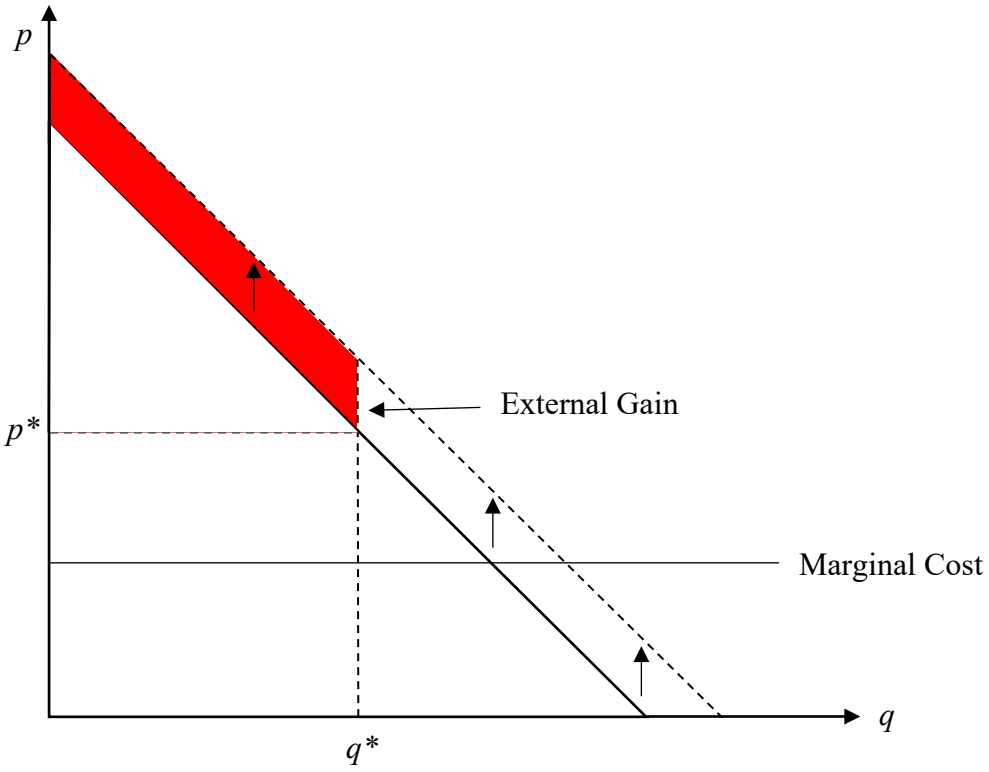

Figure 2: Permitting Reviewers to Use Quotes from a Book

Of course, if every case involving the use of quotes imposed no risk of injury to the market for the author, no author would ever object to the use of quotes by reviewers. There would never be any copyright suits brought against reviewers for using quotes. We would never observe before the courts any need to examine whether copyright law should be interpreted to permit the free use of quotes by book reviewers. Let us therefore consider a different assumption.

Suppose, now, that the use of quotes by reviewers actually has a negative impact on the market for the book.[43] This might occur because many people who might otherwise purchase the book might feel that they can get enough about the information provided in the book by reading reviews, supplemented as they are by actual quotes from the book. Indeed, this is likely to be case for some readers who are especially familiar with the material covered by the book. Alternatively, actual quotes from the book, appearing in reviews, might provide support to critical statements by reviewers and consequently lead some potential purchasers to choose not to purchase the book, as in the case of *Hubbard v. Vosper*.[44] In the absence of such quotes, readers of the reviews might discount the critical statements of reviewers, reasoning that the author cannot be as crass as the reviewers contend, but on observing actual quotes side with the reviewers.[45]

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[43] I should also consider the case where the use of quotes by reviewers has a positive impact on the demand for the book, as assumed by Posner, see *Ty, Inc*., 292 F. 3d at 517. One would imagine that no copyright holder would sue to enjoin the use of quotes under this assumption. However, perhaps some copyright holders, thinking that money could be made by forcing book reviewers to purchase licenses, might sue to enjoin the use of quotes from their books. Such behavior would be self-harming and myopic, for most copyright holders, but still likely to be observed. *Ty, Inc*., 292 F. 3d at 517 ("[T]o deem such quotation an infringement would greatly reduce the credibility of book reviews, to the detriment of copyright owners as a group, though not to the owners of copyright on the worst books."). Permitting reviewers to use quotes in this case has all of the benefits noted in the text, and the additional benefit of reducing the costs of transacting, since the vast majority of copyright holders would not demand a license from the reviewer. See *id*. (noting transaction cost avoidance benefit). This possibility of economically myopic behavior, or of adverse selection favoring low-quality work, is examined later in this text.

[44] [1972] 2 Q.B. 84. The Church of Scientology sued the defendant for the excessive use of quotes and for revealing confidential information. The court found that the quotation use was fair. The question lurking underneath is why a religion would sue a writer for presenting quotes of its own instructions. Perhaps the fear of the plaintiff was that if the instructions of the religion were revealed widely in a single outpouring, the actual teachings might dissuade people from becoming members of the Scientology Church. On the Scientology religion, see Taylor Holley, *Auditing Scientology: Reexamining the Church's 501(c)(3) Tax Exemption Eligibility*, 54 Tex. Tech L. Rev. 345, 350 (2022) ("[O]nly Scientologists may learn man's origin story, though parishioners must wait until they reach a certain "level" of Scientology before they are exposed to such information. The Church maintains that premature exposure to sensitive religious material could be hazardous to those who are not adequately prepared. However, with modern day media leaks, non-Scientologists have now discovered the Church's teachings on the creation of man: In short, an evil galactic overlord named Lord Xenu ruled over the Galactic Confederacy, and in order to reduce overpopulation on his planet, he gathered beings and sent them to the prison planet (Earth) where they were dropped into volcanoes, disintegrated by hydrogen bombs, and then turned into disembodied spirits that attached to newborn children.").

[45] For example, an individual reading a book review describing the creationism theory of the Scientologists might doubt the veracity of the reviewer unless quotes from the original source are included in the review, see Holley, *supra* note xx, at 350 (creationism theory of Scientologists).

This case is shown in Figure 3. Now there is a negative dynamic effect – that is, a dynamic cost brought about by the hypothesized change in the copyright law. The dynamic cost is shown as the shrinkage in both the rent to the author and the residual surplus going to book purchasers. However, on the other end of the balance is the external gain to the public shown by the shaded area. The welfare evaluation requires a comparison of the areas lost due to market shrinkage with the external gain from the dissemination of better information.[46] The market shrinkage effect does not reflect the entire potential cost to society because the market shrinkage effect could, in theory, foreseeably reduce the return below the amount necessary to make the book-writing prospect profitable. In this case, society would lose the total gain (rent and residual consumer surplus) in this specific market resulting from the change in copyright law.

It should be clear that this comparison of social gain and social cost is ambiguous a priori. If, for example, reviewers typically use so many quotes from the book that the readers of the reviews obtain the full content of the book from the reviews, then a rule permitting reviewers to use quotes would lead to a destruction of the market, and consequent loss to society of the total social gain from the market (rent plus residual surplus).[47] Since the total gain to society from the book is much greater generally than the static loss from copyright, such a decision would clearly be undesirable. On the other hand, if reviewers used only the quotes necessary to support their claims about the book, then the reviews most likely would not significantly harm the market for the book (either no effect or trivial market shrinkage). In this case, society clearly gains even though there may be some slight negative effect on the author.

A welfare based analysis would permit the use of quotes in this scenario as long as the market shrinkage effect is minimal in comparison to the gain to society from the dissemination of better information about the book. Thus, an optimal rule on the scope of the copyright would strike a balance that weakens the scope where the gain to society is greater than the potential (dynamic and static) cost to society. Another way of saying the same thing is that the optimal scope of copyright protection minimizes the sum of dynamic and static costs associated with such protection. For the remainder of this paper, I will take this objective to be the goal of any rule determining the copyright boundary: *to minimize the sum of static and dynamic welfare costs*.

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[46] Return to the example of *Hubbard v. Vosper*. The market shrinkage effect is the loss in revenues to the scientologists from the membership reduction due to the open display of their teachings. The external gain, however, is the welfare gain to society resulting from a better understanding of the scientologist's teachings, obviating the need to actually join the organization to discover their teachings.

[47] Of course, as the example of *Hubbard v. Vosper* indicates, this analysis can be more complicated. If the Scientologists rely on trickery to get new members to continue within the Church, then a wide open display to the public of all their teachings might destroy the Church and at the same time generate a substantial external gain. Society would gain overall, unambiguously, because the underlying market is essentially fraudulent. Thus, in the special case of a purveyor of fraudulent ideas, there really is no welfare tradeoff involved in the use of quotations that expose the nature of the underlying activity. The analysis in the diagrams here assumes that the underlying activity is socially beneficial.

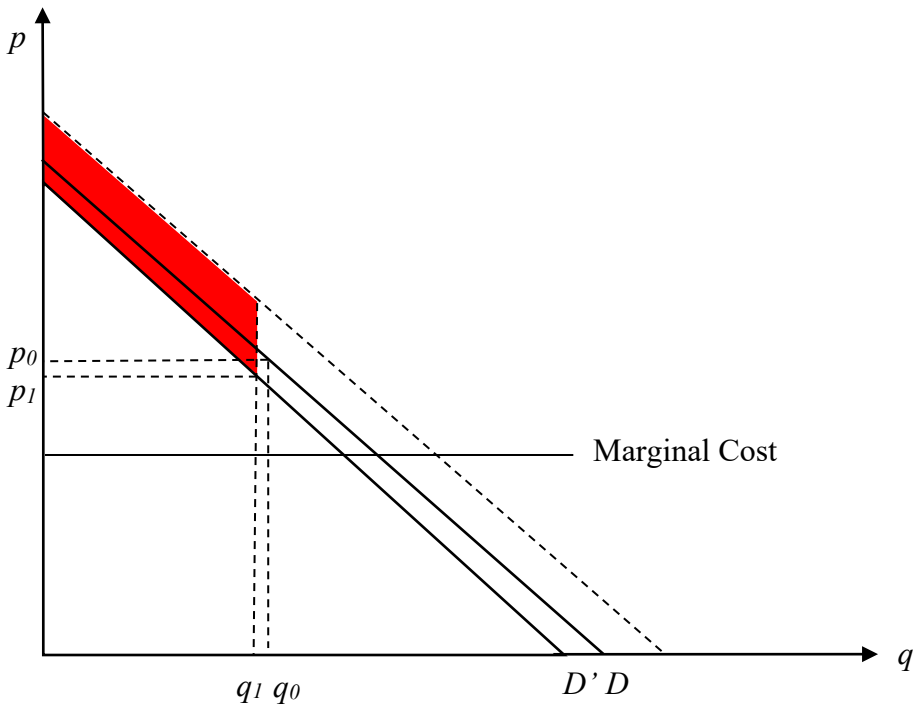

Figure 3: Permitting Reviewers to Use Quotes, with Negative Impact on Author

The reader should note that the analysis just conducted can also be applied to any question concerning the scope of copyright protection. Take, for example, the problem of abridgements. The issues are the same as those just considered. Permitting abridgements of published books enhances the education of society. That is a gain that can be shown in the same way as in Figures 2 and 3. However, abridgements can also reduce the market for the book, which I have considered in Figure 3. An optimal rule balances the dynamic cost to innovation with the static cost to consumption.

III. Property Rules and Liability Rules

Another important perspective in the economic analysis of copyright is the matter of property rules and liability rules, a topic introduced by Calabresi and Melamed.[48] A property rule, or property rule protection, enables the holder of a property right to safeguard that right through the use of injunctions.[49] A liability rule, on the other hand, enables the holder of a property right to protect that right through the use of claims for liability, with no scope for gaining injunctions against threatened invasions.[50]

A. General

The general theory in this area is that property rules are preferable to liability rules when transaction costs are low.[51] The reason is that property rules facilitate bargaining; the reaching of mutually acceptable agreements with respect to the transfer of a property right. Liability rules, on the other hand, permit the taking of a property right but with a compensatory award to the victim of the taking. The compensatory award, however, may not be as great as the subjective loss suffered by the victim.[52] And if the compensatory award is less than the gain to the taking party, the threat of having to pay a compensatory award will not deter the taking.[53] Because takings are more likely to occur under the liability rule, society will incur the costs of invoking the compensatory mechanism (litigation) and the primitive costs imposed by the self-help tactics of potential victims.[54]

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[48] Calabresi and Melamed, *supra* note xx.
[49] *Id*. at 1105.
[50] *Id*.
[51] Calabresi and Melamed, *supra* note xx, at 1119; Keith N. Hylton, Property Rules and Liability Rules, Once Again, 2 Review of Law & Economics 137 (2006). For the contrary position, see Louis Kaplow and Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713 (1996).
[52] Calabresi and Melamed, *supra* note xx, at 1091.
[53] *Id*. at 1116.
[54] Hylton, Property Rules and Liability Rules, *supra* note xx, at 188; Keith N. Hylton, Property Rules and Defensive Conduct in Tort Law Theory, 4 J. Tort L. [ii] (2011).

Thus, in addition to the matter of determining the scope of a copyright protection, society must determine the manner in which the protection is provided. Traditionally, copyrights have been protected by the property rule mechanism.[55] However, pure compensatory schemes have developed in more recent years.[56] Moreover, as a matter of optimal design, it is worthwhile to consider whether liability rules might be preferable in some contexts than property rules would be. I will return to this matter later.

B. Basic Structure, Applied to Copyright

We are dealing with property rights. As a general matter, it should be desirable to have rules regarding property rights that are relatively consistent over different species of property. The reason is that the law governing property has developed over a long period of time.[57] The courts have had quite a long time to develop optimal rules regarding property rights. The general rules governing property rights, therefore, should be presumed to provide a suitable default structure for copyright as well.

When talking about property rights in land, there are two questions that come to the fore. One is the scope of the right in land. The other is the scope provided to strangers to make incursions into the landholder's right.

The scope of the right question is answered in the first instance by the so-called *ad coelom* rule that the property owner possesses the land within the boundary of her property as well as the same space stretching up the sky and down below to the center of the earth.[58] This rule has been modified by the introduction of airplane flight.[59] Physical incursions – incursions that occupy

[55] See, e.g., BJ Ard, More Property Rules than Property? The Right to Exclude in Patent and Copyright, 68 Emory L. J. 685, 685 (2019).
[56] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006); Jake Phillips, eBay's *Effect on Copyright Injunctions: When Property Rules Give Way to Liability Rules*, 24 Berkeley Tech. L. J. 405, 420-424 (2009); Pamela Samuelson, *Withholding Injunctions in Copyright Cases: Impacts of* eBay, 63 Wm. & Mary L. Rev. 773, 823-840 (2022); Matthew Sag and Pamela Samuelson, *Discovering* eBay's *Impact on Copyright Injunctions through Empirical Evidence*, 64 Wm. & Mary L. Rev. 1447 (2023).
[57] On the history of property rights, see, e.g., Adam Smith, Lectures on Jurisprudence 14 (Ronald L. Meek, David Raphael & Peter G. Stein eds., Oxford Univ. Press 1978).
[58] 2 Blackstone, Commentaries *18 ("Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries.").
[59] See, e.g., Smith v. New England Aircraft Co., 170 N.E. 385 (Mass. 1930); Swetland v. Curtiss Airports Corp., 41 F.2d 929 (N.D. Ohio 1930).

space – within this boundary constitute trespasses.[60] This is the "hard boundary" defined by trespass law. There is also a "soft boundary" defined by the law, particularly the law of nuisance. Under nuisance law, a holder of real property can bring claims for damages for interferences with the use and enjoyment of property.[61] Thus, to some degree, the law provides the landholder with a right to certain features, such as clean air and the absence of noise, in connection with the land. Take, for example, the invasion of smoke from a nearby factory. If the interference is sufficiently great, the land possessor can bring a nuisance claim against the factory and win an award for compensatory damages. In some extreme cases of nuisances, the landholder can sue to enjoin the nuisance.[62]

The second question concerns the right of a stranger to invade the holder's property. This is governed by the doctrine of necessity.[63] Under necessity law, an individual under certain conditions can invade the possessor's property without becoming a trespasser.[64] In the case of private necessity, where the invasion is for the sole benefit of the invading party (say, to save his own life), then the invader must compensate the possessor for any injury to the property.[65] In the case of public necessity, where the invasion is for the benefit of the public, the invader does not have to compensate the possessor for injury to the property.[66] Setting to the side the compensation requirement, the necessity rule flips the essential property rights in operation. The invading party, under necessity, gains the right to occupy the possessor's property. The possessor cannot legally use self-help to remove the invader who is protected by the necessity doctrine.

In view of these two approaches, the general law on property could take one of two approaches to determining the scope of property rights, especially in the area of soft property rights. Property law could declare property rights expansively, and treat every interference and invasion as a question of necessity. Alternatively, property law could declare rights narrowly, and leave relatively little to the concept of necessity. To be more explicit, consider the soft rights of property, specifically protection against nuisances. Society could say that land possessors have rights to absolutely clean air, and then treat every interference by smoke from a nearby factory as a question of necessity. The question before the courts would then be whether necessity doctrine permits the nuisance generator to evade an injunction and even to evade having to pay compensation for the harms caused by the nuisance. In this approach, courts would develop

[60] United States v. Causby, 328 U.S. 256 (1946).
[61] See, e.g., Keith N. Hylton, Tort Law: A Modern Perspective 283-298 (2016) (discussing nuisance law).
[62] See, e.g., Boomer v. Atlantic Cement Co., 257 N.E. 2nd 870 (N.Y. 1970) (discussing conditions under an injunction may be issued for a nuisance in the state of New York).
[63] See, e.g., Hylton, Tort Law, supra not xx, at 78-84 (examination of necessity doctrine).
[64] *Id*.
[65] Vincent v. Lake Erie Transportation Co., 124 N.W. 221 (Minn. 1910).
[66] *Id*. at 222; Bowditch v. City of. Boston, 101 U.S. 16 (1879) (Defendant not liable for damages because the destruction of the property was necessary to prevent the spread of the fire.); Surocco v. Geary, 3 Cal. 69 (1853) (same).

elaborate rules, probably the same as now exist under nuisance doctrine, attached to the question of necessity. The alternative approach, really the current law, is to state the (hard) property rights in a relatively narrow form, and confine necessity doctrine to the narrow event of land or personal property invasions made necessary by the occurrence of some great risk or danger to the party choosing to invade.[67] Thus, under existing law, an individual possessor has a hard property right in the land, and rather soft or ambiguous rights against interferences commonly referred to as nuisances. Necessity doctrine applies under current law to the relatively infrequent cases where a person physically invades the possessor's property right, typically in an effort by the individual to escape some great and immediate danger.[68]

Obviously, society has chosen the latter course: Property rights are defined in a relatively narrow fashion, governing relatively clear rights, as argued by Merrill and Smith,[69] rather than expansively to include soft property rights with the use of necessity as a generous escape hatch. The reasons for this are discussed at some length by Merrill and Smith.[70] I will not dwell on the argument of Merrill and Smith, but it runs roughly as follows. As the clarity of a proposed property boundary decreases (from obvious or clear, to vague), the cost of defining a property right increases. The reason is that as the clarity of a proposed boundary decreases, it becomes harder for the law to articulate precisely what the property right entails. For example, a right to land within a specific boundary line is easy to define, while a right to "clean air", on the other hand, is a relative statement that is difficult to define. Contrariwise, as the clarity of the boundary decreases, the marginal benefit of defining the right decreases. For example, the benefit of establishing a right to clean air is less clear than the benefit of establishing a right to land within a certain boundary, because the clean air right is so difficult to define and to make the basis of transactions. The fundamental basis for this argument is the property rules framework of Calabresi and Melamed, referred to earlier.[71]

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[67] Vincent v. Lake Erie, 124 N.W. at 221-222 ("The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged….But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.")

[68] *Id*.

[69] Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L.J. 1 (2000).

[70] *Id*. at 24-42.

[71] Return to the reasoning of Calabresi and Melamed, *supra* note xx. Hard property rights correspond to situations where transaction costs are low, in the sense described by Calabresi and Melamed. Such rights can be defined easily. Hence the cost of defining is relatively low, and the benefit relatively high. The opposite is true at the extreme of the softest imaginable property right, such as a right to a noiseless environment. At some point between these extremes, the marginal costs just equal the marginal benefits, establishing an optimal degree of standardization. Merrill and Smith, *supra* note xx, at 41.

I will not focus here on the Merrill and Smith point. Instead I will focus on the remedial implications of the choice between narrow and expansive conceptions of property.[72] If society were to choose to interpret property rights expansively, the decision could easily weaken property rights across the board, including the aforementioned hard property rights (that is, rights to land and personal property). Why would this be likely to occur? Because once individuals realized the difficulty of enforcing soft property rights – for example, the difficulty of obtaining injunctions for violations of the right to clean air – individuals accused of violating or threatening to violate soft property rights would seek remedial moderations in the law. They would pressure the courts and legislatures to replace injunctions with damages awards. Next, they would pressure the courts and legislatures to replace damages awards with less severe damages awards (for example, no punitive awards permissible). These pressures would be applied to all efforts to assert property rights. The arguments asserted on behalf of weakening remedies would often appear to have great force because of the doubtful cases in which the remedies are applied (again, consider the case of injunctions to enforce clean air). The end result would be a weakening of hard property rights, as litigants successfully persuade the courts to accomplish through remedial modification what they could not get the courts to do through the definition of property rights.

This argument applies directly to copyright, as a type of property. Note that in the case of copyright, one can define the copyright boundary more or less expansively. Return to the case of a book. One can define the boundary of a copyright on a book narrowly to permit the publication of abridgments by others, or expansively to prohibit the publication of abridgments by others without the consent of the book author. Alternatively, as in the case of property law, one can define the right to invade more or less expansively – as in the case discussed above involving necessity doctrine for real property. In the copyright arena, one can define fair use as a narrow doctrine that permits an individual to invade the clear boundary of the copyright under certain special conditions without thereby becoming a trespasser. Under this approach to fair use, the court would recognize the fair use argument as a defense where the accused infringer has clearly infringed, say by distributing copies of parts or all of the book, under conditions that the court would accept as justifying the infringement. Alternatively, one can define fair use as a broad doctrine that permits invasions of less clear parts of the copyright boundary, such as the right to derivative works.

[72] There is a different perspective that is worth noting here. An expansive conception of property, with numerous and complicated exceptions under the theory of necessity, would become doctrinally confusing. Clear property rights are desirable. For a discussion of the clarity versus ambiguity issue, see Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988). However, an expansive definition of property rights is difficult to maintain with clarity. One cost of an expansive conception of property is that it forfeits predictability and certainty even with respect to entitlements whose ownership should be absolutely clear. Defenses or justifications, in the nature of a necessity argument, acceptable for the violation of a soft property right (e.g., clean air) might become acceptable for the violation of hard property right (e.g., physical incursion).

To be absolutely clear, the scope of the copyright and the scope of the fair use argument are related. The choice is really between two regimes: narrow copyright and narrow fair use, or expansive copyright and expansive fair use. There would be little need for a regime of narrow copyright coupled with expansive fair use, because with a narrow copyright there would not be much of a need for an expansive concept of fair use. Similarly, there would be little need for a regime of expansive copyright and narrow fair use, because under such a regime the most egregious violations (for example, direct copying) would have a justification in the law while the more ambiguous violations (for example, making a board game based on a novel) would have no justification in the law.

Looking at the regime choice in copyright law as one between narrow copyright and narrow fair use, or expansive copyright and expansive fair use, the fair use argument can be viewed as entirely analogous the question of necessity in property and tort law. Recall, that in the case of property law, the common law has resolved the question of doctrinal balance by adopting narrow property and narrow necessity doctrines. It has rejected the alternative of expansive property and expansive necessity. The policy reasons for the position taken by the common law are twofold. One is the cost-benefit analysis of Merrill and Smith (derived from Calabresi and Melamed), discussed earlier. The other reason is the remedial modification argument discussed earlier: that narrow property coupled with narrow necessity avoids the pressure for remedial modification that would otherwise result in a regime of expansive property coupled with expansive necessity.

One might object to the analogy of fair use with necessity doctrine on the ground that necessity often requires compensation to the plaintiff (property possessor),[73] while fair use requires no compensation to the plaintiff (copyright possessor). This objection reflects a failure to examine the welfare basis for the necessity doctrine.[74] The necessity defense requires compensation to the plaintiff only in the case of private necessity, where the basis for the invasion is entirely grounded in the interests of the invading party.[75] The necessity defense does not require compensation to the plaintiff in the case of public necessity, where the basis for the invasion is grounded in large part in the benefit to the community.[76] For example, if the invading party kills diseased cattle belonging to an individual to prevent the spread of the disease to cattle owned by others in the community, courts will not require compensation.[77] The reason is that the invader

[73] Vincent v. Lake Erie Transportation Co., 124 N.W. 221 (Minn. 1910).
[74] Keith N. Hylton, The Economics of Necessity, 41 Journal of Legal Studies 269 (2012).
[75] Vincent v. Lake Erie Transp. Co., 124 N.W., at 222 ("Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.").
[76] *Id*. (distinguishing the compensation requirement of private necessity from the case of public necessity, where "life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster.").
[77] See, e.g., House v. LA County Flood Control Dist., 25 Cal. 2d 384, 391 (1944) ("Unquestionably, under the pressure of public necessity and to avert impending peril, the legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation. Instances of this character are

is providing a benefit to the public, and a compensation requirement would deter the invader from providing the benefit to the public.[78] Now consider the case of fair use, as an invasion. The copyright fair user is like the invader who acts on the basis of public necessity. The fair use infringer creates a benefit for the public, not just himself. That courts do not require compensation to the copyright holder under the fair use doctrine is a reflection of the utilitarian basis for the fair use defense. Requiring compensation even when the fair use defense holds would deter the fair user from acting, to the detriment of the public. Should a fair user ever be required to pay compensation to the copyright holder? Under the theory explained here, such a requirement would be plausible if the fair user invades the copyright for a purpose entirely personal and not social. But in this case, the courts would not necessarily recognize a fair use defense.

These policy arguments apply to some extent to the copyright expansiveness question. A regime of expansive copyright generates uncertainty over the boundary of the copyright, and a great deal of litigation. The threat of litigation may weaken incentives for follow-on innovation, as many commentators have claimed.[79] The potentially expansive boundary generates pressures, in turn, for expansive fair use. Just as important, it also follows, is that expansive copyright generates pressures to weaken remedial measures across the board for copyright, pressures that affect rights at the core as well rights at the boundary. These pressures have begun to materialize lately. The Supreme Court's *eBay* decision, placing obstacles in the way of the acquisition of an injunction, has been extended to the copyright sphere, now making it more difficult for copyright holders to obtain injunctions.[80] In *Salinger v. Colting*,[81] the Second Circuit held that the district court erred in issuing an injunction against an unauthorized sequel to J.D. Salinger's "Catcher in the Rye" because the district court failed to examine the *eBay* factors before issuing the injunction.[82] *Salinger* is a direct byproduct of our current regime of expansive copyright coupled with expansive fair use. Expansive property rights generate credible and seemingly persuasive arguments for moderating remedial measures. This process of seeking remedial moderation is currently underway in the copyright arena. The logical end result of this process is a weakening of core copyright protections. The weakening of core copyright protections, in turn, will discourage creation.

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the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized.")

[78] There are both incentive-based and causation arguments for not requiring compensation in the case of public necessity. A person, who personally suffers no risk of harm in the event, who invades property on the motivation of public necessity would rationally choose not to act if presented with a risk of liability of $100 even though the threatened danger to others may be $1 million. Second, if the person destroys property that was already likely to be destroyed, there is no factual causation basis to hold him liable. See, e.g., Hylton, Tort Law, *supra* note xx, at 82 (discussing rationales for not imposing liability in the case of public necessity).

[79] Lawrence Lessig The Future of Ideas: The Fate of the Commons in a Connected World 250 -261 (2001); see generally, Dotan Oliar, The copyright-innovation tradeoff: property rules, liability rules, and intentional infliction of harm, 64(4) Stan. L. Rev. 951 (2012);

[80] Phillips, *supra* note xx; Samuelson, *supra* note xx.

[81] 607 F.3d 68 (2d Cir. 2010).

[82] *Id*. at 83.

C. Boundary Determination in Copyright

I will take it as fact that the existing legal system is one of expansive copyright coupled with expansive fair use. I think this is suboptimal, for reasons suggested above – specifically, the Merrill and Smith argument and the remedial modification argument. To be absolutely clear, an ideal copyright regime is one of narrow copyright coupled with narrow fair use rights. Such a regime would mirror the general common law resolution observed in property rights. This is a desirable feature, standing alone, because it enhances the consistency and the simplicity of legal doctrine.

I claim it would be socially desirable, on welfare grounds, for courts to return to relatively narrow copyright boundaries and narrow fair use rights. The narrow boundary regime would reflect the law as it was understood by Justice Story in his *Folsom* opinion that gave rise to the fair use doctrine. Story never mentions a doctrine of "fair use" in his opinion. His discussion largely concerns the boundary of copyright, and he holds in *Folsom* that the boundary does not include "fair" abridgments. Such fair abridgments, in Story's analysis, are of a particular type. Specifically, in a fair abridgment,

> [t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.[83]

In other words, the determination of the boundary, with respect to the problem of abridgment, involves a comparison of the abridgment to the original work. The abridgment must have some elements of novelty and reflect original thought and judgment. In terms of economics, such an abridgment would be a new product, or address the demands of a new market, and not merely be a near substitute for the existing work of the author. Again, in terms of economics, the fair abridgment would have, as indicated in Part II of this paper, a minimal negative effect on the incentives of the author and at the same time a significant positive educational or cultural benefit to society. The static welfare benefit of the abridgment would significantly exceed the dynamic welfare cost (as in Figure 3 discussed earlier). And such an abridgment, under Story's analysis would lie outside of the boundary of the original author's copyright[84] – which means that the original author could not block it, or demand concessions or unreasonable payments from the abridging author.

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[83] *Folsom*, 9 F.Cas. at 345.

[84] For a contemporaneous discussion of the copyright boundary problem with respect to abridgments, see, e.g., Note, Is an Abridgment an Infringement of the Copyright of the Original Work? The American Law Register (1852-1891), Vol. 3, No. 3 (Jan., 1855), pp. 129-136.

Implicit in this notion of the *Folsom* boundary is that the abridgment not serve as a ready substitute for the original work. If the abridgment were a perfect substitute, obviously it would not be an abridgment. If the abridgment excerpted the most important or significant parts of the original work, it would just as clearly violate the non-substitution element of the *Folsom* test.[85] Stepping back and looking at this from the language of economics, the abridgment should aim to be a *complement* rather than a substitute to the original work.[86] Both the concepts of substitute and complement must be treated with some care in this context. First, consider complementarity.

Of two products *A* and *B*, *B* is a complement of *A* if *A* and *B* are typically purchased together.[87] The best illustration of perfect complementarity is that of right shoes and left shoes.[88] Few consumers purchase a left shoe without also purchasing the right shoe. If a firm sold only left shoes, it would not face a risk of having its market threatened by a seller of right shoes. Quite the opposite, the seller of left shoes would gain by the entry of a seller of right shoes. The demand for the left shoe would increase substantially as the result of the entry into the market of a seller of right shoes.[89] Most shoe purchasers would be concerned only with the sum of the prices of right and left shoes.[90] As that sum declined, more consumers would purchase both shoes, and hence the seller of only left shoes would benefit.

Lunney, in an excellent article, notes the more subtle implications of complementarity for copyright.[91] Consider complements *A* and *B*, both monopolized. The producer of *A* would be considerably better off if *B* were sold competitively, and vice versa.[92] The reason is that if two firms sell complementary goods, and each is a monopoly (for example, a right shoe monopolist and a left shoe monopolist), they will both charge the monopoly price for their own parts of the bundle of complements. On the other hand, if a single monopolist produced both products *A* and

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[85] *Folsom*, 9 F.Cas. at 344-345 (On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy."),

[86] *Warhol*, 143 S. Ct. at 1289 ("By its terms, the law trains our attention on the particular use under challenge. And it asks us to assess whether the purpose and character of that use is different from (and thus complements) or is the same as (and thus substitutes for) a copyrighted work.").

[87] See, e.g., Robert Carbaugh, Contemporary Economics: An Applications Approach 35 (2006); https://archive.org/details/contemporaryecon00robe/page/34/mode/2up.

[88] Right and left shoes are an example of Cournot complements. See Rabah Amir and Adriana Gama, On Cournot's theory of oligopoly with perfect complements, https://sistemas.colmex.mx/Reportes/LACEALAMES/LACEA-LAMES2019_paper_762.pdf.

[89] See, e.g., Huh, Young Eun; Vosgerau, Joachim; Morewedge, Carey K., Selective Sensitization: Consuming a Food Activates a Goal to Consume its Complements, 53 Journal of Marketing Research 1034, 1034 (2016) ("Complements are typically goods with super additive utility. Their simultaneous consumption produces greater pleasure than the consumption of the goods in isolation … Movies and popcorn are complements because they are more pleasurable to consume together than separately.").

[90] See, e.g., Keith N. Hylton, Antitrust Law: Economic Theory and Common Law Evolution 280 (2003).

[91] Lunney, *supra* note xx.

[92] *Id*. at 794.

B, that single monopolist would set a price that optimizes the profit from the bundle. The single monopolist (of the joint product) will make a greater profit than the two individual monopolists combined, and consumers will be better off under the single monopolist than under individual specialized monopolies.[93] While this is all true, if firm *A* has a monopoly of right shoes, then it is better off having a monopolist produce and sell left shoes than having no provider of left shoes. Once a provider of left shoes enters, monopoly or not, the demand for right shoes increases – that is, the quantity of right shoes demanded increases at every price level, something an economist would refer to as a "demand shift".[94] However, after the provider of left shoes enters, the right shoe monopolist is much better off if the left shoe provider is a competitive firm rather than a monopolist. Thus, from the perspective of the right shoe monopolist, the regimes can be ranked from best to worst as follows: (1) a competitive seller of left shoes enters, (2) a monopolist seller of left shoes enters, and (3) no seller of left shoes enters. As Lunney points out, all of these considerations have implications for copyright law.[95] However, the implications I will spell out here differ from Lunney's to some degree, and are a bit simpler.

Next, consider the concept of product substitution. Two products *A* and *B* are substitutes if the introduction of product *A* causes the demand for product *B* to decrease at every price level (consistent with the demand relationship) for *B*.[96] The demand decreases because some consumers of *B* find *A* a reasonable substitute and will therefore switch their purchases to *B*. If the products are perfect substitutes, then *A* and *B* will have to be sold at the same price, net of search and travel costs.

Now consider substitution in the copyright context. Copyright law clearly must enable the copyright holder to enjoin the perfect substitute – that is, the verbatim copy – otherwise, the market for every copyrighted work would be vulnerable to destruction. Near substitutes must be enjoinable by the holder too. However, the law should take into consideration substitution effects in adjacent or derivative markets that can depress incentives to create in the market for the original work. Some original work markets and derivative markets ("use markets") are so closely adjoined that the copyright holder should be able to enjoin work in the derivative market in order to maintain the incentive to create in the original market. The classic example is books and movies. In modern times, many authors write books with the anticipation of a sale or license of the manuscript to the movie market.[97] If copyright law did not permit the holder of the

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[93] Augustin Cournot, Researches Into the Mathematical Principles of the Theory of Wealth, Chapter IX (1838), https://www3.nd.edu/~tgresik/IO/Cournot.pdf.
[94] This follows from the definition of economic complementarity. See, e.g., Carbaugh, *supra* note xx, at77.
[95] Lunney, supra note xx.
[96] See, e.g., Carbaugh, *supra* note xx, at 77.
[97] See, e.g., Brian McFarlane, Novel to Film: An Introduction to the Theory of Adaptation (1996). Viewed from a purely economic perspective, the expectation of licensing the copyright for a novel into the movie market should induce the novelist to invest more, in time and in resources, into the novel writing process. At the same time, with the expectation of a reward from the film market, more writers should enter into the novel-writing industry, until the expected net reward is zero. Given this, any reduction in the expected return from licensing a novel to a film

copyright on the book to enjoin the movie based on the book, then incentives to write books would clearly be less than in a regime where copyright law does give this power to the copyright holder. To generalize on this argument, one can distinguish *actual market substitution*, where in the extreme case the use is a direct copy that effectively destroys the market for the original, and *foreseeable or adjacent licensing market substitution*, where the use effectively injures the original author's ability to license into a foreseeable adjacent market. Thus, returning to the example of a novel, another novel that is an unauthorized direct copy is an actual market substitute, while a movie version of the novel that is an unauthorized derivative is a foreseeable licensing market substitute.

In addition to the category of complement, and substitute, there is also the category of demand independence existing between two products. In this case, if *A* and *B* have independent demands, then an introduction of product *A* into the market has no effect on the demand for *B*.[98] For example, the introduction of butter into the market should have no effect on the demand for bicycles, if butter and bicycles have independent demands. The notion of demand independence should have little relevance in the copyright fair use context. In the vast majority of cases, a derivative reformulation of an original work is likely to be either a substitute to the original or a complement to the original.

Yet another variation on substitution and complementarity is the matter of demand correlation.[99] Two products *A* and *B* have positively correlated demands if a consumer who likes product A would also like product *B*.[100] Perfect substitutes are simply an extreme case of positive correlation where the acquisition of product *A* extinguishes the need for product *B*.[101] Complementarity is another special case of positive correlation where the acquisition of product *A* makes product *B* a necessity (right shoes and left shoes). Two products *A* and *B* have

producer will reduce the incentive to enter into the novel writing industry, and to invest time and resources into the activity.

[98] E.g., Hylton, Antitrust Law, at 280.

[99] See generally, Schmalensee, Richard, 1982, Commodity Bundling by Single-Product Monopolies, Journal of Law and Economics 25, 67-71; R.P. McAfee, J. McMillan, M.D. Whinston, Multiproduct monopoly, commodity bundling, and correlation of values, Quarterly Journal of Economics, 104 (1989), pp. 371-383; Bo Chen and Debing Ni, Optimal bundle pricing under correlated valuations, International Journal of Industrial Organization Volume 52, May 2017, Pages 248-281.

[100] See, e.g., Keith N. Hylton & Michael Salinger, Tying Law and Policy: A Decision Theoretic Approach, 69 Antitrust Law Journal 469, 509 (2001) (discussing tying of goods with positively correlated demands); Einer Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit. Theory, 123 Harv. L. Rev. 397 (2009).

[101] More generally, one might say that a bundle containing two substitutes is subadditive in the valuations of both, see, e.g., R. Venkatesh, Wagner Kamakura. Optimal Bundling and Pricing under a Monopoly: Contrasting Complements and Substitutes from Independently Valued Products, 76 Journal of Business 211, 212 (2003). ("[W]hen the products are substitutes, a consumer's reservation price for the bundle would be subadditive in those for the components. This is likely when the products offer (some) overlapping benefits (e.g., "Coke" and "Pepsi") or when they compete for similar resources such as a consumer's time.").

negatively correlated demands if a consumer who likes product *A* would not like product *B*.[102] Demand correlation has implications for the scope of copyright protection. Where the demand is correlation is positive, we may observe substitution or complementarity, with substitution representing a strong case for copyright protection and complementarity a weak case. Where the demand correlation is negative between the original and derivative use, there is no strong case for copyright protection. The derivative use, in the case of negative correlation, has no prospect of harming the market for the original, because any consumer who prefers the derivative use would not prefer the original. Indeed, not only is the argument for enjoining the derivative use in the case of negative correlation weak, there is an economic basis for "Stigler bundling" in this case by marketing both the original and the derivative use together as a package.[103] If an entity gains ownership of both copyrights, with negatively correlated demands, and the entity cannot identify the type of consumer (whether he likes *A* and hates *B*, or vice versa), the entity can sell the bundle for a much greater profit, and to a greater quantity of consumers, than if the entity attempts to sell the two works separately.[104]

These arguments concerning substitution and complementarity apply to both the copyright boundary and fair use questions – two sides of the same coin. If the use is a complement to the original work, then the use can only enhance the market for the original, whether the market for the use is monopolized or competitive. In other words, the creator of the original is better off with the complementary use in existence, whether the use creator is a monopolist or not, than she would be if the use did not exist. The original creator is in the best position, of course, if the market for the use is not monopolized – that is, if the market for the use (say, an abridgment or a translation) is competitive. Now what is the role of copyright in this setting? Obviously, copyright could enable the copyright holder to enjoin the complementary use, if the law interprets the use as within the boundary of the copyright. However, enjoining the use is not necessarily optimal for the copyright holder. The copyright holder may be seduced into the view that demanding a fee from the creator of the use, and restricting the size of the market in uses, is profit-maximizing, but the holder may be mistaken about this in the long run. A competitive market in complementary uses is the optimal arrangement for the copyright holder. The best way to secure that a competitive market in complementary uses exists is to limit the right of the copyright holder to enjoin the complementary use. The copyright boundary should not include the complementary use. This interpretation of the copyright boundary actually optimizes the creation incentives provided under the statute.[105]

[102] See, e.g., Michael A. Salinger, A Graphical Analysis of Bundling, 68 Journal of Business 85 (1995) (analyzing product bundling with negatively and positively correlated demands).
[103] George J. Stigler, United States v. Loew's Inc.: A Note on Block-Booking, 1963 The Supreme Court Review 152 (1963).
[104] *Id*.
[105] Lunney, *supra* note xx, at 783.

To provide a bit more clarity to this argument, consider translations. Suppose the original author writes a science textbook. Someone proposes to write a translation into a different language. Under current law, a translation would be viewed as within the copyright boundary, and certainly not protected by fair use.[106] The copyright holder most likely will exclusively license the translation, leading to some royalties going to the copyright holder for sales of the translation. The translation is more likely to be a complement than a substitute. The translation is a substitute only for the small group of book consumers who are bilingual and indifferent as to which language they choose to read. For many more consumers, the translation is likely to be a complement in several senses: there may be consumers who would prefer to have both the translation at hand and the original work, and there may be consumers who can read only the translation, but their interest in the original work tends to promote attention to it. To generalize, a translation can be an *actual market complement*, by appealing to bilingual consumers, or a *generative market complement*, by promoting interest in the original work through stimulating the market in the foreign language version.

Now, let's return to the problem of abridgments. My argument concerning substitution and complementarity applies to the problem of determining a fair abridgment – and fair use generally. A *perfectly fair abridgment*, by definition, would not harm the market of the original work, and would, if anything, enhance the market of the original work by serving as a complement. Adopting the terms just defined, the abridgment could be an actual market complement, or a generative market complement. It is an actual market complement to the extent there are consumers who wish to purchase both the original work and the abridgment, viewing the abridgment as a quick source of information and the original work as the more developed treatment. The abridgment may be a generative market complement by appealing to consumers in different markets. There may be consumers who wish to learn the material of the original work, but have no practical reason to study it in the level of detail or manner demanded of the original work. For example, there are several abridgments of Blackstone's *Commentaries*.[107] These abridgments may have been purchased by lawyers, seeking a

[106] Copyright Act, 17 U.S.C. § 101 (On the subject matter of copyright: "A "derivative work" is a work based upon one or more preexisting works, such as *a translation*, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'."); see, e.g., Erik Ketzan, Rebuilding Babel: Copyright and the Future of Machine Translation Online, 9 Tulane Journal of Technology and Intellectual Property 205, 207-209 (2007).

[107] Here are four of the abridgments: Rev. Dr. John Trusler, A Summary of the Constitutional Laws of England, Being an Abridgement of Blackstone's Commentaries, (Isaac Riley, New York: 1788); William Blackstone, An Analytical Abridgment of the Commentaries of Sir William Blackstone on the Laws of England in Four Books: Together with an Analytical Synopsis of Each Book: to Which Is Prefixed, an Essay on the Study of the Law (P.H. Nicklin and T. Johnson eds. 1832); The Commentaries of Sir W. Blackstone, Knight, on the Law and Constitution of England, carefully abridged in a new manner, and continued down to the present time, by Wm. Curry 1796; Commentaries on the Law of England, principally in the order, and comprising the whole substance, of Commentaries of Sir W. Blackstone, by J. Addams, 1819; An Abridgment of Blackstone's Commentaries on the Laws of England, in a series of Letters from a Father to his Daughter, chiefly intended for the Use and Advancement of Female Education. By a Barrister at Law, F.R., F.A., and F.L.S. [Sir E. E. Wilmot], 1822. See also William

summarized version of a book they already possessed (actual market complementarity). However, some of the abridgments of Blackstone were targeted to audiences that were quite unlikely to read the original Blackstone (generative market complementarity). Two such audiences, at the time when there was a strong market for the Blackstone abridgments, were young men and women.[108] Young men would have difficulty understanding Blackstone and could benefit from a condensed and simplified version, which would prepare them for later study in the law and serve otherwise as a useful background on English law. Women were barred from law practice and might prefer to read a condensed and simplified version to guide them on legal matters. The Blackstone abridgments sold well and seemed to have had no significant adverse impact on the market for the *Commentaries*. Indeed, the Blackstone abridgments probably enhanced the market for the original Blackstone by generating interest among many abridgment readers to study the original Blackstone. The abridgments probably served as "gateway drugs" to the actual Blackstone, and otherwise opened new markets unlikely to be served by the original Blackstone. As in my example of right and left shoes, the abridgments served in some instances to induce purchases of the original work that would otherwise not have occurred.

My argument is that, with respect to complementary uses, such as abridgments or translations, copyright law should not treat such uses as within the copyright boundary, or conversely should treat them as shielded from control of the copyright holder under fair use. The argument is the same for both abridgments and translations. Consider, therefore, translations. Based on the foregoing, a free entry market for translations enhances the profit of the original author. The original author loses nothing, and only gains, by restricting the copyright boundary to exclude translations. Now, what about the translating party? Might it be the case that a translator would be unwilling to take on such a project without an exclusive license from the copyright holder? As an empirical matter, this seems unlikely, given that many translations were done during the era of *Folsom*, when they would not have been considered within the copyright boundary of the original work. As a theoretical matter, it seems unclear. Perhaps some translators would need a guarantee of a monopoly in the translation, but there is no reason to expect them to be the best translators. Indeed, a translator aware of his monopoly position might shirk and do a poor job.[109]

Blackstone & Wayne Morrison, Commentaries on the Laws of England (London: Cavendish 2001) (a modern variation that replaces obscure Latin phrases with English).

[108] An Abridgment of Blackstone's Commentaries on the Laws of England, in a series of Letters from a Father to his Daughter, chiefly intended for the Use and Advancement of Female Education. By a Barrister at Law, F.R., F.A., and F.L.S. Sir E. E. Wilmot, new edition [the 2nd] corrected by his son Sir J. E. E. W. 3rd edit. 1855, at pages 1-7 (Letter I, discussing, among other things, the potential purchasers of the book, in perhaps the most sexually condescending terms ever to appear in an English law book.)

[109] In the standard exclusive license arrangement, there is often no way for the licensing publisher to monitor the quality of a translation. Take the case of an English textbook translated to Chinese. Often the English publisher cannot determine if the Chinese translation is a good one. If the Chinese translator faces no risk of being outperformed by a rival, the translator may shirk. The end result is that the exclusive licensing of a translation can easily generate a single poor and high-priced translation, whereas a free-entry market into translations probably would generate at least one high-quality and low-priced translation. To the extent this phenomenon is widespread, the combination of expansive copyright and exclusive licensing of textbooks results in a substantial welfare loss relative to a regime of narrow copyright (or of expansive copyright coupled with nonexclusive licensing).

Generalizing slightly, *guaranteeing a monopoly to the complementary use might induce moral hazard in effort*,[110] resulting in an inferior product. In view of the moral hazard problem, the best way to procure a good translation may be to allow for competition in the market for translations. In such a market, a poor translation would be superseded by a superior translation. The copyright holder would benefit not only from the reduction in price of the complementary use, but also by the enhanced quality that results from such competition in the complementary use market.

The boundary theory articulated in *Folsom* does not apparently rely on whether the second author's work is profit oriented. If the second author's activity is not profit-based, it is more likely to be educational, or of a high cultural value, but there is no guarantee that this is the case; and neither is there a guarantee that a profit-based activity is not educational. Newton's *Principia* touched off a wave of profit-driven efforts to translate, abridge and popularize his contributions to science.[111] These efforts enhanced the education of the general public, and brought greater fame to Newton. Newton himself was quite unlikely to write abridgments and popular versions of his own work.[112] The question in determining whether abridgments and

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[110] Specifically, the copyright holder cannot observe the effort of the translator, and cannot condition the payment to the licensee (or translator) directly on the basis of effort. The possibility that the translator may receive some royalties might improve their incentives to create a good translation, but this is not clear, because many of the readers in the target market will not be able to determine the quality of the translation. Moreover, the likely contract that emerges is a lump sum payment to the translator, so that the translator is shielded from the risk of low textbook sales. So, given a lump sum contract, coupled with the inability of the publisher to monitor quality, the exclusive licensing of a copyright to a translator of a textbook generates a considerable risk of poor effort in the translation. The poor effort is a reflection of the moral hazard problem in economics. See Andreu Mas-Colell, Michael Dennis Whinston, and Jerry R. Green, Microeconomic Theory 478-488 (1995).

[111] Brasch, F. E., What is the Principia and what is its origin? 7 Astronomical Society of the Pacific Leaflets 145, 151 (1955). ("[T]he first English translation from the Latin third edition by Motte (London, 1729); a new edition of the same (London, 1803); French translation by the Marquise du Chastellet (Paris, 1759); Italian translation by Fergola (Napoli, 1792-93); American edition of Motte' s translation by Chittenden (New York, 1846); Glasgow edition, reprinted from the Latin third edition for Sir William Thomson and Hugh Blackburn (Glasgow, 1871); German translation by Wolfers (Berlin, 1872) ; Swedish translation by Charlier (Lund, 1927-31); Japanese translation by Kunion Oka (Tokyo, 1930); Dutch translation by Beth (Groningen~ 1932) ; Russian translation by Krylov (Moscow, 1936); American edition of Motte's translation by Cajori (Berkeley, 1934. Reissued 1941). In addition to the above, the Principia is to be found in three collected editions, a large number of abridgements, reprints, and sections for classroom purposes."); on Dutch translations and popularizations, see https://newton.edwardworthlibrary.ie/teaching-newton/leiden/; on English translations, see I. Bernard Cohen and H. Pemberton, Pemberton's Translation of Newton's Principia, with Notes on Motte's Translation, 54 Isis 319 (1963). On popularizations and their impact, see Stephen D. Snobelen, *On Reading Isaac Newton's* Principia *in the 18th Century*, 22 Endeavour 159 (1998); Laura Miller, Reading Popular Newtonianism: Print, the Principia, and the Dissemination of Newtonian Science (University of Virginia Press, 2018).

[112] Milo Keynes, *The Personality of Isaac Newton*, 49 Notes and Records of the Royal Society of London 1, 23 (1995) ("He never felt any strong desire to bring his work before the world, and increasingly developed a distaste for publishing it."). However, Newton had a strong desire for fame and recognition, and probably would have preferred to see others popularize his work, see *id*. at 29 ("[P]art of his achievement that can be attributed to ambition came from his need to obtain self-esteem in other ways than by gaining the affection of his fellows… Newton's scientific attainment was thus connected with his personality and his apparent great need to succeed."). A quick perusal of the *Principia*, however, gives the impression that Newton would have been incapable of popularizing any part of his own work.

popularizations of Newton fell outside of the boundary of his copyright on *Principia* is resolved by an examination of the novelty of the popularization effort and its tendency to serve a complementary function by reaching markets that Newton's original would not reach. Whether such efforts were profit-based or non-profit might factor into such an assessment, but would by no means be dispositive considerations.

The boundary understanding implicit in *Folsom* has a further implication for the role or function of a "narrow fair use" doctrine – that is, the narrower conception of fair use that would necessarily accompany a narrow conception of the copyright boundary. A narrow fair use doctrine, as implied by *Folsom*, would permit the copying user to assert the fair use defense only in clear violations of the copyright boundary. Take the case of a straightforward copying and selling of parts or all of an author's book. This is a clear violation of the copyright. A narrow fair use doctrine would be available as a defense for such cases. A defendant might argue, for example, that the copying was necessary for educational purposes. A court would then determine whether the purpose was truly educational, or for some purpose other than education, and whether the copying had any impact on the author's market for the book. If the copying was educational and did not adversely affect the author's book sales, the defendant would prevail under the narrow fair use argument.

In modern law, in contrast to the *Folsom* era, an abridgment or translation of a major work of science or art would be deemed within the boundary of the copyright, as a derivative work.[113] A modern court would ask whether the abridgment should be excused on the basis of the fair use doctrine. As an abstract matter, the question whether an abridgment should be excused under fair use should be resolved on the basis of the same standard applied to the boundary question examined by Justice Story in *Folsom*. However, the fair use standard now in effect appears to be narrower than the standard suggested by Story. In one clear sense, it is quite obviously narrower, because an abridgment of a modern work would not be excused today under the fair use doctrine. In a novel case, where the application of the law is not so clear as in the case of an abridgment under modern law, the courts would invoke the four prongs of the statutory fair use test:

(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;

[113] See, e.g., Ketzan, *supra* note xx (discussing translations); The Andy Warhol Foundation for the Visual Arts, Inc., v. Lynn Goldsmith and Lynn Goldsmith, Ltd., Brief of Amicus Curiae Prof. Zvi S. Rosen in Support of Respondents (U.S. August 15, 2022), at p.9 ("[I]n 1879, Eaton S. Drone asserted that "in the United States, an author . . . has the exclusive right, without special reservation, to abridge it." Eaton S. Drone, A Treatise on The Law of Property in Intellectual Productions in Great Britain and the United States 334 (1879). Drone's argument at some length against a right of fair abridgment seems to have been convincing – or at least captured the development of feelings about copyright law. No further reported cases of the fair abridgement defense being argued in the United States are found in reported cases from then on.").

(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."

These considerations are vague and communicate little guidance to courts standing alone.[114] The first prong focuses on the "use" asserted to be fair. The second prong focuses on the original work. The third focuses on the quantity of copying. The fourth focuses on the effect on the "potential market" for the copyrighted work.

By focusing on the potential market, the fourth prong already signals a narrowing of the fair use defense in comparison to the copyright boundary analysis implied by *Folsom*. A potential market could encompass all sorts of derivations and variations on the original work. An author could point to almost any variation on her work as a potential market. This violates the spirit of *Folsom*, and especially the economic understanding offered above. Take the case of complementarity. A complementary derivation on an original work does not injure the market for the original work. As explained above, it likely enhances the market for the original work. Take the case of a perfectly complementary derivative. Such a work only enhances the market for the original. However, the fourth prong of the statutory test enables the copyright holder to thwart and to tax the user on the ground that the user has occupied a potential market belonging to the copyright holder. Given the option to impose such a tax on a derivative user, many if not all copyright holders would exercise the option. Exercising the option may be sensible in the short run but self-harming in the long run in the case of perfect complementarity. The optimal strategy in the case of perfect complementarity may be to allow the free entry of derivative users, and allow their uses to drive up demand for the original work. Moreover, it must be noted, the claim of the copyright holder that the derivative user has invaded a potential market is often hollow. The copyright holder, in the majority of such cases, would not have exploited the potential market and likely would not have even discovered it.

The more fundamental problem revealed by prong four of the statutory fair use test is that the expansive copyright law of the present adopts the default position that the copyright holder possesses all potential markets related to the original work. Again, in the case of perfect complementarity, this default position is in tension with the purpose of copyright. By broadening the scope of the right, the default position partially undermines the right, and the social benefits associated with it.

The third prong of the statutory fair use test is unassailable because any examination of fair use, or of the copyright boundary, will have to examine the extent of copying. Obviously, the more copying, the more likely a violation. Of course, the third prong should not be considered in

[114] Many authors have commented on the vagueness of the standard, see, e.g., Fisher, *supra* note 5, at 1704.

isolation of the other prongs. A verbatim copy might be excused under fair use if the goal is purely educational and there is no attempt to undercut the market for the original. Such a use would fall within the analysis of Figure 2, where there is no effect on the market for the original author, but there is an educational payoff to society. The classic example is a teacher who copies, on occasion, a segment of a journal article to distribute to students.

The second prong, focusing on the original work, refers to is "nature". As stated, it would be difficult to find a vaguer standard. However, nature refers to the degree to which the original work merits protection under copyright law.[115] In some case, the utilitarian or functional nature of the original work may render it less amenable to copyright protection, as the Court indicated in *Google*.[116]

The first prong, focusing on the use, refers to the vague concerns for the "purpose and character" of the use. The economic basis for distinguishing commercial from nonprofit educational uses is doubtful.[117] The underlying concern should be the consumer welfare generated within the market. Consumer welfare is the same whether the source is a profit-seeker or a nonprofit.[118] The appropriate question from the welfare perspective is really the degree to which the use serves a complementary function to the original work. Purpose and character also obviously refer to such matters as the novelty, originality of the use, the degree of embedded effort and ingenuity, which tend to force judges into the position of art critics.[119] In the world of modern art, this inquiry should naturally compel judges toward setting a high bar in the way of users who wish to exploit the fair use defense. Otherwise, an artist whose artwork consists of pasting a hair from his head onto a canvas would be able to satisfy the "purpose and character" inquiry by pasting a hair from his head onto a direct copy of the work of the original author and calling it a fair use.

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[115] *Google*, 141 S. Ct. at 1197-1198 ("Thus, copyright's protection may be stronger where the copyrighted material is fiction, not fact, where it consists of a motion picture rather than a news broadcast, or where it serves an artistic rather than a utilitarian function… Similarly, courts have held that in some circumstances, say, where copyrightable material is bound up with uncopyrightable material, copyright protection is 'thin.'").

[116] *Id*. at 1186 ("The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world.")

[117] *Id*. at 1204 ("There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true, as many common fair uses are indisputably commercial. For instance, the text of § 107 includes examples like "news reporting," which is often done for commercial profit. So even though Google's use was a commercial endeavor, that is not dispositive of the first factor, particularly in light of the inherently transformative role that the reimplementation played in the new Android system.").

[118] I should note that Justice Story's opinion in *Folsom* includes no references to whether the use is profit-seeking or nonprofit in nature. Why the 4 prong test of Section 107 would include an explicit reference to nonprofit educational uses, rather than educational uses generally, is unclear. The welfare gain to society from education is the same, whatever the source. Liebowitz, *supra* note 5, at 190.

[119] *Warhol*, 143 S. Ct. at 1283-84.

The first prong is often dealt with under the heading of transformativeness. The theory here suggests that transformativeness should be reduced, after an initial consideration of substantive differences in the original and use,[120] to an examination of the complementary nature of the use. Is the use mostly substitutive or complementary? I mean complementary in the sense that the new use is not a substitute in any of the author's existing markets, and the use is complementary or potentially complementary, in the sense of enhancing demand for the original, or potentially enhancing demand for the original by bringing greater attention to it beyond the market for the original – actual complementarity or generative complementarity. This is somewhat the reverse of current law, which tends to focus on whether the use is a potential substitute in a potential market – and if so, the use is not fair. The approach urged here asks whether the use is a potential complement to the existing market of the original, in which case the use should be judged fair.

IV. Copyright as Property

In this part, I take a closer look at the subject of copyright as property. There is of course a well-known general distinction between ideas and expression. Copyright does not protect ideas, and especially of the utilitarian or functional sort.[121] One could say that copyright provides the least protection to ideas of a utilitarian sort.[122] Ideas of a fictional or creative sort receive some protection as they become specialized and narrow in the form of fictional images or characters. But fictional ideas or themes of a general sort are not protected at all by copyright.[123] The concept of fair use plays a role in determining the extent to which thoughts sharing the character of ideas gain protection from copyright law.[124]

Figure 4 shows a general map of copyright as property, for fiction. The horizontal axis measures the degree of novelty of expression. At the origin, the expression in the new work (the work of the user) is exactly the same as the expression of the original work. As one moves further along the horizontal axis, the percentage of old expression declines and the percentage of new

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[120] *Folsom*, 9 F.Cas. at 345 (noting, for example, that a fair abridgment cannot consist of just a use of the scissors).
[121] Baker v. Selden, 101 U.S. 99 (1879); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Mazer v. Stein, 347 U.S. 201 (1954); Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).
[122] Baker v. Selden, 101 U.S. 99 (1879); Mazer v. Stein, 347 U.S. 201 (1954).
[123] Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).
[124] *Google*, 143 S. Ct. at 1197 ("The language of §107, the "fair use" provision, reflects its judge-made origins. …That background, as well as modern courts' use of the doctrine, makes clear that the concept is flexible, that courts must apply it in light of the sometimes conflicting aims of copyright law, and that its application may well vary depending upon context. Thus, copyright's protection may be stronger where the copyrighted material is fiction, not fact, where it consists of a motion picture rather than a news broadcast, or where it serves an artistic rather than a utilitarian function. … Similarly, courts have held that in some circumstances, say, where copyrightable material is bound up with uncopyrightable material, copyright protection is "thin.").

expression increases. The vertical axis measures the novelty of ideas. At the origin on the vertical axis, the ideas used in the new work are precisely the same as the ideas of the original work – for example, the characters and everything suggesting an idea is the same. Since the most basic plotlines – such as the "Icarus arc" involving an individual who rises from nothing to reach great heights and causing his own ruin in the end[125] – are common in literature,[126] I assume the origin of the vertical axis consists mostly of characters who represent identifiable perspectives on their environment.[127] As one moves upward along the vertical axis, the percentage of copied ideas falls and the percentage of new ideas increases in the work of the user. The point at the origin represents direct or verbatim copying, where the ideas and expression are the same. Technically speaking, the points on the vertical axis are empty because once one introduces new ideas, one would have to introduce some new expression too, so one must imagine that moving upward along the vertical axis means moving upward with a slight shift toward the right of the axis itself. Moving upward along the vertical axis, then, are instances of heavy borrowing of the text of the original work, interspersed or framed with new ideas.

Similarly, along the horizontal axis, as soon as one introduces new expression, one is likely to also introduce some new ideas. Thus, the points on the horizontal axis are really empty, and as one moves along the horizontal axis, one must shift upward above the axis slightly. Moving along the horizontal axis, then, are instances of use of the same ideas and concepts of the original work (for example, the same characters as in the original fictional work viewed from the same perspective), expressed in new text. For example, moving along the horizontal axis are cases where a new author writes an unauthorized sequel to the work of the original author, adopting the same characters, concepts, and perspectives of the original author. One might quibble that the protection of characters and contextual ideas is just a feature of modern copyright law,[128] and was not true of the original Statute of Anne,[129] and that from this it follows that the notion of having property in the characters and contextual ideas is just a recent innovation in the law. However, the creation of unauthorized sequels has been viewed as inappropriate for a long time, even though it definitely occurred before the Statute of Anne. Cervantes, in his sequel, ridiculed and obliquely condemned the author of an unauthorized sequel to the first volume of *Don*

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[125] See, e.g., StoryboardThat, Icarus and Daedalus Plot Diagram and Summary Storyboard, https://www.storyboardthat.com/storyboards/bridget-baudinet/icarus-and-daedalus-plot-diagram.
[126] See, e.g., Christopher Booker, The Seven Basic Plots: Why We Tell Stories (2004).
[127] On the role and abilities of characters in fiction, see John Foxwell, Ben Alderson-Day, Charles Fernyhough, and Angela Woods, 'I've learned I need to treat my characters like people': Varieties of agency and interaction in Writers' experiences of their Characters' Voices, Conscious and Cognition, 2020 Mar. 79: 102901, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7068700/. Characters sufficiently delineated are protectable, Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Anderson v. Stallone, 11 U.S.P.Q.2d 1161 (C.D. Cal. 1989).
[128] A feature beginning with Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930). For a brief history, see Dean D. Niro, Protecting Characters through Copyright Law: Paving a New Road upon Which Literary, Graphic, and Motion Picture Characters Can All Travel, 41 DePaul L. Rev. 359 (1992)
[129] The Statute of Anne, 8 Ann. c. 19 (1710).

Quixote.[130] Cervantes's criticism reflects probably a general understanding among authors, even in the 1600s, that the launching of an unauthorized sequel was inappropriate and dishonorable conduct.

Figure 5 repeats the same considerations as Figure 4, but applied to nonfictional works, such as science and history. The space of unlawfulness stops shorter along the expression axis in Figure 5. The reason is that once one adopts a sufficient percentage of new expression within the text, the property right of the original author ceases. The law provides no protection to any of the ideas of the historian, and no protection for those of the scientist other than the practical ideas protected by patent law.

Consider the question of fair use and the appropriate copyright boundary in Figures 4 and 5. As one moves up along the vertical axis, copyright protection of the original work ceases, even though the expression in the user is nearly the same as in the original. The break between protection and nonprotection occurs because the ideas conveyed differ radically from those of the original work. I am referring here to the cases of parody and critique, and I have marked the corresponding area of the diagram "Fair Use". Parody necessarily uses much of the original's expression, otherwise it would not be recognizable as parody.[131] Similarly, critique, at a high level of detail, necessarily uses some of the expression of the original.[132] The copyright boundary permits the borrowings observed in these cases. In the top right corner of Figures 4 and 5, one observes a high percentage of new or different ideas relative to the original work, and new expression relative to the original work. In this set of cases, copyright law clearly does not proscribe the user's conduct. I have marked this set of cases as "Clearly Lawful". The area marked "Lawful", right below the area marked "Clearly Lawful," shows the space where the second author uses a substantial or high percentage of the ideas of the original author (though far short of an unauthorized sequel), and a high percentage of new expression. Because the expression is largely novel, there is no possibility of violating the copyright of the original author.

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[130] See Johnathan Bailey, How Don Quixote Handled an Unauthorized Sequel, Plagiarism Today (May 18, 2015) https://www.plagiarismtoday.com/2015/05/18/how-don-quixote-handled-an-unauthorized-sequel/.

[131] *Campbell*, 510 U.S. at 580-581 ("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.").

[132] The case law has distinguished parody and satire. According to some sources, parody targets a particular work, while satire aims to make a broader point, see, e.g., Victoria Cuartero, Dan Satorius and Michael Donaldson, Parody, Satire, and Jokes, 32 Ent. & Sports Law. 66, 66 (2015). The freedom to copy is greater in the context of parody than in satire. *Campbell*, 510 U.S. at 580-581 ("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, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."). I find this distinction hard to defend. There are many cases involving uses that can be considered either parody or satire (or both), depending on how one chooses to view the works. Indeed, all parody, to be interesting, should involve some element of satire, and satire often involves parody. Linda Hutcheon, A Theory of Parody: The Teachings of Twentieth-Century Art Forms 30-49 (2000). Because of this, a sharp distinction in copyright law between the treatment of parody and that of satire would risk inviting lawyers to characterize parodies as satires, in an effort to expand the reach of copyright.

The diagrams suggest two notions of fair use in the current law. First, consider the unlawful space involving either the same expression or the same contextual ideas (characters, etc.). Indeed, consider the origin involving verbatim copying. Fair use is applicable here on a pure transaction cost rationale.[133] Take the scenario of a teacher copying a short article to hand to her students – where she has not had time to go through the proper channels for copyright clearance. Even though the transaction costs of gaining consent have fallen considerably as a result of the internet, there still is no "quick approval" system for articles that might be valuable to pass out to students – no emergency button to push that clears the teacher for immediate dissemination. The situation of most teachers today is not very different from what it was before the internet. The teacher finds an article that should be of great interest to the students, and illustrates finely the points of a given lesson, and needs to copy it immediately to hand out or distribute to students. The welfare consequences in this case are illustrated in Figure 2, which shows that society gains from the educational benefit, and there is no loss to the original author. The students were not going to find the article without the teacher's guidance, and under virtually no circumstances would they have purchased it for a fee. This scenario corresponds to the narrow conception of fair use implicit in Story's *Folsom* opinion.

The other notions of fair use in current law are associated with the areas marked "Fair Use" and "Transformativeness" in Figures 4 and 5. These cases involve different concepts, in comparison to the verbatim copying case. In the cases of parody and critique, the transaction cost rationale associated with the narrowest conception of fair use is often not relevant. The parodist, in many instances, has sufficient to time to contact the original author and seek a license. The difficulty is that the original author is often unwilling to license a parody.[134] The more incisive the parody, the less willing is the original author to license. Requiring the consent of the original author would lead to only unintelligent parodies gaining publication.[135] Yet parody is education, often education at its best.[136] There may be some risk of a market loss to the original author, especially if parody exposes the flaws of the original author's thinking so clearly that it limits the growth of the original author's market. But society gains from such exposure. This case is represented in Figure 3, where there is a financial loss to the original author, but a greater gain to

[133] The transaction cost rationale is part of the overall fair use rationale set out in Gordon, supra note xx.
[134] See, e.g., *Campbell*, 510 U.S., at 592 ("The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask ... for criticism, but they only want praise." S. Maugham, Of Human Bondage 241 (Penguin ed. 1992).").
[135] *Campbell*, 510 U.S., at 591-591 ("We do not, of course, suggest that a parody may not harm the market at all, but 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.")
[136] Carr v. Hood, 170 Eng. Rep. 981 (K.B. 1808) ("[E]very man who published a book laid himself before the public, and became a fair subject of criticism. If his book was penned in a pompous and empty style, ridicule might fairly be used to strip folly of its self-importance…[I]t was of the highest importance, that criticism should be free, for, without it there could be no improvement in taste, in politics, or in science.") The case involved a defamation claim brought by an author who had been parodied by the defendant.

society.[137] Fair use is defensible here not because of transaction costs, because there is often no transaction cost rationale for fair use, but because the net social gain is unambiguously positive.[138]

One could argue that the application of fair use in this setting does have a transaction cost basis if one takes the view that the original author's unwillingness to consent is itself a type of transaction cost. However, this would be converting the original author's "reservation price" into a transaction cost, which seems inappropriate on economic grounds. All that we really know in these cases is that the original author increases his reservation price for consent as the quality of the parody increases. To consent to the most exquisite and richly deserved parody, the original author demands an infinite payment. But this impoverishes society.

Now consider the transformativeness question. The area in Figures 4 and 5 representing these cases covers instances where the user borrows a substantial amount, though not all, of the original author's expression, and borrows some, but not all, of the original author's ideas. The amount of expression borrowed is sufficient to potentially violate the copyright. The amount of ideas borrowed are sufficient to prevent the user from relying on the parody and critique defenses. The transformativeness test is crucial to determining whether there is a violation of the copyright. The courts have so far failed to provide guidance on this question that is any clearer than that suggested by Story in *Folsom*. I have argued in the previous part that this question should largely hinge on the matter of complementarity. Some novelty and some effort are necessary conditions, as suggested by Figures 4 and 5. However, transformativeness means something more than novelty and effort. It means that there is a high likelihood that social welfare is enhanced by recognizing the fair use defense – or alternatively drawing a boundary on the copyright property – taking into account the static welfare of consumers and the creation incentives of authors.

[137] The Figure 3 analysis, indicating a tradeoff of the harm to the individual against the gain to society, certainly applies to reasonable criticism. Parody is a special case, as perhaps the most effective form of criticism. In view of the stated purpose of the copyright clause of the U.S. Constitution, "To promote the Progress of Science and useful Arts," U. S. Const., Art. I, § 8, cl. 8, parody and criticism should be given some measure of exemption from the infringement law, because these activities adhere to the goal of the copyright clause. Posner argues that parody should have a narrow fair use defense, existing only when the original is the target of the parody and not when the original is used to make a broader point. Richard A. Posner, *When Is Parody Fair Use?*, 21 Journal of Legal Studies 67 (1992). The problem with this claim is that there are many instances when the original is both the target and the parodist is making a broader point. For this reason, I do not think Posner's suggested doctrine is advisable.

[138] To be sure, Gordon's analysis of fair use allows for this case. Gordon describes it as a general case of market failure, justifying fair use. See Gordon, *supra* note xx, at 1615. As for the law, it has long been clear that copying from the original for the purpose of criticism, and not replication, is outside of the copyright boundary, see Folsom, 9 F.Cas. at 344 ("Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.").

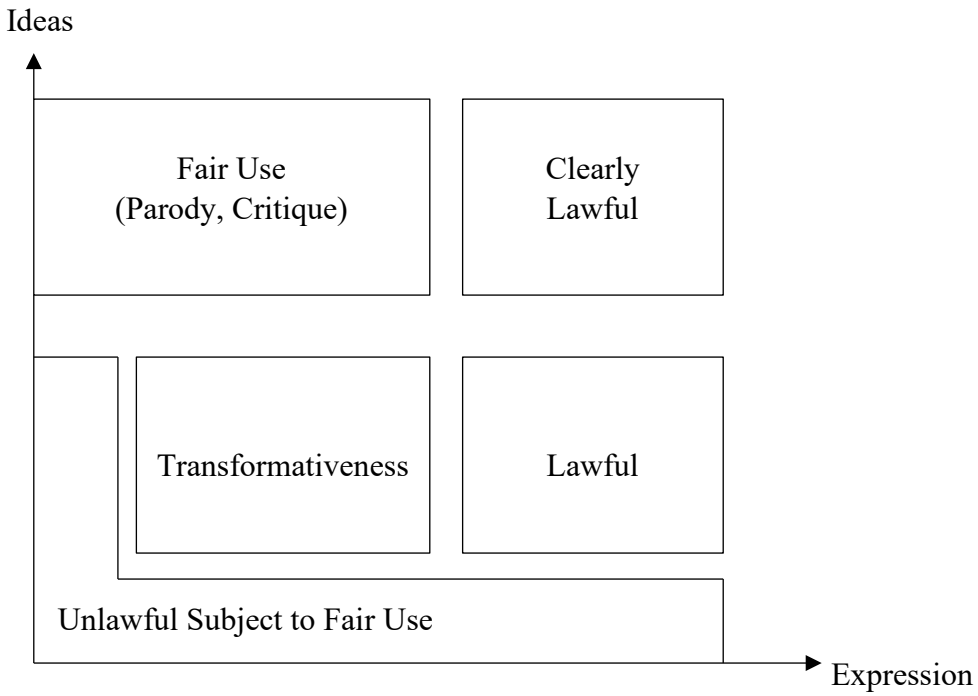

Figure 4: Map of Property Rights, Fictional Work

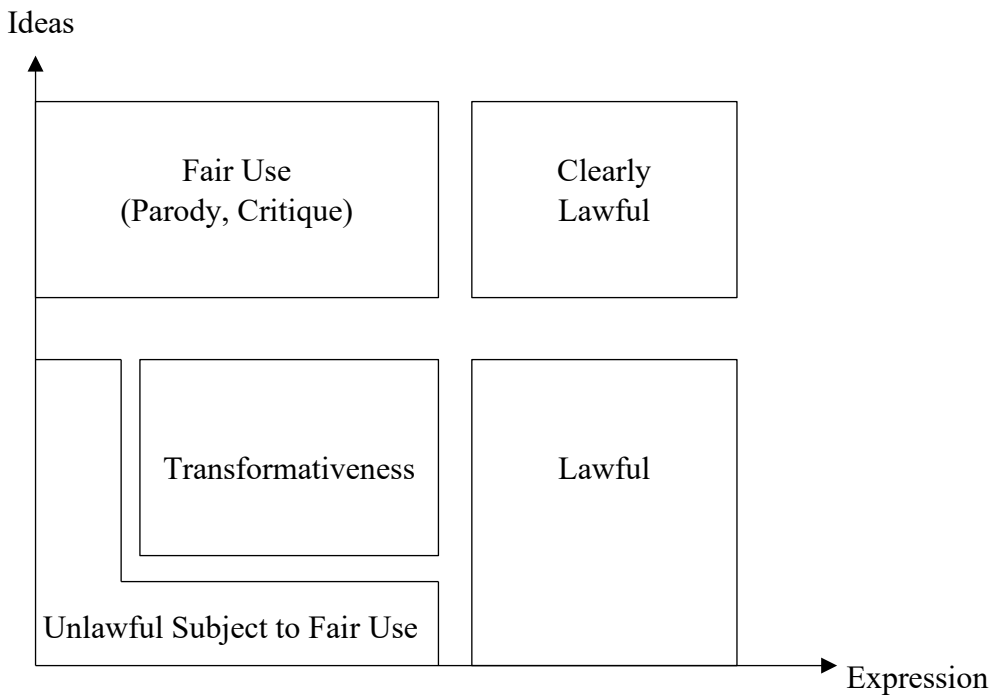

Figure 5: Map of Property Rights, Non-fiction

A focus on complementarity rather than the substitutability focus of current fair use doctrine would likely lead to a lessening of the scope of copyright protection. This is clear in the case of abridgments. A focus on complementarity would permit some unauthorized abridgments under fair use, while no unauthorized abridgments are permitted under fair use in current law.

There is nothing in the general argument here, however, that requires a weakening of copyright protection. To the contrary, the argument here would be consistent with stronger protection in some areas. For example, return to the case of verbatim copying. A thin perpetual copyright protecting against verbatim copying is not inconsistent with my analysis.[139] There are some works of original authors that require a substantial investment in the process of publication, such as books with elaborate illustrations or figures. After such a book runs out of its copyright term, there is often no incentive on the part of any publisher to continue to incur the cost of publishing the book with all of its elaborate illustrations. If any publisher were to continue to market such a book, another publisher could just strip out the illustrations and sell a cheaper version of it. This is illustrated by John Stuart Mill's *Principles of Political Economy*. The original book includes many elaborate diagrams. Mill put a great deal of effort into creating diagrams that would visually communicate important economic relationships, such as relative sizes of economies. One can find newly printed copies of Mill's book today, but I am aware of no publisher that currently produces the book with its elaborate illustrations. All of the books available are stripped of the illustrations. A perpetual thin copyright might enable a publisher to continue to make a market in Mill's *Principles*, in its original form. I do not envision this thin copyright as a prevention to any publisher who wished to provide an audiobook version, or to even post a version of the book online. It would, however, enable the publisher to profitably continue to sell the original book, full of its illustrations, to purchasers who wished to own a physical copy of it. That market no longer exists today, but it could exist as the result of thin perpetual copyright protection. The principle of utility, or social welfare, would probably endorse such a result.

The proposed modification of the law here is also necessary for the maintenance of copyright protection. The broader scope of protection now observed has led to numerous calls to weaken copyright protection.[140] These calls are not completely without justification, because there are

[139] For an argument for perpetual copyright – precisely, renewable perpetual copyright --, see, e.g., Richard A. Posner, The Law and Economics of Intellectual Property, Daedalus (2002), https://www.amacad.org/publication/law-economics-intellectual-property. Under Posner's proposal, the copyright holder can pay a fee to continue to maintain the copyright indefinitely. The difference between my proposal and Posner's is that I am insisting that the copyright be a "thin" perpetual copyright, prohibiting direct copying but otherwise permitting the development of unauthorized derivative works.

[140] E.g., Lessig, *supra* note xx; Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity, New York: Penguin Press (2004); David G. Post, His Napster's Voice, 20 Temp. Envtl. L. & Tech. J. 35 (2001); Yochai Benkler, Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain 74 N.Y.U. L. Rev. 354 (1999); Jessica Litman, Real Copyright Reform, 96 Iowa L. Rev. 1 (2010).

several specific cases where the scope of protection has expanded in recent times – again, consider the example of unauthorized abridgments, which were fair game in the era of *Folsom* but are unquestionable copyright violations today. In any event, the calls for weakening copyright protection have coincided with, and perhaps have some causal influence on,[141] the weakening of copyright protection. The courts are, at this moment, pointing the *eBay* doctrine toward copyright property.[142] The application of *eBay* to copyrights will weaken copyright remedies, as copyright holders gain fewer injunctions. With weaker remedies, the likelihood of infringement will increase. With a greater likelihood of successful infringement, the rewards from authorship will decline. As technology provides new ways in which copyright protection can be quickly bypassed or circumvented, the rewards once promised to authors will gradually shift into the technology sector.

V. Some Applications

In this part, I examine some of the recent cases as applications of the theory developed in the previous parts of this paper.

A. *AWF v. Goldsmith* (*Warhol*)

Let's start with the Warhol case. Lynne Goldsmith, a professional photographer, took a picture of the musician Prince in 1981 for Newsweek magazine. Later, in 1984, Goldsmith licensed one of her Prince photos, for one-time use only, to Vanity Fair to serve as a reference for an illustration by an artist. The artist hired for the illustration was Andy Warhol. Warhol created a purple silkscreen portrait of Prince from the photograph, which Vanity Fair published. To the naked eye, Warhol's portrait looks like Goldsmith's picture of Prince with purple and red coloring. In addition to the image published by Vanity Fair, Warhol created 15 additional portraits of Prince, two of which are pencil drawings. The 16 images constitute Warhol's "Prince Series." In 2016, after Warhol's death, the firm that owns Vanity Fair contacted the Andy Warhol Foundation and licensed one of the images from the Prince Series, specifically "Orange Prince," for a magazine celebrating the life of Prince. The firm paid AWF $10,000 for the right to publish the Orange Prince image. Goldsmith came across the image and recognized it as her photograph, and promptly notified AWF. In response, AWF sued Goldsmith for a declaratory judgment of noninfringement, or, in the alternative, fair use.

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[141] Specifically, Justice Kennedy's concurring opinion in *eBay* suggests that he was influenced by literature critical of patent enforcement by trolls. See eBay v. MercExchange, 547 U.S. 388, 396 (Kennedy, J., concurring) ("An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees). The literature critical of patent enforcement has, at least in some cases, also included critiques of copyright enforcement, see Lessig, Future of Ideas, *supra* note xx, 250-261.

[142] Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010); Phillips, *supra* note xx.

The Supreme Court's opinion in *Warhol* is a lengthy discussion of the application of fair use doctrine to the Orange Prince image – in addition to devolving into a nearly indecorous dispute between two Supreme Court justices (Sotomayor, writing for the majority, and Kagan, dissenting). The Court focused on the first prong of the statutory fair use test – the examination of the "purpose and character" of the use. The Court honed in on the question whether the use should be characterized as transformative, and held that it was not. The determination of transformativeness, as described by the Court, depends on the interpretation of vague terminology, such as whether the use "adds something new, with a further purpose or different character."[143] These terms are too vague to provide any guidance to anyone, but the Court further narrows their meaning by referring to the goals of "criticism, comment, news reporting, teaching . . . , scholarship, or research"[144] as desirable features of a transformative purpose. The Court further explains that transformation is a matter of degree, and so courts must determine whether the degree of transformation merits the application of the fair use defense. Parody, the Court notes, is a valuable feature in proving transformativeness.[145] Also, the commercial nature of the use tends to weigh against transformativeness, because a commercial use is more likely to serve as a substitute in the market to the original work.[146] Putting these considerations together and applying them to Orange Prince, the Court concluded that AWF's image is not transformative because it shares the same purpose as the original Goldsmith photograph, specifically to be used primarily in celebrity magazines, and the AWF image was made available to the commercial art market. The dissent objects to this analysis on the ground that it puts too little weight on the artist's investment of genius and time in creating a new expression of an image. The dissent accuses the majority of shifting the fair use analysis to focus mainly on the commercial nature of the use rather than the degree of newness of the character or purpose of the use. This shift toward a focus on commercialism is inconsistent with some of the Court's earlier decisions.[147]

If the key focus of fair use is on the degree to which the use is a substitute or a complement, as this paper's analysis urges, then the Court's decision in *Warhol* is straightforwardly correct. The Warhol image is clearly a substitute rather than a complement to the Goldsmith photograph.[148] It

[143] *Warhol*, 143 S. Ct. at 1247.
[144] *Id*.
[145] *Id*. at 1261.
[146] *Id*. at 1273
[147] See, e.g., *Campbell*, 510 U.S. at 570 ("The Court of Appeals… erred in giving virtually dispositive weight to the commercial nature of that parody… The statute makes clear that a work's commercial nature is only one element of the first factor enquiry into its purpose and character."); *Google*, 143 S. Ct. at 1204 ("… many common fair uses are indisputably commercial.").
[148] One might offer more subtle arguments, but the subtle arguments are insufficient to overturn the conclusion that the Warhol image was a substitute to the Goldsmith photograph in the markets in which it existed. To illustrate, one might argue that the Warhol image could have increased the value of the Goldsmith photograph, by giving it broader fame. In doing so, the Warhol image, though displacing the Goldsmith photograph in some submarkets, may have increased its value in others. In this view, the Warhol image is, to use the term I introduced earlier, a *generative* complement, because it enhances the demand for the original work by stimulating the general level of interest in it.

had served precisely as a substitute in the transaction at issue in the case. For the purposes of some magazine editors, it was clearly a superior alternative,[149] but it remained in likely uses a substitute. Indeed, the dissent, in a poor attempt to support its argument in favor of fair use, asserted that any rational magazine editor would prefer the Warhol image to the Goldsmith photograph.[150] Of course, if Warhol had foreseeably produced images using the Goldsmith photograph that would be viewed as inferior to the photograph, Warhol would not have carried out the Prince Series. Perhaps if Warhol had produced the Prince Series as fine art, which he would never attempt to enter into the commercial market, the Court might have had a different analysis of the case. But once the AWF entered Warhol's image into the market to compete with Goldsmith's photograph, the case for fair use protection largely ended.

The central argument for transformativeness in *Warhol* – commendably rejected by the majority – is that the Goldsmith picture shows a "vulnerable, uncomfortable person," which the Warhol images transform into an "iconic, larger-than-life figure," immediately recognizable as a Warhol.[151] The *Warhol* dissent makes much of this argument and describes Warhol as a towering genius of the art world.[152] This reasoning exemplifies the sort of hindsight logic that

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I argued earlier that a translation could be a generative market complement to an original textbook by increasing general interest in the original work. However, there is no evidence in *Warhol* that the Warhol image had such an effect on the Goldsmith photograph. While in theory it is possible that a use could be a substitute in one market and a generative complement in another market (or markets), this theoretical possibility does not appear evident in the facts of *Warhol*. If a case were to arise where the use is a substitute in one market and generative market complement in other markets, a court would have to determine which effect dominates. Now let us consider another subtle argument. One might argue that the Warhol image and the Goldsmith photograph are not really substitutes, because the market preference for the Warhol image is so much greater for the Goldsmith photograph. *See Warhol*, 143 S. Ct. at 1292 (Kagan, J., dissenting). From this view, the Warhol image and the Goldsmith photograph are no more substitutes than are a Rolls Royce and a Ford Escort. However, for some set of consumers interested in a Rolls Royce, there is very likely a relative price level that would induce them to choose the Ford Escort instead. Even though, for most consumers interested in a Rolls Royce, the Rolls Royce and the Ford Escort are not substitutes, there is likely to be a subset of consumers for whom the two cars are substitutes. To illustrate, suppose a wealthy parent seeks to purchase a car for a teenage child, who demands to have a Rolls Royce. The parent might decide that, even though she could easily afford the Rolls Royce, that she should purchase the Ford Escort instead, given that the teenager is still learning to drive. The existence of such consumers puts some downward market pressure, even if slight, on the pricing of the Rolls Royce. Thus, even if the market prices of the Rolls Royce and the Escort are in a 10:1 ratio, there still may exist a subset of consumers for whom the products are substitutes. The same is true of the Warhol image and the Goldsmith photograph.

[149] *Warhol*, 143 S. Ct. at 1292 (Kagan, J., dissenting).

[150] *Id*. at 1297 (Kagan J, dissenting) ("Suppose you were the editor of Vanity Fair or Condé Nast, publishing an article about Prince. You need, of course, some kind of picture. An employee comes to you with two options: the Goldsmith photo, the Warhol portrait. Would you say that you don't really care?... Of course you would care! You would be drawn aesthetically to one, or instead to the other. … In any event, the editors of Vanity Fair and Condé Nast understood the difference—the gulf in both aesthetics and meaning—between the Goldsmith photo and the Warhol portrait.").

[151] *Id*. at 1271.

[152] *Id*. at 1293 (Kagan, J., dissenting) ("Andy Warhol is the avatar of transformative copying. …The silkscreen enabled him to make brilliantly novel art out of existing "images carefully selected from popular culture."…The works he produced, connecting traditions of fine art with mass culture, depended on "appropriation[s]"… And with that m.o., he changed modern art; his appropriations and his originality were flipsides of each other. To a public accustomed to thinking of art as formal works "belong[ing] in gold frames"—disconnected from the everyday world

the vague terms of the statutory test invite. The only reason the Warhol image seems to some observers to depict an iconic, larger-than-life figure is because in reality, Prince had become an iconic, larger-than-life figure. If Prince had remained largely unknown, Warhol's image would not have been interpreted to project any image substantially different from that of the original Goldsmith photograph. The transformativeness argument was based entirely on a circular and bootstrapping logic. Moreover, if Prince had remained largely unknown, Warhol, ever the cynical exploiter of the art market,[153] never would have considered him a potential subject for one of his projects. The *Warhol* dissent does a disservice to the law and to the art world by presenting Warhol in hagiographic terms.[154]

If this analysis appears to shift the transformativeness test away from an analysis of the merits of the user's contributions and toward a more or less mechanical examination of the economic complementarity or substitutive properties of the use, then this is a shift that should be desired. Judges should generally steer clear from the business of judging art. It is an activity that is bound to make them look foolish. The fair use examinations by courts should focus more on the economic relationships between the original work and the later use of it. If, as Lunney perceptively notes, the purpose of the copyright statute is to promote innovation by enhancing incentives,[155] the important issues in the innovation analysis of fair use have to do mainly with the likely economic effects of certain types of uses, not the relative merits of the original and the use as works of art.

I do not wish to be misunderstood as saying that visual or sense-related transformativeness should play no role at all in the fair use analysis. Clearly, a derivative use that is not transformative in any artistic sense is just a direct copy of the original work. The only question in the case of a direct copy is whether it harms the market for the original. But the transformativeness question, limited to artistic qualities, discernible by the senses, is insufficient to answer the fair use question. Part of the transformativeness examination is necessarily an inquiry into the substitutive or complementary properties of the derivative use relative to the original work. Thus, transformativeness should be viewed as involving a question of *artistic transformativeness* and *economic transformativeness*. A derivative use might be viewed as artistically transformative without being economically transformative. Moreover, the

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of products and personalities—Warhol's paintings landed like a thunderclap… Think Soup Cans or, in another vein, think Elvis. Warhol had created "something very new"—"shockingly important, trans-formative art.").

[153] See Jonathan Yardley, Andy Warhol's Artless Achievement, March 2, 1987, https://www.washingtonpost.com/archive/lifestyle/1987/03/02/andy-warhols-artless-achievement/8c3ef4c9-ef05-4ae7-a4ef-908e2c30d6d6/ ("If art reveals the artist, then what are we to say of Warhol? His "art," however amusing and clever some of it may be, is callow, utterly devoid of seriousness or larger purpose. And if the public figure discloses the private man, then what again are we to say of Warhol? His much-publicized life was dedicated, quite without shame, to the pursuit of wealth and publicity, to flattery of the rich and indifference to virtually everyone else.").

[154] *Warhol*, 143 S. Ct. at 1291-1293.

[155] Lunney, *supra* note xx, at 783.

determination of artistic transformativeness should be understood as an endeavor that is vulnerable to error that is should be downgraded relative to the economic transformativeness examination in cases where the artistic question is difficult to resolve.

B. *Campbell v. Acuff-Rose Music*

I will try to make short work of the 2 Live Crew case. The rap group, 2 Live Crew, made a new version of Roy Orbison's "Pretty Woman." The two songs are not much alike. Still the Court held that the 2 Live Crew version was a parody of the Orbison song, and therefore protected as a fair use. The fact that the 2 Live Crew version was targeted for the commercial market was, as the Court notes, just one of the factors to consider in a fair use analysis, and not by any means controlling.[156]

This decision is also straightforwardly correct under this paper's model. The 2 Live Crew version was not a substitute to the Orbison song. It was more likely an economic complement than a substitute. The audience that 2 Live Crew targeted probably consisted mostly of individuals who were unfamiliar with the Orbison song, and the 2 Live Crew version might have caused them to take an interest in Orbison's song. The only potential for substitution might arise if Orbison, or the owners of the original copyright, had planned to license a rap version of the Orbison song – that is, the rap version constituted a foreseeable adjacent licensing market for Orbison. There are two senses in which the substitution effect should be considered. First, consider Orbison at the moment of creation, and whether he might envision a rap version later. This scenario is obviously implausible, given that Orbison created the song long before rap artists had entered the national music market. The second period to consider is after the Orbison song had been out for some time, the national rap market then develops, and Orbison considers a rap version of his own song. Some potential substitutive effect might be observed in this case, but there are many reasons to discount it severely. One, noted by the Court in *Campbell*, is that the 2 Live Crew parody probably would not foreclose a more serious rap version of Orbison's song.[157] The 2 Live Crew version is so different from Orbison's that there was plenty of space for someone to market a more faithful rap version of the Orbison song. Another reason for rejecting this late-period substitution theory is that it introduces a subjective test that would enable any original artist to always claim that he would have entered the same market as the user, whenever the user appears to have some success in the market – even when there is little similarity between the copyrighted work and the use. Clearly, the purpose of the fair use doctrine is not to permit such advantage taking.

[156] *Campbell*, 510 U.S., at 572, 584.
[157] *Campbell*, 510 U.S., at 593.

In light of these considerations, substitution should be considered from the perspective of a reasonable person, and the not the subjective claims of the original artist. In addition, substitution should be considered from the ex ante position of the artist near the time period of creation. If such an artist in the initial time period would reasonably have considered entering the derivative market on his own or licensing in the derivative market, within the initial time period or in a foreseeable future period, then a substitution impact is plausible. Failing to protect the artist from the risk of competition from such a substitute would foreseeably diminish the artist's incentive to create. However, in *Campbell*, there was no plausible case to be made that a reasonable person in Orbison's position might have considered entering or licensing in the derivative rap market at the time of creation or in a foreseeable future period.

The Supreme Court characterized the 2 Live Crew song as a parody of the original Orbison, but the two songs are so different that they are hardly recognizable as related. Any person who found Orbison's version pleasant would find the 2 Live Crew song grating, and certainly any person who found the 2 Live Crew version pleasant would find nothing of interest in Orbison's original. The two audiences have negatively correlated preferences. As Stigler's analysis of product bundling would indicate,[158] given the negatively correlated demands, selling the two songs bundled together for a blended price would reach a larger market than selling each individually.[159] The two songs were in no sense economic substitutes. There is no economic basis for finding 2 Live Crew's song within the copyright boundary of Orbison's song.

One might argue that, given the optimality of Stigler bundling in this scenario, the copyright holder (Acuff-Rose) should have acquired the copyright to the 2 Live Crew song and marketed the two as a bundle. The market should naturally encourage this solution. However, transaction costs may have prevented Acuff-Rose from acquiring the song, or (as was the case) Acuff-Rose may have preferred to block the 2 Live Crew version, or equivalently, to set a prohibitively high license fee.[160] *Campbell* does not explore the psychology behind Acuff-Rose's refusal to license. It seems economically myopic, since it is unlikely that the 2 Live Crew song could have adversely impacted the market for the Orbison song, and might serve as a complement. Such myopic behavior provides a justification for the fair use doctrine. It contradicts the Coasean view that an all-encompassing copyright boundary would result in copyright holders freely granting licenses to or acquiring complementary uses.

C. *The Wind Done Gone*

[158] Stigler, *supra* note xx.
[159] *Id*. at 153 (analyzing effect of bundling with negatively correlated demands).
[160] *Campbell*, 510 U.S. at 572-572 ("Acuff-Rose's agent refused permission, stating that 'I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'").

I refer to Alice Randall's upside-down version of *Gone with the Wind*, told from the viewpoint of slaves rather than slaveholders. The expression is entirely new, though the characters were thinly disguised versions of the characters in the original work. In terms of Figure 4, this is a case along the horizontal axis, on the far right end, in the area marked "Unlawful Subject to Fair Use." It is along the horizontal axis because the building-block ideas consisting of the characters of the original, and their interactions, are continued virtually unmodified into the new work. Arguably, the upside-down or antithetical perspective constitutes the imposition of a new set of ideas, but I will, for the sake of argument, assume that the ideas in a fictional work consist of the characters set out to convey various perspectives on a topic or environment. One could, for example, write a sequel to Plato's *Republic* in which the main character, Socrates, changes his mind, and concludes that liberty and free markets are superior to government thought control and communism, but this would involve the same ideas harnessed to an antithetical perspective.

The copyright holder of *Gone with the Wind* obtained an injunction against *The Wind Done Gone* in the district court.[161] The appeals court reversed, finding that the Alice Randall book was protected by the fair use doctrine.[162] The central question under this paper's framework is whether *The Wind Done Gone* is an economic substitute for *Gone with the Wind*, or an economic complement. It was certainly not a substitute. There is no sense in which a person interested in reading *Gone with the Wind* would choose instead to satisfy the same preferences by reading *The Wind Done Gone*. Not unlike *Campbell*, this is probably a case of negatively correlated preferences. Almost no one who would be enthusiastic about the themes of *Gone with the Wind*, of which racial subordination is a dominant one,[163] would have a preference to read *The Wind Done Gone*, and vice versa. The effect of *The Wind Done Gone* on the market for *Gone with the Wind* is minimal – and probably positive, through shedding additional light on the book.[164]

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[161] Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1386 (N.D. Ga.).
[162] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001).
[163] Drew Gilpin Faust, *Clutching the Chains That Bind: Margaret Mitchell and 'Gone with the Wind,'* 5 Southern Cultures 5, 14 (1999) ("Mitchell describes slaves as devoted to their masters and uninterested in the prospect of freedom. Only Yankee lies can succeed in luring simple and unsophisticated blacks away from their southern masters. A racism that leads Mitchell to describe blacks in images of harmless domestic animals before emancipation yields to a more virulent depiction of dangerous and powerful beasts in freedom — "black apes" (579), creatures with "paws" (301), animals that now threaten whites and the social order to which they cling. Mitchell's reliance upon stereotype results, quite literally, in the words of one recent critic, in a 'failure to imagine black people as fully human.'"); van den Haak, M., Plate, L., & Bick, S., 'I cringe at the slave portions': How fans of Gone with the Wind negotiate anti-racist criticism, 26 International Journal of Cultural Studies 257 (2023), https://doi.org/10.1177/13678779231163605.
[164] The sales of both books were probably positively impacted by the attention. The sales of *The Wind Done Gone* appear, by the evidence, to have been positively impacted by the attention, *see* Alexei Smirnov, Publisher: Mitchell heirs settle 'Wind Done Gone' lawsuit, Nashville Post (May 9, 2002) https://www.nashvillepost.com/home/publisher-mitchell-heirs-settle-wind-done-gone-lawsuit/article_916baf87-a9dd-5cbc-bb32-0026d7c5f243.html. No data appear to be available on the effects of the publication of *The Wind Done Gone* on the sales of *Gone with the Wind*. However, no evidence of a negative effect has been reported.

To permit the copyright holder of *Gone with the Wind* to enjoin the sale of *The Wind Done Gone*, as the district court did in this case, would enable the original copyright holder to control speech on important public matters; certainly not the purpose of copyright law. To return to Figure 2, this was a case of minimal negative impact (at most) on the incentives of the creator, with potentially substantial social benefits from the airing of modern views of the topics examined in the original work. It would be preferable that the court simply recognized that *The Wind Done Gone* is outside of the copyright boundary of *Gone with the Wind*, as would have been suggested by Story's analysis in *Folsom*, but the same result is secured by adopting a broad fair use doctrine.

Based on the arguments concerning the scope of property rights in Part IV, it is suboptimal that a court would need to invoke the fair use doctrine to permit *The Wind Done Gone* to reach the market. If the district court's decision on the scope of the copyright had been upheld, an appellate court might still have been troubled by the imposition of an injunction, and might have limited the copyright holder of *Gone with the Wind* to a damages remedy. While the individual copyright holder in this case may have preferred the damages award to no award of any sort, the broader implications of the substitution of damages remedies for injunctions would have been negative for copyright holders generally. In any event, as *Salinger v. Colting* (in which the court refused to award the injunction) indicates, that substitution toward weaker remedies has begun to occur.

Given that preferences for the original and derivative works were probably negatively correlated in *The Wind Done Gone* case, what should we think if the demands are positively correlated? In other words, suppose the consumers of the derivative use would also prefer to consume the original? Such cases are not uncommon. In *Structured Asset Sales LLC v. Sheeran et al.*,[165] the district court held that the singer Ed Sheeran had not violated the copyright to Marvin Gaye's "Let's Get It On," with his somewhat similar hit song "Thinking Out Loud." Unlike the case of *Campbell*, listeners of Ed Sheeran's song would have an interest in listening to Marvin Gaye's song. Ed Sheeran himself is reported to have performed the songs together, in concert, in a mash-up of the two.

There is no evidence that Sheeran's song depressed sales of Gaye's song. The available evidence suggests there may have been some weak complementary effect, as sales of Gaye's song increased during the copyright trial – but then so did sales of Sheeran's song.[166] Clearly, Sheeran's song was not an actual market substitute. The only interesting question is whether

[165] Case number 1:18-cv-05839, in the U.S. District Court for the Southern District of New York, 2023.
[166] On the effects of the copyright lawsuit on sales for Sheeran's song and Marvin Gaye's song, see Jason Lipshutz and Andrew Unterberger, Ed Sheeran's 'Thinking Out Loud' and Marvin Gaye's 'Let's Get It On' Both Up in Sales and Streams in Wake of Copyright Trial, Billboard (May 4, 2023) https://www.billboard.com/pro/ed-sheeran-thinking-out-loud-marvin-gaye-lets-get-it-on-trending-up/.

Sheeran's song occupied an adjacent licensing market, and here the question becomes very interesting. If Sheeran's song does occupy an adjacent licensing market, what would that market be? It would have to be identified as the broader market of pop music consumers who are not attached to the submarket that Marvin Gaye has saturated. Like Orbison writing "Pretty Woman," Marvin Gaye probably did not consider this adjacent licensing market at the time of creation of his song. However, the adjacent licensing market that Sheeran has exploited clearly exists, and was foreseeable probably at the time of Gaye's creation. Sheeran's song occupies this adjacent licensing market, and in this sense has a substitutive effect.

The district court's finding that the Sheeran song is not substantially similar to Gaye's, regarding protectable elements, and that the remaining elements were unprotected, is defended with the policy argument that if the combination of unprotectable elements were protected and not "freely available to songwriters," the goal of copyright law to promote progress in the arts and sciences would be thwarted. This is an honest admission of the policy bias behind the district court's decision. However, there is an equally defensible and opposing policy bias that not finding copying in this case depresses creativity by original authors. Future artists in the position of Marvin Gaye could find themselves in the position of a novelist who cannot license into the movie market because of the unenforceability of her copyright in a foreseeably adjacent market. The district court's decision provides encouragement to a business of identifying works within certain music submarkets (soul music, rhythm and blues, etc.), copying enough to capture the song but not so much as to clearly violate the copyright, and marketing the derivative version in the broader pop music market. There are straightforward innovation-centric and ethical reasons to prefer the bias toward licensing in this setting.[167]

[167] On the innovation-centric reasoning, it should be clear that the ability to foreseeably license into the broader pop music market would encourage the creation of more work in the style of Marvin Gaye or similar artists, to the benefit of both originators and copycats. Indeed, perhaps a change in the terms of trade, as envisioned here, would reduce the violence prevalent in hip-hop music and its likely effects. On the effects, see John McWhorter, How Hip-Hop holds Blacks Back, City Journal (Summer 2003), https://www.city-journal.org/article/how-hip-hop-holds-blacks-back. On the ethical issues, see K. J. Greene, Copyright, Culture & (and) Black Music: A Legacy of Unequal Protection, 21 Hastings Comm. & Ent. L.J. 339 (1998); Toni Lester, Blurred Lines - Where Copyright Ends and Cultural Appropriation Begins - The Case of Robin Thicke versus Bridgeport Music and the Estate of Marvin Gaye, 36 Hastings Comm. & Ent. L.J. 217 (2013); K. J. Greene, Copynorms, Black Cultural Production, and the Debate over African-American Reparations, 25 Cardozo Arts & Ent. L.J. 1179 (2008). In offering these articles on the ethics of black cultural appropriation, I am of course aware of the distinction between influence and copying. Influence has always been important in the development of art, and it would be socially harmful to attempt to thwart it. Copying, however, is different, at least under the law. *Structured Asset Sales LLC v. Sheeran* suggests that the current state of copyright law is too lenient toward cultural appropriation in the form of copying. Indeed, in one recent copyright case, *MGA Entertainment Inc. v. Clifford "T.I." Harris et al*., case number 2:20-cv-11548, in the U.S. District Court for the Central District of California, the defenses asserted, and accepted by the court, came very close to validating racially offensive arguments as defenses under copyright law. MGA had marketed dolls that copied the name, look and dress of a distinctive singing group, OMG Girlz, that the plaintiffs had produced. The court declared a mistrial early because one of the witnesses for the plaintiffs said that MGA had profited from cultural expropriation. The witness's statement justified the mistrial, to the court, because it was racially inflammatory. However, the statement also appears to be uncontrovertibly valid. So, under *MGA v. Harris*, it is a basis for a mistrial if the plaintiff makes the honest assessment in a copyright or trademark case that the defendant has attempted to profit from black cultural expropriation. MGA also argued, in its defense, that the plaintiffs, both

D. *Google v. Oracle*

Google took several lines of code from Oracle's Java software platform to create its operating system for the Android smartphone. Oracle sued on the theory that Google had violated its copyright in software code. The district court found that the lines of code at issue were not copyrightable.[168] The Federal Circuit reversed and held that Google had violated Oracle's copyright.[169] Google appealed to the Supreme Court, which held that Google's copying was protected by fair use.[170]

The Supreme Court applied the four part test from Section 107 of the copyright statute. The Court found that all four parts of the test pointed toward a finding of fair use. The nature of the use was transformative, because it involved the creation of a new technological product, the Android smartphone.[171] The use was clearly not designed to be substitutive, nor did it seem to be complementary. The nature of the copyrighted work was in large part utilitarian, and therefore holding a weak claim at best to copyright protection (see Figure 5, horizontal axis).[172] The amount of material taken from the copyrighted work was not a substantial portion of it, and the portion of the copyrighted work within Google's derivative use was minimal. Finally, the degree to which the Google product negatively impacted the market for the copyrighted work seemed trivial to the Court majority. Google's platform was not a substitute for Oracle's, and Oracle was not likely to enter the smartphone market on its own.[173] Of course, as the dissent notes, Oracle did have an interest in licensing its software to the makers of smartphones.[174] The dissent referred to evidence of a negative impact on Oracle's licensing market to derivative technologies.[175] The majority, as the dissent notes, said very little about this evidence of harm in Oracle's licensing market.[176] The absence of such discussion in the majority opinion spreads

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rappers, had used profanity in their songs, and that as a large corporation, catering to the general American public, it could not have rationally intended to associate itself with such language. MGA argued, further, that the original OMG Girlz served the preferences of such a small market (black female hip hop) that they had no rational motivation to want to copy their likeness. Finally, MGA argued that the plaintiffs were liars and extortionists simply for bringing their infringement claims. Obviously, MGA did not cross the line by openly using racial epithets in court to describe the plaintiffs, but they did manage to come very close to the line without crossing.

[168] Oracle Am., Inc. v. Google Inc., 872 F. Supp. 2d 974, 1002 (N.D. Cal. 2012).

[169] Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1363 (Fed. Cir. 2014).

[170] *Google*, 143 S. Ct. at 1209.

[171] *Id*. at 1205.

[172] *Id*. at 1198 ("[C]ourts have held that in some circumstances, say, where copyrightable material is bound up with uncopyrightable material, copyright protection is "thin"… [and] "copyright's protection may be stronger… where it serves an artistic rather than a utilitarian function.").

[173] *Id.* at 1206

[174] *Id*. at 1217 (Thomas J., dissenting).

[175] *Id*. at 1216 (Thomas J., dissenting).

[176] *Id* at 1217 ("The majority writes off this [licensing market] harm by saying that the jury could have found that Oracle might not have been able to enter the modern smartphone market successfully" … "Unable to seriously dispute that Google's actions had a disastrous effect on Oracle's potential market, the majority changes course and

some doubt on the strength of its argument. However, one plausible view of this case is that Google entered the market with a new operating system platform that it was willing to license for free (or for very little) in order to make money from advertising revenue. Based on this view, Oracle's harm in the licensing market would have occurred even if Google had not used some of the code from Oracle's software platform. The harm to Oracle, to the extent any resulted, came from Google's business model, not the copying of Oracle's code. Put another way, the causal link between Google's actions and Oracle's injury in the licensing market seems weak.

In this paper's model, *Oracle* is a case with a minor impact, at worst, in the copyrighted work's market, with a substantial social gain in a related market. The substitution impact in the original market was minimal if any, and the adverse effect in the licensing market unproven. As for the scope of the property right, this case belongs in Figure 5, dealing with nonfiction writing (and more specifically utilitarian), along the horizontal axis and near the right side of the diagram, where the property right of the original author no longer exists.[177] This is similar to a case in which a subsequent author uses the same historical figures as a previous historian, and writes a completely new and different version of the history; or, even closer, produces a movie using the same historical figures but based on an entirely different plot. Copyright should never permit the property of the original author to extend so far that it enjoins the second author in such cases.

VI. Conclusion

The different approaches to the fair use question taken by the majority and dissent in *Warhol*, with the majority focusing on the commercial nature of the Andy Warhol's use and the dissent focusing on its artistically transformative nature, seem to reflect a clash between the perspectives of business agents and artists. The majority appears to side with the business agents and the dissent with artists. One could even argue that the majority disrespects artists by seeming so unconcerned with the level of ingenuity invested by Warhol in his adaptation of Lynn Goldsmith's Prince photograph. I have suggested that this clash can be resolved most effectively by distinguishing artistic and economic transformativeness. Both types of transformation should be present to hold it a fair use. Economic transformativeness should turn not on the commercial nature of the use, but on the question whether the use serves largely as a market substitute or a market complement to the original work. However, care must be taken in defining the proper scope of the copyright as property, and the definitions of substitutes and complements in the copyright setting.

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asserts that enforcing copyright protection could harm the public by giving Oracle the power to "limi[t] the future creativity" of programs on Android.").

[177] On the reasoning for refusing to give copyright protection to utilitarian ideas, see Wendy J. Gordon, Fair Use in Oracle: Proximate Cause at the Copyright/Patent Divide, 100 Boston University Law Review 389 (2020), available at: https://scholarship.law.bu.edu/faculty_scholarship/839.