

Les certitudes du droit

Certainty and the Law

Sous la direction de
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Editor



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Copyright and Parody: Touring the Certainties of Intellectual Property and Restitution

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In addition to presenting new material, this essay adapts to the theme of "certainty" material from my prior work, including "On the Economics of Copyright, Restitution, and 'Fair Use': Systemic Versus Case-by-Case Responses to Market Failure", (1997) 8 *Journal of Law and Information Science* [Australia], at 9; *Systemische und fallbezogene Lösungsansätze für Marktversagen bei Immaterialgütern* in *Ökonomische Analyse Der rechtlichen Organisation Von Innovationen*, Beiträge zum IV. Travemünder Symposium zur Ökonomischen Analyse des Rechts, Tübingen, Verlag Mohr & Siebeck, 1994, 328-367 (Claus OTT & Hans-Bernd SCHÄFER, editors; "On Owning Information: Intellectual Property and the Restitutionary Impulse", (1992) 78 *Virginia Law Review* 149; "Of Harms and Benefits: Torts, Restitution, and Intellectual Property", (1992) 21 *Journal of Legal Studies* 449; and "Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship" (review essay), (1990) 57 *University of Chicago Law Review* 1009 [hereinafter W. J. GORDON, "Private Censorship"]. The reader is directed to these other pieces for further development of issues raised.

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One of the supposed certainties of the common law is that persons need not pay for benefits they receive except when they have agreed in advance to make payment. The rule takes many forms. One of the most familiar is the doctrine that absent a contractual obligation, a person benefited by a volunteer ordinarily need not pay for what he has received.² This rule supposedly both encourages economic efficiency and respects autonomy.

To illustrate the baseline rule: While I am out of town, my neighbor drains his swamp and in the process also dries up the mosquito haven in my backyard. I am benefited. Nevertheless, common law will probably require me neither to shoulder part of the drainage costs, nor to hand over to my neighbor any portion of the increase in land value which his actions have given me. For me to retain the benefit, and even to profit from it willfully, is not "unjust enrichment." Had my neighbor desired to have me share the costs or profit with him, he should have approached me in advance and sought my consent, by contract.

Yet if a delivery truck hits a bump so that a bag of valuable items tumbles out and onto my back yard, the owner could compel me to return the bag or pay for it. I will be liable even though I had not agreed in advance with the owner that I would pay for the items.³ This seems an exception to the basic rule that one need not pay for benefits except pursuant to contract.

2 *Restatement of Restitution*, section 2 (1937). It is sometimes said that when recovery is denied, plaintiffs tend to be called "intermeddlers," but when they win, they are more likely to be called "volunteers." Both words refer, however, to the same basic pattern: conferring benefits on someone who has not asked for them. This article uses the terms interchangeably.

3 The same puzzle recurs — but is less obvious — when I go into a store. I am not free to take whatever I want, even though I have never agreed to the store owner's entitlements over his goods. Robert Hale and other legal realists were most insistent on this point. For an application of their insights to the realm of copyright, see Wendy J. GORDON, "An Inquiry Into The Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory", (1989) 41 *Stanford Law Review* 1343 at 1422-1435 [hereinafter W. J. GORDON, "Merits of Copyright"].

The reader is probably objecting that this "exception" is no surprise — it is, rather, the familiar category of property. We all know that when we "take" others' property, whether we actively grab it or passively retain it, we usually have to either return it or pay for it. We may even be subject to further responsibilities, such as accounting to the owner for profits earned by its use. In fact, another supposed baseline rule of the common law is that to own property is to have the right to exclude "any other individual in the universe",⁴ so that any intentional taking of another's personal property, or any intentional crossing of a real property boundary, is *prima facie* actionable. Therefore, the reader may argue, there is no uncertainty — merely the coexistence of separate established categories.

Yet these two categories, property and liberty, are so familiar to us that we often overlook the extent and variability with which one limits the other. It was in part to remedy this frequent oversight that, shortly after the turn of the last century, Wesley Hohfeld developed his now-famous taxonomy of legal relations. As Hohfeld explained, "rights" and "duties" are logical correlatives, in the sense that if someone has a "right" to exclusive use of Blackacre, others must have a "duty" to stay off that land.⁵ Similarly, where someone has a "liberty" or "privilege" to act, others have (as a logical correlative) "no right" to have the government stop the action.⁶ So an expansion of property "rights" logically entails both an expansion of the "duties", and a contraction in the "liberties", of non-owners.

4 William BLACKSTONE, *Commentaries on the laws of England* (facsimile ed. 1979)(1765-69), as cited and discussed in Carol M. ROSE, "Canons of Property Talk, or, Blackstone's Anxiety", (1988) 108 *Yale L.J.* 601.

5 Wesley Newcomb HOFELD, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1917) 26 *Yale L.J.* 710, 746-747. For discussion of the intellectual and historical context in which Hohfeld wrote, see Joseph William SINGER, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld", (1982) *Wis. L. Rev.* 975. For an application of the Hohfeldian categories to copyright, see Wendy J. GORDON, "Merits of Copyright", *loc. cit.*, note 3, 1354-1378.

6 W. N. HOFELD, *loc. cit.*, note 5.

"Perhaps that's so," the reader may be conceding, "Property can limit non-owners' liberty."⁷ But that does not mean that liberty, in the sense of freedom from nonconsensual obligations, is an uncertainty. It just means that liberty principles have to be rewritten to take account of this familiar exception." For example, the principle with which this essay begins could be rewritten to say, "Persons need not pay for benefits they receive except when they have in advance agreed to pay *or* when the benefits constitute property owned by others." It could further be rewritten to take account of the nonconsensual duties imposed by the law of promissory estoppel, by tort law, by municipal law, by restitution law, and so on.

Unfortunately for the hope of certainty, the end result is a vague statement somewhat like this one: "Persons need not pay for benefits they receive except when the law says otherwise." Further complicating matters, sometimes the law says that property or "quasi-property" arises when one reaps where another has sown.⁸

The underlying goal of the instant essay is to defamiliarize the relation of property and liberty so that the reader can see it afresh. This journey is one that frequently recurs in the legal literature,⁹ but what this essay adds is a new itinerary. It leads the reader away from her accustomed tangible territory where fabled Blackacre and Whiteacre abide, into an intangible realm sometimes known as Intellectual Property. The latter, being less familiar than the realm of physical property, may be more capable of being seen free of the deadening overlay of habit.

In this realm of intangibles, we can see most vividly how, why and where the law erodes the two supposed certainties mentioned above: (1) the claim that persons need not

7 Milton Friedman and others have of course argued that property can function to *increase* liberty as well as to limit it. But that is a different topic.

8 See *International New Service v. Associated Press*, 248 U.S. 215, 239 (1918) (news items ordinarily considered in the public domain were considered "quasi-property" when taken by a competitor).

9 See, e.g., sources cited *infra*, note 11.

pay for benefits they receive except when they have agreed to pay, and (2) the claim that an intentional taking of personal property, or an intentional crossing of a property boundary, is *prima facie* actionable. Along the way, I hope to persuade the reader that standards as vague as the “fairness” in “fair use” or the “unjust” in “unjust enrichment” have both an underlying logic and a legitimate role to play.¹⁰ While my points are not novel,¹¹ the illustration, by means of Restitution and Copyright, might be. Among other things, uncertainty can have particular utility in the Intellectual Property area where the law gives monopoly power in order to provide economic incentives for creation.¹² As Professors Ayres and Klemperer argue, “the last bit of monopoly pricing provides disproportionately small profits in comparison to its social cost”,¹³ so that social benefit can be significantly enhanced by legal doctrines that deprive IP owners of the certainty needed to extract the full monopoly price.¹⁴ Ayres and Klemperer explicitly recommend tempering the reach of IP law by using open-textured standards.¹⁵

The essay that follows examines the boundary between two sets of rules. The first set arises under the law of

10 Standards such as “reasonableness” or “fairness” delegate so much power to decision-makers in individual cases that they make prediction difficult, that is, standards produce *ab ante* uncertainty. A prolific literature compares and contrasts the functions served by sharp-edged and certain *rules* with vaguer *standards*. A wonderful window into that literature is offered by two short pieces that introduce its major themes and do much to clarify them: Carol ROSE, “Crystals and Mud in Property Law”, (1988) 40 *Stan. L. Rev.* 577 and Frederick SCHAUER, “Dimensions”, (1997) 82 *Iowa L. Rev.* 911.

11 See, for example, Joan WILLIAMS, “The Rhetoric of Property”, (1998) 83 *Iowa L. Rev.* 277, 278 (seeking to “defamiliarize” property notions.) The second of the claims I investigate — the notion that property owners have a truly exclusive dominion — has been notably subject to scholarly analysis. See, e.g., Joan WILLIAMS, *supra*; Carol M. ROSE, “Canons of Property Talk, or, Blackstone’s Anxiety”, (1988) 108 *Yale L. J.* 601; Frank MICHELMAN, “Ethics, Economics, and the Law of Property”, (1982) 24 *Nomos* 3 (J. PENNOCK & J. CHAPMAN (eds)).

12 See Ian AYRES and Paul KLEMPERER, “Limiting Patentees’ Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-injunctive Remedies”, (1999) 97 *Mich. L. Rev.* 985.

13 *Id.*, at 987-988.

14 *Id.*

15 *Id.*, at 1024-1026.

Restitution, particularly the rule that volunteers ordinarily need not be rewarded. (Another way to state this same Restitution rule is to say that the retention of benefit voluntarily conferred is ordinarily not "unjust enrichment".) The second set of rules are those of Intellectual Property law, which creates property in a special kind of volunteer. My argument is simply that the law of Restitution leads almost directly to the law of Intellectual Property, though the two areas are premised on diametrically opposed baseline certainties.

For simplicity's sake, the essay primarily uses one methodology — that of economics. Of course, American and Canadian law have many dimensions. Rules and practices are most stable when they are supported by the convergence of many policies, of which economics is merely one.¹⁶ Thus the essay does address some additional policies, such as autonomy and the principle of equal respect for persons, when they are particularly apt. Nevertheless, for ease of exposition, the economic analysis will dominate. Hopefully, it will demonstrate both why the boundaries between liberty and property are fuzzy, and the nature of some of the principles that help shift the boundaries in one direction or another.

The essay then turns to examining the doctrine of property law that the intentional crossing of a property boundary is *prima facie* actionable. The essay uses three American doctrines from intellectual property, "fair use", "the idea/expression dichotomy", and "substantial similarity", to demonstrate that in appropriate circumstances, even this apparent certainty must give way.

In its final stage, the essay turns from exposition to advocacy. I hope to persuade my Canadian readers to reconsider the certainty with which Canadian law now favors an established artist's interests over those of a parodist and her audience.

16 Guido Calabresi's book TRAGIC CHOICES gives many examples that illustrate the kind of instability, or cyclic institutional and rule changes, that result when resource limitations make convergence of principles unavailable. (I am also indebted here to Randy Barnett.)

Today Canada and the United States have adopted quite opposed approaches to parody. In the U.S., the "fair use" doctrine will often shelter a parody that embodies a substantial portion of the work that it ridicules. This was demonstrated vividly in the recent U.S. Supreme Court case considering whether a rap group, "2 Live Crew" could, without permission, lawfully record and commercially distribute a parody of the Ray Orbison hit, "Oh, Pretty Woman."¹⁷ The Court remanded the copyright owner's infringement case for further consideration, in an opinion that stressed the open-ended nature of the fair use doctrine.¹⁸ In Canada, by contrast, the doctrine of "fair dealing" does not provide much shelter for parodies,¹⁹ and this hostility is underlined by Canada's generous statutory treatment of what it

17 Lyrics of the parody included lines like, "Big hairy woman you need to shave that stuff" and "Two timin' woman now I know the baby ain't mine." The lyrics of both the Orbison song and the parody appear in full at *Campbell v. Acuff Rose Music Inc.*, 510 U.S. 569 (1994) at Appendices A and B to the majority opinion.

18 *Campbell v. Acuff Rose Music Inc.*, *supra*, note 17.

19 By contrast with the open-ended fair use doctrine of the U.S., presented at note 54 below, the Canadian fair dealing provisions are narrow and specific, applying only to research or private study, news reporting, and criticism or review. Not only would the copying involved in a parody likely violate an author's ordinary rights under copyright law, but, since a parody distorts an original work, it could also violate the right of integrity. The Canadian provisions on fair dealing follow.

Copyright Act, R.S.C., (1985) ch. C-42, Section 29 (Can.) (as amended, 1997)

"EXCEPTIONS

Fair Dealing

Research or private study

29. Fair dealing for the purpose of research or private study does not infringe copyright.

Criticism or review

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

calls the artist's "moral right of integrity".²⁰ Although the Supreme Court of Canada has not addressed any case of "parody", the Canadian fair dealing statute lays out a set of crystalline rules into which it would be difficult to squeeze most parody cases.²¹

The essay elucidates an economic logic that helps to explain the uncertain, open-ended, case-by-case treatment of the United States courts. In the process, it is hoped that at least

(iv) broadcaster, in the case of a communication signal.

News reporting

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(a) the source; and

(b) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal."

20 Canada's moral rights statute is part of its copyright law, and applies to virtually any copyrighted work. *Copyright Act, supra*, note 19, s. 14.1. Relevant excerpts are set forth below at note 106. Note in particular Canada's right of integrity, which forbids alterations to a work — even a work such as a song — that prejudice an author's reputation.

21 Thus, in *Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada*, (1996) 71 C.P.R. (3d) 348; 1996 CPR LEXIS 2377 (Federal Court, Trial Division, 1996), a Canadian court imposed liability on a union for its parodic use of a Michelin logo cartoon character as part of an organizing campaign at a Michelin plant. The court declined to apply the reasoning of the U.S. Supreme Court in *Acuff-Rose* and instead applied the Canadian statute strictly, 17 C.P.R. at 380-385. The court contrasted the non-exhaustive nature of the factors listed in the U.S. Fair Use provision with the bounded and rule-like Canadian approach. The court noted:

"The exceptions to acts of copyright infringement are exhaustively listed as a closed set in sub-sections 27(2) to 27(m) and 27(3) of the [Canadian] Copyright Act. They should be restrictively interpreted as exceptions.

[...] [P]arody does not exist as a facet of 'criticism' [...] for the purposes of the *Copyright Act*." *Id.*, at 381.

Nevertheless, the court did intimate, in *dicta*, that some "critical variation" of the cartoon character might be permitted "within the context of a newspaper or journal article" about the company whose symbol it was. *Id.*, at 385.

some Canadians might be led to appreciate the merits of an approach which, under the "fair use doctrine", sometimes does allow parodies to distort copyrighted works. My argument is in part motivated by the value that transgressive and appropriative works bring to a culture.²² Nevertheless, as mentioned, in this piece I will largely confine my analytic tools to the economic.

Intellectual property law is exciting because it is where we can see new rights being created as we watch. It reminds us that much of what concerns scholars comes to life daily in the hands of judges and legislators.

I. Goals

Western culture has long recognized the tension between the law's need to speak clearly to cover broad classes of cases, and the desire to do justice in the individual case. Thus, for example, Aristotle wrote, "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by its over-simplicity, to correct the omission [...]"²³.

Such practices are often referred to as "equitable", and as presented by Aristotle (at least in this translation), they seem uncontroversial. However, it over-simplifies to speak of correcting an "omission." A judge who wants to give individualized relief will often need to do more than merely fill in an omitted blank. Rather, she may be called on to disregard a law that indeed covers the case, or she may need to utilize an

22 See Rosemary Coombe's work for valuable exploration of this theme. Rosemary J. COOMBE, *The Cultural Life of Intellectual Properties*, Durham, N.C., Duke U. Press, 1998. For an introduction to my own views on the topic, see Wendy J. GORDON and Sam POSTBRIEF, "On Commodifying Intangibles", (1998) 10 *Yale Journal of Law and the Humanities* 135-161 (review essay); Wendy J. GORDON, "Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship" (review essay), (1990) 57 *University of Chicago Law Review* 1009-1049; Wendy J. GORDON, "Reality as Artifact: From *Feist* to Fair Use", (1992) 55 *Law and Contemporary Problems* 93-107.

23 ARISTOTLE, "10 Ethics", in *The Nicomachean Ethics*, 133, D. Ross trans., revised by J.L. Ackrill & J.O. Urmson, Oxford, 1984.

equitable device (often a legal fiction such as "constructive trust") that allows her to achieve a result contrary to what the written rule would have led an observer to expect.

A judge can have good reason for such actions. A law that is always applied literally can lead to results that undermine legitimacy. Sharp-edged rules can be over-inclusive or under-inclusive, and inappropriate results can be costly in both human and economic terms.

Judge-made exceptions constitute only one route to individualized treatment. Another route is for the legislature itself to frame its dictates in terms of a broad standard, such as "fairness" or "reasonableness." Similarly, the legislature can subject hard-edged rules to an exception described by such a broad standard. When the legislature inserts broad language such as "fairness" into a statute, it is deliberately delegating some of its power to the individual tribunals that will be required to interpret the fuzzy command. Again the goal is to avoid the costs that a more certain rule can impose when its hard edges prove over-inclusive or under-inclusive.

But just as certainty can impose costs and threaten legitimacy, so can equity and the use of broad standards²⁴. For example, a regime of flexible and individualized treatment involves not only high administrative costs, but also dangers of bias, inconsistency, and insecurity. Just as excessive rigidity can undermine a legal system's legitimacy, so can excessive flexibility.

One way of potentially resolving this tension is to regularize the grants of equitable treatment themselves. Thus, the likelihood of individualized relief can become gradually

24 Excellent reviews of the literature appear in two short pieces: Carol M. ROSE, "Crystals and Mud in Property Law", (1988) 40 *Stan. L. Rev.* 577 (distinguishing hard-edged rules, which she calls "crystals", from "fuzzy, ambiguous rules of decision", which she calls "muddy", and taking an economic approach to analyzing their different functions), and Frederick SCHAUER, "Prescriptions in Three Dimensions", (1997) 82 *Iowa L. Rev.* 911 (sorting out the many strands of debate typically subsumed under the phrase "rules vs. standards.") Another valuable summary is presented in Kathleen M. SULLIVAN, "The Justices of Rules and Standards", (1992) 106 *Harv. L. Rev.* 22, 57-69.

more predictable. Another potential "resolution" is the so-called free market: If property rights are well defined, individuals can trade entitlements to suit individual needs.

In a perfect market, it is argued, all goods will flow to their highest-valued uses by the consensual behavior of the affected parties. Thus, when the Invisible Hand works properly, both certainty and individuation can coexist.

Of course, the perfect market of the Invisible Hand has virtually no counterpart in reality. In the real world, for example, transactions are costly to consummate. Third parties are affected by decisions in whose making they had no part. Further, knowledge is imperfect, extreme income inequalities abound, strategic behavior can block mutually-beneficial coordination, and some resources cannot be commodified without losing part or all of their value. So for these reasons (among many others), clear-cut property rules cannot always be relied upon. Even if one begins from neo-classical economic premises, law might appropriately favor the use of standards as well as sharply defined rules.

Although this essay touches on many topics, the central problem addressed is *parody*: how should a copyright court react when someone copies a copyrighted work and distorts it in a way that ridicules the original? As already mentioned, the approach is different in Canada and in the United States. In Canada, the copyright owner and potential parodist know the law contains a fairly certain rule which forbids parodies unless the copyright owner's consent is first obtained. In the United States, by contrast, the parties know that the situation is governed by the uncertainties of the broad "fair use" doctrine. Why shouldn't the copyright owner's right of control be consistently enforced, leaving it to author and parodist to bargain over who values the resource use more highly? That question is addressed directly in the essay's Section IV.

Before reaching that point, the paper explores a number of related matters. The remaining pages of Section I will briefly summarize the primary economic goals of copyright. Sections II and III compare "standards" with "rules" in the context of an achieving these and related economic goals, examining doctrines within the law of both Copyright and Restitution.

Section IV addresses copying that is done for the purposes of criticism and parody. The Conclusion argues that the better approach is to utilize the broad standard of "fair use".

A. Market failure and market success

The reader is probably familiar with the basic problem cited as the usual justification for intellectual property regimes: it is a form of market failure that prevents consumers from having available as many new intellectual products as they would be willing to pay for. Usually termed the "public goods" problem, it is briefly described below. What is less recognized is the fact that such market failure is only half of the prerequisite for justifying copyright: the other requisite condition is that there be *less* costly market imperfections after intellectual property is instituted than there would have been in the absence of the intellectual property regime.²⁵

B. Market failure in the absence of intellectual property

"Public goods" are defined by having two characteristics, inexhaustibility and nonexcludability. Most intangibles have these characteristics to some extent. Intangibles tend to be inexhaustible over a large range of utilization (everyone can sing or play the same song, or build the same design of engine). They also tend to be difficult for proprietors to fence off (once encountered and remembered, anyone can reproduce the song or design).²⁶ If production of a public good

25 This is explored more deeply in W. J. GORDON, "On Owning Information: Intellectual Property and the Restitutionary Impulse", *loc. cit.*, note 1, 230-238; W. J. GORDON, "Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property", (1990) 17 *U. Dayton L. Rev.* 853 [hereinafter W. J. GORDON, "Asymmetric Market Failure"] and Wendy J. GORDON, "Of Harms and Benefits: Torts, Restitution and Intellectual Property", *loc. cit.*, note 1.

26 That a good is "inexhaustible" does not mean that one person's use of it will never affect others' use. For example, at the extreme, the value of a song can become zero through saturation-level repetition, and some exhaustible physical products — such as plastic for a phonograph record or a radio set — may be necessary to afford access to the intangible. Practically speaking, then, songs may not be infinitely available to all as a valuable good.

is left entirely to the private market, lack of fencing can lead to under-production, for usually a producer needs either subsidy from government or patron, or a mode of excluding non-payers, if he or she wishes to obtain payment for what he or she has made. Without patronage or a mode of excluding free-riders, the payoff from investing in creative activities will be low, and incentives will be inadequate to induce production of as many new intangible goods as the public would be willing to pay for.

Some public goods, such as national defense, can be produced through use of a state apparatus.²⁷ This approach has the virtue of responding to both "public goods" characteristics. State production (1) can take advantage of inexhaustibility by making the benefit available to all, and (2) resolves the problem of underproduction by requiring everyone, through taxes, to pay.

Like most nations, the United States is committed to the belief that sole reliance on state-directed production or bureaucratic subsidy is not the best way to produce inventions and art. In the realm of inventions, probably the most obvious danger of state control is the bureaucratic tendency to resist innovation. In the realm of cultural products, the most obvious dangers of state control are "lack of taste,"²⁸ and the possibility of censorship. (A history of free enterprise, of course, also plays

The same partiality characterizes an intangible's nonexcludability. Thus, for example, though songs are easy to copy once heard, the initial score may be easy for the composer to keep private. Or the composer may be able to extract no-copy promises from his early, small audiences. Even after a song is popular, it may be desired in a format that favors an authorized producer's distribution networks. See note 29 and accompanying text for more discussion of this point.

27 The extent to which public provision of public goods is indeed necessary in various contexts is, of course, a matter of debate. For example, Ronald Coase has shown that although lighthouses are a classic public good (their light can be used by a virtually unlimited number of ships within range, and no ship can be practicably excluded from their light), some lighthouses have in fact been built through non-governmental arrangements. See R. H. COASE, "The Lighthouse in Economics", (1974) 17 *J. Law & Econ.* 357.

28 Or, more precisely, there is a need for taste to evolve outside the state apparatus in order for individuals to maintain some degree of genuine self-determination. See, e.g., C. Edwin BAKER, "Property and its Relation to Constitutionally Protected Liberty", (1986) 134 *U. Pa. Law Rev.* 741.

a role.) Whatever the reason, there is a consensus in the United States that a diversity of private initiatives needs to be enlisted, and that state production — despite its ability to respond to both inexhaustibility and nonexcludability — should not be the primary route to follow in regard to inventions and art. As for private subsidy through foundation and the like, support from that sector is often unavailable or sparse.

Thus, the United States opted for primary reliance on use of the private market to generate incentives for the production of inventions and art. Using a market requires curing the excludability problem. Some scholars have argued that significant modes of exclusion are available independent of the law.²⁹ For instance, even in a legal system without copyright (one might call such a system “copy liberty”), a writer and her authorized publisher could obtain payment through exploiting natural levers such as the advantage of being first in a market or having a reputation for providing authentic, distortion-free texts. But within the first years of the American republic, its Congress decided³⁰ to provide legally enforceable rights of exclusion by enacting intellectual property laws such as copyright and patent. These laws give individual creative persons the right to forbid copying³¹ of their works.

29 Scholars who are critical of copyright, or who doubt the wisdom of its expansion, typically argue that copyright may not be necessary for creators to obtain payment for their work. See, e.g., Stephen BREYER, “The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs”, (1970) 84 *Harv. L. Rev.* 281, 350; Tom PALMER, “Intellectual Property: A Non-Posnerian Law and Economics Approach”, (1989) 12 *Hamline L. Rev.* 261.

On the U.S. computer front, various forms of technological fences (including cryptography) have been recently given a legal “assist” by Congress with the adoption of the *Digital Millennium Copyright Act*. Although many technological fences are permeable to hacking, the Act makes most such technical bypass unlawful. See 17 U.S.C. Section 1201 et seq.

30 The U.S. Constitution empowers Congress to enact copyright and patent “for limited times” to further “the progress of Science and the useful arts.” U.S. Const. art. I, paragraph 8, cl. 8. Congress enacted its first copyright statute in 1790.

31 Also, American patent law prohibits even duplication of the patented invention that happens to result from completely independent efforts.

This right valuably supplements the author's physical control over her manuscript. It makes publishers and manufacturers willing to pay meaningful sums for the privilege of copying because the exclusive right provides some protection against unauthorized competition from outsiders.

Thus, intellectual property law responds primarily to the second "public goods" characteristic — difficulty of fencing — and does so by altering that characteristic by legal fiat. The law provides fences, which in turn assist the producers in capturing for their own pockets some of the benefits their efforts generate. The system relies on the premise that such enrichment will induce new investment in creative endeavor and that enough new investment will be created — investment that would not otherwise exist — that the value produced by this investment will outweigh the extra administrative and other costs of the intellectual property system.³²

32 See William M. LANDES & Richard A. POSNER, "An Economic Analysis of Copyright Law", (1989) 18 *J. Legal Stud.* 325, 326. See also Stanley J. LIEBOWITZ, "Copyright Law, Photocopying, and Price Discrimination", (1986) 8 *Res. L. & Econ.* 181 (edited by R. Zerbe).

What matters is not the absolute level of costs involved in an intellectual property system, but rather a comparison among the costs of the various potential systems. Even a system of no intellectual property rights will have significant administrative costs. Thus, assume there were a legal regime that rejected patent and copyright and recognized only individually-negotiated contracts as a limitation on the public's ability to copy. In such a context, for example, inventors may spend a good deal of money on policing the secrecy of their inventions, composers may spend a good deal of money on obtaining contractual promises-not-to-copy from people who seek entry to concerts, and the like.

Similarly, it should not be imagined that intellectual property rights are the only way that costly decreases in public access occur. A regime without intellectual property rights will afford far from unlimited access to the public. To use the prior examples: the inventor unprotected by patent may be unwilling to trade information with rival firms, and composers unprotected by copyright may be unwilling to allow radios or television to broadcast their music to general audiences.

For further analysis of the many possible alternatives to copyright law and their costs, see W. J. GORDON, "Merits of Copyright", *loc. cit.*, note 3.

C. Success of the intellectual property market

An intellectual property market cannot be "perfect," if by perfection one means a market where everyone willing to pay more than a good's marginal cost is able to purchase the good and where the producers' costs are also covered. No matter how low the marginal cost of producing an extra copy of an intangible might be — and it might be as low as zero³³ — some people who are willing to pay for a copy at that level or above will not have access to it if intellectual property law allows producers to demand payment in excess of marginal cost.

A price above marginal cost is desirable for incentives, for it is hoped that the price will cover research and development expenses and induce other potential producers to make new intangibles. Nevertheless it is clear that a right of exclusion, although the core of intellectual property law, is only a partial response to intangibles' public goods characteristics, for such law leaves the public unable to take full advantage of the inexhaustibility of intangibles. Instead, the failed promise of inexhaustibility merely exaggerates the deadweight loss that is a cost for all monopolies.

Thus, in addition to providing a right of exclusion, a successful intellectual property system should also be tailored to take as much advantage of inexhaustibility as possible. If something can be copied at no cost, there must be some instances in which allowing free copying will be Pareto-superior.³⁴ As will appear, the American legal system makes

33 The marginal cost of producing an extra unit of an intangible may be zero, because of inexhaustibility, or it may be some positive sum corresponding to the cost of the intangible's physical embodiment (such as the cost of the plastic that goes into a phonograph record).

34 It might be argued that in cases of true Pareto-superiority, the law would not need to provide a safe-harbor for free copying: if the owners of the patents and copyrights were truly unharmed by the copying (as the notion of Pareto-superiority assumes), they would allow the copying to proceed without hindrance.

However, humans are both envious and insecure. The copyright owner might refuse permission not because he is suffering tangible harm, but because he is irritated that other people are getting a free ride or because he has irrational fears about future harm. A society may well choose to consider itself entitled to disregard envy and insecurity as legally relevant harms.

some effort to recapture the lost promise of inexhaustability. Some of these efforts take the form of "certain" and hard-edged rules, such as the statutory provisions that place copyrights in the public domain after a specified number of years,³⁵ and some take the form of "uncertain" or "fuzzy" doctrines such as fair use.³⁶

II. Comparing "clear rules" with the uncertainty of case-by-case responses

For an intellectual property regime to have even a chance of producing more allocative gain than a "copy-liberty" regime, the intellectual property regime must produce resource packages that are tradable.³⁷ It must also minimize its deadweight costs and other imperfections. In the following, the article will explore some of the devices that American copyright

In addition, attention has to be paid to defining "harm". Some cases are easy. For example, assume that the copyist or adaptor is taking customers who would otherwise buy or license from the author, customers who constitute part of the very market at which the author was aiming when she set out to create the work. It would be fairly uncontroversial to call such copying or adaptation "harmful". Conversely, if the copyist or adaptor of the copyrighted work is serving a market which the original author is incapable of reaching, either directly or by licensing, then the author is not "harmed" by being denied a right over this market. See W. J. GORDON, "Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors," (1982) 82 *Columbia L. Rev.* 1600 (arguing that in cases of complete market failure, where administrative costs or other problems would prevent a copyright owner from being able to serve a given group of customers, it is likely to be appropriate to allow "fair use" to those customers when they copy without permission.)

Between these extremes many debatable cases exist for which there will be no obvious answer to the question of what constitutes "harm". In such cases the law would have to normatively decide what kind of baseline entitlement should be secured to the author. Erosion of a relevant baseline constitutes harm.

35 After a set number of years, all works of authorship go into the public domain. 17 U.S.C. section 302-305 (duration of copyrights). Duration is discussed *infra*, at text accompanying note 90 and following.

36 The doctrine of "fair use" is discussed further at *infra*, section IV.

37 Cf. Clifford HOLDERNESS, "A Legal Foundation for Exchange", (1985) 14 *J. Legal Stud.* 321.

law employs to bring "success" to the intellectual property market — which means keeping its imperfections to a minimum.

Some of these devices are system-wide responses. Adjudication under sharply defined rules is sometimes accomplished by using a "formal" approach, often associated with the notion of "property owner as sovereign." The strict liability aspects of copyright have this character, as will be noted below. Copyright law also has another kind of response: employment of open-textured standards which require case-by-case substantive inquiry. Under the latter kind of devices, a court typically makes a substantive judgment as to the desirability of commodifying the resource or behavior at issue, and decides whether (if the resource is ordinarily suitable for buying and selling) its use must be paid for by the particular defendant in the particular context.

A. Definitions: formal property rules as compared with substantive reasonableness standards

In American common law, violation of most property or personal rights will be termed a "tort."³⁸ Yet torts themselves tend to fall into two broad categories: intentional torts like battery or trespass, which are ordinarily actionable without proof that the defendant's specific behavior was socially undesirable, and unintentional torts, which are ordinarily actionable only if the plaintiff shows that the defendant's behavior was negligent or otherwise unreasonable. As a matter

38 The other two types of rights that can be sued upon in American civil (non-criminal) courts are those arising out of contract law and restitution.

"Restitution" is concerned with benefits rather than harms. See W. J. GORDON, "Of Harms and Benefits", *loc. cit.*, note 1. See also Saul LEVMORE, "Explaining Restitution", (1985) 71 *Va. L. Rev.* 65. Like negligence law, restitution involves a case-by-case mode of adjudication.

In restitution a person brings suit on the ground that the defendant has been unjustly enriched and that this enrichment came either at the plaintiff's expense or by violating some right of his. There is an obvious need for case-by-case adjudication in order to decide what enrichments are "unjust." Restitution also functions as a remedy following on the violation of other rights (*e.g.*, restitution may require a trespasser to return the profit he made by trespassing on a plaintiff's land). Restitution is discussed further in this article at Section II, C, beginning at page 86 below.

of categorization, the first type of tort can be viewed as following a "property" or "formal" model and the second as following a "nonformal tort," "reasonableness" or "substantive" model.³⁹

In the "property" or "formal" model, the courts defer to the property owner as if she were a mini-sovereign, making no inquiry into whether the owner's decision to exclude a defendant was proper or improper, or whether the defendant's use of the owner's resource was harmful or productive. A classic example under American law is trespass to land. Someone who enters land reasonably but mistakenly thinking he has the right to do so will be liable as a trespasser, as will someone who entered the land out of a pressing (but not life-saving) need for a shortcut.⁴⁰ Following out the analogy to sovereignty, the primary relevant question in these cases is essentially jurisdictional:⁴¹ inquiring into whether the defendant crossed a boundary over which the owner possessed an

39 I am indebted here to the work of William Powers. Comparing trespass with negligence, for example, Professor Powers notes:

"Ownership embodies a formal methodology, since [...] questions concerning appropriate use are answered wholly by asking whether a proposed use has been sanctioned by the owner. A decision by the landowner [...] concludes legal debate under the ownership model. On the other hand, a duty of reasonable use embodies a nonformal methodology because it makes direct, ad hoc reference to efficiency [or other measures of social desirability]. Under this model, a decision concerning the landowner [...] would depend on a comparison of relative costs and benefits in the specific case."

William C. POWERS, Jr., "A Methodological Perspective on the Duty to Act" (review essay), (1979) 57 *Texas L. Rev.* 523, 526-527.

40 Admittedly, even in intentional torts American courts may take cognizance of excuses (such as incapacity) and justifications (such as necessity or self-defense). This does not undermine the distinction between intentional and unintentional torts, however. Not only is the burden of proving such intentional-tort defenses typically on the defendant, but these defenses also permit a court far less latitude than does the broad balancing of costs and benefits which a court engages in under a reasonableness inquiry. Thus, a person taking a shortcut through another's land can take advantage of the necessity defense only if an imminent danger made the shortcut imperative.

41 See W. C. POWERS Jr., *loc. cit.*, note 39.

exclusive right and did so without obtaining the owner's consent. If so, the defendant has broken the relevant rule and is liable.

By contrast, in the "nonformal tort" or "reasonableness" model, a court does not assume as a *prima facie* matter that deference is owed to the decisions of the property owner. Instead, the court makes its own substantive inquiry into the desirability of the defendant's boundary-crossing. Further, the burden of proof will likely be placed on the plaintiff to satisfy the court that the defendant's behavior was wrongful, and typically wrongfulness will be defined by reference to an open-textured standard. A classic example in the United States is negligence law: in unintentional auto accidents, unless a defendant is found to have lacked "due care," she will not be required to pay for the damage she caused.

American copyright law follows an uneasy middle course between the more certain "formal" model and the less certain "reasonableness" model. On the one hand, virtually any unauthorized substantial copying of a protected subject matter is subject to a *prima facie* prohibition. For example, even "unconscious copying" gives rise to liability. Similarly, if a clever plagiarist convinces a magazine publisher that a short story is original, the publisher's good-faith belief that she had the real author's permission to print will not help the publisher avoid liability in a copyright infringement suit. This partakes of a formal or "property" approach.

On the other hand, the fact-finder (usually the jury) has both latitude and significant normative responsibility in deciding how much similarity amounts to "substantiality." Although the quantity copied will be important in the determination of substantiality, the inquiry remains remarkably open.⁴² In any case that involves other than exact

42 There are many verbal formulations as to the meaning of "substantial similarity," also known as "illicit copying," but none does very much to define the jury's task. Consider, for example, a classic case regarding music infringement, *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *cert. denied* 330 U.S. 851 (1947). First, the court valuably noted that, "Assuming that adequate proof is made of copying, that is not enough; for there can be 'permissible copying,' copying which is not illicit." *Id.* at 472. But then it floundered when it had to distinguish rightful from illicit copying:

copying, a defendant will probably try to argue that his work is not “substantially similar” to plaintiff’s copyrighted work.

In addition, both American and Canadian copyright law permit anyone to copy the “idea” from a copyrighted work, so long as the copyist does not also borrow the work’s “expression.”⁴³ Since no firm definition of what constitutes an “idea” has ever evolved, the idea/expression dichotomy is fully dependent on a judge’s characterization of what constitutes an “idea”. By characterizing something as an “idea”, a judge is essentially ruling that it is something that cannot be commodified for purposes of private ownership, but rather should be commonly shared. No certain rule has yet been developed capable of exhaustively defining what kinds of human mental product should or should not be commodified. I suggest no such “rule” is even possible.

Most of the literature on commodification admits the difficulty of the questions raised.⁴⁴ Thus, consider SPHERES OF JUSTICE, where Michael Walzer makes a convincing case (if one were needed) that monetary criteria should not rule all spheres. Some goods — such as political office, artistic prestige, basic human dignity — should not be made into commodities for purchase and sale.⁴⁵ But Walzer is less clear about what

“The proper criterion on that issue [...] is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that the defendant wrongfully appropriated something which belongs to the plaintiff.”

Id. at 473.

Aside from the reference to the lay (non-expert) audience, this formulation offers no more than vague references to quantity (“so much”), to market value, and to a conclusory notion of wrongfulness.

43 In American copyright law, this principle appears explicitly in the statute, 17 U.S.C. Section 102. Canadian doctrine is so similar that an overview of Canadian law makes reference to the U.S. statute to explain the principle. Lesley Ellen HARRIS, *Canadian Copyright Law*, 2nd ed., Ontario, 1995, at 16.

44 See, e.g., Margaret Jane RADIN, *Contested Commodities*, Cambridge, Harvard U. Press, 1996 (particularly her discussion of the “double bind.”).

45 Cf. Michael WALZER, *Spheres of justice: a defense of pluralism and equality*, New York, Basic Books (arguing that money should not to dominate

institutions should mediate society's difficult choices over what behaviors and resources should be placed in the market sphere, and what behaviors and resources should be governed by non-market criteria.

One institutional possibility is for the legislature to set out particular rules, and then for that same legislature to change the rules as circumstances change, or as particular norms come under pressure. This has occurred. Thus, United States rules on conscription have changed and changed again, including at several points a rule of commodification: under the nation's first conscription law, a draftee could lawfully "hire a substitute in his place."⁴⁶ Under a succeeding statute, Congress "set a flat fee of \$ 300 for exemption from induction."⁴⁷ Later, of course, such monetary exemptions became anathema, and successive rule changes gave other criteria (consider, *e.g.*, educational deferments from the draft) their chance at being a governing norm.

But such rule changes take time to implement. Arguably, the technology that drives modern copyright markets changes too fast — and arguably, the norms concerned are so subtle and the dynamics of power politics too insensitive to the public interest⁴⁸ — to rely on legislative rule-making and rule-changing as an optimal route for defining the boundaries between the market and non-market alternatives.

A perhaps preferable institutional possibility is for the legislature to adopt vague standards. As has been often noted, vagueness delegates to other decision-makers (largely judges) the power to fill in the details. Congress chose this route when it

all spheres of life, and that some way must be found to distinguish the monetary sphere from spheres where other values should predominate.)

46 Guido CALABRESI and Philip BOBBITT, *Tragic Choices*, New York, W.W. Norton & Co., 1978, at 159.

47 *Id.*, at 160.

48 Jessica Litman's studies of the legislative process in the recent U.S. Copyright arena suggest that it has served private interests much more consistently than it has the public interest. See, *e.g.*, Jessica D. LITMAN, "Copyright Legislation and Technological change", (1989) 68 *Or. L. Rev.* 275; Jessica D. LITMAN, "Copyright, Compromise, and Legislative History", (1987) 72 *Cornell L. Rev.* 857. This is likely to lead to over-commodification.

declared that "ideas" cannot be owned in copyright law.⁴⁹ without ever defining what constitutes an "idea". As a result, shifting norms and facts have fed into judges' conceptions of what should be declared an "idea" and thus placed outside the bounds of copyright ownership.

An example of judges' shifting instincts on this issue can be seen in their treatment of whether "compatibility standards" in the computer field can be protected by copyright. At one point, a defendant was ridiculed for claiming that he should be entitled to copy whatever was essential to the "idea" of producing a computer capable of running standard Apple programs. That was not an "idea", said the Court.⁵⁰ More recently, a court to the contrary indicated that a defendant is free to copy "elements that might have been dictated by external factors,"⁵¹ including elements needed to achieve compatibility with "other programs with which [the defendant's program] was designed to interact." Such elements were not ownable expression. Presumably the courts were influenced by shifts in the computer industry, and a growing recognition of the social benefit to be gained from fostering network externalities.⁵²

49 17 U.S.C. Section 102(b).

50 The court wrote: "Franklin may wish to achieve total compatibility with independently developed application programs written for the Apple II, but that is a commercial and competitive objective which does not enter into the somewhat metaphysical issue of whether particular ideas and expressions have merged." *Apple Computer Inc. v. Franklin Computer Corp.*, 714 F. 2d 1240 (3rd Cir. 1983), cert dismissed, 464 U.S. 1033 (1984). The Apple II operating system was a competitor of the now-dominant DOS system.

51 *Computer Associates International Inc. v. Altai Inc.*, 982 F.2d 693 (1992). Note, however, that this was not explicitly a holding on what was or was not an "idea".

52 Basically, if a network grows more valuable to each member when additional members join, then each new member is said to confer an "external benefit" on the existing membership. There is a growing literature applying network externality analysis to the computer field.

For example, if I use a WINDOWS operating system, I will be better off if many other people also use the same system. The more people who use WINDOWS, the more application programs will be written for WINDOWS and thus for me; also, the more people who use WINDOWS, the more easily I can communicate with other computer users. Each additional person who buys and installs a WINDOWS operating system thus confers a benefit on me.

Even in cases where a defendant has committed "substantial" copying of "expression", he remains able to call upon another important but "muddy"⁵³ standard in American copyright law: the doctrine of "fair use". A defendant will have no liability for making a copy which is "fair" in her particular circumstances.⁵⁴ The fair use defense essentially draws the court into deciding the social desirability of the defendant's copying.

Although the fair use doctrine appears in the Copyright Act, that statute declines to set out any definite strictures.⁵⁵

53 The imagery of "mud" for standards and "crystal" for rules originates in C. M. ROSE, *loc. cit.*, note 10.

54 See 17 U.S.C. Section 107. As originally enacted, section 107 provided as follows:

"107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106 [which set out a copyright owner's exclusive rights of reproduction, adaptation, public performance, and the like], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work."

17 U.S.C. Section 107 (1976). The section was recently amended to make clear that the unpublished status of a work should not be determinative.

For my further examinations of the doctrine, see, e.g., W. J. GORDON, "Fair Use as Market Failure", *loc. cit.*, note 34, (using an economic model to unify fair use cases and give some precision to the notoriously open-ended doctrine). See also Wendy J. GORDON, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property", (1993) 102 *Yale L.J.* 1533 [hereinafter W. J. GORDON, "Property Right in Self-Expression"]; W. J. GORDON, "Reality as Artifact: From *Feist* to Fair Use", *loc. cit.*, note 22.

55 The legislative history of section 107 indicates that, despite the statutory recognition accorded fair use, the nature of the doctrine remains to be defined

Formal line-drawing is rejected. As the legislative history recounts, "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."⁵⁶ At one point it seemed that the Supreme Court was willing to bring a bit more certainty to the doctrine, for one majority opinion seemed to declare that any commercial use is presumptively unfair, or at least that one of the fair use factors would be presumptively resolved against the defendant.⁵⁷ More recently, however, in the context of a commercial parody, the Supreme Court reinterpreted its prior statement and wrote that "no such evidentiary presumption is available."⁵⁸ Similarly, when a Supreme Court opinion⁵⁹ was applied as if it had adopted a rule making fair use unavailable for unpublished works, the Congress responded by amending the fair use statute to specify that the unpublished nature of a plaintiff's work was only one factor among many.⁶⁰ Thus, both the Court and Congress have shown a deliberate preference for an equitable standard over specific rules.

by case law: "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the statute [...] "*H.R. Rep. No. 94-1476*, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. at 5680 [hereinafter House Report]. See also *S. Rep. No. 94-473*, 1st Sess. 62 (1975) [Senate Report]. The courts have recognized their freedom to continue the development of fair use doctrine. See, e.g., *Triangle Publications Inc. v. Knight-Ridder Newspapers Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980) ("Congress made clear that it in no way intended to depart from Court-created principles or to short-circuit further judicial development [...]").

- 56 House Report at 65, reprinted in 1976 U.S.C.C.A.N. 5659, 5679.
- 57 *Sony*, 464 U.S. at 451. The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work," sec 107(4). In regard to that factor, the Court indicated that a likelihood of future harm to a plaintiff could be presumed from the commerciality of a defendant's use. *Id.*
- 58 *Campbell v. Acuff Rose Music Inc.*, *supra*, note 17, at the last page of the opinion. The Court at one stage of the *Campbell* opinion distinguished *Sony* on the ground that *Sony* involved "mere duplication for commercial purposes" while *Campbell* involved a transformative use, namely a parody. But the overall tenor of the opinion went beyond that distinction to reject the notion of certain and sharp rules in fair use.
- 59 *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).
- 60 17 U.S.C. Section 107, last sentence.

B. Copyright's unusual mid-range status

At first blush, it is surprising to find American copyright law placing at the virtual center of a plaintiff's case the distinctively nonformal principles of "substantiality" and "fairness." After all, copyright is a form of property, and copyists always act volitionally and deliberately. (For example, they know they are publicly performing, or using the photocopy machine, or playing music on their guitar, even if they don't know that they are copying someone else while doing so.) It seems most logical that such a volitional trespass should be treated under a formal rule, as are other non-accidental violations of property rights. The mere act of nonconsensual copying is arguably like the mere act of stepping onto someone else's land without permission, and arguably should give rise to similar liability. So why is this not the case?

Economics does not yield an immediate answer. The classic article by Calabresi and Melamed⁶¹ tells us that intentional takings of property are *prima facie* wrongful because people should not depart from the market without a strong justification. Their article tells us that accident law uses a "reasonableness" inquiry because, in accidents, such a justification is present: the participants cannot bargain with each other in advance. Before a driver chooses to drive down a particular street at 35 miles per hour, neither she *nor* the pedestrian with whom she may accidentally collide on that street, has any reason to know that they need to deal with each other. In the presence of such complete market failure, we are told, the court "mimics the market" through a negligence inquiry, trying to determine whether the parties behaved efficiently and imposing liability accordingly.

But in copyright the "substantiality" inquiry and the "fair use" doctrine are both available regardless of whether the copyright owner and the copyist have complete knowledge of each other's identity and are otherwise able to bargain. Thus, in the most recent "fair use" case to reach the United States Supreme Court, the parties had the requisite knowledge and

61 See Guido CALABRESI & A. Douglas MELAMED, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", (1975) 85 *Harv. L. Rev.* 1089.

transaction costs were minimal. Defendant, the rap group "2 Live Crew," had in fact offered the copyright owners compensation in exchange for permission to make a parody of their song, "Oh, Pretty Woman." The copyright owners simply refused to give the rap group permission.

This hardly looks like market failure — the two parties were virtually face to face. Yet the Supreme Court indicated that fair use might nevertheless be available to shield the makers of the parody from liability.⁶² How, then, can such a doctrine be squared, either with usual American patterns of tort and property law, or with economic notions of market failure?

The answer lies in the imperfection of intellectual property as a response to the "public goods" problem. At least in the absence of perfect price discrimination,⁶³ obtaining adequate incentives for production will necessarily involve a price that is set above marginal cost, and thus a quantity produced that is below the quantity that would be produced by a competitive market. Market imperfection is present in even the most pristine copyright transaction. The issue is how legal institutions cure the imperfections caused by excludability without losing the benefits excludability brings.

Or, one can put the same matter in non-economic normative terms. Copying is not necessarily wrongful. It is how

62 See *Campbell v. Acuff Rose Music Inc.*, *supra*, note 17. The case was remanded for further proceedings in light of the Supreme Court opinion that, *inter alia*, made clear the copyright owner's refusing to license should not weigh against a fair use finding. See *id.* (parodists are unlikely to be able to obtain consents). See also *id.* at 585 n.18 ("we reject Acuff Rose's argument that 2 Live Crew's request for permission to use the original should be weighed against a fair use finding.").

63 See Harold DEMSETZ, "The Private Production of Public Goods", (1970) 13 *J.L. & Econ.* 293. Copyright itself can be seen as enabling a form of price discrimination. See Wendy J. GORDON, "Intellectual Property as Price Discrimination: Implications for Contract," (1998) 73 *Chicago-Kent Law Review* 1367; also see Michael J. MEURER, "Price Discrimination, Personal Use and Privacy: Copyright Protection of Digital Works," (1997) 45 *Buff. L. Rev.* 845.

we learn,⁶⁴ it can be both harmless and beneficial,⁶⁵ and it is the essence of having a common culture.⁶⁶ Therefore it would be absurd to make all copiers *prima facie* liable as infringers.

The trick is to find some means to distinguish wrongful from fair copying. Some of those means are case-by-case, like "substantial similarity" and "fair use." Some are system-wide rules, like the provisions limiting the duration of copyrights and patents.

But the use of vague standards is probably what stands most in need of explanation. The employment of these standards is, in my view, largely due to the lost promise of inexhaustibility, coupled with the speed of technological change that characterizes the copyright industries in the last century. Since copying of an intangible is often harmless, a "fair use" and "substantial similarity" standard permit socially useful experimentation. And since such experimentation may be blocked by transaction costs, and these costs can change quickly, "fair use" allows the courts to adapt.⁶⁷

64 See Benjamin KAPLAN, *An Unhurried View of Copyright* (1967).

65 If copying is harmless, allowing copying produces a Pareto-superior result: no one is hurt and the copyist and her customers gain.

66 See W. J. GORDON, "On Owning Information: Intellectual Property and the Restitutionary Impulse", *loc. cit.*, note 1; W. J. GORDON, "Property Right in Self-Expression", *loc. cit.*, note 54.

67 W. J. GORDON, *loc. cit.*, note 34 at 1656-1657; also see *American Geophysical Union v. Texaco Inc.*, 60 F 3d 913 (2d Cir 1995), cert. denied 516 S Ct 1005 (1995) (photocopying held not fair use because, *inter alia*, licensing through the Copyright Clearance Center would have been feasible).

Note, moreover, that transaction cost barriers between copier and copyright owner are only one of many forms of market failure relevant to fair use. For example, uses such as criticism generate positive externalities, and this is one reason why a critic's extensive use of quotation is potentially entitled to fair use treatment, "Fair Use as Market Failure," at 1630-1631. Further, "fair use" is also used to address uses that should not be owned (or commodified) at all, *id.* at 1631-1632, such as uses that implicate non-monetizable free speech concerns.

The importance of providing a safe harbor for critics may be obvious and stable enough to be recognized in a rule, as the Canadian "fair dealing" statute has done. But it is not so easy to reduce to a rule the many ways in which the "fair use" doctrine can be used to investigate issues such as non-monetizability of the interests at stake in a particular case. When the question before the court is the normative inapplicability of the whole market

All that being said, however, it is still true that Copyright law places on the public a duty to refrain from certain uses of others' labor, while Restitution takes the opposite starting point. It will be useful to employ basic economics to understand why Copyright law begins with a presumption of liability (subject to an equitably-expressed exception for "fair" uses) while Restitution begins with a presumption of no liability (subject to an equitably-expressed exception for "unjust" enrichment).

C. Comparing Copyright and Restitution

Restitution doctrine provides that persons whose labor makes others better off will ordinarily have no legal recourse if they labor without advance agreement. Yet intellectual product producers can sue to obtain payment for the "fruits of their labor" from copyists who never agreed to pay. This has led some observers to view some forms of intellectual property as unjustifiable.⁶⁸ Since Restitution law contains no presumption that there should be recovery for benefits generated, it forms a useful contrast with copyright.⁶⁹

First, consider a homely example to illustrate the different treatment a laborer without a contract will receive under the two areas of law. First, imagine someone paints the roof of a building while its owner is away. After the owner

apparatus, a flexible standard is (I argue) the best way to proceed, at least until a societal consensus has formed.

Note that the issues embraced by "fair use" cases can include issues of commodification. This essay broached those issues earlier, in relation to the statutory declaration that "ideas" cannot be owned under United States copyright law. 17 U.S.C. Section 102(b). In the middle of the century, the overlap between "fair use" and the non-ownership of "ideas" was visible in the language courts used, for a defendant who used a copyright owner's "ideas" was said to be engaged in a "fair use".

68 Thus Murray Rothbard argues that intellectual property is legitimate only to the extent that it can be analogized to consent. See Murray N. ROTHBARD, *Man, Economy and State. A Treatise on Economic Principles*, Auburn, Ludwig von Mises Institute, 2nd ed., 1993, 652-660 (1962).

69 Under American copyright law, the work's creator has a right to exclusively control the rights of reproduction, copying, adaptation, performance and the like, see 17 U.S.C. Section 106. She can extract monies and obtain injunctions when someone does these things without permission.

returns the painter presents himself at the door and says, "pay me for this wonderful benefit I have given you," pointing at the new paint job which (we will assume) has increased the value of the building. In such a situation, the building owner is entitled to say something quite rude. Next, in contrast, imagine that the home owner, using her own sweat and paint, does a mural on one of her building's exterior walls, copying onto it a painting which has a valid copyright. Perhaps the mural increases the value of the building more than a new coat of pure white paint would have; perhaps the mural is an eyesore. In either event, if the owner of the copyright comes to the door and says, "Pay me or I'm going to sue you for a very large amount of money," the building owner had better be very polite.

In neither situation has the building owner agreed in advance to pay for use of the other's resource. Yet the photographer's labor embedded in a visual pattern must be paid for, and the painter's labor embedded in new roof pigment need not be.

Do not jump too quickly to say that one of the pigments embodies property while the other merely embodies labor. Pretend for a moment there is no property in pictures, and that we have to return to basic common-law techniques to determine whether or not the author of the copied picture *should* be paid.

To prevail in Restitution, persons whose voluntary actions provide benefits to others must ordinarily show one of a few very narrow justifications for departing from the market: mistake,⁷⁰ coercion,⁷¹ request,⁷² or a narrow range of exigent situations, such as danger to life and health.⁷³ Even then, their ability to recover will often be further restricted by the courts' desire to be sure that the defendant really was benefited and that forcing him to pay or disgorge will not leave him worse off than he would have been in the status quo ante.⁷⁴ Similarly, the

70 *Restatement of Restitution*, *supra*, note 2, Sections 6-69.

71 *Id.*, Sections 70-106.

72 *Id.*, Sections 107-111.

73 *Id.*, Section 112.

74 See, e.g., *id.* Section 40, cmt. b, at 109.

Restatement of Restitution is not hospitable to persons who generate benefits as a by-product of self-serving activity. Thus, the Restatement states that: "A person who, incidentally to the performance of his own duty or to the protection or improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution."⁷⁵ For example, a mine owner whose drainage efforts clear both her mine and her neighbor's mine of waters is not entitled to contribution from the neighbor.⁷⁶

A person who writes a book and publishes it is certainly operating in the furtherance of his or her own interests. Except as to someone who has bargained with the author for production of the work (such as a patron, granting agency, employer, or contract-publisher), the author is a sort of volunteer. She is voluntarily taking the risk that putting her product on the market will bring her a profit. When a book is mass-marketed, many strangers will come across it. If a stranger makes copies of the book for sale, copyright law will give the author a right of action against the copyist even if the author "volunteered" to send the work into the stream of commerce. Since that right of action will be available whether or not the copyist had a contract with the author promising to refrain from copying, and whether or not the copyist's actions harm the author,⁷⁷ it is clear that, under copyright law, a unilateral transfer of "benefits" will trigger liability.

There are many reasons for the difference between the two fields' basic rules; one difference obviously lies in the active or passive role of the person using the benefit. That is not simply an issue of autonomy. Activity or passivity also has

75 *Id.*, *supra*, note 43, Section 106. There are situations in which protecting one's own interests does not bar restitution, but these tend to be associated with coercion, as where a property owner discharges another's duty when that is the only way to prevent a third party from lawfully taking the property. *Id.*, Section 103.

76 *Id.*, Section 106, illus. 2. The result in this situation may vary if the neighbor can be said to have "freely accepted" the benefit. See Peter BIRKS, *Introduction to the Law of Restitution*.

77 Sometimes the absence of harm may make it easier to obtain fair use treatment, however. See the fourth factor in 17 U.S.C. section 107, set out at footnote 54.

implications for market formation. To see this, consider what results would follow if a legally enforced right to payment were given to the claimants in the two situations.

In the Restitution context, the active parties are the benefactors, the volunteers. Systematically allowing volunteers to sue for the benefits they have given would reduce their desire to make contracts with those who might want their services. Admittedly, the people who are the best at painting houses would have no desire to sneak around and do it behind the backs of their customers. However, the people who make messy jobs of it would probably start to paint and then ask for money after the fact — and could do so in disregard of whether the building owner preferred a different supplier, thus ruining the market even for those who would otherwise be willing to make contracts. In the volunteer context, then, a rule that encourages contract formation — and thus market formation — is a rule that denies to the benefit-generator (the potential volunteer) any right of recompense independent of contract.⁷⁸ If a volunteer thinks the law will not give restitution, then she will seek to make a bargain by asking the potential recipients for contributions before the project begins.⁷⁹

78 Even when there is a market failure in the restitution context, so that the potential benefactor and the potential recipient are unable to identify or negotiate with each other, there are only very few circumstances in which payment is ordered through the courts — mistake, request, coercion and a narrow range of emergencies justify recovery. This narrowness of recovery in the restitution context reflects the fact that if we give the benefit-generator a right to legally enforce recompense, it would tend to erode markets. See LEVMORE, *loc. cit.*, note 38.

79 Many examples exist of “internalizing benefits” by contract. Thus, in many shopping malls, where small stores are likely to benefit from the propinquity of large department stores that draw masses of customers, the small stores may be willing to pay extra rent to subsidize the larger stores’ entry. Something like this also happens in oil exploration: neighboring lessees will learn a great deal about whether or not it is worthwhile to drill under their own land from the results of their neighbor’s drilling. So “dry hole contribution agreements” have come into being: contracts by which the neighbor who stands to benefit from the information agrees to pay a share of his neighbor’s drilling costs should the hole come up dry.

Similarly, assume that landowners are likely to benefit from a venture like a resort complex locating nearby, but the resort is so expensive to build that it cannot afford many externalized benefits — e.g., it will come to the area only if it is subsidized by the existing landowners or can itself capture most of the benefits generated. Even in such a case there may be no need to allow the

In the intellectual property context, the likely impact of a right to recover is quite the opposite.⁸⁰ This occurs largely because the identity of the active party — and thus the party who has superior access to information, who is otherwise better able to enter transactions, and who is better situated to respond to the law's messages — is different there.

In the volunteer context, the recipient may be ignorant until the deed is done. It is the benefactor — like the house painter — who has the greater access to information; he knows where and when he will act. In restitution, the rule of law that speaks to this active party and encourages him to seek out consensual market arrangements is therefore a rule of “no monetary recovery without contract.” In the intellectual property situation, by contrast, the recipient-copyist is the active party: he can better initiate the transaction. After all, the copyist knows what he is copying, whereas the plaintiff-owner may be hundreds of miles away and have no idea copying is being contemplated. The copyist will also find it fairly easy to identify the author or copyright owner from the by-line, while the copyright owner has no such source of information.

Even if the author can identify the potential copyists, she faces strong strategic behavior problems in making them pay.⁸¹

resort complex to sue the benefited owners, after the fact, in restitution. The developers can try to persuade these neighbors, in advance, to pay them something to encourage them to build nearby. Admittedly, there could be hold-out problems and other strategic maneuvering making this difficult. So the active party has another option: the owner of an attraction could quietly buy the land on which the beneficial spillovers will fall. This is apparently what the Disney organization did with Epcot and Disney World: it bought up surrounding land and built on it enough hotels and restaurants to capture much of the benefit their tourist attraction generates. Where this is possible, benefits are again internalized without the need for restitution suits.

80 This is explored at greater length in W. J. GORDON, “Of Harms and Benefits: Torts, Restitution, and Intellectual Property”, *loc. cit.*, note 1, and in W. J. GORDON, “On Owning Information: Intellectual Property and the Restitutionary Impulse”, *loc. cit.*, note 1.

81 In a world without intellectual property rights, an author may want to bargain with her audience for payment, but the audience is likely to be a wide and uncertain one, and the benefits are those that will flow from an as yet undisclosed intellectual product. Even if the author could somehow identify all the potential recipients, it would be expensive and awkward to reach simultaneously all of the persons who will eventually want access to the work.

A baseline rule that denied copyright — that gave a benefit-generator no recovery unless he had a prior contract with the copyist — would leave the party with the best ability to contract (the copyist) with little motive to do so. He would probably prefer to free ride. Therefore, the law has to give the benefit-generators (the copyright owners) a right of recovery independent of contract.

Both restitution and intellectual property law give the party who has the information and ability to internalize the incentive to do so. The party simply happens to be different in restitution than in intellectual property. In each case, legal rights are arranged to facilitate the consensual transfers of resources.

Even if this were possible, what would happen when the creator tried to negotiate for a payment from them all in exchange for disclosing the work? Many of those audience members might be tempted to hold back in the hope that others' monies would be sufficient to draw the work into the marketplace where they could then make a cheap copy. The larger the group of potential purchasers, the better the odds on the gamble may seem. Also, the work's contents are largely unknown at this stage; the less certain the benefits, the less seems to be risked if the gamble does not pay off. Good odds in favor of winning, and low perceived cost in the event of a loss, make the gamble very tempting. If enough people take this gamble in the hope of taking a free ride, the requisite funds may not be forthcoming. "Chicken," "prisoner's dilemma," and other free rider games illustrate analogous dynamics.

The presence of a publisher does not much alter the desirability of granting intellectual property rights to resolve potential bargaining stalemates. Admittedly, in a world without intellectual property rights the author may find it easier to deal with a publisher than with an undifferentiated audience (only one party; low transaction costs), but then the publisher must deal with the audience. The author's problems with information, transaction costs, and free riders would simply be passed on, one step further down the line. How much would a publisher pay for a book that could be lawfully copied by all comers once it appeared on the market? Unless the publisher has a lead-time advantage or some other sort of real-world clout that can discourage copying, the rate the publisher would offer the author in such a world might be too low. If the anticipated rate of payment is low, otherwise-desirable works may not be created.

The party best positioned to alter the use to which a resource is put⁸² is required to do so by a systemic choice of a liability or no-liability rule.⁸³

The centerpoint of intellectual property liability appears in the copyright and patent statutes as a grant to the proprietor of rights to exclusive use.⁸⁴ Note that the rule setting up liability appears to be a sharp-edged and certain grant. As with all sharp-edged rules, it may be over-inclusive. Thus, although the rationale of the rule depends on the potential printer or copyist being an active party who can knowledgeably seek out bargains, copyright law also makes a publisher liable if, in good faith, she prints a copyrighted work which a plagiarizer has submitted. The law might even make a passive recipient liable. For example, assume that a painting duplicating a copyrighted work is put on the exterior wall of a house not by the building's owner, but by a skilled prankster. In that case, the householder is a passive recipient, rather than an active user (as is more typical in intellectual property cases). Nevertheless, he may be liable. Assume for example that the reproduction draws attention to the house so that the householder can sell the building for an amount in excess of the value of otherwise similar homes. If the owner in fact does sell, he will likely be guilty of infringing the copyright owner's exclusive rights over the distribution of copies.⁸⁵ Such over-inclusion can be costly.

82 This is a variation of the phenomenon Dean Calabresi referred to as looking for the "best briber." Guido CALABRESI, *The Costs of Accidents; a legal and economic analysis*, New Haven, Yale University Press, 1970.

83 Markets can yield efficiency only where resources can practicably be transferred to their highest-valued uses. See R. H. COASE, "The Problem of Social Cost", (1960) 3 *J. L. & Econ.* 1.

84 For copyright law in the U.S., see 17 U.S.C. Section 106 (giving exclusive rights over the reproduction, distribution, public performance, adaptation, etc., of the copyrighted work of authorship); for patent law in the U.S., see 35 U.S.C. Sections 101 et seq. (giving exclusive rights over making, using, selling, offering to sell, or importing, the patented invention.)

85 Under section 106(3), only the owner of the copyright has the right to distribute copies. Although the first sale doctrine (see section 109) provides an exception that allows the owners of lawfully made copies to distribute them without liability, the house owner in our example does not own a copy that was "lawfully made". Therefore he could not take shelter under the first sale doctrine, and his sale of the house would constitute an unlawful "distribution" of the copy painted upon it.

III. Systemic intellectual property rules to minimize market imperfections

Rules are not only used to enhance tradability. They are also used to distinguish between areas where legal protection is desirable and areas in which it is not. Industries may exist where perhaps the need for government to provide exclusion rights is less (because there is no significant market failure under copyliberty), or uses which are more expensive to restrict, or other areas where the costs of copyright might outweigh its value. Thus, copyright distinguishes among subject matters. Not all beneficial products of human ingenuity are capable of being owned. Differing treatment exists for computer programs, musical compositions, literary works, architecture, recorded oral presentations — each has some specialized rules in the statute. Further the Copyright Act grants ownership only in works of authorship fixed in a tangible medium of expression,⁸⁶ and even among such works the act denies protection to whole classes (such as ideas, and typographic designs)⁸⁷ which, presumably, would prove more costly than beneficial to propertize.⁸⁸ Similarly, copyright does not give owners of copyright a right to control all uses of their works. Rather, they have control over certain kinds of enumerated uses — those uses whose control is

Public display is also one of the copyright owner's exclusive entitlements. 17 U.S.C. Section 106(5). Even without a sale, it is possible that an irritated copyright owner could bring a successful suit merely for the house owner's continued "public display" of the work. However, I suspect that, in such a case, a court might read into the copyright statute a requirement that the defendant act volitionally. (A suit premised on sale of the house — sale being a volitional act — would not be as vulnerable.)

86 See, e.g., 17 U.S.C. Sections 102, 103.

87 Section 102(6) denies copyright to, *inter alia*, ideas and processes. As for typographic designs lacking protection, this is a matter of legislative history; the statute itself does not explicitly mention typography. See House Report, *supra*, note 55, at 53-57. The reason protection was not given to typographic design may have been a fear that such protection might be misused by reprinters as a way to fence off public domain literature such as Shakespeare or the Bible.

88 Industry pressures undoubtedly play a role here as well.

desirably centralized in one entity. Thus, for example, the composer of a song has exclusive rights over reproduction and public performance, but not over private performance.⁸⁹

There are also system-wide rules that work to decrease the system's costs, and to take better advantage of intangibles' inexhaustability. The key example here is that of duration.⁹⁰

To see this, we must backtrack to consider a conceptual matter. At one point, lawyers floundered when asked how to assess, even conceptually, the value of an intellectual property system. The empirical questions are hard enough, but there appeared to be a paradox where deadweight loss was concerned. True, the exclusive right that the copyright or patent owner receives from the law confers a kind of monopoly power (of varying effectiveness, depending on the competing intellectual products available to the audience.)⁹¹ Also true, this monopoly power can then cause deadweight loss as the intellectual property owner imposes a price above marginal cost and the quantity effectively available to the public is reduced. But lawyers were hard put to assess the significance of this deadweight loss, because the work to which access was being reduced by the intellectual property law might never have come into existence without that very law.

The way out of this apparent paradox was to make a conceptual distinction between those works which needed the intellectual property law to induce their authors to create them, and those works which did not. As to the former items, any production is due to the legal regime's grant of intellectual property rights. As to the latter items, the intellectual property law merely functions as a restriction.⁹²

89 For more on the role of copyright's particular provisions, see W. J. GORDON, "Merits of Copyright", *loc. cit.*, note 3, and W. J. GORDON, "Fair Use as Market Failure", *loc. cit.*, note 34, at 1605-1615.

90 In the discussion of duration that follows I am indebted to the work of Stanley Liebowitz. See, e.g., S. J. LIEBOWITZ, *loc. cit.*, note 32, at 183-188.

91 That is, the person who owns copyright in a particular book will have a monopoly over that book, but not over competing titles by other authors.

92 The discussion here puts aside what Edmund Kitch calls "prospect effects," namely, those positive effects on ease of exploitation that can occur when

Thus, one would credit the intellectual property system with all the value of the works that would not have come into existence without intellectual property rights. As to these works, any production of the item would count as a positive value, and restrictions on quantity would be irrelevant. Then, from this aggregate positive value would be deducted the deadweight loss in markets for works that would have been produced even in the absence of intellectual property rights.⁹³

The value of the intellectual property system is the net of these two numbers. As Professor Stanley Liebowitz has made clear,⁹⁴ imposing system-wide durational limits — limiting how long particular types of intellectual property rights will last — can serve to maximize this net value.

First, as duration increases, the number of new works attributable to an additional period of protection will grow smaller. The usual law of diminishing marginal utility would seem to govern; as the duration of a copyright or patent is made longer and longer, the incentive effect of additional length is likely to decrease.⁹⁵ To illustrate: extending the duration of copyright from one year to five is likely to so increase the expected rewards of writing a book or designing a poster that the increase will induce some new works to be made which would not otherwise be created. By contrast, extending the duration from 101 years to 105 is not likely to have as strong an effect, so such further extensions will bring less to the “plus” side of the ledger.

property rights are centralized in one entity. See Edmund KITCH, “The Nature and Function of the Patent System”, (1977) 20 *J. Law & Econ.* 265.

93 S. J. LIEBOWITZ, *loc. cit.*, note 32.

94 His graphical representation is particularly helpful. See *id.* at 187.

95 This point is probably made most wittily by Lord Macaulay, in his speeches before the British parliament protesting their extending the duration of copyright. Lord Macaulay argued that while copyright might be necessary to ensure a “supply of good books,” the monopoly that it imposed was at best a necessary evil. “For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.” Thomas MACAULAY, “Speech Before the House of Commons” (Feb. 5, 1841), in 8 *The Works of Lord Macaulay* 195, 199 (Lady Trevelyan ed. 1866) (discussing a bill which would have extended the duration of copyright protection).

Second, as duration increases, more and more works will not “need” the extra years to come into existence. As the reader will recall, years of protection that are not needed for incentives constitute unnecessary restrictions, and as to them “deadweight loss” should be counted on the debit side of the social ledger. For example, works which were called into existence by the promise of a 56-year reward are “pluses” to be credited to the copyright system for only their first 56 years. The copyright system’s grant of exclusive rights for years 57 and following would deserve no credit for those works’ creation. Equally importantly, any deadweight loss in markets in years 57 and following becomes a cost attributable to copyright.

Thus, as duration grows longer, the incentive value of an added durational restriction grows less, and the deadweight loss grows larger. The economic goal in choosing a durational limit is to maximize the difference between the two measures, incentive value and deadweight loss. Thus, duration can be custom-designed, providing a set of categorical sharp rules that limit the periods of protection for intangibles protected by a given regime, such as the seventeen to twenty years that U.S. law gives to utility patents,⁹⁶ as compared with the fourteen years of design patents,⁹⁷ the “life plus seventy years” that inheres in most copyrights,⁹⁸ or the ten years of protection applicable to semiconductor chip mask works.⁹⁹ These various systemic limits can function to minimize the cost attributable to deadweight loss.

IV. Using standards to minimize market imperfections: turning to the fair use doctrine and the question of parody

Sometimes markets do not evolve for a particular creative work or use — say, for example, that bargaining is impeded by problems such as externalities, or high transaction

96 35 U.S.C. Sections 154-157.

97 35 U.S.C. Section 173.

98 17 U.S.C. Sections 302-305. There is a different duration for works made for hire, etc.

99 17 U.S.C. Section 904.

costs in identifying or communicating with the copyright proprietor. If the copyright laws prohibited copying in that area it could simply be preventing copying without yielding creators any monetary advantage. That would be undesirable. Not only would copyright then fail to perform its primary function, but if users cannot reach market deals with creators, copyright would impose more costs and generate less benefit than would a regime without copyright. For though incentives may be low in a world without copyright, at least copyists and other users would have access to whatever works happened to be created; by contrast, in a world where there is copyright but no markets, incentives are low and the public has no access. Therefore, as discussed in the initial sections of this article, the ability of users to form markets is crucial to copyright's economic mission of encouraging the production and use of new work.

This observation has implications for policy in individual cases. If a defendant faces market failure in the face of copyright, then, in his case, the economic foundation for copyright has crumbled. That is a good argument (if not a complete one) for not enforcing the copyright against him. Further, it can be argued that "fair use" has evolved as an equitable response to market failure, to ensure that socially desirable uses will not be blocked.¹⁰⁰

For example, consider photocopying by individual scholars. The transaction costs in contacting a copyright owner for permission to photocopy might well outweigh the benefit the scholar expects to reap.¹⁰¹ In such a case, enforcing the copyright would merely eliminate the photocopying, rather than generate any license fees for the copyright owner. In such an

100 I have advanced this argument in W. J. GORDON, "Fair Use as Market Failure", *loc. cit.*, note 34, 1614-1615, 1627-1641. For further development, see *id.* at 1614-1657 (proposing a 3-part test for fair use, and comparing such test with the case law results) and W. J. GORDON, *Private Censorship*, *loc. cit.*, note 1, 1042-1043 (1990). See also, *e.g.*, W. M. LANDES & R. A. POSNER, *loc. cit.*, note 32; Sheldon LIGHT, "Parody, Burlesque and the Economic Rationale for Copyright", (1979) 11 *Conn. L. Rev.* 615.

101 That is, even if the scholar were willing and able to pay whatever price the copyright owner demanded, the scholar might not be willing to both pay that price plus bear the time delay, hassle, and secretarial costs involved in securing a permission.

event,¹⁰² granting "fair use" treatment to the scholar will not impair the copyright owner's potential income stream, and will allow a socially beneficial use to go forward that the transaction costs barrier would otherwise have blocked. High transaction costs are, of course, a classic cause of market failure.

The market failure approach is consistent with the great bulk of "fair use" precedent,¹⁰³ and in recent years this sort of argument has even found its way into the courts' explicit arguments. For example, in a recent fair use case involving corporate photocopying of scientific journals, the courts clearly had a market failure model in mind. The opinions of both the District Court and Court of Appeals discuss what economists identify as "transaction costs," and examine the extent to which the defendant's employees — if required to stop photocopying — could find other avenues through which to obtain the desired material.¹⁰⁴

Similarly, in the most recent fair use case before the Supreme Court, the opinion indicated that "fair use" can be justified in part as a response to situations in which copyright owners are unlikely to give permission at virtually any price.¹⁰⁵ This position, advanced in a case involving a song parody,

102 Note that this analysis is dependent upon the relative size of the applicable transaction cost barrier. If a clearinghouse or compulsory license system exists which reduces the transaction costs, then the scholar may not require fair use treatment in order to allow her use to go forward.

103 See W. J. GORDON, "Fair Use as Market Failure", *loc. cit.*, note 34, at 1627-1636.

104 See *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 60 F. 2d 93, 929-931 (2d Cir. 1994).

105 See *Campbell v. Acuff Rose Music Inc.*, *supra*, note 17. In assessing the plaintiffs' claim that the parody would impair their potential market, the Court responded: "[T]he 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" *Id.*, at 592.

The Ninth Circuit Court of Appeals made a similar point in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) ("The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought."). For other cases involving similar anti-dissemination motives on the part of copyright proprietors, see W. J. GORDON, "Fair Use as Market Failure", *loc. cit.*, note 34, at 1632-1633.

might strike the reader as inconsistent with the usual assumption of neoclassical economics that one must take preferences as a given.

If one takes this assumption seriously — it is sometimes known as the assumption of “consumer sovereignty” — then it seems the Court should have accorded to the copyright owner’s desire not to be parodied as much respect as any other value. After all, in theory, an unwillingness to sell or license merely indicates that the potential buyer/licensee is not the highest-valued user. And in many countries, such as Canada, an unwillingness to allow one’s work to be copied in a distorted manner is given more, rather than less, respect than a refusal to sell motivated by ordinary commercial reasons.¹⁰⁶

106 Canada’s moral rights statute is complex. Analysis can fruitfully begin at *Copyright Act, supra*, note 19, section 14.1 (1985) (Can.) which provides:

“Moral rights

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.”

By contrast, the United States copyright law provides a right of integrity to only a narrow class of visual artwork, usually originals. See 17 U.S.C. Section 106. The U.S. moral right is subject to “fair use” in a way that the Canadian moral right does not seem to be subject to “fair dealing.”

To parody would be to distort, and, since it might very well injure an author’s reputation, might violate the Canadian moral right of integrity. The statute provides:

“Nature of right of integrity

28.2 (1) The author’s right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

Where prejudice deemed

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

When work not distorted, etc.

(3) For the purposes of this section,

So it may seem wrongheaded of the United States Supreme Court to suggest that it may be appropriate to give a parodist — a disappointed licensee — the liberty to copy for free on the ground that the owner would not sell him a license. Is the Court under-valuing the owner's preferences? Not necessarily; there are several explanations of the Court's approach that are consistent with the traditional economic deference to individual preferences. In fact, economics suggests that a rule like Canada's that defers to an author's copyright or her supposed "moral right of integrity" will yield results that are (administrative costs aside) inferior to a case-by-case approach which tolerates some parodies — however insulting the parodies might be to an artist whose work is being intentionally distorted and mocked.

Canada, like the United States, gives fair use or fair dealing to works of criticism or review. I shall argue that parodies fall into the same analytic class, and should be treated similarly.

When a copyright owner refuses to let someone adapt her work for purposes of parodying it, or refuses to give an ideological opponent permission to quote lengthy passages, or insists on suing anyone who quotes passages of her memoirs that reflect unfavorably on her, she is using her copyright as a tool of suppression.¹⁰⁷ The question of whether authors should be entitled to refuse permission to those users of whom they

(a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or

(b) steps taken in good faith to restore or preserve the work shall not, by that act alone, constitute a distortion, mutilation or other modification of the work."

R.S., 1985, c. 10 (4th Supp.), s. 6.

107 Similar instances also appear in the corporate realm. For example, when a newspaper expanded its TV coverage it told its readership about the extended service in an advertisement that pictured a copyrighted TV Guide cover for purposes of comparison. TV Guide then sued for copyright infringement. Presumably the suit was motivated by something other than a desire for license fees. The comparative advertising was held to be a fair use. See *Triangle Publications Inc. v. Knight-Ridder Newspapers Inc.*, 626 F. Supp. 1171 (5th Cir. 1980).

disapprove is a complex one.¹⁰⁸ On which side of the issue would economics weigh in? If the proper way to look at these problems is economic, then, as mentioned, the principles of consumer sovereignty would seem to dictate that governmental decision-makers should not question why someone refuses to sell or license. Economics "assum[es] that man is a rational maximizer of his ends in life,"¹⁰⁹ and a desire to suppress would seem to be as rational an end as a desire for fame or fast cars.

Additionally, Ronald Coase has persuasively emphasized the importance of transaction costs by showing that, in their absence, the ultimate allocation of a resource will be efficient regardless of how entitlements are initially assigned.¹¹⁰ So long as the parties can meet face to face, as in copyright a copyright owner and potential parodist or critic could often do,

108 For example, it can be difficult to distinguish suppression from an attempt to direct the work into the most valuable derivative work markets. See, e.g., Paul GOLDSTEIN, *Copyright*, Vol. I, at 571-573 (rights over derivative works can affect the direction of investment and the type of works produced).

Similarly, in regard to unpublished works, it can be difficult to distinguish cases of suppression from cases of economically motivated refusals to license. An author accused of suppression may be simply trying to keep the work out of the public eye temporarily until it reaches its mature form and can be published.

Even if some practical means existed to distinguish all dissembling "suppressors" from those copyright owners who are genuinely motivated by financial return, some cases will present instances of truly mixed motives. For example, the owner of copyright in an out-of-print collection of letters might sue a biographer who extensively quotes the letters, not only out of a dislike for the biographer's message or perceived inaccuracies, but also out of a desire to preserve the reprint market for the letters. See *Meeropol v. Nizer*, 417 F. Supp. 1201, 1208 (2d Cir. 1976), *rev'd and remanded*, 520 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

109 Richard A. POSNER, *Economic Analysis of Law*, 3d ed., 1986.

110 See R. H. COASE, "The Problem of Social Cost", *loc. cit.*, note 83. The Coase Theorem is effective at least in the absence of factors such as transaction costs, wealth or income effects, and strategic behavior. See *id.* (transaction costs). See also, e.g., Donald REGAN, "The Problem of Social Cost Revisited", (1972) 15 *J. Law & Econ.* 427 (strategic behavior). Compare Ronald H. COASE, "Notes on the Problem of Social Cost", in *The Firm, the Market, and the Law*, Chicago, University Chicago Press, 1988, pp. 157, 170-174 (suggesting that income effects are unlikely to be significant, at least in contexts not involving irreplaceable goods).

why should there be any need for the judiciary to do anything but enforce whatever property right is before it?

Whether suppression would or would not be economically desirable will depend in most cases on empirical analysis of the particular fact pattern.¹¹¹ But some general observations can indicate preliminarily why, when copyright owners seek to use the copyright law to avoid criticism or ridicule, *neither* consumer sovereignty *nor* the Coase Theorem suggest that judges should give the owners formal deference.¹¹²

At least four reasons suggest that the market cannot always be relied upon to mediate attempts at suppression and that it might be economically desirable to refuse authors an entitlement to suppress.¹¹³ The four reasons are the "suppression triangle"; pecuniary effects; managerial discretion; and endowment effects. The four reasons are interrelated, and to explicate them let me begin with the "suppression triangle."

In all these examples, remember: so long as there is the possibility that the social interest will be better served by refusing to enforce the owner's copyright, an economic case is made for using a nonformal, reasonableness mode of inquiry. One would then need to compare the costs of the extra suppression that would result from adhering to a formal pro-owner result, with the administrative and other costs that would

111 Even if one interprets copyright's economic goal as being solely the use of incentives to "promote knowledge," so that satisfying the copyright owner's personal tastes would not count as an independent value, the empirical answer to suppression questions would not be easy: in a given case enforcing any particular type of suppression would both keep some knowledge secret, and yield long-term incentives that could aid knowledge in the long run (because authors who can suppress have a copyright worth more than authors who cannot). Cf., Frank I. MICHELMAN, "Property, Utility & Fairness", (1967) 80 *Harv. L. Rev.* 1165 (the effects of demoralization on productivity). Which of the two potential effects on knowledge would be greater (the loss from enforcing suppression or the gain from long-term incentives) cannot be determined *a priori*.

112 For a fuller discussion of this issue, see Wendy J. GORDON, "The Right Not to Use" (unpublished manuscript on file with the author).

113 Additional reasons might include, e.g., the potential nonmonetizability of first amendment values. See W. J. GORDON, "Fair Use as Market Failure", *loc. cit.*, note 34, at 1631-1632.

be necessary in employing a "reasonableness" or "fairness" standard. In the United States, with its strong history of prizing free speech, the costs of improper suppression of news or cultural material is viewed as very high.

A. Suppression Triangle

I use the term "suppression triangle"¹¹⁴ to point to the fact that in cases involving the suppression of information or other intellectual products,¹¹⁵ at least three parties are affected: (1) the person who seeks or threatens to make the contested use (for example, the potential parodist), (2) the copyright owner who wants to keep the material from being copied or adapted (the potential suppressor), and (3) the person or persons who would want to see the material (the potential recipients). This is the triangle of affected interests. Yet in the suppression transaction typically only two parties are present: the potential user (such as a parodist), and the copyright owner. Whether an attempt to suppress is likely to be value-maximizing will depend, *inter alia*, on how well the interest of the omitted third party, the class of potential recipients, is represented by the two immediate participants.

Theoretically, the more valuable the parody or other use is to the public, the more the public should be willing to pay for it, and the more the parodist should be willing and able to bid for permission. Thus, the notion of the Invisible Hand expects that any market participant will be in a position to reflect the interests of affected third parties (that is, the public audience). Nevertheless, the Invisible Hand often falters, and the possibility of misallocation remains.

114 I base this theory in part on the work of James Lindgren in the blackmail area. See James LINDGREN, "Unraveling the Paradox of Blackmail", (1984) 84 *Colum. L. Rev.* 670 (discussing the three-party structure involved). For an economic analysis of blackmail stressing other aspects of blackmail activity, see Ronald H. COASE, "The 1987 McCorkle Lecture: Blackmail", (1988) 74 *Va. L. Rev.* 655, 673-674.

I am indebted to Warren Schwartz for suggesting the potential relevance of the blackmail literature to this problem.

115 Information can implicate different issues from literary expression and other intellectual products; for purposes of this very general discussion, however, I shall group all together under the rubric "information."

Consider a hypothetical novelist or movie maker who wants to keep the world from knowing what a hostile critic or parodist has to say about his work. Assume also that the critic or parodist wants to quote from the work or use its imagery, and that use of the quotation or imagery is somehow essential to the comprehensibility or believability of the criticism or parody.¹¹⁶ If the law required the critic or parodist to purchase licenses to quote or paraphrase, how sure could we be that the “highest-valued” use would ensue?

For purposes of mathematical example, assume that the critic or parodist stands to earn at most a thousand dollars profit from even the best-written product. Assume that the novelist or film-maker would lose fifty thousand if the criticism or parody is published. Since the copyright owner would charge at least fifty thousand for a license to criticize or ridicule his work and the critic or parodist stands to gain only one thousand from publishing, it may look like the copyright owner holds the “highest valued” use when compared with the parodist or critic. But that may be an illusion resulting from the fact that the third party (in the owner/user/public triangle) is not being counted as part of the deal.

The publishing of the review or parody might benefit the public (who would thus be warned off from, let's say, a much-hyped romance novel that doesn't really excite anyone who reads past page five) to the tune of that same fifty thousand, or perhaps even more. On these hypothesized facts, requiring the publisher to buy a license from someone who would not sell it is a bad idea, and giving the publisher (the critic or parodist) free use is a good idea. And both are consistent with economic measures of value. If the critic had been able to capture the full

116 There is another factor that may be at work here as well: the idea/expression dichotomy. Since under current law copyright owners cannot prevent others from using their ideas, it could be argued that little suppression of note could occur; it might be suggested that a critic deprived of the privilege to quote could nevertheless communicate effectively.

For simplicity's sake, therefore, assume that in the following examples, whatever the defendant has taken from the first artist's work could be considered copyrightable expression rather than simply “idea” and that the use of the copyrighted expression is somehow essential to the effectiveness of the planned derivative work.

value that the review gave to the audience, then the novelist's fifty thousand minimum asking price would have been met.

A parodist may similarly be unable to capture the full value that the work holds for the audience. This can occur for many reasons.¹¹⁷ There may be significant positive externalities and surplus in the market for parodies, for example. There also may be other complications in the markets for reviews and parodies, such as pecuniary losses that diverge from societal economic losses.

B. Pecuniary losses

Much of the loss that can come from a critical review will often be merely pecuniary, reflecting not a net loss to society but rather a shifting of revenues from one novelist to another and possibly better one.¹¹⁸ It is as if the triangle now were a geometric figure with four points (the criticized novelist, the critic, the public, and the better novelist). If one could add to the price offered for the "license to criticize" an amount reflecting the monies that the better novelist would reap, it might be enough to make the difference. Since this cannot happen,¹¹⁹ mere pecuniary losses may take on an importance they should not have and they might prevent socially desirable licensing.

117 As economist Michael L. Katz writes of the similar problem in the research and development area:

"In the absence of perfect discrimination, the firm conducting the R & D will be unable to appropriate all of the surplus generated by the licensing of its R & D, and the firm will sell its R & D results at prices that lead to inefficiently low levels of utilization by other firms."

Michael L. KATZ, "An Analysis of Cooperative Research and Development", (1986) 4 *Rand J. Econ.* 527, 527.

118 See Richard A. POSNER, "Conventionalist Defenses of Law as an Autonomous Discipline" (September 21, 1987) (unpublished manuscript, on file with the *University of Chicago Law Review*) (using pecuniary effects to explain why landowners who create certain positive spillovers are not entitled to payment from those who benefited).

119 Journalistic ethics undoubtedly prohibit reviewers from accepting subsidies for doing hostile reviews.

C. Managerial discretion

Another possible complication has to do not with the potential buyer's inability to raise the appropriate amount of capital, but with the potential licensor's potential inability to know even a good deal when it comes along. This complication I will label managerial discretion,¹²⁰ by which I mean to embrace all those things that may make managers in complex corporations sometimes arrive at decisions that are less value-maximizing than they could be. I would include here, for example, personal risk aversion, bureaucratic structure, group dynamics, and laziness.¹²¹ Thus, the officials of a company that owns a given copyright may refuse to license simply because the license is in an unfamiliar field and their particular bureaucratic structure penalizes unlucky risk takers more than it rewards lucky ones. When critical, parodic, or otherwise controversial licenses would be at issue, the human desire to "play it safe" might prevent value-maximizing transfers from occurring.¹²² Managerial discretion is just one of many agency problems that can prevent the parties from dealing with each other like the unitary participants in the classic Coasian transaction.

D. Endowment or wealth effects: pricelessness

All of the above are reasons why socially desirable "licenses to be critical" are not likely to be granted if left solely

120 There is a fairly extensive literature on the controversial question of whether managerial discretion exists and if so what impact it has and what should be done about it; all I mean to suggest here is the simple possibility that managers in complex corporations do not always make the same decisions that an individual owner of a business would.

121 In an individual, a taste for risk or laziness might be a legitimate part of her utility curve, but a manager is supposed to act unselfishly on the part of the corporation. There is a large literature on these agency problems.

122 It might be argued that tastes for laziness or risk aversion are simply preferences that deserve the same respect under the notion of consumer sovereignty as other desires. However, we are not talking here about the risk aversion or laziness of the copyright owner, but of some person who is fortuitously placed within the licensor organization to be able to control licensing decisions. Whether gratifying such a person's taste in regard to laziness or risk serves greater economic ends (as, *e.g.*, a form of compensation) is itself complex.

to the devices of copyright owners.¹²³ One additional and probably most important factor remains to be discussed: the difference between willingness to pay and willingness to sell, sometimes identified with "endowment" or "wealth" effects.¹²⁴

The concept here basically refers to the fact that giving someone an entitlement makes that person richer, and this may change how the holder values both the entitlement and other resources, and this in turn may affect how entitlements are eventually allocated once bargaining between that person and other persons is completed.¹²⁵ Wealth effects do not retard resources from moving to hands in which, given a particular entitlement starting-point, they have the highest-valued use. Nor are they often strong enough to make a difference; in instances where fungible commodities are sold in markets populated by many buyers and sellers, "buy" prices and "sell" prices probably tend to converge. But, when wealth effects do have an impact, they have the potential of rendering the meaning of "highest-valued" use indeterminate in the sense that the location of the highest-valued use is not independent of the law. Where wealth effects are strong, everything depends on the legal assignment of entitlements that form the transaction's starting point.¹²⁶ As a

123 Of course, such licenses might be granted; I offer here only an abstract analysis which would need to be empirically verified.

124 Wealth effects are, roughly, the impact on one's preferences brought about by a change in wealth, including the change brought about by being given, or being denied, an entitlement. See, e.g., E.J. MISHAN, "The Postwar Literature on Externalities: An Interpretive Essay", (1971) 9 *J. Econ. Literature* 1 (the allocative impact of wealth effects illustrated at 18-21, though not explicitly in the context of the Coase theorem).

125 For an excellent numerical example, see *id.* at 18-21. It is well recognized that a divergence often exists between the price that a potential buyer would be willing to pay for a resource he does not own, and the price that the same person would demand before he would sell that same resource if the law had initially awarded its ownership to him. What is less clear is what terminology, explanations, and characterizations are best employed for discussing the phenomenon. For a valuable discussion suggesting, *inter alia*, that traditional "wealth effects" do not fully explain divergence between willingness-to-accept and willingness-to-pay, see Elizabeth HOFFMAN & Matthew SPITZER, "Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications", (1993) 71 *Wash. U.L.Q.* 59.

126 For a dramatic hypothetical example, see Alfred C. YEN, "Restoring the Natural Law: Copyright as Labor and Possession", (1990) 51 *Ohio St. L.J.* 491, 518-519 ("flip flop" of rights).

result, in such cases the search for the highest-valued use cannot provide a good basis for assigning initial entitlements.

Professor Coase showed that in a world without transaction costs, resources will be traded to their highest-valued uses, so that, as between any two users of a resource, if A can use the resource more productively than B, A will end up with it.¹²⁷ Therefore, many scholars argue, in a real world full of transaction costs that can impede bargaining, it often makes sense to “mimic the market”¹²⁸ and assign legal rights to the highest-valued user in the first instance. This is a core insight of Law and Economics.

Yet the Law and Economics argument largely depends on there being a stable highest-valued user.¹²⁹ The injunction to “seek efficiency by mimicking the perfect market” only makes normative sense if the perfect market allocation is a constant. If the allocation of rights significantly affects the monetary valuation that parties place on a resource, then there may be no stable economic reality for the law to seek to mimic.

There is indeed a rare class of goods which lack this stability. These are the precious, personal, irreplaceable, crucial goods one thinks of as “priceless.” Examples are many: the Dead Sea Scrolls; family heirlooms; one’s children; one’s health; one’s reputation; one’s peace of mind. The monetary value a person places on one of these goods may well depend on whether the person has a legal entitlement to it (whether she “owns” it) or whether she must purchase it.

Consider health, for example. It is plausible that most people would be unwilling to sell their organs at any price, so that Jane Smith might turn down an offer of five million dollars from Billionaire X for one of her kidneys. Similarly, if Jane Smith has kidney failure and one of her dying relatives wills her a healthy kidney, she might well be unwilling to take the

127 See R. H. COASE, *loc. cit.*, note 83.

128 See, e.g., G. CALABRESI & A. D. MELAMED, *loc. cit.*, note 61, for a classic explanation of market-mimicry.

129 For further exploration, and for citation to relevant literature, see E. HOFFMAN & M. SPITZER, *loc. cit.*, note 125.

billionaire's five million dollars in exchange for her entitlement to it. If so, Jane Smith looks like the kidney's "highest-valued user."

But should she have no entitlement to the kidney from the recently-deceased person (perhaps because the relevant jurisdiction does not recognize such bequests as enforceable), Jane Smith's own budget and health insurance will place a limit on how much she can spend pursuing the transplant. It is highly unlikely she will be able to outbid Billionaire X for the kidney. If so, Billionaire X will appear to be the "highest-valued user." One can draw from such a pattern no reliable information about whether the resource has its highest value in the hands of the billionaire or Jane Smith. This phenomenon might be called the "pricelessness effect," and its presence may be one reason why our society resists giving private ownership in body parts and other items that are "priceless" in this sense.

The pricelessness effect is a subset of the category that economists call "endowment effects" which in turn is related to wealth effects: since assigning an entitlement to someone makes that person wealthier, it can affect the valuation the person puts on resources. Often a person's "willingness to buy" price will differ significantly from the price at which she is "willing to sell".¹³⁰ Many people hedge the Coase Theorem by noting it does not apply when significant wealth or endowment effects are present. But usually the wealth or endowment effect is so minor that it does not impair the reliability of using a market mimicry approach to model efficiency.¹³¹

130 Experimental evidence on this point has been collected by Matthew Spitzer and others.

131 The impact of endowment or wealth effects is sometimes exaggerated. See R. H. COASE, "Notes on the Problem of Social Cost", *loc. cit.*, note 110, at 170-174 (discussing arguments re the presumed effect of changes in legal position on the distribution of wealth and on the allocation of resources).

Professor Coase argues that the impact of wealth effects can be overstated because, among other things, if the legal rules are known in advance, the prices of applicable resources will likely alter in a way that minimizes such effects; in addition, he suggests, contractual provision for contingencies may be available to mitigate some changes in legal rules. See *id.*, at 157. See also *id.*, at 170-174. Neither of these devices are likely to eliminate the wealth effect — here "pricelessness" — in the context of authorial suppression of embarrassing criticism, however.

The "pricelessness effect" deserves having its own name precisely because the subcategory of effects it denotes are likely to be significant. The "pricelessness effect" comes into play when the entitlement at issue pertains to a good that (1) an individual or group values very highly and (2) which is virtually irreplaceable, and (3) when it is the allocation of that very good¹³² which is at issue. As to such items, the initial placement of the entitlement is likely to have a sharp effect on the price and allocation of the resource, even in the absence of transaction costs.

In cases of parody or criticism — both areas where "fair use" treatment tends to be awarded to defendants — reputation may be at issue. To many, reputation is priceless in the sense we have been discussing. For example, a novelist who fears that a journalist will use extensive quotations from her book to bolster a hostile review will be most unlikely to sell the journalist a license to copy those quotations — regardless of the price offered. But that does not mean the author's preference is the "highest-valued use" in any meaningful sense, since that same author may be unable to buy silence if the law gives the journalist a "fair use" liberty right to publish. A similar analysis can be made of parody: since most people intensely dislike being ridiculed, the legal right may determine where the highest-valued use lies.¹³³ In such cases, the market is nearly useless as a guide¹³⁴, and formal deference to owners' market powers is inappropriate.

For example, assume A is a novelist, a copyright owner who has an entitlement not to license and who is otherwise financially comfortable; she has perhaps \$ 4 000 in the bank and

132 That is, while I predict that the law's assignment of rights in organs is likely to have a distinct effect on a kidney's allocation, it is a more complex question whether the law's assignment of rights in organs will have much of an effect on the allocation of *other* resources.

133 These points are also explored in W. J. GORDON, "Private Censorship", *loc. cit.*, note 1, at 1042-1043; also see W. J. GORDON, "Fair Use as Market Failure", *loc. cit.*, note 34, at 1632-1636 (anti-dissemination motives).

134 However, if the market were to yield the same result under *either* allocation of the legal right, then that result could be used as a guide at least to where lies the highest economic value (that is, value as measured by ability and willingness to pay).

a two-year old car and a prospect of steady royalties. A may be tempted by B's offer of, say, \$ 10 000 for a license to use her work, but she can afford to say no without altering her lifestyle. If B's project is an ordinary commercial project and A will not be sacrificing more than \$ 10 000 from foregoing alternative uses of the work, she will probably license. (It might also happen that B's project would not require an exclusive license and would not otherwise interfere with A's other licensing opportunities. If so, granting B permission to go forward would have no opportunity cost at all for A. She would be even more likely to license such a use.) However, if B's project is hostile toward A's work, A may well refuse the license, either to protect her long-term economic interest (which may be a mere pecuniary loss, remember), her aesthetic reputation, or her feelings.

If however the law gave novelist A no entitlement to prevent B's use, then she would have to persuade B not to publish (cf., blackmail payments.) The most she could offer B to persuade B not to make the critical use planned is the amount in her bank account, plus whatever she could sell her car for, plus whatever she could borrow on the strength of her expected royalty stream. The total may well be less than \$ 10 000, and A will probably demand a price in excess of \$ 10 000. Give A the entitlement and the highest-valued use of the contested expression is in her hands; give B the entitlement and the highest-valued use is in that licensee's hands. The locus of the "highest-valued use" has shifted as a result of where the law places its entitlement.

In such cases, looking to the results of consensual transactions will not give us any information about who "should" have the right.

Another way to put the point is this:¹³⁵ Economics is sometimes used as a normative guide for good social policy. When it is used in this fashion, its primary claim to legitimacy stems from the links between economics and utilitarianism.¹³⁶

135 I am indebted here to Alan Feld.

136 This belief is rather controversial. See, e.g., such classic sources on the debate as the "Symposium on Efficiency as a Legal Concern", (1980) 8 *Hofstra L. Rev.* 485 and Richard A. POSNER, *The Economics of Justice* (1987) for

The more that income distribution restricts the expression of individuals' preferences, the more shaky the link between economics and utility becomes. This linkage has the potential for completely breaking down in cases of "pricelessness." Though in such cases the parties' preferences may remain constant, both in their objects and in their intensity, a shift in who owns the entitlement may effectively disable one of those parties from effectuating that preference. Thus a legal regime that is committed (even in part) to utilitarian consequentialism would be unwise to rely upon a money-bound market model for normative guidance in cases of pricelessness.

In sum, refusing to allow a copyright owner to suppress a hostile use of the copyrighted work, in a case where the "pricelessness effect" is likely to make a determinative difference, does not necessarily contravene economic principles. In such an instance, it is appropriate for even an economically-oriented court to refuse to defer to the copyright owner, and instead make an individualized weighing of how enforcing the copyright in the given instance would affect welfare, and any other relevant consequentialist or nonconsequentialist policies.

Conclusion

This essay has examined the dynamics behind the key systemic choice made by copyright law, which is to reverse the presumption of Restitution law that people who refrain from crossing others' tangible boundaries are free to take advantage of each other's labor. In intellectual property law, this presumptive freedom is replaced by a duty not to copy. Such a duty impels potential copyists to identify themselves and seek contracts with authors and other creators. In this way, the authors are given monetary incentives to continue creating, and works are disseminated to the public. However, all this comes at a significant price: some people will not have access to works for which they would be willing to pay the marginal cost of production. This loss of access is particularly significant

further discussion of the question of whether utilitarianism and economics are truly linked in this way.

because the works may not be simply fungible goods, but may be irreplaceable, unique, and important artifacts crucial to comprehending and participating in a culture.

In order to keep access open to the most important cultural components, copyright law allows judges to declare that something constitutes an "idea" and is therefore not ownable. This flexible if muddy concept keeps the private property system permeable to the society's changing preferences regarding commodification.

"Ideas" are not ownable at all. But some cultural artifacts must be owned, if authors are to have incentives in a world without extensive subsidy. Given the high costs of an erroneous judgment to privatize, U.S. copyright law provides, *inter alia*, two standards that provide liberty, particularly to members of the public who make creative use of others' copyrighted work. These two standards are "substantial similarity" and "fair use." Both allow some copying of expression, particularly by persons who add a great deal of their own talents to what has been copied, transforming the originals.

Canada's treatment of certain transformative users — namely, parodists — is significantly different from that of the U.S. Many explanations present themselves. One is the United States' romance with free speech. We value the iconoclast more than do most nations.¹³⁷ But another obvious explanation is that in each country copyright may serve a different purpose. In the U.S., the Constitution explicitly grants Congress power to pass copyright and patent laws to serve a *public* purpose, namely, furthering of the "progress of science and the useful arts."¹³⁸ Canada's copyright law may follow more of a continental model, in which authors' rights stand on their own as a valid reason for copyright. Given Canada's dual heritage, from England and France, it seems likely that Canada would be more inclined than would the U.S. toward the French traditions of honoring the *droit d'auteur*.¹³⁹

137 Steven H. SHIFFRIN, *The First Amendment, Democracy and Romance*, Cambridge, Mass., Harvard University Press, 1990.

138 U. S. Const. Art I, cl. 8.

139 I have suggested elsewhere that even an "authors' rights" approach would yield far less protection to authors than do current copyright statutes, see W. J.

But to the extent Canada is aiming at maximizing public benefit, and to the extent that economics is a reliable guide to that benefit, this essay has suggested that an automatic deference to authors over parodists cannot be justified.

GORDON, "Property Right in Self-Expression", *loc. cit.*, note 54. Admittedly, in that essay I was operating out of an Scottish/English "natural rights" tradition rather than a Continental one.