Fair Use, Markets and Economic Analysis*

Michael A. Einhorn**

1. INTRODUCTION

This chapter will apply economic reasoning to the judicial principle of fair use that is now often applied in matters involving unauthorized takings of copyrighted works. The four activating principles of fair use, as instituted in 17 U.S.C. § 107, are found to be ambiguous and subjective, and therefore creative of legal uncertainty for producers of secondary transformative works that may add new meaning to a copyrighted work. As "the [Constitutional] goal of copyright, to promote science and the arts, is generally furthered by the creation of [such] transformative works", 1 the resulting loss of artistic investments and social criticism here can be considerable.

The difficulties of the fair use doctrine are best illustrated in the recent case of *SunTrust v. Houghton Mifflin*, which involved the publication of an unauthorized sequel to the Civil War classic "Gone with the Wind" (GWTW) that was entitled "The Wind Done Gone" (TWDG). Based on definitions of parody and satire, as well as legal considerations of market substitution, excessive borrowing, and "conjuring up" that are standard in fair use cases, the District Court preliminarily enjoined the new

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^{**}Senior Advisor, InteCap, Inc. Voice 973-618-1212; email: meinhorn@intecap.com, meinhorn@intecap.com. Views are personal and not necessarily those of other professionals at InteCap.

book because the author's stated intent extended to a general criticism of Southern history, and therefore went beyond the proper domain of parody that is often protected by fair use.² On appeal, the Circuit Court vacated the resulting preliminary injunction after finding that TWDG was a specific criticism of the depiction of slavery and race relations in GWTW,³ and that the Supreme Court decision of *Campbell v. Acuff Rose* was ambiguous on what kind of parody should be protected.⁴ The case finally settled in May, 2002 for an undisclosed amount. Had the matter continued, the work might yet have been ruled an infringement and punitive damages might yet have been assessed on the publishers.

Legal theorists may now debate the wisdom of the decision. For market advocates with a less metaphysical bent, *Suntrust* was a waste. The great contest between free speech and copyright was played before two Federal Courts constrained by the present fair use doctrine. Whatever the elegance of the legal arguments, truth is that two American courts seriously deliberated whether to enjoin the publication of a novel, and could not find unambiguous guidance from the Supreme Court regarding whether or not to do so.⁵ Indeed, however nuanced the fair use doctrine may appear, judges must often choose between the same two discomfiting options -- injunction and free use.⁶ The outcome should be particularly disconcerting to any economically attuned observer who believes that clear signals provide the best incentives for producers of artistic work, and investors in general.

While we seek to facilitate transformative use, there is no apparent equitable reason why primary rights owners should not be paid for use of their material. Indeed, a number of prominent legal authorities, including Circuit Court Judges Pierre Leval and Alex Kozinski, have suggested that the copyright system is prone to too many injunctions and that Courts may facilitate exchange by setting reasonable royalties. These judicial points also appear in the Supreme Court's *Campbell*; i.e., the "goals of copyright law, 'to stimulate the creation and publication of edifying matter', are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use."

I suggest a modification of Title 17 to provide an option to facilitate exchange in rights for transformative works. First, a new statutory category of "transformative" works would be established for material that adds sufficient new meaning to copyrighted material, and might reasonably include parodies, satires, criticisms, comments, news reports, research articles, classroom materials, and sequels or adaptations. Second, transformative users of copyrighted works may forego the fair use claim in

favor of an arbitration procedure that would based compensation on existing market benchmarks. Arbitration could only be operative for works that are demonstrably transformative, but may include some material that does not now qualify for traditional fair use. This creates greater legal assurance that transformative works are produced, and that copyright owners get paid for their contribution

2. FAIR USE AND TRANSACTION COST

As the introduction of Chapter 1 elaborates, copyright entails two economic phenomena. First, artistic works and software entail substantial investments that primary creators must undertake initially; subsequent imitation can then dissipate producer profits and the resulting financial incentive. Copyright protection then encourages artistic production by protecting against the dissipation of just deserts and financial incentives for a period of time.

However, copyright may also depress uses by secondary creators who might base their works on some amount of original material. To the point, while "knowledge and learning are promoted by the creation of more works, knowledge and learning are also promoted by a greater ability to access and to use the works of others." "It is not enough then to say that intellectual property law favors 'creators' – for here we have creators on both sides of the equation."

It is then economically improper to protect the exclusive interests of either primary or secondary producers. ¹² The tension between respective gains and losses in a particular case is better resolved through a nuanced approach that considers the particular circumstances of a contended use. ¹³ Good jurisprudence regarding copyright must then consider the basic nature of the use, market definition, transactions costs, externalities, behavioral incentives, and equitable compensation. As distinguished from the Continental regime of moral rights awarded to the creator of the work, the broad exercise of copyright in the U.S. must then be weighed in an "equitable rule of reason" that balances contending positions of user and producer.

Beginning with Section 107, Chapter 1 of the Copyright Act specifies restrictions aimed to balance user and buyer rights. The fair use limitations on copyright appear in Section 107,¹⁴ which extends the "privilege in other than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner." The introduction of Section 107 clearly

establishes that transformative works (i.e., new meanings) are the primary concern of the fair use doctrine; "the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

The four factors to be considered for identification of fair uses are:

- 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.¹⁷
 - 2. The nature of the copyrighted work.¹⁸
- 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole. 19
- 4. The effect of the use upon the potential market for or value of the copyrighted work.

Damage estimates can reasonably include displaced unit sales and licensing opportunities.

Legal justifications for "fair use" now bear an economic nuance that tends to focus on the transactions costs that are implicated in the use of protected work. Two academic articles contributed notably to this transformation. When negotiations are costless, wrote Nobel Laureate economist R.H. Coase in 1960,²⁰ disputants could be trusted to efficiently resolve commercial disputes through multilateral bargaining without need for legal stricture. However, the powerful capability of the market is diminished when negotiation costs are positive,²¹ or when economic benefits or costs redound to third parties who are excluded from representation in the exchange.

Coase's notion of transactions costs came to the copyright theater in 1983, .two decades later, when Wendy Gordon related the friction of market exchange to fair use. Prof. Gordon argued that "an economic justification for depriving a copyright owner of this market entitlement exists only when the possibility of consensual bargain has broken down in some way." Extending Gordon, Edmund Kitch and Tom Bell later observed that automated rights management may reduce the transactional difficulty, and the implied economic rationale for fair use. ²³

This modification presented by Kitch and Bell led to allegations that Prof. Gordon's economic analysis of transactions costs is overly focused on bilateral exchange, to the exclusion of merit goods that may present wider public gains.²⁴ While concerns regarding a narrow application of ARM to fair use are valid, such a reading of Gordon's analysis is not

correct. In economic analysis, transactions costs also include identifying third-party beneficiaries of public goods who might not be represented at the bargaining table, and monetizing their resulting gains. In this respect, we must distinguish between difficulties that result from the inherent friction of negotiation and the harm resulting from excluded third parties, respectively termed "no consent" and "implied consent". ²⁵

3. THE MARKET RESPONSE

An analysis of transactions cost is also incomplete if it fails to recognize how owners may respond to advanced property rights with modified business practices, institutions, or technologies. This leads to another of Prof. Gordon's points; fair use – if applied too broadly – could sap the incentive to develop the institutional mechanisms needed to reduce transactions costs and accommodate paid exchange.²⁶ With greater specificity,

to award fair use without regard to the possibility of imminent change in the market structure might be to make permanent an otherwise curable market failure and thus potentially to insulate a new and valuable use from the stimulus of consumer demand ... To persuade users to proceed through the device, copyright owners might well need a ... declaration that the uncompensated use, previously minor and left unfettered, constituted an infringement of copyright.²⁷

As noted in Chapter 1, markets, organizations, jurisprudence, and political process are interlocking components of an inherent social logic that accommodates innovation, production, and distribution. Creators, publishers, negotiating agents, and monitoring organizations then engage in routines, practices, contracts, and enforcement as tactical operations so to actualize this logic. Judicial and legislative process and results should then be appreciated as catalysts that can induce changes elsewhere in the logical stratum. The bounds of property rights must then be carefully defined to provide room for evolving market and technology.

There are a number of ways that a free market will come to facilitate copyright beyond the legal grant.

Self-Help and Collectives

With *self-help practices*, copyright owners may sometimes appropriate for themselves a share of social gains by increasing prices generally or discriminatorily. In the latter respect, movie studios may charge video

stores more for tapes, and publishers of professional journals and books may require libraries to pay more for subscriptions than individual buyers. More general ways of appropriating gains from property rights may include strategic contracts, license innovations (such as seat licenses now used for software hand), and different service versions (such as per transaction or blanket licenses offered by LEXIS-NEXIS³²).

Licensing collectives can then facilitate market exchange when transaction costs between any two players are high.³³ These agencies (which include, *inter alia*, copyright collectives, rights clearance organizations, and "one stops"³⁴) negotiate licenses, monitor use, and collect royalties on behalf of rights owners. Indeed, the ability of licensing agencies to respond to newly enforced property rights was a primary issue in the landmark case of Williams and Wilkins v. U.S.³⁵ In this landmark decision, photocopying by the defendants National Institute of Health and National Library of Medicine was awarded fair use because it was unclear "whether a ... clearinghouse system can be developed without legislation, and if so whether it would be desirable."³⁶ However, Chief Judge Cowen in his dissent argued that the very presence of a plaintiff award "may very well lead to a satisfactory agreement between the parties for a continuation of the photocopying by the defendant upon payment of a reasonable royalty to plaintiff."³⁷

Exemplifying the point, the U.S. Congress first extended copyright protection to non-dramatic public performances of musical compositions in 1897. However, since music use in non-dramatic settings was exclusively live and often spontaneous, the newly granted performance rights were difficult to enforce. Unauthorized performances consequently were quite frequent. With no extraneous government effort, several prominent songwriters in 1914 established the American Society of Composers, Authors, and Publishers (ASCAP), a nonprofit cooperative agency for the monitoring and collection of performance royalties. ASCAP instituted a system of blanket licenses that enabled music halls, movie theaters, and other licensees to perform any registered composition in its entire catalog for a specified contract period. ASCAP distributed blanket revenues to its members based on a monitored count of public performances.

The potentiality of appropriative copyright institutions was also recognized in 1995 in *American Geophysical Union v. Texaco Inc.*³⁸ Publishers of scientific journals brought a class action suit against the Texaco Corporation, whose 400 to 500 scientists had engaged in unauthorized photocopying of journal articles while performing professional research. The Circuit Court concluded that copying had

ambiguous effects in displacing journal subscriptions.³⁹ However, the Court also found that publisher revenues could conceivably increase through greater opportunities for licensing, document delivery services, and royalties that could be administered through the Copyright Clearance Center, an institution established in 1978 to assist in the collection of licensing fees from photocopiers.⁴⁰ Per *Texaco*, a copyright holder then is "entitled to demand a royalty for licensing others to use its copyrighted work ... and the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth [fair use] factor."⁴¹ The effect of strong court decisions that upheld copyright for photocopied works in facilitating the institutional rise of the CCC is documented in legal research by Kenneth Crews.⁴²

New Technologies

As an engineering application of self-help, content owners may activate new technologies to protect material and augment legal prosecution. *Technological self-help* would generally implicate "an expanding set of devices, software code, and systems designed to protect content from unauthorized copying and to facilitate electronic commerce." ⁴³ While the use of computer code is sometimes opposed as an intrusion upon consumer rights, ⁴⁴ a substitution of code for law is often an efficient monitor, as technology may be a less expense means for protecting content than ongoing surveillance and litigation. This is particularly likely when infringement produces ongoing damages that may redound through widespread digital copying and the ongoing disruption of legitimate market participants.

Self-help technological protection of copyrighted content began in January, 1986, when cable broadcasters (e.g., HBO and Showtime) encrypted over-the-air broadcast signals in order to force satellite dish owners to pay subscription fees to defray costs of uninterrupted programming captured previously for free use. ⁴⁵ After signals were encrypted, dish owners were forced to pay for the necessary decoding equipment. Congress itself later moved to protect the encryption technology from unauthorized circumvention. ⁴⁶ Enacted in Title 47 of the U.S.Code, the new statutory rules for access protection disallowed unauthorized access to the work in the first place. Notably, access protection rules were legally different from copyright, which protected the underlying work from infringing acts identified in 17 U.S.C. § 106.

Statutory Response

In addition to protecting the integrity of established "self help" technologies, law can also be used proactively to protect owner rights, particularly if institutions cannot be anticipated to arise. This more directed strategy was deployed most extensively in the legal framework of the Audio Home Recording Act of 1992, 47 which concerned the sale of digital audio tapes and home recorders that can perfectly copy music from CDs and other digital tape. In combined legislative action, Congress imposed levies⁴⁸ on the sale of digital audio tapes and home recorders, established a Serial Copy Management System that was to be installed to prevent the making of serial digital copies of sound recordings, 49 and outlawed its subsequent circumvention.⁵⁰ As a proactive strategy similar to the access protection of satellite signals, the Digital Millenium Copyright Act⁵¹ of 1998 outlawed the circumvention of access protection technologies designed to protect content on the Internet,⁵² as well as the commercial trafficking of devices that could be used to circumvent either access⁵³ or copy protection.⁵⁴

In summation, it is the openness and interactivity of the logical interface – composed of procedural, organizational, technological, and legal elements -- that often enables property rights to be enforced. This openness of process can sometimes produce unforeseen outcomes, but is to be preferred to administrative decisions based on rational-comprehensive considerations. ⁵⁵

However, an open system poses an uncertainty to the fair use provisions in copyright law that should not be overlooked. Through the market harm criterion of Section 107, the primary fair use factor attempts to determine actual or potential damages to rights owners that result from infringement. With an incomplete and open logical interface, judgmenets under this criterion sometimes implicate far more subjectivity than what many may acknowledge. Perhaps a less ambiguous manner of implementing fair use protection is to define and establish more forthrightly a domain of underlying use rights that must be protected. We now turn to this discussion.

4. ECONOMICS AND FAIR USE

Courts now implement the four part test of Section 107 with a "sensitive balancing of interests" that weights and resolves opposing factors into a blunt vector of "yes" or "no" that frequently reduces to injunction or fair

use. As there are no precise definitions to these considerations, what is ostensibly a sensitive balancing is actually quite often an arbitrary one.

As alluded, the market harm test is very subjective. To avoid market harm (per *Campbell*), a defendant must prove that there is no market for either unit sales or use-licensing of a particular work.⁵⁷ This evidently requires, *ab initio*, a proper definition of a market, and a subsequent finding that the defined entity does not exist for the application at hand.

No clear definition of a copyright market has ever been stated, nor is it evident what such a definition might look like. The implicit notion of a market generally used in copyright law does not comport with either basic economic theory or antitrust law, which considers actual or potential cohabitation of *economic markets* by two different identified *goods or services* that are reasonable substitutes for one another (most often measured by high cross-price elasticities of demand⁵⁸ or the reasonable potentiality of competitive entry⁵⁹).

However, the economic definition of a market based on consumer substitution is not easily extended to *copyright markets*, where a protected work frequently has no real legal substitutes, actual or potential. Rather, legal analysis in copyright law implicates co-habitation of copyright markets by comparing different *kinds of exchanges* that may come of a protected work. Definitions of economic and copyright markets then implicate two entirely different conceptual frames. And while economic/antitrust definitions implicate consumer or producer behavior that is often quantitatively discernible -- if not statistically measurable – copyright definitions are considerably more subjective.

As a second consideration, market analysis in copyright law now considers not only demonstrable actual exchanges, but also those that are *likely* to be developed.⁶⁰ In this regard, an assessment of likelihood must determine which conceivable events can reasonably be expected to evolve, and which are largely imaginable. An appropriate market definition would then require some delineation of standards useful toward market definition. However, establishing such standards for a copyright market can be a tall order, even for bilateral transactions, due to the openness and inherent unpredictability of responses within the logical interface.

The Ambiguities of Market Harm

The problem of economic definition in copyright markets can be illustrated through a number of practical examples:

1. <u>Bilateral Transactions</u>: A conceptual difficulty of market definition in a matter of bilateral exchange appeared in *Ringgold v. Black Entertainment Television*, where artist Faith Ringgold sued a television network for using a poster of her work in the visual background of a program. Holding for the defense, the District Court found that the program's use did not create a market substitute and would not therefore affect the artist's ability to license her work elsewhere.⁶¹

The Circuit Court reversed after Ms. Ringgold claimed that she had been *asked* on a number of occasions to license her work.⁶² However, Ringgold did not claim to have actually *concluded* any such transaction for the work in question.⁶³ This outcome could have been an indication that exchange was possible but *not particularly likely*, an intuitive indicator of *market failure*. In upholding Ringgold, the Court found potentiality of market exchange to be based on the act of "asking", rather than in the likelihood of any action actually arising.

2. <u>Licensing Institutions</u>: When licensed uses have not yet congealed, the resulting market definition is heuristic and often circular. A dissent in Texaco identified the problem: "the [required] market will not crystallize unless courts reject the fair use argument ... but, under the statutory test, we cannot declare a use to be an infringement unless... there is a market to be harmed."⁶⁴

The *Texaco* dissent brought forth considerable more uncertainty about the likelihood that viable licensing arrangements would eventually result in a manner that would accommodate Texaco's actual needs. The CCC licensed only 30 percent of Texaco's journals in use, and the CCC's per transactions and blanket license had particular features that might have interfered with likelihood of licensing had Texaco tried. Whether the shortfall of content and the ease of licensing might have changed was, to the dissenters, anyone's guess. There was no great assurance that licensing procedures would accommodate every reasonable concern.

3. Excluded Beneficiaries: Prof. Gordon warns that a "potential user may wish to produce socially meritorious new works by using some of the copyright owner's material, yet be unable to purchase permission because the market structure prevents him from being able to capitalize on the benefits to be realized." Particularly in cyberspace, the licensing of a shared project among a distributed base of noncommercial users may be quite difficult. That is, an informal association of permanent or transitory "cyber-pals" would face the daunting task of assigning licensing costs to contributing participants, who may have different degrees of commitment and willingness to donate to the project. Market failures in club or public

goods can result if each consumer acknowledges personal gain but fails to internalize the broader gains of other parties in the common-use coalition. As a practical matter, it would be difficult to gauge what licenses will be negotiated in the first place, and which will remain sustainable through subsequent strategizing by individuals who attempt to reduce their contributions.

- 4. <u>Business models</u>: It is difficult to judge market harm when business models are unformed or evolving. Both the District and the Circuit Court recognized the complications of disrupted business models in the *Napster* cases, where unauthorized individuals reproduced and distributed through the internet the contents of copyrighted sound recordings.⁶⁷ The defense had contended that the Napster system could actually have stimulated record sales and improved profits.⁶⁸ For their part, the labels presented evidence that confirmed their *intent* to enter the digital services market, and argued that their *prospective* business models would be hurt.⁶⁹ The Court was evidently invited to a fair bit of subjective consideration regarding actual and imaginable events.
- 5. Widespread Harm: In examining market harm, Courts in copyright cases also consider how unrestricted and widespread conduct similar to the defendant's would adversely affect the potential market for the original work. This consideration explicitly moves the notch from demonstrated likelihood (however judged) to mere possibility. There is nothing particularly economic or rational about considering harms from conceivable events without due regard to their respective costs and eventual practicality.

Secondary Categorizations

Given the ambiguities of market harm, it may be appropriate to replace the existing fourth criterion of Section 107 with a clause that directly implicates three types of use, as identified and defined below. We must recognize that market forces and interfaces may evolve differently with respect to statutory protections for each.

Courts have distinguished three categories of secondary use of copyrighted materials: (1) *superseding* works that directly supplant original sales, ⁷¹ (2) *derivative* works that recast copyrighted material to a new medium "that creators of original works would in general develop or license others to develop [in] traditional, reasonable, or likely to be developed markets" and (3) *transformative* works that "add something"

new, with a further purpose or different character, altering the first with new expression, meaning, or message."⁷³

In clear statutory framing, Section 101 of the Copyright Act defines the term "derivative". ⁷⁴ Derivative works may include, *inter alia*, translations, musical arrangements, dramatizations, fictionalizations, motion picture versions, sound recordings, art reproductions, abridgments, or condensations. ⁷⁵

Two definitions can be added to Section 101. Redacting the Supreme Court's definition⁷⁶ and wording in 17 U.S.C. §107,⁷⁷ a transformative work could be similarly defined in the following manner:

A *transformative* work is a work that adds new meaning to previous copyrighted content. Transformative works would include satires, parodies, criticisms, comments, book reviews, classroom materials, news articles, research, and sequels and adaptations that add substantial new meaning to existing characters and plots.

Finally, an additional definition of superseding could be added to Section 101:

A *superseding* work is a direct reproduction or performance of a work that is expected to directly substitute for actual sales or existing licensing opportunities.

Each kind of copying presents different market consequences. Substantially similar reproductions and performances of copyrighted material may supersede or displace sales and licensing of the original product, and may create immediate financial distress. Derivative copies tend to interfere with an owner's actual or potential ability to produce work in predictable applications that have wide market appeal. When the use is transformative and accordingly implicates substantially new meaning, "market substitution is at least less certain, and market harm may not be so readily inferred". From an economic perspective, these distinctions are of primary importance.

5. SUPERCEDING WORKS

In substituting one reproduction or performance technology for another, superseding copying can admittedly be economically efficient in the short run.⁷⁹ That is, copying in pirate factories or user hard drives may indeed entail lower production costs, drive prices toward marginal cost, and lead to more efficient modes of product delivery. However, primary rights

owners can be harmed in the process unless they can expropriate some gains. There is then no compelling reason why copyright should be relaxed in favor of a superseding technology, even if it is ostensibly more efficient. In a free market, copyright owners would yet have the financial incentive to adopt the more efficient production technology themselves (if unpatented), license the more efficient delivery technology (if patented), or merge or joint venture with the more efficient operatives.

Alternatively, copy technologies may have higher production costs than the original technology. Despite production inefficiency, these copies may survive in the market because they can underprice original product; copyists need not recover the considerable sunk costs necessary to produce intellectual property in the first place. Although infringement would push market prices in the direction of marginal cost, copyists nonetheless would be substituting into a less efficient production technology while simultaneously draining off contributions made toward sunk cost recovery. As both producer surplus and social welfare decline when copying is allowed, the case for copyright protection here is even more compelling

The potential for substitution and sales displacement in copyright law can be related practically to product attributes and consumer tastes in the market at hand. Among *extrinsic considerations*, ⁸⁰ potentially infringing products may be gauged for sufficient similarity to underlying works; extrinsic considerations may include, *inter alia*, product design, material, subject matter, and setting. By contrast, *intrinsic considerations* focus on the response and impressions of the intended user base. ⁸¹ Intrinsic considerations would include customer demographics, tastes, and conceivable responses to differences in product quality or price. While the potential for infringement can be found when two works are sufficiently similar, ⁸² the ultimate determinant of substitutability must be the behavior of prospective buyers.

The Fourth Circuit performed in 2001 a thoughtful economic analysis in *Lyons Partnership L.P. v. Morris Costumes, Inc.*, 83 where infringement involved the commercial rental of a dinosaur costume that resembled the famous television character "Barney". After the District Court found that evidence failed to support the idea that the costumes were sufficiently similar to cause confusion among the adults who actually rented them, the Circuit Court remanded with instructions for an injunction. 84 Evidence confirmed that younger children often could not tell the difference between the costumes; purchasing adults then expectedly would substitute between the two on many occasions.

In the Circuit Court opinion, "the relevant question that courts must ask in determining whether a work has been copied is not whether society as a whole would perceive the works to be similar in an aesthetic sense, but rather whether the works are so similar that the introduction of the alleged copy into the market will have an adverse effect on the demand for the protected work." So Consequently, "the economically important views are those of the young children ... Even if adults can easily distinguish between costumes, a child's belief that they are one and the same could deprive Barney's owners of profits." Considering again the anticipated responses of young children, similar approaches regarding audience perception, market definition, and sales displacement appeared in *Ideal Toy Corp. v. Fab-Lu Ltd.* and *Medias & Company, Inc. v. Ty, Inc.* 88

The three decisions pass the litmus test for sound economic reasoning. Each made a studied consideration of product characteristics, intended consumers, the practical nature of decision-making, and the resulting likelihood of product substitution by the copy. Each step of the process admits room for important evidence and obliges litigants to recognize important commercial consequences. Plaintiffs might have improved their case had they provided more direct evidence (e.g, surveys) to confirm empirically that adult buyers would switch to product lookalikes if they felt children would not notice. For their part, defendants might have questioned the absence of such evidence.

No Market Substitution

The famous case of *MCA v. Wilson* represents a good example of a failure to consider properly the nature of competition and product substitution..⁸⁹ Appearing in an adult musical "Let My People Come" in the New York night club The Village Gate, actors performed and recorded "The Cunnilingus Champion of Company C", which was a bawdy rendition of the wartime classic "Bugle Boy" with the same underlying melody.

Upholding the District Court, the Second Circuit in 1982 ruled that the two songs qualified as competitors in the entertainment field and that "Champion" was therefore an infringement. In the Court's notion of competition, both songs were performed on the stage, marketed in record stores, and sold in printed copies, and were therefore market rivals. Testimony, accepted as credible by the trial court, indicated that "Champion" was made to sound like "Bugle Boy" to create publicity.

By economic standards, these songs assuredly were not competitors. Real competition between two products depends upon the willingness of prospective buyers to interchange them. A sophisticated dissent made the proper economic points:

The issue is not whether the parody uses the same media as the copyrighted work – most parodies do – but whether it is 'capable of serving as a substitute for the original' (A. Latman, The Copyright Law, 215 (5th ed. 1979)), which depends on demand and product overlap rather than on the market in which the two products are vended. Applying this correct standard, it is eminently clear that the two works respond to wholly differing demands and that a customer for one would not buy the other in its place. A raucous and explicitly sexual satire is not a substitute for the innocence of Bugle Boy" ⁹¹

More than a decade later, Alan Katz and Chris Wrinn wrote a book "The Cat NOT in the Hat" that depicted the events of the O.J. Simpson trial using the famed poetic doggerel of children's author Dr. Seuss. Nothing was taken from original Seuss but trademarked illustrations (most famously, the elongated hat) and the author's poetic style. After the District Court enjoined the book's cover and illustrations based on trademark dilution, the Ninth Circuit Court in 1995 went further to establish harm to the copyright. 92

In a remarkable bit of jurisprudence, the Court held that Katz and Wrinn made "no effort to create a transformative work with new expression, meaning or message." Though the two authors copied none of Seuss' words and the plaintiff did not attempt to prove displaced sales, the court inferred market harm from lost goodwill and reputation that could accrue to the dead author's estate. ⁹⁴ Unsubstantiated as a practical matter by empirical evidence, this potential loss of goodwill was held to outweigh unrecovered expenses that redounded to the publisher, as well as the consumer loss resulting from a suppressed product. ⁹⁵ Here too, the imagined market harm has no relation to likely consumer behavior. There was no evidence presented, nor does it seem likely, that the Seuss book would have lost readership or goodwill among its primary intended audience of school children, teachers, and parents. ⁹⁶

6. DERIVATIVE WORKS

Turning to derivative works, secondary copies do not necessarily supersede sales of original materials, and at times actually may promote them. However, in adapting the basic message of a copyrighted work for representation in a different media (e.g., books to screenplays, prints to t-shirts), derivatives take substantially from the heart of a copyrighted product and may interfere with the primary owner's rights to penetrate the

new market himself. Consequently, unauthorized derivative uses may affect how a copyrighted work is subsequently developed, and conceivably how it is originated.

Courts generally have upheld the right of copyright owners to receive payments for derivative uses of their works and have explicitly rejected the suggestion that a positive impact on primary sales of their works negates entitlement. ⁹⁷ Indeed, "a speculated increase in ... sales as a consequence of ... infringement would not call the fair use defense into play as a matter of law. The owner of the copyright is in the best position to balance the prospect of increased sales against revenue from a license." The Supreme Court made the point more concretely; even if a "film producer's appropriation of a composer's previously unknown song ... turns the song into a commercial success, the boon to the song does not make the film's ... copying fair." ⁹⁹ This rulings adhere to the basic point of Coase that fair market value can generally be established in negotiations. ¹⁰⁰

However, the appropriate legal means for protecting derivatives has been sometimes contested. Judge Alex Kozinski and attorney Christopher Newman suggested that injunctions on derivative works be abandoned in favor of liability rules that would establish reasonable royalties based on market benchmarks or demonstrated damages, and attorney Judith Bresler now proposes limited considerations for derivative works of fine art. Local Indeed, Courts themselves have recently acknowledged the conceivable usefulness of liability rules to facilitate copyright transfer to derivative compilations in *New York Times Co. v. Tasini*, and *Greenberg v. National Geographic Society*. The proponents of expedited licensing do have a point; immediate injunctions discourage or suppress some secondary applications, and it is unclear whether derivative license revenues will increase the likelihood of any primary investment, which must often quicken well before secondary markets congeal.

Conceding dubious incentive effects on most primary investments, Landes and Posner point out that copyright protection in derivative markets enables *coordination effects* that permit more efficient development of the product sequence. For if secondary rights are exclusively controlled for a time, major producers -- such as movie studios and record labels -- can be expected to synchronize better their production and marketing operations. Without protection of derivatives, primary producers might purposely but inefficiently delay product launches simply to ensure that secondary products are lined up for immediate release and entry. Alternatively, primary producers may close gaps by speeding up secondary production.

Made necessary by the lack of copyright protection, the resulting strategizing nonetheless be economically inefficient.

Seminal articles by Arnold Plant¹⁰⁶ and Stephen Breyer¹⁰⁷ unwittingly illustrate the issue. Both articles seem to suggest that copyright for books can be abandoned if original publishers can warehouse large inventories for the purpose of deterring or competing vigorously with eventual copyists. Of course, such preemptive stockpiling represents a considerable expense that may reduce substantially the profitability of book publishing in the first place. The process would also heighten publisher risk, as the additional costs of stockpiling might not be recovered if subsequent sales underperform initial expectations. The additional costs posed by preemptive strategizing and lack of coordination also undermine Stewart Sterk's economics-based suggestion that derivative rights are justified *only* when projected returns from the original work cannot recover production costs, and the ensuing returns from the license are sufficient to make up the deficit.¹⁰⁸

There are two additional reasons why property rules are generally preferable to liability rules for licensing of derivative works. First, the ensuing rules will have precedential value. For example, if Warner Bros. were permitted to take the Harry Potter novels for their highly successful movies, all movie producers — as well as game, doll, and clothing manufacturers — would also come to claim easy access to a whole drove of subsequent best-selling content from Potter, possibly including sequels. If derivative markets are not protected, market onslaught by such secondary works would be overwhelming and would promulgate no real efficient deployment of cultural resources. Second, derivative infringements now entail new digital uses. It may then be particularly impractical to establish license benchmarks based on imaginary or emerging business models in markets that are yet to congeal.

To the point of the discussion, "concerns are deeper than just audience confusion. Intellectual property law is also concerned with the chaos that can occur with multiple authors pursuing their vision of some common material. Hence, copyright law serves to give the author exclusive right to control all derivative work." With legal protection of derivative works, the copyright holder may "curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable."

However, while copyright must extend to derivative works to allow coordination economies in the initial years, there is no theoretical reason why all forms of derivative protection must necessarily run the lifetime of the original copyright. Indeed, considerable social gains could be had if the right to produce some derivative works (particularly movies, plays, and book sequels) could be spun off at some earlier point. This temptation nonetheless begets three practical concerns. First, a protected class of derivatives must be carefully defined; e.g., would space shifts, compilations, abridgements, translations, screenplays, sequels, and hard merchandise equally qualify for reduced protection? Second, the primary owner must be entitled to moral rights of attribution and integrity that may permit her to identify or disassociate with the new work. ¹¹¹ Third, to avoid the legal difficulty of later uses of a split copyright, the secondary user can have no copyright in a derivative work. An unauthorized derivative use must then be awarded the limited status that is now granted to a secondary mechanical reproduction of a musical composition, which can be taken from a previously recorded work without permission but enjoys no copyright protection. ¹¹²

7. TRANSFORMATIVE WORKS

In contrast to superseding works that reduce original sales and derivative works that displace predictable licensing opportunities, transformative uses may build on previous works to create an understood context from which advocates may more powerfully criticize or comment on social beliefs and institutions; e.g., the reuse of a patriotic or religious melody can add punch to a criticism aimed at a government or church. Sometimes tasteless, transformative uses historically included a number of song parodies, ¹¹³ a comedic reuse of a photographic pose, ¹¹⁴ a music collage involving a U2 recording, ¹¹⁵ the Seussian "Cat NOT in the Hat", ¹¹⁶ adult versions of Disney, ¹¹⁷ a burlesque of the movie "Gaslight", ¹¹⁸ a satiric sequel of "Gone with the Wind", ¹¹⁹ and post-Modern visual art that appropriated recognized images for social criticism. ¹²⁰

As alluded, the use of implanted public icons may actually increase the emotional impact of the political and social comment, particularly if explored by artists and musicians not given to scholarly or prosaic expression. For example, Alice Randall criticized southern history and racial attitudes in "Gone with the Wind" far better as an author than she might have as an historian, and Jimi Hendrix protested militarism far better with his Woodstock version of "The Star Spangled Banner" than he could ever have in a speech or leaflet. In this respect, the Supreme Court held that a restriction on the form of communication – regarding a t-shirt that said "Fuck the Draft" -- amounted to a restriction on speech itself by

defusing the speaker's anger.¹²¹ It is then unrealistic to contend that transformative artists who access a work do so simply to "avoid the drudgery in working up something fresh",¹²² or that they may otherwise find an equally effective weapon by finding a different original that would be willingly licensed.¹²³

A parody that pokes fun at an original work is a quintessential example of a work with a new meaning. Indeed, Justice Souter ruled in *Campbell v. Acuff-Rose Music, Inc.*, ¹²⁴ that a parody of Roy Orbison's "Pretty Woman" shed light on the blandness and easy sexuality of the earlier work and, as a comedic form of criticism, is transformative. ¹²⁵ The judge distinguished between a critical work and other derivative works generally protected by copyright; critical transformations suppress demand while derivative works usurp it. ¹²⁶ Considering prospective transactions costs, Souter stated that "the [limited] likelihood that creators of original works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market." ¹²⁷

Though protective of parody, Courts have generally held that transformative works that use existing works as weapons to direct criticism at institutions and social norms do not qualify for fair use. In *Williams v. Columbia Broadcasting Systems, Inc.*, ¹²⁸ defendants used the comic figure of Mr. Bill to ridicule attitudes in the U.S. Navy. Holding for the plaintiffs, the court ruled that a transformative work "does not gain protection of the fair use doctrine if it merely uses the protected work as a means to ridicule another object [citing Campbell v. Acuff Rose, 510 at 580]." ¹²⁹

The idea that a targeted parody of the original work is appropriately exempt, while more general satiric or critical use is not, is consistent with Richard Posner's distinction between "target" and "weapons" applications; the former criticizes the original work while the latter uses the original to criticize something else. ¹³⁰ Posner too would protect only the parody, as he contends the satiric use would predictably be licensed in a voluntary transaction and therefore "there is no objection to letting the market make the tradeoff." ¹³¹

Posner's distinction regarding the transactional ease of licensing satire seems contrived. Parody or satire, copyright owners can be expected to strongly resist licensing secondary uses involving sexual or lowbrow comedy, political content, artistic style, musical idiom, or cultural/historical criticism that they find tasteless, disrespectful, inartistic, or impolitic. They may invoke some expanded idea of moral rights beyond the limited rights of attribution and integrity that the copyright

statute now extends in 17 U.S.C. § 106(a). As such, transactions costs may be equally formidable obstacles that block a wider variety of transformations. From an economic perspective, the case for a balanced resolution of these alternative forms of expression may resolve negotiating difficulty and reduce producer uncertainty.

The Supreme Court itself is ambiguous on the distinction regarding the special protection of parody. Indeed, the Supreme Court acknowledged the potential for a wider definition of fair use in *Campbell v. Acuff Rose*, albeit fleetingly in a footnote. Yet the Court elsewhere makes a distinction: "parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing." This dictum would form the foundation for the later ruling in *Williams v. Columbia Broadcasting System.* 134

Economic Analysis

Any process that awards injunctions against transformative works with new meaning necessarily suppresses new product and, in so doing, produces outcomes that are economically inefficient. If published, such works would widen consumer choice, contribute to political awareness, and heighten cultural sensibility. Moreover, transformative works with new meanings tend to reach largely new audiences, and do not predictably displace sales of primary goods or interfere with later undertakings of derivative licenses. Accordingly, it is unlikely that any creator's incentive to produce primary work depends on whether a small class of transformative uses can be published or not, or that an idiosyncratic use will cause producers to modify their coordination tactics or business models.

Other aspects of the present fair use test are problematic for transformative undertakings. Though Congress "eschewed a rigid, bright line approach to fair use", 135 the present doctrine of fair use treats a commercial nature as a negative factor. Carrying a negative factor, commercial publishers who are unsure of clearing this and other legal hurdles may shy away from publishing transformative works. By contrast, a facilitating attitude toward commercial presentation may actually encourage wider production and dissemination of artistic comment and criticism

As yet a third complicating consideration, creators and publishers may face a daunting criteria in the third fair use factor, which is related to the allowable amount and substantiality of the taking. Courts now do not require that takings for parody be minimal; rather, a non-minimal taking is permitted to present a reasonable "conjuring up" of a copyrighted work to make its wit recognizable. However, the application of the "conjuring up" rule can be highly subjective and is economically problematic; additional material that exceeds the necessary conjuring may broaden or deepen the punch of a critical work, and works that borrow excessively create tedium and may suffer harsh review and reduced demand. The market then has forces that constrain conjuring to efficient levels that widen the appeal of a secondary work.

As a famous example of the last point, a published comic book showed famous Disney characters engaged in sex and drug use. Although a parody, the work was enjoined nonetheless because the defendants took more "than was necessary to place firmly in the reader's mind the parodied work and those specific attributes that [were] to be satirized". In attempting to gauge the reader's mind, the court here failed to consider the possibility that the added material could have actually been humorous to the intended audience, and therefore capable of increasing the appeal of the new product. As a general consideration, the matter begs a rule that would allow a broader variety of uses than the present fair use rule.

The upshot is clear. As illustrated by the legal banter in *Suntrust*, ¹³⁸ present legal distinctions regarding commerciality, conjuring, and parody/satire are often ambiguous and may then depress incentives for presentation or publication of speech and expression. Moreover, as overseers of creative processes, transformative artists and publishers should be encouraged to offer their best interpretation rather than mince words with clipped messages that may diminish intended meaning, market appeal, and a committed adherence to the First Amendment. ¹³⁹

8. ECONOMIC DAMAGES

Infringements of copyright are often stopped through the issuance of preliminary injunctions. Generally, the single most important prerequisite for the issuance of a preliminary injunction is the showing of irreparable harm. While Courts outside of copyright cases have found that contended irreparable harm must be "likely and imminent, not remote and speculative", and that the injury must be something beyond simple monetary damages, ¹⁴¹ the task in copyright is considerably less onerous. In the copyright domain, "a showing of a prima facie case of copyright infringement or reasonable likelihood of success on the merits usually

raises a presumption of irreparable harm for preliminary injunction purposes." ¹⁴² The requirements to make a prima facie case are simple; plaintiff must show copyright ownership, and that defendants have engaged in unauthorized copying or violated exclusive owner rights. ¹⁴³ Moreover, "once a prima facie case of copyright infringement is established, the allegations of irreparable injury need not be very detailed because such injury is *generally assumed*." [emphasis mine] ¹⁴⁴

From an economic perspective, there is no reason to believe that acts of unauthorized copying necessarily lead to *irreparable* market harm to the original rights owner. Nonetheless, the use of injunctions statutory damages may be economically justified for superseding and derivative applications. Superseded business (e.g., record labels) may be hurt to the core by repeat infringement, which can be widely distributed in a worldwide market. Ex post economic damages would be difficult for plaintiffs to measure and courts to confirm. Moreover, measuring damage to actual and potential markets from derivative infringements would be equally, if not more, difficult, as these markets may take some time to congeal.

Per 17 U.S.C. §504, may reasonably award for copyright infringement either actual damages or defendant profits, or statutory damages. 146 Judge Richard A. Posner offers a sophisticated rationale for the compensation structure:

If the infringer makes greater profits than the copyright owner lost ... the owner is allowed to capture the additional profit even though it does not represent a loss to him. It may seem wrong to penalize the infringer for his superior efficiency and give the owner a windfall. But it discourages infringement. By preventing infringers from obtaining any net profit, it makes any would-be infringer negotiate directly with the owner of a copyright that he wants to use, rather than bypass the market. ¹⁴⁷

From a perspective of short-run allocative efficiency, any compensation that exceeds actual damages deters efficient transfers that would take otherwise place. Nonetheless, Posner correctly points out that the higher penalty is nonetheless useful to dissuade brazen and repeated violators who may otherwise profit from infringement, but scoff at negotiating. This could be noticeably found among famous artists who may prey upon unknown producers. From a long-run perspective, the additional protection is economically efficient if it can provide greater security and stimulate additional production.

Granting the need for strong deterrence of superceding and derivative works, we must acknowledge that transformative works may be dissuaded if punishment is excessive. As a vehicle for new meaning, the work evidently incorporates considerable social value. Moreover, higher transactions cost can be reasonably expected, as two artists attempt to assess the relative added worth of a work with little chance of displacement, but some considerable taking of moral right.

Based on a distinction by Haddock and McChesney, ¹⁴⁸ copyright judges may well distinguish transformative works based on a distinction in tort law between trespass and nuisance. ¹⁴⁹ There is no balancing in trespass of relative costs and benefits; the defendant will be subject to liability regardless of whether he caused actual financial harm to the other party. Courts in trespass actions then award injunctions and punitive damages and make no exception for de minimis harm. By contrast, nuisance is actionable only if demonstrable harm outweighs utility gained; paid damages are based on economic loss. In nuisance cases, "failure to show actual damages ... usually results in the denial of all relief because of the failure to satisfy the 'substantial harm' requirement for liability." ¹⁵⁰ So long as damages are paid, injunctions are rare.

The authors point out that assets which can be appropriated through effective negotiation are best protected by property rules, while those that may encounter predictable licensing difficulties should be subject to liability rules and ex post compensation. The key determinant would be the expected transactions cost needed to obtain agreement. Based on expected transactions costs, it is then entirely reasonable to consider different means of compensating rights holders, depending on whether or not copying is transformative, market exchange in not predictable, and negotiation is "thin".

The distinction based on transactions costs can implicate transformative works. In view of predictable negotiation difficulties, Courts may forego injunctions and limit plaintiff awards for transformative infringement to actual damages or benchmark royalties, which correspond to demonstrated lost profits or foregone license fee. Plaintiff rights to receive statutory damages for transformative uses may be entirely restricted.

From a short-run economic perspective, efficient compensations for transformative uses are efficiently based upon actual damages. Moreover, if infringements are compensated with amounts that exceed true social cost, (i.e., actual damages), it is difficult to believe that such confiscatory

assessments will stimulate any more primary works, or facilitate their coordination.

9. LIABILITY RULES

I shall now argue that Section 107 might be improved if Congress establishes optional liability rules for uses that are demonstrably transformative.

The concept is based on an economic notion that transformative works must have a widened outlet, and a philosophic notion that primary rights owners are equitably entitled to just deserts for efforts that they have contributed to its value. 153 Arbitrated royalties can be found elsewhere in the copyright industry. The suggested process is also similar to common procedure in patent law, where injunctions are rare. Rather, patent infringement cases are generally resolved with court-determined royalties that are based on fifteen judicial criteria. 154

The suggested modification of Section 107 would require two key modifications in Title 17: i.e., transformative works must be defined and administrative procedures must be established.

Definitions

We must modify Section 101 to establish a definition of transformative works that must be covered. Stated above, a statutory definition would establish a precise list of uses that contain new meaning and which therefore qualify as transformative. This definition would parallel the statutory definition of derivative works that now appears in 17 U.S.C. 8 101

The concept of "new meaning" evidently admits some subjective judgment, but is preferable to other related concepts that have been used or suggested elsewhere as a justification for fair use. Suggested vagaries from judges and writers have included allowances for "productive copying", 156 "socially laudable purposes", 157 copying for "a different purpose from the original", 158 "the prevailing understanding of the community", 159 or "customary practice". 160 With this imposing lineup, "one cannot help but suspect that, as a test, 'transformative in purpose' provides little more guidance to a judge than would be supplied by his or her own set of personal values." Seemingly confirming last point, Judge Leval stated in *Texaco* that photocopying of a single article might be

fair if a scientist could avoid carrying a whole journal, but would not be fair if used to save space in one's filing cabinets. ¹⁶²As a final point, the "community understanding" and "customary practice" standards of Lloyd Weinrib provide no ethical vision and would apparently justify unauthorized downloading of music files on college campuses and trendy towns less accommodative of copyright law.

The key to determining what is transformative is the infusion of new meaning and not artistic creativity *per se*. For example, Ravel's reorchestration of Mussorgsky's "Pictures at an Exhibition", or Liszt's piano adaptation of Wagner's "Liebestod", are artistically spectacular instrumentations but do not (to my mind) transform the intended meaning of the original composer. By contrast, parodies of "Oh Pretty Woman" and "When Sonny Gets Blue" add new meaning to the originals but are trivial or artistically modest. Most interesting for debate are transformative works with great artistic creativity and new meaning, such as John Coltrane's jazz rendition of "My Favorite Things" or a Gospel version of Handel's "Messiah" that is performed annually in Lincoln Center.

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Administration

The administrative process for royalty setting can be modeled upon arbitration procedures negotiated between ASCAP and the U.S. Department of Justice. ¹⁶³ We may allow new arbitration procedures to be implemented through statutory terms in Section 107.

Any user of a copyrighted work may request arbitration from a designated magistrate to determine a fair licensing benchmark for a particular use of a previously published work:

- (a) The prospective user must submit a written request to the copyright owner or her designated agent.
- (b) The request must be activated before the initiation of any litigation regarding the particular use.
- (c) Upon receipt of a written request, the copyright owner must within sixty days advise the user in writing of a reasonable license fee, or the information that it would require to make such a determination.
- (d) If the parties are unable to reach agreement within sixty days from the date when the request is received, the user may apply to the Court for a determination of a reasonable fee retroactive to the date of the request.

- (e) If legally agreed upon, the Court may attempt to resolve disputes through arbitration instituted under the jurisdiction of a specially appointed court magistrate.
- (f) A magistrate shall determine actual damages or reasonable royalties based on prevailing market rates established for similar uses of the copyrighted material
- (g) Arbitrators may establish no fee for any secondary work unless it is deemed to be transformative, as defined by 17 U.S.C. § 101.
- (h) Arbitrator decisions regarding the nature of the transformative work may be appealed to the District Court at large.
- (i) Arbitrator decisions regarding the size of the adjudicated royalty may not be appealed.

Per the terms of f.), arbitrators may set licensing fees in a number of manners. If actual damages are not suitable, they may appoint experts and/or obtain data from licensing databases, such as the Royalty Source Intellectual Property Database, 164 which gathers data on licensing from public financial records, news releases, and other articles and references. Arbitrators, experts, and clerks may also subscribe to periodicals and organize conferences related to the matter of licensing, as is now done by university professionals in the area of technology transfer. Disputants themselves may assist in the process by gathering data from suitable sources.

Instead of gathering data and appointing results, arbitrators alternatively may deploy procedural algorithms that are now used in buyout valuations among joint ventures. One suggested method is as follows. ¹⁶⁵ Each disputant must retain a valuation expert to value the work in question, or the resulting market harm. If the two valuations are within a designated percentage of one another, the average of the two is a conclusive value. Otherwise, a third valuation is necessarily performed by an appointed third party. The appropriate valuation is the average of the third valuation and the fee that is closest to it.

Were they adopted, liability rules based on market benchmarks or actual damages might have been reasonably deployed in a number of cases. For example, in *Suntrust*, ¹⁶⁶ the District Court recognized that the copyright owners administered a well-established market for licensed sequels that could have been extended to provide a reasonable royalty benchmark for TWDG. ¹⁶⁷ Alternatively, using data from the Royalty Source Intellectual Property Database, this author suggests that characters

or plots of existing works are appropriately licensed with royalties that range between 8 and 10 percent. 168

As another example, a reasonable benchmark apportionment for reproductions and performances of recognized melodies in transformative musical compositions would be evenly divided royalties between the original composer and the new lyricist. This would award equally the contributions made by the composer of the melody and the transformative lyricist who creates the imaginative change in words that sells the work to a new audience.

As a general rule, arbitrated licensing fees can be expected to range between 5 and 10 percent of the new sales price. Admittedly, a number of allowed uses may go badly compensated for lack of a good benchmark (although no price seems as deliberately ignorant of the market as the present choice of null or infinite price – i.e., fair use and injunction). This said, business practices and institutions will have the greatest opportunity to fill out only if exchangeable property rights are defined and transferred, possibly with court encouragement. By establishing respective rights for creators to exchange in free or administered markets, Courts then establish the requisite institutional support for complementary databases and negotiating agents that can arise in the logical layer. Arbitration and benchmark then provide the greatest opportunity and incentive for logical operations to "thicken".

10. CONCLUSION

Though an ambiguous concept, fair use might yet remain an affirmative defense to protect a number of applications, particularly when the transactions costs of licensing remain high relative to the gain from the transaction, or when use implicates group or public benefits that might not be represented at a negotiated exchange. The relative importance of transactions costs may be particularly significant when the exchanges are infrequent and idiosyncratic. Such transactions costs may also be relatively high when beneficiaries are disparate and ephemeral.

As more information is learned, initial categorizations may prove erroneous, and the borders that delineate rights and exemptions can then be suitably modified. The suggested modification then implicates a perspective on the role of law and policy-making that is purposely incrementalist and experimentalist. Action in the logical layer then proceeds in an open-ended game where relevant information is slowly revealed in the play. It is an appreciation of this interactive logicality that

safeguards the system, and is a concept that an economist would endorse.

NOTES

¹Campbell v. Acuff Rose, 510 U.S. 569, 580 (1994); 114 S. Ct. 1164.

⁵⁴"The [Supreme] Court suggests that the aim of parody is 'comic effect or ridicule', but it then proceeds to discuss parody more expansively in terms of its 'commentary' on the original. We choose to take the broader view." Supra note 3, at 1272.

⁶A. Kozinski and C. Newman, What's So Fair about Fair Use?, J. COPYR. SOC'Y 513, 525 (2000).

⁷Such expansion of the right to receive compensation for the use of intellectual property is particularly appropriate in commercial markets, where market prices signal value and implicitly assign producer resources among contending uses. *See also* Paul Goldstein, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (1994); Jane C. Ginsburg, Authors and Users in Copyright, 45 J. COPYRIGHT SOC'Y U.S.A. 1 (1997); Robert P. Merges, The End of Friction? Property Rights and Contract in the Newtonian World of On-Line Commerce, 12 BERKELEY TECH. L.J. 115 (1997).

⁸P.N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1132 (1990) ("there may be a strong public interest in the publication of the secondary work [and] the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found."); A. Kozinski and C. Newman, supra note 7 ("The best way to promote production of valuable intellectual works is to give authors and inventors the ability to demand and receive compensation for the values they create.... The best way to do this is to grant property rights that give their products exchange value.")

 $^{10}\text{Lydia}$ P. Loren, "Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems", 5 J. INTELL. PROP. L. 1, 6 (1997).

¹¹Mark A. Lemley, "The Economics of Improvement in Intellectual Property Law", 75 TEX. L. REV. 989, 996.

¹²"Without a legal monopoly too little of the information will be produced, but with the legal monopoly too little of the information will be used." R. Cooter and T. Ulen, LAW AND ECONOMICS 145 (1988)

²SunTrust Bank v. Houghton Mifflin, 136 F. Supp. 2d 1357, 1372 (2001).

³268 F. 3d 1257, 1268-9 (11th Cir. 2001).

⁴Supra note 2.

⁹Supra note 2, at 578, n. 10.

¹³"Because intellectual property rights impose costs upon the public, the intellectual property laws can be justified by the public goods argument only to the extent that they do on balance encourage enough creation and dissemination of new works to offset these costs. One of the reasons that intellectual property rights are limited in scope, in duration, and in effect is precisely in order to balance these costs and benefits." Supra note 11, 997.

¹⁷The purpose and intent implicates the introduction to Section 107, which identifies a category of uses of key concern to the drafters of the Copyright Act. The distinction regarding commerciality sometimes be ambiguous. *See* Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F. 3d 1110 (9th Cir. 2000), Marobie-FL, Inc. v. National Assoc. of Fire Equipment Distributors, 983 F. Supp. 1167 (N.D. Ill. 1997).

¹⁸ The scope of fair use is more limited with respect to non-factual works than factual works; the former necessarily involves more originality and creativity than the reporting of facts." New Era Publications v. Carol Publishing Group, 904 F. 2d at 157. Factual works are believed to have a greater public value and unauthorized uses of them are more readily tolerated by copyright law." Salinger v. Random House, Inc. 811 F. 2d at 96.

¹⁹Generally, "the larger the volume (or the greater the importance) of what is taken, the ... less likely that a taking will qualify as a fair use." Leval, supra note 8, at 1122. However, "there are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use." Maxtone Graham v.Burtchaell, 803 F. 2d 1253 (2d Cir.), *cert. denied*, 481 U.S. 1059, 107 S. Ct. 2201, 95 L. Ed. 2d 856 (1987).

²⁰Ronald H. Coase, "The Problem of Social Costs", 3 J. L.ECON. 1 (1960).

²¹Negotiation costs would broadly include drafting, bargaining, performance safeguarding, renegotiation, monitoring, and enforcement. See OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 20-22 (Free Press 1985

²²Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors", 82 COL. L. REV. 1600 (1982). The author continues: "Only where the desired transfer of resource use is unlikely to take place spontaneously, or where special circumstances such as market flaws impair the market's ordinary ability to serve as a measure of how resources should be allocated, is there an economic need for allowing nonconcensual transfer." Id., 1615. A similar point is made by William M. Landes and Richard A. Posner, "An Economic Analysis of Copyright Law", 18 J. LEG. STUD. 325, 357 (1989).

²³Edmund W. Kitch, "Can the Internet Shrink Fair Use?", 78 NEB. L. REV. 880, 881-3 (1999); Tom W. Bell, "Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine", 76 N.C.L. REV. 557 (1998).

²⁴ "Overly influenced by market failure theory and misled by evidence of licensing practices, courts have failed to distinguish between markets that should belong to authors and those that

¹⁴¹⁷ U.S.C. § 107 (2000).

¹⁵ Rosemont Enterprises Inc. v. Random House Inc., 366 F. 2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009, 87 S. Ct. 714, 17 L. Ed. 2d 546 (1967).

¹⁶¹⁷ U.S.C. § 107 (2000).

should not ... A fair use may be seen not as an encroachment on the rights of an owner, but rather as a use that does not belong to the owner to begin with." Matthew Africa, "The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts, 88 CALIF. L. REV. 1145, 1150, 1152-1153. (2000).

²⁵Annastasia. P. Winslow, "Rapping on a Revolving Door: An Economic Analysis of Parody and Campbell v. Acuff Rose", 69 S. CAL. L. REV 767, 783 (1996). Lydia Loren succinctly characterizes "implied consent" as a market outcome where "significant external benefits associated with a particular use that cannot be internalized in any bargained-for exchange; ... uses ... have significant external benefits that are spread across society as a whole." Supra note 10, at 6. Implied consent" could arguably include "the prevailing understanding of the community" and "customary practice". Lloyd L. Weinrib, "Fair's Fair: A Comment on the Fair Use Doctrine", 103 HARV. L. REV. 1137, 1143-4, 1160 (1990)

 $^{26}\mbox{Gordon},$ supra note 22, 1620-21; Landes and Posner, supra note 22, at 358.

²⁸Stanley J. Liebowitz, "Copying and Indirect Appropriability: Photocopying of Journals," JOURNAL OF POLITICAL ECONOMY, 945 (1985).

²⁹Pro CD, Inc. v. Zeidenberg 86 F.3d 1447 (7th Cir. 1996)

³⁰E.g., see http://www.cyber-matrix.com/pcprices.html.

³¹Carl Shapiro, and Hal R. Varian, INFORMATION RULES, 53-82 (1999).

³²http://www.lexisnexis.com/productsandservices/featured.asp

³³Robert P. Merges, "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations", 84 CAL. L. REV. 1293, 1326 (1996).

³⁴Copyright collectives negotiate contracts on behalf of their rights holders, e.g., in photoreproduction or musical performances. Rights clearance centers grant licenses based on individual terms specified by the owner. "One-stop-shops" are a coalition of separate collective management organizations which offer a centralized source for a number of related rights, e.g. photos and music, that would be particularly useful in multimedia production. At http://www.wipo.org/about-ip/en/about collective mngt.html. (visited June 26, 2001).

³⁵487 F. 2d 1345 (Ct. Cl. 1973).

³⁶Id., 1360-61.

³⁷Id., 1372.

³⁸802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 60 F. 3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995). *See also* Basic Books, Inc. v. Kinko's Graphics Corporation, 758 F. Supp. 1522 (1991), Princeton University Press v. Michigan Document Service 99 F. 3d 1381, 1389 (6th Cir. 1996) (en banc) (rejecting the idea that commercial course packs at universities were transformative since the course packs substituted for purchase of individual books and had "the intended purpose of supplanting the copyright holder's commercially valuable right").

²⁷Id., Gordon.

³⁹Id., 928 ("evidence is not resounding for either side.")

⁴⁰Id., 928-29. Since 1978, the Copyright Clearance Center has issued licenses to large institutional copiers on a blanket (i.e., flat fee) and per transaction basis. Blanket fees for a particular licensee are based on estimated copying levels from surveyed companies in the related industry. Transactional fees can be based on a common page rate or a more specific charge related to the exact material that is copied. By serving as a central clearinghouse, the CCC economizes on transactions costs and provides requisite authorities for reproductions in a cost-effective manner.

 $^{^{41}\}text{Id.};$ citing Campbell, supra note 2, at 1178, Harper and Row Publishers Inc., v. Nation Enters., 471 U.S. 539, 568-69 (1985)); Twin Peaks, 996 F. 2d at 1377; D.C. Comics Inc. v. Reel Fantasy Inc., 696 F. 2d 24, 28 (2d Cir. 1982); United Telephone Co. of Missouri v. Johnson Publishing Co., Inc. 855 F. 2d 604, 610 (8th Cir. 1988).

⁴² Kenneth D. Crews, "Copyright at a Turning Point: Corporate Response to the Changing Environment", INTELL. PROP. L. 277 (1996).

⁴³Kenneth W. Dam, "Self Help in the Digital Jungle", 28 J. L. & ECON. 393 (1999).

⁴⁴Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE, (New York: Basic Books, 2001), 100-8.

⁴⁵Daniel Philp, "Who Owns Satellite Transmissions?", at www.cs.dartmouth.edu/~dphilp/paper2.html (visited February 12, 2003).

⁴⁶⁴⁷ U.S.C. § 553a.

⁴⁷Pub. L. 102-563, 106 Stat. 4237 (1992).

⁴⁸17 U.S.C. § 1003-1004. The royalties are to be established and apportioned by arbitration panels that are appointed by the U.S. Copyright Office.17 U.S.C. § 800. Equipment levies are also more broadly implemented in other countries, such as France (where analog and digital media are taxed), Italy (where analog and digital media and audio equipment are taxed), and Germany (where analog and digital media, and audio and video equipment are taxed), but the concept is the same.

⁴⁹See generally 17 U.S.C. § 1002.

⁵⁰17 U.S.C. § 1002(c).

⁵¹Pub. L. No. 105-304, 112 Stat. 2860 (1998).

⁵²¹⁷ U.S.C. § 1201(a)(1).

⁵³17 U.S.C. § 1201(a)(2).

⁵⁴17 U.S.C. § 1201(b).

⁵⁵ See generally Charles E. Lindblom, The Science of Muddling Through, 19 Pub. ADMIN. REV. 79 (1959). Lindblom identifies rational comprehensive policy as administration that tries to consider and weigh all factors, gather all relevant information, measure all relevant

quantities, and willingly jump to extreme positions as logically justified.

⁵⁶Supra note 2, at 584, quoting Sony Corp. of America v. Universal City *Studios, Inc.*, 464 U.S. 417, 454, 194 S. Ct. 774, 795 (1984).

⁵⁷"Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets." Supra note 2, at 590.

⁵⁸ The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Brown Shoe v. U.S. 370 U.S. 294, 325; 82 S. Ct. 1502, 1523; 8 L. Ed. 2d 510 (1962); see also U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956).

⁵⁹ U.S. v. Falstaff Brewing Corp., 410 U.S. 527 (1973).

⁶⁰Supra note 2, at 1178.

⁶¹1996 WL 535537 at * 4 (S.D.N.Y. 1996).

 $^{62}126~\mathrm{F.}$ 3d 70 (2 $^{\mathrm{nd}}$ Cir. 1997) sourcing Affidavit of Faith Ringgold, P/P 13-14.

⁶³Id.; see also supra note 24, at 1161.

6460 F. 3d 913, 934 (J. Jacobs, Dissent).

⁶⁵Id.

⁶⁶Supra note 22, at 1631.

⁶⁷A&M Records, Inc. v. Napster, Inc., 114 F.Supp.2d (N.D. Cal. 2000), 239 F.3d 1004 (9th Cir. 2001).

⁶⁸For example, see Defense Report of Peter S. Fader.

 69 The argument was made principally in confidential expert testimony submitted by David Teece.

⁷⁰Supra note 2, at 590.

⁷¹Folsom v. Marsh, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841).

⁷²Supra note 2, at 592.

⁷³Id., 579; The decision quotes Leval, supra note 8, at 1111.

7417 U.S.C. § 101 (2000)

7517 U.S.C. § 101 (2000).

⁷⁶Supra note 2. ("Is the work superseding or does it instead add something new, with a further purpose or different character, altering the first with new expression, meaning or message; it

asks, in other words, whether and to what extent the new work is "transformative" [quoting Leval, supra note 8, at 1111])

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<sup>77</sup>17 U.S.C. §107.
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83243 F. 3d 789 (4th Cir. 2000).
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⁷⁸Supra note 2, at 591.

⁷⁹Stanley R. Besen, "Private Copying, Reproduction Costs, and the Supply of Intellectual Property", RAND Report No. N-2207-NSF. (1984).

 $^{^{80}}$ Sid & Marty Krofft Television Productions, Inc. v. McDonalds Corp., 562 F. 2d 1157, 1164 (9^{th} Cir. 1977)

 $^{^{81}}$ Id., 1164; International Luggage Registry v. Avery Products Cor., 541 F. 2d 830, 831 (9th Cir. 1976); Harold Lloyd Corp. v. Witwer, 65 F. 2d 1, 18-19 (9th Cir. 1933). Twentieth Century Fox Film Corp. v. Stonesifer, 140 F. 2d 579, 582 (9th Cir. 1944).

⁸²Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250, 23 S. Ct. 298, 47 L. Ed. 460 (1903) (circus posters); Sunset House Distributing Corp. v. Doran, 304 F. 2d 251, 252 (9th Cir. 1962) (plastic Santa Claus); King Features Syndicate v. Fleischer, 299 F. 533, 534 (2nd Cir. 1924) (doll).

⁸⁴Id., 801.

⁸⁵ Id., 803.

⁸⁶Id.

⁸⁷²⁶¹ F. Supp. 238, 241-2 (S.D.N.Y) 1966), aff'd 360 F. 2d 1021 (2d Cir. 1966);

^{88 106} F. Supp. 2d 1132 (D. Colo. 2002).

⁸⁹⁶⁷⁷ F. 2d 180 (2nd Cir. 1982).

⁹⁰ Id., 185.

⁹¹ Mansfield, Dissent, Id., 188-190.

⁹²Dr. Seuss Enterprises v. Penguin Books, 109 F. 3d 1394 (1995).

⁹³ Id., 1399.

⁹⁴Id., 1403.

⁹⁵Id., 1406.

⁹⁶The Seuss decision is criticized in T. Ochoa, "Dr. Seuss, The Juice, and Fair Use: How the Grinch Silenced a Parody", 45 J. COPYR. SOC'Y 546 (1998); G. K. Jung, "Dr. Seuss Enterprises v. Penguin Books", 13 BERKELEY TECH. L.J. 119 (1998); M. L. Shapiro, "An Analysis of the Fair Use Defense in Dr. Seuss Enterprises v. Penguin", 28 GOLDEN GATE

U. L. REV. 1 (1998); J.M. Vogel, "The Cat in the Hat's Latest Bad Trick", 20 CARDOZO L. REV. 287 (1998).

⁹⁷The present defining case would seem to be On Davis v. The Gap, Inc. 246 F. 3d 152 (2nd Cir. 2001) (upholding the idea that plaintiff's distinctive eyewear was a properly licensed item in the clothing advertisements in which it facilitated a visual draw).

98 D.C. Comics, Inc. v. Reel Fantasy, Inc. 696 F. 2d 24, 28 (2d Cir. 1982)

¹⁰³533 U.S. 483; 121 S. Ct. 2381; 150 L. Ed. 2d 500 (2001). The New York Times had constructed a digital database of its previously published newspaper articles without consent of the contributing writers. Agreeing with the Second Circuit 205 F 3d 161 (2nd Cir. 2000) that the use was not suitably protected as an unmodified revision of a licensed periodical, the Supreme Court left remedies to the District Court with an obvious point; "if necessary, the court and Congress may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution." At 519, 2393-4, 541.

104244 F. 3d 1267 (11th Cir. 2001). The Eleventh Circuit found that National Geographic had similarly infringed upon the rights of photographers by reproducing material in its digital service. On its remand, the Court wrote "In assessing the appropriateness of injunctive relief, we urge the [District] court to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work." At 1276

⁹⁹Supra note 2, at 591, n. 21.

¹⁰⁰Supra note 20. .

¹⁰¹Supra note 6, at 525.

¹⁰²Judith Bresler, "Begged. Borrowed, or Stolen: Whose Art is it Anyway?" presented to the New York Chapter of the Copyright Society of America, January 16, 2003.

¹⁰⁵Landes and Posner, supra note 22, at 353-5.

¹⁰⁶Arnold Plant, "The Economic Aspects of Copyright in Books", 1 ECONOMICA 167 (1934).

¹⁰⁷Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs", 84 HARV. L. REV. 281 (1970).

¹⁰⁸Stewart E. Sterk, "Rhetoric and Reality in Copyright Law", 94 MICH. L. REV 1197, 1215-6 (1996). (An author who earns eight million dollars per book "obviously does not need income from a movie or television-drama licensing to cover her original cost of production.")

¹⁰⁹ Shubha Ghosh, "The Merits of Ownership", 15 HARV. J. LAW & TECH. 453 (2002).

¹¹⁰UMG Recordings v. MP3.com, Inc., 92 F.Supp. 2d 349, 352 (S.D.N.Y. 2000).

^{111 17} U.S.C. § 106(a).

¹²⁰Famous examples of appropriation art using copyrighted works (many of which settled out of court) include Andy Warhol's silkscreen prints of Henri Dauman's photograph of Jacqueline Kennedy, painter George Pusenkoff's use of an outline of a nude from a Helmut Newton photograph, Robert Rauschenberg's taking of Morton Beebe's Pull, Susan Pitt's visual adaptation of material from DC Comics, David Salle's taking of visual art from Cockrill and Hughes, Jeff Koon's sculptural reproductions of comic strip drawings by James Davis and photographs by Art Rogers and Barbara Campbell, and Damian Loeb's appropriation of photography by Lauren Greenfield. William M. Landes, "Copyright, Borrowed Images, and Appropriation Art: An Economic Approach", unpublished manuscript (2000). See also Rogers v. Koons 960 F. 2d 301, United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, and Campbell v. Koons, 91 Civ. 6055.

¹²¹Cohen v. California, 402 U.S. 15, 25, 91 S. Ct. 1780, 1789; 29 L. Ed. 2d 284, 294 (1971).
Neil W. Netanel, "Copyright and a Democratic Civil Society", 106 YALE L. J. 283 (1996).
("It should not be forgotten that the Framers intended copyright itself to be the engine of free expression.")

¹¹²¹⁷ U.S.C. § 115.

¹¹³Elsmere infra note 126 ("I Love New York"); MCA v. Wilson, supra note 89; ("Boogie Woogie Bugle Boy"); Fisher v. Dees infra note 126 ("When Sonny Sniffs Glue"); Grand Upright Music Ltd. v. Warner Bros. Records, Inc. 780 F. Supp. 182 (S.D.N.Y. 1991) ("Alone Again Naturally"); Campbell v. Acuff Rose, supra note 1 ("Pretty Woman").

¹¹⁴Annie Leibovitz v. Paramount Pictures Corp., 137 F. 3d 109 (2nd Cir. 1998).

¹¹⁵Island Records and Warner-Chappell Music Inc. v. SST Records (1991)

¹¹⁶Supra note 92.

¹¹⁷Walt Disney v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); see also Walt Disney Productions v. Mature Pictures Corp. (389 F. Supp. 1497 (S.D.N.Y. 1975) (X-rated movies with actors wearing Disney hats and clothing).

¹¹⁸Benny v. Loew's Inc., 239 F. 2d 532 (9th Cir. 1956).

¹¹⁹ Supra note 2-4, and surrounding text

¹²²Supra note 2, at 1172.

¹²³As argued by Julia Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act", 34 COPYRIGHT L. SYMP. (ASCAP) 1, 25 (1987)).

¹²⁴Supra note 2, at 578.

¹²⁵Id.

¹²⁶Fisher v. Dees 794 F. 2d 432 (9th Cir. 1986); Elsmere Music Inc. v. National Broadcasting Company, 482 F. Supp. 741 (S.D.N.Y. 1979), *aff* d 623 F. 2d 252 (2nd Cir. 1980).

¹²⁷"A potential licensing market would include "only those [markets] that creators of original works would in general develop or license others to develop." Supra note 2, at 591.

¹²⁸⁵⁷ F. Supp. 2d 961 (C.D. Cal. 1999).

129Id., 968-9.

¹³⁰Richard A. Posner, "When is Parody Fair Use?", 21 J. LEGAL STUD. 67, 70-72 (1992).

¹³¹Id., 73.

¹³² "When there is little or no risk of market substitution ... taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with less justification for the borrowing than would otherwise be required." Supra note 2, at n. 14.

¹³³Supra note 2, at 585.

¹³⁴Supra note 128 and surrounding text.

¹³⁵Sony, supra note 56, at 449, n. 31

¹³⁶Elsmere Music, supra note 126, at 253, n. 1; Fisher v. Dees, supra note 126, at 438-439.

¹³⁷Disney v. Air Pirates, supra note 117.

¹³⁸Supra note 2-4 and surrounding text.

¹³⁹The connection between copyright and the First Amendment is made tellingly by Melville Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" 17 U. C. L. A. L. Rev. 1180, 1199 (1970). *See also* E. Kenley Ames, Note, Beyond Rogers v. Koons: A Fair Use Standard for Appropriation, 93 COLUM. L. REV. 1473, 1475-6 (1993); "Art created from existing imagery is a valid form of criticism and comment should be protected by copyright law against suits for infringement. To do otherwise is to chill unnecessarily the development of artistic expression and to grant an individual copyright holder undue power over the secondary artist's choice of source material

¹⁴⁰Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F. 2d 42, 45 (2d Cir. 1983).

¹⁴¹NAACP v. Town of East Haven, 70 F. 3d 219, 224 (2d Cir. 1995); JSG Trading Corp. Tray-Wrap, Inc., 917 F. 2d 75, 79 (2d Cir. 1990). (holding that "possibility" of harm in insufficient)

¹⁴²Supra note 88, at 1139 (D. Colo. 2002)

¹⁴³Hasbro Bradley, Inc., v. Sparkle Toys, Inc., 780 F. 2d 189, 192 (2d Cir. 1985); Sandoval v. New Line Cinema Corp., 973 F. Supp. 409, 412 (S.D.N.Y. 1997).

¹⁴⁴Hofheinz v. AMC Productions, 147 F. Supp. 2d 127, 134 (E.D.N.Y. 2001); sourcing ABKCO Music Inc. v. Stellar Records, 96 F. 3d 60, 64 (2d Cir. 1996); Wainwright Securities, 558 F. 2d at 94.

¹⁴⁵Country Kids' N City Slicks, Inc., v. Sheen, 77 F. 3d 1280, 1288-9 (10th Cir. 1996).

¹⁴⁶A Circuit Court has also upheld the value of infringer's use as a permissible basis for estimating actual damages, while distinguishing this value from total infringer profits and the list price of the infringer's product. Deltak, Inc., v. Advanced Systems, Inc., 767 F. 2d 357, 361 (1985).

¹⁴⁸D. D. Haddock and F.S. McChesney, *Do Liability Rules Deter Takings?*, in THE ECONOMIC CONSEQUENCES OF LIABILITY LAW: IN DEFENSE OF COMMON LAW LIABILITY (ed R. E. Meiners and B. Yandle), Quorum Books, New York, 1991, 29-59.

¹⁴⁹T. W. Merrill, "Trespass, Nuisance, and the Costs of Determining Property Rights", 14 JOURNAL OF LEGAL STUDIES, 13, 18 (1985). Trespass applies to invasions of space by unauthorized persons and tangible objects, while nuisance applies more to indirect interferences that affect the enjoyment of that space (e.g., noise, odor, pollution). The principal distinction between trespass and nuisance is the standard of care applied to determine whether the interference is actionable; i.e., whether Marshall may enjoin and/or received damages from the action of Taney, or Taney may practice his intrusion without exclusion from Marshall. To establish an actionable trespass, Marshall must show that Taney has invaded his space.

¹⁵⁰Id.

¹⁵¹On Davis v. The Gap, 246 F. 3d 152 (2nd Cir. 2001).

¹⁵²Copyright plaintiffs may press for actual or statutory compensation. 17 U.S.C. sec 504(a) (2000). Higher statutory rewards are possible if the plaintiff can demonstrate willfulness. 17 U.S.C. sec. 504(c)(2)(2000). A plaintiff must make a choice between actual or statutory compensation only before the final verdict is rendered. This may encourage the defendant to settle, but may actually serve as a disincentive to the plaintiff, as it leaves the possibility of more money on the table. The presence of statutory royalties provides incentives for rights owners to gamble for higher compensation unrelated to the actual market value of the misappropriation. Furthermore, the additional uncertainty of higher damages can serve as an additional deterrent on the publication of the transformative work.

¹⁵³W. J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory", 41 STAN. L. REV. 1343, 1353 (1989).

¹⁵⁴Georgia Pacific Corporation v. United States Plywood Corporation 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). See also Atlas-Pacific Engineering Co. v. Ashlock, 339 F. 2d 288, 290 (9th Cir. 1964); cert. denied, 382 U.S. 842, 86 S. Ct. 55, 15 L. Ed. 2d 83 (1965). ("There is a variety of possible elements of damages for patent infringement, such as the profits made by the infringer, the actual damage to the patentee, or a reasonable royalty.")

¹⁵⁶Which may include, inter alia, copying to prepare lecture notes, to enrich professional understanding, improve citizen awareness, personal entertainment, or space or time-shifting. Sony, supra note 56, at 455, n. 40.

¹⁴⁷Taylor v. Meirick, 712 F. 2d 1112, 1120 (1983)...

¹⁵⁵Supra notes 76-77 and surrounding text.

¹⁵⁷Sony, supra note 56 at 478-9 (Blackmun, J. dissenting)

158802 F. Supp. 14-15 (1994).

¹⁵⁹Weinrib, supra note 25

¹⁶⁰Id.

¹⁶¹ D. Zimmerman, "The More Things Change, The Less They Seem 'Transformed'; Some Reflections on Fair Use", J COPYR. SOCY. 251, 262, n. 55 (1998). ("To the best that I can determine, they are uses the court in question likes.")

162802 F. Supp. 14-5 (1994).

¹⁶³U.S. Department of Justice, Antitrust Division, Second Amended Final Judgment, at http://www.usdoj.gov/atr/cases/f63000/6395.html (visited May 5, 2001)

¹⁶⁴AUS Consultants, Moorestown, NJ. (http://www.royaltysource.com).

¹⁶⁵Keith Sharfman, A New Procedure for Resolving Valuation Disputes, unpublished manuscript, Rutgers University School of Law (2003). Sharfman contends that variations of such methods are now used for buyout valuation in joint ventures by Merck/Schering and Verizon/Vodaphone.

¹⁶⁶Supra note 2-4 and surrounding text. .

¹⁶⁷The "fair price to be paid for the right to publish a sequel to the work has already been set by two publishers who have agreed to pay, or paid, substantial advances and royalties for the right to create its sequels." Supra note 3 at 1373-4, n. 12

¹⁶⁸In 1999, Brighter Child Interactive acquired rights to use the characters from the television program "Adventures with Kanga Roddy" in connection with its interactive software production. In 1997, Kideo Productions Inc. acquired the rights to publish personalized storybooks using Disney Standard Characters for a \$25,000 upfront and a 10 percent royalty rate. The license contract specified a \$20,000 upfront payment plus a royalty amount based on 8 percent of net revenues. In the same year, ClubCharlies.com Inc. acquired screenplay rights to an original story plot entitled "The Misadventures of Charlie Chance"; rates were \$150,000 upfront and 10 percent of net revenues. Supra note 165