

# QUESTIONING THE ECONOMIC JUSTIFICATION FOR COPYRIGHT

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*This article questions the economic justification for copyright law's prohibition against unauthorized copying (17 U.S.C. §106). Building on the thesis of Stephen Breyer's 1970 HARV.L.REV. article, The Uneasy Case for Copyright, it identifies and explains how new technologies and social norms provide many viable business models for financing new creations without the need for the current broad copyright protection. More significantly, it contends that, in the current lottery-like media entertainment markets, the higher revenues generated for popular creations due to §106 are generally used for promotional efforts (rent seeking), which tends to crowd out borderline creations. Thus, current §106 may actually have a net negative effect on new creations.*

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... when I first began to think about these issues, the insights coming most easily and quickly were those demonstrating that the traditional system of copyright simply did not fit the facts of the new communications technologies. . . Other grounds for charging, inappropriate in the past, may now become feasible points of control if supported by legislation. We must analyze the natural structure of the emerging systems of communication to identify what modes of payment might be enforceable and socially acceptable. . . . To work, property rights must correspond to natural strategic bottlenecks that arise in organic ways from accepted social practices. . . .

Ithiel de Sola Pool (1983)<sup>1</sup>

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<sup>1</sup> Ithiel de Sola Pool, *Whither Electronic Copyright* in ELECTRONIC PUBLISHING PLUS 217, 217, 220, 227 (Martin Greenberger ed. 1985).

Stimulating content creation might involve a reexamination of the copyright laws.  
FCC Chairman Michael K. Powell (2001)<sup>2</sup>

## I. Introduction

This article questions the current economic justification for the copyright law's prohibition against unauthorized copying: 17 U.S.C. §106.<sup>3</sup> Building on the thesis of Justice Stephen Breyer's 1970 *Harvard Law Review* article, *The Uneasy Case for Copyright*,<sup>4</sup> this piece explains how new technologies appear able to support viable business models for most submarkets of creative outputs without the need for the broad legal protections of §106. Although Breyer refrained from challenging the existing Copyright Act,<sup>5</sup> this article focuses on consequences of conditions that have emerged since 1970. Most significantly, it explains how §106, through its effect on current marketing practices, may actually diminish the profitability of borderline potential new creations, thereby *reducing* creative output. That is, while §106 may have once helped to remedy a market failure, today it may actually create one.

Copyright law is supposed to serve two important, but conflicting, goals: encourage authors, composers, artists, etc. (hereinafter "creators") and publishers, record companies, studios, etc. (hereinafter "publishers"<sup>6</sup>) to 1) produce new, currently copyrightable *creations* (C<sup>3</sup>s) and 2) provide the widest *access* to those C<sup>3</sup>s. It has long been well accepted that the benefits copyrights yield in terms of new creations are greater than the harms they cause when higher

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<sup>2</sup> Remarks of Michael K. Powell, at the National Summit on Broadband Deployment, Oct. 25, 2001, *available at* <http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html>. As conservative economist Friedrich von Hayek noted, the current "slavish application of the concept of property" to copyrights may require drastic reforms to produce efficient results. FRIEDRICH A. VON HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 114 (1948). Moreover, that was before the term was expanded from 56 years to life plus 70 years and derivative works were expressly covered.

<sup>3</sup> 17 U.S.C. §106 Exclusive rights in copyrighted works. Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) . . . to perform the copyrighted work publicly; (5) . . . to display the copyrighted work publicly; (6) . . . to perform the copyrighted work publicly . . .

<sup>4</sup> Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyrights in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

<sup>5</sup> *Id.* at 321-23. *See also infra* note 40.

<sup>6</sup> The concern of copyright law has generally been not authors, but with publishers, as the necessary central figure in disseminating content. Although the Statute of Anne and U.S. copyright law vest copyright protection in authors, not publishers, that may have been a bit misleading. *See* BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 8 (1967) ("I think it nearer the truth to say that publishers saw the tactical advantage of putting forward authors' interests together with their own, and this tactic produced some effect on the tone of the statute."); Kaplan also believed that while creation was "to a considerable extent self-generated," copyright was key to encouraging publication and dissemination. *Id.* at 75. In fact, support of the printers union was a key to passage of the 1909 Copyright Act. *See* SIVA VAIDHAYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 55 (2001). Today, however, many artists would not mourn the loss of the major record companies. *See* Charles C. Mann, *The Heavenly Jukebox*, ATLANTIC, Sept. 2000, at 50, 54-56 (quoting Elton John as characterizing record companies as "thieves" and "blatant and out-and-out crooks"); Neil Strauss, *A Bill of Rights for Rockers Too*, N.Y. TIMES, Feb. 28, 2002, at E3 (discussing the formation of the Recording Artists Coalition to represent recording artists against record companies); Neil Strauss, *David vs. Goliath to a Rock Beat*, N.Y. TIMES, Oct. 3, 2002, at E3 (discussing lawsuits and settlements by artists); Ian, *infra* note 117.

prices reduce access.<sup>7</sup> Courts have found that the Act takes appropriate consideration of First Amendment values<sup>8</sup> in its “delicate balance”<sup>9</sup> between these goals, and academic scholars in the field generally focus on incremental tinkering with that balance.<sup>10</sup> Most economic analyses of copyright also consider how constraints on copying C<sup>3</sup>s *ex post* (after they have been produced) affect consumer and social welfare.<sup>11</sup> This article, however, concentrates on how §106 affects C<sup>3</sup>s *ex ante* (on the decision of whether or not to publish).

The fundamental premise on which §106 rests is that if C<sup>3</sup>s could be freely copied without paying creators, unauthorized copiers (hereinafter “copiers”) would “free ride”<sup>12</sup> on the creations and promotions of publishers, driving prices below the levels needed to induce most creators and publishers to invest the resources needed to produce new C<sup>3</sup>s. This could leave many valuable C<sup>3</sup>s unpublished.<sup>13</sup> This market failure is blamed on C<sup>3</sup>s’ nature as “public goods,”<sup>14</sup> particularly

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<sup>7</sup> See H.R. Rep. No. 60-2222, at 7 (1909) (“In enacting a copyright law Congress . . . confers a benefit upon the public that outweighs the evils of the temporary monopoly.”) As Thomas Macaulay succinctly observed, “for the sake of the good, we must submit to the evil.” See *Speech Before the House of Commons (Feb. 5, 1841)* in MACAULAY’S SPEECHES ON COPYRIGHT AND LINCOLN’S ADDRESS AT COOPER UNION 17, 23 (¶7) (Edwin L. Miller ed. 1913) [hereinafter MACAULAY]. See also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326, 335-36, 341 (1989); RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIEND OR FOE 12 (2000). The assumption of almost all economic analyses of intellectual property law, or as James Boyle calls it, “the second enclosure movement,” is that this assumption is fundamentally sound, even if the law has been extended too far to favor private property. As Boyle observed about the first enclosure movement – the establishment of private property rights in land – “this innovation in property systems allowed an unparalleled expansion of productive possibilities.” See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 35 (2003).

<sup>8</sup> See *Eldred v. Ashcroft*, 123 S.Ct. 769, 788-89 (2003) (“copyright law contains built-in First Amendment accommodations.”); *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264-65 (11<sup>th</sup> Cir. 2001). Thus, First Amendment challenges of copyright law have generally fared poorly. *But see* *Eldred*, *supra* slip at 789-90, criticizing *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001) (“copyrights are categorically immune from First Amendment scrutiny”). As Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) observes, courts have generally deferred to the analysis in Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970), although this has produced severe scholarly criticism. *Id.* Scholars have been particularly critical of the situation, where “[t]he incantation ‘property’ seems sufficient to render free speech issues invisible.” Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1537 & n.16 (1993). See *infra* V.B.

<sup>9</sup> See *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“it is not our role to alter the delicate balance Congress has labored to achieve.”); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (2<sup>nd</sup> Cir. 1994); *National Cable Television Assoc. v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1086 (D.C. Cir. 1982); *Recording Industry Assoc. v. Copyright Royalty Tribunal*, 662 F.2d 1, 17 (D.C. Cir. 1981).

<sup>10</sup> See, e.g., WATT *supra* note 7, at 4; Landes & Posner, *supra* note 7, at 326; NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 2 (2000)[hereinafter DIGITAL DILEMMA]; OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 204 (1986) (hereinafter OTA STUDY).

<sup>11</sup> These consider what set of pricing and access rules would serve the best interests of consumers, creators, or both, assuming that a C<sup>3</sup> has already been created. A good summary and discussion of the best of these analyses is provided in WATT, *supra* note 7, particularly at 30-33, 124-28, 130-32.

<sup>12</sup> See Breyer, *supra* note 4, at 303-04; Earl R. Brubaker, *Free Ride, Free Revelation, or Golden Rule?*, 18 J. L. & ECON. 147 (1975).

<sup>13</sup> At least they would not be offered as soon. See *Harper & Row v. Nation Enter.*, 471 U.S.539, 546, 557 (1985) (“It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value. . . . Absent such protection, there would be little incentive to create or

vulnerable to copying. Stimulating their production and dissemination is generally assumed to *require legal* protection. Thus, copyright law is said to represent an “engine of free expression,”<sup>15</sup> a view that even most critics of the current copyright protection accept.<sup>16</sup>

This article questions the current validity of that premise. It asserts that, in today's cyber world, it is unclear whether there is a market failure for most C<sup>3</sup>s that justifies §106 or even that §106 actually induces more new creations. Although offering only a preliminary analysis, the article concludes that, except in a few narrow circumstances, the net effect of §106's broad protection is ambiguous<sup>17</sup> and probably negative on new creations, even though it greatly increases revenues for the most popular creators. Thus, a superior result might arise from abridging §106 to provide much less protection, limited to only a few sets of C<sup>3</sup>s, while requiring copiers to prominently label their copies as unauthorized and to indicate how to donate “tips” to the creators.<sup>18</sup>

This does not ignore the issue of the moral rights of creators, discussed in V.A., below, nor does it deny that monetary rewards remain an important motivator for almost all publishers, as well as most creators. Yet a need for financial support does not imply that legal protection against unauthorized copying is either necessary or even beneficial. For example, the fashion and food industries also manage to stimulate new creations with only trademark law protections and social

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profit in financing such memoirs.”); *supra* note 7; MELVILLE NIMMER, NIMMER ON COPYRIGHT § 1.03[A] at 1-66.18 (1976); PAUL GOLDSTEIN, COPYRIGHT § 1.14 at 1:40 (1996); Landes & Posner, *supra* note 7, at 326, 332; George A. Akerlof, et al, The Copyright Term Extension Act of 1998: An Economic Analysis, amicus brief, *Eldred v. Ashcroft*, May 20, 2002, at 4-5, *available at* [http://www.aei.brookings.org/publications/briefs/brief\\_02\\_01.pdf](http://www.aei.brookings.org/publications/briefs/brief_02_01.pdf)

<sup>14</sup> Public goods are, generally, non-rivalrous goods, like a song, sunset, or national defense, whose consumption by one person does not diminish the quantity available for another. See Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954); Harold Demsetz, The Private Production of Public Goods, 13 J.L. & ECON. 293 (1970). *But see* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 292 n.24 (1996) (consumers often desire content that is “fresh”).

<sup>15</sup> *Harper & Row*, 471 U.S. at 558. See also *Eldred v. Ashcroft*, 123 S.Ct. 769, 788 (2003) (“to promote the creation and publication of free expression”).

<sup>16</sup> See, e.g., JESSICA LITMAN, DIGITAL COPYRIGHT 80 (2000) (“more and stronger and longer copyright protection will always, at the margin, cause more authors to create more works.”); LESSIG, THE FUTURE OF IDEAS 251 (2001) (hereinafter LESSIG, IDEAS) (supporting 5 year terms of protection, renewable 15 times); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 938-39 (2002); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 192 (1934) (“More authors write books because copyright exists, and a greater variety of books is published”).

<sup>17</sup> See Landes & Posner, *supra* note 7, at 331, 335-36, 338-39, 354 (recognizing that “it is not certain that any copyright protection is necessary to enable authors and publishers to cover their fixed costs,” and not taking a position on “whether, on balance, copyright is a good thing”); RICHARD A. POSNER, LAW AND LITERATURE 343 (1988) (recognizing that data to test the economic argument for copyright “has never been gathered.”); Randall C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 453 (2002) (observing that analyses of copyright law generally avoid the central social welfare question of whether C<sup>3</sup>s would be created in the absence of particular provisions of copyright law); DIGITAL DILEMMA, *supra* note 10, at 41. Moreover, there is substantial evidence against the need for copyright. See, e.g., Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 92-96 (1999).

<sup>18</sup> Cf Gordon, *supra* note 8 (explaining how a new, Lockean, natural rights approach to copyright could yield a superior result). This article regards a broad §106 in much the same way as William M. Landes, *What Has the Visual Artist's Rights Act of 1990 Accomplished?*, 25 J. CULTURAL ECON. 283, 287 (2001) regards “integrity rights:” “economists suggest that integrity rights may do more harm than good, and on balance will discourage artistic creation.”

norms to rely on.<sup>19</sup> Of more direct relevance is the empirical data in Breyer's article,<sup>20</sup> which supported prior economic analyses<sup>21</sup> that, at least in some segments of publishing, technology sufficiently arms publishers to overcome competing copiers. A 2002 article by Raymond Ku also challenged the economic basis for applying copyright law to digital music, although that analysis presumed "minimal" costs of creation.<sup>22</sup> This article recognizes that C<sup>3</sup>s are often expensive to create and promote and it addresses all types of popular culture, not just music.

The economic analysis below supplements Breyer and earlier economists in three important ways. First, and most importantly, it explains how, due to the nature of "superstar" markets for mass media products and the resulting promotional expenditures they incite, §106 probably *reduces* the economic viability of borderline publications. Thus, it questions whether §106 provides any marginal public benefit that might represent a "substantial governmental interest."<sup>23</sup> Second, it reviews many new technologies that have developed since publication of Breyer's article that appear able to support viable business models for publishers, even without current §106. Third, it discusses the great potential for employing social norms to provide substantial revenue streams. These latter two income sources may represent more effective and less burdensome alternatives to the current §106. All three of these points deserve a slightly expanded review:

§106 certainly increases the reward available from C<sup>3</sup>s – by giving them quasi-monopoly protection – but it also has two significant negative effects. William Landes and Richard Posner's classic, 1989 economic analysis of copyright has already recognized that §106 raises the cost of the raw materials<sup>24</sup> from which creators build.<sup>25</sup> The recent *Gone with the Wind* parody, musical sampling, and movie "fan edits,"<sup>26</sup> are only a few examples of the growing category of derivative, but transformative, C<sup>3</sup>s that are most chilled by this effect.

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<sup>19</sup> See LITMAN, *supra* note 16, at 105-06; Malla Pollack, *Note, Intellectual Property Protection for the Creative Chef, of How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991); Malla Pollack, *A Rose is a Rose is a Rose – But is A Costume a Dress?*, 41 J. COPYRIGHT SOC'Y OF THE USA 1 (1993). Many other types of intellectual content lack specific legal protection in the U.S. including, jokes, perfumes, furniture, etc. See Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLIN L. REV. 261, 287 (1989); Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law* in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 9 (Adam Thierer & Wayne Crews eds. 2002). Trademark law generally provides sufficient protection. See 15 U.S.C. §§ 1051-1127.

<sup>20</sup> See Breyer, *supra* note 4. See also Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 222.

<sup>21</sup> See Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. PAPERS & PROC. 421 (1966); Plant, *supra* note 16.

<sup>22</sup> Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) assumes that "the financial investment necessary to create [and market] digital music is minimal" and that its analysis may not apply for other types of C<sup>3</sup>s where that is not so, *id.* at 268 n.33, 304 n.275, & 305, even offline music, *id.* at 322. Ku also assumes that live performances are the principal source of income for musical creators. *Id.* at 308. This article contends that this is only possible for the most successful artists, see *infra* note 162.

<sup>23</sup> This is analogous to the question Ralph Brown asked in his seminal 1948 economic analysis of trademark law. See Ralph S. Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948), reprinted 108 YALE L.J. 1619 (1999). See *infra* V.B.

<sup>24</sup> See Landes & Posner, *supra* note 7, at 332, 334 & *infra* IV.A.2.

<sup>25</sup> See *infra* II.B.2.

<sup>26</sup> See *infra* section IV.A.2.

Yet copyright can also substantially *increase the costs* of promoting C<sup>3</sup>s, although this point has received little attention. Ku only touches on marketing and neither Landes and Posner's economic model nor Richard Watt's 2000 book *Copyright and Economic Theory* even consider promotional expenses at all.<sup>27</sup> This is surprising because such costs are huge in many C<sup>3</sup> market segments, especially for Hollywood films, popular music, and other superstar markets.<sup>28</sup> Trying to draw real world conclusions about copyright without attention to these *endogenous* (based on what competitors spend and can afford to spend) promotional costs, is comparable to assessing a political campaign without considering television advertising.

Regarding business models, Lawrence Lessig perceptively observed that human behavior is regulated by four distinct, although interdependent, constraints: architectures (technologies), social norms, markets, and laws.<sup>29</sup> Rephrasing this insight: the viability of markets for C<sup>3</sup>s is based on the combined effects of technologies, social norms, and laws.<sup>30</sup> Hence, as changes in technologies and social norms alter the need for legal protections like §106 (which significantly chills constitutionally protected speech, as discussed below) a regular review of alternatives should be mandatory. Section III attempts to present a comprehensive survey and conceptual assessment of all such viable choices.<sup>31</sup> Among the business models, popular artists can more easily pre-sell C<sup>3</sup>s to fans,<sup>32</sup> and publishers can shift from the sale of data set *products* (susceptible to copying) to offering *access services* (where raw data sets are not released). Product placements are also becoming more common and valuable.<sup>33</sup>

In addition, there is a potentially enormous untapped source of revenue controlled solely by "social norms."<sup>34</sup> Those norms lead many of the same consumers who do not hesitate to "steal" computer software to feel obligated to leave about \$20 billion annually in tips to waiters and waitresses among others.<sup>35</sup> When one also considers donations to street musicians, public broadcasters, and "shareware" authors,<sup>36</sup> as well as charitable contributions and holiday gifts, this

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<sup>27</sup> Landes and Posner ignore other fixed costs of producing an original and do not consider marginal marketing costs. Landes & Posner, *supra* note 7, at 327, 333. Watt also points out that his equations are "an abstraction from any real life situations." WATT, *supra* note 7, at 201-02. Ku recognizes that marketing costs can distort consumer purchase decisions. Ku, *supra* note 22, at 316-17.

<sup>28</sup> See *infra* section II.C.4.b

<sup>29</sup> Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998), adapted in LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 87-99 (1999) (hereinafter LESSIG, CODE). Trotter Hardy had previously recognized technology as a constraint on copying. Hardy, *supra* note 20.

<sup>30</sup> DIGITAL DILEMMA, *supra* note 10, at 52-54 recognized the relevance of Lessig's four modalities to copyright.

<sup>31</sup> See also the perceptive Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805 (1995).

<sup>32</sup> See *infra* sections III.A.1.b.

<sup>33</sup> See *infra* notes 171-174 & 191-192 and accompanying text, respectively.

<sup>34</sup> "Social norms" is a relatively young field of law & economics, but represents a powerful phenomenon. See Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 3 (2001) (a social norm is "a rule governing an individual's behavior that third parties other than state agents diffusely enforce by means of social sanctions"); ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

<sup>35</sup> See Dan Seligman, *Why Do You Leave Tips?*, FORBES, Dec. 14, 1998 at 138, 141 (an IRS estimate for annual tipping in 1996 was \$15 –18 billion).

<sup>36</sup> Subscribers, businesses, and foundations donated more than \$560, \$370, and \$120 million to public broadcasters, respectively, in FY2000. Corporation for Public Broadcasting Appropriation Request and Justification FY 2003 and FY 2005, Report to the House and Senate Comms., Feb. 2002, at 31 (App. E), available at [http://www.cpb.org/about/reports/appropriation/fy03\\_fy05/just\\_2003.pdf](http://www.cpb.org/about/reports/appropriation/fy03_fy05/just_2003.pdf). Creators post shareware on the Internet

option deserves more than the limited attention it has received.<sup>37</sup> Tips of a few dollars per C<sup>3</sup> might cover the entire cost of production and promotion.<sup>38</sup> Section III.A.3 explains that it may be practical to convince consumers to tip creators they enjoy, particularly if copiers must prominently label their C<sup>3</sup>s: “unauthorized copy” and offer “tip to author” options.

This article does not prove either theoretically or empirically that the current version of §106 represents a net harm to the public. Still, it appears that neither Congress nor the industry lobbyists, who have shepherded the Copyright Act through its frequent expansions, have offered any evidence that §106 provides a net benefit to society or that it is less burdensome than alternatives.<sup>39</sup> Rather, the industry’s response to Breyer’s 1970 wake up call appears to have been a combination of denial and of relief that he stopped short of advocating that copyright be abolished.<sup>40</sup> There continues to be a lack of economic analysis in this field.<sup>41</sup> Therefore, section V, below, raises serious questions about whether the current version of §106 can survive First Amendment scrutiny. While the Constitution expressly authorizes Congress to devise copyright laws to serve the public good, it appears that Congress has not actually attempted the kind of “delicate balance” in formulating the statute that courts have long expressly presumed.<sup>42</sup>

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where it is available for downloading by anyone, but they ask users to voluntarily send them a payment. See Lisa N. Takeyama, *Distributing Experience Goods by Giving Them Away: Shareware - Some Stylized Facts and Estimates of Revenue and Profitability*, 2 ECON. INNOVATION & NEW TECH. 161 (1994).

<sup>37</sup> Among the few who have given this option consideration are William Fisher, *Digital Music: Problems and Possibilities*, Oct. 2000, available at [http://www.law.harvard.edu/Academic\\_Affairs/coursepages/tfisher/Music.html](http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/Music.html) at section IV.6; Ku, *supra* note 22, at 310-11; and Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 858-68 (2001).

<sup>38</sup> Given the virtual elimination of reproduction and distribution costs, this would seem reasonable if artists handled their own marketing and production (as they do in P&D (pressing & distribution) deals) and if consumers relied more on selection assistants (SAs) to find the music they liked, (as discussed in II.C.4.c., below).

<sup>39</sup> See Breyer, *supra* note 4, at 351; *supra* note 17. Copyright law appears to pay little attention to the interests of consumers. Rather, it appears that Congress has agreed to defer judgment to industry representatives when they can develop a consensus among themselves on copyright legislation. See Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 314-15 (1989) (hereinafter Litman, *Copyright Laws*); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870-80 (1987); Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC’Y 109, 120 (1989); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1243 (1998) (“The inclusion of new subject matter has generally been responsive not to a demonstrated need, but to the bare assertion of need, indicated by the proliferation of copies and occasional anecdotal evidence, and an analogy to books, for which copyright was taken for granted.”); Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1684-86 (1999) (characterizing copyright legislation as a “series of contract negotiations” between interest groups without any “independent congressional evaluation of the substance of the negotiated agreements”); and other sources cited in Netanel, *supra* note 8, at 67-68 n.281.

<sup>40</sup> According to Paul Goldstein, Breyer’s article questioning the need for copyright was the main topic of conversation of copyright lawyers for months after it was published. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 24 (1995). Nevertheless, the only scholarly response was a student piece: Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971), which Breyer easily answered. Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972). Goldstein interprets Breyer’s response to be backpeddling from the position that copyright was unjustified, GOLDSTEIN, *id.*, at 25-26., but Breyer’s explanation for why he had declined to urge that copyright be eliminated merely reiterated his previous statements. See Breyer, *supra* note 4, at 321-23.

<sup>41</sup> See POSNER, *supra* note 17; Picker, *supra* note 17; *infra* notes 313 & 314, and accompanying text.

<sup>42</sup> See *supra* note 9.

The remainder of the article proceeds as follows: Section II considers the resources required for creations: both non-pecuniary inducements and the importance of financial considerations to creators and publishers. Sections III and IV describe the means for securing those resources. Section III explains the many ways that technologies and social norms, with the assistance of some copyright laws support the operation of viable business models. Section IV considers the marginal effects – positive and negative – of current §106 (as well as a substantially abridged version) on creators, publishers, consumers, and technological innovation. Finally, section V explains how this analysis undermines the primary defense of current §106 against constitutional challenges under either the First Amendment or Article I.

## II. Inducements to Produce Currently Copyrightable Creations (C<sup>3</sup>s)

Even great artists acknowledge the tremendous importance of money.<sup>43</sup> Creators need to pay for unavoidable, “hard” production and marketing expenses, as well as their living expenses, if not their “opportunity costs.”<sup>44</sup> They may also demand a share of anticipated surplus value. Still, non-monetary inducements should not be ignored, particularly for creators.

### A. Non-Monetary Inducements

Non-pecuniary motivations have long played a major role in stimulating artistic as well as scientific creations.<sup>45</sup> Many artists create primarily for the joy they derive from the process,<sup>46</sup> as by honoring a deity.<sup>47</sup> Many seek to praise or punish others or to celebrate or mourn some event. Others may simply enjoy pleasing audiences.<sup>48</sup> The desire for fame, respect (or “egoboo”), and achievement, which can also often be converted into income,<sup>49</sup> is probably the primary goal of

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<sup>43</sup> See TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 18 (1998) (“Bach, Mozart, Hayden, and Beethoven were all obsessed with earning money through their art . . . Mozart even wrote: ‘Believe me, my sole purpose is to make as much money as possible; for after good health it is the best thing to have.’ When accepting an Academy Award in 1972, Charlie Chaplin remarked: ‘I went into the business for money and the art grew out of it. If people are disillusioned by that remark, I can’t help it. It’s the truth.’”).

<sup>44</sup> Hard costs are those which are relatively inelastic, like costs of supplies and minimum wage labor. Soft costs are elastic, often endogenous, based on bargaining power and expected profits. Opportunity costs are the cost of forgoing the next best opportunity. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (4<sup>th</sup> ed. 1992).

<sup>45</sup> See Plant, *supra* note 16, at 168-69 (“Some of the most valuable literature that we possess” has seen the light without regard to monetary incentives); *infra* note 254. See also BRUNO S. FREY, NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION (1997).

<sup>46</sup> See, e.g. David D. Kirkpatrick, *After 2-Year Detour, Grisham Returns to Legal Thrillers*, N.Y. TIMES, Feb. 4, 2002, at E1 (quoting John Grisham: “My motives when I started were initially pure . . . I didn’t even dream of publishing . . . ‘A Time to Kill’ I wrote for the love of the story.”); CLAUDE SAMUEL, PROKOFIEV 119 (1971) (quoting Sergei Prokofiev’s wife that he found the supreme joy of life to be “the joy of creation.”).

<sup>47</sup> According to J.S. Bach, “the ultimate end or final goal of all music . . . is nothing but for the honour of God and the renewal of the soul.” quoted in THROSBY, ECONOMICS, *infra* note 56, at 109 n.13. During the Renaissance, writers generally considered themselves to be vehicles for divine inspiration, and thus not entitled to benefit personally from their work. Speaking of his writing, Martin Luther said “Freely have I received, freely given, and want nothing in return.” MARTHA WOODMANSEE, THE AUTHOR, ART AND THE MARKET 159 n.19 (1996).

<sup>48</sup> Aaron Copeland once testified that he would pay people to listen to his music. See F. M. Scherer, *The Innovation Lottery* in EXPANDING THE BOUNDS OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 3, 19 (Rochelle Cooper Dreyfuss et al, eds. 2001) (hereinafter EXPANDING THE BOUNDS OF IP).

<sup>49</sup> See Landes & Posner, *supra* note 7, at 331 (prestige that translates into income); ERIC S. RAYMOND, THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY 53 (2d

law review writers, scientists and computer programmers, among others.<sup>50</sup> Many seek a Nobel, Pulitzer, or Grammy to prove that they are the best in their field.<sup>51</sup> Some even pay to send their C<sup>3</sup>s to others.<sup>52</sup> Non-pecuniary motives also lead some to participate in community projects to create software.<sup>53</sup> Social, religious, moral, or political goals at least partially motivate creators.<sup>54</sup>

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ed. 2001) (ego satisfaction and reputation among hackers); Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 J. INDUS. ECON. 197, 212-23 (2002).

<sup>50</sup> See ROBERT MERTON, *THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS* (1973). The same forces have stimulated computer software development. See Christopher M. Kelty, *Free Software/Free Science*, FIRST MONDAY, Dec. 2001, available at [http://www.firstmonday.dk/issues/issue6\\_12/kelty/index.html](http://www.firstmonday.dk/issues/issue6_12/kelty/index.html); OTA STUDY, *supra* note 10, at 182-83 (discussing the origin of "Freeware."); *infra* note 53. But see David Lancashire, *Code, Culture and Cash: The Fading Altruism of Open Source Development*, FIRST MONDAY, Dec. 2001, available at [http://www.firstmonday.org/issues/issue6\\_12/lancashire/index.html](http://www.firstmonday.org/issues/issue6_12/lancashire/index.html) (suggesting that a primary cause of the rise of the free software movement may have been the immaturity of certain types of software markets). See also JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* 74 (1996) ("people who choose journalism [seek] . . . the satisfaction of being known and noticed, with your name in print and perhaps your face on the air; the opportunity to play a part in shaping public issues without having to go into politics."). This even leads reporters to risk their lives. See Nicholas D. Kristof, *A Life of Balances*, N.Y. TIMES, Feb. 22, 2002, at A25 (mourning the death of a *Wall St. J.* correspondent, but observing:

Will Danny Pearl's death change anything? Will it make reporters more careful? I hope so, but I doubt it. The reality is that war is a riveting story. It is the route to front-page articles, to Pulitzer Prizes, to promotions. It's terrifying, grueling, traumatizing, exhilarating. . . . And when you get a story out to the world, exposing some misery or brutality, and thereby usually making people less brutal or miserable, you feel pride at having saved lives.

<sup>51</sup> Both the Soviet Union and Chinese used state-issued prizes as a socialist mechanism to encourage creation. See Carla Hesse, *The Rise of Intellectual Property, 700 B.C. -A.D. 2000: An Idea in the Balance*, DÆDALUS, Spring 2002, at 26, 43. In the U.S., many treat salaries more as a means to measure their relative standing among their peers than for their monetary value. See ROBERT H. FRANK, *LUXURY FEVER* 122-45 (1999).

<sup>52</sup> Many authors pay for reprints to send free to potential readers, and this emerging business model of author pays and readers have free access appears likely to dominate in the scientific community. See Amy Harmon, *New Premise in Science: Get the Word Out Quickly, Online*, N.Y. TIMES, Dec. 17, 2002, at F1; Peter Suber, *Open Access to the Scientific Journal Literature*, J. BIOLOGY, available at <http://jbiol.com/content/1/1/3>.

<sup>53</sup> Prominent examples include GNU/Linux (a viable alternative to Windows) and Apache (the leading web server). See Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002). Such motivations may also work for providing the managerial support for coordinating the decentralized process. See *id.*; Boyle, *supra* note 7, at 46-47. In fact, this culture led Richard Stallman to create the General Public License (GPL) for software, under which a creator permits anyone to copy a piece of software as long as the copier attaches the GPL and the source code (explaining the software) to all copies. See Richard Stallman, *The GNU Operating System and the Free Software Movement* in *OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION* (Chris DiBona, Sam Ockman & Mark Stone eds. 1999); See also <http://www.fsf.org/copyleft/gpl.html> (discussing the concept of "copyleft"). Some creators may be attracted by the philosophy of a "Creative Commons" or other niches in the "gift economy." See <http://www.creativecommons.org>.

<sup>54</sup> See James Lee Burke, *Seeking a Vision of Truth, Guided by a Higher Power*, N.Y. TIMES, Dec. 2, 2002, at E1; Joseph Epstein, *Think You Have a Book in You? Think Again*, N.Y. TIMES, Sept. 28, 2002, at A17 (suggesting that being published may provide individual's with the significance that they formerly sought through religious salvation); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 86-95 (1996).

This also applies to some publishers, and thus, they are often willing to accept lower salaries, see Ken Auletta, *The Impossible Business*, NEW YORKER, Oct. 6, 1997, at 50, 50, and lower returns than they would for ordinary investments, see RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ARTS AND COMMERCE* 44 (2000), particularly those in the book industry. Auletta, *id.*, at 54. They may also use their businesses to trumpet their own views and causes, see Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 378 n.109 (1999) (citing anecdotal evidence that media moguls like Rupert Murdoch and William Randolph Hearst used their media to press their personal causes).

## B. Financial Issues Relevant to Creators

### 1. Effects of Compensation on Output

The non-pecuniary benefits from C<sup>3</sup> creation have led economists to recognize that standard “supply curves” fail to show the true impact of income on most creators’ output,<sup>55</sup> although this does not apply to more “humdrum” aspects of creation.<sup>56</sup> Rather, for those not fully employed as creators, it is often more useful to treat C<sup>3</sup> creation as a leisure time activity or investment in the future,<sup>57</sup> limited by the time required to meet their ongoing financial needs.<sup>58</sup> At some level of effective wages (or savings or family support<sup>59</sup>) a creator will be able to pursue C<sup>3</sup> work full-time,<sup>60</sup> and mechanisms facilitating that result can spur creative output. Subsequently, however, pursuit of fame and/or other such goals are likely to be the primary drivers of greater output.<sup>61</sup> Some may demand substantial sums for future creations, but such requests generally only represent a desire for perceived economic rents.<sup>62</sup> Once creators are working full-time on C<sup>3</sup>s,

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<sup>55</sup> See David Throsby, *Artists as Workers* in CULTURAL ECONOMICS 201, 202 (Ruth Towse & Abdul Khakee eds. 1992) (hereinafter TOWSE & KHAKEE) (“a different set of determinants is likely to influence labour supply decisions of artists in arts and nonarts markets”); Gregory H. Waddall & Neil O. Alper, *Toward a Unified Theory of the Determinants of the Earning of Artists* in TOWSE & KHAKEE, *supra* at 187, 197 (“Because of the unusual nature of the labor market for artists, we have reservations about analyzing behavior in this market with traditional human capital models which do not account for the nuances of this market.”). See generally CAVES, *supra* note 54, at 2 (“creative goods and services, the processes of their production, and the preferences of tastes of creative artists differ in substantial and systematic (if not universal) ways from their counterparts in the rest of the economy”).

<sup>56</sup> Compilers of encyclopedias, telephone books, Westlaw, and databases are likely to demand greater financial rewards than more artistic creators. Still, many individuals seem willing to volunteer to help compile relatively less-creative data sets, provided they need only commit short time periods. See Benkler, *supra* note 53, at 384, 398-99 (observing that volunteers willingly proofread and inspect maps of the moon). Those employed by for-profit firms, however, would generally demand wages based on their opportunity cost, and a standard supply curve would represent them accurately. See Hurt & Schuchman, *supra* note 21, at 426. Richard Caves calls these “humdrum” inputs. See CAVES, *supra* note 54, at 4; DAVID THROSBY, *ECONOMICS AND CULTURE* 120 (2001).

<sup>57</sup> Thus, a survey of composers in the 1970s found that their net income from composing was negative. See CAVES, *supra* note 54, at 359. Many of these creators may willingly work merely for exposure. See *id.* at 66 (pursuit of fame leads some musical groups to pay to open up for established groups at concerts); Neil Strauss, *For Musicians, Microsoft's Xbox is No Jackpot*, N.Y. TIMES, Nov. 15, 2001, at E1 (discussing how less-famous musicians who provided material for Microsoft's Xbox video game received little if any payment).

<sup>58</sup> See THROSBY, *supra* note 56, at 97, 99, 102, 162-63 (“[T]he artist is still assumed to be striving solely for the generation of cultural value but within the limitations imposed by the income requirement” and suggesting a model that “non-arts work is simply a means of enabling as much time as possible to be spent at the (preferred) artistic occupation.”); David Throsby, *Disaggregated Earnings Functions for Artists* in *ECONOMICS OF THE ARTS* 331, 334 (Victor A. Ginsburgh & Pierre-Michel Menger eds. 1996) (offering “a hypothesis that nonarts work is undertaken by artists essentially as a means of satisfying fixed minimum consumption requirements.”). Many well known creators supported themselves, at least in part, with ordinary jobs, e.g. T.S. Eliot (Lloyd's Bank), Wallace Stevens (insurance executives), William Faulkner (power plant), and Philip Glass (taxi driver). See COWEN, *supra* note 43, at 17.

<sup>59</sup> Most of the leading French artists of the 19<sup>th</sup> century, including Degas, Monet, Cezanne, and Toulouse-Lautrec, and writers Baudelaire and Flaubert, relied on their families to support them. *Id.*

<sup>60</sup> See MICHAEL FOOT, H.G.: THE HISTORY OF MR. WELLS 29-35 (1995) (discussing how H.G. Wells quit his job as a biology teacher after the successful publication of THE TIME MACHINE (1895)).

<sup>61</sup> See Kirkpatrick, *supra* note 46 (quoting John Grisham: “money is not a big issue anymore. It’s not the driving force that it was five years ago. I’m a writer. If I didn’t write, what would I do all year long?”); *supra* note 49.

<sup>62</sup> See David Throsby, *A Work-Preference Model of Artist Behaviour* in *CULTURAL ECONOMICS AND CULTURAL POLICIES* 69, 78 (Alan Peacock & Ilde Dordrecht eds. 1994) (increased income to artists already working full-time might be treated as rent or enable the artist to purchase more and better materials); *supra* note 51.

increased compensation would seem to have little effect on output.<sup>63</sup> Moreover, even introductory economics textbooks recognize that the supply curve for labor is “backward bending” for each person. That is, at some point, greater compensation will lead a worker to devote *less* time to work,<sup>64</sup> and many famous creators seem to be in the high earnings range where this applies.<sup>65</sup>

## 2. Access to Raw Materials

Courts have long recognized that all artists build on and borrow from their predecessors.<sup>66</sup> Many of Shakespeare's plots were originated by others.<sup>67</sup> In fact, literary imagination may be “but a weaving of the author’s experience of life into an existing literary tradition.”<sup>68</sup> As Siva Vaidhayanathan eloquently reveals, even leading copyright advocate Mark Twain acknowledged that “but then, we are all thieves,”<sup>69</sup> and pop music star Moby agrees.<sup>70</sup> Thus, many have challenged the very concept that any one person can be recognized as *the* author.<sup>71</sup>

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<sup>63</sup> See JOHN RUSKIN, *THE POLITICAL ECONOMY OF ART* 75 (1858) (“A real painter will work for you exquisitely, if you give him . . . bread and water and salt . . . and I should no more think . . . if Shakespeare or Milton were alive, . . . [we] were likely to get better work from them, by making them millionaires.”).

<sup>64</sup> This occurs because, although the opportunity to earn a higher salary generally leads workers to convert more leisure time into work (called the “substitution effect”), the salary also creates an “income effect,” whereby one with a higher income chooses to “buy” more hours of leisure. See, e.g., WALTER NICHOLSON, *MICROECONOMIC THEORY BASIC PRINCIPLES AND EXTENSIONS* 666-77 (7th ed. 1998); Lunney, *supra* note 37, at 887, 891-92. Monetary incentives may also have a negative effect on workers by “crowding out” non-pecuniary incentives. See FREY, *supra* note 45, at 88-102.

<sup>65</sup> See Plant, *supra* note 16, at 192 (“they may prefer now to take more holidays or retire earlier”); THROSBY, *ECONOMICS*, *supra* note 56, at 99, 102, 162-63 (finding that as creators earned greater compensation in their non-creative jobs, they cut back on their hours to spend more time on their preferred pursuit: creation); Lunney, *supra* note 37, at 891-92 (reporting that the reduction in output “begins to fall with increasing wages at a wage well below the level that broad copyright protection offers popular authors today.”)

<sup>66</sup> As Justice Story explained, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845), quoted in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). See also *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9<sup>th</sup> Cir. 1985); *Vanna White v. Samsung Elecs. Am., Inc.*; *David Deutsch Assoc.*, 989 F.2d 1512, 1513 (9<sup>th</sup> Cir. 1993) (Kozinski, dissenting).

<sup>67</sup> See RICHARD POSNER, *LAW AND LITERATURE* 397-99 (rev. ed. 1998). See also Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 *HASTINGS L.J.* 167, 176 n.26 (2002).

<sup>68</sup> See POSNER, *supra* note 67, at 403; See also Note, *Originality*, 115 *HARV. L. REV.* 1988, 1989-90 & n.5 (2002).

<sup>69</sup> See VAIDHAYANATHAN, *supra* note 6, at 56-80 (discussing Twain’s energetic and persistent support for strong copyright protection, despite his borrowing practices). Stealing and adapting material from others was also the norm in vaudeville, as illustrated by the Marx Brothers. See *id.* at 81.

<sup>70</sup> See Gerald Marzorati, *All by Himself*, *N.Y. TIMES*, Mar. 17, 2002, §6 [Magazine], at 32, 35-36 (quoting Moby “I’m the composer and the musician and the engineer, but also a plagiarist and thief.”). In fact, plagiarism appears to be very common. See Green, *supra* note 67, at 182-84; 192-93; VAIDHAYANATHAN, *supra* note 6, at 205-06 n.67.

<sup>71</sup> See Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965, 965-67, 1007-13 (1990); David Lange, *Recognizing the Public Domain*, *L & CONTEMP. PROB.*, Autumn 1981, at 147, 163-65; JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 51-60 (1996); *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi eds. 1994). But see Michiko Kakutani, *Never-Ending Saga*, *N.Y. TIMES*, Sept. 28, 1997, §6 (Magazine), at 40.

Free access is available to materials in the public domain,<sup>72</sup> which includes content predating copyright or with expired copyrights, government publications, facts,<sup>73</sup> and supposedly ideas.<sup>74</sup> In addition, some creators have voluntarily "registered" their work under a general public license (GPL) or the like, making that work available free of charge.<sup>75</sup> To the extent that C<sup>3</sup> inputs must be purchased, that cost will have a negative impact on output, as discussed in IV.A, below.

### C. Financial Issues Relevant to Publishers: Costs That Need to be Recovered

Although publishers may also be partially motivated by non-financial aspects of C<sup>3</sup>s,<sup>76</sup> most need to cover the six costs described below, which generally absorb at least 85% of C<sup>3</sup> revenues.<sup>77</sup>

#### 1. Selecting C<sup>3</sup>s

Predicting which C<sup>3</sup>s will be profitable, which one Hollywood observer termed a "nobody knows" task,<sup>78</sup> requires significant perceptiveness about quality and public tastes, as well as luck. Agents or other successful creators often provide a first level of screening,<sup>79</sup> but publishers generally invest substantial resources in this task. Interestingly, copiers producing physical

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<sup>72</sup> See Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 148-53 (2003) (mapping out the public domain).

<sup>73</sup> Facts are not subject to copyright. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). Bills have been introduced in Congress, however, seeking to change that situation. See J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997) (discussing H.R. 2652); J.H. Reichman & Paul F. Uhler, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793 (1999) (discussing H.R. 2281 and H.R. 354); Jane C. Ginsburg, *U.S. Initiatives to Protect Works of Low Authorship* in EXPANDING THE BOUNDS OF IP, *supra* note 48, at 55.

<sup>74</sup> Although 17 U.S.C. §102(b) clearly states that ideas are not protected by copyright, IV.A.2, *infra*, discusses how protecting derivative works appears to protect ideas in forms like sequels and other such variations.

<sup>75</sup> It is only free to those who offer their C<sup>3</sup>s under the GPL. See *supra* note 53.

<sup>76</sup> See *supra* note 54 (Auletta, CAVES, and Benkler).

<sup>77</sup> That is, most creators receive royalties of only about 5-15%. In the musical recording industry, new artists receive nominal royalties of 7% to 12%, superstars 15% or more, but these are subject to many adjustments so that a standard 12% royalty on a CD for an independent producer translates into a 3% of retail price royalty, i.e., less than 50¢ on a \$15 CD. Still, few CDs earn enough for artists to receive more than their advance. See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC* 19-23 (8<sup>th</sup> ed. 2000). Composers also receive about 7.55¢ for every track on every copy of every CD and vinyl record. See 17 C.F.R. §255.3. Book publishing industry royalties are somewhat higher. See Auletta, *supra* note 54, at 54 (10% is standard); CAVES, *supra* note 54, at 56-57.

<sup>78</sup> See WILLIAM GOLDMAN, *ADVENTURES IN THE SCREEN TRADE: A PERSONAL VIEW OF HOLLYWOOD AND SCREENWRITING* 39 (1984) ("With all due respect, nobody knows anything"); William T. Bielby & Denise D. Bielby, "All Hits are Flukes:" *Institutionalized Decision Making and the Rhetoric of Network Prime Time Program Development*, 99 AM. J. SOCIOLOGY 1287 (1994). See also ANDRE BERNARD, *ROTTEN REJECTIONS: A LITERARY COMPANION* (1990) (Collecting data about many famous book rejections, including *The Peter Principle* (30 times)); HAROLD L. VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS* 73 & n.2 (5<sup>th</sup> ed. 2001) (listing famous film rejections). But see Neil Strauss, *Antiwar Song, with Whimsy*, N.Y. TIMES, Mar. 12, 2003, at E3 (discussing AI software for identifying musical hits).

<sup>79</sup> See CAVES, *supra* note 54, at 53-56. See also RUTH TOWSE, *CREATIVITY, INCENTIVE AND REWARD* 82-85 (2002) (discussing search costs for singers); Celestine Bohlen, 'We Regret We Are Unable to Open Unsolicited Mail', N.Y. TIMES, Nov. 8, 2001, at E1 (some authors pay the Scott Meredith Literary Agency \$450 to read and certify the quality of their manuscripts). Many publishers refuse to waste time even opening "slush piles" of unsolicited material. *Id.*; CAVES, *supra*, at 52, 61, 113, 116. Peer groups on the web may also identify promising content. See Matthew Mirapaul, *Aspiring Screenwriters Turn to Web for Encouragement*, N.Y. TIMES, Nov. 11, 2002, at E2.

outputs can not escape this cost by simply selecting the best selling C<sup>3</sup>s;<sup>80</sup> they need to predict which C<sup>3</sup> will still be (or become) profitable at the time they are able to offer it to consumers.<sup>81</sup>

## 2. Preparation of First Copy

Most creators benefit greatly from the editorial, strategic, and psychological support of a good publisher,<sup>82</sup> a nontrivial expense. Creators also often need significant funds to complete a first copy of a C<sup>3</sup>,<sup>83</sup> although new technologies continue to reduce production costs.<sup>84</sup> Talents sought for a C<sup>3</sup> production may inflate their fee requests if they sense a surplus on the project.<sup>85</sup>

## 3. Reproduction & Delivery

Recent data indicates that hardcover books can now be printed in high volume for about \$2 per copy, high-end paperbacks for less than \$1, and about \$1 for each CD or DVD.<sup>86</sup> Distributing them to retailers appears to cost another \$2 per book<sup>87</sup> plus the cost of overproduction.<sup>88</sup>

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<sup>80</sup> Landes & Posner, *supra* note 7, at 328-29 assumed this, despite Breyer, *supra* note 4, at 298 n.68.

<sup>81</sup> They must predict additional future demand, industry output, and prices. *See infra* section III.A.1.a.

<sup>82</sup> *See, e.g.*, Lynn Hirschberg, *Who's That Girl?*, N.Y. TIMES, Aug. 4, 2002, §6 at 30 (the music industry); Martin Arnold, *With Editors Up Their Sleeves*, N.Y. TIMES, Apr. 4, 2002, at E3 (books); Jay Parini, *Saluting All the King's Mentors*, N.Y. TIMES, Feb. 25, 2002, at E1 (ditto).

<sup>83</sup> Many exceptional films have, however, been made for small amounts. *See* JOHN PIERSON, SPIKE, MIKE, SLACKERS & DYKES: A GUIDED TOUR ACROSS A DECADE OF AMERICAN INDEPENDENT CINEMA 17, 18, 52 (1995) (referencing Wayne Wang's *Chan is Missing* (\$20,000), John Sayles's *Return of the Secaucus Seven* (\$60,000), and Spike Lee's *She's Got to Have It* (\$114,000)). Nevertheless, special effects, travel, wages, etc., can be expensive. In particular, transferring a typical Hollywood film from a 35mm print to a "cleaned up" 70mm IMAX version can cost between \$2 and \$4 million. *See* Rick Lyman, *Imaxing Hollywood Hits for a Big, Seat-Shaking Second Helping of Thrills*, N.Y. TIMES, Sept. 16, 2002, at E1. Typically, musical recording costs for relatively new artists' albums by major studios range from \$80,000 to \$150,000. KRASILOVSKY & SHEMEL *supra* note 77, at 23. Still, software for digital audio workstations is available for \$1,000 (plus special effects) and cheap studios rent for as little as \$20/hour, enabling one musician to break even after selling only 400 CDs. *See* Warren St. John, *Tryin Hard to Get Free Via Rap on Your Own CD*, N.Y. TIMES, Mar. 3, 2002, §9, at 1.

<sup>84</sup> *See* COWEN, *supra* note 58, at 19-21; Frank Ahrens, *A Disturbance in Film's Force*, WASH. POST, Dec. 27, 2002, at E1 (digital cameras and PC editing software are cutting film production costs). Using computer software to generate virtual actors and sets may dramatically cut film production costs. *See* Rick Lyman, *Movie Stars Fear Inroads by Upstart Digital Actors*, N.Y. TIMES, July 8, 2001, at A1; David Kehr, *When a Cyberstar is Born*, N.Y. TIMES, Nov. 18, 2001, §2 at 1.

<sup>85</sup> *See* Laura M. Holson, *Big Hollywood Hits Don't Ensure Big Profits*, N.Y. TIMES, Sept. 2, 2002, at C1; CAVES, *supra* note 54, at 109 (warning about "the fallacy of regarding a film's costs as exogenous to its expected revenues"). The endogenous nature of marketing costs are discussed *infra* section II.C.4.b.

<sup>86</sup> *See* David D. Kirkpatrick, *Some Book Buyers Read the Price and Decide Not to Read the Rest*, N.Y. TIMES, Dec. 16, 2001, §1, at 1. CDs cost about \$1. *See* Rick Lyman, *In Revolt in the Den, DVD Has the VCR Headed to the Attic*, N.Y. TIMES, Aug. 26, 2002, at A1; VOGEL, *supra* note 78, at 162. With new reproduction technologies, the cost savings from large production runs are no longer very significant. *See* CAVES, *supra* note 54, at 144.

<sup>87</sup> *See* Auletta, *supra* note 54, at 54. Publishers generally employ private wholesalers and distributors. *See* BENJAMIN M. COMPAINE & DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 381, 69, 123, 160 (3<sup>d</sup> ed. 2000). They transport hard copies to tens of thousands of retail outlets, including separate book, music, or video stores and general stores like Wal-Mart, among others. *See* KRASILOVSKY & SHEMEL *supra* note 77, at 4-5; Auletta, *supra* at 60.

<sup>88</sup> Overproduction, despite its cost, is preferred to underproduction, which leads to lost sales that may never be recovered. Print publishers hoping to launch a best selling hardcover, adult, trade book generally print at least 100,000 copies, but about one-third, on average, are returned unsold. *See* Auletta, *supra* note 54, at 56, 59.

Meanwhile, personal computers and the Internet have cut the cost of reproduction and delivery of digital versions of C<sup>3</sup>s to trivial levels.<sup>89</sup> The MP3 standard compresses music so that a whole album can be sent via a high-speed connection in 18 minutes,<sup>90</sup> enabling consumers with such broadband connections to receive films and tapes this way.<sup>91</sup> Younger consumers may soon rely primarily on e-versions, but hard copies of most C<sup>3</sup>s are likely to be quite popular for a long time, e.g., DVD by mail,<sup>92</sup> particularly for gifts.<sup>93</sup>

#### 4. Marketing: Promotional Expenses

Promotional efforts are often the most important and expensive element of selling C<sup>3</sup>s. The Internet can help to substantially cut these costs, but even dot.coms have recognized the current importance of traditional advertising for national media products.<sup>94</sup> Most significantly, promotional efforts by the more popular C<sup>3</sup>s can crowd out attention to borderline C<sup>3</sup>s.

##### a. Artistic v. commercial considerations

The importance of marketing as opposed to “art”<sup>95</sup> is reflected in the relative amounts of money spent on the two. The average costs of producing and marketing a major feature film in 2001 were \$47.7 and \$31.0 million, respectively,<sup>96</sup> and yet that appears to *understate* the significance of marketing. When a producer casts a star like Tom Cruise in a film the industry treats the star's fee, say \$15 million, as a production cost. Yet if the director and screenwriter preferred a different actor who was willing to work for \$150,000, and Cruise was selected primarily to

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<sup>89</sup> See Eric A. Taub, *You Oughta Be in Print*, N.Y. TIMES, Oct. 17, 2002, at G1 (discussing how online publishers are offering about 100,000 new titles a year at little cost under a print-on-demand system, even if the lion's share are not worth reading). Creators can also post shorter C<sup>3</sup>s on weblogs or disseminate them via email. See Judith Shulevitz, *At Large in the Blogosphere*, N.Y. TIMES, May 5, 2002, §9 at 31; Bob Tedeschi, *Internet Experts Wonder if Weblog Technology is a Powerful New Media Species, or Just Another Fad*, N.Y. TIMES, Feb. 25, 2002, at C6.

<sup>90</sup> See DIGITAL DILEMMA, *supra* note 10, at 77. One minute of music can be compressed to 1 Mb of data, which can be transmitted in about 3 minutes (17 minutes for a 5-minute song) via a 56K modem. *Id.* Real Audio and MP3.com also pioneered the use of streaming audio (and video). Whole bundles of all the songs on an album as well as the CD's artwork are increasingly available as zip files. See Neil Strauss, *A Boxed Set in One File? Online Music Finds a Way*, N.Y. TIMES, Feb. 25, 2002, at E1.

<sup>91</sup> See Amy Harmon, *Movie Studios Provide Link for Internet Downloading*, N.Y. TIMES, Nov. 11, 2002, at C1; Ku, *supra* note 22, at 300-05 (observing that this eliminates the need for publishers to finance this cost); Amy Harmon, *Black Hawk Downloaded*, N.Y. TIMES, Jan. 17, 2002, at G1 (discussing Morpheus and other video technologies).

<sup>92</sup> See Peter Wayner, *DVDs Have Found an Unexpected Route to a Wide Public: Snail Mail*, N.Y. TIMES, Sept. 23, 2002, at C4 (discussing the success of Netflix and other such firms).

<sup>93</sup> The current generation of adults is likely to remain more comfortable with printed books and magazines. See John Leland, *Was That the Future We Just Passed By?*, N.Y. TIMES, Dec. 9, 2001, §4, at 5; Matthew Rose, *E-Books Have a Big Future, but It's Unlikely to Come Anytime Soon*, WALL ST. J., Oct. 2, 2000, at B1; W. Russell Neuman, *The Media Habit* in ELECTRONIC PUBLISHING PLUS 5, 8-9 (Martin Greenberger ed. 1985). Still, e-books appear to be gaining popularity. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 78 N.Y.U. L. REV. \_\_\_, \_\_ n.195 (forthcoming) available at <http://www.ssrn.com/abstract=328561>.

<sup>94</sup> Thus, dot.coms purchased most of the ads for the 2000 Super Bowl game. See Kathryn Kranhold, *The Real Action: Ad Bowl XXIV*, WALL ST. J. Jan. 28, 2000, at B1.

<sup>95</sup> There is a classic conflict between the efforts of publishers to satisfy commercial goals and the interests of many creators for what Caves calls “arts for arts sake.” See CAVES, *supra* note 54, at 3-5. See also *infra* note 193.

<sup>96</sup> These are MPAA estimates for 2001. See MPAA, *Average Negative Costs*, slide 14 of 44 available at <http://www.mpa.org/useconomicreview/2001Economic/sld014.htm>. MPAA, *Average Marketing Costs*, slide 16 of 44, available *id.* at sld016.htm.

improve revenues, most of the \$15 million is more accurately a marketing expense.<sup>97</sup> After this adjustment, marketing costs in the film industry may actually exceed first copy costs. In the music industry, promotion, including payola, is also quite substantial,<sup>98</sup> with Sony spending about \$25 million to market Michael Jackson's album "Invincible."<sup>99</sup> According to one book publisher, "the big crisis in American publishing is the triumph of marketing."<sup>100</sup>

b. Generally overlooked aspects of marketing C<sup>3</sup>s

For a clear understanding of the role of promotion, it is critical to understand that many C<sup>3</sup>s are "solidarity goods," which are products subject to "network effects."<sup>101</sup> Consumers value them based in large part on their popularity: for enabling the buyers to join in conversations with friends and colleagues about a story or character or to understand references made by comedians in late night monologues.<sup>102</sup> This helps to create somewhat of a "superstar/winners take all" environment<sup>103</sup> – a market highly skewed, with a few big winners, but mostly a lot of "losers."<sup>104</sup>

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<sup>97</sup> See David Carr, *Enough Tom for You? Star Covers Lose Allure*, N.Y. TIMES, July 15, 2002, at C1 (discussing free publicity generated by stars); A. O. Scott, *We're Ready for Their Close-Ups*, N.Y. TIMES, Feb. 17, 2002, §5 at 5 (movie stars are defined by their "ability to generate box-office cash."); CAVES, *supra* note 54, at 76-78, 109-10 ("Superstar salaries thus consist largely of rents."). *But see* Arthur de Vany and David Walls, *Uncertainty in the Movies: Does Star Power Reduce the Terror of the Box Office?*, 23 J. CULTURAL ECON. 285, 302-03 (1999) (finding that stars appear to have an impact on the number of screens films attract, although not necessarily on revenues).

<sup>98</sup> See Jennifer Ordonez, *Behind the Music: MCA Spent Millions on Carly Hennessy*, WALL ST. J., Feb. 26, 2002, at A1; VOGEL, *supra* note 78, at 163 (estimating marketing costs at up to \$100,000 for a standard release and \$500,000 for a major artist); <http://www.mosesavalon.com/hints> (estimating average promotional expenses on a major label deal at \$500,000); Hirschberg, *supra* note 82; Douglas Abell, *Pay for Play: An Old Tactic in a New Environment*, 2 VAND. J. ENT. L. & PRAC. 52 (2000) (discussing payola). There is also the \$3 to \$5 per CD mark-up by retailers to cover their costs, i.e., marketing. See Jon Healey, *CD Sticker Shock Accounting for Retail Sale Prices That Drive Song-Swapping Sites*, SAN JOSE MERCURY NEWS, Sept. 3, 2000, at 1D.

<sup>99</sup> See Laura M. Holson, *A Pop Star Wants a Promotion Budget Fit for a Jackson*, N.Y. TIMES, June 6, 2002, at C1.

<sup>100</sup> See Gayle Feldman, *Best and Worst of Times: The Changing Business of Trade Books, 1975-2002* (in the 1970s, the focus in publishing shifted from editorial to marketing) (forthcoming at NAJP.org NYT 12/6/02 C2); Auletta, *supra* note 54, at 63. Bill Goldstein, *Honing the Science of the Release Date*, N.Y. TIMES, Nov. 11, 2002, at C9 ("the 'opening' of a major book has increasingly come to resemble the opening of a movie."); Linton Weeks, *Authors Whose Audience Knows 'Em Like a Book*, WASH. POST, Dec. 26, 2002, at C01 (publishers want authors with platforms); David D. Kirkpatrick, *Book Selling: the Unlikely Spectacle*, N.Y. TIMES, Apr. 28, 2002, at C6. Auletta, *id.* at 54 estimates book marketing costs at 7.5% of cover price plus the retailer share that represents the cost of display, but this ignores fees due to an author's marketing value and author efforts on publicity tours. See Ann Beattie, *Essentials Get Lost in the Shuffle of Publicity*, N.Y. TIMES, Feb. 11, 2002, at E1.

<sup>101</sup> See Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity Goods*, 9 J. POL. PHIL. 129 (2001). Network effects arise when the value of a product or service increases as it is used by more individuals. For example, a single fax machine is worthless, but its value increases as more individuals use them. See JEFFREY H. ROHLFS, *BANDWAGON EFFECTS IN HIGH-TECHNOLOGY INDUSTRIES* (2001); Lisa N. Takeyama, *The Welfare Implications of Unauthorized Reproduction of Intellectual Property in the Presence of Demand Externalities*, 4 J. INDUS. ECON. 155 (1994).

<sup>102</sup> See Robert H. Frank, *When Less is Not More*, N.Y. TIMES, July 17, 2000, at A19; CAVES, *supra* note 54, at 180-82. See also Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.com*, 54 STAN. L. REV. 831, 857-58 (2002).

<sup>103</sup> See Sherwin Rosen, *The Economics of Superstar*, 71 AM. ECON. REV. 845 (1981); Glenn M. MacDonald, *The Economics of Rising Stars*, 78 AM. ECON. REV. 155 (1988); ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US* (1995); Verlyn Klinkenborg, *Nothing but Troubling News From the World of Publishing*, N.Y. TIMES, Jan. 27, 2003, at A24 ("Like the film and music industries, publishing is now driven wholly by the search for blockbuster books . . .").

This effect is heightened by the exceptionally cluttered nature of the current C<sup>3</sup> marketplace. In the year 2000, there were almost 500 new major feature films,<sup>105</sup> about 20,000 new music albums,<sup>106</sup> and significantly more than 40,000 books released.<sup>107</sup> In addition, most of the about 280 different broadcast and cable television networks,<sup>108</sup> many of the 13,000 radio stations<sup>109</sup> (and many more Internet-only broadcasters<sup>110</sup>), and 10,000 more specialized magazines and other periodicals,<sup>111</sup> all produce at least some original C<sup>3</sup>s. There are also all the C<sup>3</sup>s recycled from previous years.<sup>112</sup> The Internet, meanwhile, includes millions of other otherwise unpublished blogs (diaries) and it is beginning to offer customized news services.<sup>113</sup>

Under these conditions, publishers, seeking to develop one of the few winners in each of the niche markets, feel compelled to match their competitors' marketing efforts in a form of rent seeking.<sup>114</sup> C<sup>3</sup> promotional efforts, then, often resemble political campaigns – highly competitive, with winning often more dependent on one's marketing efforts than on the quality of one's product.<sup>115</sup> The marketing expenditures of one's competitors also become a major factor in determining which projects will be profitable, creating a promotional "arms race."<sup>116</sup> As a result, "richly deserving music can go unnoticed, drowned out by better-promoted albums . . .,"<sup>117</sup> and this phenomenon reoccurs in many media.<sup>118</sup> In fact, most of these marketing expenses

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<sup>104</sup> See *infra* section II.C.5, particularly *infra* note 131.

<sup>105</sup> See MPAA website, *Films Released*, <http://www.mpa.org/useconomicreview/2001Economic/sld011.htm>.

<sup>106</sup> See Jon Pareles, *Best of the Obscure Among 2001's Albums*, N.Y. TIMES, Jan. 3, 2002, at E1.

<sup>107</sup> See COMPAINÉ & GOMERY, *supra* note 87, at 61.

<sup>108</sup> See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Seventh Annual Report, 16 F.C.C.R. 6005, 6014 ¶15 (2001). Moreover, competition among them is intensifying. See Bill Carter, *Big Networks Show Respect to 'Sopranos'*, N.Y. TIMES, May 13, 2002, at C1.

<sup>109</sup> See FCC, Broadcast Station Totals, Sept. 2001, available at [http://www.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/2001/nrmm0112.txt](http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0112.txt)

<sup>110</sup> See Catherine Greenman, *Stream Fishing: A Guide to Net Radio*, N.Y. TIMES, Apr. 18, 2002, at G7.

<sup>111</sup> There were more than 11,000 magazines of quarterly or greater frequency and as many as 18,000 magazines. See COMPAINÉ & GOMERY, *supra* note 87, at 156-57.

<sup>112</sup> In 1997 there were 1.3 million books in print. See COMPAINÉ & GOMERY, *supra* note 87, at 61, and in 2000, more than 18,000 feature films in studio vaults. See VOGEL, *supra* note 78, at 65.

<sup>113</sup> See *supra* note 89; Nadel, *supra* note 102, at 833 n.3

<sup>114</sup> See generally Robert D. Tollison, *Rent Seeking*, 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 315, 316 (P. Newman ed. 1998); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967). See also CAVES, *supra* note 54, at 109, 393 n.25; Beattie, *supra* note 98 ("Writers are afraid not to be [on book tours], for fear they'll be completely lost in the shuffle, but paradoxically, by getting out there we add to the problem.")

<sup>115</sup> See *supra* section 4.a.; *supra* note 100; Kirkpatrick, *supra* note 98 ("It is a difficult trick making any book stand out at the booksellers convention – a noisy literary circus where scores of publishers and hundreds of authors desperately compete for attention."); Taub, *supra* note 89 (the key to success for those offering online books is getting noticed); Bernard Weinraub, *A Warbler Set Aloft by a Dedicated Flock*, N.Y. TIMES, Mar. 21, 2002, at E1.

<sup>116</sup> See *supra* note 114; *infra* IV.B; cf. Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 55 (2000). Spending seems limited only by the funds available. Moreover, as in politics, the "horse race" aspect of the process has become a story that may eclipse the substance of the content. See, e.g., Rick Lyman, *A Strong Start for 'Catch Me' but 'Two Towers' is Still Tops*, N.Y. Times, Dec. 30, 2002, at E1.

<sup>117</sup> See Pareles, *supra* note 106; See also Jon Pareles, *Spit Out by the Star-Making Machinery*, N.Y. TIMES, Feb. 3, 2002, §2 at 28 ("the costs of marketing new releases to a mass audience have grown prohibitive . . . [and] those costs have long helped limit competition from smaller companies."); Healey, *supra* note 98; Ann Powers, *Artists Take a Serious Look at the Music Business*, N.Y. TIMES, Jan. 16, 2001, at E1 (observing that many artists believe that the

appear to be socially wasteful efforts to shift demand among equally valuable allocations.<sup>119</sup>

### c. Consumers' selection assistants and online displays

The Internet already helps cut some promotional costs as many publishers now offer free online access to a highly abridged version of the C<sup>3</sup>, e.g., a book chapter, an article's abstract,<sup>120</sup> a song,<sup>121</sup> or a movie trailer. The Internet is also spawning the emergence of "selection assistants" (SAs).<sup>122</sup> SAs, in the image of travel agents or more flexible versions of *Consumer Reports*, will enable buyers to obtain instant, inexpensive access to unbiased recommendations.<sup>123</sup>

Consumers are also likely to rely on SAs because of the value of "collaborative filtering."<sup>124</sup> This mechanism uses data about consumers' prior reactions to C<sup>3</sup>s in a category to predict their responses to other C<sup>3</sup>s by searching a database to find other individuals who had very similar, if not identical responses to those C<sup>3</sup>s. The SA can then examine this similar-tastes group to identify other products it enjoyed most. The system would seem to be more accurate than any set of friends or experts for gauging one's likely reaction to a particular C<sup>3</sup>.<sup>125</sup> SAs can also help consumers to develop a customized, explicit "search profile."<sup>126</sup>

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system doesn't work for them); See Janice Ian, *The Internet Debacle – An Alternative View*, PERF. SONGWRITER, May 2002, at \_\_, available at [http://www.janisian.com/article-internet\\_debacle.html](http://www.janisian.com/article-internet_debacle.html).

<sup>118</sup> See, e.g., VOGEL, *supra* note 78, at 90-91 (films of high merit may be "pulled" if not quick hits); Goldstein, *supra* note 100 ("the definition of big has changed in . . . entertainment industries. . . 'It's more important than ever to have a fireworks display"). But see Martin Arnold, *Room at the Table for Fresh Faces*, Dec. 19, 2002, at E3.

<sup>119</sup> Expenditures made on hype or simply to neutralize competitors' spending appear to be socially inefficient. See, e.g., Floyd Norris, *Clinton Acts and Tobacco Profits*, N.Y. TIMES, Aug. 25, 1996, at F1 (the government's ban on tobacco company advertising on television appears to have increased their profits by eliminating substantial "defensive" advertising.). Such marketing is not very informative nor does it add much "psychic" value to C<sup>3</sup>s, the way cosmetics marketing often does. See Ruth La Ferla, *Front Row*, N.Y. TIMES, Jan 7, 2003, at B9 ("She's not buying that tube [of lipstick] for the color; she's buying it for the story.").

<sup>120</sup> See *Authors, publishers say book 'em — online*, USA TODAY, Feb. 7, 2002, available at <http://www.usatoday.com/life/cyber/tech/2002/02/07/books-online.htm>. Some may even offer an entire book or long article online, but only one page at a time, which should satisfy browsers, but serving to discourage downloads that might displace sales. Publishers hope to entice consumers to purchase the standard or premium version.

<sup>121</sup> See Matt Richtel, *Access to Free Online Music is Seen as a Boost to Sales*, N.Y. TIMES, May 6, 2002, at C6; Anthony Tommasini, *Click to Download Scores by New American Composers*, N.Y. TIMES, Oct. 9, 2002, at E1 (discussing the New America Composers' New Music Jukebox: [newmusicjukebox.org](http://newmusicjukebox.org)).

<sup>122</sup> See Mark S. Nadel, *The Consumer Product Selection Process in an Internet Age: Obstacles to Maximum Effectiveness and Policy Options*, 14 HARV. J.L. & TECH 183 (2000) updated version available at <http://www.ssrn.com/abstract=247818>. The emergence of this class of entities produces a dramatic shift in control over the market from producers to consumers. See Volokh, *supra* note 31, at 1834.

<sup>123</sup> "Film Movement" is applying a Book-of-the-Month Club model to independent films, i.e., offering preferred selections. See Beth Pinsker, *Want to See First-Run Indie Films? Join the Club*, N.Y. TIMES, May 6, 2002, at E1.

<sup>124</sup> See Nadel, *supra* note 122, at 240-44.

<sup>125</sup> This would seem to enable lesser known creators to achieve their goal of coming to the attention of their future fans without enormous promotional campaigns. See *Utah's Digital Economy and the Future: Peer-to-Peer and Other Emerging Technologies: Field Hearings Before the Senate Judiciary Comm.*, 106<sup>th</sup> Cong. (Oct. 9, 2000) (Testimony of Peter Breinholt) available at [http://judiciary.senate.gov/oldsite/1092000\\_pb.htm](http://judiciary.senate.gov/oldsite/1092000_pb.htm).

<sup>126</sup> Comprised of a formula that included the attributes most relevant to an individual's choice, the relative importance of those attributes, and which values of the latter to seek, these profiles should be able to precisely identify the most desirable product for each individual in a particular market. Nadel, *supra* note 122, at 246-62.

Given the value of their time, most consumers should be willing to pay for such time-saving service.<sup>127</sup> Moreover, as consumers place an increasing reliance on SAs, producers are likely to find unsolicited marketing to be less cost-effective.<sup>128</sup> In the long run, the primary marketing expenses for publishers may be the cost of convincing reputable SAs and other independent experts of the quality of their offerings.<sup>129</sup> Publishers may well pay trusted SAs for evaluating their creations, much the way firms pay auditors for their seals of approval.<sup>130</sup>

## 5. Risk of Failure

The unpredictability of consumer tastes makes investment in the production of C<sup>3</sup>s unusually risky. To qualify as attractive investments, then, highly risky projects must offer investors “big enough prizes for creations thrown to the small minority of winners.”<sup>131</sup> Publishers can partly address this by using royalties rather than large advances,<sup>132</sup> but because many participants are unwilling to trust publisher judgments or accounting, they demand set fees based on an average of expected revenues. Skewed results then lead publishers to lose on most C<sup>3</sup>s.<sup>133</sup> As noted above, copiers making hard copies face risks comparable to those faced by publishers.

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<sup>127</sup> Although consumers conditioned to expect online content to be free may initially resist paying for it, that should change. See Michael E. Porter, *Strategy and the Internet*, HARV. BUS. REV., Mar. 2001, at 63, 76–77; Matt Richtel, *A Shift Registers in Willingness to Pay for Internet Content*, N.Y. TIMES, Aug. 1, 2002, at C4; Neil Strauss, *Online Fans Start to Pay the Piper*, N.Y. TIMES, Sept. 25, 2002, at E1.

<sup>128</sup> For example, how much would digital camera makers spend on advertising if they knew that the vast majority of consumers were relying on *Consumer Reports* (CR) to determine their choices. Large marketing expenditures, which raised product costs, and thus prices, would hurt a producer’s CR ratings and thus probably reduce net sales.

<sup>129</sup> Increasingly, publishers’ marketing efforts may focus on providing all relevant information about a product or service to expert selection assistants and then explaining to them why it is the best option for the particular market niches that the SA serves. See Volokh, *supra* note 31, at 1816, 1830.

<sup>130</sup> Id at 1830. ForeWord Magazine offers publishers the opportunity to have their book reviewed online for \$295. See <http://www.forewordreviews.com>. Although some criticize this arrangement, auditors paid by an audited party can still earn a reputation for independent, unbiased judgments and integrity.

<sup>131</sup> See Scherer, *supra* note 48, at 15. Although the revenues that drug companies earn on their biggest successes may appear obscene, those rewards may be justified by the enormous costs of failed projects. See Robert Pear, *Research Cost for New Drugs Said to Soar*, N.Y. TIMES, Dec. 1, 2001, at C1, (finding the cost of developing a new drug now averages \$802 million, according to <http://csdd.tufts.edu/NewsEvents/RecentNews.asp?newsid=6>

<sup>132</sup> Executive egos, however, may prevent this. See Pareles, *supra* note 117. For a general discussion of sharing risks between publisher and creator see WATT, *supra* note 7, at 71-107.

<sup>133</sup> Thus, many projects lose money merely because they do not satisfy highly inflated, if not intentionally ridiculous revenue expectations and creative accounting practices. See PIERCE O’DONNELL & DENNIS MCDUGAL, *FATAL SUBTRACTION* (1992); CAVES, *supra* note 54, at 113-14; Lunney, *supra* note 16, at 876-77. This yields lottery-like payout patterns. See Scherer, *supra* note 48, at 12-15; Lunney, *supra* note 37, at 878 n.205; CAVES, *supra* note 54, at 61-62, 102, 120 (estimating that 1/3 – 1/2 of independent films never even find distributors and that 76% of musicals and 80% of stage plays lose money); Pareles, *supra* note 117 (90% of albums do not break even); de Vany & Walls, *supra* note 97 (films are among the riskiest products with their data showing an infinite variance). *But see* Breyer, *supra* note 4, at 296 n.66 (estimating that 85% of textbooks are profitable). Publishers are also subject to the so called winner’s curse where the winning bidder is the one that makes the most unrealistically high estimate of the value of a property, only to be cursed with the consequences of its error. See CAVES, *supra* note 54, at 142-43; Richard H. Thaler, *Anomalies: The Winner’s Curse*, 2 J. ECON. PERSP. 191 (1988). Publishers might consider less expensive ways to signal their confidence in a C<sup>3</sup> than an excess of copies. CAVES, *supra* note 54, at 143-44. Meanwhile, a portfolio strategy does not appear to work well in creative industries. See Scherer, *supra* note 48, at 7.

## 6. Processing Payments

Even if dissemination is done electronically, processing payments is not free. This task may be outsourced to credit card companies, but handling extremely low prices, e.g., 10 cents/minute for a few minutes, will likely require emerging new micro-payment technologies.<sup>134</sup>

### III. Sources of Financial Rewards Absent §106's Broad Protection Against Copying

This section identifies many business models that appear able to provide sufficient revenues for inducing the production and dissemination of C<sup>3</sup>s even without §106. The two main categories of such models are sales of copies of C<sup>3</sup>s and indirect benefits flowing from reputations earned from such work. Some of these business models are solely relevant for physical copies of C<sup>3</sup>s, but most would also apply to C<sup>3</sup>s disseminated online as electronic bits.

#### A. Sales in the Absence of Full §106 Protection

The ability of publishers to sell access to C<sup>3</sup>s generally depends on at least three factors: the capabilities of available technologies to regulate access, relevant laws, and the social norms that dictate whether evading laws or defeating technological defenses will bring shame.<sup>135</sup>

##### 1. Technology/Architecture

Publishers' ability to sell access to C<sup>3</sup>s depends, to a great extent, on the technologies available for providing access. Although publishers often criticize new technologies for threatening existing business models and requiring additional legal protection,<sup>136</sup> often new media also spawn new ways to increase the social value that can be converted into revenues and profits.<sup>137</sup> For example, in 1982, when videotapes produced minimal revenues for Hollywood, MPAA President Jack Valenti testified that "the VCR is to the motion picture industry and the American public what the Boston strangler is to the woman alone."<sup>138</sup> By the 1990s, however, Hollywood's income from videotapes dwarfed all other revenue streams.<sup>139</sup>

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<sup>134</sup> See *infra* note 182 and accompanying text.

<sup>135</sup> See *supra* text accompanying note 30.

<sup>136</sup> See DIGITAL DILEMMA, *supra* note 10, at 78-79; Landes & Posner, *supra* note 7, at 330, 363; INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 14 (1995) (hereinafter "IITF WHITE PAPER"). Copyright owners also commonly see the emergence of new technologies as an opportunity for them to supplement their rights. See David Nimmer et al, *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 44-45 (1999). Additional restrictions may, however, impose a net harm on the public's right to enjoy C<sup>3</sup>s in the public domain. See *infra* note 247. For some estimates of total losses from unauthorized copying due to old and new technologies see *infra* note 315.

<sup>137</sup> Piano rolls and then vinyl disks for recording music enabled publishers to increase revenues from music. Motion pictures increased revenues from actors' performances. The key is adapting to the new technologies with appropriate business models. DIGITAL DILEMMA, *supra* note 10, at 177-79. See also GOLDSTEIN, *supra* note 40.

<sup>138</sup> See *Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5750 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 97<sup>th</sup> Cong. 8 (1983) (testimony of Jack Valenti, president, Motion Picture Association of America, Inc.).

<sup>139</sup> See COMPAINÉ & GOMERY, *supra* note 87, at 381, 411-22; VOGEL, *supra* note 78, at 62, 91-96. Similar situations have arisen in other market segments. See Menell, *supra* note 93, at TANs 122-37 (intro to II).

a. First mover/lead time advantage

For physical copies, technology generally provides a publisher with a "first mover," or lead-time, advantage – the period after the publisher releases its C<sup>3</sup>, but before copiers are able to distribute competing copies.<sup>140</sup> A publisher who accurately forecasts demand, efficiently reproduces and markets C<sup>3</sup>s, and is willing to price aggressively<sup>141</sup> can enjoy a great advantage over copiers. The latter would recognize that any output they produced would create excess supply and trigger a price war – unprofitable to all. In fact, first mover status was so advantageous that even before the U.S. granted copyright protection to publishers of foreign books, U.S. publishers still paid such publishers to secure an early, first edition.<sup>142</sup>

One key to deterring competition is the use of "limit pricing," i.e., setting prices just below that sufficient to attract copiers.<sup>143</sup> This would consist of a higher price before copiers entered and then likely a close-to-cost price; although publishers might find it desirable to tolerate some unauthorized copying.<sup>144</sup> Copiers would only see entry as attractive if they expected the publisher to maintain high prices and profit margins.

The publisher's lead-time advantage would be greatest where there was strong consumer demand for immediate gratification, as where media attention made a C<sup>3</sup> a hot topic of conversation,<sup>145</sup> – leading consumers to buy hardcover books or stand on long lines to see the newest movies<sup>146</sup> –

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<sup>140</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. C ("The originator of valuable information or other intangible assets normally has an opportunity to exploit the advantage of a lead time in the market. This can provide the originator with an opportunity to recover the costs of development and in many cases is sufficient to encourage continued investment."); SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 38-39 (Comm. Print 1958) (herein after Machlup Report). See generally William T. Robinson, Gurumurthy Kalyanaram & Glen L. Urban, *First-Mover Advantages from Pioneering New Markets: A Survey of Empirical Evidence*, 9 REV. INDUS. ORG. 1 (1994); Weinreb, *supra* note 39, at 1235.

<sup>141</sup> Historically, the initial publisher often responded to copiers by issuing "fighter" or "killer" editions – extremely cheap versions designed to drive prices below the latter's costs – behavior that was self-defeating in the short run, but served as a long run deterrent to such entry. See Hurt & Schuchman, *supra* note 21, at 428; Plant, *supra* note 16, at 173-75. Although the antitrust laws limit this kind of behavior, see Breyer, *supra* note 4, at 300-01, it is quite effective. See Plant, *supra* at 171; Hurt & Schuchman, *supra* at 427. Previously, publishers had used a collusive "courtesy principle" to avoid competition, until that collapsed. See VAIDHAYANATHAN, *supra* note 6, at 52-53.

<sup>142</sup> See Plant, *supra* note 16, at 172-73. In fact, English authors often received more from the sale of their books to American publishers than from their British royalties. Id.; Breyer, *supra* note 4, at 299-300.

<sup>143</sup> See F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 233-36 (2d ed. 1980). See also WATT, *supra* note 7, at 68 ("all piracy can be eliminated with a suitable pricing strategy"). In fact, under the Articles of Confederation, the copyright laws in five states (Connecticut, Georgia, New York, and both Carolinas) required that copyrighted books be published in sufficient numbers and at a cheap enough price to satisfy public demand. See Gillian K. Hadfield, *The Economics of Copyright*, 38 COPYRIGHT L. SYMP. (ASCAP) 1, 10-11 (1992); Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 116 (1928).

<sup>144</sup> See WATT, *supra* note 7, at 37-54; Fernando W. Nascimento & Wilfried R. Vanhonacker, *Optimal Strategic Pricing of Reproducible Consumer Products*, 34 MGMT SCI. 921 (1988).

<sup>145</sup> See *supra* note 102 and accompanying text; CAVES, *supra* note 54, at 277-78 ("only a few creative goods at a time bask in the limelight of buzz").

<sup>146</sup> Publishers generally seek to exploit consumer desire for immediate consumption by using multiple media to price discriminate. Thus, film studios generally release a film first to theaters, then on videocassettes/DVDs, next on pay-per-view, then on pay cable and finally on network TV. See CAVES, *supra* note 54, at 168-69; VOGEL, *supra* note 78, at 84-85; David Waterman, *Prerecorded Home Video and the Distribution of Theatrical Feature Films* in VIDEO

and where copiers were unable to provide quick access. It would diminish dramatically to the extent consumers were willing and able to receive online transmissions.<sup>147</sup> For example, publishers could still benefit from a reputation for being the first to include the newest C<sup>3</sup>s, e.g., legal decisions and law review articles, in its hypertext-linked database.

#### b. Pre-sales to consumers and investors

The Internet also makes it more practical to manage standard pre-sales or a version where buyers commit to buy one out of a set of offerings.<sup>148</sup> Both, however, are suited primarily for popular creators or for C<sup>3</sup>s endorsed by trusted experts,<sup>149</sup> and both are vulnerable to free riders.

##### (1). Specific commitments

Creators/publishers often market themselves based on their special skills and seek a pre-sale contract or subscription for producing C<sup>3</sup>s at a satisfactory price. The pre-sale of books formerly entailed substantial administrative costs,<sup>150</sup> but the Internet now makes it easy for buyers to post and receive responses to requests for proposals (RFPs). Before making a selection, many prefer to consult prior purchasers or sample a short excerpt,<sup>151</sup> yet buyers commonly make purchases based on experience with a creator's previous C<sup>3</sup>s,<sup>152</sup> and schools often pre-purchase updated editions of their favorite textbooks.<sup>153</sup>

The British band Marillion offers an excellent example of how the Internet facilitates the use of pre-sales by creators with a significant following.<sup>154</sup> Despite being dropped by its recording company, the group collected a 25,000-name email list of fans and successfully solicited them for £200,000 in orders for an album (@£16 each) in just a few weeks.<sup>155</sup> This model is certainly

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MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY 221 (Eli Noam ed. 1985). Historically, studios used first, second, third, etc. "run" theaters. See MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 58-61, 69-70, 160 (1960).

<sup>147</sup> Still, it would not completely disappear. See *infra* note 169.

<sup>148</sup> Pre-sales are common in the film industry, although to distributors rather than consumers. That is, production companies may obtain significant commitments from foreign distributors, pay-TV networks, and home video firms prior to production. See VOGEL, *supra* note 78, at 61. Live theaters also pre-sell season subscriptions.

<sup>149</sup> Lesser-known creators might even be willing to pay for strong endorsements to enable them to use pre-sales. See *supra* note 130. This follows the example of unprofitable dot.coms using respected investment banks for IPOs.

<sup>150</sup> See Breyer, *supra* note 4, at 302-03, 305-06.

<sup>151</sup> See *supra* section II.C.4.d.

<sup>152</sup> See David D. Kirkpatrick, *Harry Potter Magic Halts Bedtime for Youngsters*, N.Y. TIMES, July 9, 2000, §1, at 14. This is true for all "experiential goods" – those that must be experienced to determine if they meet one's needs. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 312 (1970).

<sup>153</sup> Publishers and film studios typically approve projects based primarily on the reputations of the creators.

<sup>154</sup> Marillion sold 10 million albums, had a huge hit "Kayeleigh," was known for their "suicide" albums, and was often compared to Genesis. See MICHAEL LEWIS, NEXT: THE FUTURE JUST HAPPENED 139-44 (2001).

<sup>155</sup> Stephen King's online publication of chapters of *The Plant* was closer to a "shareware" model – requesting voluntary payments after receipt of a chapter – but it was also a form of pre-sale since readers knew that if King did not receive sufficient payments he would not offer new chapters. King's initial arrangement was to publish chapters of *The Plant* and request \$1 donations from each reader for each chapter. King would publish subsequent chapters as long as 75% of those downloading paid for the privilege. *Comment: Publishing: Not So Fast*, WALL ST. J., Aug. 2, 2000, at A20. After less than 50% of downloaders paid for the sixth installment, King stop writing. Still, King

susceptible to free riding, but entities like openculture.org believe that this model is viable.<sup>156</sup> A publisher could post the total dollar amount it required to finance a particular C<sup>3</sup>, set a deadline, and ask either of two prices: 1) a fixed price, like Marillion, seeking orders contingent on some minimum total demand or 2) seek "donations," like fundraisers in telethons, contingent on reaching the goal sought.<sup>157</sup> If potential free riders saw that consumer bids were likely to fall short of the required amount, they would have a strong incentive to pay to ensure that the C<sup>3</sup> they desired was produced.<sup>158</sup>

## (2). Discretionary commitments

Technology also appears to create the opportunity for mimicking the current textbook market.<sup>159</sup> Schools requiring a textbook in a particular category by a set date would commit to purchase a set quantity, but with discretion to choose from among all available texts. Just as they do today, publishers would decide how many different textbooks to commission based on the estimated demand and likely competitors. Thus, one publisher who estimated market demand for a freshman -level, advanced algebra textbook might be willing to commission one text/author if estimated demand exceeded \$2 million, a second if that estimate exceeded \$3.5 million. Other publishers would set other "trigger points" for each category. Publishers could be asked to designate an online page for displaying their trigger points for each category of texts as well as a running total of the dollar value of contingent orders placed for printed copies. If purchasers desired one or more new books to choose from they would feel pressure to raise total orders to the desired trigger point. This would replace the current "spot market" in textbooks with longer-term discretionary contracts, but would not appear to dampen publisher incentives to compete.<sup>160</sup>

### c. Versioning, including offering services in place of products

As mentioned above, publishers can use discriminatory prices to take advantage of consumers' willingness to pay more to get earlier access to desired C<sup>3</sup>s. Yet timeliness is only one of the many dimensions publishers use to differentiate versions of C<sup>3</sup>s.<sup>161</sup> For example, many creators are able to earn substantial fees for live performances even when free recordings are available.<sup>162</sup>

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apparently made a profit of \$450,000 on revenues of \$720,000 from the project. *Marketing & Media*, WALL ST. J., Feb. 8, 2001, at B10. See also Lunney, *supra* note 37, at 863-64. There is, however, a danger that some will game the system. See Breyer, *supra* note 4, at 303-04.

<sup>156</sup> Phish, Prince, and Wonderlick are pursuing such direct-to-fan arrangements. See Charles C. Mann, *The Year the Music Dies*, WIRED, Feb. 2003, at 90, 93. Openculture.org is offering to play middleman.

<sup>157</sup> Conditionally binding assurance contracts are in widespread use, see Palmer, *supra* note 21, at 299, as is holding funds in escrow. See John Kelsey & Bruce Schneier, *The Street Performer Protocol and Digital Copyrights*, FIRST MONDAY, June 1999, available at [http://www.firstmonday.dk/issues/issue4\\_6/kelsey/](http://www.firstmonday.dk/issues/issue4_6/kelsey/) at 8-10.

<sup>158</sup> Breyer, *supra* note 4, at 304; John Perry Barlow, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, at 84, 128. Cf. CAVES, *supra* note 54, at 248. Certainly some bidders might gamble that others would step in to pay for the C<sup>3</sup> at the last minute, but if creators used the techniques of bidding sites, like eBay, which allow bidders to choose last minute default strategies, then failures (insufficient funds promised, although the real demand exceeded the cost) should be minimized. See *infra* III.A.2.b.

<sup>159</sup> See Breyer, *supra* note 4, at 305-06.

<sup>160</sup> The website <http://www.collab.net> already occasionally hosts markets of this type to finance new software.

<sup>161</sup> See CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES* 53-81 (1999) (discussing versioning strategies).

<sup>162</sup> Large-scale concerts are one option. See Brett May & Marc Singer, *Unchained Melody*, MCKINSEY Q., No. 1, 2001, at 128, 136-37; Ku, *supra* note 22, at 308-09. But see CAVES, *supra* note 54, at 66 (concerts are only

The superior audio and visual effects of theatrical showings, particularly for films with cutting edge special effects or lush scenery,<sup>163</sup> is likely to be substantially more attractive than even free bootlegged DVDs of the film. Schools and students pay academics dramatically more for their live presentations of textbook content (teaching) than for the C<sup>3</sup>s themselves. The Grateful Dead relied primarily on performances in combination and merchandising fees discussed in III.B.1.<sup>164</sup> Playwrights might earn a substantial share of their income from consulting on performances of their work, and poets from reading their material.<sup>165</sup>

Publishers are also often able to charge significantly higher prices for signed copies or C<sup>3</sup>s that enable buyers to “participate.”<sup>166</sup> Authorized online music services may charge higher prices by offering “branded” access that is both quick and limited to reputable copies.<sup>167</sup> The latter may become particularly significant if free online C<sup>3</sup>s are commonly infected with harmful viruses or adware, or fakes.<sup>168</sup> Buyers are also often willing to buy clean hard copies even when C<sup>3</sup>s are available free online.<sup>169</sup> If offerings were required to be prominently marked “unauthorized copy,” as discussed below, they would clearly make less attractive gifts.

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profitable for the most popular groups); Healey, *supra* note 98 (“While concerts can sustain an established band with a fervid national following, new artists generally don’t make money when they venture away from home.”); VOGEL, *supra* note 78, at 160 (concerts are primarily for marketing). Smaller, “house concerts” may also be profitable. See Eric Brace, *House Music*, WASH. POST, Oct. 25, 2002, at T32.

<sup>163</sup> These may soon be further enhanced by IMAX technology. See Lyman, *supra* note 83.

<sup>164</sup> Some allow their fans to record and distribute their live recordings without restrictions, hardly generating any income from record sales. See Barlow, *supra* note 158, at 126, 128; Ku, *supra* note 22, at 308-09.

<sup>165</sup> Celebrity journalists already earn significant fees from presenting live news analyses. See FALLOWS *supra* note 50, at 88 (quoting Ted Koppel, “We are paid to fill seats . . . the same way a singer or comedian is paid,” and Jeff Greenfield, “We are booked as entertainers.”). But see *id.* at 103-28 (concerning ethical issues); *infra* note 193.

<sup>166</sup> See Matthew Mirapaul, *Selling and Collecting the Intangible, at \$1,000 a Share*, N.Y. TIMES, Apr. 29, 2002, at E2 (discussing the sale of “shares” in an online work to owners who can alter the work).

<sup>167</sup> See David Pogue, *Online Piper; Payable by the Tune*, N.Y. TIMES, May 1, 2003, at G1; Saul Hansell, *E-Music Sites Settle on Prices. It’s a Start*, Mar. 3, 2003, at C1; Strauss, *supra* note 127; Michael A. Einhorn, *Digital Content and Rights Management*, Apr. 18, 2002, at 5-6. Reputable publishers could also enable consumers to avoid delays due to limited capacity. See Richtel, *supra* note 121; DIGITAL DILEMMA, *supra* note 10, at 80-81. Trademarks would protect the values of such brands. See *supra* note 19.

<sup>168</sup> See Andrew Ross Sorkin, *Software Bullet is Sought to Kill Musical Piracy*, N.Y. TIMES, May 4, 2003, §1 at 1; Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. (forthcoming 2003) at 59-61 (discussing RIAA efforts at sabotage) available at <http://www.ssrn.com/abstract=329700>.

<sup>169</sup> Even when newspapers are available online, consumers generally prefer hard copies. Hsiang Iris Chyi & Dominic L. Lasorsa, *An Explorative Study on the Market Relation Between Online and Print Newspapers*, 15 J. MEDIA ECON. 91 (2002). Online access is free for all but a few, see Richtel, *supra* note 127, and most allow their websites to scoop their papers. See Clark Gilbert, *The Internet and Newspapers: A Dilemma in Response*, HARV. BUS. REV., May 2002, at 94. This also appears to apply to books. See Eric Flint, *Prime Palaver #6*, Apr. 15, 2002, available at <http://www.baen.com/library/palaver6.htm>. It may also apply to music. See *Peer-to-Peer Music Trading: Good Publicity or Bad Precedent*, Knowledge@Wharton, Oct. 9-22, 2002, available at <http://knowledge.wharton.upenn.edu/articles.cfm?catid=4&articleid=635&homepage=yes>; John B. Horrigan & Jorge Reina Schement, *Consuming Information More or Less: An Examination of Information Consumption Behavior as a Strategy for Substituting or Supplementing the Consumption of Other Information*, Aug. 2002, at 11-14 available at <http://intel.si.umich.edu/tprc/papers/2002/61/Horrigan.Schement.TPRC02.pdf>; Tim O’Reilly, *Piracy is Progressive Taxation, and Other Thoughts on the Evolution of Online Distribution*, Dec. 12, 2002, available at <http://www.oreillynet.com/pub/a/p2p/2002/12/11/piracy.html>.

Publishers could also charge more for supplementary content<sup>170</sup> or access to up-to-date versions of continuously changing data sets like telephone directories and weather reports or linked sets of C<sup>3</sup>s, like Westlaw, which permit easy jumping from one C<sup>3</sup> to another.<sup>171</sup> As Ithiel de Sola Pool observed long ago, publishers could transform their business from providing a *product* to providing a *service*: access to continuously updated, corrected, and linked C<sup>3</sup>s.<sup>172</sup> If publishers only provided discrete search results or software capability or highly customized content, there would be little of value for copiers to copy.<sup>173</sup> Service models are also well suited for evolving computer software<sup>174</sup> and enable publishers to employ price discrimination.<sup>175</sup>

#### d. Self-help technologies

New technologies have also made it easier for publishers to use code to protect against copying and to enable consumers to pay artists directly. Regarding the former, digital rights management technologies rely on a combination of hardware and software, including data shields, encryption technologies, and watermarks, to hinder, if not prevent, unauthorized copying.<sup>176</sup> Thus, the online music services discussed above limit how many files a subscriber may download to their hard drives or burn onto CDs.<sup>177</sup> These technologies are vulnerable to hacking,<sup>178</sup> but if they are

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<sup>170</sup> See Alex Salkever, *The Battle of the Online Content Models*, BUSINESSWEEK ONLINE, May 13, 2002 available at <http://www.businessweek.com/> (noting that the N.Y. Times sells access to crossword puzzle hints and "TimesTalks Online" for \$5.95 per stream). DVDs can include music videos and background stories about artists. See Chris Nelson, *Releasing Rock Albums Again and Again*, N.Y. TIMES, Nov. 25, 2002, at C10.

<sup>171</sup> See Matthew Mirapaul, *Today's Publishing: Better by the Book or by the Web?*, N.Y. TIMES, Feb. 4, 2002, at E2 (discussing the presentation of stories as a "dynamic and kinetic experience").

<sup>172</sup> See Pool, *supra* note 1, at 226-27; Nimmer et al, *supra* note 136, at 35; *supra* note 73; Steve Lohr, *An Internet Pioneer of the 90's Looks to a Future in Software*, N.Y. TIMES, June 17, 2002, at C1 (discussing the licensing of Opware). See also Barlow, *supra* note 158, at 128-29.

<sup>173</sup> Creators might also offer consumers "customized" versions of their C<sup>3</sup>s to meet the particular aural or visual constraints of their environments or personal preferences. See Kevin Kelly, *Where Music Will Be Coming From*, N.Y. TIMES, Mar. 17, 2002, §6 [Magazine], at 29, 31. Publishers might also offer SA services, see *supra* II.C.4.c.

<sup>174</sup> A service model appears particularly suitable for computer software, where pre-existing software bugs are constantly being discovered and corrected and where incompatibilities constantly arise as new versions of affiliated softwares are developed and employed, but it might be well suited for many operations. See generally JEREMY RIFKIN, *THE AGE OF ACCESS* 73-95 (2000). Cf Breyer, *supra* note 4, at 321-23. Such services may be practical once broadband connections to the Internet are ubiquitous, although they create some privacy problems.

<sup>175</sup> The prerequisites for it would exist: publishers who offered superior value added services would enjoy some market power; they would be able to distinguish among different customers based on their histories, and arbitrage would be difficult. See Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 59-60 (2001). Furthermore, the Robinson-Patman Act does not prohibit price discrimination for services.

<sup>176</sup> See Amy Harmon, *Studios Using Digital Armor to Fight Piracy*, N.Y. TIMES, Jan. 5, 2003, §1, at 1; DIGITAL DILEMMA, *supra* note 10, at 153-76, 282-303; Lock-My-Doc, Digital Rights Management, available at <http://www.lockmydoc.com/drm/drm.html>. Einhorn, *supra* note 167, at 5-6; Kenneth W. Dam, *Self-Help in the Digital Jungle*, in EXPANDING THE BOUNDS OF IP, *supra* note 48, at 103, 107-10; Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997); Content Specific Camcorder Jamming for Digital Projectors (Oct. 2002) <http://www.atp.nist.gov/awards/00005237.htm> (device to prevent copiers from filming from within theaters). But see *Future of Secure Digital Music Initiative Grim*, USA TODAY, Apr. 29, 2002 at <http://www.usatoday.com/life/cyber/tech/2002/04/29/sdmi.htm> (discussing the failure of SDMI).

<sup>177</sup> See Di Nome, *supra* note 167.

<sup>178</sup> See, e.g. Matt Richtel, *Digital Lock? Try a Hairpin*, N.Y. TIMES, May 26, 2002, §4 at 12; Pool, *supra* note 1, at 221 ("At any given moment, the race of technology may seem to shift in favor of hidens over seekers, but there is little reason to expect hidens to win a decisive advantage in the long term."); Amy Harmon, *Students Learning to*

reasonably robust and/or protected by social norms, some predict "[c]ode can, and increasingly will, displace law as the primary defense of intellectual property in cyberspace"<sup>179</sup> even without the Digital Millennium Copyright Act.<sup>180</sup> The Internet also makes it much easier for consumers to voluntarily contribute directly to creators whose C<sup>3</sup>s they use or admire. Artists can set up their own websites to accept payments, or direct their audiences to clearinghouse websites, such as FairTunes and Tipster<sup>181</sup> or even Amazon's tip jar. Debit cards and new micro-payment technologies should simplify the process and make small online payments more practical.<sup>182</sup>

#### e. Advertising & sponsorships

Publishers also help finance their C<sup>3</sup>s with about \$130 billion annually from advertisers desiring to reach the audiences attracted by those creations,<sup>183</sup> and new technologies are both hurting and helping this approach. Television remote controls, which enable viewers to "zap" commercials with the mute button or avoid them by channel surfing, have long distressed TV advertisers.<sup>184</sup> The even greater threats from the TiVo and ReplayTV digital video recorder (DVR) technologies have even led Paramount Pictures to charge that they violate copyright law by making it too easy for viewers to avoid commercials.<sup>185</sup> Similarly, new online "screens" enable net surfers to view web pages stripped of their commercial messages.<sup>186</sup>

Advertisers have traditionally responded by offering commercials that are too entertaining for

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*Evade Moves to Protect Media Files*, N.Y. TIMES, Nov. 27, 2002, at C3; Mann, *supra* note 6, at 44-48 (quoting Internet security consultant Bruce Schneier, author of SECRETS AND LIES (2000):

"You always have two kinds of attackers, Joe Average and Jane Hacker. Many systems in the real world only have to be secure against Joe Average." Door locks are an example: they're vulnerable to expert thieves, but the chance that any one door will encounter an expert thief is small. "But if I am Jane Hacker, the best online," Schneier says, "I can write a program that does what I do and put it up on the Web – click here to defeat the system. Suddenly Joe Average is just as good as Jane Hacker."

<sup>179</sup> See LESSIG, CODE, *supra* note 29, at 126. Breyer recognized that copyright would become irrelevant in this context. See Breyer, *supra* note 40, at 81. See also Dam, *supra* note 176, at 110-11.

<sup>180</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered §§ of U.S.C. chaps 17, 28, & 35). Its constitutionality is at issue. See Samuelson, *supra* note 72, at 161 n. 80; *infra* V.

<sup>181</sup> *What We Do*, <http://www.fairtunes.com/about/description.jsp>; *What is Tipster*, <http://tipster.weblogs.com/tipster>.

<sup>182</sup> See Barlow, *supra* note 158, at 129. See generally Jari Kytöjoki & Vesa Kärpjoki, Micro-payments - Requirements and Solutions (Jan. 10, 2000), at <http://www.hut.fi/~vkarpjjo/netsec99>; Adam Cohen, *For Pennies a Day can Dotcom Content Sites be Saved? Amazon's New Micropayment System Could Point the Way*, TIME, Feb. 19, 2001, at 81; Jeanette Borzo, *Internet Renews Interest in Micropayments*, WALL ST. J., Apr. 10, 2001, at B8.

<sup>183</sup> This includes about \$44 billion for newspapers, see <http://www.naa.org>; \$36 billion for television programs, see <http://www.tvb.org/tvfacts/index.htm>; \$18 billion for radio, see <http://www.rab.com>; and \$17 billion for magazines, see <http://www.magazine.org>. It does not include the increasing amounts collected by movie theaters.

<sup>184</sup> See, e.g. Dennis Kneale, 'Zapping' of TV Ads Appears Pervasive, WALL ST. J., Apr. 25, 1988, at 29. But see Bill Carter, *TV Industry Unfazed by Rise in 'Zapping'*, N.Y. TIMES, July 8, 1991, at D1.

<sup>185</sup> DVRs empower viewers to automatically eliminate commercials during playback or even when watching a live broadcast on a slightly-delayed (almost real time) basis. See LEWIS, *supra* note 154, at 165-90; David D. Kirkpatrick, *A TV House Divided, A Debate on Skipping Ads at AOL Time Warner*, N.Y. TIMES, Oct. 28, 2002, at C1; Amy Harmon, *Skip-the-Ads TV Has Madison Ave. Upset*, N.Y. TIMES, May 23, 2002, at A1; Amended Complaint, Paramount Picts. Corp. v. ReplayTV, Inc., Civ. No. 01-09358 (filed C.D. Cal. Nov. 21, 2001) ¶17 available at [www.eff.org/IP/Video/Paramount\\_v\\_ReplayTV/20011121\\_paramount\\_amd\\_complaint.pdf](http://www.eff.org/IP/Video/Paramount_v_ReplayTV/20011121_paramount_amd_complaint.pdf).

<sup>186</sup> See David Pogue, *Puncturing Web Ads Before They Pop Up*, N.Y. TIMES, June 27, 2002, at G1; <http://www.junkbusters.com>; <http://test.angel.net/nic/salong-home.cgi>, (which "debones" salon.com).

viewers to skip.<sup>187</sup> Publishers have also long recognized the value of “product placements,” (as highlighted by Reese’s Pieces in *E.T.*),<sup>188</sup> and this practice also affects books<sup>189</sup> and music (e.g., product jingles and background music).<sup>190</sup> Advertisements on new media are also becoming more valuable. First, the Internet has created the opportunity for viewers to make impulse purchases of products they see on a show, e.g., fashions in *Sex in the City* and music on Dawson’s Creek<sup>191</sup> Second, media firms are improving their ability to target consumers with customized or enhanced ads.<sup>192</sup> Although some might regard this business model as creating a danger that advertisers or others will use their financial influence to distort editorial or artistic creations, this tension has always existed for creative enterprises seeking profits or audience.<sup>193</sup>

## 2. Social Norms

Publishers’ ability to rely on technology and law to ensure payments for their C<sup>3</sup>s is heavily dependent on social norms and customs.<sup>194</sup> While consumers often seek to resist laws and defeat

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<sup>187</sup> See Harmon, *supra* note 185 (noting that DVRs permit advertisers to offer expanded versions of their ads); Mark Levine, *30-Second Auteur*, N.Y. TIMES, Feb. 33, 2002, §6, at 30; Joe Flint, *Super Bowl’s 30-Second Ad Rush: Forget Pigskin; Real Action For Sunday’s Game Lies in What Commercials Fly*, WALL ST. J., Jan. 26, 2001, at B1. Occasionally broadcasters offer C<sup>3</sup>s comprised solely of creative ads, like “Classic Commercials” (1999).

<sup>188</sup> See Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 301-11; Brian Steinberg, *Chapstick Lands Big-Screen Role in Sony Thriller*, WALL ST. J., Jan. 23, 2002, at B7C (“[h]aving characters eat a particular food product can cost between \$250,000 and \$500,000” or more); Aljean Harmetz, *Fox to Sell Rights to Plug Goods in Films*, N.Y. TIMES, Dec. 21, 1983, at C20; Stuart Elliott, *Hiding a Television Commercial in Plain View*, N.Y. TIMES, May 24, 2002, at C1; Bill Carter, *Skipping Ads? TV Gets Ready to Fight Back*, N.Y. TIMES, Jan. 10, 2003, at C1; Stuart Elliot, *Some Sponsors are Backing Off to Fine Tune the Art of Blending the Products into Television Shows*, N.Y. TIMES, Jan. 22, 2003, at C5.

<sup>189</sup> See David D. Kirkpatrick, *Now, Many Words From Our Sponsor*, N.Y. TIMES, Sept. 3, 2001, at A1 (Fay Weldon’s THE BULGARI CONNECTION); Snyder, *supra* note 188, at 308. Advertisers even sponsor school materials. See David D. Kirkpatrick, *Snack Foods Become Stars of Books for Children*, N.Y. TIMES, Sept. 22, 2000, at A1.

<sup>190</sup> See, e.g., Kelly, *supra* note 173, at 31.

<sup>191</sup> For example, asseenin.com provides data about products featured on a number of television programs. See also Nancy Hass, “*Sex*” Sells, in the City and Elsewhere, N.Y. TIMES, July 11, 1999, § 9, at 1; David F. Gallaher, *New Service Offers Made-to-Order CD’s From TV Show*, N.Y. TIMES, Jan. 7, 2003, at C4; Bob Tedeschi, *Recent Snafus at the Online Shops of TV Networks*, N.Y. TIMES, May 13, 2002, at C8.

<sup>192</sup> See Harmon, *supra* note 185; Farhad Manjoo, *TiVo Town or Sonicblue City*, WIREDNEWS, June 6, 2002 available at <http://www.wired.com/news/print/0,1294,53008,00.html> (Best Buy viewers can access enhancements to its ads).

<sup>193</sup> See BEN BAGDIKIAN, THE MEDIA MONOPOLY xxv-xxvii, 152-73 (6th ed. 2000) (observing that advertisers generally seek consumption-friendly environments for their ads); C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 44-69 (1994) (detailing how media dependency on advertising favors content fostering a “buying mood” over coverage of controversial issues); ERIC BARNOUW, THE SPONSOR 57 (1978) (“The most formidable impediment is not censorship, but self-censorship. Its monuments are proposals not budgeted, ideas never proposed.”); Randall Rothenberg, *Messages From Sponsors Become Harder to Detect*, N.Y. TIMES, Nov. 19, 1989 §4 at 5 (“the once sacrosanct line separating editorial matter and advertising in print, broadcast, and entertainment media is eroding, a victim of media companies struggling for ad revenues in a stagnant market and advertisers are only too eager to exploit their weaknesses.”). Artists are often pressured by their financial supporters, e.g., to write “a more hummable melody,” Stephen Sondheim, *Opening Doors*, on MERRILY WE ROLL ALONG (RCA 1982), or to cut out portions of a work, e.g., speeches about the Catholic church in SATURDAY NIGHT FEVER (1977). Fights between artists and publishers/producers are legion. See *supra* note 95.

<sup>194</sup> See *supra* note 34; Barlow, *supra* note 158, at 127) (“unwritten code . . . ethics . . . understandings”); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 471 (2003).

technologies they consider unfair,<sup>195</sup> they voluntarily make donations for other valued services.

a. Resistance to payments

Many web surfers interpret the cyberspace mantra "information wants to be free,"<sup>196</sup> to justify helping themselves to free copies of digital information.<sup>197</sup> Some may act out of resentment for being denied "private copying" rights they believe they deserve.<sup>198</sup> Others believe that excessive prices justify civil disobedience.<sup>199</sup> Many may have lost respect for the law after observing Microsoft and others escape significant penalties despite illegal conduct.<sup>200</sup>

b. Voluntary contributions

On the other hand, consumers often donate cash to street musicians and at "pay what you can" live performances and museums, and contribute checks to public broadcasters and creators of shareware computer programs.<sup>201</sup> Many willingly pay a "surcharge" for products "made in America" by "union labor,"<sup>202</sup> or by firms with admirable labor practices, like Ben & Jerry's, all to support higher payments to labor.<sup>203</sup> Economists have found that such behavior is not only

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<sup>195</sup> Cf. OTA STUDY, *supra* note 10, at 121-22 ("Only if the public perceives copyright rules as fair and reasonable will they voluntarily respect the law."); Dawn C. Chmielewski, *Andreessen: Copy Protection Efforts are Doomed*, SILICONVALLEY.COM, Apr. 9, 2002, at [www.siliconvalley.com/mld/siliconvalley/3031836.htm](http://www.siliconvalley.com/mld/siliconvalley/3031836.htm); Matt Richtel, *Music Services Aren't Napster, But the Industry Still Cries Foul*, N.Y. TIMES, Apr. 17, 2002, at C1.

<sup>196</sup> Stewart Brand's words, in context, were "Information wants to be free because it has become so cheap to distribute, copy and recombine – too cheap to meter. It wants to be expensive because it can be immeasurably valuable to the recipient." See STEWART BRAND, *THE MEDIA LAB: INVENTING THE FUTURE AT M.I.T.* 202 (1987).

<sup>197</sup> See DIGITAL DILEMMA, *supra* note 10, at 124-32. This attitude is at least partly due to the ease of copying digital C<sup>3</sup>s, as well as ignorance about some of the counter-intuitive aspects of current copyright law. See Amanda Lenhart & Susannah Fox, *Downloading Free Music: Internet Music Lovers Don't Think It's Stealing 2* (2000), available at [http://www.pewinternet.org/reports/pdfs/PIP\\_Online\\_Music\\_Report2.pdf](http://www.pewinternet.org/reports/pdfs/PIP_Online_Music_Report2.pdf) (finding that 78% of Internet users who download music don't think it is stealing to save music files on their computer hard drives); *It's OK to Download Free Music Files According to 80 Percent of Online Users*, QuickTake.com, May, 2000, available at <http://www.quicktake.com/qt/static/files/DigitalMusicFinal.pdf>; Litman, *Copyright Laws*, *supra* note 39, at 353. Even experts are often stymied. See DIGITAL DILEMMA, *supra*, at 132-39; LITMAN, *supra* note 16, at 72.

<sup>198</sup> Many were angered that the law did not protect their right to register a CD they had purchased at MP3.com to give them nationwide access to it. See Amy Harmon, *CD Technology Stops Copies, But it Starts Controversy*, N.Y. TIMES, Mar. 1, 2002, at C1 ("Being treated like a criminal [for private copying] makes me want to act like one."). Many believe that they should be able to share their C<sup>3</sup>s with their friends. John Schwartz, *Trying to Keep Young Internet Users From a Life of Piracy*, N.Y. TIMES, Dec. 25, 2001, at C1.

<sup>199</sup> Many are irritated at high prices. See LITMAN, *supra* note 16, at 168; cf. Graham Gori, *In Mexico, Pirated Music Outsells the Legal Kind*, N.Y. TIMES, Apr. 1, 2002, at C5. This is exacerbated when consumers realize that more than 90% of the price of a CD or DVD goes to middlemen, rather than the artists, see *supra* note 77, and that publishers are not passing on cost savings from Internet dissemination. This has incited calls for civil disobedience. See Lunney, *supra* note 37, at 907-10. In fact, states can prevent "professional" fundraisers from misleading the public about how significant a share of their payments actually go to the party they believe they are supporting. See *Madigan v. Telemarketing Assoc.*, \_\_\_ U.S. \_\_\_, slip at 20 (May 5, 2003).

<sup>200</sup> See e.g. Lawrence Lessig, *It's Still a Safe World for Microsoft*, N.Y. TIMES, Nov. 9, 2001, at A27; *infra* note 228.

<sup>201</sup> See *supra* note 36.

<sup>202</sup> See Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 1034 (1986).

<sup>203</sup> See Elizabeth H. Cryer & William T. Ross, *The Influence of Firm Behavior on Purchase Intention: Do Consumers Really Care About Business Ethics?*, 14 J. CONSUMER MKTG. 421 (1997) (finding consumers would pay more for products from ethical firms); Jeffrey L. Seglin, *A Boss Saved Them. Should They Save Him?*, N.Y. TIMES, Jan. 20, 2002, §3, at 4. *But see* Maryln Carrigan & Ahmad Attalla, *The Myth of the Ethical Consumer – Do Ethics*

surprisingly common,<sup>204</sup> but may even represent an efficient way to finance some activities.<sup>205</sup> Consumers who like to think of themselves as fair<sup>206</sup> often decline to purchase items when their low prices are due to the exploitation of workers<sup>207</sup> as illustrated by the California grape boycotts.<sup>208</sup> This has led some scholars to recognize that tipping could help finance creators.<sup>209</sup>

Restaurant tipping, which generates approximately \$20 billion a year,<sup>210</sup> is probably the model of voluntary payments most relevant to C<sup>3</sup> creators. Although many claim that they tip to reward quality service, data shows that the size of the tip is only somewhat affected by that factor.<sup>211</sup> Most North Americans tip even when they receive bad service and never expect to return,<sup>212</sup>

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*Matter in Purchase Behavior?*, 18 J. CONSUMER MKTG. 560 (2001).

<sup>204</sup> See Charles Bram Cadsby & Elizabeth Maynes, *Voluntary Provision of Threshold Public Goods with Continuous Contributions: Experimental Evidence*, 71 J. PUB. ECON. 53, 68-69 (1999) ("[O]ur experiments provide many examples where groups move toward cooperation rather than free-riding over time. Indeed, our results indicate that deterioration in the level of contributions is a special case, occurring only when the incentives to reach an efficient equilibrium are relatively low. The more general result is that contributions move toward a Nash equilibrium over repeated rounds of a public goods game."); John O. Ledyard, *Public Goods: A Survey of Experimental Research*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 111, 156-57 (John H. Kagel & Alvin E. Roth eds., 1995) (summarizing studies showing that with communication permitted between group members, contribution rates increased to between seventy and ninety percent, even over repeated periods); Daniel Rondeau et al., *Voluntary Revelation of the Demand for Public Goods Using a Provision Point Mechanism*, 72 J. PUB. ECON. 455, 468 (1999) ("Using large groups in an induced value framework, we have shown that the provision point mechanism with money-back guarantee and proportional rebate of excess contributions can closely approximate demand revelation."). These are referenced in Lunney, *supra* note 37, at 863 n.171.

<sup>205</sup> See Roland J. Kushner & Arthur C. Brooks, *The One-Man Band by the Quick Lunch Stand: Modeling Audience Response to Street Performance*, 24 J. CULTURAL ECON. 65 (2000). While tipping appears to exhibit some elements of efficiency, it does not appear to be fully efficient. See Michael Conlin et al, *The Norm of Restaurant Tipping*, J. ECON. BEHAV. & ORG., at §4. (forthcoming) available at <http://www.people.cornell.edu/pages/edo1/Tips.PDF>. Cooperative behavior even appears to have positive neurological effects. See James K. Rilling et al, *A Neural Basis for Social Cooperation*, 32 NEURON 395 (2002).

<sup>206</sup> See ROBERT H. FRANK, *PASSIONS WITHIN REASON* 1-42, 163-84 (1988). Neither tipping nor other related behavior appears to be explainable as enlightened self interest. See Jon Elster, *Social Norms and Economic Theory*, J. ECON PERSP., Fall 1989, at 99; Lunney, *supra* note 37, at 858-68.

<sup>207</sup> See Steven Greenhouse, *Banishing the Dickensian Factor*, N.Y. TIMES, July 9, 2000, § 4, at 5 (noting that the Fair Labor Association has adopted a code for monitoring working conditions in foreign countries);

<sup>208</sup> See Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborer" Continue to be Excluded From the National Labor Relations Act?*, 48 EMORY L.J. 489, 543 n.274 (1999) ("in December 1965 . . . [a] Harris poll showed that 17 million people stopped buying table grapes.").

<sup>209</sup> See *supra* note 37.

<sup>210</sup> See *supra* note 35.

<sup>211</sup> See Conlin, et al, *supra* note 205, at §4.2; Michael Lynn, *Restaurant Tipping and Service Quality: A Tenuous Relationship*, 42 CORNELL HOTEL & RESTAURANT ADMIN. Q. 14 (2001); Michael Lynn & Michael McCall, *Gratitude and Gratuity: A Meta-Analysis of Research on the Service-Tipping Relationship*, 29 J. SOCIO-ECON. 203 (2000) (restaurant customers do tip more for better service, but the relationship between service and tip size is very weak, with the former explaining about 2% of the latter); Craig Claiborne, *Food: Why Tip for Poor Service*, N.Y. TIMES, Dec. 21, 1959, at 31 (the public "rewards both good and bad table service equally"). Then again, restaurants that pool their tips, which include almost all fine-dining restaurants in New York, among others, do not help that cause. See also William Grimes, *Tips: Check Your Insecurity at the Door*, N.Y. TIMES, Feb. 3, 1999, at F1.

<sup>212</sup> See Leo P. Crespi, *The Implications of Tipping in America*, 11 PUB. OPINION Q. 424, 428-30 (1947). A 1996 survey found that 94% of Americans are inclined to leave tips in restaurants. See Tibbett L. Speer, *The Give and Take of Tipping*, AM. DEMOGRAPHICS, Feb. 1997, at 51. See also Grimes, *supra* note 211 ("Many uncertainties surround the dining experience, but one thing is sure. At the end of the meal, the diner, barring a near-nuclear catastrophe, will leave a tip."); KERRY SEGRAVE, *TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES* vii

apparently to maintain a self-image of being “fair.”<sup>213</sup> Consumers actually treat tips as payments due for services rendered, as does the Internal Revenue Service.<sup>214</sup>

Therefore, publishers might focus on convincing consumers that, at least in North America, it is both fair and proper to tip creators of C<sup>3</sup>s.<sup>215</sup> A media campaign modeled after the "Look for the union label" jingle<sup>216</sup> or those urging consumers to buy "green" (environmentally friendly),<sup>217</sup> i.e., pay extra to do the right thing, might be more effective than those accusing users of theft.<sup>218</sup> State governments, following the rationale of the 1995 White Paper, could require schools to teach students that using C<sup>3</sup>s without paying the creators is as wrong as plagiarism<sup>219</sup> and

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(1998) ("In its early history, tipping was . . . branded as un-American and undemocratic. . . tipping eventually became more entrenched in American life than in any other country.").

<sup>213</sup> Researchers, like Michael Lynn, have concluded that tippers probably tip to avoid disapproval, even by someone they will never interact with again, given existing social norm. Conlin et al, *supra* note 205, at 16; Robert Woodhead, *Tipping – A Method for Optimizing Compensation for Intellectual Property*, available at <http://tipping.selfpromotion.com>; Fred Hapgood, Voluntary Payments, presented to the Digital Commerce Society of Boston, Sept. 5, 2000, available at <http://tipster.weblogs.com/hapgood>. See also *supra* note 206; Crespi, *supra* note 212, at 426. For an enlightening cinematic discussion of tipping, see RESERVOIR DOGS (Miramax 1992), relevant dialogue available at <http://lenny.dyadel.net/dogs.txt> (at 2<sup>nd</sup> half of scene 1).

<sup>214</sup> *Roberts v. Commissioner*, 10 T.C. 581 (1948) (finding that it was reasonable for the IRS to treat the tips of taxi cab drivers as income, not gifts). Moreover, to respond to the unreported income from tips, the IRS has developed a 4-step process to estimate tips, which presumes that 90% of restaurant diners tip at least 12%. See *McQuatters v. Commissioner*, 32 T.C.M. (CCH) 1122, 1973 T.C.M. (P-H) ¶ 73,240, 1973 WL 2419.

<sup>215</sup> See Woodhead, *supra* note 213; Hapgood, *supra* note 213; Pool, *supra* note 1, at 223. Yet, restaurant tipping varies significantly from nation to nation. For example, as of 1988, it had not caught on in Australia, China, Denmark, Iceland, and Japan, and it is limited to rounding up the bill or to leaving small change in Belgium, France, Italy, the Netherlands, Norway, and Sweden. See NANCY STARR, *THE INTERNATIONAL GUIDE TO TIPPING* (1988).

<sup>216</sup> See, Union Label History, available at [www.uaw699.com/committees/union\\_label/union\\_label\\_history.html](http://www.uaw699.com/committees/union_label/union_label_history.html).

<sup>217</sup> See Walter Coddington, *It's No Fad: Environmentalism is Now a Fact of Corporate Life*, MKTG NEWS, Oct. 15, 1990, at 7 (finding that, in 1989, 67 percent of Americans stated that they were willing to pay 5-10 percent more for ecologically compatible products); Hazel T. Suchard & Michael J. Polonski, *A Theory of Environmental Buyer Behavior and its Validity: The Environmental Action – Behavior and its Validity: The Environmental Action-Behavior Model* in 2 AMA Summer Educators' Conf. Proceedings 187 (M.C. Gilly et al, eds., 1991) (finding environmentally conscious individuals were willing to pay 15-20 percent more for green products), cited in Michael Laroche et al, *Targeting Consumers Who Are Willing to Pay More for Environmentally Friendly Products*, 18 J. CONSUMER MKTG. 503, 503 (2001).

<sup>218</sup> See, e.g., Amy Harmon, *Music Swappers Get a Message on PC Screens: Stop it Now*, N.Y. TIMES, Apr. 30, 2003, at C1; Laura M. Holson, *Recording Artists Join in Campaign Against Unauthorized Music File-Sharing*, N.Y. TIMES, Sept. 26, 2002, at C3. Data indicates that marketing appears to be as useful for generating voluntary payments as for sales. See Burton A. Weisbrod & Nestor D. Dominguez, *Demand for Collective Goods in Private Non-profit Markets: Can Fundraising Expenditures Help Overcome Free Rider Behavior?*, 30 J. PUB. ECON. 83 (1986). See also Elizabeth Becker, *California Farmers Reconsidering Opposition to Subsidies*, N.Y. TIMES, Apr. 8, 2002, at A14 (California is considering a campaign to urge its residents to favor California's fruits and vegetables). Meanwhile, publishers would seem to qualify as the social norm “change agents,” i.e., “self-motivated leaders,” “norm entrepreneurs,” if not also “opinion leaders” that Ellickson, *supra* note 34, at 10-17, contends are required to establish such norms. Furthermore, fans and fan clubs of individual creators would seem to qualify as “enthusiastic appreciative observers,” under the standards of Richard McAdams, if not Eric Posner. *Id.* at 17-22. Finally, a court decision striking down current §106 would represent a suitable “trigger event.” *Id.* at 23-24.

<sup>219</sup> See IITF WHITE PAPER, *supra* note 136, at 203-10. See also DIGITAL DILEMMA, *supra* note 10, at 216-17, 304-10; LITMAN, *supra* note 16, at 111-21; OTA STUDY, *supra* note 10, at 120-21; Schwartz, *supra* note 198; Ellickson, *supra* note 34, at 38-42; Landes & Posner, *supra* note 7, at 331; Barlow, *supra* note 158, at 129. After all, compliance with copyright norms appears to depend more on perceptions of morality and legitimacy than the law. See Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L

discourages creators from producing more C<sup>3</sup>s,<sup>220</sup> particularly new or “borderline” artists.

If publishers could rely on consumers’ aversion to exploiting creators<sup>221</sup> to generate tips to cover fees to creators and promotional costs, then publishers’ first mover status should enable them to underprice and undermine copiers. Moreover, consumers could be asked to contribute for free online copies as well as hard copies and even some lesser amount for C<sup>3</sup>s borrowed from a library or purchased used.<sup>222</sup> As Ku suggests, the government might even mandate that distributors of C<sup>3</sup>s offer consumers a tipping option.<sup>223</sup>

Admittedly, a lack of direct live contact with an artist comparable to that with food servers would be less compelling, but websites could still employ interfaces with the voice of the creator or an enthusiastic fan, automated, if not live.<sup>224</sup> Requests like “would you please help enable us to continue our efforts by contributing at least \$1?” might well shame consumers into making a reasonable contribution. Rewarding fans who donated with some form of “membership” could also stimulate imitation.<sup>225</sup> A similar function might be served by cashiers in stores where lower priced “unauthorized” copies of a book were sold alongside authorized copies.<sup>226</sup> Theater companies, talent, and critics could support playwrights by not aiding productions that refused to

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& POL. 219 (1997). It is also consistent with efforts at establishing honor codes. See Kate Zernike, *With Student Cheating on the Rise, More Colleges are Turning to Honor Codes*, N.Y. TIMES, Nov. 2, 2002, at A10.

<sup>220</sup> That is supported by evidence of higher tips in restaurants that consumers frequented repeatedly. See Conlin, *supra* note 205, at 14. Similarly, the payments that Stephen King received for “Plant” stayed relatively stable until there was no need to encourage future content. See *supra* note 155. The key would be to cultivate a general attitude approaching that described by Steve Hogarth, the lead singer of the band Marillion:

I actually believe that our fans, if they can download something that we're doing from Napster, will feel that they've sort of let us down if they don't pay for it. . . . the record company is a bit like someone who bets ten pounds on a horse . . . The relationship the fans have with the artists, they're a bit like that guy who looks after the horse and feeds it and trains it . . . . It's about caring rather than just having a bet.

See LEWIS, *supra* note 154, at 148-49. These conditions or the success of pre-sales would support the development of a radical transformation of the music business. See note 169, *supra*; Strauss, *supra* note 149. But see Ann Powers, *Artists Take a Serious Look at the Business of Music*, N.Y. TIMES, Jan. 16, 2001, at E1 (“The relationship between artists and fans has been intermediated for so long by promotion outlets and marketing companies that there’s a disconnect.” (quoting Jenny Toomey, organizer of the 2001 Future of Music Coalition conference)).

<sup>221</sup> See Hurt & Schuchman, *supra* note 21, at 428-29 (discussing the promotion of a version of J.R. Tolkien's *Lord of the Rings* trilogy labeled as the only “authorized” one in competition with one that paid no royalties to Tolkien.).

<sup>222</sup> Publishers are now eager to collect commissions on the resale of used C<sup>3</sup>s, as under a “droit de suite” concept. See Brian Garrity, et al, *CD Pricing, Used Sales Debated: Concerns Rise Over High Retail Profile of Used CDs*, BILLBOARD, June 8, 2002, at 1; Frank Green, *Music Industry Remains in Spin*, SignOnSanDiago.com, available at [http://www.sduiontribune.com/news/business/20020614-9999\\_1614usedCDs.html](http://www.sduiontribune.com/news/business/20020614-9999_1614usedCDs.html). Used book sales have also grown dramatically. See Richard Rayner, *An Actual Internet Success Story*, N.Y. TIMES, June 9, 2002, §6 at 112.

<sup>223</sup> Ku, *supra* note 22, at 311 n.319.

<sup>224</sup> See Woodhead, *supra* note 213 (“It's easy to rationalize stiffing MegaCorp, but much harder to screw the hard-working guy the top of whose head they can see on the webcam answering their emails.”); Neil McManus, *Attention, Shoppers. Don't You Use That Tone With Me*, N.Y. TIMES, Mar. 7, 2002, at G3 (discussing the use of avatars that look like cartoons, but can converse with customers from kiosks in stores). To be most effective, payment solicitations would be as personalized as possible to counter the distance and anonymity of cyberspace. See DIGITAL DILEMMA, *supra* note 10, at 49. See also Woodhead, *supra* note 213 (“By letting users set the price, rather than setting it myself, I more than doubled my income.”).

<sup>225</sup> See Strahilevitz, *supra* note 168, at 47 & n.185.

<sup>226</sup> In a noteworthy scene from Woody Allen’s *BANANAS* (United Artists 1971), Fielding Mellish, is willing to pay a significant surcharge (for a bundle of unwanted magazines) to avoid an embarrassing attention from an anonymous newsstand cashier regarding his purchase of the adult magazine “Orgasm,” although his ploy fails.

offer reasonable license fees to artists.<sup>227</sup> Certainly, there would be many free riders, but imperfection is tolerated in many other important areas of the world economy.<sup>228</sup>

### c. Government payments

Public museums, schools, and libraries already buy C<sup>3</sup>s directly,<sup>229</sup> including paying higher prices for periodical subscriptions to reflect their greater use.<sup>230</sup> The “public lending rights” programs adopted in many European nations now pay creators based on the uses made of their work in libraries.<sup>231</sup> There has also long been support for using taxpayer-financed rewards instead of granting copyright or patent rights, although most analysis of this option has focused on patents rather than copyrights.<sup>232</sup>

### 3. Laws

The technologies and social norms discussed above in combination with general laws, like those against theft, can provide significant revenue streams for C<sup>3</sup> creators. Nevertheless, those writing the Constitution recognized that special additional legal protections might be necessary to support an optimal engine of free expression. Before considering current §106 in section IV, below, it is useful to review some copyright laws that appear to provide net public benefits:

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<sup>227</sup> Although the FTC’s prosecuted the Fashion Guild for organizing a boycott of retailers who sold pirated fashions, but that boycott was a formal arrangement involving contracts, records, and heavy fines. *Fashion Originator’s Guild of America v. Federal Trade Commission*, 312 U.S. 457, 462-65 (1941). A more informal boycott of institutions that neglected playwrights lacking contracts, record keeping, or penalties, would appear to be legal.

<sup>228</sup> In fact, the government has refrained from expending sufficient resources to go after most income tax cheats even though such expenditures would pay for themselves many times over. See David Cay Johnston, *Departing Chief Says the I.R.S. is Losing Its War on Tax Cheats*, N.Y. TIMES, Nov. 5, 2002, at A1.

<sup>229</sup> The Queens Borough Public Library (NYC) sometimes orders thousands of copies of a single blockbuster. See Marcia Biederman, *Making It Work: Library Thrives With a Common Touch*, N.Y. TIMES, Sept. 12, 1999, §14, at 3.

<sup>230</sup> See Janusz A. Ordover & Robert D. Willig, *On the Optimal Provision of Journals qua Sometimes Shared Goods*, 68 AM. ECON. REV. 324 (1978). See also David D. Kirkpatrick, *Publishers and Libraries Square Off Over Free Online Access to Books*, N.Y. TIMES, June 17, 2002, at C7 (discussing the same issue with respect to e-books).

<sup>231</sup> See Jennifer M. Schneck, *Note, Closing the Book on the Public Lending Right*, 63 N.Y.U. L.REV. 878 (1988); Joshua H. Foley, *Comment: Enter the Library: Creating a Digital Lending Right*, 16 CONN. J. INT’L L. 369, 385 n.115 (2002). Payments are based on either survey systems comparable to those used by music performance rights organizations, like ASCAP and BMI or library purchases, library holdings, or actual checkouts. See Schneck, *supra*, at 891-93; Bennett M. Lincoff, *A Plan for the Future of Music Performance Rights Organizations in the Digital Age* in EXPANDING THE BOUNDS OF IP, *supra* note 48, at 167, 173. Breyer rejected the idea of a fund to compensate publishers for photocopying due to the administrative costs of collecting funds from libraries. See Breyer, *supra* note 4, at 322. Yet federal funding for such a program might be considered if the other business models above did not prove viable in some submarkets. In 1998, ASCAP & BMI collected almost \$1 billion for about 200,000 writers and 80,000 publishers. KRASILOVSKY & SHEMEL *supra* note 77, at 5, 153-56. Similar systems are also used to distribute the funds collected via the surcharges discussed *infra* III.B.2. See Lunney, *supra* note 37, at 854.

<sup>232</sup> See Steven Shavell & Tanguy Van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J. L. & ECON. 525, 526-27 (2001). Government support was considered by European countries in 19<sup>th</sup> century. See Boyle *supra* note 7, at 57. For a detailed review of the major proposals and his own, see Michael Abramowicz, *Perfecting Patent Prizes* VAND. L. REV. (forthcoming) available at [www.ssrn.com/abstract=292079](http://www.ssrn.com/abstract=292079); Steve P. Calandrillo, *An Economic Analysis of Intellectual Property Rights*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301 (1998). Ku now proposes this for music today. Ku, *supra* note 22, at 313-15. For support in the context of copyright, see Plant, *supra* note 16, at 193; Michael Polanyi, *Patent Reform*, 11 REV. ECON. STUD. 61, 65 (Summer 1944).

To most effectively capitalize on the pursuit of respect and reputation by C<sup>3</sup> creators, it is important to ensure that they are accorded credit, i.e., paternity.<sup>233</sup> In scholarly and scientific fields, authors generally give credit to those upon whom they build to gain credibility for their own work,<sup>234</sup> as do courts when citing precedents (or compelling scholarly work). Social norms condemn significant omissions as plagiarism.<sup>235</sup> Existing tort and unfair competition laws, appear to already require such attribution and prohibit fraudulent claims of authorship.<sup>236</sup> Hence even absent §106, publishers could create the “Look for the union label”-type campaign, as mentioned above, asking consumers to look for indication that a C<sup>3</sup> was an “authorized” copy.<sup>237</sup> Better yet, copyright law should expressly require copiers to prominently label their C<sup>3</sup>s as “unauthorized copies”<sup>238</sup> and give consumers a tipping option.<sup>239</sup> Government entities could also require or at least encourage public entities like schools and libraries to buy only authorized versions of C<sup>3</sup>s, at least when the latter were priced within some percentage of market prices.<sup>240</sup>

Publishers can also use contract law to help them manage their rights in C<sup>3</sup>s.<sup>241</sup> For example, where a C<sup>3</sup> was being prepared for only a small number of consumers, such as a research report, non-disclosure/confidentiality agreements might be feasible.<sup>242</sup> In fact, some scholars view

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<sup>233</sup> The right to paternity is guaranteed by the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6 bis., 25 U.S.T. 1341, 1161 U.N.T.S. 3. See also Green, *supra* note 67, at 206. Creators like those discussed *supra* section II.A, care more about being acknowledged for their C<sup>3</sup>s than being paid. See David Lange & Jennifer Lange Anderson, *Fair Use and Transformative Critical Appropriation*, (Nov. 2001), available at <http://www.law.duke.edu/pd/papers/langeand.pdf> at 155.

<sup>234</sup> Footnote references often dwarf the text of law review articles. As Eric Raymond observed about creative hackers: “Interestingly enough, you will quickly find that if you are completely and self-deprecatingly truthful about how much you owe other people, the world at large will treat you like you did every bit of the invention yourself and are just being becomingly modest about your innate genius.” See RAYMOND, *supra* note 49, at 40, 54.

<sup>235</sup> See Green, *supra* note 67; Richard A. Posner, *On Plagiarism*, ATLANTIC, April, 2002, at 23.

<sup>236</sup> 15 U.S.C. §1125(a). See also Federal Trademark Dilution Act of 1995, 15 U.S.C. §1125(c)(1); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989).

<sup>237</sup> See *supra* note 221.

<sup>238</sup> J.R. Tolkien used this. See *supra* note 221. See also Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 29 & n.102 (2000). The Supreme Court's unanimous 2003 *Madigan* decision made it clear that states can act reasonably to ensure that consumers are not misled about where their payments go. See *supra* note 199. Copiers would be free to indicate any voluntary payments they made to creators, but labels would still be required for unauthorized copies to prevent copiers from misleading buyers by paying creators only a very small portion of profits. Cf. David Barstow & Diana B. Henriques, *9/11 Tie-Ins Blur Lines of Charity and Profit*, N.Y. TIMES, Feb. 2, 2002, at A1.

<sup>239</sup> See *supra* note 223, and accompanying text.

<sup>240</sup> In 2000, more than 100 public and private universities refused to authorize the use of their logos on lower-priced apparel made by companies whose factories do not meet the standards of the “Fair Labor Association.” See Thomas L. Friedman, *Knight is Right*, N.Y. TIMES, June 20, 2000, at A25. See also Breyer, *supra* note 4, at 305.

<sup>241</sup> Publishers can only use contracts to alter terms ancillary to “the general scope of copyright.” See, e.g., *Trandes Corp. v. Guy F. Arkinson Co.*, 996 F.2d 655, 659 (4<sup>th</sup> Cir. 1993) (discussing the “extra element” test).

<sup>242</sup> The courts have generally enforced voluntarily accepted confidentiality agreements, even when they prohibited the press from publishing facts. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). Yet unless consumers were willing to keep information confidential, see VAIDHAYANATHAN, *supra* note 6, at 178 (discussing billboard.com's non-disclosure system), this type of agreement would likely be preempted by copyright law as a mere subterfuge. See Nimmer et al, *supra* note 136, at 58-59. Requiring publishers to secure such agreements would impose administrative costs, but where there was a continuing relationship and where customers were already being monitored for online access, the additional cost would not appear to be substantial.

copyright law as a set of default contract terms, many of which may be overridden by terms negotiated by the parties.<sup>243</sup> Yet contractual provisions to extend copyright protection beyond the bounds of copyright law are limited by §301 (the preemption provision),<sup>244</sup> the Constitution's Supremacy Clause,<sup>245</sup> and general public policy.<sup>246</sup> This reflects the discomfort the nation's founders had with government-enforced monopolies.<sup>247</sup>

## B. Social Norms and Rewards Other Than Sales

Two other social norms also provide substantial financial support for the production and financing of many C<sup>3</sup>s. First, many consumers are willing to support favorite creators above and beyond making purchases. Second, there is strong social support for direct government and private sector financing of important artistic and scientific C<sup>3</sup>s.

### 1. Payments Due to Consumer Gratitude, Desire for Affiliation or Expertise

Creators can often obtain financial support from consumers appreciative of their work or desiring to associate with them, for example the "angels" who "invest" in Broadway shows.<sup>248</sup> Creators can also use their fame for merchandising: products based on their creations, those with their trademarks, or simply goods or services they choose to endorse.<sup>249</sup> Internet guru Esther Dyson

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<sup>243</sup> Some believe that employing contracts could well be in the public interest. See Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N. C. L. REV. 557 (1998); Dam, *supra* note 176; Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998); Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995).

<sup>244</sup> 17 U.S.C. §301. Nimmer et al, *supra* note 136, at 41. Still, some believe that its preemption applies solely to state legislation. Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millenium*, 47 J. COPYRIGHT SOC'Y U.S.A. 193, 198 (2000).

<sup>245</sup> See *id.*, at 199; Nimmer et al, *supra* note 136, at 40-41 (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834)).

<sup>246</sup> Contracts contrary to public policy are unenforceable. See RESTATEMENT (2D) OF CONTRACTS § 178; This was the basis for a lawsuit by New York State. See Matt Richtel, *Court Rejects Company's Efforts to Restrict Reviews of its Software*, N.Y. TIMES, Jan. 18, 2003, at C2. Contracts relating to digital forms of intellectual property may also be voidable under other statutory bases. See Jerome H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PENN. L. REV. 875 (1999).

<sup>247</sup> See Boyle, *supra* note 7, at 53-56; VAIDHAYANATHAN, *supra* note 6, at 22-24. The tremendous importance of a hearty public domain is clear. See *supra* section II.B.2; Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 180-97 (2003).

<sup>248</sup> See James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464 (1990); Kelsey & Schneier, *supra* note 157, at 8; Chris Nelson, *Rock Group Finds a New Way to Sell Out*, N.Y. TIMES, Sept. 23, 2002, at C9 (quoting one fan "It's a way for me and the other people . . . to really feel like [we're] part of the band, part of their music.") New online art forms even enable creators to sell rights to "participate" in a creation. See Mirapaul, *supra* note 166 (discussing sales of "shares" in an online work).

<sup>249</sup> See, e.g. VOGEL, *supra* note 78, at 96; Laura M. Holson & Rick Lyman, *In Warner Brothers' Strategy, A Movie is Now a Product Line*, N.Y. TIMES, Feb. 11, 2002, at C1; Leslie Kaufman, *PBS is Expanding its Brand from the Television Screen to the Shopping Mall*, N.Y. TIMES, June 27, 2002, at C8; Eric Asimov, *Britney Spears; Not Yet a Woman, Already a Restaurateur*, N.Y. TIMES, June 19, 2002, at F1; Saul Hansell, *In New Tack, iVillage Looks Beyond Ad Revenue*, N.Y. TIMES, June 17, 2002, at C1; DIGITAL DILEMMA, *supra* note 10, at 63; *supra* note 162. Moreover, courts have come to award trademark owners the rights to the "surplus value" from the use of their marks on unrelated products. See Rochelle Cooper Dreyfus, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); <http://www.davidbowie.com>; LEWIS, *supra* note 154, at 145.

observed long ago, that authors can write to increase their reputations and earn their income from ancillary services.<sup>250</sup> Thus, C<sup>3</sup> creators can often earn income from teaching in their areas of expertise, supported by student tuition and alumni donations.<sup>251</sup> Many consumers willingly pay to hear authors on promotional tours at stops like Washington DC's Smithsonian Museum.<sup>252</sup>

## 2. Support for Particularly Valuable C<sup>3</sup>s: "Merit Goods"

§106 is generally of little benefit to culturally or scientifically valuable (and often unpopular) C<sup>3</sup>s termed "merit goods."<sup>253</sup> Rather, society has generally supported them in three other ways: the generosity of individuals and private organizations; government subsidies; and student tuition. In fact, most of what are generally considered to be the greatest artistic and literary works of humanity were financed by royal, feudal, or church patronage, rather than copyrights.<sup>254</sup> Many creators still depend on foundations, research centers, and arts institutions.

The U.S. government has long played a major role in subsidizing the production of new C<sup>3</sup>s both through the salaries professors earn at public educational institutions and through grants to researchers in the public and private sector.<sup>255</sup> In more recent decades, federal funds have financed artistic creations through entities like the National Endowment for the Arts, the National Endowments for the Humanities, and the Corporation for Public Broadcasting.<sup>256</sup> State

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<sup>250</sup> See Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136. See also Barlow, *supra* note 158, at 126. A good example is the way Red Hat arose to help consumers with the use of the free Linux operating system. See ROBERT YOUNG & WENDY GOLDMAN ROHM, UNDER THE RADAR: HOW RED HAT CHANGED THE SOFTWARE BUSINESS AND TOOK MICROSOFT BY SURPRISE (1999). Creators could also offer consumers the selection assistance discussed *supra* II.C.4.c. Creators with expertise in a field of business, e.g., human resources, sales, might also serve as members of corporate boards of directors, representing shareholder interests. In fact, such independent experts could alleviate the problems created by current board members more accountable to management than shareholders. See Mark S. Nadel, *More Power to Shareholders*, WALL ST. J., June 26, 1989, at A8.

<sup>251</sup> Non-academic creators, including novelists, journalists, artists, etc., can also offer courses to interested students through affiliations with the credible educational institution that often invite them to speak. Entrepreneurs, could cobble together academic courses from guest lectures from expert authors and journalists, and reputable local media firms or book stores could even offer degrees for students who completed a specified number of sponsored courses.

<sup>252</sup> See <http://residentassociates.org/>; DIGITAL DILEMMA, *supra* note 10, at 63; *supra* note 162. Bookstores might also shift their focus more towards managing book club meetings and other author forums for a fee.

<sup>253</sup> See Richard A. Musgrave, *Merit Goods* in RATIONALITY, INDIVIDUALISM AND PUBLIC POLICY 207-10 (Geoffrey Brennan & Cliff Walsh eds. 1990); John G. Head, *On Merit Wants: Reflections on the Evolution, Normative Status, and Policy Relevance of A Controversial Public Finance Concept* in *id.*, at 211-44.

<sup>254</sup> This would include all C<sup>3</sup>s created before 1709. See Plant, *supra* note 16, at 169; POSNER, *supra* note 67, at 389.

<sup>255</sup> In 1970, in the United States, the support awarded by governments and other institutions in the form of grants and prizes to C<sup>3</sup> producers was "large when compared with the total revenue that scholarly, technical, or scientific writers receive from copyright royalties, and even in the case of literary works it is significant." Breyer, *supra* note 4, at n.28 and accompanying text. More recent data indicates that the government provides about forty percent of all U.S. research and development expenditures, primarily for basic research. See Linda R. Cohen & Roger G. Noll, *Privitizing Public Research*, SCI AM., Sept. 1994, at 72, 75; John M. Golden, *Biotechnology, Technology Policy, and Patentability: Natural Products and Invention in the American System*, 50 EMORY L.J. 101, 136 (2001).

<sup>256</sup> Prior to 1930, there was very little federal support. During the depression, however, an immense WPA Arts Project was created. See DICK NETZER, THE SUBSIDIZED MUSE: PUBLIC SUPPORT FOR ARTS IN THE UNITED STATES 53-59 (1978). In 1965, the creation of the National Foundation on Arts & Humanities established the National Endowment for the Humanities (NEH), the National Endowment for the Arts (NEA), and the Federal Council on Arts and Humanities. In the Corporation for Public Broadcasting was added in 1967. *Id.* at 59-79.

and local legislatures and arts groups also fund creators.<sup>257</sup> Independent boards help guard creators' freedom to produce C<sup>3</sup>s critical of the entities that fund them.<sup>258</sup>

Government bodies also play a number of other supportive roles. Public schools help train creators in English, music, and art, as do school newspapers, yearbooks, etc. Public entities also subsidize access to facilities like the Kennedy Center,<sup>259</sup> public broadcasting stations, and cable television public access channels.<sup>260</sup> Finally, the tax deductibility of donations to qualified non-profit arts and science entities also serves to subsidize C<sup>3</sup> creators.<sup>261</sup> Some have proposed financing content by selling or leasing portions of the publicly owned radio spectrum.<sup>262</sup>

#### **IV. Prohibiting Unauthorized Copying of C<sup>3</sup>s (§106): The Marginal Effects**

While the factors discussed above induce the production of many C<sup>3</sup>s, the Constitution empowers Congress to adopt copyright laws to promote additional output. The current version of §106, however, may have a net negative effect of the social benefits from C<sup>3</sup>s because it both increases the cost of key creative inputs and stimulates rent-seeking marketing, which appears to reduce the profitability of borderline C<sup>3</sup>s. A more socially optimal result might be achieved by only protecting some types of C<sup>3</sup>s and severely cutting the extent to which they are protected.

##### **A. Effects of Current §106 on Creation**

Although §106 clearly increases the revenues of popular creators, as discussed in II.B, above, the impact of increased revenues on output is ambiguous. For creators popular enough to demand a share of those revenues the backward bending supply curve may well kick in and reduce their output.<sup>263</sup> Meanwhile, for "borderline" creators, the willingness of so many aspiring stars to work for almost nothing except the chance for future stardom, suggests that competition will deny them any share of the increased revenues, assuming that revenues for their C<sup>3</sup>s do not actually decrease, as discussed in B., below. Still, the increased payoff may lead some borderline creators to switch from part-time to full-time production.

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<sup>257</sup> Id. at 128-30; Robin Pogrebin, *Hot Seat, Hard Times: City's New Cultural Affairs Chief Settles In*, N.Y. TIMES, Feb. 26, 2002, at E1. Funds may be allocated not only for their long term value to cultural history, but for shorter term benefits to tourism, see THROSBY, ECONOMICS, *supra* note 56, at 128-30, or community spirit or unity.

<sup>258</sup> Independent boards are protected by both important traditions and laws prohibiting government interference with arts funding groups. See 20 U.S.C. §953(c). *But see* MACAULAY, *supra* note 7, at 21 (¶6) ("I can conceive of no system more fatal to the integrity and independence of literary men than one under which they should be taught to look for their daily bread to the favour of ministers and nobles."); Netanel, *supra* note 14, at 352-63, 353 (quoting Voltaire: "every philosopher at court becomes as much a slave as the first official of the crown").

<sup>259</sup> See NETZER, *supra* note 256, at 46.

<sup>260</sup> See 47 U.S.C. 531; Felix Gillette, *No Static at All*, WASH. CITY PAPER, Dec. 7, 2001, at 24, 35-36, available at <http://www.washingtoncitypaper.com/archives/cover/2001/cover1207.html>.

<sup>261</sup> See NETZER, *supra* note 256, at 43-45. In the spirit of such public-private "joint ventures," some foundations seek to work with the private sector to fund joint projects. Examples of this model include the Noggin children's television show, and online educational fathom.com. See DAVID BOLLIER, IN SEARCH OF THE PUBLIC INTEREST IN THE NEW MEDIA ENVIRONMENT 12-15 (2002); NETZER, *supra* note 256, at 188.

<sup>262</sup> See LAWRENCE GROSSMAN & NEWTON MINOW, A DIGITAL GIFT TO THE NATION (2001) (proposing a Digital Opportunity Investment Trust for financing new kinds of noncommercial, public interest content) and related proposals discussed at an Aspen Institute seminar in summer 2001. See BOLLIER, *supra* note 261.

<sup>263</sup> See notes 64 & 65, *supra* and accompanying text.

With the increasing popularity of lists of best sellers and box office winners, etc., large winning payoffs are not needed for signaling the market niches that society favors.<sup>264</sup> Meanwhile, copyright-enhanced rewards may divert some creators into copyright-protected markets and away from other, more socially beneficial industry segments<sup>265</sup> or industries.<sup>266</sup> Furthermore, as many have recognized, creators, as a class, might actually be better off with *less* copyright protection,<sup>267</sup> because that would reduce their cost of inputs: both administrative costs and licensing fees for creating derivative works.

### 1. Overcoming impractical administrative costs for productive fair uses

The fair use doctrine is supposed to spare creators the need to incur the burdensome administrative costs of obtaining permission for minor uses of others' materials.<sup>268</sup> Yet the standards for fair use are so vague and constrained by lower federal courts that creators are often chilled out of fear of litigation.<sup>269</sup> Documentary filmmaker Davis Guggenheim finds that "if any piece of artwork is recognizable by anybody . . . then you have to clear the rights of that and pay to use the work," requiring significant, if not prohibitive, payments to lawyers, among others, simply to track down the rights' owners.<sup>270</sup> If fact, Hollywood features, such as *Batman Forever* and *The Devil's Advocate* have faced court injunctions for lacking appropriate clearances. The Internet<sup>271</sup> and a more efficient online Copyright registration procedure, however, might well

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<sup>264</sup> Netanel calls them the neoclassicists. See Netanel, *supra* note 14, at 309.

<sup>265</sup> See Lunney, *supra* note 267. See also Plant, *supra* note 16, at 192; Hurt & Schuchman, *supra* note 21, at 430; Lunney, *supra* note 37, at 888-90; Breyer, *supra* note 4, at 309. Absent §106, Joseph Liu observed that creators would likely favor technologies that facilitated the collection of fees.

<sup>266</sup> This is a hidden opportunity cost. See Lunney, *supra* note 267, *supra* note 37, at 880-81; Plant, *supra* note 16, at 184; Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 *ECONOMICA* 30, 40 (1934).

<sup>267</sup> See Landes & Posner, *supra* note 7, at 332-334, 337 & n.17; Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 *INT'L REV. L. & ECON.* 81, 88 (2002). See also Dawn C. Nunziato, *Justice Between Authors*, 9 *J INTELL. PROP. L.* 219 (2002); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *OHIO ST. L.J.* 517, 556 (1990); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 *VAND. L. REV.* 483, 494-97, 513 (1996); *supra* II.B.2. Cf O'Reilly, *supra* note 169.

<sup>268</sup> See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *COLUM. L. REV.* 1600, 1615, 1628-30 (1982); Breyer, *supra* note 4, at 316-18; POSNER, *supra* note 67, at 389-405. Still, after *Harper & Row v. Nation* (1985) it is not clear that fair use covers much beyond where a reasonable copyright owner would have consented to the use and thus a situation that should only arise where administrative costs make it impractical to seek permission. See Netanel, *supra* note 8, at 21-23.

<sup>269</sup> See *Eldred v. Ashcroft*, 123 S.Ct. 769, 806 (2003) (Breyer, J., dissenting); Pierre N. Leval, *Toward a Fair Use Standard*, 103 *HARV. L. REV.* 1105, 1106-07 (1990); L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 *J. INTELL. PROP. L.* 223, 224-26 (2001); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 *B.U. L. REV.* 975, 988-91 (2002); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659, 1693-94 (1988); Litman, *Copyright Legislation*, *supra*, note 39, at 341; LESSIG, *IDEAS* *supra* note 16, at 183.

<sup>270</sup> See LESSIG, *IDEAS* *supra* note 16, at 3-4; Eldred, 123 S.Ct. at 805-06 (Breyer, J., dissenting); *DIGITAL DILEMMA*, *supra* note 10, at 65. For examples of the problems of identifying who owns a copyright see Frances Nevins, *Little Copyright Dispute on the Praire: Unbumping the Will of Laura Ingalls Wilder*, 44 *ST. LOUIS U.L. REV.* 919 (2000); Amy Harmon, *Copyright Hurdles Confront Selling of Music on the Internet*, *N.Y. TIMES*, Sept. 23, 2002, at C1.

<sup>271</sup> See Tushnet, *supra* note 238, at 14 n.42; <http://benedict.com/visual/visual.htm> [LESSIG, *IDEAS* *supra* note 16, at 4.] The Internet can certainly diminish costs for consumptive uses. See Bell, *supra* note 243, at 579-80; Hardy, *supra* note 20, at 236-42. Rights owners, however, may well refrain from automated licensing of productive uses.

alleviate this problem.<sup>272</sup>

## 2. Ideas & transformative uses & "derivative works"

When copyright law only prohibited reproductions of a C<sup>3</sup> it did not inhibit creators' efforts to formulate new expressions based on the same ideas.<sup>273</sup> In fact, §102(b) of the Copyright Act expressly excludes ideas from protection.<sup>274</sup> Yet copyright law's increasing protection of "derivative works"<sup>275</sup> undermines that policy. Thus, courts today generally deny creators the right to imitate the "total concept and feel" of a song, television show, or a greeting card.<sup>276</sup>

The 11<sup>th</sup> Circuit did recognize an outside limit on protection of such derivative works when it dissolved an injunction against the publication of Alice Randall's *The Wind Done Gone* parody of *Gone with the Wind*.<sup>277</sup> Still, Margaret Mitchell's estate was able to use copyright law to force Randall's publisher to incur litigation costs of \$150,000<sup>278</sup> – the equivalent of a large fine – for publishing a derivative work that challenged the latter's iconic view of the antebellum South as racist.<sup>279</sup> The clear message that case sends to creators (and publishers) who seek to build on

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<sup>272</sup> When copyright owners form clearinghouses that also helps. See DIGITAL DILEMMA, *supra* note 10, at 68; See also LESSIG, IDEAS *supra* note 16, at 251, and newmusicjukebox.org, discussed, *supra* note 121.

<sup>273</sup> Prior to 1900, copyright law did not inhibit truly transformative uses. Infringement was evaluated "by looking not so much to what the defendant had taken as to what he had added or contributed." See KAPLAN, *supra* note 6, at 17.

<sup>274</sup> "In no case does copyright protection for an original work of authorship extend to any idea, . . . concept, . . . or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b); Baker v. Seldon, 101 U.S. 99, 103 (1879). This reflects Thomas Jefferson's observation:

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and the improvement of his conditions, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement of exclusive appropriation. . . .

Letter from Thomas Jefferson to Isaac McPherson, August 13, 1813, in THE WRITINGS OF THOMAS JEFFERSON 6 (H.A. Washington, ed., 1861), 175, 180. As Learned Hand emphasized, ideas and plot outlines are "given up to the public" so that authors may draw from their predecessors' innovations and insights. See Nichols v. Universal Pictures, 45 F.2d 119 (2d Cir. 1930). In fact, when ideas and expression are inseparable, the expression loses copyright protection. See Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9<sup>th</sup> Cir. 1971).

<sup>275</sup> See VAIDHAYANATHAN, *supra* note 6, passim. See also Lunney, *supra* note 267, at 534-40, 546-48; Patterson, *supra* note 269, at 239; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 49-52 (2002).

<sup>276</sup> See Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9<sup>th</sup> Cir. 1970); Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9<sup>th</sup> Cir. 1977); Arnstein v. Porter, 154 F.2d 464, 469-73 (2d Cir. 1946); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's 'Total Concept and Feel'*, 38 EMORY L.J. 393 (1989). Jessica Litman finds that §106(2) now reads as though even "thinking about" a derivative work is prohibited! See LITMAN, *supra* note 16, at 22, 32, 71.

<sup>277</sup> Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11<sup>th</sup> Cir. 2001). The litigation was settled in May 2002, with Houghton Mifflin agreeing to contribute an undisclosed amount to Morehouse College. See David D. Kirkpatrick, *Mitchell Estate Settles 'Gone with the Wind' Suit*, N.Y. TIMES, May 10, 2002, at C6.

<sup>278</sup> Lessig used this figure in his Nov. 2001 debate with Jack Valenti. See Creativity, Commerce & Culture: Lessig v. Valenti, Annenberg School of Communications, L.A., Cal. Nov. 29, 2001 (debate) available at annenberg.usc.edu/events/011129LessigValenti/debate.smil at 54-55:00 into the 95:00 (minute) debate.

<sup>279</sup> In particular, the Mitchell estate was adamantly opposed to associating the novel with interracial sex. See David D. Kirkpatrick, *A Writer's Tough Lesson in Birthing a Parody*, N.Y. TIMES, Apr. 26, 2001, at E1.

ideas from C<sup>3</sup>s is, however: "if you publish it, they will come" . . . to get you.<sup>280</sup>

This right to deny licenses<sup>281</sup> has also chilled many types of transformative uses,<sup>282</sup> including "fan edits,"<sup>283</sup> musical sampling, described by some as "mashups" or "bootleg remixes,"<sup>284</sup> and "fan fiction,"<sup>285</sup> among others,<sup>286</sup> in addition to political speech.<sup>287</sup> Hence, the derivative works provision is probably the most severely criticized aspect of copyright law.<sup>288</sup> It and associated

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<sup>280</sup> See FIELD OF DREAMS (Universal 1989). See also <http://www.chillingeffects.org> (some cease-and-desist letters sent by copyright holders); Netanel, *supra* note 8, at 292 n.24, 304; GOLDSTEIN, *supra* note 40, at 6 (noting the effects of front-page lawsuits on authors and publishers).

<sup>281</sup> For example, Cameron Crowe was denied use of Led Zeppelin's "Stairway to Heaven" for his film *Almost Famous*, Bill Desowitz, *All of 'Almost Famous'*, N.Y. TIMES, Mar. 31, 2002, §2, at 22, and Baz Luhrmann was denied use of Cat Stevens's song "Father and Son" in his award-winning *Moulin Rouge*. See Daniel Zalewski, *Thinking These Thoughts is Prohibited*, N.Y. TIMES, Jan. 6, 2002, §9, at 10. See also Anthony Tommasini, *All-Black Casts for 'Porgy'? That Ain't Necessarily So*, N.Y. TIMES, Mar. 20, 2002, at E1 (The Gershwin estate refuses to permit the 1935 Opera "Porgy and Bess," to be performed without a virtually all-black cast); That is, theirs is a property, not simply liability, right. See *infra* note 338; Reichman & Samuelson, *supra* note 73, at 145-51.

<sup>282</sup> See VAIDHAYANATHAN, *supra* note 6; LESSIG, IDEAS *supra* note 16.

<sup>283</sup> See Zalewski, *supra* note 281:

a delightful new art form emerged [in 2001]: the fan edit. Devotees of the pop singer Bjork, for example, have begun running her songs through their computers, tweaking the beats and instrumentation, then posting hundreds of "remixed" versions on the Web. Some of these edits are tone-deaf; others, however, trump the original arrangements. . . . Mike J. Nichols, . . . used his Macintosh to make a series of merciful cuts to "The Phantom Menace" – most notably, the virtual elimination of the irksome Jar Jar Blinks. Fans who obtained a copy of Nichols's "Phantom Edit" through the Internet hailed the arrival of a vastly improved (if not yet good) movie.

See also Amy Harmon, *'Star Wars' Fan Films Come Tumbling Back to Earth*, N.Y. TIMES, Apr. 28, 2002, at §2, at 28; OTA STUDY, *supra* note 10, at 138-39. See also Matthew Mirapaul, *If You Can't Join 'Em, You Can Always Tweak 'Em*, N.Y. TIMES, Mar. 4, 2002, at E2 ("the site allows visitors to take six [works of art] at a time and combine them into an onscreen collage").

<sup>284</sup> See Chris Norris, *Mash-Ups*, N.Y. TIMES, Dec. 15, 2002, §6 at 102; Neil Strauss, *Spreading via the Web, Pop's Bootleg Remix*, N.Y. TIMES, May 9, 2002, at A1. Some music executives rated a remixed album as the best album of any kind released in the first third of 2002. *Id.*

<sup>285</sup> Judge Learned Hand recognized long ago that one of the advantages of letting work fall into the public domain was that later editors "might do a much better job than the originator," cited in LESSIG, IDEAS *supra* note 16, at 106 n.4. See also Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1123 (1986). Yet copyright law severely chills this. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L. A. ENT. L.J. 651 (1997).

<sup>286</sup> See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147, 166, 194-95 (1998); Rick Lyman, *Hollywood Balks at High-Tech Sanitizers*, N.Y. TIMES, Sept. 19, 2002, at E1; Negativland (Hosler & Joyce), *Two Relationships to a Cultural Public Domain*, 66 LAW & CONTEMP. PROBS. 239, 242, 254-57; Lange & Anderson, *supra* note 233, at 137-40; Michele Boldrin & David K. Levine, *The Case Against Intellectual Property*, 92 AM. ECON. REV. PAPERS & PROC. 209 (2002).

<sup>287</sup> For examples of suppressions of political expression see Gordon, *supra* note 8, at 1535-36; Netanel, *supra* note 14, at 294-97. See also Leval, *supra* note 269, at 1118 & n.64; Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1060 (1997).

<sup>288</sup> See, e.g., Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 304-05 (1992); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1217 (1996); Lunney, *supra* note 267, at 513, 650; Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1269 (1997); Lange & Anderson, *supra* note 233; Rubinfeld, *supra* note 275, at 53-59. See also Note, *supra* note 68. One possible partial remedy for this would be the equivalent of a blocking patent. See Lemley, *supra* note 287, at 1052. Even access priced at "neutral" compulsory license rates, might still hinder some poor, aspiring creators, since "there is no particular reason to believe that creative ability will always correlate with the ability to pay market price for improvement rights . . ." Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 482 n.67 (1998). Jed Rubinfeld would avoid

lawsuits instill a chill resembling that created by many state libel laws before they were severely deflated by the Supreme Court's landmark 1964 decision in *New York Times v. Sullivan*. While the Court was faced with this derivative works issue in 1994 when it evaluated 2 Live Crew's parody of Roy Orbison's "Pretty Woman," it held only that parodies could qualify as "fair use" and remanded the case for consideration of the resulting harm to the market for the parodied item.<sup>289</sup> The Court failed to recognize a chill similar to the one it identified in *Sullivan*.<sup>290</sup>

## B. Current §106's Affect on Publishing

§106 certainly substantially increases publisher revenues for popular C<sup>3</sup>s, but rather than encouraging new creations, those funds may merely support larger marketing campaigns or greater rents for powerful talents.<sup>291</sup> In fact, the rent seeking discussed above, may well fully dissipate 100% or more of the increased revenues generated by copyright protection,<sup>292</sup> and this likely has a strong negative effect on borderline C<sup>3</sup> projects. Just as the marginal candidates in a political campaign find it more difficult to attract financing when the major candidates are able to amass larger war chests, so marginal C<sup>3</sup>s may find it more difficult to find publishers when copyright protection inflates major publisher spending on promotion. The need for "defensive" marketing to respond to the avalanche of advertising by popular C<sup>3</sup>s seeking §106-enhanced prizes would be likely to raise the costs of many borderline projects into unprofitable territory.

Furthermore, increased revenues would not necessarily translate into increased publisher profits since those involved in a C<sup>3</sup> who had bargaining power would seek to divide any such amount among themselves. Even if publishers did accrue greater profits, they would have no incentive to invest them in projects expected to be unprofitable.<sup>293</sup> Publishers seem no more likely to finance "charitable" C<sup>3</sup>s than the consumers who would retain their funds absent §106.

The conventional wisdom has been that §106 could nudge some unprofitable C<sup>3</sup>s into positive territory by allowing publishers to appropriate a greater portion of the social value generated by blockbusters.<sup>294</sup> An example can help illustrate this view. Suppose creator X had a project and

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this problem by only granting the original work owner a right to sue for profit allocation, Rubinfeld, *supra*, at 59, but this raises the issue of what are profits. See note 133, *supra*. See also Lange & Anderson, *supra*, at 143-55.

<sup>289</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>290</sup> See James Boyle, *The First Amendment and Cyberspace: The Clinton Years*, 63 LAW & CONTEMP. PROBS. 337, 340-48 (2000); Rubinfeld, *supra* note 275, at 59.

<sup>291</sup> See Ku, *supra* note 22, at 316-17 (contending that copyright cannot be justified based on its ability to help publishers finance marketing efforts that distort consumer choice).

<sup>292</sup> There is a tendency for rent seeking expenditures to exceed the total reward in lottery environments. See D. Michael Risinger et al, *Brave New "Post-Daubert" World – A Reply to Professor Moenssens*, 29 SETON HALL L. REV. 405, 425 (1998); Daniel Kahneman & Amos Tversky, *Prospect Theory: Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992), cited in Lunney, *supra* note 37, at n.210. But see Michael Abramowicz, *Copyright Redundancy*, 2003 at 11 available at <http://www.ssrn.com/abstract=374580>.

<sup>293</sup> Although S. Rep. No. 104-315, at 12-13 (1996) states an expectation that publishers will use extra profits to subsidize marginal C<sup>3</sup>s, it gives no reason why this would arise. See also Lunney, *supra* note 37, at 874-76.

<sup>294</sup> See *supra* note 15 & 16 and accompanying text; Scherer, *supra* note 48, at 20. Parties argue that diminishing current copyright rewards would diminish publishers' willingness to take risks, i.e., publish untried or risky C<sup>3</sup>s. See Paul Goldstein, *Copyright*, 55 L. & CONTEMP. PROBS. 79, 83 (1992); David Ladd, *The Harm of the Concept of Harm in Copyright: The Thirteenth Donald C. Brace Memorial Lecture*, 30 J. COPYRIGHT SOC'Y 421, 431 (1983).

that a publisher estimated its publication costs, including promotion (in a world without §106) to be \$49,000, but its expected revenues to be only \$48,000, making it an unprofitable project. Assume, however, that the addition of §106 would raise its expected revenues (in the slight chance that it was a blockbuster) by \$2,000<sup>295</sup> to \$50,000. Copyright supporters would argue that this demonstrates how §106 can nudge borderline C<sup>3</sup>s into profitability.<sup>296</sup>

There is, however, a hidden and misleading assumption in this reasoning: that §106 increases the *net* benefit for borderline C<sup>3</sup>s, like X's, and therefore its profitability. That, however, ignores the complicated interrelation between copyright and marketing, discussed above. Although §106 was apt to offer relatively little benefit to a borderline creation, like X's<sup>297</sup> it would probably yield relatively more benefit to X's more popular competitors,<sup>298</sup> enabling them to increase their promotional expenditures disproportionately, likely leaving X in a relatively *worse* position.<sup>299</sup>

### C. Other Effects & Empirical Data

All economic analyses of copyright recognize that there is a large “deadweight loss” to society arising because publishers protected by copyright set prices which deny access to many consumers who would willingly pay the marginal or even average cost for C<sup>3</sup>s.<sup>300</sup> §106 also enables incumbent media industries to slow the development of competitors armed with new technologies by denying them access to valuable, if not essential, C<sup>3</sup>s. Thus, the film industry initially tried to stymie television broadcasters by denying them access to films;<sup>301</sup> in turn, television broadcasters managed to constrain cable television systems' access to broadcast programming,<sup>302</sup> and cable programmers tried to deny satellite companies access to cable

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<sup>295</sup> Assume that the C<sup>3</sup> had a .1% chance of earning an additional \$1 million and a .01% chance of earning an additional \$10 million.  $(.001 \times \$1 \text{ million}) + (.0001 \times \$10 \text{ million}) = \$1,000 + 1,000 = \$2,000$ .

<sup>296</sup> Even critics of the current level of copyright protection appear to accept this rationale. See *supra* note 16.

<sup>297</sup> See Breyer, *supra* note 4, at 301; Lunney, *supra* note 37, at 882. See also *supra* note 117.

<sup>298</sup> See note 131, *supra*.

<sup>299</sup> That is, if the revenues of popular competitors rose 200% and they invested half of that in marketing, X would need to spend much more than \$2,000 to maintain its market share and would, thus, return to unprofitable territory (\$51,000+ in costs). Alternatively, if X stood pat on promotion, the increased marketing by popular competitors would likely lead them to increase their market share against X and reduce X's revenues, very possibly below \$48,000. In fact, there are probably many projects that would be marginally profitable absent §106, but are unprofitable due to the effect of §106 on the revenues and marketing expenditures of more popular competitors, particularly likely blockbusters!

<sup>300</sup> See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention* in KENNETH J. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* 144, 153 (1971); Lunney, *supra* note 267, at 556-57, 564-67; William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 954, 991-96 (1981); Zimran Ahmed, *The Copyright Tax*, WINTERSPEAK.COM, Feb. 20, 2002, available at <http://www.winterspeak.com/columns/022002.html> (estimating billions of dollars of losses).

<sup>301</sup> See Douglas Gomery, *Failed Opportunities: The Integration of the U.S. Motion Picture and Television Industries*, 10 Q. REV. FILM STUD. 219 (1984). In 1964, some movie theaters successfully pressured major film producers to refuse to supply films for the Hartford subscription TV experiment. See Amendment of Part 73 to Provide for Subscription Television Service, Fourth Report & Order, 15 F.C.C.2d 466, 475 (1968).

<sup>302</sup> When the Supreme Court rejected broadcasters' charges that cable television system operators' retransmission of broadcast signals was prohibited by the 1909 Copyright Act, broadcasters were able to prevail upon the FCC and Congress to limit cable system access to distant broadcast signals and to attractive “pay” shows. See Stanley Besen & Robert Crandall, *The Deregulation of Cable Television*, L. & CONTEMP. PROB. Winter, 1981, at 77, 91-110.

networks.<sup>303</sup> Restrictions today appear to be hindering the roll out of broadband to the home.<sup>304</sup> Furthermore, when representatives of existing technologies have negotiated over copyright laws, they have allocated benefits among themselves, minimizing the rights available for new technologies,<sup>305</sup> thereby hindering innovation. Thus the Sony Bono Act has frustrated many innovative efforts to post valuable material online for easy public access,<sup>306</sup> and proposed rules for PCs would constrain the tools creators need to produce innovative C<sup>3</sup>s.<sup>307</sup> Surcharges on technology devices,<sup>308</sup> have major<sup>309</sup> although these systems have major drawbacks.<sup>310</sup> There also appear to be costs with respect to increased media concentration<sup>311</sup> and enforcement.<sup>312</sup>

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<sup>303</sup> See David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 FED. COMM. L.J. 511 (1995). Congress responded to this problem by requiring cable networks to deal fairly with satellite distributors. See 47 U.S.C. § 548(c)(2)(B). Some cable operators also tried to deny satellite master antenna television (SMATV) access to "essential" programming. See Paul Kagan Assoc., Inc., *SMATV Antitrust Suits*, CABLE TV FRANCHISING, June 29, 1982, at 5.

<sup>304</sup> See Amy Harmon, *Hearings on Digital Movies and Piracy*, N.Y. TIMES, Mar. 1, 2002, at C4. See also Powell speech, *supra* note 2 ("Much of what is holding broadband content back is caused by copyright holders trying to protect their goods in a digitized environment (in other words, a perfect reproduction world)."). The five film studio partners of the Movielink Internet service have also been sued by a competitor, Intertainer, for trying to use their control over films to drive it out of business. See Harmon, *supra* note 91.

<sup>305</sup> See Litman, *Copyright Laws*, *supra*, note 39, at 299-305.

<sup>306</sup> The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 301-304 (1999)) interferes with Eric Eldred's <http://eldred.ne.mediaone.net>; Michael Hart's Project Gutenberg, <http://www.gutenberg.net> (between 1971 and May 2002, it published over 5,000 ebooks and was adding almost 50 per week); Brewster Kahle's Internet Archive <http://www.archive.org/about/index.html>; and the Prelinger Archives Heather Green, *A Library as Big as the World*, BUSINESSWEEK ONLINE, Feb. 28, 2002, at [http://www.businessweek.com/technology/content/feb2002/tc20020228\\_1080.htm](http://www.businessweek.com/technology/content/feb2002/tc20020228_1080.htm); <http://www.prelinger.com/prelarch.html>.

<sup>307</sup> See John L. Zittrain, *Taming the Consumer's Computer*, N.Y. TIMES, Mar. 11, 2002, at A21; Amy Harmon, *Piracy or Innovation? It's Hollywood vs. High Tech*, N.Y. TIMES, Mar. 14, 2002, at C1; Cf. Kevin Werbach, *Who Controls Information?*, RELEASE 1.0, May 31, 2002, at 1,17 ("One prominent Silicon Valley VC said he wouldn't invest in the next Tivo because it would be a lawsuit waiting to happen").

<sup>308</sup> In Western Europe, broadcasting content has long been financed by a combination of periodic license fees on radio and television sets as well as advertising. See ELI M. NOAM, *TELEVISION IN EUROPE* 3 (1991). Yet, this approach failed to get much support as a response to the Sony Betamax decisions. See H.R. 1030, 98<sup>th</sup> Cong. (1983); RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 167-75 (1996). Yet the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) applied this approach to digital audio recording devices and associated storage media. 17 U.S.C. §§ 1003-07, but given the weak demand for this technology, this kind of approach has not been very relevant in the U.S. or in Europe. See Lunney, *supra* note 37, at 853-55. But see Neil Weinstock Netanel, *Impose Noncommercial Use Levy to Allow Free P2P File-Swapping and Remixing*, Nov. 2002 available at <http://www.ssrn.com/abstract=352560>. See also Strahilevitz, *supra* note 168, at 62-64.

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<sup>310</sup> Lunney, *supra* note 37, at 855-58, 912-14 discusses three drawbacks: unfairness to those who do not use the resources for copying, discouraging the introduction of innovative copying technologies, and transforming copyright from a "property" to a "liability" right. While one can describe copyright as "a tax on readers for the purpose of giving a bounty to workers," See MACAULAY, *supra* note 7, at 25 (¶9) a tax on purchasers of equipment rather than just consumers of works distorts demand even more. See also *supra* note 17; WATT, *supra* note 7, at 132-34 (criticizing this approach and noting that Australia declared such a mechanism to be anti-constitutional).

<sup>311</sup> §106 also appears to enhance media concentration because large media firms, controlling large amounts of copyrighted material, are apt to facilitate cross-licensing between creators whom they represent, alleviating the time and trouble they would face if they were independents. See Benkler, *supra* note 267, at 88-89, 92, 94; Benkler, *supra* note 54, at 400-12; Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free*

Empirical analyses have not shown that copyright protection increases net output,<sup>313</sup> leading many to question the actual value of copyrights and patents.<sup>314</sup> Still, copyright advocates point to the benefit of approximately \$9 billion annual positive balances of trade in this area.<sup>315</sup> Although a full examination of international issues is beyond the scope of this article, it appears that the U.S. long refused to join all of the relevant international creative rights' treaties, but once the U.S. became a net exporter of C<sup>3</sup>s it joined them all.<sup>316</sup> The existence of current §106 was crucial to this participation, and a sharply reduced §106 would likely force the U.S. to abrogate

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*Enterprise*, 53 VAND. L. REV. 1879, 1904-11 (2000); BETTIG, *supra* note 308, at 101. See also Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 983-84 (1970); Guy Pessach, *Copyright Law as a Silencing Restriction on Non-Infringing Materials – Unveiling the Real Scope of Copyright's Diversity Externalities*, Nov. 28, 2002, Yale Law & Econ Research Paper No. 286. Benkler also points out a homogenization effect. See Benkler, *supra* note 267, at 95, and a feedback effect. *Id.* at 95-98. Lessig contends that the recording industry's aim seems to be to insure that no venture capitalist invests in a technology that competes with existing recording industry licensees without the approval of the industry, i.e., entry barrier control. See LESSIG, *IDEAS supra* note 16, at 200-01. In addition, larger firms are more likely to find it cost effective to survey consumers so as to permit them to engage in price discrimination for their libraries of content. See Netanel, *supra* note 311, at 1914-17.<sup>312</sup> Any property rights structure imposes enforcement costs. See Harold Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J. L. & ECON. 11, 14 (1964). In addition to the cost of monitoring, negotiating, and litigating, it may also include costs of lost privacy, etc. See e.g., Epic amicus brief in *Paramount v. Replay TV*, [http://www.epic.org/privacy/replaytv/amici\\_brief\\_eick\\_order.pdf](http://www.epic.org/privacy/replaytv/amici_brief_eick_order.pdf). For copyrights, distributors must negotiate and litigate over and monitor the use of C<sup>3</sup>s.

<sup>313</sup> As the DIGITAL DILEMMA, *supra* note 10, at 41 noted, studies of patents "laid down a solid base of knowledge that supported the development of patents policies between 1960 and 1980 era[. . .]o comparable body of work exists with respect to the importance of copyright in fostering information creation and use." But see Litman, *supra* note 71, at 998 ("Most arguments over the appropriate scope of copyright protection, unfortunately, occur in a realm in which empirical data is not only unavailable, but is also literally uncollectible."); Bell, *supra* note 19, at 7-8.

<sup>314</sup> With respect to patents, in 1958, Machlup concluded that, "None of the empirical evidence at our disposal and none of the theoretical arguments presented either confirms or confutes the belief that the patent system has promoted the progress of the technical arts and the productivity of the economy." Machlup Report, *supra* note 140, at 79. More recently see Kai-Lung Hui and I.P.L. Png, *On the Supply of Creative Work: Evidence From the Movies*, 92 AM. ECON. REV. 217 (2002) (not finding sufficient evidence to show that the Sony Bono Copyright Extension Act, led to an increase in U.S. movie production); TOWSE, *supra* note 79, at 21; Roberto Mazzoleni & Richard R. Nelson, *Economic Theories About the Benefits and Costs of Patents*, 32 J. ECON. ISSUES 1031 (1998); Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173 (1986); F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 628-30 (3<sup>rd</sup> ed. 1990).

<sup>315</sup> *U.S. International Service*, SURV. CURRENT BUS., Nov. 2001, at 49, 75, 83-84 (tables 4.4 & 5.4) available at <http://www.ita.doc.gov/td/sif/TradeData2001.pdf> at 27, 34-35. Moreover, that amount would be much higher, but for rampant piracy. See International Federation of the Phonograph Industry, *IFPI Music Piracy Report*, June 2001, at 3 (estimating \$4.2 billion in piracy of hard copies in the music industry in 2000), available at <http://www.ifpi.org/site-content/library/piracy2001.pdf>. But see DIGITAL DILEMMA, *supra* note 10, at 187-90 (reviewing flaws in estimates of piracy); WATT, *supra* note 7, at 33-37 (citing many studies criticizing economic estimates and finding "the majority of cost estimates are irrelevant, since they are based on incorrect assumptions").

<sup>316</sup> Historically, the US had been a net importer of C<sup>3</sup>s and was content to remain outside the Berne convention. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1986, S. Treaty Doc. No. 99-27 (1986), 828 U.N.T.S. 221 (Berne Convention). That changed in the late 1970s?, and in 1988, the U.S. joined. H.R. Rep. No. 100-609, cited in Denicola, *supra* note 244, at 204 n.68; World Intellectual Property Organization (WIPO) Copyright Treaty, Dec. 20, 1996, art. 11, S. Treaty Doc. No. 105-17 (1997); WIPO Performance and Phonograms Treaty, Dec. 20, 1996, art 18, S. Treaty Doc. No. 105-17 (1997); Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 14, 1994, 33 I.L.M. 1197, 1201 (1994) (TRIPs); Universal Copyright Convention of 1952, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, rev'd, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 (Universal Copyright Convention).

some, if not all, of those treaties.<sup>317</sup> Still, it is not clear how much harm that would do to U.S. exports or how the rest of the world would react.<sup>318</sup>

#### D. A Severely Truncated §106

Some types of C<sup>3</sup>s appear to lack a combination of business models that would make them economically viable absent some protection against unauthorized copying. Yet given harm copyright does to C<sup>3</sup> output, as discussed here, it is probably socially optimal to keep copyright protection to a minimum.<sup>319</sup> Formulating a detailed set of options for providing such protection is beyond the scope of this article, but it will describe one strategy that might be pursued. Congress could adopt general standards, modeled on the four-element test for judging “fair use” for copyright,<sup>320</sup> and leave it to the courts to develop a more common law-like resolution of copyright protections, as the latter do when judging allegations of “unfair competition.”<sup>321</sup> As Ray Patterson and Litman have suggested, copyright law could prohibit commercial exploitation, rather than all copying.<sup>322</sup> A possible framework for providing publicly beneficial protection might resemble the following:

##### 1. General provisions

Unauthorized copying might be prohibited where copies did not offer consumers any significant incremental benefit, e.g., significantly lower prices or easier access, over what publishers were already providing. Thus, copiers would be prohibited from republishing online newspaper

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<sup>317</sup> Lessig suggests that his proposals could have similar effects. See LESSIG, *IDEAS*, *supra* note 16, at 330-31 n.14.

<sup>318</sup> While other nations could consider relying on the business models discussed in III, above, that would be difficult given that so many nations regard copyright as a natural right and lack social norms supporting the tipping model. See *supra* note 215.

<sup>319</sup> See Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1615 (2001) (“incentives should be as modest as possible”); MACAULAY, *supra* note 7, at 23 (¶7) (copyright “ought not to last a day longer than is necessary for the purpose of securing the good [of increased production]”); KAPLAN, *supra* note 6, at 115-17; Samuelson, *supra* note 72, at 90, 91, 94.

<sup>320</sup> See 17 U.S.C. §107. For a clear recent application of the standard see *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11<sup>th</sup> Cir. 2001). See generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995); Leval, *supra* note 269; Fisher, *supra* note 269. Congress would adopt such criteria after carefully considering the effects of different terms on various types of C<sup>3</sup>s. Hopefully, the standards would be more expansive and public interest oriented than UCITA. See Samuelson, *supra* note 72.

<sup>321</sup> See Reichman & Samuelson, *supra* note 73, at 139-44; Reichman & Uhler, *supra* note 73, at 825-28, 836-37; Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 854-59 (1992). Courts also have wide discretion when judging eligibility for some exemptions from antitrust laws, such as whether a firm meets the failing industry defense to the antitrust merger restrictions. See *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969) (finding that a failing firm defense requires a court to find (1) the grave possibility of a business failure; (2) the lack of any other prospective purchaser; and (3) the chances for successful reorganization are slight). Courts also evaluate eligibility for the infant industry exemption. See *United States v. Jerrold Elecs. Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) (bundling permitted for an infant industry, but only while it remains economically necessary). But cf. Fisher, *supra* note 269, at 1717-19.

<sup>322</sup> See LITMAN, *supra* note 16, at 180; LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 194, 215, 228 (1968) (observing that federal copyright law was originally designed to protect an exclusive right to sell). See also Rubinfeld, *supra* note 275, at 54-59 (discussing a profit allocation approach).

content where the copier could easily have provided a “deep link”<sup>323</sup> instead.<sup>324</sup> In addition, the law could accord publishers protection for “hot news” under a misappropriation standard like that adopted by the Supreme Court in *International News Service v. Associated Press*.<sup>325</sup> It could apply whenever copiers tried to destroy a publisher’s first mover advantage, as by transmitting a publisher’s live C<sup>3</sup> feed simultaneously over a competing channel or trying to scoop another publisher’s exclusive.<sup>326</sup> Granting publishers less than 24-hour exclusivity for live sports and news C<sup>3</sup>s could be held to be unfair competition.<sup>327</sup> More generally, the law might prohibit the unauthorized dissemination of any C<sup>3</sup>s before the publisher had had a “reasonable” chance to be first to release them to consumer homes.<sup>328</sup>

## 2. Provisions for specific industries

Granting different statutory copyright protections to different industry segments creates some problems,<sup>329</sup> but the current, relatively uniform standards for all varieties of C<sup>3</sup>s are likely to produce greater harm. Instead, each individual industry segment should be considered on its own merits.<sup>330</sup> If industry groups claimed that they needed additional legal protection to function at socially optimal levels, Congress could hold hearings and collect and evaluate evidence, as it did when adopting the Newspaper Preservation Act in 1970.<sup>331</sup> If film studios showed a need for more protection, they, but not book publishers, would receive it.<sup>332</sup> Given the likely need for

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<sup>323</sup> Deep links link directly to specific content on a website, bypassing home or other front pages (and ads or other attractions). See *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 WL 525390, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal.) aff’d 2001 WL 51509, 2001 U.S. App. LEXIS 1454 (9th Cir.); *Kelly v. Arriba Soft Corp.*, 77 F. Supp.2d 1116, 1120-1121 (C.D. Cal. 1999), aff’d in relevant part, 280 F.3d 934, 940-44 (9th Cir. 2002).

<sup>324</sup> *Los Angeles Times v. Free Republic*, 56 U.S.P.Q.2d 1862 (C.D. Cal. Nov. 16, 2000). This would, however, only prohibit online copying, not the dissemination of hard copies to those lacking easy online access.

<sup>325</sup> *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215 (1918). See *NBA v. Motorola, Inc.* 105 F.3d 841, 847-48 (2d Cir. 1997); Joel Rothstein Wolfson, *Contract and Copyright are Not at War: A Reply to “Metamorphosis of Contract into Expand,”* 87 CALIF. L. REV. 79, 88-91 (1999) See also L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict Between Property Rights and Political Rights*; 62 OHIO ST. L.J. 703, 729-30 (2001).

<sup>326</sup> This would apply to cases like *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985). The standards might be limited to situations meeting the 3 conditions articulated in 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:51, at 10-95 (4<sup>th</sup> ed. 1996).

<sup>327</sup> Historical evidence demonstrates that sports leagues were economically viable without any television revenue, and it appears that a dramatic reduction in media revenues would simply translate into much lower player salaries, but not threaten the viability of the sport. Some degree of transitional protection might be justified, however, due to huge existing long-term contracts, unless such contracts could be voided due to a material mistake.

<sup>328</sup> The release could be via the airwaves, wires, or in hard copies. Although this could discourage filmmakers from releasing their films for broadcast or home video, that would seem unlikely given the investments studios make in marketing during the original release period and how quickly most films age. Still there might be exceptions for classics, including Disney’s animated features. See BETTIG, *supra* note 308, at 97-99.

<sup>329</sup> See Breyer, *supra* note 4, at 322 (courts may have difficulty distinguishing between classes). But see KAPLAN, *supra* note 6, at 117, (particularly text accompanying n.98).

<sup>330</sup> See Zachariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 510 (1945) (“The scope of protection for each kind of property should depend on its nature . . .”).

<sup>331</sup> Pub. L. No. 91-353, 84 Stat. 466, codified at 15 U.S.C. §§ 1801-04. The Act seeks to preserve a diversity of editorial voices by making it easier for newspapers to qualify for the “failing company” defense to an otherwise anti-competitive merger. See *Committee for and Independent P-I v. Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983). See also COMPAINE & GOMERY, *supra* note 87, at 49-51.

<sup>332</sup> Whether or not the facts supported a retroactive copyright extension for old films, see *Hal Roach Studio brief in Eldred*, see *infra* note 351, such a rationale does not justify retroactive protection for books.

analysis of detailed and continually-changing economic data, an expert body, like the Copyright Office, might be assigned the task of conducting administrative rulemakings.<sup>333</sup>

Those seeking additional protection could be required to show that: 1) they expended significant efforts to produce their C<sup>3</sup>s, 2) alternative models did not provide sufficient compensation,<sup>334</sup> and 3) their proposed additional protection was minimally burdensome. For example, producers of non-time-sensitive broadcast television programming might assert that 24-hour protection would be insufficient to recover the hard costs of the quality fare on HBO. Setting the minimum duration of protection would be more difficult. Still, it is useful to note that publishers are able to earn large revenues from theaters, pay TV, and video rentals even though viewers know that the C<sup>3</sup>s sold through the former media will be available in only a few years on free television. A few months might quite suffice for books and only a few days for the increasing number of one-time-only reality TV shows, although other categories might justify longer terms.<sup>335</sup>

### 3. Compulsory licenses

Even in the absence of §106, compulsory licenses could still be relevant for creators, distributors, and copiers, particularly radio stations, who wanted to avoid the need for labeling copies “unauthorized copy” and offering tipping options. Setting “reasonable” rates, however, is inherently political.<sup>336</sup> Furthermore, some would object to denying creators the right to refuse access to anyone they disapprove of,<sup>337</sup> by transforming copyright from a property to a “liability” rule.<sup>338</sup> Courts could enforce such a requirement in the same manner they handle eminent

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<sup>333</sup> Alternatively, some other expert group might be selected or appointed. The former Congressional Office of Technology Assessment (OTA) might have been an ideal candidate for such a task. See OTA STUDY, *supra* note 10. In its absence, the respected, non-partisan National Academy of Sciences’ National Research Council would appear well qualified. See DIGITAL DILEMMA, *supra* note 10.

<sup>334</sup> These first two are similar to the standards that the European Database Protection Directive requires for non-creative databases, see Ginsburg, *supra* note 73, at 70-71, and those of David Lange & Jennifer Lange Anderson’s standard respecting infringements for transformative works. See Lange & Anderson, *supra* note 233, at 154.

<sup>335</sup> See Steve Lohr, *Steal This Book? A Publisher is Making it Easy*, N.Y. TIMES, Jan. 13, 2003, at C4; Bill Carter, *Reality Shows Alter the Way TV Does Business*, N.Y. TIMES, Jan. 25, at A1. *The Economist* recently proposed a single 14-year term, renewable once. See *Copyrights: A Radical Rethink*, ECONOMIST, Jan. 25, 2003, at 15. The case of computer software certainly offers an instructive case study on this issue. As highly respected copyright scholar Pam Samuelson has noted, the computer software business thrived under a shareware, rather than copyright, model. See Paula Samuelson et al, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2377 (1994). Moreover, according to Microsoft’s Bill Gates “If people had understood how patents would be granted when most of today’s ideas were invented and had taken out patents, the industry would be at a complete standstill today.” See FRED WARSHOFKY, *THE PATENT WARS* 170 (1994). In fact, economists have long believed that patent terms have been too long. Machlup attributed the continued increase rather than decrease in terms to the fact that legislators generally heard from attorneys of patent holders and patent seekers rather than economists. Machlup Report, *supra* note 140, at 9-10.

<sup>336</sup> See Dale N. Hatfield & Robert Alan Garrett, *A Reexamination of the Cable Television Compulsory Licensing Rates: The Copyright Royalty Tribunal and the Marketplace*, 5 HASTINGS COMM. & ENT. L. J. 681 (1983); BETTIG, *supra* note 308, at 125-50; Jack Valenti’s description of cable retransmission presentation at Nov. 2001 USC debate, *supra* note 278. Although there are good reasons and momentum for preferring market-based to government-set rates, government rate setting is still the default with respect to essential facilities and eminent domain takings. See also the Copyright Office webcasting music ruling. [http://www.copyright.gov/carp/webcasting\\_rates\\_final.html](http://www.copyright.gov/carp/webcasting_rates_final.html).

<sup>337</sup> See *supra* IV.A.2, particularly note 281; Reichman & Samuelson, *supra* note 73, at 145-51.

<sup>338</sup> For an explanation of this distinction, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

domain and the essential facilities doctrine requirements.<sup>339</sup>

## V. Constitutional Questions

The analysis in sections III and IV raises serious questions as to whether the current, bloated version of §106, if challenged in court, could meet the First Amendment's intermediate scrutiny standard or even the lesser rational basis requirements of Article I.

### A. Article I: The Exclusive Rights Clause<sup>340</sup>

Prior to the passage of the Constitution, early American laws granting copyright protection were premised on the need to both encourage creation and provide creators with a just reward.<sup>341</sup> The writings of Thomas Jefferson, Thomas Macaulay, Adam Smith, and James Madison, however, indicate a great concern about the evils of granting monopoly rights to authors and inventors.<sup>342</sup> Although some might view this as denying creators their "natural rights," not only do creators build on the work of their predecessors, as noted above,<sup>343</sup> but they also commonly depend on teachers for training and often taxpayers for funding. Furthermore, the American capitalistic system fosters competition that drives prices down from levels reflecting the social value of output to cost-based amounts.<sup>344</sup> Thus, teachers and doctors provide tremendously valuable services, yet society encourages competition that leaves their salaries at only a fraction of the social value they produce.<sup>345</sup>

Thus, the Exclusive Rights Clause of the Constitutional appears to limit the authority of Congress to grant copyrights,<sup>346</sup> and both the Supreme Court and Congress have recognized that

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<sup>339</sup> See Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing In the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 409 (2001); Glen Robinson, *On Refusing to Deal With Rivals*, 87 CORNELL L REV. 1177, 1209-11 (2002).

<sup>340</sup> This article uses "Exclusive Rights Clause" in place of "Intellectual Property Clause" or "Copyright Clause" because this appears to be a more accurate description of the clause. See Benkler, *supra* note 247, at 175 n.10.

<sup>341</sup> See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1000-02 (1990); Sterk, *supra* note 288, at 1199. The view that authors have a special right to the fruits of their labor is an ancient one with two separate strands: "the natural law thesis" and "just reward." See Machlup Report, *supra* note 140, at 21. The first rationale, generally associated with the French, recognized a natural, almost divine right to one's creations. In the words of one philosopher, "it's mine because I made it . . . It wouldn't have existed but for me." See, e.g., Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL & PUB. AFF. 31, 36 (1989). Mark Twain also adopted this view. See VAIDHAYANATHAN, *supra* note 6, at 56-80. See also Breyer, *supra* note 4, at 284 n.16 & 285 n.17. The second theory, supported by classical English economists like Adam Smith and John Stuart Mill, viewed one's right to ownership of the fruits of one's work as a just reward for the creation. Machlup Report, *supra* note 140, at 19. Lord Mansfield was probably its preeminent legal spokesman, although he later retreated from supporting a perpetual, natural right of copyright. See GOLDSTEIN, *supra* note 40, at 45-51. These rationales, however, have serious weaknesses. See Hurt & Schuchman, *supra* note 21, at 423; Breyer, *supra* note 4, at 285-91; Weinreb, *supra* note 39, at 1217-29; Sterk, *supra*.

<sup>342</sup> See *supra* note 247; *Eldred v. Ashcroft*, 123 S.Ct. 769, 803 (2003) (Breyer, J, dissenting) .

<sup>343</sup> See *supra* notes 64 & 65 and accompanying text.

<sup>344</sup> Breyer, *supra* note 4, at 285, 312. See generally Hettinger, *supra* note 341, at 36-45.

<sup>345</sup> Competition is welcomed as a means for shifting social value from producer to consumer surplus. Indeed, when a firm faces no or little competition and seeks to extract the full social surplus for itself, society generally considers this to be price gouging or a monopoly problem. See Breyer, *supra* note 4, at 286.

<sup>346</sup> "The Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for

copyright law must further the interests of the public, not merely creators. The declaration of the 1909 House Report on the copyright statute is clear:<sup>347</sup>

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served. . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . . In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public.

The Supreme Court has also interpreted the Exclusive Rights Clause in this manner. In *Sony Corp. v. Universal City Studios* it held that copyright's monopoly privileges "are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward."<sup>348</sup> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . ."<sup>349</sup> Monopolies are not permitted under the Exclusive Rights Clause

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limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST., art. I, § 8, cl. 8. See *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 546 (1985) (This "limited grant is a means by which an important public purpose may be achieved," citing *Sony*, 464 U.S. 417, 429 (1984))(emphasis added); Cf *Graham v. John Deere*, 383 U.S. 1, 5-6 (1966); *Merges & Reynolds*, *supra* note 116, at 56-64 (2000); *Benkler*, *supra* note 321, at 539-52.

<sup>347</sup> See H.R. Rep. No. 60-2222, at 7 (1909); H.R. Rep. 100-609, at 17 (1988); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) ("That Congress, in passing the Act of 1790, did not legislate in reference to existing rights, appears clear . . . Congress, then, by this act, instead of sanctioning an existing right . . . created it."); *Eldred*, 123 S.Ct. at 803 (Breyer, J, dissenting). This plain statement has been regarded as definitive. See *Weinreb*, *supra* note 39, at 1215, citing 1 GOLDSTEIN, *supra* note 13, at §1.13.2.3. See also Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 422, 441 (1985) ("the primary objective of the intellectual property laws is not to reward the author or inventor, but rather to secure for the public the benefits derived from the labors of authors and inventors. . . . The argument that a particular interest group will make more money and therefore be more creative does not satisfy . . . the constitutional requirement of the intellectual property clause.") (Kastenmeier was the long-time chair of the House subcommittee with jurisdiction over copyright and one of the primary players responsible for the passage of the 1976 Copyright Act); Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 591-92 (1985); Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 723, 728 (1998) (copyright protection extends only "to the extent that it does not impede creativity or the wide dissemination of works" and is based on the assumption that "it will bring the greatest good to the greatest number if property rights are honored more or less absolutely.").

<sup>348</sup> *Sony Corp v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Eldred*, 123 S.Ct. at 784-85 & n.17. And the Court quoted *Sony* in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) ("We have often recognized the monopoly privilege that Congress has authorized, while 'intended to motivate the creative activity of authors and inventors by the provision of a special reward,' are limited in nature and must ultimately serve the public good."). See also *Eldred*, 123 S.Ct. at 802 (Breyer, J, dissenting);

<sup>349</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576-77 (1977); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 ("The sole interest of the United States and the primary objective in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."); 1 GOLDSTEIN, *supra* note 13, at § 1.14 at 1:40. While *Mazer v. Stein*, 347 U.S. 201, 219 (1954) observed that ensuring that creative artists receive "rewards commensurate with the services rendered," is a goal of copyright law, the Court noted that "The copyright law, like the patents statute,

when there is no “concomitant *advance* in the ‘Progress of Science and useful Arts,’”<sup>350</sup> although the Court in *Eldred v. Ashcroft* showed great deference to Congress.<sup>351</sup>

Section IV finds that §106 probably generates a net cost rather than benefit in terms of new creations as well as both a deadweight loss from restricting consumer access and harm to technological development. In any case, there appears to be no evidence to the contrary.<sup>352</sup> Still, measured against a mere “rational basis” legal standard and without strong empirical data to rely upon, it is most unlikely that a court would strike down §106 as unconstitutional under Article I.

## B. The First Amendment

There is no dispute that copyright law abridges some speech, but courts have long accepted that its net effect, in light of provisions for fair use, is so clearly positive and constitutional<sup>353</sup> that the D.C. Circuit stated the hyperbole that “copyrights are categorically immune from First Amendment scrutiny.”<sup>354</sup> On the other hand, the 2<sup>nd</sup> Circuit’s 2001 decision in *Universal City Studios v. Corley*<sup>355</sup> indicates that at least one Circuit is now willing to seriously evaluate First Amendment challenges to copyright provisions. As the *Corley* court and a few others have found, the content-neutral provisions of the Copyright Act trigger the court’s intermediate scrutiny standard.<sup>356</sup> Still, courts are likely to be very reluctant to seriously examine the economic analysis above given their general resistance to upsetting longstanding legal doctrine, particularly here where some limited level of protection against unauthorized copying appears constitutional for some types of C<sup>3</sup>s and evaluating the details of which types and for how long is delegated to the Congress.<sup>357</sup>

Despite this reluctance, the courts may be hard pressed to ignore the economic analysis above if §106 is challenged by parties complaining that the provision stifles a critical catalyst for

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makes reward to the owner a secondary consideration.” See *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

<sup>350</sup> *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (emphasis added).

<sup>351</sup> See *Eldred v. Ashcroft*, 123 S.Ct. 769, 782 n.15, 785 (2003).

<sup>352</sup> See *supra* note 39. But see *Eldred*, 123 S.Ct. at 781, 782 n.15 (referencing the self-serving testimony of some artists). Defenders of §106 might contend that Congress clearly has the right to grant an “exclusive right,” yet the truncated version of §106 discussed in IV.D would include exclusive rights, as would the right to offer their works for sale without labeling them as “unauthorized copies.”

<sup>353</sup> See *supra* notes 8 & 15.

<sup>354</sup> See *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). But see *Eldred*, 123 S.Ct. at 789-90 (noting that the D.C. Circuit spoke to broadly). See *supra* note 351.

<sup>355</sup> 273 F.3d 429 (2d Cir. 2001).

<sup>356</sup> 273 F.3d 429, 450 (2d Cir. 2001) (evaluating provision under intermediate scrutiny). See also *U.S. v. Elcom*, 2002 WL 1009662 (N.D. Cal. 2002) (evaluating DCMA under intermediate scrutiny); *CBS Broad., Inc. v. EchoStar Communications Corp.*, 265 F.3d 1193, 1209-11 (11th Cir. 2001), *cert. denied* 122 S.Ct. 1964 (2002); *Satellite Broad. & Communications Ass’n v. FCC*, 275 F.3d 337, 355 (4th Cir. 2001), *cert. denied*. 122 S.Ct. 2588 (2002). See also *Baker*, *supra* note 17, at 922-33; *Netanel*, *supra* note 8, at 47-69.

<sup>357</sup> *Eldred*, 123 S.Ct. at 785. See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding the FCC’s fairness doctrine based on a finding of economic scarcity of airwaves, even though that scarcity was a result of the government’s choice of broadcast licensing regimes). Some of the myriad challenges to the so called scarcity include *ITHIEL DE SOLA POOL*, *TECHNOLOGIES OF FREEDOM* 141 (1983) (“it was policy, not physics, that led to the scarcity of frequencies); and others compiled at Mark S. Nadel, *Electrifying the First Amendment*, 5 *CARDOZO L. REV.* 531, 541 n.62 (1984). It would be as if New York City justified imposing a “fairness doctrine” on parties parading down Fifth Ave. after choosing to grant only a single 5-year 5<sup>th</sup> Ave. parade permit to one party.

stimulating voter deliberation on issues of public policy. For example, even otherwise apathetic voters appear willing to budget a few hours to viewing the award-winning film *Traffic* which very thoughtfully explores the nation's illegal drug problem.<sup>358</sup> Such engaging films, as well as plays by Anna Deavere Smith on racism,<sup>359</sup> and even television shows like *Ally McBeal* (which examined myriad issues of sexual equality and harassment), may represent the only practical means for stimulating voters to deliberate about those issues at meals, parties, online discussion groups, and on radio call-in shows.<sup>360</sup>

In fact, such material, which permits audiences to vicariously participate in fictional deliberations, may be the best way to break through the defenses of individuals who strongly resist even considering challenges to some of their values.<sup>361</sup> §106, however, prevents the use of such C<sup>3</sup>s without the owner's permission, and, in most cases, the cost of obtaining such approval would likely be prohibitive. Yet if "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government,"<sup>362</sup> and using such copyrighted material is critical to achieving this result,<sup>363</sup> and the current 4-part "fair use" test does not exempt it,<sup>364</sup> then §106 deserves to be scrutinized.

Absent a "fair use" exception, and evaluating the combination of §106/§107 protection under intermediate scrutiny, the provisions would need to serve a "substantial government interest" and represent a means that did "not burden substantially more speech than is necessary."<sup>365</sup> The government would need to show that "the record as it now stands supports Congress' predictive judgment" that §106 furthers important governmental interests; and does not burden substantially

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<sup>358</sup> See editorial, *Adjusting Drug Policy*, N.Y. TIMES, Feb. 27, 2001 at A22 ("It is rare for a Hollywood movie to stimulate debate about social policy, but that has been the case with 'Traffic,' Steven Soderbergh's gritty depiction of the drug wars that has been nominated for an Academy Award as best picture.").

<sup>359</sup> ANNA DEAVERE SMITH, TWILIGHT – LOS ANGELES, 1992 ON THE ROAD: A SEARCH FOR AMERICAN CHARACTER (1994); ANNA DEAVERE SMITH, FIRES IN THE MIRROR: CROWN HEIGHTS, BROOKLYN, AND OTHER IDENTITIES (1993). GUESS WHO'S COMING TO DINNER? (Columbia 1967) offers an earlier balanced and engaging experience.

<sup>360</sup> See Bill Carter, *This Season to Be Last for 'Ally McBeal'*, N.Y. TIMES, Apr. 18, 2002 at C10 ("At its height, 'Ally McBeal' was probably the most discussed show on television"). Norman Lear's "All in the Family" (1971-79) had an even greater social impact on a larger portion of society.

<sup>361</sup> ROBERT D. PUTNAM, BOWLING ALONE 216-46 (2000) identified television, i.e., video entertainment-available in the home, as the most likely culprit responsible for reducing civic involvement in the United States in the later decades of the 1900s. Still, he also recognizes that "the extraordinary power of television can encourage as well as discourage civic involvement. Let us challenge those talented people who preside over America's entertainment industry to create new forms of entertainment that draw the viewer off the couch and into his community." Id. at 410. The past stimulating work of Stanley Kramer, and the work today of Spike Lee and Oliver Stone, to name just a few, demonstrate that there are creators willing and able to incite the American public to discuss important issues of public policy, even if their presentations are not always fairly balanced. See Netanel, *supra* note 14, at 349-51, 350 ("Our public discourse comprises a rambunctious, effervescent brew of spectacle, prurient appeal, social commentary, and political punditry. It is part entertainment, but as it entertains, it often reveals contested issues and deep fissures within our society, just as it may reinforce widely held beliefs and values.")

<sup>362</sup> *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J, concurring).

<sup>363</sup> The Supreme Court has recognized the particular expression can have special emotive value. See *Cohen v. California*, 403 U.S. 15, 24 (1971) (noting the emotive effect of a particular word on the back of a coat).

<sup>364</sup> See *supra* note 320

<sup>365</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("Turner I") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). *But see Eldred v. Ashcroft*, 123 S.Ct. 769, 789 (2003) (rejecting the relevance of *Turner* to copyright).

more speech than necessary to further those interests.<sup>366</sup> With respect to the second, there does not appear to be any record evidence that Congress seriously considered the alternatives to §106 discussed above,<sup>367</sup> and even if it had, technological changes and the importance of these issues would warrant periodic, updated reviews.<sup>368</sup> Meanwhile, the analysis above finds that current §106 does not appear to serve the important government interest of increasing new creations, which has been assumed to outweigh the benefit just discussed of public deliberation on important issues of public policy, at the core of the purposes of the First Amendment.<sup>369</sup> The harm to international treaties and trade, discussed in IV.C, above, would have to be seriously considered, but it would be surprising if it were found to outweigh all other factors.<sup>370</sup>

## VI. Conclusion

The analysis above reveals that the long accepted, but rarely examined, public value of §106 of the copyright law is highly questionable. §106's impact on generally overlooked endogenous marketing costs appears to lead to a decrease in the economic viability of borderline C<sup>3</sup>s, diminishing net new creations, thereby undermining the presumption that it serves the public interest in this manner. Meanwhile, Congress appears to have neglected to seriously consider some less burdensome alternatives for stimulating creative output, both those raised in Stephen Breyer's 1970 article and those based on more recent technologies in combination with social norms. Moreover, §106 represents a key obstacle to what may be the best chance for stimulating a deliberative democracy in cyberspace incited by educational, entertaining, and engaging C<sup>3</sup>s.

If §106 was severely abridged there would likely be some initial negative effects,<sup>371</sup> but primarily to publishers and the wealthiest creators, not the rest.<sup>372</sup> Once creators recognized that the world had changed, they would likely adjust their expectations, just as actors who demand \$10 million fees for films projected to earn \$100 million in revenues accept much smaller fees for creations expected to generate much lower revenues. As long as creators and publishers can

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<sup>366</sup> *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 185 (1997) ("Turner II"). This is the approach the Supreme Court took in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("Turner I") concerning the FCC's "must carry" rules. *Turner I* recognized that the "mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation" from First Amendment review. 512 U.S. at 640.

<sup>367</sup> *See supra* note 39.

<sup>368</sup> While past conditions may well have long justified past practices, changes in costs and benefits due to technological change may eviscerate the constitutional bases for continuing such practices. *Cf. Eldred*, 123 S.Ct. at 797 (Stevens, J. dissenting)

<sup>369</sup> *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 533-35 (2001).

<sup>370</sup> *But see Eldred*, 123 S.Ct. at 781-82. *Contra* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1181-83. A full blown intermediate scrutiny review is beyond the scope of this article, but there does not appear to be any precedent for U.S. courts to find that the interests of satisfying an international treaty would justify abridging the First Amendment rights of Americans. Thus, in 2001 a federal district court was unwilling to abridge eBay's First Amendment rights by enforcing a French court's judgment requiring eBay to take special precautions not to offer Nazi materials to French citizens. *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme*, 169 F.Supp.2d 1181, 1186-87 (N.D.Cal. 2001).

<sup>371</sup> Undermining author and publisher expectations, built on the present system, would be admittedly demoralizing, *see Breyer, supra* note 4, at 322, still, that hardly seems to justify it in the face of its substantial costs to society.

<sup>372</sup> The beneficiaries of the current broad §106 appear to be the most popular creators, their publishers and lobbyists, as well as the members of Congress who stand to be rewarded with campaign contributions in appreciation for their past and future action. *See Ian, supra* note 117.

earn more than their opportunity cost, they will continue to produce  $C^3$ s. Meanwhile reducing constraints on dissemination of  $C^3$ s would be likely to increase societal welfare.