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PARODY AND PERCEPTION: AN ALTERNATIVE APPROACH TO SECONDARY USE IN COPYRIGHT

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PARODY AND PERCEPTION

Laura R. Bradford[*]

Abstract

This Article draws on cognitive research to examine a conflict within copyright doctrine. Scholars typically analyze unauthorized secondary use of expressive works using an economic or a free speech analysis. The former views copyrighted works primarily as products, the latter primarily as speech. Both paradigms focus on the person speaking or distributing informational works. However, copyrighted works contain unique communicative properties that implicate both expression and understanding of that expression. This Article argues that because copyright is a right to control certain types of information, how we process information is relevant in determining copyright's scope. By incorporating lessons from cognitive research on memory, attention, and preference, courts can formulate rules that provide a better balance between the rights of owners and the need for open engagement with expressive works. More generally, a cognitive approach to secondary use refocuses the debate from a question of what owners deserve to look at what audiences require in choosing and consuming such works. This focus is in keeping with copyright's goal of promoting innovation to further the public good.

INTRODUCTION

In the fall of 2004, Little, Brown and Company published "Yiddish with Dick and Jane." As in the original, Dick and Jane teach basic language skills, except that in this version they are adults, the words are Yiddish, and they live in a suburban neighborhood rife with adultery and drug use. Pearson, the publisher of the original Dick and Jane books, has not expressed interest itself in licensing a Yiddish version. But in January of 2005 it sued for copyright infringement, among other claims, because the new portrayal of Dick and Jane is unsuited for association with the first grade reading primer and the nostalgic memories it inspires.[1] A "Fun with Dick and Jane" movie is scheduled for release in the summer of 2005, and

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[1] Complaint ¶¶ 17, 33, 34, Pearson Educ. Inc., v. Little Brown and Co., (No. CV05-0033 CBM).

Pearson would rather not alienate its potential audience.[2] Little, Brown & Company, publisher of the Yiddish version, claims the book is social commentary entitled to First Amendment protection.[3]

Pearson's real concern is for the perception of its characters among consumers. But the question is whether copyright law should take into account consumer perception. Trademark law, with its prohibitions against blurring and tarnishment of symbols, would seem better suited to such claims and many plaintiffs, including Pearson, file suit under both theories. However, as court decisions have narrowed trademark dilution protection,[4] producers can increasingly rely on copyright's broader provisions to protect songs, characters, images and texts against dilution of meaning and value in the face of imaginative reworkings of popular fare, or "secondary use."

The Dick and Jane complaint echoes the typical claim for broad copyright protection: that if we allow too much secondary use of expressive works without the owner's permission, the works themselves will be degraded and overexploited.[5] Owners of expressive works claim loss of control over the presentation of a work, be it an image, film, character or song, has the potential to destroy the positive associations that the public has with the original and so destroy the demand for attendant products. This harm is typically compared to the problem of "overgrazing" in real property law.[6] Those with shared access to a resource have no incentive to maintain its value and so will overuse it until depletion. The solution to this "tragedy of the commons" model is a private right of exclusion.

The problem with importing an overgrazing doctrine into copyright is that expressive property does not behave exactly like real property. Where real property gives owners rights to a demarcated piece of ground, the precise boundaries of a right to tell a story or perform a song are difficult to measure. Copyright forbids use not only of exact text, but of any communication recognizable as "substantially similar" or obviously derived from an original. Under modern copyright, infringement exists whenever an ordinary observer would conclude that the defendant has

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[2] *Id*. at ¶ 30; *see also* Edward Wyatt, Primer Spoof with Yiddish Faces Suit (in English), NY TIMES, Jan. 15, 2005, at B7.

[3] Wyatt, *supra* note // at B7.

[4] *See, e.g.*, Moseley v. Victoria's Secret Catalogue, Inc., 537 U.S. 418 (2003) (stating that action for trademark dilution requires proof of actual harm rather than just a "likelihood of dilution"); TCPIP Holding Co., Inc. v. Haar Communications, Inc., 244 F.3d 88 (2d Cir. 2001) (famous marks eligible for dilution protection must be both inherently distinctive and have acquired significant distinctiveness among consumers).

[5] *See, e.g.*, William M. Landes & Richards A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 487-88 (2003) (arguing for perpetually renewable copyright to prevent overuse that prematurely exhausts commercial value); Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 927 (1999) (arguing that most audience members prefer stability in the identity of cultural objects); Alex Kozinski, *Mickey & Me*, 11 U. MIAMI ENT. & SPORTS L. REV. 465. 469 (1994).

[6] *See, e.g.*, Landes & Posner, *supra* note // at 487 ("Recognition of an overgrazing problem in copyrightable works has lagged."); Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 918-19 (2004) (stating that overgrazing can occur even with nonrivalrous goods such as songs and "theories").

incorporated something of value from plaintiff's work, regardless of whether anyone would mistake the second work for the former. Audience members resent that anyone should own exclusive rights to communicate alternative conceptions of an expressive work.[7] Digital technology exacerbates the problem by giving a tangible medium to informal communication and so pulling huge swaths of social interaction into the reach of the copyright laws.[8]

Courts have endeavored to find a middle ground so that important critical speech can reach the marketplace, but free-riding or use of old works to get attention for unrelated works can not.[9] This "parody" test allows speech that directly comments on previous work to use that work free of charge. If the second work uses the older work for attention, or to satirize society in general, the second user must get permission.[10] However, the difficulty of locating a precise point of view in ambiguous creative works creates an uncertain standard that chills potential speakers and discourages investment in satirical works. Small-scale users are especially disadvantaged because they generally lack the resources to bargain for licenses or defend potential lawsuits.[11]

This Article argues that by paying attention to a significant body of research about how people process and use information, courts can formulate better, more tailored rules regarding use and re-use of informational products, specifically cultural works such as books, movies, characters and songs. Because copyright is a right to control the flow of certain types of information, how we process information is relevant in determining copyright's scope. According to the Copyright Act of 1976, copyright protects the right to produce objects in which works can be "perceived, reproduced, or otherwise communicated."[12] Put simply, ownership in expressive property now extends to any object that has the ability to call to mind a protected work. Any tangible communication that evokes Winnie the Pooh, no matter what the format, for example, belongs to Disney. Though this has been true now for nearly a century, copyright's cognitive component has received almost no attention in scholarship or judicial decisions. Instead, the justification for such a broad right remains

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[7] *See generally* LAWRENCE LESSIG, FREE CULTURE 1-48 (2004).

[8] For further discussion, see text accompanying notes //-// infra. *See also* LESSIG, *supra* note //, at 8.

[9] Campbell v. Acuff-Rose Music, 510 U.S. 569, 592-94 (1994).

[10] *See infra* text accompanying notes //-//.

[11] *See generally* Molly Shaffer Van Houweling, Distributive Values in Copyright 83 TEX. L. REV. 1536, 1564-67 (2005). Such users are also disadvantaged by the considerable administrative burden of locating copyright owners for older works. This burden has grown steeper in recent years because copyright's extended term means original authors may be long-dead and heirs and transferees scattered or forgotten. In addition, notice, registration and periodic renewal which ensured information about copyright owners remained publicly available are no longer requirements for copyright protection.

[12] 17 USC §§ 101, 102, 106 (2004) (reserving to owners the exclusive rights to reproduce and display a copyrighted work); H.R. REP. No. 94-1476 (1976) at 61-62, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675.

tied to doctrines from real property.

By acknowledging the dynamic properties of information as opposed to tangible entitlements, we can locate a more exact balance between the rights of owners and the need for diverse and open engagement with expressive works. Cognitive research on memory, attention and preference suggests that, as a practical matter, we can provide more leeway to secondary uses of expressive works that exhibit characteristics such as clear source information and audience opt-in distribution methods. As a normative matter, such models indicate that we should be concerned about the consumer's ability to choose between competing interpretations of a work, not the owner's authority to control public perception.

In other areas of the law, research from cognitive and behavioral psychology has provided insights about how to distribute resources efficiently and to resolve private disputes. Studies of human perception and decision-making faculties have been used to reframe debates about tort remedies and contract formation.[13] In property law, acknowledgement of decision-making biases has prompted reexamination of the idea that broad, well-defined property rights facilitate rational and efficient market exchanges.[14] As the nature of property grows more intangible and the nature of ownership more diffuse, scholars are looking at how common cognitive biases and processes impact the optimal allocation of entitlement rights in a variety of settings.[15] To date, however, the cognitive components of certain forms of intellectual property such as copyright, trademark or rights of publicity have received little to no attention. This void is curious given that the boundaries of the entitlements themselves reference human perception.[16]

With respect to copyright in particular, attention to cognitive psychology and consumer research can provide more tailored rules for secondary use. Copyright's purpose is to enrich the public by encouraging

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[13] *See generally* BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed. 2000); *see also* Pierre Schlag, *Missing Pieces, A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (examining competing fields of legal scholarship from a cognitive perspective).

[14] *See, e.g.*, Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, in BEHAVIORAL LAW AND ECONOMICS 211 (Cass Sunstein ed. 2000); Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, in BEHAVIORAL LAW AND ECONOMICS 302 (Cass Sunstein ed. 2000).

[15] For example, several scholars have argued that governance rules of corporate organizations be adjusted to account for common group behaviors and communication strategies. *See, e.g.*, Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003); Donald C. Langevort, *The Human Nature of Corporate Boards: Law, Norms and the Unintended Consequences of Independence and Accountability*, 89 GEO. L. REV. 797 (2001). Others have argued that because default rules inevitably shape preferences, legal frameworks should attempt to guide consumers and individuals toward welfare-maximizing choices. *See, e.g.*, Daphna Lewinsohn-Zamir, *The Objectivity of Well-being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003); Cass R. Sunstein & Richard H. Thaler, *Liberterian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

[16] *See, e.g.*, 17 U.S.C. § 106 (reserving to authors the right to produce tangible objects or performances in which their work may be perceived).

the production of creative works.[17] The public is best served by encouraging greater numbers of innovative uses until such uses distort the ability of consumers to identify and choose between works.[18] Such an approach removes the emphasis on the motives of the secondary user, as under the current fair use test, and focuses instead on the needs of the consumer. Well-established doctrines from social cognition research indicate that we can better distinguish between the types of secondary uses that undermine consumer choice and those that do not.

Four doctrines from cognitive science - attitude resistance, source effects, frequency effects and hierarchy of processing research – provide an illustration. Taken together they suggest that certain uses of copyrighted materials are unlikely to materially harm an owner's investment in or ability to maintain a specific identity for a given informational work. Recognition of such information processing effects would allow more leeway for secondary use that exhibits characteristics such as clear source information and audience opt-in distribution methods. Such doctrines also suggest more freedom for secondary use of older rather than newer works. To offer two simple examples, a literary parody of Dick and Jane, clearly marked as such and available only to willing purchasers, does not seem likely to do much harm to the general public's ability to recognize authorized versions of the characters. By contrast a ubiquitous television commercial using Dick and Jane to promote Viagra may unconsciously distort audience memory and attitude. Under the current parody regime, determination of whether a given use is fair can only be made after distribution and the filing of a lawsuit. The guidelines outlined above remove the need for a separate fair use category for "parody" in favor of a less ambiguous safe harbor for certain derivative uses.

Part I of this Article looks at economic or free speech accounts of secondary use and shows how each omits consideration of elements important to consumers. Part II explains the reasons why a cognitive analysis is relevant to copyright law. It traces the historical development of copyright from a right to reproduce tangible objects to a right of conceptual representation and shows how contemporary debates over branding and re-use stem from this expansion. Part III introduces a new standard for secondary use based on cognitive principles that could replace or at least augment the current problematic parody analysis.

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[17] *See, e.g.*, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (stating that the ultimate aim and sole interest of the copyright act is to stimulate artistic creativity for the public good); *accord* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *but see* Eldred v. Ashcroft, 537 U.S. 214, 123 S. Ct. 769, 785 n. 18 ("[C]opyright serves public ends by providing individuals with an incentive to pursue private ones.").

[18] *See, e.g.*, *Twentieth Century Music Corp.*, 422 U.S. at 156 ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

First, however, an important word about vocabulary. Cognitive psychology refers to the study of how people process and remember information.[19] Related areas in social cognition research examine how the processing of information affects attitude and preferences.[20] At the risk of muddying the social science waters, I use the term "cognitive research" to refer to both areas of scientific study. I also draw on behavioral and ethnographic research about marketing and consumer preference, using the umbrella label "consumer research" to refer to this body of knowledge.

I. PREVAILING ACCOUNTS OF SECONDARY USE: TRESPASS AND FREE SPEECH

A. The Economic Account of Expressive Property

The prevailing account of copyright and secondary use treats expressive property like real property. This framework, drawn from law and economics scholarship, emphasizes the importance of private ownership as the solution to "the tragedy of the commons" problem. In this view, common ownership of resources is inefficient because each individual stakeholder has little incentive to maintain or improve the resource but instead will overuse it. Private ownership, on the other hand, provides incentives to improve and maintain the property and allows for full internalization of the costs of different choices. Applying this analysis to intellectual property frames all unauthorized secondary users as trespassers and their secondary works as stealing.[21] The problem with this analysis is that real property insights based on the behavior of farmers in pastures are of limited use in an intangible format grounded in human perception.[22]

Under tragedy of the commons model, in the absence of property rights, users will overexploit a pasture because, without a guarantee that the pasture will be properly managed over time, each individual user's best interest is to "overgraze" or take as much grass as possible for their herd.[23] The same insight has been made about hunting; where no one controls the

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[19] *See* GREGORY ROBINSON-RIEGLER & BRIDGET ROBINSON-RIEGLER, COGNITIVE PSYCHOLOGY 2 (2004); MICHAEL W. EYSENACK, PRINCIPLES OF COGNITIVE PSYCHOLOGY 1 (1993); *but see* DIANE GILLESPIE, THE MIND'S WE 2-3 (1992) (arguing for expansion beyond the information processing focus of cognitive science to consider context and social interpretation as part of perception).

[20] *See* ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 3 (1999).

[21] See Richard A. Posner, *When is Parody Fair Use?*, J. LEGAL STUD. 67, 67, 72 (1992) (describing parody as a "taking" and comparing it to "larceny") (hereinafter "Posner, *Parody*").

[22] Others have criticized the tendency to draw direct analogies between real and intangible property. See, e.g., William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform*, 92 CAL. L. REV. 1639, 1643 (2004); Mark A. Lemley, Property, Intellectual Property and Free-Riding 3 (Aug. 2004) (unpublished manuscript on file with author) available at http://ssrn.com/abstract=582602. These critiques focus on the differences between real and intangible property from an economic perspective. I also am interested in these differences, but in this Article I explore additional perspectives beyond economics to describe the properties of intangible goods.

[23] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347, 353 (1967); Landes & Posner, *supra* note *//*, at 484.

ability of others to hunt, no one has incentive to increase or maintain the stock of game.[24] In either case the richness of the soil or the stock of game will quickly diminish.

Private ownership, by contrast, allows for consideration of the costs and benefits of different uses of a resource.[25] The owner will allocate rights to the land to maximize its value and increase her own wealth or happiness.[26] Private ownership will induce investment in improving the property because the owner knows she will be able to capture the return on her investment.[27]

Concentrated ownership of land also lowers the transaction costs of private agreements. Where ownership is concentrated, outside parties may easily contract for any beneficial use of the property.[28] The identity of the initial owner matters little then; in an efficient market with low transaction costs, the owner will sell or license rights to the party who will put the parcel to its highest and best use.[29] The economic approach presumes that consensual market transfers ordinarily are the most effective way to distribute resources; departures from this norm in the form of legal regulation bear a heavy burden of proof.[30]

Scholars rely on the tragedy of the commons model to formulate rules that stretch across different types of entitlements. A property doctrine that applies universally promotes certainty in contracting and lowers information costs for businesses.[31] Legal exceptions to broad property regimes frustrate competition and promote rent-seeking behavior among interest groups.[32]

According to this unified theory, incentives operate similarly with intellectual entitlements, such as copyrights, trademarks and the right of publicity, as they do with in tangible property.[33] Private ownership creates

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[24] Demsetz, *supra* note //, at 350.

[25] *Id.* at 347.

[26] *Id.* at 354.

[27] *Id.* at 355.

[28] *Id.* at 356.

[29] Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ. 1, 7, 11 (1960).

[30] *See* Robert Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655, 2662 (1994) (hereinafter "Of Property Rules"); Robert Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 306-07 (1993) (summarizing the economic view but arguing for greater flexibility in the case of parody in copyright law) (hereinafter "*Are You Making Fun of Me?*").

[31] *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 314 (1996) (noting the preference of neoclassicist property theory for general property rules that facilitate allocative efficiency); *cf.* Frank H. Easterbrook, *Cyberspace v. Property Law*, 4 TEX. REV. L. & POL. 103, 107-08 (1999) (describing general property regimes as "contract-enabling" because they foster competition across regimes and discourage rent-seeking by private interest groups).

[32] Easterbrook, *Cyberspace v. Property Law*, *supra* note //, at 107-08.

[33] *See, e.g.*, Landes & Posner, *supra* note //, at 484; Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 112 (1990) ("the right to exclude in intellectual property is no different in principle than the right to exclude in physical property."); *see also Eldred*, 537 U.S. at 212 n. 18 (2003) (stating that the economic philosophy behind the Copyright Clause is to provide material incentives to individuals to produce works of knowledge).

rewards for producing expressive property.[34] The right to exclude others from free-riding on this effort creates incentives to maintain and invest in creation and spurs further creative efforts.[35] Owners of intangible rights will choose licensing and distribution arrangements that will maximize the value of the right.[36] In a costless environment, they will also choose the uses most beneficial to society because it will be economically efficient to do so.[37]

But what of overgrazing? Expressive property is intangible and so may be said to be less vulnerable to overuse than soil or hunting grounds. Further, its consumption is "nonrivalrous."[38] Use of a book, movie, image, or any other form of commodified information does not impose a direct cost on others using the same information.[39] Expressive works may be endlessly copied without diminishing the quality of the original.[40]

Economic theorists maintain that expressive works may nonetheless be vulnerable to overgrazing. For example, trademarks are vulnerable to dilution when used even by noncompetitors to describe unrelated goods.[41] The use of "Gucci" on a diaper bag may lessen the value of the mark by weakening its connection to luxury goods.[42] Similarly, commercial use of a celebrity's image in connection with a variety of different products is likely to lessen the value of that celebrity's endorsement.[43]

The same effect appears in copyright. Mattel polices unauthorized uses of its Barbie character to avoid its use in art works or pop songs that might displease or disgust its target audience of young girls and their mothers.[44] As Richard Posner has noted, Disney actively manages its characters to avoid overkill and audience confusion.[45] "If . . . anyone were

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[34] *Eldred*, 537 U.S. at 212 n.18.

[35] *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 28 J. LEGAL STUD. 325 (1989).

[36] *See, e.g.*, Posner, *Parody*, *supra* note // at 69 (even where a potential derivative use of copyright is better or more valuable, transaction costs will be minimized by concentrating ownership in a single pair of hands); William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 7 (2000); Merges, "*Of Property Rules*," *supra* note //, at 306 (1993) (consensual market transfers are the most effective way to pursue the twin goals of incentive and dissemination).

[37] Posner, *Parody*, *supra* note //, at 69.

[38] Mark Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 143 (2004) (hereinafter "Ex Ante Versus Ex Post").

[39] Lemley, *supra* note //, at 25.

[40] Dennis S. Karjala, Statement of Intellectual property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, The Copyright Term Extension Act 9 (Jan. 28, 1998), *available at* http://homepages.law.asu.edu/%7Edkarjala/OpposingCopyrightExtension/legmats/1998Statement.html (last visited March 6, 2005).

[41] Landes & Posner, supra note //, at 464.

[42] Gucci Shops, Inc. v. R. H. Macy & Co., Inc., 446 F.Supp. 838 (SDNY 1977).

[43] Landes & Posner, *supra* note //, at 362-63; *see also* Stuart Elliot, *Critics Claim Multiple Deals Risk Saturation*, USA TODAY, Apr. 30, 1991 at 1B.

[44] Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003); Mattel, Inc. v. Pitt, 229 F.Supp.2d 315 (S.D.N.Y.2002); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002) (suing in trademark).

[45] Landes & Posner, *supra* note //, at 486 ("To avoid overkill, Disney manages its character portfolios with care. It has hundreds of characters on its books, many of them just waiting to be called out of retirement . . . .

free to incorporate the Mickey Mouse character into a book, movie, song etc., the value of the character might plummet. Not only would the public rapidly tire of Mickey Mouse, but his image would be blurred as some authors portrayed him as a Casanova, others as catmeat, others as an animal rights advocate, still others as the henpecked husband of Minnie."[46] Without strong ownership rights, those seeking to exploit the value created and maintained by a work's owners will exhaust the work's potential without considering the cost of their actions to others or to the work itself. The need of owners of expressive property to exclude trespassers is thus as great for expressive works as it is for owners of pastureland or hunting grounds.

The need to exclude may be even greater with respect to expressive works because of the particular dynamics of the media and entertainment industries. Many works of authorship take years to create. The author thus incurs substantial costs, at least in the form of opportunity costs. Publishers too must decide whether to distribute a book before knowing whether it will succeed. They commit huge sums in advance to distribution and marketing. Only a very few expressive works earn back these initial investments. These blockbusters subsidize the creation and marketing of all of the other works that never find an audience. Producers thus need to recoup all of the social value of successful works to continue to produce new works.[47] Any free riding on this investment will redirect resources to copycats and secondary use, which can make use of already successful works for free, instead of the risky business of creating works from scratch.[48]

These concerns underlie the claim that the list of exceptions allowed for secondary use of expressive property should be narrow.[49] Economic scholars argue that fair use exemptions are justified mainly in limited circumstances of market failure.[50] For example, because few owners will willingly submit their works to ridicule, private transactions will fail to

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Disney practices good husbandry of its characters and extends the life of its brands by not overexposing them . . . . They avoid debasing the currency.") (internal citations omitted).

[46] Landes & Posner, *supra* note //, at 487-88. *See also* Hughes, *supra* note // at 926, 941-42.

[47] Landes & Posner, *supra* note //, at 495.

[48] Posner, *supra* note //, at 72.

[49] *Id*. at 69, 72; Patry & Posner, *supra* note //, at 1644.

[50] *See, e.g.*, 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, 583 (1998) (adopting a market failure theory of fair use); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U.CHI. LEGAL F. 217, 233; Edmund W. Kitch, *Can the Internet Shrink Fair Use?*, 78 NEB. L. REV. 880, 881 (1999) (predicting that the internet will enable easy and efficient communication between users of copyrighted work and copyright owners, which will reduce the market failure situations which justify fair use doctrine); PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 224, 230 (1994) (arguing that as technology reduces transaction costs, the need for safety valves like fair use declines, but excepting limited distributional goals such as education and research); *Cf.* Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 34 MCGEORGE L. REV. 541, 561-62 (2003) (arguing that exceptions from liability rules should be limited to clear market failure, but preferring a damages rule over injunctive relief in many cases). Gordon argued in an earlier piece for a purely economic view of fair use, *see* Wendy J. Gordon, *Fair Use as Market Failure*, 82 Colum. L. Rev. 1600, 1605 (1982), but has since argued that creative expression serves important nonmonetary values as well.

create a licensing market for parody.[51] Even if the social value of the parody is great, the transaction costs, here in the form of the owner's reputational interests, are too high to permit efficient functioning of the market.[52] But to prevent rampant free-riding under the guise of parody, economic theorists contend that the exception should only apply where the work is unquestionably the target of the second author's criticism.[53]

By contrast, secondary users wishing to make use of a text as a vehicle or "weapon" to criticize society generally should be able to bargain for a license in the competitive market.[54] So long as such users pay a market price, the theory goes, owners will be happy to facilitate this wider dissemination of their products.[55] Therefore, users need no fair use exception to remove market obstructions.[56]

The Supreme Court has embraced this framework in two landmark decisions governing secondary use. In *Harper & Row*, the Court looked at whether "the user stands to profit from use of copyrighted work without paying the customary price"—in other words, whether a finding of fair use would preclude efficient market transactions-- in finding that publication of a small excerpt from a newly-released presidential memoir was not fair use.[57] In *Campbell v. Acuff-Rose*, concerning a rap version of a famous fifties ballad "Pretty Woman," the Court limited the parody exception to cases of direct commentary on a theory of market failure.[58] The Court distinguished between works that use "elements of a prior author's composition to create a new one that, at least in part, comments on that author's works" with those where the "commentary has no critical bearing on the . . . original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh."[59] The Court reasoned that because creators of imaginative works would never license critical lampoons of their own productions, judicial intervention was necessary to further valuable social commentary. Where the second work used the previous to criticize something else, the Court ruled it could "stand on its own two feet and so requires justification for the very act of borrowing."[60]

This economic view of intellectual property is evident in more

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[51] Posner, *supra* note //, at 73.

[52] *Id.*

[53] *Id.*; Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y 209, 216 (1982).

[54] Posner, *supra* note //, at 71 (describing the purpose of many parodies as simple amusement); Goldstein, *supra* note // at 216.

[55] Posner, *supra* note //, at 72-73; Goldstein, *supra* note // at 216.

[56] Posner, *supra* note //, at 73.

[57] 471 U.S. 539, 566 (1985).

[58] 510 U.S. 569 (1994)

[59] *Id.* at 580.

[60] *Id.* at 581.

recent decisions. Faced with the question of whether a sampling of musical notes constituted infringement even if no one could recognize the similarity, the Sixth Circuit in *Bridgeport Music v. Dimension Films* considered which result would lead to the most efficient stewardship of musical recordings and ruled the taking to be infringement.[61] Continuing the analogy of copyright with real property, the court stated even a small number of musical notes should be analyzed as "a physical taking rather than an intellectual one."[62]

The *Bridgeport* decision incorporates the common mistake that all secondary use of copyrighted works is analogous to a physical trespass in real property. Bright line rules for property create market efficiency but differences between real estate and creative works alter where those lines should be drawn. Until we understand what we mean to protect with copyright, we cannot understand what constitutes a trespass of that right.

Insights about real property fail to allocate rights efficiently in the case of intangible works in part because of differences in the nature of the entitlement. The ability to unbundle rights to real estate is generally well understood. Acknowledgment of the dynamics of real property pervades the default rules around which parties license, such as the liability rules for removal of subjacent support or the question of which easements will be said to "touch and concern" the land and so run with property. With expressive property, these dynamics remain mysterious and under dispute. On the one hand, consumption of expressive goods is nonrivalrous. Your use of one copy of a text will not affect my ability to consume another copy. On the other hand, the overgrazing paradigm suggests the opposite: that any secondary use of a character, image, tune or design affects the perception of the work as a whole and so its market value. Individual members of ownership entities tend to be risk-averse when confronting this uncertainty. The prevailing wisdom in the entertainment industry favors uniformity of message across uses of protected characters and narratives to prevent expressive "overgrazing."[63] Thus owners have a powerful disincentive to license use of their properties to all but a narrow segment of goods the owner identifies as complementary. This set of products is likely to be

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[61] Bridgeport Music, Inc v. Dimension Films, 383 F.3d 390, 399 (6th Cir. 2004).

[62] *Id.* The court's decision turned on the different treatment of "sound recordings" and "musical compositions" in the Copyright Act. *See* 17 U.S.C. § 114(b) (stating that the owner of a copyrighted sound recording has the exclusive right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality). Because the Act grants owners the right to alter sound recordings, the court concluded that the substantial similarity test did not apply. *Bridgeport Music*, 383 F.3d at 398. It is not clear, however, that the Act grants owners rights over alterations beyond recognition. The court rejected the idea of a de minimus exception because a disdain for free-riders; it held that "even when a small part of a sound recording is sampled, the part taken is something of value," even if the only value was to "save costs" for the secondary user. *Id.* at 399. Such an analysis ignores the distributional concerns underlying the fair use exception without explaining how a de minimus exception would materially impact copyright's incentive functions.

[63] *See* discussion accompanying *infra* notes //-//.

much less than the set of potential products that audience members might find valuable, useful or interesting.

The scalability of information products, which enables them to serve massive and very small numbers of users, also prevents beneficial private transactions. In a real property circumstance, the tangible nature of the goods establishes a certain scale of potential uses. Parties seeking licenses to and easements on a three-acre parcel tend to be limited in number, easily identifiable, and represent a certain subset of activities consistent with the character and size of the land.[64] Expressive property by contrast is endlessly multipliable, may be distributed in numerous formats, and appeals to both large and small-scale users simultaneously. The concentration of ownership in a single party reduces transaction costs for large-scale licensees, but imposes additional burdens on smaller users. Individual authors and small entities often lack the information and resources necessary to engage in negotiations over established properties. They do not belong to the proper networks, and may not be sufficiently repeat players to invest in joining them. For example, many large film studios will not accept story or product pitches unless they come from an established agency or other known industry channels.[65] In addition, the potential revenue from such licenses is so small that it is usually not worth the owner's time to engage in negotiations. Disney, for one, will not consider a new product line unless it has the potential to become a billion-dollar revenue stream.[66] In this way, the economic view tends to concentrate control over the dissemination and social construction of expressive works in the hands of a few large and conformist organizations.

In addition, the ambiguity surrounding what exactly constitutes a parody creates uncertain boundaries for innovation using older texts. As discussed infra in Part II, the impulse to communicate about and reinterpret popular texts is ancient and widespread.[67] Examples may be found among the plays of the ancient Greeks,[68] early Jewish texts,[69] and in Chaucer's Canterbury Tales.[70] The Supreme Court's definition of parody as

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[64] *See* Patry & Posner, supra note //, at 1643.

[65] Telephone Interview with Gabriel Scott, Public Affairs Officer, Writer's Guild West (May 9, 2005); *see also* Hallmark Entertainment, Frequently Asked Questions *at* http://www.hallmarkent.com/help.php#20 (last visited May 8,2005).

[66] AL LIEBERMAN AND PAT ESGATE, THE ENTERTAINMENT MARKETING REVOLUTION: BRINGING THE MOGULS, THE MEDIA, AND THE MAGIC TO THE WORLD 5 (2002).

[67] Parody is a form of satire, in which prevailing vices or follies are held up to ridicule, but is particular in that parody incorporates material from a target text as a constituent part. MARGARET A. ROSE, PARODY: ANCIENT, MODERN & POST-MODERN 80-81 (1993).

[68] Hegemon of Thasos, Gigantomachia (mocking the tales of the allegedly victorious Athenians in Sicily, who had actually been defeated); Aristophanes (ridiculing the styles of Aeschylus and Euripedes in The Knights, The Frogs and The Acharnians). *See also* Leon R. Yankwich, *Parody & Burlesque in the Law of Copyright* 33 CAN. BAR REV. 1130 (1955).

[69] ROSE, *supra* note //, at 120.

[70] GEOFFREY CHAUCER, *Rhyme of Sir Thopas*, in THE CANTERBURY TALES.

something that targets a specific work, is somewhat narrower than the historical definition, which identifies parody as any work that adopts the style or substance of an original for comic effect or ridicule.[71] Although parody is a derivative art form, some scholars ascribe to it a significant role in breaking down old forms and usher in new styles. At least one theorist gives it a dominant role in the creation of the novel in Europe because parody accustomed audiences to works of fiction in which the author's voice was concealed behind the voices of others.[72] Parody has also historically have been favorite devices of young authors as they try out different styles before developing their own.[73]

The narrow exception for targeted criticism endangers this tradition. Judges applying the parody test struggle to isolate one prevailing "message" from a complex expressive work.[74] No case explains a certain process by which a judge should reach a conclusion about a work's message, and whether that message "comments" on a previous work, other than presumably by instinct and intuition.[75] As Rebecca Tushnet has pointed out, courts may be incapable of making such a determination. To borrow her example, it is a question capable of intense debate and no satisfactory answer as to whether Warhol's paintings of Campbell soup cans "commented" on the cans, or used them just for attention.[76] The resulting uncertainty about the legal standard coupled with the property remedy of injunction for violation chills potential speakers and discourages investment in satirical works.[77]

Furthermore, by the time judges, who disproportionately represent a few limited segments of society, can perceive a parodic message the social flaw being exposed is generally well-understood. Judges have tended to be more lenient to works that speak across well-known cultural divides, such as race or gender.[78] Where a work speaks to less-obvious or well-accepted

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[71] ROSE, *supra* note //, at 81-82.

[72] MIKHAIL MIKHAILOVICH BAKHTIN, THE DIALOGIC IMAGINATION 6, 309 (1981); *see also* ROSE, *supra* note // at 132.

[73] ROSE, supra note //, at 30; *See generally* HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY 15 (1975).

[74] *See* 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, 13 (2000) (hereinafter "*Copyright as a Model for Free Speech Law*"); Dianne Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 709 (1992) (vagueness surrounding the scope of the property right and how it intersects with speech rights mean that the decision in many cases comes down to the discretion and sense of justice of particular judge and jury).

[75] Merges, *Are You Making Fun of Me? supra* note *//*, at 312.

[76] Tushnet, *supra* note //, at 13.

[77] *Id.* at 20-21.; Zimmerman, *supra* note // at 709.

[78] *See, e.g.*, *Campbell*, 510 U.S. at 582-83; Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (2001); Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003); *see also* William F. Patry, Parody, Political Correctness, and the First Amendment, at http://williampatry.blogspot.com/2005/04/parody-political-correctness-and-first.html (last visited May 9, 2005).

issues, such as intra-racial parodies or, in some cases, works connected to homosexuality, judges have tended to draw narrower lines around what constitutes a "comment."[79] Restricting the exception to critiques that are already well-accepted minimizes its value. Such a cautious standard threatens the ability of satire to illuminate unexamined tensions and only reinforces dominant ways of thinking. It also encourages overtly critical works over more subtle combinations of traditions.[80]

In contrast to the economic school, more recent scholarship from cognitive and behavioral psychology suggests that understanding both the nature of the property subject and its social function is crucial to determining the proper allocation of property rights. Research demonstrates that status quo bias acts as a powerful barrier to private transactions around resource entitlements. People tend to value resources more highly if such resources have been initially allocated to them than if those goods had been allocated somewhere else.[81] People are therefore reluctant to part with resources that they own even if the transaction would put the resource to a more valuable use. Such research puts renewed emphasis on finding optimal default allocations to increase social welfare and private utility since such allocations are likely to be given legitimacy by recipients and so remain in place. Understanding how the resource at issue operates and is valued by different stakeholders enables the formulation of more effective default rules.[82]

B. Copyright Minimalists

1. First Amendment Critique

Before turning to cognitive research, it is worth discussing the

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[79] Compare *Campbell*, 510 U.S. at 582-82 (finding a parody where a rap song indirectly criticized earlier romanticized urban setting of song by a white artist) to Parks v. Laface Records, 329 F.3d 437, 453-454 (6th Cir. 2003) (finding no parody under the Lanham Act where rap group used the name of civil rights icon "Rosa Parks" in a song obliquely about changing times and new black heroes). The divergent verdicts seem to rest more on discomfort with interpreting intra-racial commentary than actual differences between the "parodic messages" of the songs. Similarly, in the early nineties, judges were reluctant to allow recoding of popular symbols by groups with homosexual affiliation. *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 541 (1987) (forbidding use of label "Gay Olympic Games" for alternative sporting event despite widespread use of the term by other organizations unaffiliated with the official games); MGM-Pathe Communications, Co., 774 F.Supp. 869, 877 (SDNY 1991) (enjoining use of Pink Panther symbol by anti-gay violence patrols).

[80] For example, the popular and critically-acclaimed Grey Album, which combined music from the Beatles' White Album and JayZ's Black Album, was withdrawn under legal challenge presumably because the work would not meet the legal definition of parody.

[81] *See generally* Daniel Kahneman, Jack L. Knetsch, and Richard W. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

[82] Cass R. Sunstein & Richard H. Thaler, *Liberterian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) (because default rules inevitably shape preferences, legal frameworks should attempt to guide consumers and individuals toward welfare-maximizing choices); *cf.* Russell Korobkin, *The Status Quo Bias And Contract Default Rules*, 83 CORNELL L. REV. 608, 674-75 (arguing that the status quo bias indicates the desirability of tailoring default rules to specific circumstances).

primary critique of the economic property-based account of secondary use. First Amendment scholars articulate a positive account of First Amendment values to support the interests of audience members in recoding popular works and fault the economic framework for failing to consider democratic values of free speech and autonomy. This critique effectively identifies problems with the prevailing regime. However, since copyright restrictions generally trespass on First Amendment freedoms,[83] the First Amendment by itself offers little guidance in how to balance between competing interests. Solutions rooted in free speech discount the importance of a right to exclude for preservation of the identity and meaning of cultural goods. Like the economic account, the free speech critique imperfectly reflects the dynamics of the entitlements to information at issue.

The First Amendment critique focuses on the control that copyright gives to large media firms over development of and engagement with culture. With the advent of mass media, many of the symbols and narratives that permeate everyday life are commodified.[84] Think here of the Star Wars movies, the Coca-Cola logo, and characters from popular television shows such as Bart and Lisa Simpson. People find fulfillment in using such conventional or widely understood symbols to express their commitment to cultural, political or social groups.[85] They comment on their surroundings through creative mixing of traditions and reworkings of popular culture.[86] Even the decision to copy verbatim someone else's speech may serve democratic values. The assertion that someone's words are relevant to a new situation is a particular political stance.[87] To these critics, copyright law restricts the social flow of texts, photographs, music and other symbolic works, a form of control that may deprive us of the optimal cultural conditions for democratic debate and expressive innovation.[88]

A similar critique may be found among scholars who view the Internet and the new "networked society" as particularly fertile ground to

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[83] *See* Rebecca Tushnet, *Copy This Essay: How the Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 538 (2004).

[84] Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991); Rochelle Cooper Dreyfuss, *We are Symbols and Inhabit Symbols, So Why Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Public*ity, 20 COLUM.-VLA J.L. & ARTS 123, 123 (1996) (stating that Betty Crocker has replaced Hestia in the public consciousness).

[85] Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, *supra* note //, at 16; JOHN PHILIP JONES & JAN SLATER, WHAT'S IN A NAME: ADVERTISING AND THE CONCEPT OF BRANDS 217-225 (1986) (describing Coca Cola brand loyalists who fanatically collect products bearing the company's logo because, as one collector says "It's in everyone's past . . . It's the symbol of America").

[86] Coombe *supra* note //, at 1864-66; Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 678-79 (1997) (hereinafter "*Legal Fictions*").

[87] Tushnet, *supra* note //, at 565; Tushnet, *Copyright as a Model for Free Speech Law*, *supra* note //, at 16-17.

[88] Coombe, *supra* note //, at 1866.

encourage active participation in culture and self-government.[89] The ease of digital transmission and reproduction enables users to transform common symbols and texts for their own purposes, and so "speak back" to more powerful entities.[90] Networked communication raises the potential for collaboration and decentralized production and so active engagement in the cultural sphere.[91] However, this same technology also enables greater tracking, surveillance and blocking of expressive consumption.[92] Use of expressive works leaves a trail on the Internet. Owners seek to charge fees or enjoin unauthorized viewing and distribution of works or derivatives. In this way, strong intellectual property rights threaten to undermine the Internet's potential to foster a true democratic culture.

To counteract these trends, scholars have put forward positive theories of the First Amendment that would limit the amount of protection copyright owners may claim. For example, Neil Netanel has argued that inherent in First Amendment values is a need for offerings from "diverse and antagonistic" sources.[93] Yochai Benkler has advanced a similar thesis, arguing that because the First Amendment requires a robust public domain, it limits the rights in information that may be granted to private entities.[94] Jed Rubenfeld argues that the First Amendment cabins copyright by protecting an absolute "freedom of imagination."[95] No person should require permission to exercise her imagination, nor should anyone be prevented from disseminating works of her own imagination.[96] Rubenfeld thus takes issue not with copyright's prohibition on reproduction, but on the derivative works right that prevents unauthorized users from reimagining cultural works.[97]

These theorists agree that a positive theory of the First Amendment would require a broadening of copyright's treatment of transformative uses beyond the narrow allowance for targeted parody.[98] According to the free speech model, where a secondary work is "transformative," that is, the

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[89] *See, e.g.*, Yochai Benkler, *Freedom in the Commons: Toward a Political Economy of Information*, 52 DUKE L.J. 1245 (2003); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 10-14 (2004) (arguing that the Internet empowers consumers to become active participants in the production of public culture).

[90] Balkin, *supra* note //, at 33-34; Benkler, *supra* note // at 1266; Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 Cardozo Arts & Ent. L.J. 215, 233 (1996).

[91] Balkin *supra* note //, at 11-13, 33-34.

[92] Balkin, *supra* note //, at 18.

[93] *See, e.g.*, Neil Weinstock Netanel, *Market Hierarchy And Copyright In Our System Of Free Expression*, 53 VAND. L. REV. 1879, 1881 (2000) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

[94] Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEM. PROBS. 173, 187 (2003).

[95] Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

[96] *Id.*

[97] *Id.* at 4.

[98] *Id.* at 5; Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 4 STAN. L. REV 1, 84 (2001); Yochai Benkler, *Free As The Air To Common Use: First Amendment Constraints On Enclosure Of The Public Domain*, 74 N.Y.U. L. REV. 354, 357 (1999)

author has added her own original expression along with the previous work to change its meaning or purpose,[99] courts should not enjoin that speech.[100] As with other prior restraints, injunction of transformative works, which by definition contain original expression, raises a specter of government-assisted censorship. Such restrictions risk suppressing valuable thoughts and ideas that would lose force expressed another way.[101]

The problem is that the First Amendment by itself does not tell us how to choose between speakers.[102] Some transformative uses are still substitutive, such as the adaptation of a novel into a screenplay. The screenplay author may add pages of new dialogue and invent new characters; this is often the case even for authorized adaptations.[103] She may use quite a bit of imagination. But once that adaptation is commercially released, it will satisfy much of the audience's demand for a film version and so will likely siphon off a large chunk of the owner's expected return.[104]

Rubenfeld and Netanel would answer this dilemma by imposing a compulsory license or profit apportionment scheme whereby a judge or neutral tribunal calculates what portion of the second author's return is due to the genius of the first creator's work.[105] Such a system would separate the right to receive compensation for use from the right to control what form the use takes. Properly managed, a panel of experts probably could arrive at a reasonable licensing fee. Furthermore, the shadow of government oversight should encourage private bargaining.

However appealing on its face, this system conserves the uncertainty of the current doctrine and undermines copyright's incentive functions. It conserves uncertainty because it entrusts judges to separate changes that involve imagination from changes introduced only to evade the reproduction right. This latter class would still be subject to injunction.[106] This inquiry is arguably as subjective as asking if a new work "comments" on an original.[107]

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[99] Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 U.C.L.A. L. REV. 1449, 1464 (1997).

[100] Rubenfeld, *supra* note //, at 53; Netanel, *supra* note // at 84; *see also* Zimmerman, *supra* note //, at 25; Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunction in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

[101] *See* Tushnet, *Copyright as a Model for Free Speech Law*, supra note //, at 10-11.

[102] *See* David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 284-85, 304-05 (2004).

[103] *See* Goldstein, *supra* note //, at 7.

[104] For some commentators, this sort of piracy is worse than the literal kind because the secondary user appropriates for herself a new, untapped market, whereas if the infringing work were limited to the same medium, it would only attract the same people who already had the opportunity to purchase the plaintiff's work. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[E][2] at 13-92; *cf.* Goldstein, *supra* note // at 5 (publishers will invest more in purchasing, marketing and producing a work when they know they can control all derivative uses).

[105] Netanel, *Copyright and a Democratic Civil Society*, *supra* note //, at 381.

[106] Rubenfeld, *supra* note //, at 55.

[107] Michael Abramowicz, A Theory of the Derivative Right and Related Doctrines, at 42-44 (2005)

The regime undermines incentives because it does not address overuse. Economics scholars argue with some basis that mass promotion of a popular character may saturate the public's demand for that character especially, if as seems likely, many people will try to reimagine the character into their own products all at the same time.[108] Audiences who prefer one version will have trouble keeping the meaning of the property straight between so many competing uses.[109] Minimalists resist this claim by painting it as a form of moral or reputational harm to the author that should not be protected by copyright.[110] This goes too far. As discussed further in Part II, overexposure of or inconsistency in expressive works can decrease audience demand.[111] The ability to control how a work is distributed to the public is a core right of the copyright act,[112] and bears less on moral or reputational interests than on simple economics.[113] The original author may lose not only licensing revenue from an authorized derivative, but may see demand for the original work fall as well. Audiences may lose their connection with a beloved work in amidst an array of competing re-imaginations. We would have solved the problem of copyright cannibalizing free speech rights, by allowing free speech to cannibalize copyright.[114]

2. Economic Minimalists

A second line of economic critique more directly addresses the overgrazing paradigm and rejects it outright. For example, Mark Lemley argues that copyright's incentive function dictates that protection should extend only as far as necessary to reward authors and spur future creation.[115] Because consumption of intangible property is nonrivalrous, the public should enjoy surplus value beyond what is required by the owner.[116]

Lemley sees the problem of overgrazing as self-limiting for four reasons. First, only a subset of works that are widely known across a culture are likely to be "overgrazed." Second, if consumers prefer the

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(unpublished paper on file with the author).

[108] *See supra* text accompanying notes //-//.

[109] *See* Hughes, *supra* note // at 942-55; Alex Kozinski, *Mickey & Me*, 11 U. MIAMI ENT. & SPORTS L. REV. 465. 469 (1994).

[110] Rubenfeld, *supra* note //, at 53-54; Tushnet, Legal Fictions, *supra* note //, at 675.

[111] See text at //-// infra.

[112] 17 U.S.C. § 106(3) (2004).

[113] *Cf.* Abramowicz, *supra* note // at 28 (purpose of derivative work right is to prevent rent dissipation).

[114] Furthermore, copyright can be returned to its original status as a right of reproduction only. *See, e.g.*, Rubenfeld, *supra* note //, at 55. New methods of distribution have inexorably altered how people consume expressive works. *See infra* text accompanying notes //-//. A right of reproduction today would provide less protection than it did in 1856 because so many ways exist to "copy" a work without literal reproduction.

[115] *Free-Riding*, *supra* note // at 33.

[116] *Id.* at 43; 47-48

original context of the work, demand will remain high for that version. If consumers prefer the rewrite, then we should examine our assumption that consumers prefer static meaning in their cultural symbols. Third, allowing competition to produce sequels and rewrites may spur the original owner to produce a newer version faster. Finally, the social value of allowing subversion of icons outweighs the social good of protecting them.[117]

Although correct on many counts, this account of overgrazing is firmly "ex post." It assumes a world in which cultural icons already exist. Once control over many forms of reproduction and reuse is removed, it may be much harder to establish works with static meanings across a culture.[118] One should not go too far here. Complementary regimes such as trademark and unfair competition may prevent some free-riding even without copyright.[119] However, it seems likely that without copyright's derivative works protection, many popular works will be imitated and mass-marketed before an audience has had the time to become well-acquainted with the original.

The suggestion also discounts copyright's structural function. As Netanel has written, copyright does not serve only as an inducement to produce a greater quantity of expressive products. It also is designed to support a sector of creative and communicative activity that is relatively free of reliance on state subsidy and elite patronage.[120] To do this, copyright must grant authors and distributors more surplus than would be necessary to cover the costs of initial production and marketing. One also must account for copyright's role in encouraging dissemination as well as creation of expressive works.[121] This includes the cost of marketing and advertising plus the costs of promoting works that turn out to be unsuccessful. Finally, it seems strange to cap awards to authors at their cost.[122] A bad book costs as much to print and market as a good one, for example. This kind of structural cap would remove at least the monetary incentive to write great books instead of mediocre ones.

As Lemley himself has recognized, what is needed is an account of incentive and access issues that is specific to copyright law.[123] Economic property analysis and free speech doctrine are useful here, but both neglect

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[117] *Ex Ante Versus Ex Post*, supra note //, at 145.

[118] *Cf.* Hughes, *supra* note // at 943.

[119] Goldstein, *supra* note // at 220; F. Scott Kieff, The Case Against Copyright 7 (unpublished paper on file with the author) available at http://ssrn.com/abstract=600802 (last visited May 11, 2005); *but see* Dastar Corp v. Twentieth Century Fox Film, 539 U.S. 23 (2003) (holding that Lanham Act does not prevent unaccredited copying of copyrighted work).

[120] Netanel, *Copyright and a Democratic Civil Society*, *supra* note // at 352-358; Posner & Landes, *supra* note // at 475, 488, 495.

[121] Netanel, *Copyright and a Democratic Civil Society*, *supra* note // at 358; Posner & Landes, *supra* note // at 475, 488, 495.

[122] *Free-riding*, supra note //, at 34.

[123] *Id*. at 45.

key aspects of how consumers actually choose and make use of expressive works. The economic account neglects the importance of communication and discussion about competing interpretations of symbolic works. The minimalists ignore significant audience interests in the stability of identity in cultural works. This Article argues that by paying attention to rules regarding how we understand and consume information, we can arrive at rules that more precisely balance free speech and democracy interests with the stability and incentive functions underlying audience choice.

II. A COGNITIVE BASIS FOR SECONDARY USE

Three lines of research support using cognitive research to analyze secondary use of informational goods. First, from a historical perspective, copyright has ceased to subsist in rights to copy tangible goods and now protects against a much wider range of activity designed to evoke proprietary works in the minds of an audience. Beginning in the early 1900s, a dramatic increase in new technologies led Congress and the courts to define copyright broadly across formats by reference to the perceptual effect of uses. The precise boundaries of such rights have never been satisfactorily explained. Second, owners sue and judges enjoin unauthorized secondary uses under copyright at least in part to protect against overuse and degradation of consumer associations with popular brands. Here too, the extent to which copyright can and should protect against alteration in consumer perceptions is unclear.

Third, for consumers, works of information exist simultaneously in tangible format ready for consumption, and in memory in need of discussion and elaboration for proper encoding of experience. This duality gives consumers interests on both sides of the debate. Secondary use of expressive works of information can crowd the external marketplace and distort the ability to engage productively with beloved works. However, once experienced, free discussion of the elements of shared cultural works facilitates categorization of knowledge, understanding of self, and development of cultural ties with peers. These dynamics, drawn from consumer psychology research, reveal a collision between the goals of owner and audience that should inform the secondary use debate.

A. From a Right of Reproduction to Right of Conceptual Representation

1. Early History

The development of the Copyright Act in the eighteenth century reveals the roots of the current debate over overgrazing and secondary use. To

enable exploitation of works in formats like theatre, radio and film, owners sought to protect against use beyond literal reproduction. They fought for a right to represent the essence of a work in any manner capable of being perceived. The boundaries of this right to represent meaning across formats intersected with traditional audience reuse and recoding rights in a way that has not yet been satisfactorily resolved.

The original copyright acts in both Britain and the United States focused on the economics of the printing press, and so defined narrowly the exclusive rights granted to an author. The early British Copyright statute, the Statute of Anne protected only the mechanical rights to "print, reprint or import" a book.[124] The first US Copyright statute was similarly limited to giving authors of maps and books the exclusive right to "print[], reprint[], publish[], and vend" such works.[125] Courts in both jurisdictions read these rights to prohibit only literal copying, and allowed subsequent authors free reign to use existing works as raw material in abridgements and translations.

The creation of a property right in something as ethereal as literary doctrine troubled jurists from the beginning. In *Millar v. Taylor*, an early British case addressing copyright's scope, one of the presiding judges questioned the boundaries of this new form of intangible property.

> "The property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment than by mental possession or apprehension; safe and invulnerable, from their own immateriality; no trespass can reach them."[126]

In response, William Blackstone, who argued *Millar* for the plaintiff, clarified that the property right was not in the ideas put forth in the book but was found in its actual text.[127] Blackstone elaborated on this description in his second volume of the Commentaries published a few years later.[128] In the Commentaries Blackstone wrote that "The identity of a literary composition consists entirely in the sentiment and language; the same conceptions, cloaked in the same words, must necessarily be the same

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[124] 8 Anne, c. 19 (1710)

[125] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[126] Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

[127] 96 Eng. Rep. 189 ("Style and sentiment are the essential of a literary composition. These alone constitute its identity.").

[128] MARK ROSE, AUTHORS AND OWNERS 89-90 (1993).

composition."[129] He classified literary property as a type of estate similar to the natural right of occupancy in unclaimed land.[130]

Early United States copyright law similarly set copyright's boundaries at exact reprints. For example, in 1853 the author Harriet Beecher Stowe sued the translators of an unauthorized version of *Uncle Tom's Cabin* targeted to German immigrants.[131] The 1831 Act in force at the time was silent on the issue of derivative rights. Stowe argued that the translation was a direct copy, with only the "mechanical signs" having been changed. The judge disagreed and read the Act to protect only the "precise words" used by Stowe. He found that her characters, concepts and creations were public property, however, and "may be used and abused by imitators, play-rights and poetasters."[132] After publication, "[t]he author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language."[133]

2. "Cognate" Rights

Soon after the Stowe decision, Congress began to expand copyright's scope to include non-literal copies. It is the boundaries of this expansion that have yet to be fully mapped out. For example, in 1856, Congress had added the right to publicly perform a dramatic work to the exclusive rights of copyright owners.[134] *Daly v. Palmer*, brought in 1868, defined the boundaries of an infringing performance.[135] In that case, the plaintiff had written a popular play involving a dramatic rescue in front of an oncoming train. A British playwright obtained a copy and wrote a different hit play in London containing a similar scene. A New York theatre sought to produce the second play and Daly sought an injunction. The two plays shared little in common in terms of dialogue, characters or plot save for the infamous railroad scene, and even that contained material differences. However, the new right of public performance freed the court from side by side comparison as a test for infringement. Instead, the court found that Daly's play could be infringed "by representation, as well as by printing, publishing and vending."[136] The test of whether a dramatization violated this right of "representation" was its ability through movement and

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[129] 2 WILLIAM BLACKSTONE, COMMENTARIES * 405-06.
[130] *Id.*
[131] 23 F. Cas. 201, 207 (1853).
[132] *Id.* at 208.
[133] *Id.* at 207.
[134] An Act to Amend the Several Acts Respecting Copyright, ch. 169, 11 Stat. 138 (1956) (current version at 17 U.S.C. § 106 (2004)).
[135] 6 F.Cas. 1132, (SDNY 1868).
[136] *Id.* at 1137-38.

gesture to "excite[] emotions and impart[] impressions" that the audience would experience as substantially similar to the original work.[137] Daly thus marked the first moment where the rights protected by copyright ceased to subsist entirely in a tangible works and instead became focused on the impact of the work on paying audiences.[138]

Technological advances pushed the boundaries of prohibited "copying" further. Mechanical piano rolls first presented the question of whether non-literal musical reproduction constituted a "reproduction" prohibited under the Act.[139] These rolls, perforated cylinders designed to produce melodies when rotated inside a player piano, gave the same impression as if a person had sat and played a composition off of sheet music. Music publishers sought royalties, but the pianola manufacturers argued that a perforated cylinder that looked nothing like a piece of paper containing musical notations could not violate copyright's reproduction right.[140] This was the question presented to the courts: was a piano roll a "copy" of sheet music?[141]

The music publishers lost the court battle, but then succeeded in persuading Congress to revise the Copyright Act's definition of copying. By the time the music rolls case reached the Supreme Court in 1908, under the heading *White-Smith Music Publishing Company v. Apollo Company*, the manufacture and sale of such pianos had reached seventy five thousand and the sale of the rolls had topped over one million per year. Accordingly, the Court chose a narrow reading of the then-current act and limited the definition of "copy" to exact "reproduction or duplication of a thing."[142] "The statute has not provided for the protection of the intellectual conception apart from the thing produced," wrote Justice Day for the majority. Justice Holmes concurred, but wrote separately to argue that to fully protect inventors, the statute should be revised to extend protection not only to the form of a composition, but to its "essence." "A musical composition is a rational collocation of sounds apart from concepts . . . . On principle anything that mechanically reproduces the sounds ought to be held a copy."[143]

The publishers then took the matter up with Congress, which was at the time in the process of holding hearings to revise the copyright laws.[144]

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[137] The court found that "All that is substantial and material in the plaintiff's 'railroad scene' has been used . . . in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff's play." *Id.* at 1138.

[138] Goldstein, *supra* note //, at 218.

[139] GOLDSTEIN, *supra* note //, at 65.

[140] GOLDSTEIN, supra note // at 66.

[141] White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 2 (1908).

[142] *Id.* at 17.

[143] *Id.* at 19-20.

[144] GOLDSTEIN, *supra* note // at 67. *See also* Metro-Goldwyn Mayer Distr. Corp. v. Bijou Theatre Co., 59 F.2d 70, 74 (1st Cir. 1932) (describing the desire to overturn the *White-Smith* decision as one of the purposes of the

In 1909, Congress added a several new rights for copyright holders. These included, in the case of dramatic works, the right to "represent" the work in whole or in part "in any manner or method whatsoever"[145] and, in the case of musical compositions, the right to "make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."[146] These rights to "represent" intangible works or reproduce "thought" quietly but explicitly expanded copyright's reproduction right from tangible objects into the realm of perceptual similarities.

This transformation was complete when Holmes decided a 1911 case, *Kalem Co. v. Harper Bros.*,[147] concerning a motion picture photoplay. The case, involving a silent movie based on the novel Ben-Hur, turned on the right added in 1870 to "dramatize" a book. Although the silent movie was not literally similar to the text of the book, Holmes relied on *Daly* to find that "[t]he essence of the matter . . . is not the mechanism employed, but that we see the event or the story lived."[148]

Holmes' insistence on locating the "essence" of the protected work recalls Blackstone's attempts to identify what was "essential" in copyright. Where Blackstone had located the borders of the literary estate at the "style and sentiment . . . the same conceptions cloaked in the same language,"[149] Holmes had by 1911 extended the boundaries to include anything that conveyed the same story to the understanding of the audience. The 1909 Act and Holmes' *Kalem* opinion paved the way for courts to apply the right of conceptual representation embraced in *Daly* to new technologies as far from the printing press as moving pictures, radio, television and even computer software.[150] Any method of production that might call up the "essence" of the composition in the mind of a paying audience now fell within the limits of copyright.

The current Copyright Act reflects this expansion of the author's domain. In the 1976 Copyright Act, the separate sections relating to dramatic, literary, musical or photographic works were for the most part combined in favor of a unitary approach to the bundle of rights granted

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1909 Copyright Act).

[145] Act of March 9, 19090, ch. 820, § 1(d), 35 Stat. 1075 ("make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.") (current version at 17 U.S.C. § 106 (2004)).

[146] *Id.* at § 1(e). The Act made this latter right prospective only and provided a compulsory license to ensure that no producer could gain a monopoly over the entire format. GOLDSTEIN, *supra* note //, at 67.

[147] 222 U.S. 55 (1911).

[148] *Id.* at 61.

[149] 2 WILLIAM BLACKSTONE, COMMENTARIES * 405-06

[150] Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931) (radio); Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co., 59 F.2d 70, 75 (1st Cir.1932) (movies); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983) (computer operating systems).

under copyright. The exclusive reproduction right granted to owners includes the right to produce a material object in which the work can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[151] The derivative work right reserves to the owner "any other form in which a work may be recast, transformed, or adapted."[152]

Though this language has existed for over twenty years, courts have not carefully examined the outer limits of this right of conceptual representation.[153] The "substantial similarity" test, which determines the boundaries between infringing and non-infringing similar works, offers little guidance.[154] Most courts look to an "ordinary observer" or "audience" test that asks whether the new work evokes a similar "impression" as the old,[155] or whether an ordinary observer would conclude that the new work incorporated something of value from plaintiff's work.[156] These tests expand the limits of copyright beyond literal similarity or even semantic similarity to any work that, in the opinion of the average viewer or listener, evokes a former work. Such tests assume without explanation that plaintiffs deserve control over any aspect of their work with value to the audience, and at the extreme threaten to elide copyright's cornerstone distinction between protected expression and unprotectible ideas and concepts.[157]

3. Effect on Common-Law Traditions of Parody, Burlesque and Pastiche

The confusion over copyright's boundaries is especially pernicious in cases where a new author seeks to re-use excerpts of an existing work for a different purpose. To date, no court has clearly defined in the wake of the

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[151] 17 USC §§ 101, 102 (2004).

[152] 17 USC §§ 101, 106 (2004).

[153] See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (noting that the distinction between literal and non-literal similarity in copyright has received "almost no express judicial recognition").

[154] Judge Learned Hand, the architect of the foundational approach to the modern substantial similarity inquiry, in *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930), concluded in one of his last copyright cases in 1960 that "obviously, no principle can be stated as to when an imitator has gone beyond the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

[155] 4 Nimmer supra note //, § 13.03[E][1] at 13-82, § 13.03[E][2] at 13-89-90.

[156] *See, e.g.*, Incredible Technologies, Inc., v. Virtual Technologies, Inc., 400 F.3d 1007, 1011 (7th Cir. 2005) (describing the "ordinary observer" test in the context of video games as: "'whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value.'"); Stromback v. New Line Cinema, 384 F.3d 283, 287 (6th Cir. 2004) (same, and concluding that the question is turns on whether the "net impression" of the works' expressive elements are substantially similar to one another); Sturdza v. United Arab Emirates, 281 F.3d 1287, 1296 (DC Cir. 2002) (same); Yankee Candle Co., Inc. v. Bridgewater Candle Co., LLC, 259 F.3d 25, 33 (1st Cir. 2001) (same); Educational Testing Services v. Katzman, 793 F.2d 533, 541 (3rd Cir. 1986) (same); *see also* Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 111 (2d Cir. 2001) (describing the ordinary observer test as whether "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work").

[157] *See* 4 Nimmer, *supra* note //, § 13.03[A][1][c] at 13-46.

1909 expansions whether the ability to communicate subjective conceptions of an expressive work belongs to the audience or to the author.[158] Instead, resolution of this question has come to focus on imprecise questions about the secondary user's motivation in using the work.

Although nothing in the legislative history indicates that Congress intended the 1909 Act to alter the common-law rights of audience members to parody and burlesque popular works, the new derivative rights did just that.[159] Before the revisions of 1909, the law took a benign view of parody, satire, burlesque, pastiche and other forms of communicating alternative audience perceptions of a cultural work. Such use was common as a form of commercial art and in everyday discourse. On the stage, most popular plays were the subject of parodies that were performed at about the same time as the originals.[160] Imitators often spoofed the styles of well-known writers and performers. Newspapers reported or reproduced parodies of popular works frequently.[161] As far as courts were concerned, so long as the parodist had not copied the previous work in its entirety, or set out to replace rather than ridicule the original, parodies qualified as fair use.[162]

Not long after passage of the 1909 act, the judicial attitude towards parody and burlesque took a marked shift. The ability to exploit a single work through the different mediums of radio, motion pictures and the

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[158] Compare, for example, Warner Bros., Inc. v. American Broadcasting Cos., 780 F.2d 231, 242 (2d Cir. 1983) ("[S]tirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement.") with Bridgeport Music, Inc v. Dimension Films, 383 F.3d 390, 399 (6th Cir. 2004) (use of only a small portion of plaintiff's musical composition was infringement even where no ordinary listener would notice the similarity); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1267 (11th Cir. 2001) (finding substantial similarity even when copyrighted characters were "inverted" in imaginative retelling so that their traits, values and even settings were opposite to the original); Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1169 (9th Cir. 1977) (finding infringement between popular television show and characters in an advertisement despite lack of literal similarity between characters because overall impression, effect and "concept and feel" were similar); Columbia Pictures Indus., Inc. v. Miramax Films Corp., 11 F. Supp.2d 1179, 1186 (C.D. Cal. 1998) (finding substantial similarity where defendant's movie trailer consciously evoked plaintiff's but used different actor and props and referred to completely different subject matter). See also White v. Samsung Electronics America, Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (finding that any symbol that "evoked" a celebrity's likeness could violate the right of publicity).

[159] S. Rep. No. 6187 at 1 (1907) (stating that the bill preserved common law adjudication of what constituted infringement and fair use); *see also* H.R. Rep. 2222 at 7, 9 (1909) (stating that monopoly given to the author was ultimately intended to benefit the public and that nothing in the bill intended to alter author's common-law rights with respect to the work).

[160] Yankwich, *supra* note //, at 1136; William Lyon Phelps, *Daily Talk About Books and Authors*, THE WASH. POST, Dec. 12, 1933, at 6 (noting how in years past two New York comedians always selected the most popular play of the year to burlesque).

[161] *See, e.g.*, A Parody, N.Y. TIMES, May 3, 1896, at 11 (reprinting an anonymous parody of Emerson's Brahma); A Parody, N.Y. TIMES, Aug. 23, 1896, at 2 (reprinting a parody of Horace by Alexander Pope); Parody, N.Y. TIMES at 12 (Mar. 29, 1885) (essay praising parodies for their role in chastening and instructing authors); Albert E. McKay, *Parodies on The White Man's Burden*, N.Y. TIMES, May 27, 1889, at BR351 (reprinting portions of a number of parodies of Kipling's poem); Barrie Denies Parody, N.Y. TIMES, July 17, 1921, at 23 (reporting the denial of Sir James Barrie that he had written a parody of a Mrs. Asquith's memoirs reportedly entitled "Knees I Have Sat Upon.")

[162] *See, e.g.*, Bloom & Hamlin v. Nixon, 125 Fed. 977 (C.D. Pa. 1903) (parody of the style of a popular singer by singing the chorus of a copyrighted song not infringement); Green v. Minzensheimer, 177 Fed. 286 (C.C.N.Y. 1909) (same with respect to the chorus and one verse); Green v. Luby, 177 Fed. 287 (C.C.N.Y. 1909) (singing of an entire song to imitate popular singer took more than necessary and was infringement).

television led owners of popular dramatic works to clamp down on parodists who transposed the work to a new format. Judges began vilifying the act of parody itself as a taking no different from any other theft.[163]

For example, in 1956, a New York district court enjoined a television parody of a popular film. The decision in the case, *Loews, Inc. v. Columbia Broadcasting System*, explicitly distinguished between acceptable and non-acceptable formats for parody. It drew a line between literature and scientific texts, where broad fair use and parody might be allowed because such works aimed to further progress in the arts and sciences, and fields where "business competition" existed such as broadcast entertainment. [164] The court ruled that the factor of whether "that the infringing work . . . has been issued for commercial gain, rather than in the interests of the advancement of learning" was crucial.[165] Many commentators at the time, including Leon Yankwich, the chief judge of the district, condemned the decision for its cramped view of parody and satire and its contention that the author's desire for commercial gain was "primary" in determining fair use.[166] Nonetheless, the decision was upheld and praised by both the 9th Circuit and the Supreme Court.[167]

The Loews case introduced the dichotomy, picked up by the Supreme Court later in the 1994 decision in *Campbell* between "true" parody that seeks to make a critical comment, and false parody, which looks only for attention or commercial profit.[168] Although the Court in *Campbell* provided greater leeway for commercial parodies than *Loews* had, it preserved the rhetorical distinction between true, disinterested critique and crass attention-getting commercialism. The result has been a test that for the most part distinguishes between commercial and non-commercial, or private and public, expressive activity.[169] Since *Loews* and *Campbell*, parody and pastiche have greatly retreated from the commercial

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[163] *See* Hill v. Whalen & Martin, 220 Fed. 359 (D.C.N.Y. 1914) (characters in play In Cartoonland were clearly meant to be copyrighted Mutt and Jeff characters and so threatened to meet consumer demand for an authorized dramatization of the strip); Loews, Inc. v. Columbia Broadcasting System, 131 F. Supp. 165, 183 (S.D. Cal. 1955) *aff'd sub nom* Benny v. Loew's Inc., 239 F.2d 532 (9th Cir1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958).

[164] 131 F. Supp. at 175, 183 ("'[T]he law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art.' . . . We do not think . .. [the] use of the word 'art' was used in a sense broad enough to include a t.v. program.").

[165] *Id.* at 184-85

[166] *See* Yankwich, *supra* note //, at 1151 (pointing out that "material gain by writers of parody and burlesque is not of modern origin," and that writers from the Greeks through Sterne, Fielding and Thackeray received compensation for writing satires).

[167] Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court* Columbia Broadcasting System, Inc, v. Loew's Inc., 356 U.S. 43 (1958).

[168] *See also* MCA v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981) ("While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit of for private commercial gain."); Wainwright Securities Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) ("Fair use distinguishes between a true scholar and a chiseler who infringes a work for personal profit.").

[169] LESSIG, supra note // at 8.

marketplace. Those seeking to rework a popular text, comment on favorite characters through fiction, or call to mind iconic works in fine art, for example, risk onerous lawsuits.[170]

However, digital technology destabilizes the tenuous balance drawn in cases like *Loews* and *Campbell*. The Internet is quickly destroying the boundaries between personal and public, and private and commercial in communication. Private use of works, once considered outside the scope of copyright, now takes place in increasingly public fora. For example, Marvel Comics recently brought a lawsuit to prevent fans of its superhero comics from "dressing up" as their protected characters in an unaffiliated fantasy game.[171] Marvel obviously wants to protect the audience for its authorized games, but how far is this really from prohibiting pretend games in one's backyard?

Distance-learning courses have similarly challenged the traditional fair use exception for educational discussions and performances. The original exception assumed a face-to-face interaction in a classroom setting. In 2002 Congress had to pass a special rule clarifying that the exception applied to online learning environments as well.[172] However, for-profit institutions, which are increasingly prevalent, and libraries, which host many such courses, remain outside the exception.[173] The ability of students in those classes to "discuss" copyrighted works online free of charge remains in doubt.

To say that copyright extends to audience perception then does not answer the question of where exactly the border around a copyrighted work ends. Although the question arises in numerous fair use cases,[174] courts have not clarified at what point an audience's memory and perception of characters, music or other expressive elements becomes the property of the audience. The proper balance between the owner's right to profit from the original creation and the audience's right to identify with, consider, rework and discuss the significance of the work remains unresolved.

For this reason, those who argue that the dynamics of digital networks should control the contours of user rights may aim too narrowly.[175] These technologies are still developing and will change many times in the coming decades. What will remain the same, or at least will

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[170] *See, e.g.*, Donald G. McNeil Jr., *On Stage and Off: Parody, but No One's Laughing*, N.Y. TIMES, Dec 23, 1994, at C2 (noting the difficulties for small theater companies in mounting parodies of well-known works).

[171] *See* Alex Viega, *Marvel Sues Firms Behind Superhero Role-Playing Game*, The Associated Press (Nov. 12, 2004) *available at* http://www.sfgate.com/cgibin/article.cgi?file=/news/archive/2004/11/12/financial2219EST0151.DTL (last modified Mar. 4, 2005).

[172] Technology, Education and Copyright Harmonization Act, 17 U.S.C. §§ 110(2), 112(f)) (2004); *see* Kristine H. Hutchinson, Note: *The Teach Act::Copyright Law And Online Education*, 78 N.Y.U. L. REV. 2204 (2003) for a description of problems with the Act.

[173] Hutchinson, *supra* note //, at 2225-27.

[174] See *infra* text accompanying notes //-//.

[175] *See, e.g.*, Balkin, *supra* note //, at 52.

shift more slowly over time, is the mechanics of human comprehension. Just as owners have fought for rights that are purposefully not technology-specific but extend to anything that sends a cognitive message,[176] so user rights should not depend on technology, but should be grounded in the mechanics of human perception. Otherwise, the battle that Congress feared for authors in which they would have to litigate every new technological advance to determine protection, is being fought by users on the back-end to defend a diminishing universe of fair uses with each new technological breakthrough.

B. Branding

The extension of copyright into amorphous realms of consumer perception has led authors and owners to claim an ownership right in the preservation of a desired brand identity. From their standpoint, the right to represent a story or song across mediums must include the ability to halt competing representations of the same work, even if the two works are not confusingly similar or do not serve the same purpose or audience. Because profitability in entertainment and increasingly retail industries depends on being able to repurpose familiar popular works across a variety of media, owners must vigilantly protect core works to ensure that varied incarnations maintain a consistent meaning and identity to consumers.[177] The introduction of negative or dissonant associations with a marquee work threatens the ability of that work to support large tie-in and promotional enterprises. This, at least, is the harm claimed when owners sue to enjoin unauthorized secondary use. By adding a copyright claim to what are essentially trademark concerns, owners are able to sidestep trademark's broader free speech safeguards. Courts have been inconsistent in their willingness to entertain claims based on alteration in consumer perception in the context of copyright.

1. Positive and Negative Associations

Due to their negligible marginal cost, entertainment companies increase profits by producing and distributing products to as many audiences and markets as possible.[178] Producers may distribute profitable works through new channels, such as releasing films on television and DVDs. Many films

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[176] H.R. REP. No. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.A.A.N. 5659, 5664.

[177] *See, e.g.*, MICHAEL L. WOLF, THE ENTERTAINMENT ECONOMY 25 (1999) (noting how the need to attract audience attention has led studios to consolidate with assets including networks, cable TV stations and book publishers to market and distribute products through a variety of outlets).

[178] *Id.* at 98, 228-230.

earn more through DVD sales than they do in their initial box office run.[179] Marketers repurpose and recycle profitable works through sequels, spin-offs, adaptations, and promotional tie-ins.[180] Books become movies. Movies reappear as musicals or video games. Popular songs animate advertising or films. Once a work has achieved commercial success, its audience will follow it from product to product. Tie-in products increase loyalty by heightening familiarity and engagement with the work.[181] Some brands earn more through merchandising than through the original product. Winnie the Pooh, for example, has grown from a tubby little bear to a billion dollar franchise for Disney through sales of DVDs, toys and his popular theme-park ride, the Honey Hunt.[182]

The ability to repurpose characters and brand images lowers risks and costs for owners. Use of an already popular story line or character offers predictable revenues and requires less promotion.[183] No matter what, the tie-in product will interest some segment of the audience.[184] The strength of established works is not just theory. Of the top ten films of all time by revenue, for example, four are sequels or prequels, and five are based on popular books or comics.[185]

Identifiable brands form the center of this juggernaut. For entertainment products, characters, situations, melodies, authors and designs can all act as brand signifiers.[186] To the purchasing public, the use of a popular character or recognizable tune acts as an information shortcut or heuristic. Consumers save time and energy evaluating a product by conferring on it

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[179] David D. Kirkpatrick, *Action-Hungry DVD Fans Sway Hollywood*, NY TIMES Aug. 17, 2003 at A1 (home video sales accounted for more than 58 percent of film industry income in the past year, more than twice box-office revenues).

[180] Benjamin A. Goldberger, *How the Summer of the SpinOff came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 317-348 (describing the various media into which characters may be spun off and reused).

[181] JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUNESSY, PERSUASION IN ADVERTISING 63 (2004); WOLF, *supra* note //, at 231 ("When a company offers theme parks, hotels, movies, toys, fast food, books, videos, records, magazines, clothing and other products the hope is that all of these products and the efforts behind them will mesh and contribute to a chain reaction that creates more energy, awareness and economic effect than any single aspect might have done on its own."); Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials*, 76 Cal. L. Rev. 1067, 1093-94 (2003) (same).

[182] *See* Laura Bradford, *Who Owns Pooh?*, TIME, Jul. 15 2002, at B16; Another example is the Jurassic Park movie series. The two movies themselves garnered $1.5 billion in worldwide box office sales. Receipts from home videos, toys, video games, amusement park rides and other revenue streams has approached $3.5 billion. WOLF, *supra* note //, at 229.

[183] Goldberger, *supra* note //, at 327-29.

[184] WOLF, *supra* note //, at 224-25 (stating that we are predisposed to accept, or at least look at, anything that carries the brand of a big entertainment company).

[185] All Time Box Office Domestic Grosses, http://www.boxofficemojo.com/alltime/domestic.htm (last visited Mar. 6, 2005). The four sequels are Shrek 2, Lord of the Rings: Return of the King; Star Wars I: The Phantom Menace, and Spider-Man 2. In addition to Spider-Man 2 and Lord of the Rings, the other films based on books are Jurassic Park, Spider-Man I, and The Passion of the Christ. Only Titanic, ET and Star Wars boast original concepts.

[186] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 40-41, 60; *see also* Cristel A. Russell, Andrew T. Norman & Susan E. Heckler, *People and "Their" Television Shows: An Overview of Television Connectedness*, *in* THE PSYCHOLOGY OF MASS MEDIA 275, 284 (L.J. Shrum, ed., 2004) (television show acts as a brand).

their associations with the brand.[187] To perform this function effectively, brands must maintain a consistent personality and identity.[188] In fact, research studies show that consumers punish products and brands that require too much effort to evaluate.[189] A brand that stands for something simple is more memorable, more visible and more meaningful than a brand associated with a variety of images.[190] To keep parents and children invested in purchasing new Winnie the Pooh DVDs for example, Winnie's parents must ensure that he maintains a loveable and innocent persona through all licensed uses.

Marketers know that whatever is associated with a brand has the power to affect its image. Mechanisms in our brains automatically classify things as 'good' or 'bad' as soon as we perceive them.[191] If something that anchors an entertainment brand, such as a popular character or a well-known song, is associated with something that triggers a positive emotional response, our appreciation of the brand increases.[192] Accordingly, much of modern advertising is designed to increase positive associations with advertised brands and products through use of symbolic and emotional appeals to the values of the target audience.[193]

However, negative information has even greater impact than positive information.[194] Brand images are developed over time.[195] Consumers learn to "trust" a brand through repeated exposure.[196] If a brand somehow has been associated with incompatible values or unpleasant images, consumers will be less likely to purchase it.[197] Studies suggest that

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[187] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 60; WOLFE, *supra* note //, at 223; DAVID N. MARTIN, ROMANCING THE BRAND: THE POWER OF ADVERTISING AND HOW TO USE IT 92 (1989).

[188] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 66; WOLFE, *supra* note //, at 223-24; MARTIN, supra note //, at 89-92.

[189] Ellen C. Garbarino & Julie A. Edell, *Cognitive Effort, Affect, and Choice*, 24 J. OF CONSUMER RES., 147, 156 (1997).

[190] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note // at 38-42, 58-60; WOLF, *supra* note //, at 223; MARTIN, *supra* note //, at 92.

[191] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 62, 124; ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN 5 (1994); Magda Teresa Garcia & John A. Bargh, *Automatic Evaluation of Novel Words*, J. OF LANGUAGE & SOC. PSYCHOL. 414, 414 (2003).

[192] Sarah C. Haan, *Note: The Persuasion Route of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1299 (2000). According to an influential 1991 Advertising Research Foundation study, "likeability" in an advertisement is the single best predictor of effectiveness in promoting brand memory and purchasing decisions. Russell I. Haley & Allan L. Baldinger, *The ARF Copy Research Validity Project*, J. OF ADVERTISING RES., 11, 29 (1991).

[193] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 57-59, 64; *see also* MARTIN, *supra* note //, at 95 ("In advertising, we seek to shape attitudes . . . What we want is for the consumer to remember the brand and what it offers and have a positive attitude about trying it.").

[194] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 63; *see also* Stephen J. Hoch & Young-Won Ha, *Consumer Learning: Advertising and the Ambiguity of Product Experience*, 13 J. OF CONSUMER RESEARCH 221, (1986) (stating that because of asymmetric costs of different types of errors, people are more wary of mistakenly accepting something that might be bad than mistakenly rejecting something that might be good).

[195] MARTIN, *supra* note //, at 89.

[196] *Id.*; O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 57-59, 64.

[197] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 63; *cf.* Jennifer Aaker, Susan Fournier & S. Adam Brasel, *When Good Brands Do Bad*, 31 J. OF CONSUMER RESEARCH 1 (2004).

the negative perception of the brand will persist for some time even through attempts by the owners to provide countering information.[198]

Frequent exposure can also harm consumer attitudes. During initial introduction to a brand or message, frequency of exposure increases familiarity and likeability.[199] Individuals tend to misattribute the increased ease of processing of a familiar message to the content of the message itself, and so find their tolerance of and positive attitude towards the message increase over time.[200] Consumers thus will respond more favorably to messages communicated frequently even if they initially disagree with the message or find its source not credible.[201] However, after a certain level of unvaried exposure, tedium sets in and consumers will begin to feel negatively toward the message or brand.[202] Owners of expressive properties carefully manage audience exposure to enhance familiarity but to decrease the likelihood of audience fatigue.[203]

These marketing truisms explain the panic of brand managers when an outsider uses a brand element in an unauthorized way. Although owners may eschew smaller players when it comes to licensing, they will pay attention to even slight secondary uses done without permission.[204] Such uses threaten to taint carefully managed brand campaigns by association with negative or even just inconsistent elements.

According to media reports and publicly filed complaints, this harm to the perceptive value of a character or work is precisely the concern of litigants seeking to enjoin secondary uses. For example, after a flash animation film swept around the Internet in the fall of 2004 with President George W. Bush and John Kerry singing to the tune of Woody Guthrie's "This Land is Your Land," the music publisher that owned the copyright to

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[198] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 59-60.

[199] S*ee* Robert B. Zajonc & Hazel Marcus, *Affective and Cognitive Factors in Preferences*, 9 J. OF CONSUMER RES. 123, 125 (1982).

[200] *See* John A. Bargh, *Conditional Automaticity: Varieties of Automatic Influence in Social Perception and Cognition*, *in* UNINTENDED THOUGHT 14 (James S. Uleman & John A. Bargh eds., 1989) (frequency of exposure to a subject produces positive feelings of trust and liking due to ease of recall that is misattributed to the qualities of the subject itself); *see also* McCullough & Ostrom, *Repetition of Highly Similar Messages and Attitude Change*, 59 J. OF APPLIED PSYCHOL. 395-97 (1974) (positive feelings towards print advertisements increased with moderate exposure).

[201] Alan Sawyer, *Repetition, Cognitive Responses, and Persuasion*, *in* COGNITIVE RESPONSES IN PERSUASION 237-244 (R. Petty T. Ostrum, and T. Brock, eds., 1981); *see also* Bargh, *supra* note // at 14.

[202] Sawyer, *supra* note // at 247, 250-53; John T. Cacioppo & Richard E. Petty, *Cenrtal and Peripheral Routes to Persuasion: The Role of Message Repetition*, in PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS 91, 99 (Linda F. Alwitt & Andrew A. Mitchell eds. 1985) (repetition of audio messages); B. J. Calder & B. Sternthal, *Television Commercial Wearout: An Information Processing View*, J. OF MARKETING RES. 184. 185 (television ads).

[203] *See* Bill Britt, *Disney's Global Goals*, MARKETING 26 (May 17, 1990) ("To avoid overkill, Disney manages its character portfolios with care. It has hundreds of characters on its books, many of them just waiting to be called out of retirement . . . . Disney practices good husbandry of its characters and extends the life of its brands by not overexposing them . . . . They avoid debasing the currency.").

[204] See *supra* text accompanying notes //; *cf.* J.C. HERZ, JOYSTICK NATION 143 (1997) ("Nintendo's in-house characters are its crown jewels. And the company is fastidious, to the point of paranoia, about safe-guarding their reputations.").

Guthrie's tune sought to stop distribution of the film.[205] The concern was not that the spoof would directly substitute for sales of albums or singles featuring the song, nor was it having to forego whatever nominal license fee the cartoonists might have paid. Kathryn Ostien, director of copyright licensing for the publisher, told CNN that the harm was the creation of new associations with the song, presumably those of political carping and dissension: "This puts a completely different spin on the song. The damage to the song is huge."[206]

Other copyright owners express similar concerns about the harm of secondary use on the perceptive value of the original. Mattel has sued at artists for using its protected Barbie characters in a song about materialism,[207] or fine art photographs or reproductions that placed the doll in erotic or sexualized positions.[208] In each case, Mattel claimed that the connection of the doll with such unpleasant associations harmed the value of the toy itself in addition to markets for licensed derivatives.[209] The guardians of Margaret Mitchell's estate, SunTrust Bank, may have objected to Alice Randall's sexually explicit reworking of Gone With the Wind for similar reasons.[210] Barney's owners sued to enjoin a skit wherein the San Diego chicken beat up an imposter Barney because children in the audience had been frightened and might be turned off the brand.[211] Lever Brothers succeeded in enjoining a parody commercial for a video game in which its Snuggle fabric softener bear was attacked by tanks in part because of the commercial's association of the Snuggle bear with violence.[212]

2. Overlap with Trademark Functions

In this way, the extension of copyright to cognition has prompted

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[205] According to CNN, the publisher, The Richmond Group, sent a cease and desist letter to film's producers, who then filed a declaratory judgment action seeking protection as fair use in the form of parody. The parties settled soon thereafter. *See* Allen Wastler, *A JibJab Showdown*, CNN Money, at http://money.cnn.com/2004/07/26/commentary/wastler/wastler/, (July 26, 2004).

[206] *Id.*

[207] Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002) (suing for trademark dilution) (hereinafter "MCA Records").

[208] Mattel, Inc. v. Walking Mountain Prods, 353 F.3d 792 (9th Cir. 2003) (hereinafter "Walking Mountain"); Mattel Inc. v. Pitt, 229 F.Supp.2d 315 (S.D.N.Y. 2002) (hereinafter "Pitt").

[209] *See Walking Mountain*, 353 F.3d at 805; *MCA Records*, 296 F.3d at 902-03.

[210] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1282-83 (11th Cir. 2001) (attributing to SunTrust a "vigilance" in policing Gone With the Wind's public image and speculating that the claim was aimed in part at preserving the book 's reputation).

[211] Appellant's Brief, Lyons Partnership v. Giannoulas, 179 F.3d 384 (5th Cir.1999) (No.98-11003) *available at* 1998 WL 34085765.

[212] Conopco, Inc. v. 3DO Co., 53 U.S.P.Q.2d 1146, (S.D.N.Y. 1999) (describing the injunction in a later contempt action); *see also* Memorandum of Law in Support of Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction at 21, Conopco, Inc. v. 3DO, 53 U.S.P.Q.2d 1146 (S.D.N.Y. 1999) (No. 99 Civ. 10893). Many of these cases are brought under both trademark and copyright. Courts do not always distinguish between regimes in issuing injunctions. *See, e.g.*, *Conopco*, 53 U.S.P.Q.2d at 1147 (quoting from original TRO order).

owners to seek remedies when the "goodwill" associated with an expressive elements is threatened. Such copyright suits function similarly to an action for trademark dilution. Indeed, many secondary use cases proceed under both trademark dilution and copyright infringement theories.[213] Despite the overlap in function, however, copyright protection is more problematic than trademark when used to protect a work's signaling function. Trademark protects the ability of merchants to communicate information to consumers about the source of goods or services. Derived from Congress' power to regulate commerce, it applies only to commercial uses on like goods.[214] By contrast, copyright governs every reproduction or representation of proprietary works no matter how small or personal. Trademark thus relates only to choice aspects of consumption, whereas copyright governs choice between goods and also the buyer's use of the good.

Trademark protection also differs from copyright in that it is explicitly limited only to "confusing" or demonstrably harmful uses. Trademark infringement cases examine a list of factors such as similarity of the marks and of channels of trade to determine whether a junior mark infringes another.[215] Copyright litigation requires no evidence that audiences be confused or misled by similarities between uses. In limited circumstances, owners of famous trademarks may sue in federal court to enjoin commercial use of similar marks on unrelated goods under a "dilution" theory, but to do so they must provide evidence of actual harm to the mark in the form of blurring or tarnishment of its meaning among relevant consumers.[216] In copyright secondary use cases, courts presume harm to the work through unauthorized use.[217] They place the burden on the user to prove the value of the secondary use through affirmative defenses such as parody.[218] For these reasons, the interpretation of copyright to cover consumer associations provides a kind of super-trademark protection that omits trademark's safeguards against overreaching.

No court has yet taken the trouble to examine forthrightly whether or not the dilution of a work's meaning properly falls under copyright. Instead, courts have been alternatively receptive or dismissive of the theory depending on their opinion of the value of the secondary use. Where courts find the secondary use to be legitimate criticism of the original or are

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[213] *See, e.g., id.*; *Walking Mountain*, 353 F.3d at 797; Dr. Seuss Enters, L.P., v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997) Lyons Partnership v. Giannoulas, 179 F.3d 384 (5th Cir.1999).

[214] 15 U.S.C. § 1114 (2005).

[215] *See, e.g.*, Savin Corp. v. Savin Group, 391 F.3d 439, 456 (2d Cir. 2004).

[216] Moseley v. Victoria's Secret Catalogue, Inc., 537 U.S. 418 (2003). At least one lower court has found this requirement to be looser in the subset of cases where the defendant's mark is identical or virtually identical to the plaintiff's. *See, e.g., Savin Corp.*, 391 F.3d at 452. State standards may also be less stringent, *see Savin Corp.*, 391 F.2d at 456, but not all states have their own dilution acts.

[217] *See, e.g.*, Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 628 (9th Cir. 2003); MyWebGrocer, LLC v. Hometown Info, Inc., 375 F.3d 190, 193 (2d Cir. 2004).

[218] *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U.S. 569, 592-94 (1994).

otherwise sympathetic to the message of the new work, they will dismiss the plaintiff's suit as an attempt to shield the work from effective critique.[219] Although these judges may be right that the public interest in satire outweighs potential harm to a brand, they are wrong when they state that plaintiffs seek only to avoid criticism. The plaintiffs' concerns are much broader and more banal; they seek to avoid any use that conflicts with a managed brand personality. Indeed, where courts are less sympathetic to the parody at issue or do not find a direct "critique" present, they are more receptive to the idea that loss of control over public presentation works an irreparable harm to the value of the original text.[220] For example, in a case concerning the use of a James Bond-like character in an advertisement for Honda automobiles, a court enjoined the commercial because of the risk that association of Bond with a "low-end" car like Honda would harm the brand's upscale licensing strategy.[221]

One answer to the branding question would be to rule that consumer perception and opinion is completely outside the bounds of copyright. Multiple imitations of a work may "devalue" that work in the popular mind, but the work itself is not altered.[222] The same effect could be found if a purchaser plays a new album over and over to the point where she never wants to hear it again, but the law does not allow the copyright owner to forbid such use.

The problem with discounting consumer perception altogether is the emphasis in the fair use test on potential market harm to the value of the

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[219] *Walking Mountain*, 353 F.3d at 805; *SunTrust Bank*, 268 F.3d at 1282-83 ("Suntrust may be vigilant of Gone With the Wind 's public image--but it may not use copyright to shield Gone With the Wind from unwelcome comment."); Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983) ("The fourth factor is aimed at the copier who attempts to usurp the demand for the original work. The copyright laws are intended to prevent copiers from taking the owner's intellectual property and are not aimed at recompensing damages which may flow indirectly from copying.") (internal citations omitted).

[220] *See, e.g.,* Dr. Seuss Enters, L.P., v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997) (considering harm to the "substantial goodwill and reputation" associated with Dr. Seuss in enjoining unauthorized use of Dr. Seuss's copyrighted Cat in the Hat character in a book about the OJ Simpson murder trial); Conopco Inc, 53 U.S.P.Q. at 1149 (noting that use of bear character in enjoined commercial "potentially broadly damaged SNUGGLE Bear's reputation"); United Features Inc., v. Koons, 817 F. Supp. 370, 382 (SDNY 1993) (considering effect that large numbers of unauthorized sculptures of carton character would have on public's desire for licensed products); Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202, 1208 (ND Tex. 1981) (enjoining local TV commercial parody of plaintiff's successful "Be A Pepper" campaign because distractions from the uniqueness and originality of the commercials would logically shorten the life of the ad campaign and damage business goodwill); *cf.* Robert Merges, *Of Property Rules*, *supra* note // at 2659 n.15 (1994) (noting copyright's policy of favoring the reputational interest of authors by ensuring that authors can control all manifestations of a work).

[221] Metro-Goldwyn-Mayer, Inc. v. American Honda Motors, 900 F. Supp 1287, 1300 (CD Cal. 1995) (finding no fair use where low-end car maker used spoof of copyrighted character in advertising in part because "it is likely that James Bond's association with a low-end Honda model will threaten its value in the eyes of future upscale licensees").

[222] For an articulation of this specific critique, see Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193, 244 (2004). The Langvardts find attention to consumer opinion generally inconsistent with copyright's mandate to promote progress in the arts and sciences. They do not examine the specific consequences of including alteration of consumer perceptions as part of an analysis of market harm caused by secondary use.

work or its derivatives.[223] The Copyright Act disallows copying in any form. An owner need not demonstrate any harm before she is entitled to enjoin the new use or receive damages.[224] The burden rests on the secondary user to prove through the fair use test that the use will not harm the value of the original.[225] Diminishment of consumer demand is relevant to this inquiry.

One could distinguish explicitly between harm through direct market substitution, and harm through indirect diminishment of brand appeal and audience demand. Indeed, courts often claim to be doing just this.[226] In a world where every possible derivative belongs to the owner, however, it is difficult to imagine a work that does not directly substitute for some possible licensed use.[227] Furthermore, the difference between direct and indirect substitution may be illusory for the owner. He or she is just as injured if demand is diverted to a pirate or because demand dries up due to audience fatigue. Semantically, the two may boil down to the same thing. The traditional description of use that substitutes is one that will "usurp the demand" for the original.[228] Exhausting a work's novelty value in service of another product arguably qualifies as "substitutive" under this definition.[229] Even if the definition were clarified, fair use's contextual nature would continue to tempt owners to overreach, and so would continue to subject secondary users to the possibility of a lawsuit.[230] Excluding consideration of consumer perception then would require at a minimum a significant reconfiguration of the fair use analysis.

Assuming such considerations remain on the table, the uncertainty for potential users remains too high. If they can convince a court that theirs is a true comment on the original work, the court will discount any harm to brand perception. If, on the other hand, a court rejects the parodic message, loss of control over public associations with the brand most likely will be considered as a market harm. The Supreme Court suggested in a footnote in the Campbell decision that, where market harm is unlikely, a secondary

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[223] Courts determine whether an unauthorized use is "fair" upon consideration of four factors. These include: (1) the purpose and character of the use (2) the nature of the copyrighted work (3) the amount and substantiality of the portion taken (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107 (2004).

[224] *See* sources cited *supra* note 205.

[225] *Campbell*, 510 U.S. at 590, 594.

[226] *See, e.g.*, *Suntrust Bank*, 268 F.3d at 1280-81 (distinguishing between works that 'capitalize on notoriety' and those that directly substitute and stating that critical screeds are unlikely to act as substitutes). However, in between frontal critical attacks and direct substitutes there lies a whole universe of subtle materials and messages that could impair audience demand in a related market. Compare *id*. with *United Features Inc.*, 817 F. Supp. at 382.

[227] *See, e.g.*, *Cambell*, 510 U.S. at 593 n.24 (noting the difficulty in distinguishing between types of harm).

[228] *See, e.g.*, Fisher v. Dees, 792 F.2d 432, 438 (9th Cir. 1986).

[229] *See, e.g.*, Patry & Posner, *supra* note //, at 1644-45 (stating that use that impairs a work's market or value though "free-riding" is not a fair use).

[230] *See* Patry & Posner, supra note // at 1655-58.

use could be less targeted at the original and still qualify as fair use.[231] This suggestion of flexibility is illusory because from a consumer perception standpoint, all uses of a protected work trespass on potential markets.[232]

Our legal framework thus embodies a one-way assumption for the meaning of expressive texts. According to the law, except in very limited circumstances, owners get to decide how consumers communicate publicly about popular works. This account, based on observations about real property, ignores the participatory nature of informational goods. Such good derive much of their value from their use and significance to others.[233] If we allow owners to profit from the positive effects when the public embraces their work, why shouldn't we ask them to bear more risk if members grow disenchanted, bored or rebellious?

C. Consumer Psychology and Consumption

Consumers have interests on both sides of the secondary use debate. Consumers choose between expressive goods at least in part based on brand identity messages or cues from the work's owner.[234] Stable brand identities allow for easy and convenient product selection. However, the process of consuming the work stimulates subjective association, fantasy and imagery.[235] These associations form part of the significance of the work to the user.[236] Shared communication of the experience of consumption helps to establish a social meaning of the work that may be different from the meaning put forth by the work's copyright owner.[237] These associations, although stimulated by and inextricably linked to the work, should not be considered part of the original copyright owner's domain.

1. Choice

Consumer psychology research points to two principal aspects that

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[231] *Campbell*, 510 U.S. at 580 n. 14.

[232] Indeed, in the ten years since the decision, no court has been willing to rest a fair use determination on this basis alone.

[233] Pessach, *supra* note // at 1084.

[234] DANIEL MILLER, MATERIAL CULTURE AND MASS CONSUMPTION 190 (1987); *see also* John Deighton, *The Interaction of Advertising and Evidence*, 11 J. OF CONSUMER RESEARCH 763, 764 (1984) (demonstrating that advertising arouses initial expectations that consumers try to confirm through experience with a product).

[235] MILLER, *supra* note //, at 190-91 (discussing from an anthropological perspective the process of transforming through consumption an alienable good to a cultural artifact endowed with particular inseparable connotations); Elizabeth C. Hirschman & Morris B. Holbrook, *Hedonic Consumption: Emerging Concepts, Methods and Propositions* 46 J. OF MARKETING 92, 92 (1982).

[236] Hirschman & Holbrook, *supra* note //, at 93-95.

[237] *Cf.* JEROME BRUNER, ACTS OF MEANING 13 (1990) (culture is shared and participatory; we depend on shared modes of discourse to negotiate the meaning and interpretation of cultural objects); KATHERINE NELSON, MAKING SENSE: THE ACQUISITION OF SHARED MEANING 249-51 (1985) (development of meaning is an interactive process that depends on internal interpretive systems, the context of the use and how the communication is interpreted within a given community).

inform choice of hedonic materials: attention and identity. Choice of any consumer product depends on audience attention and understanding, but these elements have greatest impact for hedonic goods because unlike food or household staples they have no independent functions that would require purchase.

a. Attention

The most salient feature of the current economy is the sheer number of works competing for the attention of an audience.[238] Twenty years ago, producers of expressive goods faced a marketplace consisting of relatively few outlets and essentially a captive audience.[239] A scarcity of informational product existed in the face of mass demand. New methods of information distribution, such as television, the Internet and portable digital devices, have changed all this. Information can reach us at our desks, at home and as we travel between the two.[240] We are also subject to an expanding volume of media products.[241] This wealth of information creates a poverty of attention.[242]

A familiar text, work or personality allows consumers to pick out products of interest and tune out the rest.[243] Buying on the basis of gut feelings about a product, such as a general positive attitude or "liking" created by brand identity, saves consumers cognitive energy. They can sidestep feelings of doubt and hesitancy that naturally result from paying closer attention to any consumptive choice.[244]

The importance of attention helps to explain the tenacity of parody even in the tightly controlled proprietary marketplace. By placing an older work in a new context, either in an advertisement or in a product itself, producers offer familiarity and surprise, two elements likely to captivate an audience.[245] In a consumer research study examining advertising effectiveness, researchers found that people spend more time on and have

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[238] WOLF, *supra* note //, at 84.

[239] *Id.* at 84-85.

[240] David W. Schumann, *Media Factors that Contribute to a Restriction of Exposure to Diversity*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA 233, 242, 247 (L.J. Shrum ed. 2004).

[241] According to one industry estimate, fifteen years ago the average adult saw or heard 500-800 messages per day including television, radio, billboards etc. In 1999, the number had more than tripled to 3000 per day. WOLF, *supra* note //, at 256.

[242] WOLF, *supra* note //, at 84.

[243] WOLF, *supra* note //, at 253, 257 ("In today's environment, mind share- how well the public knows your brand and cares about it- often precedes market share.").

[244] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 60.

[245] *See* Rik Pieters, Luk Warlop & Michel Wedel, *Breaking Through the Clutter: Benefits of Advertising Originality and Familiarity for Brand Attention and Memory*, MANAGEMENT SCI. Vol. 48, No. 6, (2002) pp. 765, 765-66, 777; *see also* Yih Hwai Lee & Charlotte Mason, *Responses to Information Incongruency in Advertising: the Role of Expectancy, Relevancy and Humor*, 26 J. OF CONSUMER RESEARCH 156, 156 (1999) (messages that presented relevant information in unexpected ways showed higher recall and elicited more positive attitudes among potential consumers).

greater memory for advertising messages that use familiar elements in unfamiliar, unexpected ways.[246] Studies show that humor also increases a consumer's response to a message. Humorous messages command more attention, but they also act as a distraction, disarming possible criticism.[247] One way to view parody then is as a device that fools consumers to pay attention to something they would ordinarily disregard.

This impact persists whether or not the secondary user is parodying the work, using it to satirize something else or just trying generally to get attention. The Supreme Court's distinction between productive uses and uses just to get attention in this respect creates a false dichotomy. Every secondary user, parodist or not, will attract a greater audience for a message by tying it to a well-known work than they would by distributing the message alone. The problem is that everyone cannot use expressive works at once. Symbols in the form of characters, sounds and images will cease to catch consumer attention if they see or hear them everywhere. Consumers have an interest in controlled use of branded properties so that they can allocate their attention efficiently.

2. Identity

After awareness, consumer research suggests that the choice to consume a given work depends on that work having some salient meaning or symbolic value. This is what Posner and Landes mean when they argue that the transformation of Mickey Mouse from Disney's grinning spokescharacter to a raffish derelict or hen-pecked husband will harm the value of the character himself.[248] Popular characters, sounds and images provide useful information. We can expend less effort choosing between films for example, if one is a sequel or derivative. We do not need to spend time and energy researching the plot of the film; we know we are interested in this character or story.

Specifically, consumer research shows that we choose entertainment, or "hedonic" goods, based on the experience we think they will offer us.[249] Attractive qualities in expressive works include works that we think will be transporting, that contain a character or storyline in which we would like to envision ourselves, or they offer access to a desired group

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[246] DAVENPORT & BECK, THE ATTENTION ECONOMY 195 & Ex. 11-1 (2001) (finding that factors that attracted attention to email messages included that the message concerned topics of personal interest and that the content was presented in a new, unusual or unique way); Pieters, Warlop & Wedel, *supra* note // at 773.

[247] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 132; Lee & Mason, *supra* note // at 168.

[248] Posner & Landes, *supra* note // at 487-88.

[249] *See* Richard P. Bagozzi, Hans Baumgartner, Rik Pieters, and Marcel Zeelenberg, *The Goal of Emotions in Goal-Directed Behavior*, *in* THE WHY OF CONSUMPTION 37, 50 (2000) (hypothesizing that many consumer behaviors such as seeing movies are the result of anticipated emotions); Morris B. Holbrook & Elizabeth C. Hirschman, *The Experiential Aspects of Consumption: Consumer Fantasies, Feelings and Fun*, 9 J. OF CONSUMER RES. 132, 138 (1982); JANOS LAZLO, COGNITION AND REPRESENTATION IN LITERATURE 96 (1999).

or situation.[250] In this way, most consumers interact with expressive products not with the aim of transforming the product, but with the desire to be transformed by the product.[251] For example, we tend to choose to purchase music based on its ability to draw us in and offer an absorbing experience.[252]

Once again, secondary users benefit by defining their own work in opposition to a previous one. Communicating a salient identity to distracted consumers is difficult. Producers seeking to market to one target segment can use existing goods as informational short-cuts. For example, the popular Middle Eastern brand Mecca Cola is beloved because it is marketed explicitly as an opportunity to reject American imperialism in the form of the American brand standard Coca Cola.[253] The video game company that based a series of ads on blowing up Lever's Snuggle fabric softener bear gained instant credibility with adolescent male gamers.[254] These products catch the eye of a target market by repurposing symbols of lifestyles, the cuddly safety of childhood, or the brash consumerism of the United States, about which their audience is ambivalent.

The same effects hold true when previous works are incorporated into the work itself. The rap group 2 Live Crew identified itself as dangerous, outside, and urban by reworking a nostalgic seventies tune. Alice Randall sent a message about the prominence of black Americans in culture by upending the racial hierarchies in the original Gone With the Wind. Each artist made their message more interesting by framing it in terms of a text with which a significant part of the audience was already invested.

However, overuse or inconsistent use of such signifiers ruins their informative value and impedes their utility for audience choice.[255] The works themselves may be less desirable for consumption if their meanings are altered. For example, music that has been used for a variety of commercial purposes may cease to easily transport listeners. Characters that act every which way will make poor vehicles for individual fantasy.

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[250] Russell W. Belk, Gulez Ger & Soren Askegaard, *The Missing Streetcar Named Desire*, *in* THE WHY OF CONSUMPTION 98, 112-14 (2000); Morris B. Holbrook, Donald R. Lehmann & John O'Shaughnessy, *Using versus Choosing: The Relationship of the Consumption Experience to Reasons for Purchasing*, EUROPEAN J. OF MARKETING 49, 52 57-58 (finding that people buy novels and records more for social than utilitarian reasons); *cf.* BRUNER, supra note // at 53-54 (fiction draws us in by offering an ambiguous array of vicarious possibilities that readers can "try on for fit"); Scott Jones, Colleen Bee, Rick Burton & Lynn R. Kahle, *Marketing Through Sports Entertainment: A Functional Approach*, *in* THE PSYCHOLOGY OF MASS MEDIA 309, 311-12 (consumers watch sports as a way of aligning themselves with a favored sports hero or property); William Chipps, *Hitching Brands to the Stars*, BILLBOARD, Aug. 21, 2004, at 40 (consumers want to purchase products used, worn or touted by favorite celebrities).

[251] Hughes, *supra* note //, at 957.

[252] Kathleen T. Lacher, Hedonic *Consumption: Music as a Product*, 16 ADVANCES IN CONSUMER RES. 367, 368, 371 (1989).

[253] O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note //, at 88.

[254] *See* Conopco, Inc. v. 3DO, 53 U.S.P.Q.2d 1146, 1148-49 (S.D.N.Y. 1999).

[255] *See* Hughes, *supra* note //, at 943.

Overuse and widespread conflicting uses may interfere with the ability of users effectively to choose works to consume. Although owners may have no right to dictate the meaning of their works to members of the audience, they do have some claim to preserving the ability of audiences to choose to engage with their works.

Others have argued that widespread use will have mostly positive effects on audience desire and the value of individual works.[256] For example, the value to me of seeing a certain film, "The Aviator," say, increases as more of my friends see it.[257] Seeing the film then provides not only temporary enjoyment, but a basis for connection and discussion with a desired peer group. This is also true of scholarly works. The value of this article increases the more people who have read it and quote its ideas. Such positive externalities are termed "network effects."[258] While this is a good argument for free dissemination of exact copies of works, it is more complicated when it comes to derivatives. The theory depends on my friends and I all having seen the same version of "The Aviator" or we will have no basis for comparison. Network effects fail if we cannot easily exchange information about our shared experience.

To be sure, some derivatives do increase the value of originals. Sales of books tend to increase after the release of film and DVD versions, for example.[259] In such cases, however, the derivative is complementary to the original. It is unclear what the release of badly made, offensive or critical derivatives might have on consumer perceptions of and desire for an original work. Furthermore, copyright and other proprietary schemes ensure that only one authorized derivative is released in each category. Without copyright, audiences could be bombarded with multiple sequels to popular films, film versions of popular books, and commercials featuring characters from each.[260] The ubiquitous presence of multiple texts may decrease the desirability of every part of the franchise even though individual uses may have found an audience in isolation. Consumers will also have to spend more time and energy sorting through competing messages, something they may be unwilling to do when it comes to works chosen for escapist, experiential reasons.

3. Use

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[256] Stewart E. Sterk, What's in a Name: the Troublesome Analogies Between Real and Intellectual Property 22 (2004) *available at* http://ssrn.com/absract=575121 (unpublished paper on file with the author).

[257] *Id*.

[258] *See* Pessach, *supra* note //, at 1085 (describing cultural network effects).

[259] Sales of books from the Lord of the Rings trilogy shot up after the release of film and DVD versions, for example. Amazon Sales Rank for Lord of the Rings, *available at* amazon.com/exec/0395193958 (visited January 18, 2005).

[260] *See* Abramowicz, *supra* note //, at 5, 23.

Once a consumer has access to a work or has it in his possession, the relationship changes. Cultural works provide a variety of complex and important functions for users. These experiences extend beyond simple entertainment or desire to pass time.[261] Users engage with cultural works as a way of projecting and exploring their idealized "true" selves.[262] Engagement with adventure and risks not present in daily life allows for emotional release and fantasy.[263] Such works also can assist in acclimating to new situations or establishing cultural norms.[264] Watching a film about a painful situation, such as the divorce in *Kramer v. Kramer*, can help individuals to process difficult experiences and painful emotions, for example.[265] The knowledge that many others have experienced the same works can inform our sense of appropriate reactions to novel situations.[266] Even works of fashion dictate rules of appearance that consumers can choose whether and how to adopt.[267] Cultural works also assist in defining and establishing social networks.[268] Common consumption of the new hit show or novel creates a shared experience.[269] In the absence of tightly-knit communities or shared rituals, expressive goods provide outlets for interacting with others.[270]

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[261] Holbrook & Hirschman, *supra* note // at 138; *see also* Cristel A. Russell, Andrew T. Norman & Susan E. Heckler, *People and "Their" Television Shows: An Overview of Television Connectedness* in THE PSYCHOLOGY OF MASS MEDIA 275, 276 (listing reasons why people watch soap operas).

[262] *See* Eric J. Arnold & Linda L. Price, *Authenticating Acts and Authoritative Performances: Questing for self and community*, *in* THE WHY OF CONSUMPTION, 140, 145 (2000); Russell, Norman & Heckler, supra note // at 277; *see also* BRUNER, *supra* note // at 33, 101 (The self is shaped in reference to cultural systems of interpretation).

[263] Hirschman & Holbrook, *supra* note //, at 96; *see also* Arnold & Price, *supra* note // at 150 (consumers of rafting trips gain self-assurance and confidence through memories of the experience); Melanie C. Green, Jennifer Garst, Timothy C. Brock, *The Power of Fiction: Determinants and Boundaries*, *in* THE PSYCHOLOGY OF MASS MEDIA 161, 169 (L.J. Shrum, ed., 2004) (describing how participants who felt transported into a story come to see characters as friends and remember narrated events as real).

[264] See Maria Kniazeva, *Between the Ads: Effects of NonAdvertising TV Messages on Consumption Behavior*, *in* THE PSYCHOLOGY OF MASS MEDIA 213, 218, 220 (L.J. Shrum, ed., 2004) (media sorts reality into meaningful social categories that consumers can use to interpret their daily lives and can help to acculturate foreigners to new environments); *cf.* BRUNER, *supra* note //, at 68 (human propensity to share stories and find interpretations within dominant moral and institutional schemes is one of the most powerful forms of social stability).

[265] Hirschman & Holbrook, *supra* note //, at 96.

[266] *Id.*

[267] Craig J. Thompson, Dianna L. Haytko, *Speaking of Fashion: Consumers' Uses of Fashion Discourses and the Appropriation of Countervailing Cultural Meanings*, J. OF CONSUMER RESEARCH, Vol. 24, No. 1 (1997) at 15-42; *see also* Jonathan M. Barnett, Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property and the Incentive Thesis7-9 (2005), forthcoming Virginia Law Review, available at http://ssrn.com/abstract=704721.

[268] Russell, Norman & Heckler, *supra* note //, at 279; MILLER, supra note // at 209, 212; Hirschman & Holbrook, *supra* note //, at 99; *cf.* Arnold & Price, *supra* note // at 154-158 (arguing that certain acts of consumption, such as viewing or participating in Christmas pageants, river-rafting trips, tourism, and football games, contribute to self-conception and connection to community).

[269] *See* WOLF, *supra* note // at 38 (increasingly common ground with family and colleagues is found in shared entertainment experiences); Timothy C. Brock & Stephen D. Livingston, *The Need for Entertainment Scale*, *in* THE PSYCHOLOGY OF ENTERTAINMENT MEDIA 255, 272 (L.J. Shrum, ed., 2004) (concurring with Wolf); Arnold & Price, *supra* note // at 154-55.

[270] *See* MILLER, *supra* note //, at 215; Arnold & Price, *supra* note //, at 140, 141, 148-160; Kniazeva, *supra* note //, at 218-21; Russell, Norman & Heckler, *supra* note //, at 277; *see generally* Hirschman & Holbrook, *supra*

At the same time, the act of consuming a work alters its meaning for the individual. When reading, watching a performance or listening to music, users process the sensory attributes of the work itself, but also generate internal, multisensory imagery.[271] This can include real memories triggered by association, fantastical imagery inserting ourselves in or in relation to the work, and pure affective arousement. [272] In this way, each consumer of a work encodes his or her experience of the work differently in memory.[273] Users enhance their experience of a work by sharing and contrasting their own consumptive experience with others.[274] Some claim that this ability to communicate about and share experience is a crucial step in processing and internalization of memory.[275] At one extreme, people strongly affected by experiences with expressive works may join fan clubs, participate in fantasy reenactments, or create "fan fiction" in the form of unauthorized derivatives.[276]

Only a copyright zealot would suggest that an individual's experience of a text somehow belongs to the copyright owner. And yet, many of the lawsuits surrounding secondary use of expressive works result from a user's attempt to communicate a subjective understanding of the work to others. Alice Randall claimed that she wrote her "parody" of Gone With the Wind as a way of "dealing with my response to a text, portraying my response to a text."[277] Her response was also intended to communicate what she felt was a common view among African-Americans: "I think it was the time has come for America to understand how an African-American woman, and many African-Americans, view the book that has influenced our country's culture and how we view ourselves as a country."[278] Fans who "dress up" as comic book characters online or who publish

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note //, at 92-97.

[271] Hirschman & Holbrook, *supra* note //, at 92-94; LAZLO, *supra* note // at 98.

[272] *See* LAZLO, *supra* note //, at 96-98; Green, Garst & Brock, *supra* note // at 169; Athinodoros Chronis & Ronald D. Hampton, *Living in Another World: the Role of Narrative Imagination in the Production of Fantasy Enclaves*, 31 ADVANCES IN CONSUMER RES. 193, 193 (2004).

[273] *See, e.g.*, WALTER KINTSCH, REPRESENTATION OF MEANING IN MEMORY at 107-08, 115-16 (1974) (finding that representations are stored in memory on a semantic rather than literal basis and individual memory of texts may differ based on differences in environment and presentation). Cognitive research posits that people encode stories in the form of schemas or scripts that assimilate the details of the story with preexisting knowledge about its subject. ROBINSON-RIEGLER, *supra* note //, at 464-65. However, people's operative schemas may differ depending on their place in the culture. *See* BRUNER, *supra* note //, at 64; LAZLO, *supra* note // at 103-07.

[274] Tushnet, *Copy This Essay*, *supra* note // at 545-46; *see also* WOLF, *supra* note // at 38 (entertainment products put people on the same wavelength and replace a sense of shared community); Brock & Livingston, *supra* note //, at 272 (concurring with Wolf); BRUNER, *supra* note // at 13, 33, 68 (arguing that as cultural beings our way of life depends on shared meaning and concepts which are negotiated through discourse about interpreting narratives and symbols).

[275] *See* Gillespie, *supra* note // at 148 (arguing that memory and cognition are themselves participatory and that through imaginative reconstruction and critical reflection with others we come to understand ourselves and our relationships); *see also* BRUNER, *supra* note //, at 33.

[276] Tushnet, *Legal Fictions*, *supra* note // at 651-58; Russell, Norman & Heckler, *supra* note //, at 279.

[277] CNN Interview with Alice Randall, http://archives.cnn.com/2001/SHOWBIZ/books/06/22/randall.cnna/

[278] *Id.*

unauthorized sequels or spin-offs are doing something similar.[279] These individuals are making use of what is in some sense their own experience. It can be argued that the ability to enjoy the consumptive experience and share it with others is what consumers believed they paid for when they bought access to the work.

What is needed then is a theory that can preserve the ability of audience to fully use expressive works while protecting the stable identity that allows consumers to distinguish between works.

III. TOWARDS A BALANCED TEST FOR SECONDARY USE

Contrary to the overgrazing paradigm in which all secondary uses will equally alter audience conceptions, cognitive research suggests that all secondary uses do not impact audience members equally. Although the dynamics of memory and perception are complicated, four well-established doctrines may aid in drawing lines between intangible entitlements and audience re-use rights. These are resistance, frequency effects, source effects and hierarchy of processing.

First, our general attitudes towards iconic works, which are most often the subject of disputes, are resistant to change. We are more likely to pay attention to works that conform to what we already believe and to discount works that conflict with our attitudes.[280] This suggests that people attracted to "parodic" reworkings of texts already share the attitude of the new version, while those who prefer the old will disregard it.

Second, as we cannot possibly pay attention to all of the messages, content and persuasion hurtling our way from multiple sources, we use processing cues, or heuristics, to determine which messages deserve attention and concentration. Several common processing heuristics such as source effects, frequency of exposure, and level of processing effort may help us to better delineate between secondary uses that are likely to distort the identity of works for audiences, and those that won't. These processes can thus inform the boundaries we draw around rights to expressive works.

1. Resistance

The first doctrine with relevance for secondary use is attitude resistance. Consumer purchasing decisions are to some extent based on

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[279] For example, the designer of the City of Heroes game objected to by Marvel Comics sought to "make the experience of playing City of Heroes just like my childhood comic-book experience" by allowing users to design their own fantasy superheroes based on actual comicbook characters. Michael Lafferty, *Cryptic's Jack Emmert takes a few moments from polishing Issue 3 of City of Heroes to talk about what lies ahead for gamers*, PC GAMEZONE at http://pc.gamezone.com/news/12_10_04_06_16PM.htm (accessed Feb. 7, 2005); *see also* Tushnet, *Legal Fictions*, *supra* note // at 657.

[280] David W. Schumann, *supra* note //, at 235.

attitudes.[281] We buy what we have a positive feeling toward and we avoid what we dislike.[282] Once we have formed strong attitudes about an object, we tend to resist change.[283] This may be because often certain attitudes are linked as part of an overall self-schema.[284] People who live in big cities for example tend to prefer different cars, clothes, political candidates and cultural works than those from rural areas.[285] Changing one belief may call into question the entire self-schema.[286] To avoid dissonance, we tend to ignore or discount messages that call our attitudes into question, and we give greater attention to those that reinforce our beliefs.[287] The more familiar and rote a perception or belief is, the less likely we are to alter it either consciously or unconsciously through new information.[288] While this state of affairs may undercut the possibility of cultural dialogue through reworkings of popular texts, it also suggests that as a practical matter such reworkings may not have much affect on overall audience perception. People who have a long history of positive relations with a work, such as an iconic novel like Gone With the Wind, are likely to discount any information that might persuade them to change their attitude.[289] Those already ambivalent about the work and its portrayal of race relations will enjoy seeing these problems exposed through a work like Randall's Wind Done Gone. Similarly, people who love Dick and Jane for their innocence will tend to ignore any negative connotations from the suburban Yiddish version. Those who have always found Dick and Jane a little saccharine and stiff will enjoy seeing the duo confront a more diverse and dangerous world than they've been used to. The newer works don't so much steal an audience from the original as they allow a richer discussion for those so inclined. These works are unlikely to chip away much at underlying attitudes about iconic originals because those attitudes are so rote and well-rehearsed.[290] Furthermore, continued marketing and promotion of the original versions will only reinforce the strength of dominant consumer attitudes.

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[281] ALICE H. EAGLY & SHELLY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES 216 (1993).

[282] *See* Paul M. Herr & Russell H. Fazio, *The Attitude-to-Behavior Process: Implications for Consumer Behavior*, *in* ADVERTISING EXPOSURE, MEMORY AND CHOICE 119, 131-32 (Andrew A. Mitchell, ed. 1993).

[283] EAGLY & CHAIKEN, *supra* note //, at 559; Green, Garst & Brock, *supra* note // at 172-73.

[284] Schumann, *supra* note //, at 234-35.

[285] *See generally* JOHN SPERLING, SUZANNE HELBURN, SAMUEL GEORGE, JOHN MORRIS & CARL HUNT,THE GREAT DIVIDE: RETRO VS. METRO AMERICA (2004)

[286] EAGLY & CHAIKEN, *supra* note //, at 584-89; Schumann, *supra* note //, at 235.

[287] EAGLY & CHAIKEN, *supra* note //, at 590-608; Schumann, *supra* note//, at 235-36 (*quoting* TODD GITLIN, MEDIA UNLIMITEd 118-19 (2001)).

[288] James L. McGaugh, Emotional Activation, Neuromodulatory Systems, and Memory in MEMORY DISTORTION 255, 255, 265 (Daniel L. Schacter, ed. 1995); *see also* Green, Garst & Brock, *supra* note //, at 172-73 (noting the strength of attitudes formed through experience of fiction though also noting at least one theory as to why those attitudes may be more vulnerable to counterpropoganda).

[289] *Cf.* Schumann, supra note // at 235-36 (using studies in the sociology of media consumption to argue that people restrict their exposure to dissonant media messages).

[290] McGaugh, *supra* note // at 255-56

With newer works or ones that are not yet familiar, memory and attitude is more vulnerable to change. Information to which we are frequently exposed and of which we are often reminded is less susceptible to distortion.[291] Newly formed perceptions, by contrast, are more vulnerable to alteration by conflicting information.[292] These findings support suggestions that newer works deserve greater protection than more established ones. Perhaps owners deserve an absolute protection from unlicensed commercial derivatives for one year following publication, for example, with wider use permitted later.

2. Source Effects

Research on perception and memory also reveals that users process messages differently depending on source. With so many messages clamoring for attention, we decide which to pay attention to partially based on the credibility or attractiveness of the source.[293] The credibility of a source refers both to a source's expertise on a topic and trustworthiness as a communicator.[294] Where consumers have little attention or involvement with the subject of a message, as they might with advertising or promotion of a new media product, they tend to evaluate the message based on peripheral cues such as the message source.[295] They will more readily accept information from a source perceived as credible, and will discount information from sources perceived as biased or untrustworthy.[296] For example, one experiment comparing high to moderate credibility sources asked individuals to rank several abstract modern poems based on use of alliteration. They were then shown an article that identified the poem they ranked second to last as a superior example of alliteration and were then

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[291] *Id.*

[292] *Id.* at 256, 265.

[293] *See* Shelly Chaiken, *Heuristic versus Systemic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 752, 753, 763 (1980) (finding that perceptions of a source's expertise affected opinion of a message and hypothesizing that source cues affect opinion change because they influence both attention to a message and predisposition to its content); DAVENPORT, *supra* note //, at 195.

[294] R. Glen Hass, *Effects of Source Characteristics on Cognitive Responses and Persuasion*, *in* COGNITIVE RESPONSES IN PERSUASION 141, 142-43 (Richard E. Petty, Thomas M. Ostrom & Timothy C. Brock eds., 1981).

[295] *See* Shelly Chaiken & Durairaj Maheswaran, *Heuristic Processing Can Bias Systemic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 460, 466, 469 (1994) (describing experiment in which students evaluated an unfamiliar product based on descriptions from sources of varying credibility); *see also* RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE 54 (1986).

[296] Chaiken & Maheswaran, supra note// at 264; Hass, *supra* note // at 154-55 (but noting an exception where the subject is already predisposed to believe in or trust the opinion expressed); *see also* Rochelle Lynn Chaiken, The Use of Source Versus Message Cues in Persuasion: An Information Processing Analysis 17-26 (Dec. 1977) (on file with the author) (summarizing research studies); Paulette M. Gillig & Anthony G. Greewald, *Is It Time to Lay the Sleeper Effect to Rest?*, 29 J. OF PERSONALITY AND SOCIAL PSYCH. 132, 135 (1974) (noting tendency to discount information from low credibility sources); *cf.* Tulin Erdem & Joffre Swait, *Brand Credibility, Brand Consideration, and Choice*, 31 J. OF CONSUMER RES. 191 (2004).

asked to rank the poems again. Those who were told that the article had been written by TS Eliot were likely to change their opinion of the poem's merit. Those who were old the article was written by a graduate student in English seeking a teaching position were somewhat likely to change their opinion, but much less so than the former group.[297]

Source credibility effects can explain the phenomenon observed by Tushnet and others that users seem not to mind unauthorized reworkings of popular texts in the form of fan fiction or parody so long as one "orthodox" version exists.[298] It may be that consumers are perfectly capable of contextualizing reworkings of expressive texts if they have sufficient information about source. Those who prefer the authorized version will stick with that. Those looking to explore alternatives can do so freely so long as unauthorized versions are clearly marked and contain non-misleading source information.[299] So, for example, works clearly identified as emanating from an unauthorized source, either in a labeled "parody" work such as the Yiddish with Dick and Jane book, or in the context of a sketch comedy show, for example, should be expected to have less impact on consumer attitudes than confusing or ambiguous secondary uses.

3. Frequency Effects

Frequency and repetition, by contrast, can confuse and exhaust audiences. As noted above, after an initial level of familiarity, overexposure to a communication elicits boredom and dislike.[300] In a study of attitudes towards television commercials, research demonstrated that greater exposure to similar commercials decreased liking and positive feelings both for the commercials and the products advertised.[301] Variations in the commercials designed to enhance attention had little ameliorating effect.[302] Similar effects were found in another study using non-commercial radio messages.[303] Repeated exposure to a message may also lead to involuntary changes in perception, even if the recipient initially discredited the source as not credible or biased.[304] In this way, frequent exposure may

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[297] Hass, supra note //, at 158; *see also* J.P. Das, R. Roth & D.R. Stagner, *Understanding Versus Suggestion in the Judgment of Literary Passages*, 35 J. OF ABNORMAL AND SOCIAL PSYCHOLOGY 547, 547-561 (1967).

[298] Tushnet, *Legal Fictions*, *supra* note //, at 672-73; Goldberger, *supra* note //, at 352.

[299] By "source" information, I do not mean that in the ordinary case a simple disclaimer of affiliation would suffice. As has been demonstrated in the trademark context, disclaimers can enhance confusion by associating the defendant's goods directly with the plaintiff. *See, e.g.*, Mitchell E. Radin, *Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives*, 76 TRADEMARK REP. 59, 65 (1986). In this context, "source" would have to include at a minimum (a) clear and conspicuous indication that the work is "unauthorized" and (b) the identity of the new author if it is likely to be meaningful to consumers.

[300] See *supra* text accompanying notes //-//.

[301] Calder & Sternthal, *supra* note //, at 185.

[302] *Id.*

[303] Cacioppo & Petty, *supra* note // at 99.

[304] *See* Lynn Hasher, David Goldstein & Thomas Toppino, *Frequency and the Conference of Referential*

override the efficacy of other informational cues such as source and so confuse consumers as to authorized and illicit interpretations.[305] To avoid this aspect of "overgrazing," secondary uses most likely to distort audience perception should remain subject to property remedies like an injunction.[306] These would include mass media advertisements incorporating proprietary works and other mass promotions of secondary works that reach audiences unbidden and have the potential to distort audience memory for a work.[307] So, for example, secondary use in pop-up ads, television advertising, flyers, posters and perhaps even pervasive forms of mass media distribution such as general radio promotion for songs or wide release for films would remain subject to injunction. Works which must be sought out to be consumed such as books, plays or website parodies, or that are subject to small-scale distribution such as casual emails could not be enjoined. Owners would thus retain strong property boundaries against the most harmful types of secondary use.

4. Hierarchy of Processing

A fourth theory relevant to this area is research postulating high and low systems of cognitive processing. This research argues that individuals process certain types of information using more or less cognitive effort.[308] Systemic processing involves relatively high degrees of attention and logical processing of message content.[309] By contrast, we will use low-involvement processing for messages that seem unimportant, trivial or when we lack sufficient attention or expertise to logically evaluate the subject matter.[310] In low involvement processing, we use cues such as source or familiarity to determine our attitude toward the communication and we tend

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Validity, 16 J. OF VERBAL LEARNING AND VERBAL BEHAVIOR 107, 107-112 (1977) (noting that experiment subjects were more likely to accept repeated statements about subjects such as politics, science and art as true over similar non-repeated statements); *see also* Scott A. Hawkins & Stephen J. Hoch, *Low-Involvement Learning: Memory Without Evaluation*, J. OF CONSUMER RES. 212, 214 (1992) (consumers come to accept repeated and familiar messages as true without evaluating the content of the message); Herbert E. Krugman, *The Impact of Television Advertising: Learning Without Involvement*, PUBLIC OPINION Q. 349, 354 (1965); *Cf.* Alice H. Eagly & Shelly Chaiken, *Attitude Strength, Attitude Structure and Resistance to Change* in ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES 413, 427 (Jon Krosnick and Richard E. Petty ed. 1995) (well-documented successes in changing strong attitudes involve bombarding people with information consistent with the new attitude); Sawyer, *supra* note //, at 254.

[305] *See, e.g.*, Kathryn A. Braun, *Postexperience Advertising Effects on Consumer Memory*, 25 J. OF CONSUMER RESEARCH 319, 332 (1999) (finding that consumers may confuse the true nature of product-experience with a subsequent ad-induced description of it).

[306] *Cf.* Braun, *supra* note//, at 321, 332-33 (subsequent misinformation can alter beliefs without producing a conscious sense of confusion); Gavan Fitzsimmons; J. Wesley Hutchinson & Patti Williams, *Non-conscious Influences on Consumer Choice*, 13 MARKETING LETTERS 269, 273 (2002) (same).

[307] *See generally* Braun, *supra* note //; *see also Campbell*, 510 U.S. at 580 n.14 (suggesting that works with "wide dissemination" are more likely to substitute for the original than works with "minimal distribution.").

[308] See, e.g., PETTY & CAPUCCIO, *supra* note // at 54; Chaiken & Maheswaran, *supra* note // at 460;

[309] Chaiken & Maheswaran, *supra* note // at 460; Chaiken, *supra* note //, at 752.

[310] *Id.*; PETTY & CAPUCCIO, *supra* note // at 54; Hawkins & Hoch, *supra* note // at 213.

to ignore the details of precise information contained in the message.[311] For this reason, low-involvement messages can actually have greater unconscious impact on our attitudes.[312] Although we have not consciously evaluated the truth or credibility of such messages, they remain stored in memory and may unconsciously impact our opinions and desires the next time we consider a topic related to that message.[313] So, for example, when we see an advertisement describing Morton Salt as "easy to pour," we do not really pay attention, but we store a few bits of information from the ad without any conscious elaboration. Over time, and with repeated exposure, an association of Morton Salt with "easy to pour" is established.[314]

The theory has relevance for secondary use because certain types of expressive works tend to be processed along one path or the other. Depth of processing to some degree depends on individual goals in approaching a type of communication.[315] Those actively seeking information about an imminent decision are more likely to use systemic processing than those seeking diversion or pleasure.[316] However, certain types of works are susceptible to generalization. Longer literary works, for example, demand greater cognitive involvement regardless of individual goals.[317] Quick and simple images such as cartoons or catchy melodies, on the other hand, are more likely to receive heuristic processing.[318] Although knowledge about source may lead us to discount such works when they emanate from authors other than the original and so blunt their impact, this effect may be incomplete.[319] If we want to provide maximum protection to copyright

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[311] PETTY & CAPUCCIO, *supra* note // at 54; Chaiken & Maheswaran, *supra* note // at 460; Hawkins & Hoch, *supra* note // at 214.

[312] Hawkins & Hoch, *supra* note // at 213-14; Krugman, *supra* note //, at 254.

[313] Hawkins & Hoch, *supra* note // at 213-14; *see also* ROBERT HEATH, THE HIDDEN POWER OF ADVERTISING 95 (2001).

[314] Krugman, supra note //, at 254

[315] EAGLY & CHAIKEN, *supra* note //, at 330.

[316] *See* Richard C. Vincent & Michael D. Basil, *College Students' News Gratifications, Media Use And Current Events Knowledge*, 41 J. OF BROADCASTING AND ELECTRONIC MEDIA, 380, 380-392 (1997) (college students approaching graduation consumed all types of media more instrumentally to gain knowledge about the world they were about to enter); Richard E. Petty, John T. Cacioppo, and David W. Schumann, *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. Consumer Res. 135, 138 (1983).

[317] *See, e.g.*, Michael W. Eysenck, PRINCIPLES OF COGNITIVE PSYCHOLOGY 77-78 (1993) (tasks that involve processing of meaning receive greater depth of processing); Fergus I.M. Craik & Richard S. Lockhart, *Levels of Processing: A Framework for Memory Research*, 12 J. VERBAL LEARNING & VERBAL BEHAVIOR 671, 680 (1972) (hypothesizing that tasks that require analysis of meaning of words lead to greater memory retention due to greater depth of processing required by semantic elaboration as opposed to syntactic or structural judgments).

[318] *Cf.* Hawkins & Hoch, supra note //, at 223 (advertisers prefer jingles and rhymes because they increase memory without stimulating elaborative processing). Ease of consumption is a general motivating factor for low-involvement consumers.

[319] For example, some studies have found a "sleeper effect" for messages from low credibility sources. Although such messages are initially discounted, over time listeners may retain the information while forgetting its source, leading them to gradually accept the message over time. Darlene B. Hannah & Brian Sternthal, *Detecting and Explaining the Sleeper Effect*, 11 J. OF CONSUMER RES. 632, 632 (1984); Other studies, however, have failed to replicate this affect, or have found it to be very limited. Gillig & Greenwald, *supra* note //, at 138-39.

owners, then, we would want to be more concerned with likely low-involvement processing works than with dramatic or literary works that demand more sustained cognitive attention. In this respect, the older copyright acts, which provided for different bundles of rights depending on the type of work, may have more internal logic than the current system of mostly uniform rights.

5. Implications for Judicial Analysis of Secondary Use Under Copyright

The virtue of adopting an analysis based on cognitive principles is to remove analysis of artistic meaning from the judicial sphere and to provide clearer rules to secondary users and to owners. Judges are not well equipped by training or experience to arbitrate over the objective meaning of cultural works. They can, however, with relative ease determine whether a work is old or new, whether source information is present, whether a message has been mass-advertised or otherwise pushed on large segments of the audience, or whether a work is a book or a poster. In this way, judges need not learn the underlying science to incorporate insights from cognitive research as well as economics. Such an analysis would also provide secondary users with more certainty by providing a clearer indication of works that cannot be enjoined.

Judges could easily incorporate this analysis within the existing fair use framework. The fourth factor under the current fair use test asks judges to determine the effect of the secondary work on the market for the original. No standards currently exist by which to measure market harm. Although many have argued that only uses that substitute for the original in the market should count, widespread licensing of expressive works challenges our definition of what the "market" should be. Is it only uses for which the owner has already licensed the original? Uses that the owner might want to license in the future?[320] Or, as many owners argue, any use that lowers the licensing value of the brand more generally? The above rules directly address the issue of harm to consumer perceptions, and allow judges a cleaner framework for adjudicating the fourth factor in secondary use cases.[321] Such a test would remove the need for a special "parody" exception except perhaps in the relatively rare cases where artists seek to mass disseminate a commercial parody.

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[320] *See* Goldstein, supra note //, at 225 for an argument in favor of this broader definition.

[321] As an alternative, such factors could be used to frame a more contextual inquiry into "substantial similarity" between an original and a derivative work. Because these factors help to distinguish between uses that consumers will find confusing, and those that they will contextualize effectively, they are relevant to the question of what kinds of unauthorized derivative works overstep the boundary between permissible conjuring of an older work and impermissible "copying" of that work. *See, e.g.*, Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICKINSON L. REV. 181, 194-202 (1994) (arguing generally that a finding of substantial similarity should depend on likelihood of harm to the owner's incentive to create).

Proponents of secondary use might argue that restrictions on methods of promotion or types of work unfairly burden an important type of expression and interfere with its finding an audience. To the extent that restrictions on dissemination and advertising burden secondary works, this is not necessarily a bad thing. The disadvantage of allowing greater personal and commercial use of popular copyrighted works is that it becomes cheaper to use existing works than to create more original texts. In an attention economy, works positioned off of popular brands will have an easier time getting attention and establishing a personality relative to consumer expectations. Limits on advertising and methods of distribution may help to remedy this imbalance and ensure sufficient investment in more original works. Compulsory license fees or actions for profit allocation, such as Netanel's or Rubenfeld's schemes, may also be appropriate in certain commercial contexts.[322]

IV. CONCLUSION

Copyright's cognitive elements have gone unexamined for too long in favor of analysis grounded in real property theory. Rules based on pastures and cattle however have limited force when applied to rights in information. A more explicit grounding of copyright principles in the mechanics of human cognition, similar to the types of analysis commonplace under trademark law, provides a better balance between rights of owners and needs of users. In many ways, such a theory is no more controversial than suggesting that the fee simple estate in real property conform to the known dynamics of physical space. Courts once considered air rights part of a landowner's domain.[323] This definition changed when air traffic increased the social value of public air space to the point where it outweighed the private need for such rights.[324] Similarly, the copyright owner's estate may be narrowed to account for valuable expressive uses that do not do much harm to the marketing and distribution rights meant to be reserved to the owner. Acknowledgement of copyright's conceptual underpinnings thus allows for compromise between the competing economic and free speech models of secondary use.

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[322] *See supra* text accompanying notes //-//.
[323] 3 WILLIAM BLACKSTONE, COMMENTARIES *18
[324] United States v. Causby, 328 U.S. 256, 261 (1946).