

# HOW CURRENT COPYRIGHT LAW DISCOURAGES CREATIVE OUTPUT: THE OVERLOOKED IMPACT OF MARKETING

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## ABSTRACT

This Article explores how copyright law's prohibition against unauthorized copying and sales may, counter to the law's purported goal, have an overall negative impact on the production and dissemination of creative content. The Article contends that in the current lottery-like environment of many media markets, copyright law disproportionately inflates the revenues of the most popular creations, which leads publishers to spend increasing amounts on promotional campaigns, which, intentionally or not, drowns out economically marginal creations. This discourages, rather than encourages, investment in many new creations. Consequently, current copyright law may actually reduce the overall production of new creations. As an alternative to the current strict limits copyright law imposes on copying, this Article explains how new technologies, social norms, and much weaker prohibitions against unauthorized copying may be combined to create viable business models for financing new creations. These business models appear capable of ensuring creators and publishers a sufficient profit to stimulate creation and distribution but without the significant harms produced by broad prohibitions against unauthorized copying.

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I. INTRODUCTION

[F]or the sake of the good, we must submit to the evil.

-Thomas Macaulay,  
Speech Delivered in the House of Commons<sup>1</sup>

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1. See Thomas Macaulay, Speech Delivered in the House of Commons (Feb. 5, 1841), in PROSE AND POETRY 731, 734-35 (para. 7) (G.M. Young ed., 1952).

The granting of [exclusive copyrights by Congress], under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

-House Report on the 1909 Copyright Act<sup>2</sup>

The quotations above highlight a fundamental premise of copyright law: that granting the copyright holder a virtual monopoly by prohibiting the unauthorized copying and sales of copyrighted works<sup>3</sup> is a necessary evil for attracting the financial investments needed to promote the creation and distribution of these creative works. The rationale is that if creative works could be freely copied, unauthorized copies would drive prices below the levels needed to induce most creators and publishers to invest in producing new works.<sup>4</sup> This would leave many valuable creative works uncreated or unpublished.<sup>5</sup> Thus, the assumption is that prohibiting unauthorized copying promotes a benefit—new creations—that outweighs the harm—limited access to these creations.<sup>6</sup>

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2. House Report on the 1909 Copyright Act, H.R. REP. NO. 60-2222, at 7 (1909).

3. See 17 U.S.C. § 106 (2000).

4. 1 PAUL GOLDSTEIN, COPYRIGHT § 1.14, at 1:40-:41 (2d ed. Supp. 2004) (“To give fewer property rights than are needed to support this investment would give users freer access, but to a less than socially desirable number and quality of works.”). This market failure is intensified by content’s nature as a “public good,” the consumption of which by one person does not diminish the quantity available for another. See Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293, 293 (1970); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954). Examples of public goods include non-rivalrous goods such as a song, a sunset, or national defense.

5. At least it might not be offered as soon. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value.”); *id.* at 557 (“Absent such protection, there would be little incentive to create or profit in financing such memoirs.”); MELVILLE NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-66.18 (1976); Brief of George A. Akerlof et al. as Amici Curiae at \*4-\*5, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (providing an economic analysis of the main feature of the Copyright Term Extension Act of 1998 and stating that “[t]he main economic rationale for copyright is to supply a sufficient incentive for creation”), available at [www.aei.brookings.org/admin/authorpdfs/page.php?id=16](http://www.aei.brookings.org/admin/authorpdfs/page.php?id=16); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989) (“Without copyright protection, authors, publishers, and copiers would have inefficient incentives with regard to the timing of various decisions.”).

6. See RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? 12 (2000); Landes & Posner, *supra* note 5, at 335 (“Some copyright protection is necessary to generate the incentives to incur the costs of creating easily copied works . . .”). The benefits and costs of intellectual property are often measured via economic analyses.

Even those strongly opposed to monopolies accept the premise that the protection against copying provided by § 106 of the Copyright Act is required to stimulate investment in new creative works.<sup>7</sup> Moreover, the Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises* characterized copyright law as “the engine of free expression.”<sup>8</sup> Although the Court’s opinion in *Eldred v. Ashcroft* indicated doubt in the wisdom of Congress’s decision to extend copyright terms,<sup>9</sup> other court decisions on copyright have long presumed that Congress has crafted copyright legislation so as to maintain a “delicate balance” between excessive copyright protection (which limits consumption) and minimal copyright protection (which undercuts production).<sup>10</sup> Similarly, most copyright law commenta-

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*See, e.g.*, Landes & Posner, *supra* note 5, at 333-36 (describing a model of the effect of copyright protection on the creation of works). Against the background of the success of the first enclosure (of land) movement, the premise of almost all economic analyses of intellectual property law is that the recognition of strong property rights in intellectual creations is fundamentally sound. James Boyle calls this establishment of strong intellectual property rights “the second enclosure movement.” *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

7. Even many who criticize current copyright protection as excessive agree. *See, e.g.*, LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 251 (2001) [hereinafter LESSIG, *IDEAS*] (supporting five year terms of protection, renewable fifteen times); JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* 80 (2001) (“[M]ore and stronger and longer copyright protection will always, at the margin, cause more authors to create more works.”); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 938-39 (2002) (“Copyright, however, is generally justified precisely in terms of enhancing, not dampening, media entities’ capacity to perform their role. It supposedly leads to more and higher quality provision of information and vision.”); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 *ECONOMICA* 167, 192 (1934) (“More authors write books because copyright exists, and a greater variety of books is published.”).

8. *See* 471 U.S. at 558; *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (stating that the purpose of copyright law is “to *promote* the creation and publication of free expression”) (emphasis original).

9. *Eldred*, 537 U.S. at 208.

10. *See* *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“[I]t is not our role to alter the delicate balance Congress has labored to achieve.”); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“Because this task involves a difficult balance between the interests of authors . . . in the control and exploitation of their writings . . . and society’s competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (“As with the development of other easy and accessible means of mechanical reproduction of documents, the invention and widespread availability of photocopying technology threatens to disrupt the delicate balances established by the Copyright Act.”).

tors have also accepted that a significant general prohibition against copying is a necessary component of copyright law, and their research has focused on finding a socially optimal point along the continuum between too much and too little copyright protection.<sup>11</sup>

This Article challenges copyright's fundamental premise by arguing that copyright law's prohibition of unauthorized copying may not be necessary *or even actually helpful* to inducing socially optimal levels of new creations from both creators and "publishers" in all media.<sup>12</sup> In fact, the Article contends that the prohibition against unauthorized copying may actually reduce the production of new works. This arises because of the development of new technologies and the emergence of many, if not most,

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11. See NAT'L RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 2 (2000) [hereinafter DIGITAL DILEMMA]; OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 204 (1986) [hereinafter OTA Study]; WATT, *supra* note 6, at 4; Landes & Posner, *supra* note 5, at 326; see also Alan Greenspan, *Market Economies and Rule of Law* (Apr. 4, 2003) ("If our objective is to maximize economic growth, are we striking the right balance in our protection of intellectual property rights?"), <http://www.federalreserve.gov/BoardDocs/speeches/2003/20030404/default.htm>.

12. The term "publishers" is used hereinafter to include record companies, studios, and other disseminators of content. Although U.S. law vests copyright protection in authors, not publishers, the economic rationale for copyright suggests that this choice was more tactical than substantive. See *Am. Geophysical Union*, 60 F.3d at 927 ("[T]he monopoly privileges conferred by copyright protection and the potential financial rewards therefrom are not directly serving to motivate authors to write individual articles; rather they serve to motivate publishers to produce journals."); BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 8-9 (1967) ("[P]ublishers saw the tactical advantage of putting forward authors' interests together with their own, and this tactic produced some effect on the tone of the statute"). In fact, support of the printers union was a key to passage of the 1909 Copyright Act. See SIVA VAIDHAYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 55 (2001). Today, however, many artists would not mourn the loss of the major record companies. See Charles C. Mann, *The Heavenly Jukebox*, ATLANTIC, Sept. 2000, at 39, 50, 54-56 (quoting Elton John as characterizing record companies as "thieves" and "blatant and out-and-out crooks"); Neil Strauss, *A Bill of Rights for Rockers Too*, N.Y. TIMES, Feb. 28, 2002, at E3 (discussing the formation of the Recording Artists Coalition, which was formed to "take a stand on financial and creative issues pertaining to musicians, whose best interests sometimes conflict with the agenda of the Recording Industry Association of America"); Neil Strauss, *David vs. Goliath to a Rock Beat*, N.Y. TIMES, Oct. 3, 2002, at E3 (discussing lawsuits and settlements by artists); Janice Ian, *The Internet Debacle—An Alternative View*, PERFORMING SONGWRITER MAG. (May 2002) (stating that arguments that the recording industry and artists are being harmed by free downloading is "nonsense" and that "every time we make a few songs available on my website, sales of all the CDs go up"), [http://www.janisian.com/article-internet\\_debacle.html](http://www.janisian.com/article-internet_debacle.html).

current media markets as lottery-like, “winner-take-all” markets, where promotional efforts may be more important than content.

This Article charges that previous comprehensive economic analyses of copyright, with one exception,<sup>13</sup> are seriously flawed due to their failure to account for promotional expenses.<sup>14</sup> It observes that promotional costs often far outweigh the other costs associated with a creation, and asserts that analyzing the economics of copyright without considering them is like assessing a political election contest without considering campaign advertising.

Additionally, this Article explains that protection against unauthorized copying provides dramatically disproportionate benefits to the most popular creations: it enables the publishers seeking to create blockbusters to finance enormous promotional campaigns, which drown out valuable, artistic creations that lack competitive marketing efforts. In this way, § 106 of the Copyright Act may actually serve to raise entry barriers for many new creations by diminishing expected profits for these economically marginal works.

Instead of an overbroad protection against unauthorized copying, this Article explains how current technologies, social norms, and minimal protection against copying could be used to support many profitable business models for creators and publishers. In fact, because current copyright protection likely *reduces* the overall number and breadth of new creations produced, these new models may encourage the production of even more creations. This approach builds on the findings of then-Professor Stephen Breyer’s 1970 article, *The Uneasy Case for Copyright*, which revealed that the economic case for copyright protection was tenuous in many segments of the publishing market.<sup>15</sup> Breyer used empirical data,<sup>16</sup> which supported

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13. One exception is Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 316-17 (2002) (recognizing the need to finance marketing and promotion).

14. In their classic 1989 economic analysis of copyright, Landes and Posner ignore other fixed costs of producing an original and do not consider marginal marketing costs. Landes & Posner, *supra* note 5, at 71-84, 327, 333. Nor do they address this omission in their recent book discussing the economic configuration of intellectual property law where a slightly revised version of their 1989 article appears as chapter 3. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003). In his detailed and otherwise comprehensive book, *COPYRIGHT AND ECONOMIC THEORY*, Watt also points out that his equations are “an abstraction from any real life situations.” WATT, *supra* note 6, at 201-02.

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

prior economic analyses,<sup>17</sup> to demonstrate that there were viable business models that worked in some segments of print publishing even in the absence of copyright protection. In addition, this Article greatly expands upon the scope of Raymond Ku's article, *The Creative Destruction of Copyright*, which examined online distribution of music and argued that copyright is unnecessary for digital works.<sup>18</sup>

This Article further challenges the necessity of a law prohibiting unauthorized copying by noting its lack of empirical support. For example, the fashion and food industries, among others, manage to stimulate new creations with reliance only upon trademark law protections and social norms.<sup>19</sup> Meanwhile, experts have concluded that the net effect of current copyright laws on creative output is ambiguous.<sup>20</sup> In fact, neither Congress

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16. *See id.*

17. *See, e.g.*, Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); Plant, *supra* note 7.

18. Ku, *supra* 13, at 267-68.

19. *See* LITMAN, *supra* note 7, at 105-06; Malla Pollack, *A Rose is a Rose is a Rose—But is a Costume a Dress?*, 41 J. COPYRIGHT SOC'Y 1 (1993); Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991). Other types of intellectual content lacking specific legal protection in the United States include jokes, perfumes, and furniture. *See* Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 9 (Adam Thierer & Wayne Crews eds., 2002); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLIN L. REV. 261, 287 (1989). Trademark law generally provides sufficient protection. *See* 15 U.S.C. §§ 1051-1127 (2000).

20. *See* DIGITAL DILEMMA, *supra* note 11, at 41 Box 1.4 (“No [solid] body of work exists with respect to the importance of copyright in fostering information creation and use.”); RICHARD A. POSNER, *LAW AND LITERATURE* 343 (1988) (recognizing that data to test the economic argument for copyright “has never been gathered”); Landes & Posner, *supra* note 5, at 354 (recognizing that “it is not certain that any copyright protection is necessary to enable authors and publishers to cover their fixed costs”); Kai-Lung Hui & I.P.L. Png, *On the Supply of Creative Work: Evidence From the Movies*, 92 AM. ECON. REV. 217 (2002) (not finding sufficient evidence to show that the Sonny Bono Copyright Act led to an increase in U.S. movie production); Randall C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 453 (2002) (observing that analyses of copyright law generally avoid the central social welfare question of whether creative works would be created in the absence of particular provisions of copyright law). Moreover, there is substantial evidence against the need for copyright. *See, e.g.*, Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 92-96 (1999) (arguing that the current copyright regime lacks a rational basis and was instituted based upon misleading empirical evidence and despite the lack of evidence of market failure absent copyright protection). *But see* Bell,

nor the industry lobbyists who have shepherded the Copyright Act through its frequent expansions have offered convincing evidence that § 106 provides a net benefit to society or is less burdensome than alternatives.<sup>21</sup> Rather, the industry's response to Breyer's 1970 wake up call appears to have been a combination of denial and of relief that he stopped any case of advocating that copyright be abolished.<sup>22</sup> In short, Congress has neither

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*supra* note 19, at 7-8; Jessica D. Litman, *The Public Domain*, 39 EMORY L.J. 965, 965-67, 998 (1990) ("Most arguments over the appropriate scope of copyright protection, unfortunately, occur in a realm in which empirical data is not only unavailable, but is also literally uncollectible.").

Even with respect to patents, in 1958, Machlup concluded that, "None of the empirical evidence at our disposal and none of the theoretical arguments presented either confirms or confutes the belief that the patent system has promoted the progress of the technical arts and the productivity of the economy." FRITZ MACHLUP, AN ECONOMIC REVIEW OF THE PATENT SYSTEM, SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., at 79 (1958) [hereinafter MACHLUP REPORT]. For more recent data on this point see F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 450-54 (3d ed. 1990); RUTH TOWSE, CREATIVITY, INCENTIVE AND REWARD 21 (2002); Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173 (1986); Roberto Mazzoleni & Richard R. Nelson, *Economic Theories About the Benefits and Costs of Patents*, 32 J. ECON. ISSUES 1031 (1998).

21. See *Eldred v. Ashcroft*, 537 U.S. 186, 206, 207 n.15 (2003) (referencing only the self-serving testimony of some artists); Breyer, *supra* note 15, at 351 ("The [congressional hearings on the Copyright Revision Bill] reveal little critical analysis of industry claims that protection is needed."); Pollack, *supra* note 20, at 92 ("The Copyright Office finessed the absence of any evidence of market failure by declaring that Congress has often acted to legislate market conduct without empirical evidence."). Copyright law appears to pay little attention to the interests of consumers. Rather, it appears that Congress has agreed to defer judgment to industry representatives when they can develop a consensus among themselves on copyright legislation. See Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1684-86 (1999) (characterizing copyright legislation as a "series of contract negotiations" between interest groups without any "independent congressional evaluation of the substance of the negotiated agreements"); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870-80 (1987); Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 314-15 (1989) [hereinafter Litman, *Copyright Legislation*]; Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act*, 36 J. COPYRIGHT SOC'Y 109, 120 (1989); Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149, 1243 (1998).

22. According to Paul Goldstein, Breyer's article questioning the need for copyright was the main topic of conversation of copyright lawyers for months after it was published. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 24 (1995). Nevertheless, the only scholarly response to Breyer's article was a student piece by Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971), which



assessed the business models discussed below nor examined how the explosion of marketing has changed the content market.

Part II gives some background on current copyright laws before discussing how the explosion of marketing and copyright's role in financing such marketing appears to increase entry barriers to creation and how other effects of § 106 also deter new creation. Part III identifies the costs creators and publishers must cover to induce them to publish. Part IV describes many business methods based on distribution technologies, social norms, and government funding, which together could provide viable business models that include only a very limited prohibition against copying. Part V offers a proposal for a severely truncated prohibition against unauthorized copying. Finally, Part VI offers a short conclusion.

## II. THE HARMFUL EFFECTS OF COPYRIGHT PROTECTION UNDER § 106

The Exclusive Rights Clause of the Constitution empowers Congress “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>23</sup> Based on this clause, Congress granted copyright owners the exclusive rights outlined in 17 U.S.C. § 106.<sup>24</sup> Most significantly, § 106 includes the rights: “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phon-

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Breyer easily answered in Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972). Goldstein interprets Breyer's response to be backpedaling from the position that copyright was unjustified, GOLDSTEIN, *supra*, at 25-26, but Breyer's explanation for why he had declined to urge that copyright be eliminated merely reiterated his previous statements. See Breyer, *supra* note 15, at 321-23. But see William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1708 n.231 (1988) (finding Tyerman's response convincing).

23. U.S. CONST. art. I, § 8, cl. 8. This Article uses “Exclusive Rights Clause” in place of “Intellectual Property Clause” or “Copyright Clause” because this appears to be a more accurate description of the clause.” See Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 175 n.10 (2003).

24. See 17 U.S.C. § 106 (2000) (stating that “the owner of copyright under this title has the exclusive rights . . .”); see also Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 5, 17, 28, and 35 U.S.C.); The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

orecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . .”<sup>25</sup>

Section A reviews the justification for a prohibition against unauthorized copying. Section B, however, explains how the protection under § 106 appears to be having some unanticipated effects. It observes that, by enabling publishers in many current lottery-like content markets to dramatically increase their revenues from their most popular works and then to spend them on promoting those works, § 106 leads those popular works to crowd out more economically marginal works, thereby, having a net negative effect on new creations. Section C discusses other effects of § 106 that frustrate vibrant new creation.

### A. The Justification Behind the § 106 Prohibition of Unauthorized Copying

Throughout the world, intellectual property rights have been justified under at least three theories. Under a “natural rights” theory, copyright protection merely codifies a creator’s natural right to possess the fruits of his or her labor.<sup>26</sup> Under a “just reward” theory, copyright protection recognizes that justice dictates that creators deserve the benefits of what they have created.<sup>27</sup> Under a “public welfare” theory, however, copyright protection is granted solely as a necessity to promote the creation and distri-

25. 17 U.S.C. § 106.

26. Breyer, *supra* note 15, at 284-85; Hurt & Schuchman, *supra* note 17, at 422. This rationale, generally associated with the French, recognized a natural, almost divine right to one’s creations. In the words of one philosopher, “[I]t’s mine because I made it . . . . It wouldn’t have existed but for me.” See, e.g., Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 36 (1989). These rationales, however, have serious weaknesses. See, e.g., Hurt and Schuchman, *supra* note 17, at 243 (finding that the main difficulty with natural property right theory is applying the principle upon which it is based more generally); see Weinreb, *supra* note 21, at 1217-29 (“Traced to ground, the argument that an author has a ‘natural’ property in the copyright of his creation depends on a string of distinct but related propositions that are independently plausible and gain added force by their relation, but are in fact vulnerable.”).

27. This theory, supported by classical English economists like Adam Smith and John Stuart Mill, viewed one’s right to ownership of the fruits of one’s work as a just reward for the creation. MACHLUP REPORT, *supra* note 20, at 21. However, the “just reward” rationale is not without weaknesses. See Breyer, *supra* note 15, at 285-91 (listing some weaknesses such as “discerning the extent to which an author should be able to maintain control” of the creation and determining the “value” of the work to society); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1248 (1996) (arguing that the just reward rationale “rests on a faulty foundation” because “[i]n a market economy, the principal importance of high compensation is as a signal designed to affect future behavior, not as a reward for past achievement”).

bution of new creative works, a result that would be in the public's best interest.<sup>28</sup>

Before the U.S. Constitution was adopted, laws granting copyright protection in the United States were justified under multiple theories.<sup>29</sup> However, the Exclusive Rights Clause of the Constitution uses only a public welfare justification and does not mention a natural rights justification for protection. As the House Report on the 1909 Copyright Act declared:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served . . . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . .

In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public.<sup>30</sup>

The public benefit rationale for copyright law was underscored by Congressman Robert Kastenmeier, long-time chair of the House subcommittee with jurisdiction over copyright and one of the primary players responsible for the passage of the 1976 Copyright Act:

[T]he primary objective of the intellectual property laws is not to reward the author or inventor, but rather to secure for the public the benefits derived from the labors of authors and inven-

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28. Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?*, 70 MINN. L. REV. 417, 422, 441 (1985).

29. See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 1000-02 (1990); Sterk, *supra* note 27, at 1199.

30. H.R. REP. NO. 60-2222, at 7 (1909); see also *Eldred v. Ashcroft*, 537 U.S. 186, 246-47 (2003) (Breyer, J., dissenting) (“The Constitution itself describes the basic Clause objective as one of ‘promoting the Progress of Science,’ *i.e.*, knowledge and learning. The Clause exists not to ‘provide a special private benefit,’ . . . but ‘to stimulate artistic creativity for the general public good.’”) (citations omitted); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834) (“That Congress, in passing the Act of 1790, did not legislate in reference to existing rights, appears clear . . . Congress, then, by this act, instead of sanctioning an existing right . . . created it.”); H.R. REP. 100-609, at 17 (1988). The writings of Thomas Jefferson, Thomas Macaulay, Adam Smith, and James Madison also indicate a great concern about the problems with granting creators’ monopoly rights. See *Eldred*, 537 U.S. at 246 (Breyer, J., dissenting); VAIDHAYANATHAN, *supra* note 12, at 22-24; Benkler, *supra* note 23, at 180-97; Boyle, *supra* note 6, at 53-56.

tors. . . . The argument that a particular interest group will make more money and therefore be more creative does not satisfy . . . the constitutional requirement of the intellectual property clause.<sup>31</sup>

The Supreme Court has also interpreted the Exclusive Rights Clause in this manner. In *Mazer v. Stein*, the Court noted that “[t]he economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.”<sup>32</sup> Furthermore, consistent with the 1909 House report, the Court has interpreted the Constitution to limit Congress’s ability to grant copyright monopolies. In *Sony Corp. v. Universal City Studios, Inc.*, the Court held that copyright’s monopoly privileges “are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward.”<sup>33</sup> The Court has also explicitly stated that monopolies are not permitted under the Exclusive Rights Clause when there is no “concomitant *advance* in the ‘Progress of Science and useful Arts.’”<sup>34</sup>

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31. Kastenmeier & Remington, *supra* note 28, at 422, 441; *see also* Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579, 591-92 (1985); Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 723 (1998) (“[C]opyright rights should be protected, unless it can be shown that the extent of protection is hampering creativity or the wide dissemination of works.”).

32. 347 U.S. 201, 219 (1954); *accord* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-77 (1977); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); 1 GOLDSTEIN, *supra* note 4, at § 1.14, at 1:40. While the Court in *Mazer* observed that ensuring that creative artists receive “rewards commensurate with the services rendered” is a goal of copyright law, 347 U.S. at 219, the Court has elsewhere noted that “copyright law, like the patents statute, makes reward to the owner a secondary consideration.” *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948).

33. 464 U.S. 417, 429 (1984); *see also* *Eldred*, 537 U.S. at 211-13. The Court quoted *Sony* in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“We have often recognized the monopoly privilege that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and must ultimately serve the public good.”).

34. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (emphasis added); *see* *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary objective in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”). But the Court in *Eldred* accorded great deference to Congress on this matter. *See* 537 U.S. at 207 n.15, 212-13

Thus, the Supreme Court and Congress have often recognized that the Exclusive Rights Clause of the Constitution limits Congress's authority to grant copyrights and that copyright law must further the interests of the public, not merely the creators or publishers.<sup>35</sup>

## **B. How the Marketing Explosion Leads § 106 to Crowd Out Marginal New Creations**

In furthering the public interest, Congress, courts, and scholars have long supported a substantial prohibition against unauthorized copying.<sup>36</sup> Today, however, promotional expenses, a variable that almost everyone has ignored when examining the economic incentives and justifications for copyright law,<sup>37</sup> have exploded. This has dramatically changed the economic environment of many media markets and should provoke policy-makers to reexamine whether and when prohibiting copying actually best serves the public good.<sup>38</sup>

In many media markets today, marketing may be the most significant cost. That may not appear to be the case for major feature films, for which 2002 figures indicate average costs of \$58.8 million to produce and \$27.3 million to market,<sup>39</sup> but those figures hide a significant marketing cost in production costs. While actors' salaries are treated as a production cost, the fees commanded by superstar actors seem to reflect their marketing value rather than their acting skills.<sup>40</sup> Meanwhile, major music labels

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(“We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”)

35. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“[This] *limited* grant is a means by which an important public purpose may be achieved.”) (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)) (emphasis added); *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 539-52 (2000); Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 56-64 (2000).

36. See *supra* notes 2, 3, 6.

37. See *supra* notes 13, 14.

38. For example, increased distribution enables more people to consume a work and more creators to build on the work to produce derivative works. See Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 511 (1945) (stating we are all standing “on the shoulders of giants”).

39. See MOTION PICTURE ASS'N WORLDWIDE MARKET RESEARCH, U.S. ENTERTAINMENT INDUSTRY: 2002 MPA MARKET STATISTICS 19, 20 (2003) [hereinafter 2002 MPA STATS]. “Negative costs” includes production costs, studio overhead, and capitalized interest. *Id.* at 19. Marketing costs are costs incurred after production. *Id.* at 20.

40. Realistically a large portion of the fee for marquee actors like Tom Cruise and

spend hundreds of thousands, on average, on promotion for a new album (including payola),<sup>41</sup> as compared to only \$80,000 to \$150,000 for producing them.<sup>42</sup> Michael Jackson even complained when Sony spent *only* about \$25 million to market his album “Invincible.”<sup>43</sup> The book publishing industry has also seen the triumph of marketing.<sup>44</sup>

Furthermore, the promotion of creative works is not simply to inform the public about the works; it is also to create “solidarity goods,” which are products valued, in large part, due to their popularity, separate and

Julia Roberts should be recognized as a marketing, not a production, cost. See A.O. Scott, *We’re Ready for Their Close-Ups*, N.Y. TIMES, Feb. 17, 2002, § 5 at 5 (movie stars are defined by their “ability to generate box-office cash”). But see Arthur de Vany & David Walls, *Uncertainty in the Movies: Does Star Power Reduce the Terror of the Box Office?*, 23 J. CULTURAL ECON. 285, 302-03 (1999) (finding that stars appear to have an impact on the number of screens films open on and remain on, but not necessarily on revenues). After this adjustment, marketing costs in the film industry may actually exceed first copy costs. See RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ARTS AND COMMERCE* 76-78, 109-10 (2000) (“Superstar salaries thus consist largely of rents. With producers competing to employ [the superstar], the star’s pay tends to be the expected rent that she can attract.”).

41. See HAROLD L. VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS* 163 (5th ed. 2001) (estimating marketing costs at up to \$100,000 for a standard release and \$500,000 for a major artist); Douglas Abell, *Pay for Play: An Old Tactic in a New Environment*, 2 VAND. J. ENT. L. & PRAC. 52 (2000) (discussing payola); Lynn Hirschberg, *Who’s That Girl?*, N.Y. TIMES, Aug. 4, 2002, § 6 at 30 (stating that the fee for promoters can range from \$100,000 to \$400,000); Moses Avalon Royalty Calculator, MosesAvalon.com, at <http://www.mosesavalon.com/marc.htm> (last visited Apr. 28, 2004) (providing a royalty calculator for creators and setting \$500,000 as the default amount for average promotional expenses on a major label deal); see also Tobias Regner, *Innovation of Music*, in *ECONOMICS OF COPYRIGHT: DEVELOPMENTS IN RESEARCH AND ANALYSIS* 104, 107-09 (Wendy J. Gordon & Richard Watt eds., 2003).

42. Typically, musical recording costs for relatively new artists’ albums by major studios range from \$80,000 to \$150,000. M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THIS BUSINESS OF MUSIC* 23 (8th ed. 2000). There is also the \$3 to \$5 per CD mark-up by retailers to cover their costs, including marketing costs. See Jon Healey, *CD Sticker Shock Accounting for Retail Sale Prices That Drive Song-Swapping Sites*, SAN JOSE MERCURY NEWS, Sept. 3, 2000, at 1D.

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

44. See GAYLE FELDMAN, *BEST AND WORST OF TIMES: THE CHANGING BUSINESS OF TRADE BOOKS, 1975-2002*, at 16-22 (2003) (finding that in the 1970s the focus in publishing shifted from editorial to marketing); Ken Auletta, *The Impossible Business*, NEW YORKER, Oct. 6, 1997, at 50, 63; Bill Goldstein, *Honing the Science of the Release Date*, N.Y. TIMES, Nov. 11, 2002, at C9 (“The ‘opening’ of a major book has increasingly come to resemble the opening of a movie.”).

apart from their intrinsic quality.<sup>45</sup> Publishers hope consumers will feel pressure to purchase these popular creative products to allow them to join conversations with friends about the movie plotline, television character, or book,<sup>46</sup> and to belong to the group of consumers that has enjoyed the popular creative work.<sup>47</sup> This pack mentality contributes to the current winner-take-all content environment—a highly skewed market with a few big winners and a lot of losers.<sup>48</sup>

The incredibly cluttered nature of the current media markets only heightens the lottery environment. Today publishers annually release about 450 new major feature films,<sup>49</sup> 20,000 new music albums,<sup>50</sup> and more than 100,000 new books.<sup>51</sup> In addition, other producers of original content include most of the nearly 350 national television networks,<sup>52</sup> many of the 13,000 radio stations,<sup>53</sup> and 10,000 more specialized magazines and other periodicals.<sup>54</sup> The Internet offers millions of pages of blogs

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45. See Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity Goods*, 9 J. POL. PHIL. 129, 132 (2001).

46. See CAVES, *supra* note 40, at 180-82 (describing the benefits creative goods receive from social interchange because “people like to converse about creative goods” and “[c]reative goods and the cultural consumption capital that surrounds them provide what is likely the most suitable grist [for conversation]”); Robert H. Frank, *When Less is Not More*, N.Y. TIMES, July 17, 2000, at A19.

47. Sunstein & Ullmann-Margalit, *supra* note 45, at 132.

48. See ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US* 19 (1995) (“[W]inner-take-all markets attract too many contestants, result in inefficient patterns of consumption and investment, and often degrade our culture.”); Glenn M. MacDonald, *The Economics of Rising Stars*, 78 AM. ECON. REV. 155 (1988); Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981); Verlyn Klinkenborg, *Nothing But Troubling News From the World of Publishing*, N.Y. TIMES, Jan. 27, 2003, at A24 (“Like the film and music industries, publishing is now driven wholly by the search for blockbuster books.”).

49. See 2002 MPA STATS, *supra* note 39, at 14.

50. See Jon Pareles, *Best of the Obscure Among 2001’s Albums*, N.Y. TIMES, Jan. 3, 2002, at E1.

51. The number of new book titles rose from 46,743 in 1990 to 122,108 in 2000. See FELDMAN, *supra* note 44, at 8-9.

52. See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Tenth Annual Report ¶ 142 & tbl. 8 (2004), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-5A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-5A1.pdf) (last visited May 9, 2004).

53. See Audio Services Division, Fed. Communications Comm’n, Broadcast Station Totals (Mar. 31, 2004), available at <http://www.fcc.gov/mb/audio/totals> (last visited May 9, 2004).

54. In addition, there are more than 11,000 magazines of quarterly or greater frequency and as many as 18,000 magazines. See BENJAMIN M. COMPAINE & DOUGLAS

and other new content. Meanwhile, this new content competes with all the creative works produced in previous years.<sup>55</sup>

Under these conditions, publishers seeking to field one of the few winners in each niche market will often feel compelled to match their competitors' marketing efforts.<sup>56</sup> These promotional efforts are highly competitive, with winning often more dependent on the quality of the marketing than the quality of the product.<sup>57</sup> With success in these markets—the potential profits from being a solidarity good or other blockbuster—resembling a rent, these promotional campaigns represent a form of “rent seeking.”<sup>58</sup> Also, much of the marketing expenses seeking to shift demand among equally valuable allocations appear to be socially wasteful.<sup>59</sup> The

GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA INDUSTRY 156-57 (3d ed. 2000).

55. In 1997, there were 1.3 million books in print. *See id.* at 61. In 2000, more than 18,000 feature films were stored in studio vaults. *See* VOGEL, *supra* note 41, at 65. Moreover, the Internet has spawned a substantial increase in the exchange of used media content. *See* Richard Rayner, *An Actual Internet Success Story*, N.Y. TIMES, June 9, 2002, § 6 at 112.

56. *See* CAVES, *supra* note 40, at 109, 393 n.25; Ann Beattie, *Essentials Get Lost in the Shuffle of Publicity*, N.Y. TIMES, Feb. 11, 2002, at E1 (“Writers are afraid not to be [on book tours], for fear they’ll be completely lost in the shuffle, but paradoxically, by getting out there we add to the problem.”).

57. *See* David D. Kirkpatrick, *Bookselling, the Unlikely Spectacle*, N.Y. TIMES, Apr. 29, 2002, at C6 (“It is a difficult trick making any book stand out at the booksellers convention—a noisy literary circus where scores of publishers and hundreds of authors desperately compete for attention.”); Eric A. Taub, *You Oughta Be in Print*, N.Y. TIMES, Oct. 17, 2002, at G1 (stating the key to success for those offering online books is getting noticed); Bernard Weinraub, *A Warbler Set Aloft by a Dedicated Flock; Patience Pays Off for Nelly Furtado’s Team*, N.Y. TIMES, Mar. 21, 2002, at E1.

58. *See generally* PAUL PECORINO, RENT SEEKING: A TEXTBOOK EXAMPLE 8-9 (U. Ala. Econ. Fin. & Legal Stud., Working Paper No. 04-01-01, 2004), <http://www.ssrn.com/abstract=496062> (last visited May 9, 2004); Robert D. Tollison, *Rent Seeking*, 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 315, 316 (Peter Newman ed., 1998); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967).

59. Expenditures made to hype or simply to neutralize competitors' spending appear to be socially inefficient. *See, e.g.*, Floyd Norris, *Clinton Acts and Tobacco Profits*, N.Y. TIMES, Aug. 25, 1996, at F1 (stating that the government's ban on tobacco company advertising on television appears to have increased industry profits by eliminating substantial “defensive” advertising). This type of promotion is in contrast to the type that helps buyers find better matches for their idiosyncratic tastes, like that aiding “selection assistant” (SA) services, *see infra* Part IV.A.4, or which adds “psychic” value to creative works, the way cosmetics marketing often does. *See* Ruth La Ferla, *Front Row*, N.Y. TIMES, Jan. 7, 2003, at B9 (“She’s not buying that tube [of lipstick] for the color; she’s buying it for the story.”) (quoting Mary Lisa Gavenas, a former beauty editor at *Glam-*



marketing expenditures of competitors also become a major factor in determining which projects will be profitable, creating a promotional “arms race.”<sup>60</sup> As one commentator observed, “the costs of marketing new releases to a mass audience have grown prohibitive . . . [and] those costs have long helped limit competition from smaller companies.”<sup>61</sup> As a result, high quality content, especially from smaller producers without deep pockets, can be drowned out.<sup>62</sup>

The overbroad copyright protection of § 106 feeds this beast by allowing the most popular creations to earn revenues well beyond what publishers need to cover the production and distribution costs of their new creations: successes and failures. Publishers then feel compelled to turn around and dissipate these revenues on larger marketing campaigns or greater rents for the few most popular creators.<sup>63</sup> In fact, this type of rent seeking may well dissipate 100% *or more* of the increased revenues generated by § 106.<sup>64</sup> The higher marketing expenses financed by § 106 raise entry barriers, leaving many economically borderline projects unprofitable. Thus,

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*our and Mirabella).*

60. See *supra* note 57; cf. Merges & Reynolds, *supra* note 35, at 55. Moreover, as in politics, the “horse race” aspect of the process has become a story that may eclipse the substance of the content. See, e.g., Rick Lyman, *A Strong Start for ‘Catch Me’ but ‘Two Towers’ is Still Tops*, N.Y. TIMES, Dec. 30, 2002, at E1.

61. Jon Pareles, *Spit Out by the Star-Making Machinery*, N.Y. TIMES, Feb. 3, 2002, §2 at 28.

62. See VOGEL, *supra* note 41, at 90-91 (stating that films of high merit may be “pulled” if they are not quick hits); Goldstein, *supra* note 44 (“[T]he definition of big has changed in publishing, as it has in other entertainment industries. . . . [¶] ‘It’s more important than ever to have a fireworks display,’ said Patricia Eisemann, publicity director of Scribner, a division of Simon & Schuster.”); Healey, *supra* note 42; Ian, *supra* note 12 (describing this phenomenon in the music industry); Pareles, *supra* note 50. *But see* Martin Arnold, *Room at the Table for Fresh Faces*, Dec. 19, 2002, at E3.

63. See Ku, *supra* note 13, at 316-17 (contending that copyright cannot be justified based on its ability to help publishers finance marketing efforts that distort consumer choice); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 876 (2001).

64. There is a tendency for rent seeking expenditures to exceed the total reward in lottery environments. See Daniel Kahneman & Amos Tversky, *Prospect Theory: Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); Lunney, *supra* note 63, at 879 n.210 (citing Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992)); D. Michael Risinger et al., *Brave New “Post-Daubert” World—A Reply to Professor Moenssens*, 29 SETON HALL L. REV. 405, 425 (1998). *But see* Michael Abramowicz, *Copyright Redundancy* 11 (2003), available at <http://www.ssrn.com/abstract=374580> (last visited May 9, 2004).

§ 106 seems likely to make it harder for marginal new works to find publishers willing to publish and promote them.

Meanwhile, the economic argument that § 106 necessarily promotes more creative works at the margin is flawed. The argument is that copyright protection allows publishers to appropriate a greater portion of the economic value generated by the few economically borderline new works that become blockbusters.<sup>65</sup> They do so by protecting such works against the competition blockbusters would face, and the accompanying reduced prices and revenues. Such protection should thereby lead publishers to find more of those works profitable and thus publish them.<sup>66</sup> Copyright supporters would argue that this demonstrates how § 106 pushes economically borderline creative works into profitability and increase the number of new works.<sup>67</sup>

The hidden and misleading assumption in this reasoning is that because § 106 produces this initial increase in the expected revenues of borderline creative works, the provision has a net positive effect on the profitability of such works. Yet this incomplete analysis assumes that all other factors relevant to the new works' revenues and profitability remain constant, and they do not. Rather § 106 also leads the revenues from the most popular works to increase, and disproportionately more than the revenues of more borderline works.<sup>68</sup> This allows publishers of the most popular works to disproportionately increase their marketing efforts, forcing publishers of marginal works to either 1) spend even more money on marketing simply to retain their sales and revenues or 2) refrain from further increasing marketing expenditures, but see their works' sales and revenues decline. In either case, the increased marketing costs or decreased revenues triggered by § 106 likely lead many otherwise marginally profitable

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65. See F.M. Scherer, *The Innovation Lottery*, in EXPANDING THE BOUNDS OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 20 (Rochelle Cooper Dreyfuss et al. eds., 2001); *supra* notes 7-8 and accompanying text. Some scholars argue that diminishing current copyright rewards would diminish publishers' willingness to take risks, i.e., publish untried or risky work. See Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS. 79, 83 (1992); David Ladd, *The Harm of the Concept of Harm in Copyright: The Thirteenth Donald C. Brace Memorial Lecture*, 30 J. COPYRIGHT SOC'Y 421, 431 (1983).

66. Assume that the new work had a .1% chance of earning an additional \$1 million and a .01% chance of earning an additional \$10 million. Then, its expected earnings would increase by  $(.001 \times \$1 \text{ million}) + (.0001 \times \$10 \text{ million}) = \$1000 + 1000 = \$2,000$ .

67. Even critics of the current level of copyright protection appear to accept this rationale. See *supra* note 7.

68. See Lunney, *supra* note 63, at 882.

creative projects to become unprofitable and therefore to no longer be produced.<sup>69</sup>

In addition, the increased revenues that larger publishers earn due to § 106 that are not spent on promotion are still unlikely to be invested in projects expected to be unprofitable. These publishers are no more likely to finance “charitable” creative works—that is, to subsidize marginal work—than the consumers who would retain their funds absent § 106.<sup>70</sup>

### C. Other Ways Current Copyright Law Chills Creative Expression

Although scholars have overlooked the negative impact of marketing on creative output, they have recognized other serious drawbacks to current broad copyright protection, particularly the expansive protection of “derivative works.”<sup>71</sup> Prior to 1900, § 102(b) of the Copyright Act, which expressly denies any copyright protection to ideas,<sup>72</sup> was interpreted to

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69. See *supra* notes 61-62 and accompanying text.

70. Although the Senate Report accompanying the Copyright Term Extension Act states an expectation that publishers will use extra profits to subsidize marginal work, it offers no reason why this would arise. S. REP. NO. 104-315, at \*12-\*13 (1996), 1996 WL 397400; Lunney, *supra* note 63, at 874-75 (noting that work that would otherwise be expected to be profitable would be published anyway and that there is no rational reason why publishers would use excess profits to finance works expected to be unprofitable). *But see* David D. Kirkpatrick, *CD Price Cuts Could Mean New Artists Will Suffer*, N.Y. TIMES, Sept. 29, 2003, at C1.

71. See VAIDHAYANATHAN, *supra* note 12, *passim*; see also Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 534-40, 546-48 (1996); L. Ray Patterson, *Eldred v. Reno: An Example of the Law of Unintended Consequences*, 8 J. INTEL. PROP. L. 223, 239 (2001); Jed Rubinfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 49-52 (2002).

72. “In no case does copyright protection for an original work of authorship extend to any idea, . . . concept, . . . or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b) (2000); see also *Baker v. Seldon*, 101 U.S. 99, 103 (1879). This reflects Thomas Jefferson’s observation:

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

Letter from Thomas Jefferson to Isaac McPherson, August 13, 1813, in THE WRITINGS OF THOMAS JEFFERSON 6, 175, 180 (H.A. Washington ed., 1861). As Judge Learned Hand emphasized, ideas and plot outlines are “given up to the public” so that authors may draw from their predecessors’ innovations and insights.” See Jane C. Ginsburg, *Authors and*

permit creators to build on the ideas of others to produce creative, transformative works.<sup>73</sup> Nevertheless, as protection of derivative works has grown to cover even the “total concept and feel” of a work,<sup>74</sup> the right of the copyright owner to deny licenses to other creators has chilled many types of transformative uses.<sup>75</sup> These include “fan edits”<sup>76</sup> and “fan fiction,”<sup>77</sup> and even political speech.<sup>78</sup> Since most new creations generally

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*Users in Copyright*, 45 J. COPYRIGHT SOC'Y 1, 5 (1997) (quoting Judge Learned Hand). In fact, when ideas and expression are inseparable, the expression loses copyright protection. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

73. Prior to 1900, infringement was evaluated “by looking not so much to what the defendant had taken as to what he had added or contributed.” See KAPLAN, *supra* note 12, at 17.

74. See, e.g., *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (finding copyright protection for a greeting card’s “total concept and feel”); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work’s ‘Total Concept and Feel’*, 38 EMORY L.J. 393 (1989). Jessica Litman finds that § 106(2) now reads as though even thinking about a derivative work is prohibited! See LITMAN, *supra* note 7, at 22, 32, 71.

75. See LESSIG, *IDEAS*, *supra* note 7, *passim*; VAIDHAYANATHAN, *supra* note 12, *passim*.

76. See Daniel Zaleski, *Thinking These Thoughts is Prohibited*, N.Y. TIMES, Jan. 6, 2002, §9, at 10. Zaleski writes:

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

*Id.*; see also OTA STUDY, *supra* note 11, at 138-39; Amy Harmon, *‘Star Wars’ Fan Films Come Tumbling Back to Earth*, N.Y. TIMES, Apr. 28, 2002, at § 2, at 28; Matthew Mirapaul, *If You Can’t Join ‘Em, You Can Always Tweak ‘Em*, N.Y. TIMES, Mar. 4, 2002, at E2 (describing a website that “allows visitors to take six [works of art] at a time and combine them into an onscreen collage”). These include mash-ups and bootleg remixes, which are based on sampling. See Chris Norris, *Mash-Ups*, N.Y. TIMES, Dec. 15, 2002, §6 at 102; Neil Strauss, *Spreading via the Web, Pop’s Bootleg Remix*, N.Y. TIMES, May 9, 2002, at A1.

77. See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

78. For examples of how copyright law can suppress political expression, see Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535-36 (1993), and Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 294-

primarily reconfigure elements from previous work,<sup>79</sup> Judge Learned Hand recognized that the importance of letting works fall into the public domain was so later editors “might do a much better job than the originator.”<sup>80</sup> Thus, it should not be surprising that the derivative works provision is probably the most severely criticized aspect of copyright law.<sup>81</sup>

Publishers fearing the cost of lawsuits are apt to decline to publish content where others appear likely to claim that it includes or is a derivative work of theirs, even if such claim appears unreasonable. The problem is the cost of litigation. In fact, the chill from the derivative works provision resembles the one created by many state libel laws before these laws were severely diminished by the Supreme Court’s landmark 1964 decision in *New York Times v. Sullivan*.<sup>82</sup> (That holding granted publishers significant breathing room to err before they could be convicted of defamation, thereby reducing their fear of lawsuits.<sup>83</sup>) The Eleventh Circuit did recog-

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97 (1996).

79. See Landes & Posner, *supra* note 5, at 332 (“Creating a new work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it.”); *infra* text accompanying notes 132-137.

80. See LESSIG, IDEAS, *supra* note 7, at 106. The booming Japanese market in comic book stories based on existing characters but by creators other than the original authors illustrates the large market demand for such output. See Salil Mehra, *Copyright and Comics in Japan: Does Law Explain Why All the Cartoons My Kid Watches are Japanese Imports?*, 55 RUTGERS L. REV. 155, 164-66 (2002); see also DIGITAL CONNECTIONS COUNCIL OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 8 (2004) [hereinafter CED REPORT], available at [http://www.ced.org/docs/report/report\\_dcc.pdf](http://www.ced.org/docs/report/report_dcc.pdf) (last visited May 9, 2004).

81. See, e.g., David Lange & Jennifer Lange Anderson, *Fair Use and Transformative Critical Appropriation* (Nov. 2001), available at <http://www.law.duke.edu/pd/papers/langeand.pdf> (last visited May 9, 2004); Lunney, *supra* note 71, at 513, 650; Rubinfeld, *supra* note 71, at 53-59; Sterk, *supra* note 27, at 1217; Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1269 (1997). Even access priced at “neutral” compulsory license rates, might still hinder some poor, aspiring creators, since “there is no particular reason to believe that creative ability will always correlate with the ability to pay market price for improvement rights.” Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462, 482 n.67 (1998). Jed Rubinfeld would avoid this problem by only granting the original work owner a right to sue for profit allocation. Rubinfeld, *supra* note 71, at 59. But this raises the issue of what are profits. See Lange & Anderson, *supra* note 81, at 143-55.

82. 376 U.S. 254 (1965) (striking down a state law that allowed a libel action brought by a public official against critics of his official conduct).

83. *Id.* at 264-65. Unfortunately, the Court failed to take the opportunity to remedy this chill when it had the chance in the 1994 parody case *Campbell v. Acuff-Rose Music*,

nize an outside limit on copyright protection when it dissolved an injunction against the publication of Alice Randall's *The Wind Done Gone* parody of *Gone with the Wind*,<sup>84</sup> but the litigation costs were about \$150,000.<sup>85</sup> Thus, the clear message these cases send to creators (and publishers) who seek to build on others' ideas is: if you publish it, they will come . . . to get you.<sup>86</sup>

Meanwhile, the fair use exception to copyright protection has only limited value due to publisher fears that copyright holders will claim that uses are not fair. The fair use doctrine, which permits unauthorized but very limited uses of copyrighted content, is supposed to spare creators the need to incur the administrative costs of obtaining permission for minor uses of others' materials.<sup>87</sup> Yet the standards for invoking it are so vague that creators are often chilled by the fear of litigation.<sup>88</sup> Given that even

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*Inc.*, 510 U.S. 569 (1994). The Court in *Campbell* only held that parodies could qualify as "fair use," thus finding that a rap parody of Roy Orbison's song "Oh, Pretty Woman" could be a fair, noninfringing use. *Id.* The Court remanded the case for consideration of the resulting harm to the market for non-parodic rap derivatives of the song. *Id.*; see James Boyle, *The First Amendment and Cyberspace: The Clinton Years*, 63 LAW & CONTEMP. PROBS. 337, 340-48 (2000); Rubinfeld, *supra* note 71, at 59.

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

85. See A Debate on "Creativity, Commerce & Culture" with Larry Lessig and Jack Valenti, Annenberg School of Communications, Los Angeles, Cal., at 23-24 (Nov. 29, 2001) available at <http://www.learcenter.org/pdf/LessigValenti.pdf> (last visited May 9, 2004) [hereinafter Lessig & Valenti].

86. Cf. FIELD OF DREAMS (Universal 1989) ("If you build it, they will come."); see also Chilling Effects, Chilling Effects Clearinghouse, at <http://www.chillingeffects.org> (displaying cease-and-desist letters sent by copyright holders) (last visited Apr. 28, 2004).

87. See Breyer, *supra* note 15, at 316-18; Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615, 1628-30 (1982). Still, after *Harper & Row, Publishers, Inc. v. Nation Enterprises*, it is not clear that fair use covers much beyond where a reasonable copyright owner would have consented to the use, and thus a situation that should only arise where administrative costs make it impractical to seek permission. See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 21-23 (2001).

88. See LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 95-99, 185-88, 304-06 (2004) (discussing how creators refrain from making fair uses of content out of fear of litigation, even when top legal scholars tell them that they are clearly in the right), available at <http://cyberlaw-temp.stanford.edu/freeculture.pdf> [hereinafter LESSIG, CULTURE] (last visited May 15, 2004); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L.

some major Hollywood features have faced court injunctions for lacking appropriate clearances,<sup>89</sup> documentary filmmaker Davis Guggenheim concludes that “if any piece of artwork is recognizable by anybody . . . then you have to clear the rights of that and pay to use the work.”<sup>90</sup> Yet trying to obtain permission to use others’ materials or even simply tracking down the rights’ owners requires significant, if not prohibitive, payments.<sup>91</sup> In fact, many have recognized that creators, as a class, might actually be better off with *less* copyright protection, since the benefit to creator licensees would exceed the harm to the creators whose content was used.<sup>92</sup> The Internet and a more efficient online copyright registration procedure, however, might well alleviate this problem if together they can make it inexpensive and practical for creators to procure licenses from copyright holders.<sup>93</sup>

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REV. 1105, 1106-07 (1990); Litman, *Copyright Legislation*, *supra* note 21, at 341; Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 988-91 (2002); Patterson, *supra* note 71, at 224-26.

89. LESSIG, IDEAS, *supra* note 7, at 4 (describing the litigation faced by *12 Monkeys*, *Batman Forever*, and *The Devil’s Advocate*). See also Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 14 n.42 (2000); Copyright Website LLC, at <http://benedict.com/visual/visual.aspx> (last visited Apr. 28, 2004).

90. LESSIG, IDEAS, *supra* note 7, at 3 (quoting Davis Guggenheim).

91. See *Eldred v. Ashcroft*, 537 U.S. 186, 251-52 (2003) (Breyer, J., dissenting) (describing the difficulty of finding the current copyright holders of older works and the possibility that such works may have multiple copyright holders); DIGITAL DILEMMA, *supra* note 11, at 65; LESSIG, CULTURE, *supra* note 88, at 95-97, 101-07, 222-25; LESSIG, IDEAS *supra* note 7, at 3-4. For examples of the problems of identifying who owns a copyright see Frances M. Nevins, *Little Copyright Dispute on the Prairie: Unbumping the Will of Laura Ingalls Wilder*, 44 ST. LOUIS U. L. REV. 919 (2000); Amy Harmon, *Copyright Hurdles Confront Selling of Music on the Internet*, N.Y. TIMES, Sept. 23, 2002, at C1.

92. See Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT’L REV. L. & ECON. 81, 88 (2002); Landes & Posner, *supra* note 5, at 332-34, 337 & n.17; Mehra, *supra* note 80, at 182-84, 194-96; see also Lunney, *supra* note 71, at 494-97, 513; Dawn C. Nunzianto, *Justice Between Authors*, 9 J. INTELL. PROP. L. 219 (2002); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 556 (1990); cf. Tim O’Reilly, *Piracy is Progressive Taxation, and Other Thoughts on the Evolution of Online Distribution*, Dec. 12, 2002, available at <http://www.oreillynet.com/pub/a/p2p/2002/12/11/piracy.html> (last visited May 9, 2004).

93. See LESSIG, IDEAS, *supra* note 7, at 251 (suggesting that the U.S. Copyright Office operate a website where authors could register their work). The Internet can certainly diminish costs for consumptive uses. See Tom W. Bell, *Fair Use v. Fared Use: The Im-*

All economic analyses of copyright recognize that there is a large “deadweight loss” to society because publishers protected by copyright set prices which deny access to many consumers who would willingly pay the marginal or even average cost for creative works.<sup>94</sup> Rewards enhanced by § 106 may also divert some creators into copyright-protected markets and away from other, more socially beneficial industry segments or industries<sup>95</sup>—a hidden opportunity cost to society.<sup>96</sup>

Section 106 also enables incumbent media industries to slow the development of competing new technologies by denying access to critical content. Thus, the film industry tried to stymie television by denying broadcasters access to films, both in television’s early years<sup>97</sup> and when the broadcasters tried to experiment with pay-TV.<sup>98</sup> In turn, broadcasters constrained cable television systems’ access to broadcast programming,<sup>99</sup>

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*fact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557, 579-80 (1998); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 236-42 (1996). Rights owners, however, may well refrain from automated licensing of productive uses. For discussions of copyright clearinghouses, see DIGITAL DILEMMA, *supra* note 11, at 68; LESSIG, IDEAS, *supra* note 7, at 251, and expedited registration processes, see New Music Jukebox, Am. Music Ctr., at <http://newmusicjukebox.org> (last visited Apr. 29, 2004).

94. See KENNETH J. ARROW, *Economic Welfare and the Allocation of Resources for Invention*, in ESSAYS IN THE THEORY OF RISK-BEARING 144, 153 (1971); Lunney, *supra* note 71, at 556-57, 564-67; Zimran Ahmed, *The Copyright Tax*, WINTERSPEAK.COM, Feb. 20, 2002, at <http://www.winterspeak.com/columns/022002.html> (estimating billions of dollars of losses) (last visited May 9, 2004). Such losses are somewhat mitigated by public libraries, which offer a small subset of the total content output free to the public.

95. See Lunney, *supra* note 71, *passim* (discussing the incentives for individuals to invest in creative works); see also Breyer, *supra* note 15, at 309; Hurt & Schuchman, *supra* note 17, at 430; Lunney, *supra* note 63, at 888-90; Plant, *supra* note 7, at 192.

96. See Lunney, *supra* note 71, at 492 (stating that the “inevitable result of such protection is that we will have too many entertaining works, at the expense of having too little of everything else”); Lunney, *supra* note 63, at 880-81; Plant, *supra* note 7, at 184; Arnold Plant, *The Economic Theory Concerning Patents for Inventions*, 1 ECONOMICA 30, 40 (1934).

97. See Douglas Gomery, *Failed Opportunities: The Integration of the U.S. Motion Picture and Television Industries*, 10 Q. REV. FILM STUD. 219 (1984).

98. In 1964, some movie theaters successfully pressured major film producers not to supply films for the Hartford subscription TV experiment. See Amendment of Part 73 to Provide for Subscription Television Service, Fourth Report & Order, 15 F.C.C.2d 466, 475 (1968).

99. When the Supreme Court rejected broadcasters’ charges that cable television system operators’ retransmission of broadcast signals was prohibited by the 1909 Copyright Act, broadcasters were still able to prevail upon the FCC and Congress to limit cable system access to distant broadcast signals and to attractive “pay” shows. See Stanley



and cable programmers tried to deny satellite companies access to cable networks.<sup>100</sup> Similar defensive industry responses today appear to be hindering the rollout of broadband,<sup>101</sup> digital video recorders,<sup>102</sup> and Internet distribution technologies.<sup>103</sup> Furthermore, when manufacturers of existing technologies have negotiated over legislative revisions to copyright laws they have allocated benefits among themselves, generally slighting new media<sup>104</sup> and thereby hindering innovation. Thus the Sonny Bono Act has frustrated many innovative uses of the Internet,<sup>105</sup> and other proposed

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Besen & Robert Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROB. 77, 91-110 (1981).

100. See David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 FED. COMM. L.J. 511 (1995). Congress responded to this problem by requiring cable networks to deal fairly with satellite distributors. See 47 U.S.C. § 548(c)(2)(B) (2000).

101. See Amy Harmon, *Hearings on Digital Movies and Piracy*, N.Y. TIMES, Mar. 1, 2002, at C4; Remarks of FCC Chairman Michael K. Powell, at the National Summit on Broadband Deployment, Oct. 25, 2001, at 2, available at <http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html> (“Much of what is holding broadband content back is caused by copyright holders trying to protect their goods in a digitized environment.”).

102. See Kevin Werbach, *Who Controls Information?*, RELEASE 1.0, May 31, 2002, at 1,17 (“One prominent Silicon Valley VC said he wouldn’t invest in the next Tivo because it would be a lawsuit waiting to happen.”).

103. See, e.g., *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (holding for record companies that sued a Web server that made music files available online to customers who already owned the music for copyright infringement); LESSIG, CULTURE, *supra* note 88, at 189-99 (the MP3 technology and Internet radio). The Movielink Internet service’s five film studio partners have also been sued by a competitor, Intertainer, for trying to use their control over films to drive it out of business. See Amy Harmon, *Black Hawk Downloaded*, N.Y. TIMES, Jan. 17, 2002, at G1 (discussing Morpheus and other video technologies). Larry Lessig contends that the recording industry’s aim seems to be to insure that no venture capitalist invests in a technology that competes with existing recording industry licensees without the approval of the industry, i.e., entry barrier control. See LESSIG, IDEAS, *supra* note 7, at 200-01.

104. See Litman, *Copyright Legislation*, *supra* note 21, at 299-305.

105. The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998), chilled projects like Eric Eldred, Eldritch Press, at [http://web.archive.org/web/\\*/http://eldred.ne.mediaone.net](http://web.archive.org/web/*/http://eldred.ne.mediaone.net) (last visited May 3, 2004); Michael Hart’s Project Gutenberg, at <http://www.gutenberg.net> (last visited Apr. 29, 2004) (free electronic books); Internet Archive, at <http://www.archive.org> (last visited Apr. 29, 2004); and the Prelinger Archives, <http://www.prelinger.com/prelarch.html> (last visited Apr. 29, 2004) (film archives). See Heather Green, *A Library as Big as the World*, BUSINESSWEEK ONLINE, Feb. 28, 2002, at [http://www.businessweek.com/technology/content/feb2002/tc20020228\\_1080.htm](http://www.businessweek.com/technology/content/feb2002/tc20020228_1080.htm) (last visited May 9, 2004).

rules would constrain new technological innovations and creative works.<sup>106</sup>

Another problem with § 106 is that it appears to increase media concentration because merged media firms gain the advantage of having easier access to cross-license each others' content. Absent § 106, all publishers would be able to engage in socially beneficial cross uses.<sup>107</sup>

Finally, there are significant costs in enforcing § 106. Any property rights structure imposes enforcement costs.<sup>108</sup> In addition to the costs of monitoring, negotiating, and litigating, there is also the cost of lost privacy and the like, when there is litigation over who has had access to creative works.

### III. INDUCING THE PRODUCTION OF CREATIVE CONTENT

Both creators and publishers must be motivated to create and disseminate creative content. Most creators are motivated by non-monetary as well as monetary needs or goals, in fact many, if not most, would probably create even in the absence of significant financial rewards. On the other hand, without adequate financial incentives, few publishers—as businesses created, generally, to make profits—would appear willing to invest the resources required to cover their many costs, as detailed in the rest of this section. The business models discussed in Part IV, below, appear to be sufficient to generate the needed revenues.

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106. See CED REPORT, *supra* note 80, at 45-59; John L. Zittrain, *Taming the Consumer's Computer*, N.Y. TIMES, Mar. 11, 2002, at A21.

107. RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 101 (1996); Benkler, *supra* note 92, at 88-89, 92, 94; 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, 400-12 (1999); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Enterprise*, 53 VAND. L. REV. 1879, 1904-11 (2000) (examining the problem of a small number of conglomerates holding the rights to creations); see also Guy Pessach, *Copyright Law as a Silencing Restriction on Non-Infringing Materials—Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067 (2003); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 983-84 (1970). Benkler also points out a homogenization effect, see Benkler, *supra* note 92, at 95, and a feedback effect. *Id.* at 95-98. In addition, larger firms are more likely to find it cost effective to survey consumers so as to permit them to engage in price discrimination for their libraries of content. Netanel, *supra* note 107, at 1914-17.

108. See Harold Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J.L. & ECON. 11, 14 (1964).

## A. Inducing Creators to Create

Non-pecuniary motivations have long played a major role in stimulating artistic creations.<sup>109</sup> The joy of simply pleasing audiences<sup>110</sup> or of the creative process drives many creative artists.<sup>111</sup> Others see themselves simply as vessels to deliver content.<sup>112</sup> Still others seek to praise or punish others or to celebrate or mourn some event.<sup>113</sup> The desire for fame, respect, and achievement also motivates many creators.<sup>114</sup> For example, as one journalist asserted: “[P]eople who choose journalism [seek] . . . the satisfaction of being known and noticed, with your name in print and perhaps your face on the air; the opportunity to play a part in shaping public issues without having to go into politics.”<sup>115</sup> Many seek to prove that they

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109. See Plant, *supra* note 7, at 168-69 (“Some of the most valuable literature that we possess has seen the light without the need for monetary incentives.”); see also BRUNO S. FREY, *NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION* (1997).

110. Aaron Copland once testified that he would pay people to listen to his music. See Scherer, *supra* note 65, at 3, 19.

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

112. See MARTHA WOODMANSEE, *THE AUTHOR, ART AND THE MARKET* (1996). Speaking of his writing, Martin Luther said, “Freely have I received, freely given, and want nothing in return.” *Id.* at 159 n.19.

113. See, e.g., DAVID THROSBY, *ECONOMICS AND CULTURE* 109 n.13 (2001) (Johann Sebastian Bach stated that “the ultimate end or final goal of all music . . . is nothing but for the honour of God and the renewal of the soul.”); Ari Posner, *No Experience Required: ‘The O.C.’ Rewrites the Rules of TV Writing*, N.Y. TIMES, Mar. 21, 2004, §2, at 1 (Josh Schwartz “is the rare writer who uses his work to thank his parents . . . instead of exacting revenge on them.”).

114. See ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 53 (2d ed. 2001) (describing ego satisfaction and reputation among hackers); Landes & Posner, *supra* note 5, at 331 (describing prestige that translates into income); see also OTA STUDY, *supra* note 11, at 182-83 (discussing the origin of “Freeware”); Christopher M. Kelty, *Free Software/Free Science*, FIRST MONDAY, Dec. 2001, available at [http://www.firstmonday.dk/issues/issue6\\_12/kelty/index.html](http://www.firstmonday.dk/issues/issue6_12/kelty/index.html) (last visited May 9, 2004). But see David Lancashire, *Code, Culture and Cash: The Fading Altruism of Open Source Development*, FIRST MONDAY, Dec. 2001, available at [http://www.firstmonday.org/issues/issue6\\_12/lancashire/index.html](http://www.firstmonday.org/issues/issue6_12/lancashire/index.html) (suggesting that a primary cause of the rise of the free software movement may have been the immaturity of certain types of software markets) (last visited May 9, 2004).

115. See JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE*

are the best in their field, as certified by a Nobel Prize, Pulitzer Prize, or Grammy Award.<sup>116</sup> To achieve fame or generate publicity, some even pay to send their work to others.<sup>117</sup> Non-pecuniary motives also lead some to participate in community projects to create software.<sup>118</sup> Clearly, social, religious, moral, or political goals at least partially motivate some creators.<sup>119</sup>

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AMERICAN DEMOCRACY 74 (1996). This even leads reporters to risk their lives. See Nicholas D. Kristof, *A Life of Balances*, N.Y. TIMES, Feb. 22, 2002, at A25. Kristof mourned the death of a *Wall Street Journal* correspondent, but observed:

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

*Id.*

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

117. Prior to the Internet, many authors of law review articles paid for reprints to send free to potential readers. This emerging "author pays" business model, so readers have free access, appears likely to dominate in the scientific community. See Amy Harmon, *New Premise in Science: Get the Word Out Quickly, Online*, N.Y. TIMES, Dec. 17, 2002, at F1.

118. Prominent examples include GNU/Linux (a viable alternative to Windows) and Apache (the leading web server). See Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002). Such motivations may also work to provide the managerial support to coordinate the decentralized process. See *id.*; Boyle, *supra* note 6, at 46-47. In fact, this culture led Richard Stallman to create the General Public License ("GPL") for software, under which a creator permits anyone to copy a piece of software as long as the copier attaches the GPL and the source code (explaining the software) to all copies. See Richard Stallman, *The GNU Operating System and the Free Software Movement*, in OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION (Chris DiBona et al. eds., 1999); see also GNU General Public License (June 1991), available at <http://www.fsf.org/copyleft/gpl.html> (discussing the concept of "copyleft"). Some creators may be attracted by the philosophy of a "Creative Commons" or other niches in the "gift economy." See, e.g., Creative Commons, at <http://www.creativecommons.org> (last visited Apr. 29, 2004).

119. See Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 86-95 (1996) (discussing social and political motivations for art); Joseph Epstein, *Think You Have a Book in You? Think Again*, N.Y. TIMES, Sept. 28, 2002, at A17 (suggesting that being published may provide individuals with the significance that they formerly sought through religious salvation). This also applies to some publishers. See *infra* note 143.

Still, even great artists acknowledge the tremendous importance of financial payments. As one scholar has noted,

Bach, Mozart, Hayden, and Beethoven were all obsessed with earning money through their art . . . . Mozart even wrote: “Believe me, my sole purpose is to make as much money as possible; for after good health it is the best thing to have.” When accepting an Academy Award in 1972, Charlie Chaplin remarked: “I went into the business for money and the art grew out of it. If people are disillusioned by that remark, I can’t help it. It’s the truth.”<sup>120</sup>

Moreover, individual creators must pay for costs related to creation of their works: materials, production, and possibly marketing costs. They must also pay for living expenses and, ideally, recover their opportunity costs: the income that they could have earned if they pursued other employment instead of focusing on creating new content.<sup>121</sup> To feel emotionally satisfied, many also need to feel that they receive their fair share of any surplus value they help to create.

Economists have recognized that standard supply curves, which show the relationship between compensation paid to workers and their output, while useful for evaluating employees creating more “humdrum” works (telephone books, databases, and reference works),<sup>122</sup> fail to accurately reflect the incentives of creators, for whom non-monetary goals may well dominate monetary ones.<sup>123</sup> For those who are not fully employed as creators, it appears more appropriate to treat content creation as a leisure time activity or investment in the future<sup>124</sup> that is constrained by their ongoing

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120. TYLER COWEN, IN PRAISE OF COMMERCIAL CULTURE 18 (1998).

121. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 6 (4th ed. 1992).

122. Those employed by for-profit firms to compile encyclopedias, telephone books, databases, etc., are likely to demand wages based on their opportunity cost, and a standard supply curve would represent them accurately. See Hurt & Schuchman, *supra* note 17, at 426. Richard Caves calls these “humdrum” inputs. See CAVES, *supra* note 40, at 4.

123. See David Throsby, *Artists as Workers*, in CULTURAL ECONOMICS 201, 202 (Ruth Towse & Abdul Khakee eds., 1992) (“[A] different set of determinants is likely to influence labour supply decisions of artists in arts and nonarts markets.”). See generally CAVES, *supra* note 40, at 2 (“[C]reative goods and services, the processes of their production, and the preferences of tastes of creative artists differ in substantial and systematic (if not universal) ways from their counterparts in the rest of the economy . . .”).

124. Many work merely for exposure. See CAVES, *supra* note 40, at 66 & 359 (noting that pursuit of fame leads some musical groups to pay to open up for established groups at concerts and that a survey of composers in the 1970s found that their net income from composing was negative); Neil Strauss, *For Musicians, Microsoft’s Xbox is No Jackpot*,

financial needs.<sup>125</sup> Since at some level of effective wages (or savings or family support), a creator will be able to pursue creative work full-time,<sup>126</sup> such compensation, which leads to the creator's increased or even full-time production of creative content, does indeed spur overall creative output. Yet, once certain financial desires are satisfied, money may become less of a motivation and the pursuit of fame or the simple need to create may become the primary drivers of greater output. As John Grisham explained, "Money is not that big an issue anymore. It's not the driving force that it was five years ago. I'm a writer. If I didn't write, what would I do all year long?"<sup>127</sup>

Furthermore, even introductory economics textbooks recognize that the supply curve for labor is "backward bending" for each person. That is, at some point, greater compensation will cause a worker to devote *less* time to work.<sup>128</sup> Although most creators probably never reach that point, many famous creators—those who benefit most from copyright protection—seem to be in the high earnings range where increased compensation reduces their incentive to create.<sup>129</sup> Some renowned creators may demand

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N.Y. TIMES, Nov. 15, 2001, at E1 (discussing how less-famous musicians who provided material for Microsoft's Xbox video game received little if any payment).

125. See THROSBY, *supra* note 113, at 97, 99, 102, 162-63 (noting that "the artist is still assumed to be striving solely for the generation of cultural value but within the limitations imposed by the income requirement" and suggesting a model that "non-arts work is simply a means of enabling as much time as possible to be spent at the (preferred) artistic occupation"); David Throsby, *Disaggregated Earnings Functions for Artists*, in *ECONOMICS OF THE ARTS* 331, 334 (Victor A. Ginsburgh & Pierre-Michel Menger eds., 1996) (offering "a hypothesis that nonarts work is undertaken by artists essentially as a means of satisfying fixed minimum consumption requirements"). Many well known creators supported themselves, at least in part, with ordinary jobs, e.g., T.S. Eliot (Lloyd's Bank), Wallace Stevens (insurance executive), William Faulkner (power plant), and Philip Glass (taxi driver). See COWEN, *supra* note 120, at 17.

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

127. Kirkpatrick, *supra* note 111.

128. Although the opportunity to earn a higher salary generally leads workers to convert more leisure time into work (called the "substitution effect"), the salary also creates an "income effect," whereby one with a higher income chooses to "buy" more hours of leisure. See WALTER NICHOLSON, *MICROECONOMIC THEORY BASIC PRINCIPLES AND EXTENSIONS* 666-77 (7th ed. 1998); Plant, *supra* note 7, at 192 (noting that, once they have earned a sufficient amount, authors "may prefer now to take more holidays or retire earlier.").

129. See Lunney, *supra* note 63, at 891-92 (reporting that the reduction in output "begins to fall with increasing wages at a wage well below the level that broad copyright protection offers popular authors today."). For example, the majority in *Eldred* argued

substantial sums for future creations, but such requests probably only represent their desire for the perceived economic rents due them as their fair share of total revenues, rather than their need for a sufficient incentive to work more hours.<sup>130</sup> It is also important to recognize that many creators understand that their need or desire for financial rewards from their creative works need not come from direct sales of them. As Internet guru Esther Dyson has observed, experts often write to enhance their reputations and earn their income from ancillary services.<sup>131</sup> Most academic writing, including law review articles, would seem to fall into that category.

In addition to take-home pay, creators must also secure raw materials for their work. Courts have long recognized that all artists to some degree build on and borrow from their predecessors. As Justice Story explained,

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.<sup>132</sup>

For example, many of Shakespeare's plots were originated by others.<sup>133</sup> In fact, literary imagination may be "but a weaving of the author's experience of life into an existing literary tradition."<sup>134</sup> Even leading copyright advocate Mark Twain acknowledged that "we are all thieves,"<sup>135</sup> and

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that singers Quincy Jones, Bob Dylan, etc., required greater compensation to produce more work. See *Eldred v. Ashcroft*, 527 U.S. 186, 207 n.15 (2003). However, lower compensation might actually have led them to work more to earn what they wanted.

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

131. ROBERT YOUNG & WENDY GOLDMAN ROHM, *UNDER THE RADAR: HOW RED HAT CHANGED THE SOFTWARE BUSINESS AND TOOK MICROSOFT BY SURPRISE* (1999); Esther Dyson, *Intellectual Value*, *WIRED*, July 1995, at 136.

132. *Emerson v. Davies*, 8 F. Cas. 615, 619 (D. Mass. 1845) (No. 4436). See also *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 1985); *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, dissenting).

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

134. See POSNER, *supra* note 133, at 403; see also Note, *Originality*, 115 *HARV. L. REV.* 1988, 1989-90 & n.5 (2002).

135. VAIDHAYANATHAN, *supra* note 12, at 55-80 (discussing Twain's energetic and

pop music star Moby agrees, observing that “I’m the composer and the musician and the engineer, but also a plagiarist and thief.”<sup>136</sup> While the nature and form of the elements copied varies between and within media, since virtually all content includes some degree of copying, many have challenged the very concept that any one person can be recognized as *the* author.<sup>137</sup>

Those creators that use copyrighted source inputs must license those inputs, and this, at least initially, negatively impacts a creator’s output. While a very successful creator may recoup this licensing cost and more, the need to license source material probably hinders the vast majority of only marginally successful creators, some of whom cannot afford to pay both the fee and the cost of tracking down whom to pay.<sup>138</sup> New creators face lower costs to the extent the material they build upon is available free as public domain materials,<sup>139</sup> including content predating copyright or with expired copyrights, government publications, facts,<sup>140</sup> or supposedly, ideas.<sup>141</sup> They will also benefit from access to work by creators who are

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persistent support for strong copyright protection, despite his borrowing practices). Stealing and adapting material from others was also the norm in vaudeville, as illustrated by the Marx Brothers. *See id.* at 81.

136. Gerald Marzorati, *All by Himself*, N.Y. TIMES, Mar. 17, 2002, § 6 (Magazine), at 32, 35-36. In fact, plagiarism appears to be very common. *See* VAIDHAYANATHAN, *supra* note 12, at 205-06 n.67; Jon Pareles, *Plagiarism in Dylan, Or a Cultural Collage?*, N.Y. TIMES, July 12, 2003, at B7.

137. *See* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51-60 (1996); Litman, *supra* note 20, at 965-67, 1007-13 (1990). *See generally* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994).

138. *See supra* note 91 and accompanying text.

139. *See* Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 148-53 (2003).

140. Although facts are not subject to copyright under *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), bills have been introduced in Congress seeking to change that situation, particularly with respect to commercial databases. *See* Jane C. Ginsburg, *U.S. Initiatives to Protect Works of Low Authorship*, in EXPANDING THE BOUNDS OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 55 (Rochelle Cooper Dreyfuss et al. eds., 2001); J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793 (1999) (discussing H.R. 2281 and H.R. 354).

141. Although 17 U.S.C. § 102(b) (2000) clearly states that ideas are not protected by copyright, the protection of derivative works appears to protect ideas as expressed in sequels and other such variations. *See supra* notes 71-86 and accompanying text.



voluntarily registering their work under a general public license (GPL) or the like, making that work available free of charge.<sup>142</sup>

## **B. The Financial Needs of Publishers: Costs That Need to be Recovered**

Most creators have relied on publishers to handle the tasks involved in both preparing final versions of and distributing their creative works (although, as discussed below, the Internet is changing this). Publishers, meanwhile, generally undertake these tasks if they believe that they can earn at least some small profit<sup>143</sup> after covering their costs. In addition to compensation to the creator, publishers' costs include: selection of content, preparation of first copy, reproduction and delivery, marketing, insurance against failure, and processing of payments. These latter six costs have generally absorbed at least eighty-five percent of revenues from creative content.<sup>144</sup>

The first cost publishers face is finding and selecting creative content. Predicting which creations will be profitable requires significant perceptiveness about quality and public tastes, as well as luck.<sup>145</sup> The often acci-

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142. It is only free to those who offer their creative works under the GPL. *See supra* note 118.

143. Academic and a few politically motivated publishers, however, may be willing to lose money on publications in the service of other goals, as well as to accept lower salaries, *see* Auletta, *supra* note 44, at 50, and lower returns than they would for ordinary investments. *See* CAVES, *supra* note 40, at 44 (describing how many art dealers are "willing to settle for less profit than humdrum entrepreneurs"). Publishers may also use their businesses to trumpet their own views and causes. *See* Benkler, *supra* note 107, at 378 n.109 (citing anecdotal evidence that media moguls like Rupert Murdoch and William Randolph Hearst used their media to press their personal causes).

144. That is, most creators receive royalties of only about 5-15%. In the musical recording industry, new artists receive nominal royalties of 7% to 12%, superstars 15% or more. However, these royalties are subject to many adjustments so that a standard 12% royalty on a CD for an independent producer translates into a 3% of retail price royalty to the artist, i.e., less than 50¢ on a \$15 CD. Still, few CDs earn enough for artists to receive more than their advance. *See* KRASILOVSKY & SHEMEL, *supra* note 42, at 19-23. Composers also receive about 5.7¢ for every track on every copy of every CD and vinyl record. *See* 17 C.F.R. § 201.19(e)(4) (2004). Book publishing industry royalties are somewhat higher. *See* CAVES, *supra* note 40, at 56-57 (describing the typical royalty contract for trade books as including 10% of the book's retail price and splitting the gross profit 58%-42%); Auletta, *supra* note 44, at 54 (describing the standard as being 10%).

145. *See* William T. Bielby & Denise D. Bielby, "All Hits are Flukes": *Institutionalized Decision Making and the Rhetoric of Network Prime Time Program Development*, 99 AM. J. SOCIOLOGY 1287 (1994); *see also* ANDRE BERNARD, *ROTTEN REJECTIONS: A LITERARY COMPANION* (1990) (collecting data about many famous book rejections, including *The Peter Principle* (30 times)); VOGEL, *supra* note 41, at 73 & n.2 (listing fa-

dental nature of publishing was captured most famously by William Goldman's description: "Nobody knows anything."<sup>146</sup> Although agents or other successful creators often provide a first level of screening,<sup>147</sup> and the Internet is helping to cut this cost by facilitating peer group reviewing,<sup>148</sup> publishers nonetheless invest substantial resources in trying to identify worthy content. Interestingly, those that pirate creative works generally do not escape this cost simply by selecting creations that have already become best sellers. After all, to make a profit, pirates must accurately predict the future market for the creative work, i.e., what consumer demand, competition, and prices will be like at the time they are actually ready to start selling pirated copies to consumers.<sup>149</sup>

Second, a publisher must pay for the preparation of the first copy. While new technologies continue to reduce production costs in some creative markets,<sup>150</sup> creators often need significant funds to complete their original work. Although exceptional films have been made for small amounts,<sup>151</sup> the performance fees to performers, special effects, travel,

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mous film rejections).

146. See WILLIAM GOLDMAN, *ADVENTURES IN THE SCREEN TRADE: A PERSONAL VIEW OF HOLLYWOOD AND SCREENWRITING* 39 (1983); see also Norm Alster, *It's Just a Game, But Hollywood is Paying Attention*, N.Y. TIMES, Nov. 23, 2003, § 3, at 4.

147. See CAVES, *supra* note 40, at 53-56 (describing the very low acceptance rates—three or four for every 10,000 submissions received for one publishing company—and the role agents play as intermediaries between authors and publishers); see also Celestine Bohlen, *We Regret We Are Unable to Open Unsolicited Mail*, N.Y. TIMES, Nov. 8, 2001, at E1 (noting that some authors pay the Scott Meredith Literary Agency \$450 to read and certify the quality of their manuscripts). Many publishers refuse to waste time even opening "slush piles" of unsolicited material. Bohlen, *supra*, at E1; CAVES, *supra* note 40, at 52, 61, 113, 116.

148. See, e.g., Matthew Mirapaul, *Aspiring Screenwriters Turn to Web for Encouragement*, N.Y. TIMES, Nov. 11, 2002, at E2. But see Amy Harmon, *Amazon Glitch Unmasks War of Reviewers*, N.Y. TIMES, Feb. 14, 2004, at A1.

149. They must predict additional future demand, industry output, and prices. See *infra* section IV.A.1. This is ignored by Landes & Posner, *supra* note 5, at 328-29, despite the note in Breyer, *supra* note 15, at 298 n.68.

150. See COWEN, *supra* note 120, at 19-21; Frank Ahrens, *A Disturbance in Film's Force*, WASH. POST, Dec. 27, 2002, at E1 (reporting that digital cameras and PC editing software are cutting film production costs); David Pogue, *Recording Studio in a Box*, N.Y. TIMES, Jan. 15, 2004, at G1. Using computer software to generate virtual actors and sets may dramatically cut film production costs. See Dave Kehr, *When a Cyberstar is Born*, N.Y. TIMES, Nov. 18, 2001, § 2, at 1; Rick Lyman, *Movie Stars Fear Inroads by Upstart Digital Actors*, N.Y. TIMES, July 8, 2001, at A1.

151. See JOHN PIERSON, SPIKE, MIKE, SLACKERS AND DYKES: A GUIDED TOUR ACROSS A DECADE OF AMERICAN INDEPENDENT CINEMA 17, 18, 52 (1995) (referencing Wayne Wang's *Chan is Missing* (\$20,000), John Sayles's *Return of the Secaucus Seven*

crew wages, etc. can be quite costly.<sup>152</sup> Furthermore, talented personnel sought for a creative work may inflate their fee requests if they expect there to be a surplus on the project.<sup>153</sup> Musical recording costs for relatively new artists' albums by major studios range from \$80,000 to \$150,000.<sup>154</sup> Publishers also must often provide significant amounts of artistic, strategic, and psychological support to creators, particularly artists, at the beginning of their careers.<sup>155</sup>

Third, publishers must pay for the reproduction and delivery of creative works, although digital technologies have dramatically reduced these costs. For example, hardcover books can now be produced in high volume for about \$2 per copy, high-end paperbacks, CDs, and DVDS for about \$1.<sup>156</sup> New reproduction technologies have also dramatically reduced the cost savings of a large production run, making smaller runs that respond to customer demand more feasible.<sup>157</sup> The average cost of transporting hard copies of creative works, i.e., distributing books to retailers, is about \$2 per copy.<sup>158</sup> Publishers generally employ private wholesalers and distributors who transport hard copies to tens of thousands of retail outlets.<sup>159</sup> To avoid lost sales that may never be recovered, publishers also generally err on the side of overproduction, which increases production costs. Publishers generally expect returns of about 35% for frontlist hardcovers, 25% for

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(\$60,000), and Spike Lee's *She's Gotta Have It* (\$114,000)).

152. See generally 2002 MPA STATS, *supra* note 39 (describing MPAA cost averages). Even simply transferring a typical previously produced Hollywood film from a 35mm print to a "cleaned up" 70mm IMAX version can cost between \$2 and \$4 million. See Rick Lyman, *Imaging Hollywood Hits for a Big, Seat-Shaking Second Helping of Thrills*, N.Y. TIMES, Sept. 16, 2002, at E1.

153. See CAVES, *supra* note 40, at 109 (warning about "the common fallacy of regarding a film's costs as exogenous to its expected revenues"); Laura M. Holson, *Big Hollywood Hits Don't Ensure Big Profits*, N.Y. TIMES, Sept. 2, 2002, at C1.

154. See KRASILOVSKY & SHEMEL, *supra* note 42, at 23. Still, software for digital audio workstations is available for \$1,000 (plus special effects) and studios rent for as little as \$20/hour.

155. See, e.g., Martin Arnold, *Making Books: With Editors Up Their Sleeves*, N.Y. TIMES, Apr. 4, 2002, at E3; Hirschberg, *supra* note 41; Jay Parini, *Saluting All the King's Mentors*, N.Y. TIMES, Feb. 25, 2002, at E1.

156. See VOGEL, *supra* note 41, at 162; David D. Kirkpatrick, *Some Book Buyers Read the Price and Decide Not to Read the Rest*, N.Y. TIMES, Dec. 16, 2001, § 1, at 1; Rick Lyman, *In Revolt in the Den, DVD Has the VCR Headed to the Attic*, N.Y. TIMES, Aug. 26, 2002, at A1.

157. See CAVES, *supra* note 40, at 144.

158. See Auletta, *supra* note 44, at 54.

159. See *id.* at 60; COMPAINE & GOMERY, *supra* note 54, at 69, 123, 160, 381; KRASILOVSKY & SHEMEL, *supra* note 42, at 4-5.

trade paperbacks the first year of publication (20% thereafter), and 40-50% for mass market paperbacks.<sup>160</sup> Meanwhile, personal computers and the Internet have dramatically cut the cost of reproduction and delivery of digital versions of creative content. Thus, online publishers are offering about 100,000 new titles a year at little cost under a print-on-demand system, even if the lion's share are not worth reading.<sup>161</sup> The MP3 standard compresses one minute of music to a mere one megabyte of data, which can be transmitted in about three minutes via a 56K modem (seventeen minutes for a five-minute song), while a whole album can be sent via a high-speed connection in eighteen minutes.<sup>162</sup> Even Hollywood films can be disseminated online over broadband connections.<sup>163</sup> Still, while younger consumers may soon rely primarily on e-versions, hard copies of most creations are likely to be quite popular for a long time, particularly for gifts.<sup>164</sup>

The fourth and often most important element of selling content is the enormous expense of marketing a work effectively. While the Internet already helps cut promotional costs by enabling publishers to offer free online access to excerpts of their books, music, or video,<sup>165</sup> or even an in-

160. See FELDMAN, *supra* note 44, at 24.

161. See Gayle Feldman, *Got a Book in You? More Companies Than Ever are Willing to Get it Out*, N.Y. TIMES, Mar. 1, 2004, at C6; Taub, *supra* note 57, at G1. Creators can also post shorter creations on weblogs or disseminate them via email. See Judith Shulevitz, *At Large in the Blogosphere*, N.Y. TIMES, May 5, 2002, § 9, at 31; Bob Tedeschi, *Internet Experts Wonder if Weblog Technology is a Powerful New Media Species, or Just Another Fad*, N.Y. TIMES, Feb. 25, 2002, at C6.

162. See DIGITAL DILEMMA, *supra* note 11, at 77. Real Audio and MP3.com also pioneered the use of streaming audio (and video). Whole bundles of all the songs on an album as well as the CD's artwork are increasingly available as zip files. See Neil Strauss, *A Boxed Set in One File? Online Music Finds a Way*, N.Y. TIMES, Feb. 25, 2002, at E1.

163. See Ku, *supra* note 13, at 303-04 (observing that this eliminates the need for publishers to finance this cost); Harmon, *supra* note 103, at G1 (discussing Morpheus and other video technologies).

164. The current generation of adults is likely to remain more comfortable with printed books and magazines. See generally W. Russell Neuman, *The Media Habit*, in ELECTRONIC PUBLISHING PLUS 5, 8-9 (Martin Greenberger ed., 1985); Matthew Rose, *E-Books Have a Big Future, But It's Unlikely to Come Anytime Soon*, WALL ST. J., Oct. 2, 2000, at B1. Still, e-books appear to be gaining popularity. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 128-29 (2002-03).

165. See *Authors, Publishers Say Book 'Em—Online*, USA TODAY, Feb. 7, 2002, available at <http://www.usatoday.com/life/cyber/tech/2002/02/07/books-online.htm> (last visited May 15, 2004); Matt Richtel, *Access to Free Online Music is Seen as a Boost to Sales*, N.Y. TIMES, May 6, 2002, at C6; Anthony Tommasini, *Click to Download Scores*

ferior quality copy of the whole work,<sup>166</sup> use of the traditional media, particularly television, remains crucial.<sup>167</sup> Promotional costs and their significance were already discussed in some detail in Section II.B, above. Increased use of the buyer-financed, Internet-empowered selection assistants, discussed in IV.A.4, however, could dramatically reduce these costs of publication.

A fifth publishing cost is the need to insure against the risk of failure. The unpredictability of consumer tastes makes investment in the production of creative content so risky that investors must be offered enormous prizes for their rare winners.<sup>168</sup> Publishers can partly reduce the cost of failure by using royalties rather than large advances,<sup>169</sup> but because many participants are unwilling to trust publisher judgments or accounting, they demand set fees based on expected revenues. This leads publishers to lose on most creative works.<sup>170</sup> Publishers also suffer from the effects of “the

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by *New American Composers*, N.Y. TIMES, Oct. 9, 2002, at E1 (discussing the American Music Center’s New Music Jukebox: [newmusicjukebox.org](http://newmusicjukebox.org)); Amazon.com, at <http://www.amazon.com> (last visited Apr. 29, 2004) (providing a function called “Look Inside,” which displays excerpts from selected books). Amazon is even experimenting with offering online text searches of books. See Lisa Guernsey, *In Amazon’s Text Search, a Field Day for Book Browsers*, N.Y. TIMES, Nov. 6, 2003, at G7.

166. See *infra* note 202

167. Even the dot.com companies recognize this, and they purchased most of the ads for the 2000 Super Bowl game. See Kathryn Kranhold, *The Real Action: Ad Bowl XXIV*, WALL ST. J., Jan. 28, 2000, at B1; see also Neil Strauss, *Forget Radio, Music Path to Success is TV, TV, TV*, N.Y. TIMES, Jan. 22, 2004, at E1.

168. See Scherer, *supra* note 65, at 15. The situation is somewhat analogous to that in the pharmaceutical industry. Although the revenues that drug companies earn on their biggest successes may appear obscene, those rewards may be justified by the enormous costs of failed projects. See Robert Pear, *Research Cost for New Drugs Said to Soar*, N.Y. TIMES, Dec. 1, 2001, at C1, (finding the cost of developing a new drug now averages \$802 million, according to the Tufts Center for the Study of Drug Development, <http://csdd.tufts.edu/NewsEvents/RecentNews.asp?newsid=6> (last visited May 15, 2004)).

169. Executive egos, however, may prevent this. See Pareles, *supra* note 61, §2, at 28. For a general discussion of sharing risks between publisher and creator see WATT, *supra* note 6, at 71-107.

170. See CAVES, *supra* note 40, at 113-14; PIERCE O’DONNELL & DENNIS MCDUGAL, *FATAL SUBTRACTION* (1992); Lunney, *supra* note 63, at 876-77. This yields lottery-like payout patterns. See CAVES, *supra* note 40, at 61-62, 102, 120 (estimating that 1/3 to 1/2 of independent films never even find distributors and that 76% of musicals and 80% of stage plays lose money); de Vany & Walls, *supra* note 40, at 285 (stating that films are among the riskiest products with their data showing an infinite variance); Lunney, *supra* note 63, at 878 n.205; Pareles, *supra* note 61 (stating that 90% of albums do not break even); Scherer, *supra* note 65, at 12-15. But see Breyer, *supra* note 15, at 296 n.66 (esti-

winner's curse," where the winning bidder for some creative work is the one that makes the most unrealistically high estimate of the value of a property, and thus suffers from this overpayment.<sup>171</sup> As noted above, copiers intending to sell hard copies do not avoid all of this risk, since they are forced to estimate future demand, competition, and prices, creating their own comparable risks.

Finally, publishers need to recover their cost of processing payments, i.e., transferring funds from the consumer to themselves. The use of credit cards and online payment systems that delegate the work to buyers (who may be aided by electronic passports) is reducing the cost of this process, while the emergence of new micro-payment technologies<sup>172</sup> should make it practical to collect even small fees and donations.

#### IV. SOURCES OF FINANCIAL REWARDS ABSENT § 106's BROAD PROTECTION AGAINST COPYING

To generate sufficient revenues to cover the costs of production and dissemination of all types of creative works, as just reviewed in Part III, there must be at least one viable business model for each media market segment. As the discussion below makes clear, many relevant business models can function effectively without § 106's prohibition against unauthorized copying. Rather, these business models rely on a combination of new and existing technologies, social norms, and copyright laws other than § 106's broad protection against unauthorized copying.<sup>173</sup>

This section attempts to present a comprehensive survey and conceptual assessment of the relevant business models for financing the creation of content.<sup>174</sup> Many of these methods depend primarily on technology, but

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mating that 85% of textbooks are profitable).

171. CAVES, *supra* note 40, at 142-43; Richard H. Thaler, *Anomalies: The Winner's Curse*, 2 J. ECON. PERSP. 191 (1988).

172. *See infra* note 235 and accompanying text.

173. This analysis of business models draws somewhat on Professor Lawrence Lessig's observation that human behavior is regulated by four interdependent constraints—architectures (technologies), social norms, markets (prices), and laws. LAWRENCE LESSIG, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998), in *CODE AND OTHER LAWS OF CYBERSPACE* 87-99 (1999) [hereinafter LESSIG, CODE]. Lessig's focus, however, was quite different than the one in this Article. He was concerned with how changes in architecture, social norms, and markets had changed the justification for laws or how one should interpret the Constitution. The National Research Council recognized the relevance of Lessig's four modalities to copyright. DIGITAL DILEMMA, *supra* note 11, at 52-54.

174. *See generally* Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE

social norms and some government funding and limited legal protection are also important. In addition, most involve selling creative content directly but some also rely on general, indirect payments like tips and donations. Most could apply to both electronic copies distributed online and physical copies distributed through traditional channels. But some would work only for one type of distribution or the other.

#### **A. Using Technology to Generate Revenues From Creative Works**

A publisher's ability to sell access to creative content depends largely on the existence of technologies that allow them to provide buyers with limited access to the content. Although publishers usually criticize new technologies as threatening their existing business models and requiring additional legal protection,<sup>175</sup> new media have repeatedly spawned unprecedented ways to convert the social value of creative works into revenues and profits.<sup>176</sup> For example, recording music on piano rolls, then vinyl disks, and so on enabled publishers to sell musical performances. The invention of motion pictures allowed many writers and producers of plays to sell performances of screenplays. In each case, the key to capturing new revenue was creating new business models to suit the new technologies.<sup>177</sup> For example, when developers introduced the first videocassette recorders (VCRs) in 1982, MPAA President Jack Valenti testified that "the VCR is to the motion picture industry and the American public what the Boston strangler is to the woman alone."<sup>178</sup> But the film industry adapted and by the 1990s a film's income from videotapes dwarfed all other revenue streams.<sup>179</sup>

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L.J. 1805 (1995).

175. See DIGITAL DILEMMA, *supra* note 11, at 78-79; Landes & Posner, *supra* note 5, at 330, 363. Copyright owners also commonly see the emergence of new technologies as an opportunity for them to supplement their rights. See David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 44-45 (1999).

176. See CED REPORT, *supra* note 80, at 18-22, 68-73.

177. See DIGITAL DILEMMA, *supra* note 11, at 177-79; see also GOLDSTEIN, *supra* note 22.

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

179. See COMPAINÉ & GOMERY, *supra* note 158, at 381, 411-22; Sharon Waxman, *Studios Rush to Cash in on DVD Boom*, N.Y. TIMES, Apr. 20, 2004, at E1. Similar situations have arisen in other market segments, such as publishing, sound recording, and television. See Menell, *supra* note 164, at 98-108.

In summary, new technologies have created the potential to dramatically reduce publisher costs—including marketing—enough to make it much more practical for new creators to finance publication without the broad protections of § 106.

1. *Pre-sales to Consumers*

Publishers can attempt to cover all of their costs by seeking that amount in prepayments from consumers. Of course, only certain types of content are likely to attract buyer interest in such an arrangement.

Pre-sales to distributors, rather than consumers, are already common in the film industry. Under pre-sale arrangements, production companies obtain financial commitments from foreign distributors, pay-TV networks, and home video before production even starts,<sup>180</sup> although they generally only cover a portion of a publisher's total costs. Similarly, newspaper and magazine publishers generally only recover a portion of their total costs from their subscribers. For other types of creative content, the Internet appears to make it practical to pre-sell in two ways: a) specific content to consumers before it is even produced and b) give consumers discretion to credit their prepayment to one of a number of competing works, after the works have been completed. The first of these pre-sale arrangements, however, is generally only practical for creators with large and enthusiastic fan bases. Furthermore, pre-sale arrangements in general are vulnerable to free riders who may decline to pre-buy, with the hope that others will pay the full cost and permit the free rider to get access at no cost.<sup>181</sup>

a) *Pre-sales of a Specific Creative Work*

The first type of pre-sale involves a specific single creative work, which the consumer makes a pre-production commitment to purchase once it is available. The Internet makes it practical for publishers to directly contact prior purchasers of a creator's work or others who appear to have enjoyed it and to solicit them directly and relatively inexpensively for pre-sales. For example, the popular British band Marillion collected an e-mail list of 25,000 fans and successfully solicited them for £200,000 in pre-sale orders for a £16 album in just a few weeks.<sup>182</sup> Another example is Stephen King's online serial publication of chapters of a new novel, *The*

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180. See VOGEL, *supra* note 41, at 61. Theater and concert producers also pre-sell season subscriptions.

181. See Breyer, *supra* note 15, at 303-04.

182. Marillion sold 10 million albums and, had a huge hit with "Kayleigh." See MICHAEL LEWIS, *NEXT: THE FUTURE JUST HAPPENED* 139-44 (2001).



*Plant*. Although the payment system resembled a “shareware” model because he requested voluntary payments after receipt of a chapter, the online publication was also a form of pre-sale because King made his offering of new chapters contingent on receiving sufficient payments for previous chapters. King’s effort was profitable but only partially successful: the percentage of downloaders who paid was below King’s threshold and he stopped publishing online.<sup>183</sup>

Although King’s online experiment shows that the pre-sale model is susceptible to free riding, the model has attracted the interest of some artists.<sup>184</sup> Under this type of pre-sale, a publisher or artist would post online the total dollar amount it required to finance and make a reasonable profit on a new creation. A deadline for meeting this goal could be set and consumers could be asked to pay either a fixed price for a single order or to make a variable contribution that would help meet the goal.<sup>185</sup> Even potential free riders would have a strong incentive to contribute some amount to ensure that the new work they desired was produced, at least if total pre-sales appeared likely to fall short of the total needed. Creators and publishers could use the techniques of bidding sites, like eBay, to capture funds by allowing bidders to choose last minute default strategies that empowered them to offer an amount as high as they were willing to pay if the work they desired would otherwise not be produced.<sup>186</sup>

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183. King’s initial arrangement was to publish chapters of *The Plant* and request \$1 donations from each reader for each chapter. King would publish subsequent chapters as long as 75% of those downloading paid for the privilege. *See Comment: Publishing: Not So Fast*, WALL ST. J., Aug. 2, 2000, at A20. After less than 50% of downloaders paid for the sixth installment, King stopped writing. Still, King apparently made a profit of \$450,000 on revenues of \$720,000 from the project. *Marketing & Media*, WALL ST. J., Feb. 8, 2001, at B10; *see also* Lunney, *supra* note 63, at 863-64. There is, however, a danger that some will game the system. *See* Breyer, *supra* note 15, at 303-04.

184. *See* Chris Nelson, *Pearl Jam, On its Own, Seizes the Moment and Sells CD on the Web*, N.Y. TIMES, Nov. 17, 2003, at C10; Charles C. Mann, *The Year the Music Dies*, WIRED, Feb. 2003, at 90, 93 (Phish, Prince, and Wonderlick). It has also attracted the interest of a middleman. *See* OpenCulture.org, at [http://web.archive.org/web/\\*/http://www.openculture.org/](http://web.archive.org/web/*/http://www.openculture.org/) (last visited May 6, 2004).

185. Conditionally binding assurance contracts are in widespread use in magazine and book sales, *see* Palmer, *supra* note 19, at 299, as is holding funds in escrow. *See* John Kelsey & Bruce Schneier, *The Street Performer Protocol and Digital Copyrights*, FIRST MONDAY, June 1999, 8-10, at [http://www.firstmonday.dk/issues/issue4\\_6/kelsey/](http://www.firstmonday.dk/issues/issue4_6/kelsey/) (last visited May 15, 2004); *see also* Diane Leenheer Zimmerman, *Authorship Without Ownership: Reconsidering Incentives in a Digital Age*, 52 DEPAUL L. REV. 1121, 1150-51 (2003).

186. This would help if insufficient funds were promised, although the real demand exceeded the cost. *See* Breyer, *supra* note 15, at 304; John Perry Barlow, *The Economy of*

As seen with the Marillion and King examples, this type of pre-sale arrangement is most suitable for creators that are already well-known, but lesser-known creators could also use this arrangement if they secured recommendations from critics or other institutions whose judgments have earned credibility among consumers. Subscriptions to magazines follow this model since the consumer is pre-purchasing a package of articles, often from unknown writers, based on the reputation of the publisher.

Another version of pre-sales of specific works would enable publishers to allow buyers to reduce their risks by basing the price ultimately charged on the quality of the reviews a new work received. Thus, consumers would commit to pay some maximum price, but if the “quality” of the offering was below some designated level they would be due a specified refund. For example, an album could be priced for presale at varying price levels depending on whether a designated reviewer rated its artistic quality with 3, 2, or 1 “stars.”<sup>187</sup>

b) Discretionary Pre-sales

The second type of pre-sale would give buyers a bit more discretion. Buyers would merely commit to purchase one of a set of content packages. For example, textbook publishers would designate a webpage for displaying all of the potentially competing textbooks that they were considering publishing for a particular course. They would also indicate on the webpage how much total buyer demand for the set of texts would be needed to trigger them to commission one or more relevant texts. Thus, one publisher might be willing to commission one freshman-level, advanced algebra textbook if demand exceeded \$2 million and a second if demand exceeded \$3.5 million. Schools desiring to use a new advanced algebra would then commit to contribute some total amount, not counting printing costs, to purchase copies of one of the relevant available texts. To the extent that schools saw that total demand was insufficient to trigger the commissioning of any new texts they would have to decide whether to live with that or to raise their contributions. If they wanted to be able to choose

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*Ideas: A Framework for Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, [http://www.wired.com/wired/archive/2.03/economy.ideas\\_pr.html](http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html) (last visited May 15, 2004).

187. To avoid delegating too much power to any one review, prices could depend on how many of a specified group of reviewers gave the content a specific rating. Reliance on a large enough group would dilute the power of any one critic and make bribery less likely. Another way for trusted entities to reduce the risks of corruption without the need for too many critics would be for the entities to select a few expert critics and announce results without disclosing which experts they relied upon for the particular work.

from multiple texts they would have a strong incentive to help insure that total commitments reached the level needed to trigger that number of texts from publishers. This mechanism would replace the current “spot market” (where purchasers are made on an “as needed” basis) in textbooks with contracts that, while discretionary, also guarantee revenues to some publishers without dampening publisher incentives to compete.<sup>188</sup>

## 2. *Versioning and Offering Services in Place of Products*

Publishers can also increase their revenues from the sale of creative work by setting different prices for different versions of it,<sup>189</sup> that is, discriminatory prices, which take advantage of some consumers’ willingness to pay more to get access to superior forms of the desired content. For example, publishers release hardbound versions of novels before cheaper paperback versions to capture revenues from those willing to pay more for earlier access. New technologies are increasing their ability to offer multiple versions of content. Film studios have long taken advantage of such prior technologies, and most now generally maximize their revenues by releasing a film first to theaters, then on videocassettes/DVDs, next on pay-per-view, then on pay cable, and finally on network TV.<sup>190</sup>

Creators can already earn substantial fees for live performances even when free recordings are available.<sup>191</sup> Thus, the Grateful Dead relied substantially on compensation for their live performances while encouraging their fans to make and circulate bootleg recordings.<sup>192</sup> Celebrity journalists already earn significant “entertainer” fees for presenting news analyses in

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188. The website CollabNet, at <http://www.collab.net> (last visited Apr. 29, 2004), already occasionally hosts markets of this type to finance new software.

189. See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 53–81 (1999) (discussing versioning strategies).

190. See CAVES, *supra* note 40, at 168-69; VOGEL, *supra* note 41, at 84-85; David Waterman, *Prerecorded Home Video and the Distribution of Theatrical Feature Films*, in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY 221 (Eli Noam ed., 1985).

191. See Ku, *supra* note 13, at 308-09; Brett May & Marc Singer, *Unchained Melody*, MCKINSEY Q., No. 1, 2001, at 128, 136-37. *But see* CAVES, *supra* note 40, at 66 (describing how in the 1960s, touring pop groups received extensive local airplay yet had several money-losing tours); Healey, *supra* note 42 (“While concerts can sustain an established band with a fervid national following, new artists generally don’t make money when they venture away from home.”). Small “house concerts” may also be profitable. See Eric Brace, *House Music*, WASH. POST, Oct. 25, 2002, at T32. Schools and students pay academics dramatically more for their live presentations of textbook content (teaching) than for the creations themselves.

192. See Ku, *supra* note 13, at 308-09; Barlow, *supra* note 186.

live speeches.<sup>193</sup> Likewise, the superior audio and visual experience of theatrical movie showings, particularly for films with cutting edge special effects or lush scenery,<sup>194</sup> is likely to be substantially more attractive than even free bootlegged DVDs of the film. Although the use of special glasses and polarized projections to produce three-dimensional images in movie theaters has not yet proved to be a practical offer, it is probably not long before holograph technologies may enable theaters to offer versions of a creative work that are both highly valued by consumers and too expensive and impractical for copiers to attempt to duplicate.

New technologies now allow creators to offer consumers “customized” versions of their works to meet the particular aural or visual constraints of the buyer’s environments or tastes.<sup>195</sup> Creators may offer consumers enhanced versions of their work that permit consumers to “participate” in the work.<sup>196</sup> The technology of karaoke already enables consumers to inject their voices into a creative work. The economical practicality of customized printings of books can permit consumers to replace a character in a story with someone they want to surprise with a gift. Future technologies should permit consumers to insert their faces and bodies into films. As Ithiel de Sola Pool observed nearly two decades ago, publishers in some media industries could transform their business from providing a *product* to providing a *service*: enhanced access to content.<sup>197</sup>

In certain markets, publishers could also offer consumers supplementary content that adds value to the original work, including commentary on a film, book, or song, or crossword puzzle hints,<sup>198</sup> Access in multiple for-

193. See FALLOWS *supra* note 115, at 88. *But see id.* at 103-28 (concerning ethical issues).

194. These may soon be further enhanced by IMAX technology. See Lyman, *supra* note 152. IMAX technology allows viewers to feel as if they are a part of the film, as opposed to merely viewing the film. *IMAX® Cinema*, Science Museum, at <http://www.sciencemuseum.org.uk/imax/imaxtechnology.asp> (last visited Apr. 29, 2004).

195. See Kevin Kelly, *Where Music Will Be Coming From*, N.Y. TIMES, Mar. 17, 2002, § 6 (Magazine), at 29, 31.

196. Artwork that allowed the purchaser to participate would be another special option. See Matthew Mirapaul, *Selling and Collecting the Intangible, at \$1,000 a Share*, N.Y. TIMES, Apr. 29, 2002, at E2 (discussing the sale of “shares” in an online work to owners who can alter the work).

197. See Ithiel de Sola Pool, *Whither Electronic Copyright*, in ELECTRONIC PUBLISHING PLUS 217, 226-27 (Martin Greenberger ed., 1985); see also Nimmer et al., *supra* note 175, at 35; Barlow, *supra* note 186; Steve Lohr, *An Internet Pioneer of the 90’s Looks to a Future in Software*, N.Y. TIMES, June 17, 2002, at C1 (discussing the licensing of Op-ware).

198. See Chris Nelson, *Trying To Sell CDs by Adding Extras*, N.Y. TIMES, Oct. 6,

eign language options is already often available. For some other works, creators might also offer enhanced access in the form of linked sets of content that permit easy jumping between or within works of scholarship or even art.<sup>199</sup>

In response to copiers, authorized online music services may publicize their comparative advantages (and justification for higher prices): quick access to reputable copies of music.<sup>200</sup> These authorized sources may become particularly significant if free online content is commonly infected with harmful viruses, adware, or fakes.<sup>201</sup> In certain markets, buyers are also often willing to buy clean hard copies even of content, such as newspapers or books, available free online.<sup>202</sup>

### 3. Advertising

Publishers have also helped finance creative content by selling advertising, including display ads in newspapers and magazines, television commercials and product placements within television shows and movies. Such media industry advertising currently totals about \$130 billion annually.<sup>203</sup> While some new technologies are hurting this business model, oth-

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2003, at C7; Alex Salkever, *The Battle of the Online Content Models*, BUSINESSWEEK ONLINE (May 13, 2002), <http://www.businessweek.com/> (noting that the N.Y. TIMES sells access to crossword puzzle hints and “TimesTalks Online” for \$5.95 per stream).

199. See Matthew Mirapaul, *Today’s Publishing: Better by the Book or by the Web?*, N.Y. TIMES, Feb. 4, 2002, at E2 (discussing the presentation of stories as a “dynamic and kinetic experience”).

200. See DIGITAL DILEMMA, *supra* note 11, at 80-81; Amy Harmon, *What Price Music?*, N.Y. TIMES, Oct. 12, 2003, § 2, at 1; John Schwartz & John Markoff, *Power Players: Big Names are Jumping Into the Crowded Online Music Field*, N.Y. TIMES, Jan. 12, 2004, at C1.

201. See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 583-85 (2003); Andrew Ross Sorkin, *Software Bullet is Sought to Kill Musical Piracy*, N.Y. TIMES, May 4, 2003, § 1, at 1 (discussing RIAA efforts at sabotage); John Schwartz, *When Free Isn’t Really Free*, N.Y. TIMES, Nov. 23, 2003, § 3, at 1.

202. Even when newspapers are available free online, consumers generally prefer hard copies. Hsiang Iris Chyi & Dominic L. Lasorsa, *An Explorative Study on the Market Relation Between Online and Print Newspapers*, 15 J. MEDIA ECON. 91 (2002). This also appears to apply to books. See LESSIG, *CULTURE*, *supra* note 88, at 284-85 (discussing other books, while his own book also illustrates the point); Eric Flint, *Prime Palaver #6*, Apr. 15, 2002, available at <http://www.baen.com/library/palaver6.htm> (last visited May 15, 2004). It may also apply to music. See Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. TIMES, Sept. 22, 2003, at C1; *Peer-to-Peer Music Trading: Good Publicity or Bad Precedent?*, Knowledge@Wharton, Oct. 9, 2002, available at <http://knowledge.wharton.upenn.edu/articles.cfm?catid=4&articleid=635&homepage=yes>.

203. This includes about \$45 billion for newspapers, see *Annual Newspaper Advertis-*

ers are helping to increase its effectiveness. Television remote controls, which enable viewers to “zap” commercials with the mute button or avoid them by channel surfing, have long distressed TV advertisers.<sup>204</sup> Paramount Pictures has even challenged the legality of the TiVo and ReplayTV digital video recorder (DVR) technologies, which empower viewers to automatically eliminate commercials during playback or even when watching a live broadcast on a slightly-delayed (almost real time) basis.<sup>205</sup> Similarly, new online “screens” enable net surfers to view web pages stripped of their commercial messages.<sup>206</sup> Of course, advertisers have long responded to these technologies by offering commercials that are too entertaining for viewers to want to skip.<sup>207</sup>

Publishers have also long recognized the value of “product placements,” which capture audiences by embedding advertised products in entertainment content.<sup>208</sup> This practice may increasingly pervade books<sup>209</sup>

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*ing Expenditures*, Newspaper Assoc. of Am., at <http://www.naa.org/artpage.cfm?AID=1566&SID=1022> (last updated Feb. 2004); \$42 billion for television programs, see *2003 TV Ad Revenue Figures*, Television Bureau of Advertising, at <http://www.tvb.org/central/index.html> (last visited Apr. 29, 2004); \$20 billion for radio, see *Radio Advertising Revenues*, Radio Advertising Bureau, at <http://www.rab.com>; and \$18 billion for magazines, see *Magazine Advertising Revenue and Pages for PIB Measured Magazines*, Magazine Publishers of Am., at [http://www.magazine.org/Advertising\\_and\\_PIB/Ad\\_Trends\\_and\\_Magazine\\_Handbook/1238.cfm](http://www.magazine.org/Advertising_and_PIB/Ad_Trends_and_Magazine_Handbook/1238.cfm) (last visited Apr. 29, 2004). It does not include the increasing amounts collected by movie theaters.

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

205. See Amended Complaint, *Paramount Picts. Corp. v. ReplayTV, Inc.*, Civ. No. 01-09358 (filed C.D. Cal. Nov. 21, 2001) ¶ 17, available at [http://www.eff.org/IP/Video/Paramount\\_v\\_ReplayTV/20011121\\_paramount\\_amd\\_complaint.pdf](http://www.eff.org/IP/Video/Paramount_v_ReplayTV/20011121_paramount_amd_complaint.pdf) (last visited May 15, 2004); LEWIS, *supra* note 182, at 165-90; Eric A. Taub, *Reply TV’s New Owners Drop Features That Riled Hollywood*, N.Y. TIMES, July 21, 2003, at C3.

206. See Saul Hansell, *As Consumers Revolt, a Rush to Block Pop-Up Online Ads*, N.Y. TIMES, Jan. 19, 2004, at C1; David Pogue, *Puncturing Web Ads Before They Pop Up*, N.Y. TIMES, June 27, 2002, at G1.

207. See Bill Carter, *NBC is Hoping Short Movies Keep Viewers From Zapping*, N.Y. TIMES, Aug. 4, 2003, at C1; Joe Flint, *Super Bowl’s 30-Second Ad Rush: Forget Pigskin; Real Action For Sunday’s Game Lies in What Commercials Fly*, WALL ST. J., Jan. 26, 2001, at B1. Broadcasters even offer packages comprised solely of creative ads, see, e.g., *Superbowl’s Greatest Commercials*, CBS Broadcasting Inc., [http://www.cbs.com/specials/2004\\_superbowl\\_commercials](http://www.cbs.com/specials/2004_superbowl_commercials) (last visited Apr. 29, 2004); *Classic TV*, About.com, at <http://classictv.about.com/cs/commercials> (last visited Apr. 29, 2004).

208. See Steven L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 301-11 (1992); Stuart Elliot, *On ABC, Sears Pays to be Star of New Series*, N.Y. TIMES, Dec. 3, 2003, at C1;

and other content.<sup>210</sup> The Internet, however, is increasingly allowing product placements to give audiences the chance to make an actual impulse purchase of such products, e.g., fashions worn on *Sex in the City* and music heard on *Dawson's Creek*.<sup>211</sup> These offerings are not yet seamless, but technology should soon permit this, as well as enabling consumers to gain quick access to more information about a product of interest.<sup>212</sup> This should make product placements substantially more valuable to advertisers and thus a larger source of funding for creators.

Second, media firms are improving their ability to target consumers with customized or enhanced ads based on the user's interaction with the medium.<sup>213</sup> Because such ads are of more interest and value to consumers, they will be less disturbing, and this should make advertisers willing to pay higher fees. One problem with relying on an advertiser-support business model, however, is the well recognized danger that advertisers will use their financial influence to distort editorial or artistic content.<sup>214</sup>

#### 4. Consumer Selection Assistants

The Internet facilitates a shift away from biased, seller-financed marketing messages and towards consumer financed selection assistance that serves the individual customer's personal tastes. The Internet already pro-

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Brian Steinberg, *Chapstick Chiller: Lip Balm Lands Role in Scary Movie*, WALL ST. J., Jan. 23, 2002, at B7C ("Having characters eat a particular food product can cost between \$250,000 and \$500,000 [or more].").

209. See Snyder, *supra* note 208, at 308; David D. Kirkpatrick, *Now, Many Words From Our Sponsor*, N.Y. TIMES, Sept. 3, 2001, at A1 (reviewing Fay Weldon's *THE BULGARI CONNECTION*, a novel at the center of much controversy for featuring paying product placements). Advertisers even sponsor school materials. See David D. Kirkpatrick, *Snack Foods Become Stars of Books for Children*, N.Y. TIMES, Sept. 22, 2000, at A1.

210. See, e.g., Kelly, *supra* note 195, at 31.

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

212. See Amy Harmon, *Skip-the-Ads TV Has Madison Ave. Upset*, N.Y. TIMES, May 23, 2002, at A1 (noting that DVRs can offer expanded versions of ads).

213. See Bob Tedeschi, *If You Liked the Web Page, Try the Ad*, N.Y. TIMES, Aug. 4, 2003, at C1.

214. C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 44-69 (1994); BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY*, at xxv-xxvii, 152-73 (6th ed. 2000) (describing the influence advertisers have on content).

vides buyers with easy and often free access to recommendations from friends via personal e-mail, listserves, and blogs. Cyberspace is also fostering the growth of entities seeking to offer expert recommendations as “selection assistants” (SAs).<sup>215</sup> Previously, personal shopping consultants were too expensive for most shoppers. The Internet, however, by eliminating the need for the consultant to waste time on traveling to clients and also expanding their potential customer basis worldwide, thereby enables them to amortize their research costs over many more customers. This in turn permits SAs to charge lower rates that should be cost effective for increasing numbers of consumers eager to save time but still find their best choices. Even lower prices should be available for automated offerings.

SAs can offer more traditional services based on their exhaustive knowledge of all the relevant offerings available in a market segment, the most relevant features of those offerings, and the consumer’s express preferences for such features.<sup>216</sup> Yet technologies that allow databases of consumer shopping data to be aggregated and manipulated are also increasingly enabling SAs to offer consumers exciting new “collaborative filtering” services. Collaborative filtering uses data about consumers’ prior reactions to creative works in a category to predict their responses to other content by searching a large database of consumer purchases and reactions for other individuals who had very similar, if not identical, responses to those works. The SA can then examine this similar-tastes group to identify their reactions to other products, suggesting which to recommend to the customer and which to warn them to avoid. Such a system is generally much more accurate than any mere set of personal friends or individual experts for predicting one’s likely reaction to a particular creative work.<sup>217</sup> This taste-driven marketing then may enable lesser known creators to

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215. See Mark S. Nadel, *The Consumer Product Selection Process in an Internet Age: Obstacles to Maximum Effectiveness and Policy Options*, 14 HARV. J.L. & TECH. 183, 185-87 (2000), updated version available at <http://www.ssrn.com/abstract=247818>. The emergence of this class of entities produces a dramatic shift in control over the market from producers to consumers. See, e.g., Volokh, *supra* note 174, at 1834; Zimmerman, *supra* note 185, at 1166.

216. SAs could also help consumers to develop a customized, explicit “search profile” comprised of a formula that includes the attributes most relevant to an individual’s choice, the relative importance of those attributes, and which values of the latter to seek. These profiles should be able to precisely identify the most desirable product for each individual in a particular market. See Nadel, *supra* note 215, at 246-62.

217. See Nadel, *supra* note 215, at 240-44.



come to the attention of their future fans without enormous promotional campaigns.<sup>218</sup>

Unfortunately, the euphoria and unsustainable business models associated with the e-commerce bubble led consumers to expect SA services to be free, forcing their providers to seek revenues from advertisers and commissions on the goods they helped sell.<sup>219</sup> This made it very difficult for SAs to place the interests of buyers ahead of those of the sellers who paid them. With excess free capital gone, and thus few, if any, firms willing to provide high value advice free of charge, consumers are beginning to be willing to pay for valuable information online. As this willingness increases, SAs should be able to blossom.<sup>220</sup>

In addition to fees from buyers, SAs—like financial auditors—might charge creators for evaluating creations and offering detailed reviews.<sup>221</sup> Assuming that these fees were reasonably low, new creators might even warmly welcome this alternative to current marketing practices, which are expensive and leave many dependent on publishers for financial and logistical support. Meanwhile, as more consumers relied on SAs, unsolicited marketing would become less cost-effective.<sup>222</sup>

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218. See *Utah's Digital Economy and the Future: Peer-to-Peer and Other Emerging Technologies: Field Hearings Before the Senate Judiciary Comm.*, 106th Cong. (2000) (testimony of Peter Breinholt), available at [http://judiciary.senate.gov/oldsite/1092000\\_pb.htm](http://judiciary.senate.gov/oldsite/1092000_pb.htm).

219. Nadel, *supra* note 215, at 203.

220. See Volokh, *supra* note 174, at 1816, 1830; Michael E. Porter, *Strategy and the Internet*, HARV. BUS. REV., Mar. 2001, at 63, 76–77; Matt Richtel, *A Shift Registers in Willingness to Pay for Internet Content*, N.Y. TIMES, Aug. 1, 2002, at C4; Neil Strauss, *Online Fans Start to Pay the Piper*, N.Y. TIMES, Sept. 25, 2002, at E1.

221. See Volokh, *supra* note 174, at 1830. ForeWord Magazine offers publishers the opportunity to have their book reviewed online for \$295. ForeWord Reviews, at <http://www.forewordreviews.com> (last visited Apr. 27, 2004).

222. For example, how much would digital camera makers spend on advertising if they knew that the vast majority of consumers were relying on *Consumer Reports* to determine their choices? Large marketing expenditures, which raised product costs, and thus prices, would hurt a producer's *Consumer Reports* ratings and thus probably reduce sales.

5. *First Mover or Lead Time Advantage for Hard Copies*

Publishers generally enjoy a “first mover” or lead-time advantage<sup>223</sup> over copiers in the sale of physical copies. During the period after they release a new work and before copiers can make copies available to consumers, publishers can take two important actions. First, publishers can take advantage of any significant consumer demand for immediate consumption of a new work while it is a hot topic of conversation.<sup>224</sup> Such demand leads consumers to stand in long lines to see the newest movie or to buy a hardcover book rather than waiting for a cheaper paperback edition. It also leads businesses to pay premiums for access to databases that offer the quickest, e.g., real time, access to new data or stories.

Second, a publisher that can accurately forecast demand, efficiently reproducing its works, and pricing aggressively, can probably deter copiers by producing the full output necessary to meet anticipated demand and publicizing this fact. Once copiers knew that the publishers’ variable cost of selling one more copy would include zero production costs, they would realize that they could not compete and rational copiers would refrain from entering the market. Most would understand that any copies they produced would create an excess supply and trigger a price war that would be unprofitable to all.

Historically, the initial publisher often responded with an analogous strategy: it demonstrated that if it faced copiers it would issue “fighter” or “killer” editions—extremely cheap versions designed to drive prices below the copiers’ costs. Although this behavior was self-defeating in the short run, it served to deter future copying of other works.<sup>225</sup> In fact, first mover status was once so advantageous in the book industry that even be-

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223. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 38 cmt. c (1995) (“The originator of valuable information or other intangible assets normally has an opportunity to exploit the advantage of a lead time in the market. This can provide the originator with an opportunity to recover the costs of development and in many cases is sufficient to encourage continued investment.”); MACHLUP REPORT, *supra* note 20, at 38-39 (describing the rationale behind allowing headstart advantages via patents). See generally William T. Robinson et al., *First-Mover Advantages from Pioneering New Markets: A Survey of Empirical Evidence*, 9 REV. INDUS. ORG. 1 (1994).

224. See CAVES, *supra* note 40, at 277-78 (“[O]nly a few creative goods at a time bask in the limelight of buzz.”); *supra* note 46 and accompanying text.

225. See Hurt & Schuchman, *supra* note 17, at 428; Plant, *supra* note 7, at 173-75. Although the antitrust laws limit this kind of behavior, it is quite effective. See Breyer, *supra* note 15, at 300-01 (discussing restrictions); Hurt & Schuchman, *supra* note 17, at 427 (discussing effectiveness). Publishers also used a collusive “courtesy principle” to avoid competition before it collapsed. See VAIDHAYANATHAN, *supra* note 12, at 52-53.

fore the United States granted copyright protection to books published abroad, U.S. publishers paid foreign publishers to secure an early, first edition.<sup>226</sup> English authors often received more from the sale of their books to American publishers than from their British royalties.<sup>227</sup>

In addition to deterring entry with “full” production, publishers could also deter entry by setting prices just below that sufficient to attract copiers (“limit pricing”).<sup>228</sup> Copiers typically will only see entry as attractive if they expect the publisher to maintain high prices that generate substantial profit margins, giving the copiers an umbrella price to operate under. Although publishers might find it desirable to tolerate some unauthorized copying in exchange for a slightly higher price point,<sup>229</sup> publishers could also undercut copiers by setting a high initial price for the work and then reducing it to little more than cost once the copiers entered the market.

Many believe that any first mover advantages due to prior technologies have been eliminated by newer technologies, but this is not quite so. It is certainly true that DVD copies of a blockbuster movie may turn up on the street days before it actually opens in the theaters. MP3’s of a new album can pop up on peer-to-peer networks weeks before the album’s release date. Illegal copies of best-selling books, like those of J.K. Rowling, are mass produced in third world countries and sold at roadside vendors for a few dollars. Still, a large portion of the consumer market does not have effective access to these copies and thus are still inclined to buy from traditional retailers. Also, some of these pre-release activities would be prohibited under the truncated version of § 106, discussed below.

#### 6. *Self-help Technologies: DRM and Tip “Boxes”*

While some new technologies make it easier for consumers to make unauthorized copies, others make it easier for publishers to protect against such copying or to collect payments from willing consumers. Examples of

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226. See Plant, *supra* note 7, at 172-73.

227. Breyer, *supra* note 15, at 299-300; Plant, *supra* note 7, at 172-73.

228. See SCHERER, *supra* note 20, at 233-36; see also WATT, *supra* note 6, at 68 (“All piracy can be eliminated with a suitable pricing strategy.”).

229. See WATT, *supra* note 6, at 58 (“It is not so difficult to imagine cases in which piracy can be beneficial to the producers of originals.”); Fernando W. Nascimento & Wilfried R. Vanhonacker, *Optimal Strategic Pricing of Reproducible Consumer Products*, 34 MGMT SCI. 921 (1988). Copying that accelerates network effects may produce net benefits. Lisa N. Takeyama, *The Welfare Implications of Unauthorized Reproduction of Intellectual Property in the Presence of Demand Externalities*, 2 J. INDUS. ECON. 155 (1994). For example, a single fax machine is worthless, but its value increases as more individuals use them. See *id.*

the second include both hardware and software digital rights management (DRM) technologies, which can limit how many files a subscriber may download or how long a copy remains usable.<sup>230</sup> Although these technologies are vulnerable to hacking,<sup>231</sup> those that are reasonably robust or respected because of social norms can substantially reduce unauthorized copying. Indeed, since DRM depends on “code” to protect content, some fear that “[c]ode can, and increasingly will, displace law as the primary defense of intellectual property in cyberspace.”<sup>232</sup> In fact, excessive technological content protection could be even more detrimental to creative output than current copyright law. These excesses should be addressed by law.<sup>233</sup>

Technology like the Internet also makes it much easier for consumers to contribute directly to creators whose work they consume or admire. Artists can set up their own websites to accept payments or direct their audi-

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230. Some DRM technologies include data shields, encryption technologies, and watermarks. See DIGITAL DILEMMA, *supra* note 11, at 153-76, 282-303; Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137 (1997); Tom Di Nome, *You Listen, You Pay: Post-Napster Music Services*, N.Y. TIMES, Mar. 7, 2002, at G9; Amy Harmon, *Studios Using Digital Armor to Fight Piracy*, N.Y. TIMES, Jan. 5, 2003, § 1, at 1; Eric A. Taub, *DVDs Meant for Buying but Not for Keeping*, N.Y. TIMES, July 21, 2003, at C1 (describing expiring discs).

231. See, e.g., Amy Harmon, *Students Learning to Evade Moves to Protect Media Files*, N.Y. TIMES, Nov. 27, 2002, at C3; Mann, *supra* note 12, at 44-48. Mann quoted Internet security consultant Bruce Schneier, author of SECRETS AND LIES (2000):

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

*Id.*; see also Pool, *supra* note 197, at 221 (“At any given moment, the race of technology may seem to shift in favor of hidiers over seekers, but there is little reason to expect hidiers to win a decisive advantage in the long term.”); Matt Richtel, *Digital Lock? Try a Hairpin*, N.Y. TIMES, May 26, 2002, § 4, at 12.

232. See LESSIG, CODE, *supra* note 173, at 126; Kenneth W. Dam, *Self-Help in the Digital Jungle*, in EXPANDING THE BOUNDS OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 110-11 (Rochelle Cooper Dreyfuss et al. eds., 2001).

233. See CED REPORT, *supra* note 80, at 38-39, 74-77; Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace*, 28 CONN. L. REV. 981, 999-1000 (1996).

ences to clearinghouse websites that will forward payment to the artists.<sup>234</sup> Debit cards and new micro-payment technologies should make even small online payments more economical.<sup>235</sup> This could make it practical for respected pundits to offer access to their columns or new musicians to individual songs for, maybe, 25 cents each. It would also provide the technological backbone for the tip-oriented business model discussed in greater detail in Part IV.B.

### 7. *Ancillary Hardware Sales*

In the early days of radio, before the business model of advertiser-supported content was introduced, content was broadcast free by firms seeking to profit from the sale of radio receivers.<sup>236</sup> Expanding on this model, hardware manufacturer industry groups might find it cost-effective to increase customer demand for their products by vertically integrating into or financing creative content for use in their product.<sup>237</sup> Currently, the owners of Broadway theaters often invest in very risky new shows to give value to what might otherwise be empty seats in their theaters. Even when theater owners lose money producing the play, they may make enough from renting their theaters to more than compensate for this. Of course, theater producers generally only do so for productions in their own theaters, making this example less relevant for other industries. Still, to the extent an industry trade association were to use persuasion to encourage voluntary, industry-wide contributions to such content, this could be a source of financing for some new forms of contents.

## **B. Social Norms: Tipping, Donations, Dues, and Reciprocity**

Publishers can and should do more to tap the enormous potential of social norms<sup>238</sup> for providing a funding alternative to the current socially

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234. Examples of clearinghouse websites include Fairtunes and Tipster, or even Amazon's tip jar. *What We Do*, at [http://web.archive.org/web/\\*/www.fairtunes.com/about/description.jsp](http://web.archive.org/web/*/www.fairtunes.com/about/description.jsp) (last visited May 1, 2004); *What is Tipster*, The Tipster Protocol, at <http://tipster.weblogs.com/tipster> (last visited Apr. 29, 2004); *Amazon Honor System*, Amazon.com, at <http://www.amazon.com/honor> (last visited Apr. 29, 2004).

235. See Anne Eisenberg, *A Virtual Cash Register Rings Up Tiny Transactions*, N.Y. TIMES, Jan. 8, 2004, at G5; Bob Tedeschi, *Companies Are Trying Once Again to Find Ways to Turn Penny-Ante Charges for Web Viewing into Profits*, N.Y. TIMES, July 21, 2003, at C5; Jari Kytöjoki & Vesa Kärpijoki, *Micro-payments - Requirements and Solutions* (Jan. 10, 2000), at <http://www.hut.fi/~vkarpijo/netsec99> (last visited May 15, 2004).

236. See Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J. L. & TECH. 287, 306-07 (1998).

237. See Schwartz & Markoff, *supra* note 200.

238. "Social norms" is a relatively young field of law and economics, but represents a

harmful broad legal protection of § 106. Instead of trying to handicap new technologies and scare consumers into avoiding the use of others by threatening lawsuits, publishers should use their experience and expertise in marketing to teach consumers to view reasonable payments to creative artists as only fair and the right thing to do.<sup>239</sup> Publishers should encourage a stronger social custom of tipping, donating to, or otherwise supporting valued content creators and their publishers.

Individual consumers already support artistic creations in many ways. Some people donate cash to street musicians and at “pay what you can” live performances and museums. Others contribute money to public broadcasters and to creators of shareware computer programs.<sup>240</sup> In fact, consumers are often willing to pay more than they must in order to support some greater good. Just as many are willing to pay a voluntary “surcharge” for products “made in America” by “union labor,” or otherwise to support “reasonable” payments to deserving workers,<sup>241</sup> so too they should

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powerful phenomenon. *See generally* ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Robert C. Ellickson, *The Market for Social Norms*, 3 *AM. L. & ECON. REV.* 1, 3 (2001) (defining a social norm as “a rule governing an individual’s behavior that third parties other than state agents diffusely enforce by means of social sanctions”); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *MICH. L. REV.* 338 (1997).

239. *See* Barlow, *supra* note 186 (“unwritten code . . . ethics . . . understandings”); David Lange, *Reimagining the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 463, 471 (2003). Some observe that the music industry’s biggest hurdle to stop piracy throughout the world is cultural, not legal. *See* Amy Harmon, *CD Technology Stops Copies, But it Starts Controversy*, *N.Y. TIMES*, Mar. 1, 2002, at C1 (“Being treated like a criminal [for private copying] makes me want to act like one.”); Mark Landler, *For Music Industry, U.S. is Only the Tip of a Piracy Iceberg*, *N.Y. TIMES*, Sept. 26, 2003, at A1 (noting that music executives abroad doubt that suing file sharers will stem illegal copying due to relatively weak copyright laws and the ubiquity of piracy); Matt Richtel, *Music Services Aren’t Napster, But the Industry Still Cries Foul*, *N.Y. TIMES*, Apr. 17, 2002, at C1; Remarks by Chairman Alan Greenspan, *supra* note 11 (“[I]f our market system is to function smoothly, the vast majority of trades must rest on mutual trust and only indirectly on the law.”).

240. Subscribers, businesses, and foundations donated more than \$560 million, \$370 million, and \$120 million to public broadcasters, respectively, in FY2000. Corporation for Public Broadcasting Appropriation Request and Justification FY 2003 and FY 2005, Report to the House and Senate Comms., Feb. 2002, at 31 app. E, *available at* [http://www.cpb.org/about/reports/appropriation/fy03\\_fy05/just\\_2003.pdf](http://www.cpb.org/about/reports/appropriation/fy03_fy05/just_2003.pdf) (last visited May 15, 2004). Creators post shareware on the Internet where it is available for downloading by anyone, but they ask users to voluntarily send them a payment. *See* Lisa N. Takeyama, *The Shareware Industry: Some Stylized Facts and Estimates of Rates of Return*, 2 *ECON. INNOVATION & NEW TECH.* 161 (1994).

241. *See* Elizabeth H. Creyer & William T. Ross, Jr., *The Influence of Firm Behavior*

be willing to pay, i.e., tip, creative artists, even if there is no legal requirement.

The model of voluntary payments most relevant to creative artists is that of restaurant tipping, which generates approximately \$20 billion a year.<sup>242</sup> Although many tippers may claim that they tip to reward quality service, data show that tip size is only slightly related to the quality of the service.<sup>243</sup> Most North Americans tip even when they receive bad service and never expect to return to the restaurant.<sup>244</sup> They appear to act primarily to maintain a self-image of being “fair,”<sup>245</sup> treating tips as payments due for services rendered.<sup>246</sup>

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on *Purchase Intention: Do Consumers Really Care About Business Ethics?*, 14 J. CONSUMER MKTG. 421 (1997) (finding consumers would pay more for products from ethical firms); Jeffrey L. Seglin, *The Right Thing: A Boss Saved Them. Should They Save Him?*, N.Y. TIMES, Jan. 20, 2002, § 3, at 4. *But see* Maryln Carrigan & Ahmad Attalla, *The Myth of the Ethical Consumer—Do Ethics Matter in Purchase Behavior?*, 18 J. CONSUMER MKTG. 560 (2001).

242. See Dan Seligman, *Why Do You Leave Tips?*, FORBES, Dec. 14, 1998, at 138, 141 (an IRS estimate for annual tipping in 1996 was \$15-18 billion); Ofer H. Azar, *The Social Norm of Tipping: A Review*, at 1 (2002) (offering an estimate of \$26 billion), at <http://www.ssrn.com/abstract=370081> (last visited May 15, 2004).

243. See Azar, *supra* note 242, at 8-11; Michael Conlin et al., *The Norm of Restaurant Tipping*, 52 J. ECON. BEHAV. & ORG. 297, 306-07 (2003); Michael Lynn & Michael McCall, *Gratitude and Gratuity: A Meta-Analysis of Research on the Service-Tipping Relationship*, 29 J. SOCIO-ECON. 203, § 4 (2000) (restaurant customers tip only slightly more for better service, with the quality of service explaining about 2% of the size of the tip).

244. See Leo P. Crespi, *The Implications of Tipping in America*, 11 PUB. OPINION Q. 424, 428-30 (1947); Florence Fabricant, *Tips Past the Tipping Point*, N.Y. TIMES, Sept. 25, 2002, at F1 (noting with regard to tipping charts, “It would definitely be less offensive if they offered 10% as an option, to at least acknowledge the possibility of poor service.”); William Grimes, *Tips: Check Your Insecurity at the Door*, N.Y. TIMES, Feb. 3, 1999, at F1 (“Many uncertainties surround the dining experience, but one thing is sure. At the end of the meal, the diner, barring a near-nuclear catastrophe, will leave a tip.”). A 1996 survey found that 94% of Americans are inclined to leave tips in restaurants. See Tibbett L. Speer, *The Give and Take of Tipping*, AM. DEMOGRAPHICS, Feb. 1997, at 51.

245. Researchers like Michael Lynn have concluded that tippers probably tip to avoid disapproval, even by someone they will never interact with again, given existing social norm. Conlin et al., *supra* note 243, at 311-14; Azar, *supra* note 242, at 2-3; Robert Woodhead, *Tipping—A Method for Optimizing Compensation for Intellectual Property*, at <http://tipping.selfpromotion.com> (last visited May 15, 2004); Fred Hapgood, *Voluntary Payments*, <http://tipster.weblogs.com/hapgood> (presented to the Digital Commerce Society of Boston, Sept. 5, 2000) (last visited May 15, 2004); *see also* Crespi, *supra* note 244, at 426.

246. Even the Internal Revenue Service considers tips as income. *Roberts v. Commissioner*, 10 T.C. 581 (1948) (finding that it was reasonable for the IRS to treat the tips

Given the American social norm for tipping, publishers should try to convince consumers that it is fair to give creative artists their due.<sup>247</sup> Fans already pay to join fan clubs of their favorite artists. This approach deserves more than the limited attention it has received.<sup>248</sup> A media campaign to encourage consumers of creative content to pay extra because creators deserve fair compensation for their work could be modeled after the “look for the union label” jingle or buy “green” (environmentally friendly) advertising.<sup>249</sup>

Now many might view a proposal to rely on voluntary compliance as absolutely ridiculous given current widespread public resistance to copyright laws. Yet most of that resistance appears to be based on public perception that the current system is unfair: prices of CDs have been too high<sup>250</sup> and restrictions on an individual’s own uses, as well sharing are excessive, and thus file sharing is not stealing.<sup>251</sup> The recent success of

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of taxi cab drivers as income, not gifts). Moreover, the IRS presumes that ninety percent of restaurant diners tip at least twelve percent. *McQuatters v. Commissioner*, 32 T.C.M. (CCH) 1122, 1973 T.C.M. (P-H) ¶ 73,240, 1973 WL 2419.

247. See Pool, *supra* note 197, at 223 (“People would pay a small extra fee rather than feel they are cheating.”); Woodhead, *supra* note 245; Hapgood, *supra* note 245. Yet, restaurant tipping varies significantly from nation to nation. See Michael Lynn, *National Personality and Tipping Customs*, 28 PERSONALITY & INDIVIDUAL DIFFERENCES 395 (2000).

248. Among the few who have given this option consideration are Ku, *supra* note 13, at 310-11; Lunney, *supra* note 63, at 858-68; William Fisher, *Digital Music: Problems and Possibilities* § IV.6, Oct. 2000, at [http://www.law.harvard.edu/Academic\\_Affairs/coursepages/TFisher/Music.html](http://www.law.harvard.edu/Academic_Affairs/coursepages/TFisher/Music.html) (last visited May 15, 2004).

249. See Walter Coddington, *It’s No Fad: Environmentalism is Now a Fact of Corporate Life*, MKTG. NEWS, Oct. 15, 1990, at 7 (finding that, in 1989, 76 percent of Americans stated that they were willing to pay 5-10 percent more for ecologically compatible products); Michael Laroche et al., *Targeting Consumers Who Are Willing to Pay More for Environmentally Friendly Products*, 18 J. CONSUMER MKTG. 503, 503 (2001) (finding environmentally conscious individuals were willing to pay 15-20 percent more for green products) (citing Hazel T. Suchard & Michael J. Polonski, *A Theory of Environmental Buyer Behavior and its Validity: The Environmental Action—Behavior and its Validity: The Environmental Action-Behavior Model*, in 2 AMA SUMMER EDUCATORS’ CONFERENCE PROCEEDINGS 187 (M.C. Gilly et al., eds., 1991)).

250. See Amy Harmon & John Schwartz, *Despite Suits, Music File Sharers Shrug Off Guilt and Keep Sharing*, N.Y. TIMES, Sept. 19, 2003, at A1. This is aggravated when the consumer realizes that more than 90% of the price of a CD or DVD goes to middlemen rather than the artists, and that publishers are not passing on cost savings from using the Internet. See sources cited *supra* notes 42 and 144. Still, lower CD prices are addressing this. See Strauss, *supra* note 220.

251. See Harmon & Schwartz, *supra* note 250 (stating that eighteen percent think that sharing music files is always all right); Lunney, *supra* note 63, at 907-10; Mary Madden



more reasonably priced business models, like the 99 cent per song offerings by Apple's iTunes,<sup>252</sup> although most of such music is available free online, suggests that content consumers are willing to pay reasonable prices if given the chance. Back to tipping, it is useful to note that "[i]n its early history, tipping was . . . branded as un-American and undemocratic . . . [but] tipping eventually became more entrenched in American life than in any other country."<sup>253</sup>

In fact, economists have found that tipping behavior is surprisingly common. As one pair of scholars reported: "[O]ur experiments provide many examples where groups move toward cooperation rather than free-riding over time. Indeed, our results indicate that deterioration in the level of contributions is a special case, occurring only when the incentives to reach an efficient equilibrium are relatively low."<sup>254</sup> A donation system may even represent an efficient way to finance some creative activities.<sup>255</sup> It builds on the fact that many, if not most, consumers like to think of themselves as fair.<sup>256</sup> This has led some scholars to recognize that voluntary payments such as tips and donations from appreciative consumers could play a role in financing new creations.<sup>257</sup> As Kenneth Arrow has

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& Amanda Lenhart, Music Downloading, File-sharing and Copyright: A Pew Internet Project Data Memo, July 2003 (finding that 67% of Internet users who download music don't care whether the music they download is copyrighted), *available at* [http://www.pewinternet.org/reports/pdfs/PIP\\_Copyright\\_Memo.pdf](http://www.pewinternet.org/reports/pdfs/PIP_Copyright_Memo.pdf) (last visited May 15, 2004).

252. See John Markoff, *Apple Sells 70 Million Songs in First Year of iTunes Service*, N.Y. TIMES, Apr. 29, 2004, at C10.

253. KERRY SEGRAVE, TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES, at vii (1998).

254. Charles Bram Cadsby & Elizabeth Maynes, *Voluntary Provision of Threshold Public Goods with Continuous Contributions: Experimental Evidence*, 71 J. PUB. ECON. 53, 68-69 (1999); Daniel Rondeau et al., *Voluntary Revelation of the Demand for Public Goods Using a Provision Point Mechanism*, 72 J. PUB. ECON. 455, 468 (1999) ("Using large groups in an induced value framework, we have shown that the provision point mechanism with money-back guarantee and proportional rebate of excess contributions can closely approximate demand revelation.").

255. See Roland J. Kushner & Arthur C. Brooks, *The One-Man Band by the Quick Lunch Stand: Modeling Audience Response to Street Performance*, 24 J. CULTURAL ECON. 65 (2000) (proposing that street performance can be economically efficient).

256. See ROBERT H. FRANK, PASSIONS WITHIN REASON 1-42, 163-84 (1988). Neither tipping nor other related behavior appears to be explainable as enlightened self interest. See Jon Elster, *Social Norms and Economic Theory*, J. ECON. PERSP., Fall 1989, at 99; Lunney, *supra* note 63, at 858-68.

257. See *supra* note 248

recognized, social norms can in some cases “compensate for market failures.”<sup>258</sup>

States could require schools to teach students that consuming content without paying the creators their due is unfair<sup>259</sup> and discourages creators from producing more. Since compliance with copyright norms may sometimes depend more on perceptions of morality and legitimacy than the law,<sup>260</sup> the key would be to cultivate the attitude of personal responsibility for continued creative output described by one music artist:

I actually believe that our fans, if they can download something that we're doing from Napster, will feel that they've sort of let us down if they don't pay for it. . . . [T]he record company is a bit like someone who bets ten pounds on a horse . . . . The relationship the fans have with the artists, they're a bit like that guy who looks after the horse and feeds it and trains it . . . . It's about caring rather than just having a bet.<sup>261</sup>

Creating this attitude in consumers should work for new or economically “borderline” artists, although sympathy for them would likely erode if they gained financial success. Consumers could be asked to contribute for free online copies as well as hard copies, and even to give some lesser amount for works borrowed from a library or bought used.<sup>262</sup> This would

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258. See Kenneth J. Arrow, *Political and Economic Evaluation of Social Effects and Externalities*, in *FRONTIERS OF QUANTITATIVE ECONOMICS* 3, 22 (Michael D. Intriligator ed., 1971).

259. See INFORMATION INFRASTRUCTURE TASK FORCE, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 203-10* (1995); see also *Digital Dilemma*, *supra* note 11, at 216-17, 304-10; OTA Study, *supra* note 11, at 120-21 (pertaining to industry education initiatives); Ellickson, *supra* note 238, at 38-42 (regarding the state's capabilities as moral educator); Laura M. Holson, *Studios Moving to Block Piracy of Films Online*, *N.Y. TIMES*, Sept. 25, 2003, at A1 (regarding antipiracy ads by the content industry).

260. See Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 *N.Y.U. J. INT'L L & POL.* 219 (1997).

261. See LEWIS, *supra* note 182, at 148-49 (quoting Steve Hogarth, the lead singer of the band Marillion). These conditions and the success of pre-sales would support the development of a radical transformation of the music business.

262. A “droit de suite” approach to artistic work grants artists rights to profits from resales of their copyrighted works, and California has adopted a five percent royalty payment on resales of fine arts. Michael B. Reddy, *The Droit De Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 *LOY. L.A. ENT. L.J.* 509, 509, 521 (1995). Publishers are now eager to apply that concept so as to collect commissions on the resale of used books. See Brian Garrity et al., *CD Pricing, Used Sales Debated:*

be even more practical if the government mandated that distributors of content offer consumers an option to contribute to the creator.<sup>263</sup>

Admittedly, tipping an artist may be less compelling given a lack of direct live contact comparable to that to food servers in a restaurant, but websites could be used to create some meaningful interaction between the consumer and the artist. For example, the website could include the voice of the creator or enthusiastic fan asking the consumer to please “enable us to continue our efforts by contributing at least \$1?”<sup>264</sup> Shoppers in stores might eschew lower priced “unauthorized” copies in favor of higher-priced authorized copies merely to avoid the disapproval of the cashier.<sup>265</sup> Creators might also adapt the model that fan clubs use for soliciting and rewarding dues-payers with early notifications about new releases and performance schedules as well other privileges.<sup>266</sup> Theater companies, talent, and critics could support playwrights by protesting productions that refused to offer reasonable license fees to artists.<sup>267</sup>

Consumers also already provide substantial financial support to creators due to their appreciation of the creator’s work or so that they may as-

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*Concerns Rise Over High Retail Profile of Used CDs*, BILLBOARD, June 8, 2002, at 1; Frank Green, *Music Industry Remains in Spin*, SignOnSanDiago.com, available at [http://www.sduniontribune.com/news/business/20020614-9999\\_1614usedCDs.html](http://www.sduniontribune.com/news/business/20020614-9999_1614usedCDs.html). Used book sales have grown dramatically. See Rayner, *supra* note 55.

263. See Ku, *supra* note 13, at 311 n.319.

264. See Neil McManus, *Attention, Shoppers. Don’t You Use That Tone With Me*, N.Y. TIMES, Mar. 7, 2002, at G3 (discussing the use of avatars that look like cartoons, but can converse with customers from kiosks in stores); Woodhead, *supra* note 245 (“It’s easy to rationalize stiffing MegaCorp, but much harder to screw the hard-working guy the top of whose head they can see on the webcam answering their emails.”). To be most effective, payment solicitations would need to be as personalized as possible to counter the distance and anonymity of cyberspace. See DIGITAL DILEMMA, *supra* note 11, at 49; see also Woodhead, *supra* note 245 (“By letting users set the price, rather than setting it myself, I more than doubled my income.”).

265. In a scene from Woody Allen’s *BANANAS* (United Artists 1971), Fielding Melish pays a significant surcharge (for a bundle of unwanted magazines) to avoid embarrassing attention from a newsstand cashier regarding his purchase of the adult magazine “Orgasm,” although his ploy fails. See also Hurt & Schuchman, *supra* note 17, at 428-29 (discussing the promotion of a version of J.R. Tolkien’s *Lord of the Rings* trilogy labeled as the only “authorized” one in competition with one that paid no royalties to Tolkien).

266. See Strahilevitz, *supra* note 201, at 567-68 & n.204.

267. Although *Fashion Originator’s Guild of America v. Federal Trade Commission*, upheld the FTC’s prosecution of the Fashion Guild for organizing a boycott of retailers who sold pirated fashions, that boycott was a formal arrangement involving contracts, records, and heavy fines. See 312 U.S. 457, 462-65 (1941). A much more informal boycott of institutions that neglected playwrights would appear to be legal.

sociate with such creators. “Angels” often invest in Broadway shows for the glamour,<sup>268</sup> and many fans buy merchandise with a creation’s trademark or endorsed by the creator.<sup>269</sup>

Consumers are also likely to be more inclined to pay creators for ancillary services when they feel indebted to the creators for previous enjoyment of uncompensated work. This is not to claim that consumers will not seek out the most highly qualified service providers when they need a service, but when they view many as virtually equal, they are apt to choose the one to which they feel indebted. Thus, creators could earn funds by offering consumers the selection assistance discussed above in Part IV.A.4. Those with expertise in a field of business, such as human resources or sales, might be offered an inside track for serving as members of corporate boards of directors, representing shareholder interests.<sup>270</sup>

The Audio Home Recording Act of 1992 imposed surcharges on digital audio recording devices and associated storage media to compensate copyright holders for the unauthorized copies they feared would ensue.<sup>271</sup> Although weak demand reduced the significance of that experiment, this approach has significant academic support,<sup>272</sup> and in Western Europe, broadcast content has long received substantial funding from periodic license fees on radio and television sets and advertising.<sup>273</sup> This approach,

268. See James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464 (1990); Kelsey & Schneier, *supra* note 185, at 8; cf. Chris Nelson, *Rock Group Finds a New Way to Sell Out*, N.Y. TIMES, Sept. 23, 2002, at C9 (quoting one fan “It’s a way for me and the other people . . . to really feel like [we’re] part of the band, part of their music.”). New online art forms even enable creators to sell rights to “participate” in a creation. See Mirapaul, *supra* note 196 (discussing sales of “shares” in an online work).

269. See, e.g., VOGEL, *supra* note 41, at 96; Eric Asimov, *Britney Spears; Not Yet a Woman, Already a Restaurateur*, N.Y. TIMES, June 19, 2002, at F1; Laura M. Holson & Rick Lyman, *In Warner Brothers’ Strategy, A Movie is Now a Product Line*, N.Y. TIMES, Feb. 11, 2002, at C1; Leslie Kaufman, *PBS is Expanding its Brand from the Television Screen to the Shopping Mall*, N.Y. TIMES, June 27, 2002, at C10.

270. In fact, such independent experts could alleviate the problems created by current board members more accountable to management than shareholders. See Mark S. Nadel, *More Power to Shareholders*, WALL ST. J., June 26, 1989, at A8.

271. The Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237, applied it to digital audio recording devices and associated storage media. 17 U.S.C. §§ 1003-1007 (2000).

272. See Lunney, *supra* note 63, at 853-55; see also Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File-Sharing*, 17 HARV. J.L. & TECH. 1 (2003) (proposing such a levy on digital hardware to compensate for free personal use copying of digital content); Strahilevitz, *supra* note 201, at 587-90.

273. See ELI M. NOAM, TELEVISION IN EUROPE 3 (1991).

however, failed to get much traction in Congress when it was presented as a response to the *Sony Betamax* decision,<sup>274</sup> probably due to some key drawbacks to such surcharges.<sup>275</sup> Instead of mandating this surcharge, consideration might be given to making a strong effort to encourage hardware purchasers to make a suggested contribution at the time they purchased hardware capable of making unauthorized copies.

Certainly, there would be many free riders, but a social norm for tipping creative artists coupled with a de-escalation in today's hyper-marketing practices could enable many new artists to finance both production and promotion. In fact with digital media, the virtual elimination of reproduction and distribution costs would allow some artists to handle their own marketing and production.

### C. Government Funding

Governments have long provided significant funding towards the creation of culturally or scientifically valuable (and often unpopular) content termed "merit goods."<sup>276</sup> In fact, most of the greatest artistic and literary works of humanity were financed by royal, feudal, or church patronage, rather than copyrights.<sup>277</sup> Today the National Endowment for the Arts, the National Endowment for the Humanities, the Corporation for Public Broadcasting,<sup>278</sup> and state and local legislatures and arts groups provide

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274. See BETTIG, *supra* note 107, at 167-75.

275. Lunney, *supra* note 63, at 855-58, 912-14 (discussing three drawbacks: unfairness to those who do not use the resources for copying, discouraging the introduction of innovative copying technologies, and transforming copyright from a "property" to a "liability" right). While one can describe copyright as "a tax on readers for the purpose of giving a bounty to workers," see Macaulay, *supra* note 1, at 737 (para. 9), a tax on purchasers of equipment rather than just consumers of works arguably distorts demand even more. See also WATT, *supra* note 6, at 132-34 (criticizing this approach and noting that Australia declared such a mechanism to be anti-constitutional); *supra* note 20.

276. See Richard A. Musgrave, *Merit Goods*, in RATIONALITY, INDIVIDUALISM AND PUBLIC POLICY 207-10 (Geoffrey Brennan & Cliff Walsh eds., 1990) (discussing the concept of "merit goods").

277. This would include all pre-1709 creative content. See POSNER, *supra* note 133, at 389; Plant, *supra* note 7, at 170.

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

significant amount of funds to creators.<sup>279</sup> Moreover, the tax-deductibility of many arts donations provides a further public subsidy to private donations.<sup>280</sup> Some have even proposed raising funds for the arts by selling or leasing portions of a quintessential public good—the radio spectrum.<sup>281</sup>

Public museums, schools, and libraries also help finance creative work with substantial purchases. For example, the Queens Borough Public Library in New York sometimes orders thousands of copies of a single blockbuster,<sup>282</sup> and schools and libraries often pay higher prices for periodical subscriptions to reflect their greater use.<sup>283</sup> It appears that public libraries and government-supported academic libraries together now spend on the order of \$3 billion annually on information resources.<sup>284</sup> The “public lending rights” programs adopted in many European nations now pay creators based on the uses made of their work in libraries, a model that could serve as a basis for a more sophisticated content compensation program in the United States.<sup>285</sup> There has also long been support for using

279. *Id.* at 128-30; National Assembly of State Arts Agencies, Press Release, *State Arts Agency Funding Reflects Continuing State Budget Woes*, Nov. 3, 2003, [http://www.nasaa-arts.org/nasaaanews/legapprop04/press\\_rel.pdf](http://www.nasaa-arts.org/nasaaanews/legapprop04/press_rel.pdf) (last visited May 15, 2004). Funds may be allocated not only for their long term value to cultural history, but for shorter term benefits to tourism, or community spirit or unity. *See* THROSBY, *supra* note 113, at 128-30 (discussing tourism benefits).

280. *See* NETZER, *supra* note 278, at 43-45. In the spirit of such public-private “joint ventures,” some foundations seek to work with the private sector to fund joint projects. Examples of this model include the Noggin children’s television show, and online educational fathom.com. *See* DAVID BOLLIER, *IN SEARCH OF THE PUBLIC INTEREST IN THE NEW MEDIA ENVIRONMENT* 12-15 (2002); NETZER, *supra* note 278, at 188.

281. *See* LAWRENCE GROSSMAN & NEWTON MINOW, *A DIGITAL GIFT TO THE NATION* (2001); *see also* BOLLIER, *supra* note 280 (discussing related proposals discussed at an Aspen Institute seminar in summer 2001).

282. *See* Marcia Biederman, *Making It Work: Library Thrives With a Common Touch*, N.Y. TIMES, Sept. 12, 1999, § 14, at 3.

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

284. *See* CED REPORT, *supra* note 80, at 14 n. t.

285. *See* Joshua H. Foley, Comment, *Enter the Library: Creating a Digital Lending Right*, 16 CONN. J. INT’L L. 369, 385 n.115 (2002); Jennifer M. Schneck, Note, *Closing the Book on the Public Lending Right*, 63 N.Y.U. L. REV. 878, 883 (1988); *see also* Bennett M. Lincoff, *A Plan for the Future of Music Performance Rights Organizations in the Digital Age*, in *EXPANDING THE BOUNDS OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* 172-74 (Rochelle Cooper Dreyfuss et al. eds., 2001). Breyer rejected the idea of a fund to compensate publishers for photocopying due to the administrative costs of collecting funds from libraries. *See* Breyer, *supra* note 15, at 322.

taxpayer-financed rewards instead of granting copyright or patent rights, although most analysis of this option has focused on patents rather than copyrights.<sup>286</sup>

Government bodies also play a number of other roles supportive of creators. Public schools teach English, music, and art and support school newspapers, yearbooks, and performances, which develops audiences as well as creators. Public entities also subsidize facilities such as the Kennedy Center,<sup>287</sup> public broadcasting stations, and cable television public access channels.<sup>288</sup>

## V. PROPOSED LEGAL FRAMEWORK: DISCLOSURES OF PATERNITY AND A SEVERELY TRUNCATED PROHIBITION AGAINST UNAUTHORIZED COPYING (§ 106)

The business models and social norms discussed above appear capable of providing sufficient revenue streams for creative artists and publishers in the absence of a prohibition against unauthorized copying, but some of those business models depend on two provisions that would replace that prohibition. Furthermore, the analysis below suggests that replacing the current prohibition against unauthorized copying (§ 106) with a severely truncated set of prohibitions might be desirable for producing a more optimal level of creative output.

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Yet federal funding for such a program might be considered if the other business models above did not prove viable in some submarkets.

286. See Steven Shavell & Tanguy Van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525, 526-27 (2001) (noting that many European countries considered such government support schemes in the 19th century); see also Boyle *supra* note 6, at 57. For a detailed review of the major proposals and his own, see Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003); Steve P. Calandrillo, *An Economic Analysis of Intellectual Property Rights: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301 (1998). Ku proposes this for music today. Ku, *supra* note 13, at 313-15. For support in the context of copyright, see Plant, *supra* note 7, at 193; Michael Polanyi, *Patent Reform*, 11 REV. ECON. STUD. 61, 65 (1944). Despite First Amendment dangers, the government, e.g., Library of Congress, already evaluates the quality of popular culture in other contexts. See, e.g., Randy Kennedy, *So Many Films, But Only a Few are Treasures; Library of Congress Separates Mere Movies From Landmarks*, N.Y. TIMES, Feb. 5, 2004, at E1.

287. See NETZER, *supra* note 278, at 46.

288. See 47 U.S.C. § 531 (2000); Felix Gillette, *No Static at All*, WASH. CITY PAPER, Dec. 7, 2001, at 24, 35-36, at <http://www.washingtoncitypaper.com/archives/cover/2001-/cover1207.html> (last visited May 15, 2004).

### A. Disclosures of Paternity and Social Norms

The two new provisions proposed as replacements for broad prohibitions against copying would recognize an expanded right of paternity<sup>289</sup> in a manner designed to foster the use of social norms to control unreasonable, but not reasonable, copying. First, copyright law should expressly require copiers to prominently label their copies as “unauthorized copies.”<sup>290</sup> Existing tort and unfair competition laws already prohibit fraudulent claims of authorship,<sup>291</sup> and significant omissions are condemned as plagiarism,<sup>292</sup> but this provision would be more explicit and go a bit further. It would help ensure that those consumers who recognized the fairness of rewarding creators would be able to do so and those tempted to neglect creators would at least risk embarrassment in front of cashiers (for real space purchases),<sup>293</sup> if not guilt. Second, copyright law should require copiers to give consumers information about how to tip or donate to the creator, making it easier for fair-minded consumers to do so.<sup>294</sup> Even non-commercial disseminators could be required to include information about how to donate to the creators, such as a creator’s URL.

Those now using filesharing on the Internet would face a different choice than they have today. No longer forced to pay \$18 for a CD, they would now have to choose between paying ninety-nine cents for a song, pursuing a somewhat constrained form of filesharing, or violating the law.

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289. The right to paternity is guaranteed by the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6 bis., 25 U.S.T. 1341, 1161 U.N.T.S. 3. *See also* Green, *supra* note 133, at 206. Many creators, like those discussed in text accompanying notes 114-117, *supra*, care more about being acknowledged for their creative work than being paid. *See* Lange & Anderson, *supra* note 81, at 155.

290. *See* Tushnet, *supra* note 89, at 29 & n.102 (2000). The Supreme Court’s unanimous decision in *Illinois v. Telemarketing Assoc.*, 538 U.S. 600 (2003), made it clear that states can act reasonably to ensure that consumers are not misled about where their payments go. Copiers would be free to indicate any voluntary payments they made to creators, but labels could still be required for unauthorized copies to prevent copiers from misleading buyers by paying creators only a very small portion of profits. *Cf.* David Barstow & Diana B. Henriques, *9/11 Tie-Ins Blur Lines of Charity and Profit*, N.Y. TIMES, Feb. 2, 2002, at A1.

291. 15 U.S.C. § 1125(a) (2000); *see also* Federal Trademark Dilution Act of 1995, 15 U.S.C. §1125(c)(1); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 157 (1989) (“[U]nfair competition has its roots in the common-law tort of deceit: its general concern is with protecting consumers from confusion as to source.”).

292. *See* Green, *supra* note 133; Richard A. Posner, *On Plagiarism*, ATLANTIC, April, 2002, at 23.

293. *See supra* note 265.

294. *See supra* note 263.



The new, legal, but constrained form of filesharing would require them to seek out a provider who included a prominent label that 1) disclosed that the copies it provided were unauthorized and 2) gave recipients a URL where they could make voluntary payments to the relevant artists. Meanwhile, authorized publishers would be able to promote the fact that buying their versions would support the creator directly much like the “look for the union label” campaigns mentioned above. Government entities could also require, or at least encourage, public entities like schools and libraries to buy only authorized copies of content when the copies are priced close to the market price.<sup>295</sup>

Most consumers would probably find it easier to pay reasonable fees than to pursue the constrained, but legal form of copying. On the other hand, those who pursued their former unconstrained form of filesharing would stand in a very different light. While they might previously have thought of themselves as involved in civil disobedience,<sup>296</sup> flouting copyright law to “beat” the big, bad, rich publishers, they would now be violating a law that merely sought to aid sympathetic creators in a minimally burdensome manner. They would be hard pressed to defend their actions as more than personal selfishness and cheating. In fact, there is even reason to believe that many of those cyberspace leaders and many hackers who now devote significant time and effort to beating the “evil” music industry, would be willing to serve as vigilante, Guardian Angel-like protectors of new artists, policing cyberspace to try to ensure that such deserving creators were not being cheated.

## **B. A Truncated Set of Prohibitions Against Unauthorized Copying**

It appears that even the combination of technology, social norms, and the two legal provisions just mentioned would not, in an environment lacking current § 106, be able to provide sufficient support to ensure that all types of creative content were economically viable at optimal levels. Rather, some categories of creative content would seem to deserve some appropriate level of protection against unauthorized copying, although given the social and economic costs of a broad § 106 to consumers and

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295. In 2000, more than 100 public and private universities refused to authorize the use of their logos on lower-priced apparel made by companies whose factories did not meet the standards of the Fair Labor Association. See Thomas L. Friedman, *Knight is Right*, N.Y. TIMES, June 20, 2000, at A25; see also Breyer, *supra* note 15, at 305.

296. See Lunney, *supra* note 63, at 907-10.

new creators alike, as discussed in Parts II.B and II.C, it would be important to keep such protection to a minimum.<sup>297</sup>

This Article offers a general strategy for a minimal level of copyright protection against unauthorized copying. Congress could adopt general standards, modeled on the four-element test for judging fair use under copyright law,<sup>298</sup> and leave it to the courts to develop a common law resolution of copyright protections, as courts already do when judging allegations of unfair competition.<sup>299</sup> As Ray Patterson and Jessica Litman have suggested, copyright law could prohibit only commercial exploitation, rather than all copying.<sup>300</sup> A possible framework for providing publicly beneficial protection to creative content might resemble the following:

### 1. *General Provisions*

Unauthorized copying might be prohibited where copiers did not offer consumers a significant incremental benefit, such as significantly lower prices or easier access, over what publishers already offered. Thus, copiers would be prohibited from copying content that the original publisher was already providing at no charge online. For example, as long as newspaper

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297. See KAPLAN, *supra* note 12, at 115-17; Macaulay, *supra* note 1, at 734-35 (para. 7) (stating that copyright “ought not to last a day longer than is necessary for the purpose of securing the good [of increased production]”); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 133 (1999); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1249 (1998); Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1615 (2001) (“incentives should be as modest as possible”); Sterk, *supra* note 27, at 1205.

298. See 17 U.S.C. §107 (2000). For a clear recent application of the standard see *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). See generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995); Benkler, *supra* note 35; Fisher, *supra* note 22; Wendy J. Gordon, *Asymmetric Market Failure and Prisoner’s Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 854-59 (1992). *But cf.* Fisher, *supra* note 22, at 1717-19 (proposing alternative compensation schemes for digital content); Leval, *supra* note 88 (suggesting that despite inconsistent adjudication, there are sound principles governing fair use rooted in the purpose of copyright law). Ideally, Congress would adopt such criteria only after carefully considering the effects of different terms on various types of content, although the disappointing UCITA model gives little cause for hope on this. See Samuelson, *supra* note 139.

299. See Reichman & Samuelson, *supra* note 140, at 139-44; Reichman & Uhler, *supra* note 140, at 825-28, 836-37.

300. See LITMAN, *supra* note 7, at 180; LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 194, 215, 228 (1968) (observing that federal copyright law was originally designed to protect an exclusive right to sell); see also Rubinfeld, *supra* note 71, at 54-59 (discussing a profit allocation approach).

stories are available free online, other newspapers should not be allowed to make unauthorized republications of them, where they could easily have provided a “deep link” instead.<sup>301</sup> The same would be true for books like Lawrence Lessig’s “Free Culture,” which is available free online as a PDF file.<sup>302</sup> Similarly, to the extent that television program producers or record companies provide free access to their materials online, accompanied by commercial messages, others would only be allowed to disseminate the links to those materials, not the materials themselves.

In addition, the law could accord publishers protection for “hot news” under a misappropriation standard like that adopted by the Supreme Court in *International News Service v. Associated Press*.<sup>303</sup> This protection could apply whenever copiers tried to deny a publisher its first mover advantage, as by transmitting a publisher’s live feed simultaneously over a competing channel or trying to scoop another publisher’s exclusive.<sup>304</sup> Granting a publisher 24-hour exclusivity might be deemed a safe harbor for avoiding suit for unfair competition. The law might also prohibit unauthorized dissemination before the publisher had a “reasonable” chance to release a new work to consumers.<sup>305</sup> A provision like this should provide more than

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301. Deep links take users directly to specific content on a website, bypassing home or other front pages (and ads or other attractions). See *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV-99-7654 HLH, 2000 WL 525390, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000), *aff’d*, No. 00-56574, 2001 WL 51509, 2001 U.S. App. LEXIS 1454 (9th Cir. Jan. 22, 2001). This would, however, only prohibit online copying, not the dissemination of hard copies to those lacking easy online access. This would support the much-criticized result in *Los Angeles Times v. Free Republic*, 56 U.S.P.Q.2d 1862 (C.D. Cal. Nov. 16, 2000).

302. See <http://cyberlaw-temp.stanford.edu/freeculture.pdf> (last visited May 15, 2004).

303. *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215 (1918); see also L. Ray Patterson, *Copyright in the New Millennium: Resolving the Conflict Between Property Rights and Political Rights*, 62 OHIO ST. L.J. 703, 729-30 (2001).

304. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (holding that excerpting President Ford’s memoir before it was published was not fair use). The standards might be limited to situations meeting the 3 conditions articulated in 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:51, at 10-95 (4th ed. 1996) (naming three elements of misappropriation: (1) substantial investment in the appropriated item by the plaintiff; (2) appropriation at little or no cost by the defendant; and (3) injury to plaintiff by the misappropriation).

305. The release could be via the airwaves, wires, or in hard copies. This could discourage filmmakers from releasing their films for broadcast or home video, but that would seem unlikely given the investments studios make in marketing during the original release period and how quickly marketing value depreciates and most films age. Still, this might not apply to classics, such as many of Disney’s animated features, which are rere-

adequate protection to those producing real time sporting events, award shows, or live reality shows.

## 2. *Provisions for Specific Industries*

Granting different statutory copyright protections to different industry segments may also better tailor the solution to the problem of providing optimal incentives for content creation. While such differential treatment may raise some problems,<sup>306</sup> the current, relatively uniform standards for all varieties of creative content may well produce greater harm. Instead, each individual industry segment should be considered on its own merits.<sup>307</sup> If industry groups believed that they needed additional legal protection to function at socially optimal levels, Congress could hold hearings and evaluate evidence, as it did when adopting the Newspaper Preservation Act in 1970.<sup>308</sup> If film studios could demonstrate a need for more protection in order for very old films to be restored,<sup>309</sup> then such evidence would justify aiding such content, but not new protection for book publishers or recent or future films. Given the likely need for analysis of detailed and continually-changing economic data, an expert body, like the Copyright Office, might be assigned the task of conducting administrative rulemakings.<sup>310</sup> Certainly, lobbyists for each industry would seek special protection, but their efforts would be constrained by their burden of presenting data justifying such special protection.

Those seeking additional protection could be required to show that: 1) they expended significant efforts to produce their creations; 2) sufficient

leased periodically. *See* BETTIG, *supra* note 107, at 97-99.

306. *See* Breyer, *supra* note 15, at 322 (courts may have difficulty distinguishing between classes). *But see* KAPLAN, *supra* note 12, at 117 (proposing different copyright terms for various types of works).

307. *See* Chafee, *supra* note 38, at 510 (“The scope of protection for each kind of property should depend on its nature.”).

308. Pub. L. No. 91-353, 84 Stat. 466 (codified at 15 U.S.C. §§ 1801-1804 (2000)). The Act seeks to preserve a diversity of editorial voices by making it easier for newspapers to qualify for the “failing company” defense to an otherwise anti-competitive merger. *See* Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 478 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983); *see also* COMPAINÉ & GOMERY, *supra* note 54, at 49-51.

309. *See* Eldred v. Ashcroft, 537 U.S. 186, 206-07 (2003) (affirming extension of the copyright term in part because it may encourage copyright owners to invest in the restoration of their works).

310. Research and analysis of the data might be provided by the respected, non-partisan, and experienced National Academy of Sciences’ National Research Council. *See, e.g.*, DIGITAL DILEMMA, *supra* note 11.

compensation was unavailable from other sources;<sup>311</sup> and 3) their proposed additional protection was minimally burdensome to creators and consumers.<sup>312</sup> For example, producers of non-time-sensitive broadcast television programming might assert that 24-hour protection would be insufficient to recover the hard costs of the quality fare offered by HBO. Setting the minimum duration of protection would be difficult, but it is useful to note that publishers earn large revenues from theaters, pay TV, and video rentals even though viewers know that the content will be available in only a few years on free television. A few months might suffice for books and only a few days for the increasing number of one-time-only reality TV shows, although other categories might justify longer terms.<sup>313</sup>

### 3. *Consequences of Revising § 106*

In considering how media markets would be affected by a drastic reduction in § 106 rights, it is useful to distinguish between currently popular creators and new entrants. The former are likely to remain viable by employing the business models discussed above in Part IV. For example, movie theater technology should protect the lion's share of first run box office receipts,<sup>314</sup> and established filmmakers could easily cultivate further

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311. These first two are similar to the standards that the European Database Protection Directive requires for non-creative databases, *see* Ginsburg, *supra* note 140, at 70-71, and those of David Lange & Jennifer Lange Anderson's standard respecting infringements for transformative works. *See* Lange & Anderson, *supra* note 81, at 154.

312. Legislation passed under this provision should be held to the Court's intermediate scrutiny standard. *See* Baker, *supra* note 7, at 922-33; Netanel, *supra* note 87, at 47-69. Under that standard, the government would need to show that "the record as it now stands supports Congress' predictive judgment" that the provision 1) furthers important governmental interests; and 2) does not burden substantially more speech than necessary to further those interests. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997) [hereinafter *Turner II*]. This is the approach the Supreme Court took in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") concerning the FCC's "must carry" rules. *Turner I* recognized that the "mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation" from First Amendment review. 512 U.S. at 640. *But see Eldred*, 537 U.S. at 220-21 (rejecting the relevance of *Turner* to copyright).

313. *See* Bill Carter, *Reality Shows Alter the Way TV Does Business*, N.Y. TIMES, Jan. 25, 2003, at A1; Steve Lohr, *Steal This Book? A Publisher is Making It Easy*, N.Y. TIMES, Jan. 13, 2003, at C4 (describing open source electronic books). *The Economist* recently proposed returning to the 18th-century standard of a single 14-year term, renewable once. *See Copyrights: A Radical Rethink*, ECONOMIST, Jan. 23, 2003, at 15.

314. Movie makers might use technology to enhance the theater experience enough to justify higher prices. After all, theater tickets are priced many times as high as movie tickets for a comparable two hours or so of multi-media entertainment.

revenue from product placements. Popular musicians, novelists, and textbook writers could take advantage of the pre-sale mechanisms discussed above, as well as fees for consulting and teaching. Similarly, writers for television would probably be able to earn substantial amounts from product placements as well as for writing draft speeches or draft advertising copy for corporation. Free riding would certainly occur, but enough consumers would likely recognize that creators deserved and required a reasonable fee to continue and would contribute, if social norms and technology combined to make it attractive and easy.

The critical question, however, is how a truncation of § 106 copy protection would affect new entrants who lacked a loyal audience. Since most appear willing to earn little in the short run in return for the chance at fame, there may be little or no immediate effect; the dramatically lower costs of creation, reproduction, and dissemination of media today have combined to produce an explosion in the number of new works of all kinds.<sup>315</sup> This is not to deny that many creators can benefit, often significantly, from the editorial and artistic aid publishers have traditionally provided, but what they have generally needed most is the expertise and financing to reproduce, distribute, and market their creation. After all, new creators generally approach a publisher with a sample of their work, i.e., which they have already produced. Given that new technologies have reduced dissemination costs, if the SAs discussed in Part IV.A.4 grow in significance, new creators should stand a reasonable chance of financing all of the costs of production, distribution, and minimal marketing to supplement SAs.

New entrants with particular appeal to the young might find it difficult to rely on voluntary dues or donations, since social norms might have less sway with this demographic, but they might monetize their special appeal through fan clubs. Alternatively, publishers, like current record companies, might be willing to advance creators limited funds, as well as provide services for a fee, in return for a share of revenues that successful creators earned over a set term. Although these contracts might well resemble the ones currently criticized as exploitive by many recording artists, the reformed context may well increase the appeal of such arrangements enough to motivate content creation above current levels.

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315. For example, the number of new book titles more than doubled from 1990 to 2000. *See supra* note 51.

### C. Compulsory Licenses

Even under the system of minimal prohibitions against unauthorized copying proposed here, compulsory licenses—granting legal authorization to make copies after payment of a statutory license fee—would remain relevant. They would provide a mechanism for copiers to avoid the potentially disruptive, if not embarrassing, disclosures of their unauthorized uses. Still, setting reasonable license fees is inherently political and has proved to be a thorny problem under existing compulsory licensing law.<sup>316</sup> Furthermore, a compulsory license system strips away the right of creators to prevent the use of their creation by someone of whom they disapprove.<sup>317</sup> Still, compulsory licenses could strike a judicious balance between the need of creators for compensation and the desire of other creators and disseminators to use the work.<sup>318</sup>

## VI. CONCLUSION

This Article argues that current copyright law probably reduces the overall number of new creations while restricting consumer access and producing other harms. No empirical analyses have shown that copyright protection increases net output.<sup>319</sup> The analysis above reveals that the long accepted but rarely examined public value of § 106 of the copyright law is highly questionable. Section 106's impact on generally overlooked endogenous marketing costs appears to lead to a decrease in the economic viability of borderline works, diminishing net new creations and thereby undermining the presumption that it serves the public interest in this manner. Meanwhile, Congress has neglected to seriously consider the less bur-

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316. See BETTIG, *supra* note 107, at 125-50; Dale N. Hatfield & Robert Alan Garrett, *A Reexamination of the Cable Television Compulsory Licensing Rates: The Copyright Royalty Tribunal and the Marketplace*, 5 HASTINGS COMM. & ENT. L.J. 681 (1983); Lesig & Valenti, *supra* note 85, at 32-33 (reporting the negotiations involved in setting the compulsory license rate for the 1976 Copyright Act); see also Summary of the Determination of the Librarian of Congress on Rates and Terms for Webcasting and Ephemeral Recordings, U.S. Copyright Office (Feb. 23, 2003), at [http://www.copyright.gov/carp/-webcasting\\_rates\\_final.html](http://www.copyright.gov/carp/-webcasting_rates_final.html) (last visited May 15, 2004).

317. See Reichman & Samuelson, *supra* note 140, at 145-51.

318. Courts could enforce such a requirement in the same manner they handle eminent domain and the essential facilities doctrine requirements. See Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing In the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 409 (2001); Glen Robinson, *On Refusing to Deal With Rivals*, 87 CORNELL L. REV. 1177, 1209-11 (2002).

319. See *supra* notes 20 & 21.

densome alternative business models discussed in Part IV for stimulating creative output by employing recent technologies in combination with social norms and a seriously truncated § 106.

If Congress abridged § 106 there would be some initial negative effects,<sup>320</sup> especially to publishers and the wealthiest creators.<sup>321</sup> Once creators recognized that the world had changed, they would likely adjust their expectations, just as actors who demand \$10 million fees for films projected to earn \$100 million in revenues accept much smaller fees for creations expected to generate much lower revenues. As long as creators and publishers can earn more than their opportunity cost, they will continue to produce new works. Meanwhile reducing constraints on dissemination of content would be likely to increase societal welfare by spawning a vibrant content marketplace that supports the creative endeavor not by prohibitions, but by personal participation on the part of artists and creators alike. This paradigm seems better suited “To promote the Progress of Science and useful Arts” than § 106—or at the least, well suited to open a more productive debate.

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320. Undermining author and publisher expectations built on the present system would be, admittedly, demoralizing. *See* Breyer, *supra* note 15, at 322. Still, that hardly seems to justify § 106 in the face of its substantial costs to society.

321. The beneficiaries of the current broad § 106 appear to be the most popular creators, their publishers and lobbyists, as well as the members of Congress who stand to be rewarded with campaign contributions in appreciation for their past and future action. *See* LESSIG, CULTURE, *supra* note 88, at 216-18; Ian, *supra* note 12.