

PARODY AND PERCEPTION: USING COGNITIVE RESEARCH TO EXPAND FAIR USE IN COPYRIGHT

LAURA R. BRADFORD*

Abstract: This Article draws on cognitive research to examine a conflict within copyright doctrine. Scholars typically analyze unauthorized secondary use of expressive works using an economic or a free speech analysis. The former views copyrighted works primarily as products, the latter primarily as speech. Both paradigms focus on the person doing the speaking or distributing. Copyrighted works, however, protect communication between two parties, which involves both expression and understanding of that expression. This Article argues that because copyright is a right to control certain types of information, how we process information is relevant in determining copyright's scope. By incorporating lessons from cognitive research on memory, attention, and preference, courts can formulate rules that better balance the rights of owners with the needs of consumers and new users for open engagement with expressive works. More generally, a cognitive approach to secondary use refocuses the debate from a question of what users intend to what audiences require in choosing and consuming such works. This focus is in keeping with copyright's goal of promoting innovation to further the public good.

INTRODUCTION

In the fall of 2004, Little, Brown and Company ("Little Brown") published *Yiddish with Dick and Jane*. As in the original, Dick and Jane teach basic language skills, except that in this version they are adults, the words are Yiddish, and they live in a suburban neighborhood rife

* © 2005, Laura R. Bradford, Frank H. Marks Visiting Associate Professor and Administrative Fellow in the Intellectual Property Program, George Washington University Law School. I would like to thank David Kirkpatrick, Niva Elkin-Koren, Diane Zimmerman, Michael Abramowicz, Rebecca Hollander-Blumoff, Kerry Abrams, Mark A. Lemley, Laura Heymann, Mark McKenna, the Lawyering Colloquium, the NYU Law and Humanities Colloquium, and the MSU Young IP Scholars Workshop for their thoughts and comments. Alexis Stone and Zach Winnick provided valuable research assistance. Any remaining errors are my own. The author grants others permission to make copies of this article for use by nonprofit educational institutions, so long as the copies are distributed at or below cost, the author and journal are identified, and proper notice of copyright is affixed to each copy.

with adultery and drug use. Pearson, the publisher of the original Dick and Jane books, has not expressed interest in licensing a Yiddish version. But in January 2005 Pearson sued Little Brown for, among other things, copyright infringement because the new portrayal of Dick and Jane is unsuited for association with the first grade reading primer and the nostalgic memories it inspires.¹ Given that a *Fun with Dick and Jane* movie is scheduled for release in December 2005, Pearson would rather not alienate its potential audience.² Little Brown, publisher of the Yiddish version, claims the book is social commentary entitled to First Amendment protection.³

Pearson's real concern is for the perception of its characters among consumers and this Article closely examines such claims. Some might argue that concern about consumer reactions does not belong within copyright law. Trademark law, with its prohibitions against blurring and tarnishment of symbols, might seem better suited to these issues and many plaintiffs, including Pearson, file suit under both theories. Copyright law, however, also looks to consumer perceptions to set boundaries around protected works and determine what unauthorized uses qualify as "fair."

Reliance on consumer reactions is pervasive in copyright law. Modern copyright law forbids use not only of exact text, but also of any communication audiences recognize as "substantially similar" or obviously derived from an original. Infringement exists whenever an ordinary observer would conclude that the defendant has incorporated something of substance and value from the plaintiff's work, regardless of whether audiences would mistake the second work for the former.⁴ New uses are "fair" only to the extent they do not adversely

¹ Complaint at ¶¶ 17, 33, 34, *Pearson Educ. Inc. v. Little Brown & Co.*, No. 2:05 CV 00033 CBM (C.D. Cal. Jan. 3, 2005).

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

³ Wyatt, *supra* note 2, at B7.

⁴ See, e.g., *Incredible Techs., Inc., v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005) (describing the "ordinary observer" test in the context of video games as "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value."); *infra* notes 179-83 and accompanying text. It is worth noting that general exceptions such as the merger doctrine and scenes a faire exist. The scenes a faire doctrine exempts stock scenes and incidents that are common to certain genres or themes, such as car chases in police movies or depictions of killing in vampire stories, from being claimed by any one party. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][4] at 13-78.6 to -78.7 (perm. ed., rev. vol. 2005). The merger doctrine states that when an idea and its expression have become synonymous, so that there is no other way to express the idea, the expression itself is un-

affect the market or "value" of the original—a test that asks courts to consider consumer appeal and demand.⁵ Such amorphous tests already grant owners control over most public representations of their works, regardless of whether one thinks copyright law should extend to issues of consumer perception. Accordingly, as court decisions have narrowed trademark dilution protection, producers can increasingly rely on copyright's broader provisions to protect songs, characters, images, and texts against dilution of meaning and value in the face of imaginative reworkings of popular fare, or "secondary use."⁶

Pearson's complaint echoes the typical claim for such broad copyright protection: that if courts allow too much secondary use of expressive works without the owner's permission, the original works themselves will be degraded and overexploited.⁷ Owners of expressive works claim loss of control over the presentation of a work, be it an image, film, character, or song, has the potential to destroy the public's positive associations with the original and so exhaust the demand for the original and its attendant products. Such use also allows new users to "free-ride" on the owner's investments in building an audience for the original work.⁸

This harm is typically analogized to the problem of "overgrazing" in natural resource law.⁹ This paradigm suggests that those with

protected. *Id.* § 13.03[B][3] (listing as examples a label depicting a piece of fruit or a map showing the location of a proposed pipeline). These general doctrines, however, do not speak to situations like the dispute between Pearson and Little Brown over the *Dick and Jane* books, where a second author purposefully uses specific and well-known properties to make a distinct expressive point.

⁵ 17 U.S.C. § 107(4) (2000); see also *infra* notes 251–52 and accompanying text.

⁶ See, e.g., *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 433 (2003) (stating that action for trademark dilution requires proof of actual harm rather than just a "likelihood of dilution"); *TCPIP Holding Co., Inc. v. Haar Commc'ns, Inc.*, 244 F.3d 88, 98 (2d Cir. 2001) (finding famous marks eligible for dilution protection must be both inherently distinctive and have acquired significant distinctiveness among consumers).

⁷ See, e.g., Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 927 (1999) (arguing that most audience members prefer stability in the identity of cultural objects); Alex Kozinski, *Mickey & Me*, 11 U. MIAMI ENT. & SPORTS L. REV. 465, 469 (1994); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 487–88 (2003) (arguing for perpetually renewable copyright to prevent overuse that prematurely exhausts commercial value).

⁸ See Lawrence Lessig, *Re-Marking the Progress in Frischmann*, 89 MINN. L. REV. 1031, 1034 (2005) (describing copyright as preventing free-riding by competitors); Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 72 (1992) (arguing that allowing free use of older works redirects resources to copying and reuse, leading to underinvestment in production).

⁹ See Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 918–19 (2004) (stating that overgrazing can occur even with nonrivalrous goods such as songs and theo-

shared access to a resource have no incentive to maintain its value and so will overuse it until depletion.¹⁰ Only a private right to exclude others will solve this "tragedy of the commons."

Academic critiques of using an overgrazing doctrine for intellectual property are widespread. Critics claim that copyright's purpose of encouraging investment in creative works does not require control over all manifestations of that work after creation.¹¹ It is unclear to what extent multiple versions harm or degrade the audience's ability to connect with the original, thereby altering incentives to produce creative works.¹² Increasingly, First Amendment scholars and audience members resent that any one person should own the right to communicate alternative conceptions of an expressive work.¹³

These critiques recognize that the problem with importing an overgrazing doctrine into copyright is that expressive property does not behave exactly like real property. Where real property gives owners rights to a demarcated piece of ground, the precise boundaries of a right to tell a story or perform a song are difficult to measure. Unlike rights in tangible objects, copyright grants rights in something more ephemeral: information and communication.

Digital technology exacerbates the tension between audience and owner in two ways. First, it facilitates copying, alteration, and distribution of copyrighted works. Second, it makes tangible informal communication and social interaction through email, websites and other forms of electronic communication, and so pulls relatively private speech into the reach of the copyright laws.¹⁴

While rejection of overgrazing might be fashionable in academia, courts have endeavored to find a middle ground. Through use of a "parody" test, courts seek to allow important critical speech to reach the marketplace, but prevent free-riding or use of old works to get atten-

ries); Landes & Posner, *supra* note 7, at 485 ("Recognition of an overgrazing problem in copyrightable works has lagged.").

¹⁰ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (analyzing the environmental problems posed by overpopulation in light of the overgrazing model).

¹¹ See Mark Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 143-46 (2004) [hereinafter Lemley, *Ex Ante Versus Ex Post*]; Mark A. Lemley, *Property, Intellectual Property and Free-Riding* 32 n.100 (Stanford Law Sch. John M. Olin Program in Law and Econ., Working Paper No. 291, 2004) [hereinafter Lemley, *Free-Riding*], available at <http://ssrn.com/abstract=582602>.

¹² Lemley, *Ex Ante Versus Ex Post*, *supra* note 11, at 145-46.

¹³ See LAWRENCE LESSIG, *FREE CULTURE* 1-48 (2004); *infra* text accompanying notes 101-19.

¹⁴ For further discussion, see text accompanying notes 200-02. See also LESSIG, *supra* note 13, at 8.

tion for unrelated works.¹⁵ This test allows speech directly commenting on previous work to use the previous work free of charge. If the second work uses the older work for attention, or to satirize society in general, the second user must get permission or risk injunction.¹⁶ The difficulty, however, of locating a precise point of view in ambiguous creative works creates an uncertain standard that chills potential speakers and discourages investment in satirical works. Small-scale users are especially disadvantaged because they generally lack the resources to bargain for licenses or defend potential lawsuits.¹⁷

This Article argues that by paying attention to the significant body of research about how people process and use information, courts can formulate more tailored rules regarding use and reuse of informational products, specifically cultural works such as books, movies, characters, and songs. Because copyright is a right to control the flow of certain types of information, how we process information is relevant in determining copyright's scope. Other areas of intellectual property law, such as trademark, implicitly recognize that rights in information depend on not only the content of the information but also its effect on the recipient. Only uses that cause consumer confusion or demonstrably alter consumer perception are actionable in trademark. Recognition of similar substantive limitations in copyright law has lagged.

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

¹⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–94 (1994).

¹⁶ See *infra* notes 66–68, 257–60, and accompanying text.

¹⁷ See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1536, 1564–67 (2005). Such users are also disadvantaged by the considerable administrative burden of locating copyright owners for older works. This burden has grown steeper in recent years because copyright's extended term means that original authors may be long-dead and heirs and transferees scattered or forgotten. In addition, notice, registration, and periodic renewal, which ensured information about copyright owners remained publicly available, are no longer required for copyright protection.

perception. This approach conserves the owner's incentive to invest in authorized reproductions while allowing greater participation by outsiders in reforming, debating, and refining the work.¹⁸

In other areas of the law, research from cognitive and behavioral psychology has provided insights on how to distribute resources efficiently and to resolve private disputes. Studies of human perception and decision-making faculties have been used to reframe debates about tort remedies and contract formation.¹⁹ In property law, acknowledgement of decision-making biases has prompted re-examination of the idea that broad, well-defined property rights facilitate rational and efficient market exchanges.²⁰ As the nature of property grows more intangible and the nature of ownership more diffuse, scholars are looking at how common cognitive biases and processes impact the optimal allocation of entitlement rights in a variety of settings.²¹ To date, however, the cognitive components of certain forms of intellectual property such as copyright, trademark, or rights of publicity have received little to no academic attention. This void is curious given that the boundaries of the entitlements themselves reference human perception.²²

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

¹⁸ See Lemley, *Free-Riding*, *supra* note 11, at 43, 47–48 (stating that copyright protection should extend only as far as necessary to reward authors and spur future creation; surplus value should be enjoyed by the public).

¹⁹ See generally BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed., 2000); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989) (examining competing fields of legal scholarship from a cognitive perspective).

²⁰ See, e.g., Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 19, at 302; Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 19, at 211.

²¹ For example, several scholars have argued that governance rules of corporate organizations should be adjusted to account for common group behaviors and communication strategies. See Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1241, 1294–1315 (2003). See generally Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001). Others have argued that because default rules inevitably shape preferences, legal frameworks should attempt to guide consumers and individuals toward welfare-maximizing choices. See, e.g., Daphna Lewinsohn-Zamir, *The Objectivity of Well-being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

²² See 17 U.S.C. § 106 (2000) (reserving to authors the right to produce tangible objects or performances in which their work may be perceived).

ing the production of creative works.²³ The public is best served by encouraging greater numbers of innovative uses until such uses distort consumers' ability to identify and choose between works.²⁴ Such an approach removes the emphasis on the motives of the secondary user, as under the current fair use test, and focuses instead on the needs of the consumer. Well-established doctrines from social cognition research indicate that we can better distinguish between the types of secondary uses that undermine consumer choice and those that do not.

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

Part I of this Article looks at economic and free speech accounts of secondary use and shows how each omits consideration of elements

²³ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (stating that the ultimate aim and sole interest of the Copyright Act is to stimulate artistic creativity for the public good); accord *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). But see *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) ("[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.").

²⁴ See *Aiken*, 422 U.S. at 156 ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

that are important to consumers.²⁵ Part II explains the reasons why a cognitive analysis is relevant to copyright law.²⁶ It traces the historical development of copyright from a right to reproduce tangible objects to a right of conceptual representation and shows how contemporary debates over branding and reuse stem from this expansion.²⁷ Part III introduces a new standard for secondary use based on cognitive principles that could replace, or at least augment, the current problematic parody analysis.²⁸

First, however, an important word about the vocabulary within this Article. Cognitive psychology refers to the study of how people process and remember information.²⁹ Related areas in social cognitive research examine how the processing of information affects attitudes and preferences.³⁰ At the risk of muddying the social science waters, I use the term "cognitive research" to refer to both areas of scientific study. I also draw on behavioral and ethnographic research about marketing and consumer preference, using the umbrella label "consumer research" to refer to this body of knowledge.

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

A. *The Economic Account of Expressive Property*

The prevailing account of copyright and secondary use treats expressive property like real property. This framework, drawn from Law and Economics scholarship, emphasizes the importance of private ownership as the solution to "the tragedy of the commons" problem. In this view, common ownership of resources is inefficient because each individual stakeholder has little incentive to maintain or improve the resource but instead will overuse it. Private ownership, on the other hand, provides incentives to improve and maintain the property and allows for full internalization of the costs of different choices.

²⁵ See *infra* notes 31–131 and accompanying text.

²⁶ See *infra* notes 132–321 and accompanying text.

²⁷ See *infra* notes 132–270 and accompanying text.

²⁸ See *infra* notes 322–71 and accompanying text.

²⁹ See MICHAEL W. EYSENCK, *PRINCIPLES OF COGNITIVE PSYCHOLOGY* 1 (1993); GREGORY ROBINSON-RIEGLER & BRIDGET ROBINSON-RIEGLER, *COGNITIVE PSYCHOLOGY* 2 (2004). But see DIANE GILLESPIE, *THE MIND'S WE* 22–23 (1992) (arguing for expansion beyond the information-processing focus of cognitive science to consider context and social interpretation as part of perception).

³⁰ See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 3 (1999).

Applying this analysis to intellectual property frames all unauthorized secondary users as trespassers and their secondary works as stealing.³¹ The problem with this analysis is that real property insights based on the behavior of farmers in pastures are of limited use in an intangible format grounded in human perception.³²

Under the tragedy of the commons model, in the absence of private property rights, users will overexploit a pasture because, without a guarantee that the pasture will be properly managed over time, each individual user's best interest is to "overgraze" or take as much grass as possible for their herd.³³ The same insight has been made about hunting: where no one controls the ability of others to hunt, no one has incentive to increase or maintain the stock of game.³⁴ In either case, the richness of the soil or the stock of game will quickly diminish.

Private ownership, by contrast, allows for consideration of the costs and benefits of different uses of a resource.³⁵ Owners will allocate rights to the land to maximize its value and increase their own wealth or happiness.³⁶ Private ownership will induce investment in improving the property because owners know they will be able to capture the return on their investment.³⁷

Concentrated ownership of land also lowers the transaction costs of private agreements. Where ownership is concentrated, outside parties may easily contract for any beneficial use of the property.³⁸ The identity of the initial owner matters little then; in an efficient market with low transaction costs, the owner will sell or license rights to the party who will put the parcel to its highest and best use.³⁹ The economic approach presumes that consensual market transfers ordinarily

³¹ See Posner, *supra* note 8, at 67, 72.

³² Others have criticized the tendency to draw direct analogies between real and intangible property. See, e.g., Lemley, *Free-Riding*, *supra* note 11, at 2-3; William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 CAL. L. REV. 1639, 1643 (2004). These critiques focus on the differences between real and intangible property from an economic perspective. I also am interested in these differences, but in this Article I explore additional perspectives beyond economics to describe the properties of intangible goods.

³³ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354 (1967); Landes & Posner, *supra* note 7, at 484.

³⁴ Demsetz, *supra* note 33, at 351.

³⁵ See *id.* at 348.

³⁶ *Id.* at 355.

³⁷ See *id.* at 356.

³⁸ *Id.* at 357.

³⁹ Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 7, 11 (1960).

are the most effective way to distribute resources; departures from this norm in the form of legal regulation bear a heavy burden of proof.⁴⁰

Scholars apply the tragedy of the commons model broadly with the aim of creating rules that stretch across different types of entitlements. They do so on the theory that a property doctrine that applies universally promotes certainty in contracting and lowers information costs for businesses.⁴¹ Legal exceptions to broad property regimes frustrate competition and promote rent-seeking behavior among interest groups.⁴²

According to this unified theory, incentives operate similarly with intellectual entitlements, such as copyrights, trademarks, and the right of publicity, as they do with tangible property.⁴³ Private ownership creates rewards for producing expressive property.⁴⁴ The right to exclude others from free-riding on this effort creates incentives to maintain and invest in creation and spurs further creative efforts.⁴⁵ Owners of intangible rights will choose licensing and distribution arrangements that will maximize the value of the right.⁴⁶ In a costless

⁴⁰ See Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2655, 2662 (1994) [hereinafter Merges, *Of Property Rules*]; Robert P. Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 306-07 (1993) [hereinafter Merges, *Are You Making Fun of Me?*] (summarizing the economic view but arguing for greater flexibility in the case of parody in copyright law).

⁴¹ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 314 (1996) (noting the preference of neoclassicist property theory for general property rules that facilitate allocative efficiency); cf. Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 TEX. REV. L. & POL. 103, 107-08 (1999) (describing general property regimes as "contract-enabling" because they foster competition across regimes and discourage rent-seeking by private interest groups).

⁴² Easterbrook, *supra* note 41, at 107-08.

⁴³ See, e.g., Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112 (1990) ("[A] right to exclude in intellectual property is no different in principle from the right to exclude in physical property."); Landes & Posner, *supra* note 7, at 484; see also *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (stating that the economic philosophy behind the Copyright Clause is to provide material incentives to individuals to produce works of knowledge).

⁴⁴ *Eldred*, 537 U.S. at 212 n.18.

⁴⁵ See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

⁴⁶ See, e.g., William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 6 (2000); Merges, *Are You Making Fun of Me?*, *supra* note 40, at 306 ("[C]onsensual market transfers are the most effective way to simultaneously pursue the twin goals of incentive and dissemination."); Posner, *Parody*, *supra* note 8, at 69 (stating that even where a potential derivative use of copyright is better or more valuable, transaction costs will be minimized by concentrating ownership in a single pair of hands).

environment, owners will also choose the uses most beneficial to society because it will be economically efficient to do so.⁴⁷

But what of overgrazing? Expressive property is intangible and so may be less vulnerable to overuse than soil or hunting grounds. Further, its consumption is "nonrivalrous."⁴⁸ Use of a book, movie, image, or other form of commodified information does not impose a direct cost on others using the same information.⁴⁹ Expressive works may be endlessly copied without diminishing the quality of the original.⁵⁰

Economic theorists maintain that intellectual property may nonetheless be vulnerable to overgrazing. For example, trademarks are vulnerable to dilution when used even by non-competitors to describe unrelated goods.⁵¹ The use of "Gucci" on a diaper bag may lessen the value of the mark by weakening its connection to luxury goods.⁵² Similarly, commercial use of a celebrity's image in connection with a variety of different products is likely to lessen the value of that celebrity's endorsement.⁵³

Producers claim that the same effect appears in copyright. Mattel polices unauthorized uses of its Barbie character to avoid its use in art works or pop songs that might displease or disgust its target audience of young girls and their mothers.⁵⁴ As William Landes and Richard Posner have noted, Disney actively manages its characters to avoid overkill and audience confusion.⁵⁵ They observe:

⁴⁷ Posner, *supra* note 8, at 73 (stating that in all but the case of direct criticism, the market is best placed to make an efficient trade-off between the First Amendment value of a parody and the cost to the social value of the original work); see also PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 178-79 (1994).

⁴⁸ Lemley, *Ex Ante Versus Ex Post*, *supra* note 11, at 143.

⁴⁹ Lemley, *Free-Riding*, *supra* note 11, at 25.

⁵⁰ Dennis S. Karjala, Statement of Copyright and Intellectual Property Law Professors in Opposition to H.R. 604, H.R. 2589, and S. 505, "The Copyright Term Extension Act" 9 (Jan. 28, 1998), <http://homepages.law.asu.edu/%7Edkarjala/OpposingCopyrightExtension/legmats/1998Statement.html>.

⁵¹ Landes & Posner, *supra* note 7, at 485.

⁵² Gucci Shops, Inc. v. R. H. Macy & Co., Inc., 446 F. Supp. 838, 839-40 (S.D.N.Y. 1977).

⁵³ Landes & Posner, *supra* note 45, at 362-63; Stuart Elliott, *Critics Claim Multiple Deals Risk Saturation*, USA TODAY, Apr. 30, 1991, at 1B.

⁵⁴ Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 796, 802 (9th Cir. 2003); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 899 (9th Cir. 2002) (suing in trademark); Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315, 318-19 (S.D.N.Y. 2002).

⁵⁵ Landes & Posner, *supra* note 7, at 486 ("To avoid overkill, Disney manages its character portfolio with care. It has hundreds of characters on its books, many of them just waiting to be called out of retirement . . . Disney practices good husbandry of its characters and extends the life of its brands by not over-exposing them . . . They avoid debasing the currency.") (alteration in original).

If . . . anyone were free to incorporate the Mickey Mouse character in a book, movie, song etc., the value of the character might plummet. Not only would the public rapidly tire of Mickey Mouse, but his image would be blurred, as some authors portrayed him as a Casanova, others as catmeat, others as an animal-rights advocate, still others as the hen-pecked husband of Minnie.⁵⁶

Without strong ownership rights, those seeking to exploit the value created and maintained by a work's owners will exhaust the work's potential without considering the cost of their actions to others or to the work itself.⁵⁷ Thus, economic theorists contend that the need of owners of expressive property to exclude trespassers is as great for expressive works as it is for owners of pastureland or hunting grounds.⁵⁸

According to the economic account, the need to exclude may be even greater with respect to expressive works because of the particular dynamics of the media and entertainment industries. Many works of authorship take years to create. The author thus incurs substantial costs, at least in the form of opportunity costs. Publishers too must decide whether to distribute a book before knowing whether it will succeed. They commit huge sums in advance to distribution and marketing, but only a very few expressive works earn back these initial investments. These blockbusters subsidize the creation and marketing of all of the other works that never find an audience. Producers thus need to recoup all of the social value of successful works to continue to produce new works.⁵⁹ Any free-riding on their investment will redirect resources to copycats and secondary use, where creators can make use of already successful works for free instead of engaging in the risky business of creating works from scratch.⁶⁰

These concerns underlie the claim that the list of exceptions allowed for secondary use of expressive property should be narrow.⁶¹ Economic scholars argue that fair use exemptions are justified mainly in limited circumstances of market failure.⁶² For example, because few

⁵⁶ Landes & Posner, *supra* note 7, at 487-88; see Hughes, *supra* note 7, at 926, 941-42.

⁵⁷ Landes & Posner, *supra* note 7, at 484.

⁵⁸ *Id.* at 485.

⁵⁹ *Id.* at 495.

⁶⁰ Posner, *supra* note 8, at 72.

⁶¹ *Id.*; Patry & Posner, *supra* note 32, at 1644.

⁶² See, e.g., GOLDSTEIN, *supra* note 47, at 224, 230 (arguing that as technology reduces transaction costs, the need for safety valves like fair use declines, but excepting limited distributional goals such as education and research); Tom W. Bell, *Fair Use vs. Fared Use*:

owners will willingly submit their works to ridicule, private transactions will fail to create a licensing market for parody.⁶³ Even if the social value of the parody is great, the transaction costs, here in the form of the owner's reputational interests, are too high to permit efficient functioning of the market.⁶⁴ But to prevent rampant free-riding under the guise of parody, economic theorists contend that the parody exception should only apply where the original work is unquestionably the target of the second author's criticism.⁶⁵

By contrast, secondary users wishing to make use of a text as a vehicle or "weapon" to criticize society generally should be able to bargain for a license in the competitive market.⁶⁶ So long as such users pay a market price, the theory goes, owners will be happy to facilitate this wider dissemination of their products.⁶⁷ Therefore, users need no fair use exception to remove market obstructions.⁶⁸

The Supreme Court has embraced this framework in two landmark decisions governing secondary use. First, in 1985, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court looked at whether "the user stands to profit from exploitation of the copyrighted material without paying the customary price"—in other words, whether a finding of fair use would preclude efficient market transactions—in finding that publication of a small excerpt from a newly released presidential memoir was not fair use.⁶⁹ Later, in 1994, in *Campbell v. Acuff-Rose Music, Inc.*, which concerned a rap version of a famous fifties bal-

The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. REV. 557, 583 (1998) (adopting a market failure theory of fair use); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 233; Edmund W. Kitch, *Can the Internet Shrink Fair Use?*, 78 NEB. L. REV. 880, 881 (1999) (predicting that the Internet will enable easy and efficient communication between users of copyrighted work and owners of copyrighted works, which will reduce the market failure situations that justify the fair use doctrine); cf. Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 34 McGEORGE L. REV. 541, 561–62 (2003) (arguing that exceptions from liability rules should be limited to clear market failure, but preferring a damages rule over injunctive relief in many cases). Wendy J. Gordon argued in an earlier piece for a purely economic view of fair use, see Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1605 (1982), but has since argued that creative expression serves important nonmonetary values as well.

⁶³ See Posner, *supra* note 8, at 73–74.

⁶⁴ See *id.*

⁶⁵ *Id.* at 71; Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 235 (1983).

⁶⁶ Posner, *supra* note 8, at 71 (describing the purpose of many parodies as simple amusement); see Goldstein, *supra* note 65, at 235.

⁶⁷ See Posner, *supra* note 8, at 72–73; Goldstein, *supra* note 65, at 216.

⁶⁸ See Posner, *supra* note 8, at 73.

⁶⁹ 471 U.S. 539, 562 (1985).

lad *Pretty Woman*, the Court limited the parody exception to cases of direct commentary on a theory of market failure.⁷⁰ The Court distinguished between works that use "elements of a prior author's composition to create a new one that, at least in part, comments on that author's works" with those where the "commentary has no critical bearing on the . . . original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh"⁷¹ The Court reasoned that because creators of imaginative works would never license critical lampoons of their own productions, judicial intervention was necessary to further valuable social commentary.⁷² Where the second work used the original to criticize something else, the Court ruled it could "stand on its own two feet and so require[d] justification for the very act of borrowing."⁷³

This economic view of intellectual property is evident in more recent decisions. In 2004, faced with the question of whether a sampling of musical notes constituted infringement even if no one could recognize the similarity, the Sixth Circuit Court of Appeals in *Bridgeport Music v. Dimension Films* considered which result would lead to the most efficient stewardship of musical recordings and ruled the sampling to be infringement.⁷⁴ Continuing the analogy of copyright with real property, the court stated even the borrowing of a small number of musical notes should be analyzed as "a physical taking rather than an intellectual one."⁷⁵

The *Bridgeport* decision incorporates the common mistake that all secondary use of copyrighted works is analogous to a physical trespass

⁷⁰ 510 U.S. 569, 580–81, 590–94 (1994).

⁷¹ *Id.* at 580.

⁷² *See id.* at 580–81.

⁷³ *Id.* at 581.

⁷⁴ *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398–99 (6th Cir. 2004).

⁷⁵ *Id.* The court's decision turned on the different treatment of "sound recordings" and "musical compositions" in the Copyright Act. *See id.*; *see also* 17 U.S.C. § 114(b) (2000) (stating that the owner of a copyrighted sound recording has the exclusive right "to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality"). Because the Copyright Act grants owners the exclusive right to "alter" sound recordings, the court concluded that the substantial similarity test did not apply. *Bridgeport Music*, 383 F.3d at 398 n.8. It is not clear, however, that the Copyright Act grants owners rights over alterations beyond recognition. The court rejected the idea of a de minimus exception because of a disdain for free-riders; it held that "even when a small part of a sound recording is sampled, the part taken is something of value," even if the only value was to "save costs" for the secondary user. *Id.* at 399. Such an analysis ignores the distributional concerns underlying the fair use exception without explaining how a de minimus exception would materially impact copyright's incentive functions.

in real property. Bright-line rules for real property create market efficiency but differences between real estate and creative works alter where those lines should be drawn with respect to creative works. Until we understand what we mean to protect with copyright, we cannot understand what constitutes a trespass of that right.

Insights about real property fail to allocate rights efficiently in the case of intangible works in part because of differences in the nature of the entitlement. The ability to unbundle rights to real estate is generally well understood. Acknowledgment of the dynamics of real property pervades the default rules around which parties license, such as the liability rules for removal of subjacent support for example.⁷⁶ With expressive property, these dynamics remain mysterious and under dispute. On the one hand, consumption of expressive goods is nonrivalrous. One's use of one copy of a text will not affect another's ability to consume another copy. On the other hand, the overgrazing paradigm suggests the opposite: that any secondary use of a character, image, tune, or design affects the perception of the work as a whole and so its market value. Individual members of ownership entities tend to be risk-averse when confronting this uncertainty. The prevailing wisdom in the entertainment industry favors uniformity of message across uses of protected characters and narratives to prevent expressive "overgrazing."⁷⁷ Thus owners have a powerful disincentive to license use of their properties to all but a narrow segment of goods the owner identifies as complementary.⁷⁸ This set of products is likely to be much less than the set of potential products that audience members might find valuable, useful, or interesting.

The scalability of information products, which enables them to serve both massive and very small numbers of users, also prevents beneficial private transactions. In a real property circumstance, the tangible nature of the goods establishes a certain scale of potential uses. Parties seeking licenses to and easements on a three-acre parcel tend to be limited in number, easily identifiable, and represent a certain subset of activities consistent with the character and size of the land.⁷⁹ Express-

⁷⁶ See *Platts v. Sacramento N. Ry.*, 253 Cal. Rptr. 269, 271-72 (1988) (owner of subjacent support is absolutely liable for damages caused to surface owner by removal of the natural necessary support; liability survives even after remover has sold the property).

⁷⁷ See *infra* notes 207-41 and accompanying discussion.

⁷⁸ See Guy Pessach, *Copyright Law as a Silencing Restriction on Noninfringing Materials: Unveiling the Scope of Copyright's Diversity Externalities*, 76 S. CAL. L. REV. 1067, 1089-90 (2003) (arguing that economies of scale lead corporate media to produce homogenous content and neglect minority tastes).

⁷⁹ See Patry & Posner, *supra* note 32, at 1643.

sive property by contrast is endlessly multipliable, may be distributed in numerous formats, and appeals to both large and small-scale users simultaneously. The concentration of ownership in a single party reduces transaction costs for large-scale licensees, but imposes additional burdens on smaller users. Individual authors and small entities often lack the information and resources necessary to engage in negotiations over established properties. They do not belong to the proper networks, and may not be sufficiently repeat players to invest in joining them. For example, many large film studios will not accept story or product pitches unless they come from an established agency or other known industry channels.⁸⁰ In addition, the potential revenue from such licenses is so small that it is usually not worth the owner's time to engage in negotiations. Disney, for one, will not consider a new product line unless it has the potential to become a billion-dollar revenue stream.⁸¹ In this way, the economic view tends to concentrate control over the dissemination and social construction of expressive works in the hands of a few large and conformist organizations.

Moreover, the ambiguity surrounding what exactly constitutes a parody creates uncertain boundaries for innovation using older texts. As discussed in Part II, the impulse to discuss and reinterpret popular texts is ancient and widespread.⁸² Examples may be found among the plays of the ancient Greeks,⁸³ in parodies of early Jewish texts,⁸⁴ and in Chaucer's *Canterbury Tales*.⁸⁵ The Supreme Court's definition of parody as something that targets a specific work is somewhat narrower than the historical definition, which identifies parody as any work that adopts

⁸⁰ Telephone Interview with Gabriel Scott, Public Affairs Officer, Writer's Guild West, (May 9, 2005); see also Hallmark Entertainment, Help, <http://www.hallmarkent.com/help.php#20> (last visited Sept. 11, 2005).

⁸¹ See AL LIEBERMAN & PATRICIA ESGATE, *THE ENTERTAINMENT MARKETING REVOLUTION: BRINGING THE MOGULS, THE MEDIA, AND THE MAGIC TO THE WORLD* 5 (2002); *infra* notes 132–321.

⁸² Parody is a form of satire, in which prevailing vices or follies are held up to ridicule, but is particular in that parody incorporates material from a target text as a constituent part. MARGARET A. ROSE, *PARODY: ANCIENT, MODERN & POST-MODERN* 80–81 (1993).

⁸³ ARISTOPHANES, *THE COMPLETE PLAYS OF ARISTOPHANES* 13–51, 53–100, 367–415 (Moses Hadas ed., 1962) (ridiculing the styles of Aeschylus and Euripides in the *Knights*, the *Frogs*, and the *Acharnians*); ALBIN LESKY, *A HISTORY OF GREEK LITERATURE* 417 (James Willis & Cornelis de Heer trans., Thomas Y. Crowell Co. 2d ed. 1963) (stating that Aristode named Hegemon of Thasos as the first writer of parodies, and mentioning Hegemon's *Gigantomachia*, which parodied the Athenian military loss in Sicily); see also Leon R. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. BAR REV. 1130, 1133–34 (1955).

⁸⁴ ROSE, *supra* note 82, at 120.

⁸⁵ GEOFFREY CHAUCER, *The Prologue and Tale of Sir Thopas*, in *CANTERBURY TALES* 382–90 (A.C. Cawley ed., Borzoi Books 1992) (1400).

the style or substance of an original for comic effect or ridicule.⁸⁶ Although parody is a derivative art form, some scholars ascribe to it a significant role in breaking down old forms and ushering in new styles. At least one theorist gives it a dominant role in the creation of the novel in Europe because parody accustomed audiences to works of fiction in which the author's voice was concealed behind the voices of others.⁸⁷ Parody has also historically been a favorite device of young authors as they try out different styles before developing their own.⁸⁸

The narrow exception for targeted criticism endangers this tradition. Judges applying the parody test struggle to isolate one prevailing "message" from a complex expressive work.⁸⁹ No case explains a certain process by which a judge should reach a conclusion about a work's message, and whether that message "comments" on a previous work, other than presumably by instinct and intuition.⁹⁰ As Rebecca Tushnet has pointed out, courts may be incapable of making such a determination.⁹¹ To borrow her example, whether Warhol's paintings of Campbell's soup cans "commented" on the cans or used them just for attention is a question capable of intense debate with no satisfactory answer.⁹² The resulting uncertainty about the legal standard coupled with the property remedy of injunction for violation chills potential speakers and discourages investment in satirical works.⁹³

Furthermore, by the time judges, who disproportionately represent a few limited segments of society, can perceive a parodic message, the social flaw being exposed is generally well-understood. Judges have tended to be more lenient to works that speak across well-known

⁸⁶ ROSE, *supra* note 82, at 81–82.

⁸⁷ MIKHAIL MIKHAILOVICH BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 6, 309 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Tex. Press 1981); see also ROSE, *supra* note 82, at 132.

⁸⁸ ROSE, *supra* note 82, at 30; see HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 30 (1975).

⁸⁹ See Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 13 (2000); Dianne Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 709 (1992) (describing how many cases are determined by the discretion and sense of justice of each particular judge and jury due to the vagueness surrounding the scope of property rights and its intersection with speech rights).

⁹⁰ See Merges, *Are You Making Fun of Me?*, *supra* note 40, at 312.

⁹¹ Tushnet, *supra* note 89, at 13.

⁹² *Id.*

⁹³ *Id.* at 20–21; see Zimmerman, *supra* note 89, at 709.

cultural divides, such as race or gender.⁹⁴ Where a work speaks to less obvious or well-accepted issues, such as intra-racial parodies or, in some cases, works connected to homosexuality, judges have tended to draw narrower lines around what constitutes a "comment."⁹⁵ Restricting the exception to critiques that are already well-accepted minimizes its value. Such a cautious standard threatens the ability of satire to illuminate unexamined tensions and only reinforces dominant ways of thinking. It also values overtly critical works over more subtle combinations of traditions.⁹⁶

In contrast to the economic school, more recent scholarship from cognitive and behavioral psychology suggests that understanding both the nature of the property subject and its social function is crucial to determining the proper allocation of property rights.⁹⁷ Research demonstrates that status quo bias acts as a powerful barrier to private transactions involving resource entitlements. People tend to value resources more highly if such resources have been initially allocated to them than if those goods had been allocated somewhere else.⁹⁸ Therefore, people are reluctant to part with resources that they own even if the transaction would put the resource to a more valuable use. Such research puts renewed emphasis on finding optimal default allocations to increase

⁹⁴ See, e.g., *Campbell*, 510 U.S. at 582–83; *Walking Mountain*, 353 F.3d at 802; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1270–71 (11th Cir. 2001); see also The Patry Copyright Blog, <http://williampatry.blogspot.com> (Apr. 29, 2005, 6:29 EST).

⁹⁵ Compare *Campbell*, 510 U.S. at 582–83 (finding a parody where a rap song indirectly criticized earlier romanticized urban setting of song by a white artist), with *Parks v. Laface Records*, 329 F.3d 437, 453–54 (6th Cir. 2003) (finding no parody under the Lanham Act where rap group used the name of civil rights icon Rosa Parks in a song obliquely about changing times and new black heroes). The divergent verdicts in *Campbell* and *Parks v. Laface Records* seem to rest more on discomfort with interpreting intra-racial commentary than actual differences between the "parodic messages" of the songs. Similarly, in the early nineties, judges were reluctant to allow recoding of popular symbols by groups with homosexual affiliation. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 540–41 (1987) (forbidding use of label "Gay Olympic Games" for alternative sporting event despite widespread use of the term Olympic(s) by other organizations unaffiliated with the official games); *MGM-Pathe Comm'ns, Co. v. Pink Panther Patrol*, 774 F. Supp. 869, 877 (S.D.N.Y. 1991) (enjoining use of the Pink Panther symbol by anti-gay violence patrols).

⁹⁶ For example, the popular and critically acclaimed Grey Album, which combined music from the Beatles' White Album and Jay-Z's Black Album, was withdrawn under legal challenge presumably because the work would not meet the legal definition of parody. Electronic Frontier Foundation, *Grey Tuesday: A Quick Overview of the Legal Terrain*, http://www.eff.org/IP/grey_tuesday.php (last visited Sept. 11, 2005).

⁹⁷ See Lewinsohn-Zamir, *supra* note 21, at 1717–18, 1726 (reasoning objective value judgments about property entitlements, based on the quality and identity of property at issue, can create welfare-maximizing default rules); *infra* note 99.

⁹⁸ See generally Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

social welfare and private utility since allocations are likely to be given legitimacy by recipients and so remain in place. Understanding how the resource at issue operates and is valued by different stakeholders enables the formulation of more effective default rules.⁹⁹

B. Copyright Minimalists and the First Amendment Critique

Before turning to cognitive research, it is worth discussing the primary critique of the economic property-based account of secondary use. First Amendment scholars articulate a positive account of First Amendment values to support the interests of audience members in recoding popular works and fault the economic framework for failing to consider democratic values of free speech and autonomy. This critique effectively identifies problems with the prevailing regime. Since copyright restrictions generally trespass on First Amendment freedoms,¹⁰⁰ however, the First Amendment alone offers little guidance in how to balance competing interests. Solutions rooted in free speech discount the importance of a right to exclude for investment in entertainment projects. Like the economic account, the free speech critique imperfectly reflects the dynamics of the information entitlements at issue.

The First Amendment critique focuses on the control that copyright gives to large media firms over development of and engagement with culture. With the advent of mass media, many of the symbols and narratives that permeate everyday life are commodified.¹⁰¹ Think here of the Star Wars movies, the Coca-Cola logo, and characters from popular television shows such as Bart and Lisa Simpson. People find fulfillment in using such conventional or widely understood symbols to express their commitment to cultural, political, or social groups.¹⁰²

⁹⁹ Sunstein & Thaler, *supra* note 21, at 1162 (arguing that because default rules inevitably shape preferences, legal frameworks should attempt to guide consumers and individuals toward welfare-maximizing choices); cf. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 674–75 (1998) (arguing that the status quo bias demonstrates the desirability of tailoring default rules to specific circumstances).

¹⁰⁰ See Rebecca Tushnet, *Copy This Essay: How the Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535, 538 (2004).

¹⁰¹ Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863 (1991); see Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Why Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.-VLA J.L. & ARTS 123, 124 (1996) (stating that Betty Crocker has replaced Hestia in the public consciousness).

¹⁰² JOHN PHILIP JONES & JAN SLATER, *WHAT'S IN A NAME?: ADVERTISING AND THE CONCEPT OF BRANDS* 217–25 (2003) (describing Coca Cola brand loyalists who fanatically

They comment on their surroundings through creative mixing of traditions and reworkings of popular culture.¹⁰³ Even the decision to copy verbatim someone else's speech may serve democratic values. The assertion that someone's words are relevant to a new situation is a particular political stance.¹⁰⁴ Copyright law restricts "the social flow of texts, photographs, music and . . . other symbolic works," a form of control that may deprive us of the optimal cultural conditions for democratic debate and expressive innovation.¹⁰⁵

A similar critique may be found among scholars who view the Internet and the new "networked society" as particularly fertile ground to encourage active participation in culture and self-government.¹⁰⁶ The ease of digital transmission and reproduction enables users to transform common symbols and texts for their own purposes, and so "speak back" to more powerful entities.¹⁰⁷ Networked communication raises the potential for collaboration and decentralized production and thus active engagement in the cultural sphere.¹⁰⁸ This same digital technology, however, also enables greater tracking, surveillance, and blocking of expressive consumption.¹⁰⁹ Use of expressive works leaves a trail on the Internet. Owners seek to charge fees or enjoin unauthorized viewing and distribution of works or derivatives. In this way, strong intellectual property rights threaten to undermine the Internet's potential to foster a true democratic culture.

To counteract these trends, scholars have put forward positive theories of the First Amendment that would limit the amount of protection copyright owners may claim. For example, Neil Netanel has argued that inherent in First Amendment values is a need for offer-

collect products bearing the company's logo because, as one collector says, "it's in everybody's past . . . [it is] the symbol of America"); Tushnet, *supra* note 89, at 16.

¹⁰³ See Coombe, *supra* note 101, at 1864-66; Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 678-79 (1997).

¹⁰⁴ Tushnet, *supra* note 89, at 17.

¹⁰⁵ Coombe, *supra* note 101, at 1866.

¹⁰⁶ See, e.g., Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 10-13 (2004) (arguing that the Internet empowers consumers to become active participants in the production of public culture); Yochai Benkler, *Freedom in the Commons: Toward a Political Economy of Information*, 52 DUKE L.J. 1245, 1266 (2003).

¹⁰⁷ See Balkin, *supra* note 106, at 33-34; Benkler, *supra* note 106, at 1266; Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 233, 236 (1996).

¹⁰⁸ See Balkin, *supra* note 106, at 11-13, 33-34.

¹⁰⁹ See *id.* at 18.

ings from "diverse and antagonistic" sources.¹¹⁰ Yochai Benkler has advanced a similar thesis, arguing that because the First Amendment requires a robust public domain, it limits the rights in information that may be granted to private entities.¹¹¹ Jed Rubenfeld argues that the First Amendment cabins copyright by protecting an absolute "freedom of imagination."¹¹² No person should require permission to exercise her imagination, nor should anyone be prevented from disseminating works of her own imagination.¹¹³ Rubenfeld thus takes issue not with copyright's prohibition on reproduction, but on the derivative works right that prevents unauthorized users from reimagining cultural works.¹¹⁴

These theorists agree that a positive theory of the First Amendment would require a broadening of copyright's treatment of transformative uses beyond the narrow allowance for targeted parody.¹¹⁵ According to the free speech model, where a secondary work is "transformative," that is, the author has added her own original expression along with the previous work to change its meaning or purpose,¹¹⁶ courts should not enjoin that speech.¹¹⁷ As with other prior restraints, the injunction of transformative works, which by definition contain original expression, raises a specter of government-assisted censorship. Such restrictions risk suppressing valuable thoughts and ideas that would lose force if expressed another way.¹¹⁸ As to claims that unfettered secondary use will erode audience demand, minimal-

¹¹⁰ Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1881 (2000) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

¹¹¹ See Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 187 (2003).

¹¹² Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 4-5 (2002).

¹¹³ *Id.* at 4.

¹¹⁴ *Id.* at 5.

¹¹⁵ See *id.*; see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 357-58 (1999); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 84 (2001).

¹¹⁶ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

¹¹⁷ See Netanel, *supra* note 115, at 84; Rubenfeld, *supra* note 112, at 53; Zimmerman, *supra* note 89, at 737; see generally Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

¹¹⁸ See Tushnet, *supra* note 89, at 10-11.

ists see such concerns as improperly safeguarding the moral value or reputation of the work against criticism and comment.¹¹⁹

One problem is that the First Amendment, by itself, does not direct how to choose between speakers.¹²⁰ Some transformative uses are still substitutive, such as the adaptation of a novel into a screenplay. The screenplay author may add pages of new dialogue and invent new characters; this is often the case even for authorized adaptations.¹²¹ The author may use quite a bit of imagination. But once that adaptation is commercially released, it will satisfy much of the audience's demand for a film version, thereby siphoning off a large chunk of the owner's expected return.¹²²

Rubinfeld and Netanel would answer this dilemma by imposing a compulsory license or profit apportionment scheme whereby a judge or neutral tribunal calculates what portion of the second author's return is due to the appeal of the first creator's work.¹²³ Such a system would separate the right to receive compensation for use from the right to control what form the use takes. Assuming proper management, a panel of experts potentially could arrive at a reasonable licensing fee. Furthermore, the shadow of government oversight would likely encourage private bargaining.

However appealing, this system preserves the uncertainty of the current doctrine and undermines copyright's incentive functions. It preserves uncertainty because it entrusts judges to separate changes that involve imagination from changes that are introduced only to evade the reproduction right. This latter class would still be subject to injunction.¹²⁴ This inquiry is arguably as subjective as asking if a new work "comments" on an original.¹²⁵

¹¹⁹ Rubinfeld, *supra* note 112, at 53–54; Tushnet, *supra* note 103, at 675.

¹²⁰ See David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 284–85, 304–05 (2004).

¹²¹ See Goldstein, *supra* note 65, at 220–21.

¹²² For some commentators, this sort of piracy is worse than the literal kind because the secondary user appropriates a new, untapped market, whereas if the infringing work were limited to the same medium, it would only attract the same people who already had the opportunity to purchase the plaintiff's work. NIMMER & NIMMER, *supra* note 4, § 13.03[E][2] at 13–92; cf. GOLDSTEIN, *supra* note 47, at 7 (asserting that publishers will invest more in purchasing, marketing, and producing a work when they know they can control all derivative uses).

¹²³ See Netanel, *supra* note 41, at 380–81; Rubinfeld, *supra* note 112, at 57–58.

¹²⁴ Rubinfeld, *supra* note 112, at 55.

¹²⁵ See Michael Abramowicz, *A Theory of the Derivative Right and Related Doctrines* 42–44 (2005) (unpublished paper, on file with the author).

The regime also undermines incentives because it does not address overuse. Economics scholars argue that mass promotion of a popular character may saturate the public's demand for that character, especially if, as seems likely, many people will try to reimagine the character into their own products at the same time.¹²⁶ While there may be reasons to doubt that such effects are universal or widespread, especially for well-known works, it is not clear that negative externalities should be discounted altogether.¹²⁷ As discussed further in Part II, empirical data does suggest that in certain circumstances overexposure to expressive works can decrease audience demand by altering the ability to recognize, understand or appreciate authorized versions.¹²⁸ While this is unlikely to deter amateur creators and low-intensity investments in creative production, the risks of instant copycats and quick market saturation may discourage sustained investment in expressive works.¹²⁹ It is hard to see how such an environment leaves audiences or owners better off. We would have solved the prob-

¹²⁶ See *supra* notes 54–60 and accompanying text.

¹²⁷ See Lemley, *Ex Ante Versus Ex Post*, *supra* note 11, at 145–46. Professor Mark A. Lemley has argued that copyright owners do not need a right to exclude secondary users because the problem of overgrazing, or congestion externalities, is self-limiting. He gives four reasons for this claim. First, only a subset of works that are widely known across a culture are likely to be “overgrazed.” *Id.* at 145. Second, if consumers prefer the original context of the work, demand will remain high for that version. *Id.* at 146. If consumers prefer the rewrite, then we should examine our assumption that consumers prefer static meaning in their cultural symbols. *Id.* Third, allowing competition to produce sequels and rewrites may spur the original owner to produce a newer version faster. *Id.* Finally, the social value of allowing subversion of icons outweighs the social good of protecting them. *Id.* at 145–46. Although compelling on many counts, this account of overgrazing is firmly “ex post.” It assumes a world in which cultural icons already exist. Once control over many forms of reproduction and reuse is removed, it may be much harder to establish works with iconic, consensus meanings across a culture. *Cf.* Hughes, *supra* note 7, at 943, 960 (noting that in the absence of intellectual property rights, use of a symbol such as Madonna’s image could mean something entirely different to someone in Oregon than it would in Venice Beach, and eventually could become meaningless altogether). One should not go too far here though. Complementary regimes such as trademark and unfair competition may prevent some free-riding aside from copyright protection. Goldstein, *supra* note 65, at 220; F. Scott Kieff, *The Case Against Copyright: A Comparative Institutional Analysis of Intellectual Property Regimes* 7 (Stanford Law Sch. John M. Olin Program in Law and Econ., Working Paper No. 297, 2004), available at <http://ssrn.com/abstract=600802>. *But see* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 37–38 (2003) (holding that the Lanham Act does not prevent unaccredited copying of copyrighted work in which the copyright has lapsed).

¹²⁸ See *infra* notes 228–32, 346–53 and accompanying text.

¹²⁹ *Cf.* Abramowicz, *supra* note 125, at 28 (arguing that the purpose of derivative work right is to prevent rent dissipation).

lem of copyright cannibalizing free speech rights by allowing free speech to cannibalize copyright.¹³⁰

As Mark Lemley has argued, what is needed is an account of incentive and access issues that is specific to copyright law.¹³¹ Economic property analysis and free speech doctrine are useful here, but both neglect key aspects of how consumers actually choose and make use of expressive works. The economic account neglects the importance of communication and discussion about competing interpretations of symbolic works. The minimalists ignore significant audience interests in the ability to recognize and identify with cultural works. By paying attention to research regarding how we understand and consume information, we can arrive at rules that more precisely balance free speech and democracy interests with the stability and incentive functions underlying audience choice.

II. AN INFORMATION-PROCESSING ACCOUNT OF SECONDARY USE

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

Third, for consumers, works of information exist simultaneously in tangible format ready for consumption, and in memory in need of discussion and elaboration for proper encoding of experience. This duality gives consumers interests on both sides of the debate. Secondary use of expressive works of information can crowd the external marketplace and distort the ability to engage productively with favor-

¹³⁰ Furthermore, copyright cannot be returned to its original status as a right of reproduction only. See Rubinfeld, *supra* note 112, at 55. New methods of distribution have inexorably altered how people consume expressive works. See *infra* notes 148–83 and accompanying text. A right of reproduction today would provide less protection than it did in 1856 because so many ways exist to “copy” a work without literal reproduction.

¹³¹ Rubinfeld, *supra* note 112, at 44–45.

ite works. Once experienced, however, free discussion of the elements of shared cultural works facilitates categorization of knowledge, understanding of self, and development of cultural ties with peers. These dynamics, drawn from consumer psychology research, reveal a collision between the goals of owner and audience that should inform the secondary use debate.

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

1. Early History

The development of the Copyright Act in the eighteenth century reveals the roots of the current debate regarding overgrazing and secondary use. To enable exploitation of works in formats like theatre, radio, and film, owners sought to protect against use beyond literal reproduction. Owners fought for a right to represent the essence of a work in any manner capable of being perceived. The boundaries of this right to represent meaning across formats intersected with traditional audience reuse and recoding rights in a way that has not yet been satisfactorily resolved.

The original copyright acts in both Britain and the United States focused on the economics of the printing press, and so defined narrowly the exclusive rights granted to an author. The early British Copyright statute, the Statute of Anne, protected only the mechanical rights to "print, reprint or import" a book.¹³² The first U.S. Copyright statute was similarly limited to giving authors of maps and books the exclusive right to "print[], reprint[], publish[], and vend" such works.¹³³ Courts in both jurisdictions read these rights to prohibit only literal copying, and allowed subsequent authors free reign to use existing works as raw material in abridgements and translations.¹³⁴

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

¹³² 8 Ann., c. 19 (1710) (Eng.).

¹³³ Act of May 31, 1790, ch. 15, 1 Stat. 124.

¹³⁴ See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 343 (C.C.D. Mass. 1841) (No. 4901) (distinguishing between "facile use of . . . scissors" to condense a work and steal its most valuable portions with "real, substantial condensation," which revealed "intellectual labor and judgment" of bona fide new author); *Burnett v. Chetwood*, (1720) 35 Eng. Rep. 1008, 1009-10 (Ch.) (reasoning that the statute restrains only "the mechanical art of printing" and not new translations).

judges questioned the boundaries of this new form of intangible property:

[T]he property here claimed is all ideal; a set of ideas which have no bounds or marks whatever Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension ¹³⁵

In response to similar arguments in an earlier case, William Blackstone articulated what was to become the standard response: that the property right was not in the ideas put forth in the book but was found in its actual text.¹³⁶ Blackstone elaborated on this description in his second volume of the Commentaries published a few years later.¹³⁷ Blackstone wrote that "[t]he identity of a literary composition consists entirely in the *sentiment* and *language*, the same conceptions, cloaked in the same words, must necessarily be the same composition"¹³⁸ He classified literary property as a type of estate similar to the natural right of occupancy in unclaimed land.¹³⁹

The limit of copyright to literal copying showed concern for the rights of secondary authors but also sought to make expressive works available to the widest possible audience. Abridgements served a valuable public interest by making more expensive, and in some cases more complicated, works available in cheaper and simpler versions. By protecting the ability of secondary authors to make use of previous works, judges believed they were furthering aims of public education and intellectual progress.¹⁴⁰ That an unauthorized derivative work

¹³⁵ *Millar v. Taylor*, (1769) 98 Eng. Rep. 201, 233 (K.B.).

¹³⁶ *Tonson v. Collins*, (1761) 96 Eng. Rep. 180 (K.B.) ("Style and sentiment are the essentials of a literary composition. These alone constitute its identity.").

¹³⁷ WILLIAM BLACKSTONE, 2 COMMENTARIES *406; see MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 89-90 (1993).

¹³⁸ BLACKSTONE, *supra* note 137, *406.

¹³⁹ *Id.* at *400-01, 405; ROSE, *supra* note 137, at 90.

¹⁴⁰ See *Banker v. Caldwell*, 3 Minn. 94, 3 Gil. 46, 53 (1859) ("It has been a very difficult question in the courts to determine what is original and what borrowed or pirated, in a literary production. It cannot be necessary that the matter contained in a work, the thought, sentiment and language, should be all original, to entitle the author to the protection of a copyright, because if such was the case, in the present advanced state of the sciences, learning, and literature, we might look for very few additions which would fall in the privileged sphere. It would exclude . . . abridgments of works beyond the reach of many, which now form a large portion of the means through which knowledge is conveyed to the people.").

might displace the market for the original or a licensed abridgement or translation was not given much weight.¹⁴¹

Beyond exact text, the plot, characters, and sensibility of the author were fair game for imitators and critics. For example, in 1853 the author Harriet Beecher Stowe sued the translators of an unauthorized version of *Uncle Tom's Cabin* targeted to German immigrants.¹⁴² The 1831 Copyright Act in force at the time was silent on the issue of derivative rights.¹⁴³ Stowe argued that the translation was a direct copy, with only the mechanical signs having been changed.¹⁴⁴ The judge disagreed and read the Act to protect only the precise words used by Stowe.¹⁴⁵ He found that her characters, concepts, and creations were public property, however, and "may be used and abused by imitators, play-rights and poetasters."¹⁴⁶ After publication, "[t]he author's conceptions have become the common property of his readers, who cannot be deprived of the use of them, nor of their right to communicate them to another clothed in their own language" ¹⁴⁷

2. "Cognate" Rights

Soon after the *Stowe* decision, Congress began to expand copyright's scope to include non-literal copies.¹⁴⁸ It is the boundaries of this expansion that have yet to be fully mapped out. For example, in 1856, Congress had added the right to perform a dramatic work pub-

¹⁴¹ In an 1847 case, Judge McLean of the First Circuit Court of Appeals criticizes the fair abridgement doctrine for its lack of attention to the effects on the sale of the work abridged. See *Story v. Holcombe*, 23 F. Cas. 171, 172-73 (C.C.D. Ohio 1847) (No. 13,497) ("The argument that the abridgement is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unwilling and unable to purchase the work at large, is not satisfactory. This to some extent may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgement? . . . The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author—a right secured by law."). Finding himself bound by precedent based on the English doctrine, however, he refused to fully enjoin an abridgement of Justice Story's *Commentaries on Equity Jurisprudence*.

¹⁴² *Stowe v. Thomas*, 23 F. Cas. 201, 201 (C.C.E.D. Pa. 1853) (No. 13,514).

¹⁴³ See Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.

¹⁴⁴ *Stowe*, 23 F. Cas. at 202-05.

¹⁴⁵ *Id.* at 206-08.

¹⁴⁶ *Id.* at 208.

¹⁴⁷ *Id.* at 206.

¹⁴⁸ Goldstein, *supra* note 65, at 213-14.

licly to the exclusive rights of copyright owners.¹⁴⁹ *Daly v. Palmer*, decided in 1868, defined the boundaries of an infringing performance.¹⁵⁰ In that case, the plaintiff wrote a popular play involving a dramatic rescue in front of an oncoming train.¹⁵¹ A British playwright obtained a copy and wrote a different hit play in London containing a similar scene.¹⁵² A New York theatre sought to produce the second play and Daly sought an injunction.¹⁵³ The two plays shared little in common in terms of dialogue, characters, or plot save for the infamous railroad scene, and even that contained material differences.¹⁵⁴ The new right of public performance, however, freed the court from side-by-side comparison as a test for infringement.¹⁵⁵ Instead, the court found that Daly's play could be infringed "by representation as well as by printing, publishing, and vending."¹⁵⁶ The test of whether a dramatization violated this right of "representation" was its ability through movement and gesture to "excite[] emotions and impart[] impressions" that the audience would experience as substantially similar to the original work.¹⁵⁷ *Daly* thus marked the first moment where the rights protected by copyright ceased to subsist entirely in tangible works and instead became focused on the impact of the work on paying audiences.¹⁵⁸

Technological advances pushed the boundaries of prohibited "copying" further. Mechanical piano rolls first presented the question of whether non-literal musical reproduction constituted a "reproduction" prohibited under the Act.¹⁵⁹ These rolls, perforated cylinders designed to produce melodies when rotated inside a player piano, gave the same impression of a person sitting and playing a composition off of sheet music. Music publishers sought royalties for such use, but the pianola manufacturers argued that a perforated cylinder that

¹⁴⁹ Act of August 18, 1856, ch. 169, 11 Stat. 138 (current version at 17 U.S.C. § 106 (2000)).

¹⁵⁰ 6 F. Cas. 1132, 1135-39 (C.C.S.D.N.Y. 1868) (No. 3552).

¹⁵¹ *Id.* at 1133.

¹⁵² *Id.* at 1133-34.

¹⁵³ *Id.* at 1134.

¹⁵⁴ *See id.* at 1134-35.

¹⁵⁵ *See Daly*, 6 F. Cas. at 1135-38.

¹⁵⁶ *Id.* at 1137-38.

¹⁵⁷ *Id.* at 1137. The court found that "[a]ll that is substantial and material in the plaintiff's 'railroad scene' has been used . . . in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff's play." *Id.* at 1138.

¹⁵⁸ *See Goldstein, supra* note 65, at 213-14.

¹⁵⁹ GOLDSTEIN, *supra* note 47, at 65.

little resembled a piece of paper containing musical notations could not violate copyright's reproduction right.¹⁶⁰ The courts were thus presented with the question of whether a piano roll was a "copy" of sheet music.¹⁶¹

By the time the music rolls case reached the Supreme Court in 1908, in *White-Smith Music Publishing Co. v. Apollo Co.*, the manufacture and sale of such pianos had reached seventy five thousand and the sale of the rolls had topped over one million per year.¹⁶² Accordingly, the Court chose a narrow reading of the then-current act and limited the definition of "copy" to "reproduction or duplication of a thing."¹⁶³ "The statute has not provided for the protection of the intellectual conception apart from the thing produced," wrote Justice Day for the majority.¹⁶⁴ Justice Holmes concurred, but wrote separately to argue that to protect inventors fully, the statute should be revised to extend protection not only to the form of a composition, but to its "essence."¹⁶⁵ "A musical composition is a rational collocation of sounds apart from concepts On principle anything that mechanically reproduces the sounds ought to be held a copy"¹⁶⁶

The publishers then took the matter up with Congress, which was at the time in the process of holding hearings to revise the copyright laws.¹⁶⁷ In 1909, Congress passed the 1909 Copyright Act, which added several new rights for copyright holders.¹⁶⁸ In the case of dramatic works, these included the right to "represent" the work in whole or in part "in any manner or by any method whatsoever"¹⁶⁹ and, in the case of musical compositions, the right to "make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded

¹⁶⁰ *Id.* at 66.

¹⁶¹ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 8–11 (1908).

¹⁶² *Id.* at 9.

¹⁶³ *Id.* at 17.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 19 (Holmes, J., concurring).

¹⁶⁶ *Apollo*, 29 U.S. at 19–20 (Holmes, J., concurring).

¹⁶⁷ GOLDSTEIN, *supra* note 47, at 67; *see also* Metro-Goldwyn-Mayer Distrib. Corp. v. Bi-jou Theatre Co., 59 F.2d 70, 74 (1st Cir. 1932) (describing the desire to overturn the *Apollo* decision as one of the purposes of the 1909 Copyright Act).

¹⁶⁸ Act of March 4, 1909, ch. 320, § 1(d), 35 Stat. 1075 (current version at 17 U.S.C. § 106 (2000)).

¹⁶⁹ *Id.*

and from which it may be read or reproduced"¹⁷⁰ These rights to "represent" intangible works or reproduce "thought" quietly but explicitly expanded copyright's reproduction right from tangible objects into the realm of perceptual similarities.

This transformation was complete when Holmes decided a 1911 case, *Kalem Co. v. Harper Bros.*, concerning a motion picture photoplay.¹⁷¹ The case, involving a silent movie based on the novel *Ben-Hur*, turned on the right added in 1870 to "dramatize" a book.¹⁷² Although the silent movie was not literally similar to the text of the book, Holmes relied on *Daly* to find that "[t]he essence of the matter . . . is not the mechanism employed but that we see the event or the story lived."¹⁷³

Holmes' insistence on locating the "essence" of the protected work recalls Blackstone's attempts to identify what was "essential" in copyright. Where Blackstone had located the borders of the literary estate at the "*sentiment and language* . . . the same conceptions cloathed in the same words,"¹⁷⁴ Holmes had by 1911 extended the boundaries to include anything that conveyed the same story to the understanding of the audience. The 1909 Copyright Act and Holmes' *Kalem* opinion paved the way for courts to apply the right of conceptual representation embraced in *Daly* to new technologies from the printing press such as moving pictures, radio, television, and even computer software.¹⁷⁵ Any method of production that might call up the "essence" of the composition in the mind of a paying audience now fell within the limits of copyright.

The current Copyright Act reflects this expansion of the author's domain. In the 1976 Copyright Act, the separate sections relating to dramatic, literary, musical, or photographic works were for the most part combined in favor of a unitary approach to the bundle of rights granted under copyright.¹⁷⁶ The exclusive reproduction right granted to owners includes the right to produce a material object in which the

¹⁷⁰ *Id.* § 1(e). The Act made this latter right only prospective and provided a compulsory license to ensure that no producer could gain a monopoly over the entire format. See GOLDSTEIN, *supra* note 47, at 67.

¹⁷¹ See 222 U.S. 55, 61-62 (1911).

¹⁷² See *id.* at 61.

¹⁷³ *Id.*

¹⁷⁴ BLACKSTONE, *supra* note 137, at *406.

¹⁷⁵ See generally *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) (radio); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1250-54 (3d Cir. 1983) (computer operating systems); *Bijou Theatre Co.*, 59 F.2d at 75 (movies).

¹⁷⁶ See 17 U.S.C. § 102 (2000).

work can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."¹⁷⁷ The derivative work right reserves to the owner "any other form in which a work may be recast, transformed, or adapted."¹⁷⁸

Though this language has existed for over twenty years, courts have not carefully examined the outer limits of this right of conceptual representation.¹⁷⁹ The "substantial similarity" test, which determines the boundaries between infringing and non-infringing similar works, offers little guidance.¹⁸⁰ Most courts look to an "ordinary observer" or "audience" test that asks whether the new work evokes a similar "impression" as the old,¹⁸¹ or whether an ordinary observer would conclude that the new work incorporated something of value from plaintiff's work.¹⁸² These tests expand the limits of copyright beyond literal similarity or even semantic similarity to any work that, in the opinion of the average viewer or listener, evokes a former work. Such tests assume without explanation that plaintiffs deserve control over any aspect of their work with value to the audience, and at the extreme threaten to elide copyright's cornerstone distinction between protected expression and unprotectible ideas and concepts.¹⁸³

¹⁷⁷ *Id.* §§ 101, 102.

¹⁷⁸ *Id.* §§ 101, 106.

¹⁷⁹ See NIMMER & NIMMER, *supra* note 4, § 13.03[A] at 13-35 to -36 (noting that the distinction between literal and non-literal similarity in copyright has received "almost no express judicial recognition").

¹⁸⁰ Judge Learned Hand, the architect of the foundational approach to the modern substantial similarity inquiry in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), concluded in one of his last copyright cases that "[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

¹⁸¹ NIMMER & NIMMER, *supra* note 4, § 13.03[E][1] at 13-82, 13.03[E][2] at 13-89 to -90.

¹⁸² See *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005) (describing the "ordinary observer" test in the context of video games as "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value"); *Stromback v. New Line Cinema*, 384 F.3d 283, 297 (6th Cir. 2004) (same, and concluding that the question turns on whether the "net impression" of the works' expressive elements are substantially similar to one another); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (same); *Yankee Candle Co., Inc. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001) (same); *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 541 (3d Cir. 1986) (same); see also *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001) (describing the ordinary observer test as whether "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work").

¹⁸³ See NIMMER & NIMMER, *supra* note 4, § 13.03[A][1][c] at 13-46.

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

The confusion over copyright's boundaries is especially pernicious in cases where a new author seeks to reuse excerpts of an existing work for a different purpose. To date, no court has clearly defined in the wake of the 1909 expansions whether the ability to communicate subjective conceptions of an expressive work belongs to the audience or to the author.¹⁸⁴ Instead, resolution of this question has come to focus on imprecise questions about the secondary user's motivation in using the work.

Although nothing in the legislative history indicates that Congress intended the 1909 Copyright Act to alter the common-law rights of audience members to parody and burlesque popular works, the new derivative rights did just that.¹⁸⁵ Before the revisions of 1909, the law took a benign view of parody, satire, burlesque, pastiche, and other forms of communicating alternative audience perceptions of a cultural work. Such use was common as a form of commercial art and in everyday discourse. On the stage, most popular plays were the subject of parodies that were performed at about the same time as the originals.¹⁸⁶ Imitators often spoofed the styles of well-known writers and performers. Newspapers reported or reproduced parodies of popular

¹⁸⁴ Compare *Warner Bros., Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 242 (2d Cir. 1983) ("Stirring one's memory of a copyrighted character is not the same as appearing to be substantially similar to that character, and only the latter is infringement."), with *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 399 (6th Cir. 2004) (finding use of only a small portion of plaintiff's musical composition was infringement even where no ordinary listener would notice the similarity), and *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1267 (11th Cir. 2001) (finding substantial similarity even when copyrighted characters were "inverted" in imaginative retelling so that their traits, values and even settings were opposite to the original), and *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (finding infringement between popular television show and characters in an advertisement despite lack of literal similarity between characters because overall impression, effect, and "concept and feel" were similar), and *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179, 1186 (C.D. Cal. 1998) (finding substantial similarity where defendant's movie trailer consciously evoked plaintiff's but used different actors and props and referred to completely different subject matter).

¹⁸⁵ S. REP. NO. 6187, at 1 (1907) (stating that the bill preserved common law adjudication of what constituted infringement and fair use); see also H.R. REP. NO. 2222, at 7, 9 (1909) (stating that monopoly given to the author was ultimately intended to benefit the public and that nothing in the bill intended to alter author's common-law rights with respect to the work).

¹⁸⁶ Yankwich, *supra* note 83, at 1136; William Lyon Phelps, *Daily Talk About Books and Authors*, WASH. POST, Dec. 12, 1933, at 6 (noting how in past years two New York comedians always selected the most popular play of the year to burlesque).

works frequently.¹⁸⁷ As far as courts were concerned, so long as the parodist had not copied the previous work in its entirety, or set out to replace rather than ridicule the original, parodies qualified as fair use.¹⁸⁸

Not long after passage of the 1909 Copyright Act, judicial attitudes towards parody and burlesque took a marked shift. The ability to exploit a single work through the different mediums of radio, motion picture, and television led owners of popular dramatic works to clamp down on parodists who transposed the work to a new format. Judges began vilifying the act of parody itself as a taking no different from any other theft.¹⁸⁹

For example, in 1955, a California district court enjoined a television parody of a popular film.¹⁹⁰ The decision in the case, *Loew's, Inc. v. Columbia Broadcasting System*, explicitly distinguished between acceptable and unacceptable formats for parody.¹⁹¹ It drew a line between literature and scientific texts, where broad fair use and parody might be allowed because such works aimed to further progress in the arts and sciences, and fields where "business competition" existed such as broadcast entertainment.¹⁹² The court ruled that the factor of whether "the infringing work . . . has been issued for commercial

¹⁸⁷ See *A Parody*, N.Y. TIMES, Aug. 23, 1896, at 2 (reprinting a parody of Horace by Alexander Pope); *A Parody*, N.Y. TIMES, May 3, 1896, at 11 (reprinting an anonymous parody of Emerson's *Brahma*); *Barrie Denies Parody*, N.Y. TIMES, July 17, 1921, at 23 (reporting the denial of Sir James Barrie that he had written a parody of a Mrs. Asquith's memoirs reportedly entitled "Knees I Have Sat Upon."); Albert E. McKay, *Parodies on "The White Man's Burden."*, N.Y. TIMES, May 27, 1899, at BR351 (reprinting portions of a number of parodies of Kipling's poem); *Parody*, N.Y. TIMES, Mar. 29, 1885, at 12 (essay praising parodies for their role in chastening and instructing authors).

¹⁸⁸ See generally *Green v. Luby*, 177 F. 287 (C.C.S.D.N.Y. 1909) (singing an entire song to imitate popular singer took more than necessary and was infringement); *Green v. Minzenheimer*, 177 F. 286 (C.C.S.D.N.Y. 1909) (singing the chorus and one verse of a copyrighted song to parody the style of a popular singer was not infringement); *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903) (same with respect to the chorus only).

¹⁸⁹ See *Loew's, Inc. v. Columbia Broad. Sys., Inc.*, 131 F. Supp. 165, 183 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom. by an equally divided court*, *Columbia Broad. Sys., Inc. v. Loew's, Inc.* 356 U.S. 43 (1958); *Hill v. Whalen & Martell*, 220 F. 359 (S.D.N.Y. 1914) (characters in play *In Cartoonland* were clearly meant to be copyrighted Mutt and Jeff characters and so threatened to meet consumer demand for an authorized dramatization of the strip).

¹⁹⁰ *Loew's*, 131 F. Supp. at 186.

¹⁹¹ *Id.* at 175, 183.

¹⁹² *Id.* at 175 ("[T]he law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art' . . . We do not think . . . [the] use of the word *art* was used in a sense broad enough to include a T.V. program . . .") (emphasis added).

gain, rather than in the interests of advancement of learning" was crucial.¹⁹³ Many commentators at the time, including Leon Yankwich, the chief judge of the district, condemned the decision for its cramped view of parody and satire and its contention that the author's desire for commercial gain was "primary" in determining fair use.¹⁹⁴ Nonetheless, the decision was upheld and praised by both the Ninth Circuit and the U.S. Supreme Court.¹⁹⁵

The *Loew's* case introduced the dichotomy, picked up by the Supreme Court later in the 1994 decision in *Campbell v. Acuff-Rose Music, Inc.* between "true" parody that seeks to make a critical comment and false parody, which looks only for attention or commercial profit.¹⁹⁶ Although the Court in *Campbell* provided greater leeway for commercial parodies than in *Loew's*, it preserved the rhetorical distinction between true, disinterested critique and crass, attention-getting commercialism.¹⁹⁷ The result has been a test that for the most part distinguishes between commercial and non-commercial, or private and public, expressive activity.¹⁹⁸ Since *Loew's* and *Campbell*, parody and pastiche have greatly retreated from the commercial marketplace. Those seeking to rework a popular text, comment on favorite characters through fiction, or call to mind iconic works in fine art, for example, risk onerous lawsuits.¹⁹⁹

Digital technology, however, destabilizes the tenuous balance drawn in cases like *Loew's* and *Campbell*. The Internet is quickly destroying the boundaries between personal and public, and private and commercial in communication. Private use of works, once considered outside the scope of copyright, now takes place in increasingly public

¹⁹³ *Id.* at 184-85.

¹⁹⁴ See Yankwich, *supra* note 83, at 1151 (pointing out that "[m]aterial gain by writers through parody and burlesque is not of modern origin," and that writers from the Greeks through the great English parodists of the 15th and 16th centuries received compensation for writing satires).

¹⁹⁵ *Benny*, 239 F.2d at 534, 537.

¹⁹⁶ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580-81 (1994); *Loew's*, 131 F. Supp. at 174-76; see also *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981) ("While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain."); *Wainwright Secs., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977) ("[Fair use] distinguishes between a true scholar and a chiseler who infringes a work for personal profit.").

¹⁹⁷ See *Campbell*, 510 U.S. at 578-85.

¹⁹⁸ See LESSIG, *supra* note 13, at 8.

¹⁹⁹ See, e.g., Donald G. McNeil Jr., *On Stage and Off: Parody, but No One's Laughing*, N.Y. TIMES, Dec. 23, 1994, at C2 (noting the difficulties for small theater companies in mounting parodies of well-known works).

fora. For example, Marvel Comics recently brought a lawsuit to prevent fans of its superhero comics from "dressing up" as their protected characters in an unaffiliated fantasy game.²⁰⁰ Marvel obviously wants to protect the audience for its authorized games, but its stance is not so distinct from attempting to prohibit pretend games in one's backyard.

Distance-learning courses have similarly challenged the traditional fair use exception for educational discussions and performances. The original exception assumed a face-to-face interaction in a classroom setting. In 2002 Congress had to pass a special rule clarifying that the exception applied to online learning environments as well.²⁰¹ For-profit institutions, which are increasingly prevalent, and libraries, which host many such courses, however, remain outside the exception.²⁰² The ability of students in those classes to "discuss" copyrighted works online free of charge remains in doubt.

To say that copyright extends to audience perception then does not answer the question of where to draw copyright's boundaries. Although the question arises in numerous fair use cases, courts have not clarified at what point an audience's memory and perception of characters, music or other expressive elements becomes the property of the audience.²⁰³ The proper balance between the owner's right to profit from the original creation and the audience's right to identify with, consider, rework, and discuss the significance of the work remains unresolved.

For this reason, those who argue that the dynamics of digital networks should control the contours of user rights may aim too narrowly.²⁰⁴ These technologies are still developing and will change many times in the coming decades. What will remain the same, or at least will shift more slowly over time, are the mechanics of human comprehension. Just as owners have fought for rights that are purposefully not technology-specific but extend to anything that sends a cognitive message, so should user rights not depend on technology, but should

²⁰⁰ See generally Alex Veiga, *Marvel Sues Firms Behind Online Superhero Role-Playing Game*, N. COUNTY TIMES (Cal.), Nov. 12, 2004, available at http://www.nctimes.com/articles/2004/11/12/special_reports/science_technology/16_04_5011_11_04.prt.

²⁰¹ Technology, Education and Copyright Harmonization Act, 17 U.S.C. §§ 110(2), 112(f) (2000). See Kristine H. Hutchinson, Note, *The TEACH Act: Copyright Law And Online Education*, 78 N.Y.U. L. REV. 2204 (2003), for a description of problems with the Act.

²⁰² Hutchinson, *supra* note 201, at 2225-27.

²⁰³ See *infra* notes 271-321 and accompanying text.

²⁰⁴ See, e.g., Balkin, *supra* note 106, at 52.

be grounded in the workings of information perception.²⁰⁵ Otherwise, the battle that Congress feared for authors, in which they would have to litigate every new technological advance to determine protection, is being fought by users to defend a diminishing universe of fair uses with each new technological breakthrough.

B. *Copyright Ownership in a Desired Brand Identity*

The extension of copyright into amorphous realms of consumer perception has led authors and owners to claim an ownership right in the preservation of a desired brand identity. From their standpoint, the right to represent a story or song across mediums must include the ability to halt competing representations of the same work, even if the two works are not confusingly similar or do not serve the same purpose or audience. Because profitability in entertainment and increasingly retail industries depends on being able to repurpose familiar popular works across a variety of media, owners must vigilantly protect core works to ensure that varied incarnations maintain a consistent meaning and identity to consumers.²⁰⁶ The introduction of negative or dissonant associations with a marquee work threatens the ability of that work to support large tie-in and promotional enterprises. This, at least, is the harm claimed when owners sue to enjoin unauthorized secondary use. By adding a copyright claim to what are essentially trademark concerns, owners are able to sidestep trademark's broader free speech safeguards. Courts have been inconsistent in their willingness to entertain claims based on alteration in consumer perception in the context of copyright. The uncertainty of both trademark and copyright rules in this area has left consumers and secondary users without clear guidance.

1. Positive and Negative Associations

Due to their negligible marginal cost, entertainment companies increase profits by producing and distributing products to as many audiences and markets as possible.²⁰⁷ Producers may distribute

²⁰⁵ See, e.g., H.R. REP. NO. 94-1476, at 51 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5664.

²⁰⁶ See, e.g., MICHAEL J. WOLF, *THE ENTERTAINMENT ECONOMY* 25 (1999) (noting how the need to attract audience attention has led studios to consolidate assets with networks, cable TV stations, and book publishers to market and distribute products through a variety of outlets).

²⁰⁷ See *id.* at 97-98, 228-30.

profitable works through new channels, such as releasing films on television and DVDs. Many films earn more through DVD sales than they do in their initial box office run.²⁰⁸ Marketers repurpose and recycle profitable works through sequels, spin-offs, adaptations, and promotional tie-ins.²⁰⁹ Books become movies, movies reappear as musicals or video games, and popular songs animate advertising or films. Once a work has achieved commercial success, its audience will follow it from product to product. Tie-in products increase loyalty by heightening familiarity and engagement with the work.²¹⁰ Some brands earn more through merchandising than through the original product. Winnie-the-Pooh, for example, has grown from a tubby little bear to a billion dollar franchise for Disney through sales of DVDs, toys, and his popular theme-park ride, the Honey Hunt.²¹¹

The ability to repurpose characters and brand images lowers risks and costs for owners. Use of an already popular story line or character offers more predictable revenues and requires less promotion.²¹² No matter what, the tie-in product will interest some segment of the audience.²¹³ The strength of established works is not just theory. Of the top ten films of all time by revenue, for example, five are sequels or prequels, and four are based on popular books or comics.²¹⁴

²⁰⁸ David D. Kirkpatrick, *Action-Hungry DVD Fans Sway Hollywood*, N.Y. TIMES, Aug. 17, 2003, at A1 ("Home video sales accounted for more than 58 percent of Hollywood's income last year, more than twice as much as box-office revenues.").

²⁰⁹ Benjamin A. Goldberger, *How the "Summer of the Spinoff" Came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 317-47 (2003) (describing the various media into which characters may be spun off and reused).

²¹⁰ WOLF, *supra* note 206, at 231 ("When a company offers theme parks, hotels . . . movies, toys, fast food, books, videos, records, magazines, clothing, and other products, the hope is that all these products and the efforts behind them will mesh and contribute to a chain reaction that creates more energy, awareness and economic effect than any single aspect might have done on its own."); see JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, PERSUASION IN ADVERTISING 63 (2004); Pessach, *supra* note 78, at 1093.

²¹¹ See Laura Bradford, *Who Owns Pooh?: Disney Fights in Court over Digital Rights to a "Silly Old Bear" as New Technology Casts Doubt on Old Contracts*, TIME, Jul. 15, 2002, at B16. Another example is the *Jurassic Park* movie series. The first two movies themselves garnered \$1.5 billion in worldwide box office sales, while receipts from home videos, toys, video games, amusement park rides, and other revenue streams has approached \$3.5 billion. WOLF, *supra* note 206, at 229.

²¹² Goldberger, *supra* note 209, at 327-29.

²¹³ WOLF, *supra* note 206, at 224-25 (stating that we are predisposed to accept, or at least look at, anything that carries the brand of a big entertainment company).

²¹⁴ All Time Box Office Domestic Grosses, <http://www.boxofficemojo.com/alltime/domestic.htm> (last visited Sept. 11, 2005). The five sequels are *Shrek 2*; *Lord of the Rings: Return of the King*; *Star Wars I: The Phantom Menace*; *Spider-Man 2*; and *Star Wars III: Revenge of the Sith*. In addition to *Spider-Man 2* and *Lord of the Rings*, the other films based on books

Identifiable brands form the center of this juggernaut. For entertainment products, characters, situations, melodies, authors, and designs can all act as brand signifiers.²¹⁵ To the purchasing public, the use of a popular character or recognizable tune acts as an information shortcut or heuristic. Consumers save time and energy evaluating a product by conferring on the product their associations with the brand.²¹⁶ To perform this function effectively, brands must maintain a consistent personality and identity.²¹⁷ In fact, research studies show that consumers punish products and brands that require too much effort to evaluate.²¹⁸ A brand that stands for something simple is "more memorable, more visible and more meaningful" than a brand associated with a variety of images.²¹⁹ To keep parents and children invested in purchasing new Winnie-the-Pooh DVDs, for example, Disney must ensure that he maintains a loveable and innocent persona through all licensed uses.

Marketers know that whatever is associated with a brand has the power to affect its image. Mechanisms in our brains automatically classify things as "good" or "bad" as soon as we perceive them.²²⁰ If something that anchors an entertainment brand, such as a popular character or a well-known song, is associated with something that triggers a positive emotional response, our appreciation of the brand increases.²²¹ Accordingly, much of modern advertising is designed to

are *Spider-Man* and *The Passion of the Christ*. Only *Titanic*, *ET* and *Star Wars* boast original concepts.

²¹⁵ See O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 40–41, 60; see also Cristel A. Russell et al., *People and "Their" Television Shows: An Overview of Television Connectedness*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* 275, 284 (L.J. Shrum ed., 2004) (arguing that television shows act as brands).

²¹⁶ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 60; see DAVID N. MARTIN, *ROMANCING THE BRAND: THE POWER OF ADVERTISING AND HOW TO USE IT* 89 (1989); WOLF, *supra* note 206, at 223.

²¹⁷ MARTIN, *supra* note 216, at 89–92; O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 66; see WOLF, *supra* note 206, at 223–24.

²¹⁸ Ellen C. Garbarino & Julie A. Edell, *Cognitive Effort, Affect, and Choice*, 24 J. CONSUMER RES. 147, 156 (1997).

²¹⁹ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 66; see MARTIN, *supra* note 216, at 92; WOLF, *supra* note 206, at 223.

²²⁰ ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 116–17 (1994); O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 62, 124; Magda Teresa Garcia & John A. Bargh, *Automatic Evaluation of Novel Words: The Role of Superficial Phonetics*, 22 J. LANGUAGE & SOC. PSYCHOL. 414, 414 (2003).

²²¹ See Sarah C. Haan, Note, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281, 1299 (2000). According to an influential 1991 Advertising Research Foundation study, "likeability" in an advertisement is the single best predictor

increase positive associations with advertised brands and products through use of symbolic and emotional appeals to the values of the target audience.²²²

Negative information, however, has an even greater impact on brand association than positive information.²²³ Brand images are developed over time.²²⁴ Consumers learn to "trust" a brand through repeated exposure.²²⁵ If a brand somehow has been associated with incompatible values or unpleasant images, consumers will be less likely to purchase it.²²⁶ Studies suggest that the negative perception of the brand will persist for some time even through attempts by the owners to provide countering information.²²⁷

Frequent exposure can also harm consumer attitudes. During initial introduction to a brand or message, frequency of exposure increases familiarity and likeability.²²⁸ Individuals tend to misattribute the increased ease of processing of a familiar message to the content of the message itself, and so find their tolerance of and positive attitude toward the message increase over time.²²⁹ Consumers thus will

of effectiveness in promoting brand memory and purchasing decisions. Russell I. Haley & Allan L. Baldinger, *The ARF Copy Research Validity Project*, 31 J. ADVERTISING RES. 11, 29 (1991).

²²² See O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 57–59, 64; see also MARTIN, *supra* note 216, at 95 ("In advertising, we seek to shape attitudes What we want is for the consumer to remember the brand and what it offers and to have a positive attitude about trying it.").

²²³ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 63; see also Stephen J. Hoch & Young-Won Ha, *Consumer Learning: Advertising and the Ambiguity of Product Experience*, 13 J. CONSUMER RES. 221, 223 (1986) (stating that because of asymmetric costs of different types of errors, people are more wary of mistakenly accepting something that might be bad than mistakenly rejecting something that might be good).

²²⁴ MARTIN, *supra* note 216, at 89.

²²⁵ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 63, 67.

²²⁶ See O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 64–65; cf. Jennifer Aaker et al., *When Good Brands Do Bad*, 31 J. CONSUMER RES. 1, 13 (2004) (summarizing study that showed that consumer relationships with "sincere" brands, defined as those like Hallmark or Ford that show traits of nurturance, warmth, family-orientation, and traditionalism, suffered more after "transgression" by the brand, than consumer relationships with exciting, "trendy" brands, such as MTV or Virgin).

²²⁷ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 59–60.

²²⁸ See Robert B. Zajonc & Hazel Marcus, *Affective and Cognitive Factors in Preferences*, 9 J. CONSUMER RES. 123, 125 (1982).

²²⁹ See John A. Bargh, *Conditional Automaticity: Varieties of Automatic Influence in Social Perception and Cognition*, in UNINTENDED THOUGHT 3, 14 (James S. Uleman & John A. Bargh eds., 1989) (noting that frequency of exposure to a subject produces positive feelings of trust and liking due to ease of recall that is misattributed to the qualities of the subject itself); see also J. Lee McCullough & Thomas M. Ostrom, *Repetition of Highly Similar Messages and Attitude Change*, 59 J. APPLIED PSYCHOL. 395, 395–97 (1974) (finding positive feelings towards print advertisements increased with moderate exposure).

respond more favorably to messages communicated frequently even if they initially disagree with the message or find its source not credible.²³⁰ After a certain level of unvaried exposure, however, tedium sets in and consumers will begin to feel negatively toward the message or brand.²³¹ Owners of expressive properties carefully manage audience exposure to enhance familiarity but to decrease the likelihood of audience fatigue.²³²

These marketing truisms explain the panic of brand managers when an outsider uses a brand element in an unauthorized way. Although owners may eschew smaller players when it comes to licensing, they will pay attention to even slight secondary uses done without permission.²³³ Such uses threaten to taint carefully managed brand campaigns by association with negative or even just inconsistent elements.

According to media reports and publicly filed complaints, this harm to the perceptive value of a character or work is precisely the concern of litigants seeking to enjoin secondary uses. For example, after a flash animation film swept around the Internet in the fall of 2004 with President George W. Bush and John Kerry singing to the tune of Woody Guthrie's *This Land is Your Land*, the music publisher that owned the copyright to Guthrie's tune sought to stop distribution of the film.²³⁴ The concern was not that the spoof would directly sub-

²³⁰ See Alan Sawyer, *Repetition, Cognitive Responses, and Persuasion*, in COGNITIVE RESPONSES IN PERSUASION 237-44 (Richard E. Petty et al. eds., 1981); see also Bargh, *supra* note 229, at 14 (positing that frequency of exposure to a subject produces positive feelings of trust and liking due to ease of recall that is misattributed to the qualities of the subject itself).

²³¹ See John T. Cacioppo & Richard E. Petty, *Central and Peripheral Routes to Persuasion: The Role of Message Repetition*, in PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS: THEORY, RESEARCH, AND APPLICATIONS 91, 99 (Linda F. Alwitt & Andrew A. Mitchell eds., 1985) (repetition of audio messages); Sawyer, *supra* note 230, at 247, 250-53; Bobby J. Calder & Brian Sternthal, *Television Commercial Wearout: An Information Processing View*, 17 J. MARKETING RES. 173, 185-86 (1980) (repetition of television ads).

²³² See Bill Britt, *Disney's Global Goals*, MARKETING, May 17, 1990, at 26 ("To avoid overkill, Disney manages its character portfolio with care. It has hundreds of characters on its books, many of them just waiting to be called out of retirement . . . Disney practices good husbandry of its characters and extends the life of its brands by not over-exposing them . . . They avoid debasing the currency.").

²³³ See *supra* notes 80-81 and accompanying text; cf. J.C. HERZ, JOYSTICK NATION: HOW VIDEOGAMES ATE OUR QUARTERS, WON OUR HEARTS, AND REWIRED OUR MINDS 134 (1997) ("Nintendo's in-house characters are its crown jewels. And the company is fastidious, to the point of paranoia, about safe-guarding their reputations.").

²³⁴ Allen Wastler, *A Jibjab Showdown*, CNN MONEY, July 26, 2004, <http://money.cnn.com/2004/07/26/commentary/wastler/wastler/>. The publisher sent a cease and desist letter to the film's producers, who then filed a declaratory judgment action seeking protection as fair use in the form of parody. Evan Hansen, *Jibjab Beats Copyright Rap*, CNET

stitute for sales of albums or singles featuring the song, nor was it having to forego whatever nominal license fee the cartoonists might have paid. Kathryn Ostien, director of copyright licensing for the publisher, told CNN that the harm was the creation of new associations with the song, presumably those of political carping and dissension stating, "This puts a completely different spin on the song. The damage to the song is huge."²³⁵

Other copyright owners express similar concerns about the harm of secondary use on the perceptive value of the original. Mattel has sued artists for using its protected Barbie characters in a song about materialism²³⁶ and in fine art photographs or reproductions that placed the doll in erotic or sexualized positions.²³⁷ In these cases, Mattel claimed that the connection of the doll with such unpleasant associations harmed the value of the toy itself in addition to markets for licensed derivatives.²³⁸ The guardians of Margaret Mitchell's estate, SunTrust Bank, may have objected to Alice Randall's sexually explicit reworking of *Gone With the Wind* for similar reasons.²³⁹ Likewise, Barney's owners sued to enjoin a skit wherein the San Diego Chicken beat up an imposter Barney because children in the audience had been frightened and might be turned off the brand.²⁴⁰ Lever Brothers succeeded in enjoining a parody commercial for a video game in which its Snuggle fabric softener bear was attacked by tanks in part because of the commercial's association of the Snuggle bear with violence.²⁴¹

NEWS.COM, Aug. 25, 2004, http://news.com.com/JibJab+beats+copyright+rap/100-026_5322970.html. The parties settled soon thereafter, after attorneys found evidence that the copyright on Mr. Guthrie's song expired in 1973. *Id.*

²³⁵ Wastler, *supra* note 234.

²³⁶ Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 899 (9th Cir. 2002) (suing for trademark dilution).

²³⁷ Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 796-97 (9th Cir. 2003); Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315, 318 (S.D.N.Y. 2002).

²³⁸ See *Walking Mountain*, 353 F.3d at 805; *MCA Records*, 296 F.3d at 902-03.

²³⁹ Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1282-83 (11th Cir. 2001) (attributing to SunTrust a "vigilance" in policing *Gone With the Wind*'s public image and speculating that the claim was aimed in part at preserving the book's reputation).

²⁴⁰ Brief of Petitioner-Appellant at 7-8, Lyons P'ship v. Giannoulas, 179 F.3d 384 (5th Cir. 1999) (No. 98-11003), 1998 WL 34085765.

²⁴¹ Conopco, Inc. v. 3DO Co., 53 U.S.P.Q.2d 1146, 1147 (S.D.N.Y. 1999) (describing the injunction in a later contempt action); see also Memorandum of Law in Support of Plaintiff's Application for a Temporary Restraining Order, a Preliminary Injunction, and an Order for Expedited Discovery at 21, Conopco, Inc. v. 3DO, 53 U.S.P.Q.2d 1146 (S.D.N.Y. 1999) (No. 99 Civ. 10893). Many of these cases are brought under both trademark and copyright. Courts do not always distinguish between these regimes in issuing injunctions. See, e.g., *Conopco*, 53 U.S.P.Q.2d at 1147 (quoting from original TRO order).

2. Overlap with Trademark Dilution

In this way, the extension of copyright to cognition has prompted owners to seek remedies when the "goodwill" associated with expressive elements is threatened. Such copyright suits function similar to actions for trademark dilution. Indeed, many secondary use cases proceed under both trademark dilution and copyright infringement theories.²⁴² Despite the overlap in function, however, copyright protection is more problematic than trademark when used to protect a work's signaling function because it suppresses a greater range of expressive activity. Trademark protects the ability of merchants to communicate information to consumers about the source of goods or services.²⁴³ Derived from Congress' power to regulate commerce, it applies only to commercial uses on like goods.²⁴⁴ By contrast, copyright governs every reproduction or representation of proprietary works, no matter how small or personal. Trademark thus relates only to the ability to choose goods in the marketplace, whereas copyright governs choice between goods and the buyer's use of those goods.

Trademark protection also differs from copyright in that it is explicitly limited only to "confusing" or demonstrably harmful uses.²⁴⁵ Trademark infringement cases examine a list of factors such as similarity of the marks and channels of trade to determine whether a junior mark infringes a senior one.²⁴⁶ Copyright litigation requires no evidence that audiences be confused or misled by similarities between uses. In limited circumstances, owners of famous trademarks may sue in federal court to enjoin commercial use of similar marks on unrelated goods under a "dilution" theory, but to do so they must provide evidence of actual harm to the mark in the form of blurring or tar-

²⁴² See, e.g., *Walking Mountain*, 353 F.3d at 797; *Giannoulas*, 179 F.3d at 387; *Dr. Seuss Enters., L.P., v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1396, 1403 (9th Cir. 1997); *Conopco*, 53 U.S.P.Q.2d at 1147.

²⁴³ See 15 U.S.C. § 1127 (2000) ("The term 'trademark' includes any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.").

²⁴⁴ *Id.* § 1114.

²⁴⁵ *Id.* (describing trademark infringement as uses of marks that are likely to cause confusion among consumers); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 433 (2003) (holding that action for trademark dilution requires proof of actual harm to economic value of a mark).

²⁴⁶ See *Savin Corp. v. Savin Group*, 391 F.3d 439, 456 (2d Cir. 2004).

nishment of its meaning among relevant consumers.²⁴⁷ In copyright secondary use cases, courts presume harm to the work through unauthorized use.²⁴⁸ They place the burden on the user to prove the value of the secondary use through affirmative defenses such as parody.²⁴⁹ For these reasons, the interpretation of copyright to cover consumer associations provides a kind of super-trademark protection that omits trademark's safeguards against overreaching.

No court has yet taken the trouble to examine forthrightly whether or not dilution of a work's meaning properly falls under copyright. Instead, courts have been alternatively receptive or dismissive of the theory depending on their opinion of the value of the secondary use. Where courts find the secondary use to be legitimate criticism of the original or otherwise sympathetic to the message of the new work, they will dismiss the plaintiff's suit as an attempt to shield the work from effective critique.²⁵⁰ Although these judges may be right that the public interest in satire outweighs potential harm to a brand, they are wrong when they state that plaintiffs seek only to avoid criticism. The plaintiffs' concerns are much broader and more banal; they seek to avoid any use that conflicts with a managed brand personality. Indeed, where courts are less sympathetic to the parody at issue or do not find a direct "critique" present, they are more receptive to the idea that loss of control over public presentation works an irreparable harm to the value of the original text.²⁵¹ For example, in a

²⁴⁷ *Moseley*, 537 U.S. at 433. At least one lower court has found this requirement to be looser in the subset of cases where the defendant's mark is identical or virtually identical to the plaintiff's. See *Savin Corp.*, 391 F.3d at 452. State standards may also be less stringent, see *id.* at 456, but not all states have their own dilution acts.

²⁴⁸ See, e.g., *MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 192 (2d Cir. 2004); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003).

²⁴⁹ See, e.g., *Campbell*, 510 U.S. at 592-94.

²⁵⁰ *Walking Mountain*, 353 F.3d at 806; *Suntrust Bank*, 268 F.3d at 1282-83 ("Suntrust may be vigilant of *Gone With the Wind*'s public image—but it may not use copyright to shield *Gone With the Wind* from unwelcome comment . . ."); *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983) ("The fourth factor is aimed at the copier who attempts to usurp the demand for the original work. The copyright laws are intended to prevent copiers from taking the owner's intellectual property and are not aimed at recompensing damages which may flow indirectly from copying.") (internal citations omitted).

²⁵¹ See, e.g., *Dr. Seuss Enters., L.P.*, 109 F.3d at 1403 (considering harm to the substantial "goodwill and reputation" associated with Dr. Seuss in enjoining unauthorized use of Dr. Seuss's copyrighted Cat in the Hat character in a book about the O.J. Simpson murder trial); *Conopco, Inc.*, 53 U.S.P.Q.2d at 1149 (noting that use of a bear character in enjoined commercial "potentially broadly damaged SNUGGLE® Bear's reputation"); *United Feature Syndicate Inc. v. Koons*, 817 F. Supp. 370, 382 (S.D.N.Y. 1993) (considering effect that large numbers of unauthorized sculptures of cartoon characters would have on public's

case concerning the use of a James Bond-like character in an advertisement for Honda automobiles, a court enjoined the commercial because of the risk that association of Bond with a "low-end" car like Honda would harm the brand's upscale licensing strategy.²⁵²

For potential users, the uncertainty surrounding this question chills expressive activity and innovation. If secondary authors can convince a court that theirs is a true comment on the original work, the court will discount any harm to brand perception. If, on the other hand, a court rejects the parodic message, loss of control over public associations with the brand most likely will be considered as a market harm. The Supreme Court suggested in a footnote in the *Campbell* decision that, where market harm is unlikely, a secondary use could be less targeted at the original and still qualify as fair use.²⁵³ This suggestion of flexibility is illusory because from a branding standpoint, all uses of a protected work trespass on potential markets.²⁵⁴

The legal framework thus embodies a one-way assumption for the meaning of expressive texts. According to the law, except in very limited circumstances, owners get to decide how consumers communicate publicly about popular works. This account, based on observations about real property, ignores the participatory nature of informational goods. Such goods derive much of their value from their use and significance to others.²⁵⁵ If we allow owners to profit from the positive effects when the public embraces their work, we probably should ask them to bear more risk if audience members grow disenchanted, bored, or rebellious.

One answer to the branding question would be to rule that consumer perception and opinion is completely outside the bounds of copyright. Multiple imitations of a work may "devalue" that work in

desire for licensed products); *Dr. Pepper Co. v. Sambo's Rests., Inc.*, 517 F. Supp. 1202, 1208-09 (N.D. Tex. 1981) (enjoining local television commercial parody of plaintiff's successful "Be A Pepper" campaign because distractions from the uniqueness and originality of the commercials would logically shorten the life of the ad campaign and damage business goodwill); cf. *Merges, Of Property Rules*, *supra* note 40, at 2659 n.15 (noting copyright's policy of favoring authors' reputational interest by ensuring that authors can control all manifestations of a work).

²⁵² *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1300-01 (C.D. Cal. 1995).

²⁵³ *Campbell*, 510 U.S. at 580 n.14.

²⁵⁴ Indeed, in the ten years since the decision, no court has been willing to rest a fair use determination on this basis alone.

²⁵⁵ *Pessach*, *supra* note 78, at 1084.

the popular mind, but the work itself is not altered.²⁵⁶ The same effect could be found if a purchaser plays a new album over and over to the point where she never wants to hear it again, but the law does not allow the copyright owner to forbid such use.

The problem with discounting consumer perception altogether is the difficulty of separating such a claim from a legitimate cause of action within copyright. The Copyright Act disallows copying of protected elements in any form, absent a few specific exceptions.²⁵⁷ Such clear and certain boundaries are thought to facilitate trade and investment in creative works.²⁵⁸ Accordingly, an owner need not demonstrate any harm before she is entitled to enjoin the new use or receive damages.²⁵⁹ To qualify as a fair use of the work, the burden rests on the secondary user to prove that the use will not harm the value of the original.²⁶⁰ Diminishment of consumer demand is relevant to this inquiry.

One could distinguish between harm through direct market substitution and harm through indirect diminishment of brand appeal and audience demand. Indeed, courts often claim to be doing just this.²⁶¹ In a world where every possible derivative belongs to the owner, however, it is difficult to imagine a work that does not directly substitute for some

²⁵⁶ For an articulation of this specific critique, see Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193, 244 (2004). Arlen and Kyle Langvardt find attention to consumer opinion generally inconsistent with copyright's mandate to promote progress in the arts and sciences. *See id.* They do not examine the specific consequences of including alteration of consumer perceptions as part of an analysis of market harm caused by secondary use.

²⁵⁷ 17 U.S.C. §§ 106–112 (2000).

²⁵⁸ *See supra* notes 35–47 and accompanying text.

²⁵⁹ *See MyWebGrocer*, 375 F.3d at 192; *Elvis Presley Enters.*, 349 F.3d at 627.

²⁶⁰ *Campbell*, 510 U.S. at 590, 594. Courts determine whether an unauthorized use is “fair” upon consideration of four factors. These include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion taken; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

²⁶¹ *See, e.g., Suntrust Bank*, 268 F.3d at 1280–81 (distinguishing between works that “capitalize on . . . notoriety” and those that directly substitute and stating that critical screeds are unlikely to act as substitutes). In between frontal critical attacks and direct substitutes, however, there lies a whole universe of subtle materials and messages that could impair audience demand in a related market. *Compare id.* at 1281 n.4 (declining to consider harm of widespread unauthorized sequels on markets for authorized derivatives of a famous book where unauthorized book was, in the court’s opinion, clearly and directly critical of original), with *United Features Inc.*, 817 F. Supp. at 382 (considering harm that widespread unauthorized derivative sculptures could pose to underlying comic book character’s licensing value in all potential three-dimensional or merchandising markets in finding that satirical but not overtly critical fine art reproduction was not a fair use).

possible licensed use.²⁶² Furthermore, the difference between direct and indirect substitution may be illusory for the owner. The owner is just as injured if demand is diverted to a pirate as if demand dries up due to audience fatigue. In reality, the two may boil down to the same thing. The traditional description of a use that substitutes is one that will usurp the demand for the original.²⁶³ Exhausting a work's novelty value in service of another product arguably qualifies as "substitutive" under this definition.²⁶⁴ Excluding consideration of consumer perception then would require at a minimum a significant reconfiguration of the derivative right and the fair use analysis.

This doctrinal confusion reflects the reality that unauthorized dilution poses problems for some works under copyright that do not exist for non-expressive works such as those covered by patent. Take a proven pharmaceutical product like a heart or cholesterol drug. If a pirate attempts to pass off his goods as the proven item, if a disaffected consumer uses the trademark in a disparaging way, or even if a celebrity actor publicly lambasts the drug on a popular morning television show, the drug will work the same way when administered to a patient. The efficacy of the product itself has never been altered. By contrast, the entire purpose of a creative work is to deliver a particular message to an audience. Unfettered secondary use of the creative elements of the work may alter the ability of the original to deliver its intended message. Diminishment of the work's communicative impact may lessen incentives to invest in the production and dissemination of creative works. In this way, copyright and trademark may legitimately overlap in protecting a work's expressive value.²⁶⁵

²⁶² See *Campbell*, 510 U.S. at 593 n.24 (noting that because all parodies are also potentially substitutes for a licensed work in a derivative market, it may be difficult to separate permissible harm caused by criticism from impermissible harm caused by substitution). Justice Souter does not clarify whether harm to the work's retail value through inconsistent use or overuse is properly understood as "effectiveness of critical commentary" or "substitution." See *id.*

²⁶³ See *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986).

²⁶⁴ See Patry & Posner, *supra* note 32, at 1644-45 (suggesting that use that impairs a work's market or value though "free-riding" is not a fair use).

²⁶⁵ Professor Lemley has argued that diminishment of value to producers caused by new entrants to a market is the hallmark of what economists refer to as a "perfect market" and so is not a cause for concern. Lemley, *Ex Ante Versus Ex Post*, *supra* note 11, at 144. If we equate "value" with price, then Lemley is right. If, however, "value" is taken to mean efficacy or utility of the good, then everyone loses through overuse. Lemley's account is thus a better fit for goods such as software products than for communicative goods such as texts and music.

Trademark protection by itself may be sufficient to address these harms. Trademark and unfair competition theories are designed to police against secondary uses that deceive consumers or inordinately dilute the expressive value of symbols.²⁶⁶ Because trademark reaches only commercial uses, using trademark alone to safeguard the signaling function of a work could by itself provide more latitude for secondary use and recoding.²⁶⁷

This solution is doctrinally satisfying but practically elusive. For one thing, the Supreme Court's recent decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.* limited the use of trademark theories to protect expressive elements of a copyrighted work.²⁶⁸ Furthermore, given the collective clout of the copyright industries, it is highly unlikely that Congress would actually repeal portions of the derivative and distribution rights and the fair use exception necessary to remove copyright from the balance.²⁶⁹ Additionally, trademark dilution itself is a notoriously slippery concept and so may not provide much ex ante certainty to encourage secondary users.²⁷⁰

Whatever doctrinal scheme is used to address branding concerns, a primary concern should be to provide secondary authors with clear and predictable guidelines about what kinds of uses are "fair" or exempted. Boundaries that are simple and easy to understand will reduce enforcement and transaction costs for owners, and will provide greater certainty and latitude to secondary users, especially those who

²⁶⁶ See Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671, 703, 707 (1984).

²⁶⁷ See 15 U.S.C. § 1125(c)(4)(B) (2000) (exempting non-commercial use).

²⁶⁸ 539 U.S. 23, 32 (2003) (stating that trademark protects information about the source of a tangible good, but not ideas or communications embodied in a communicative product). A discussion of the problems with the *Dastar* decision is beyond the scope of this Article, but many have pointed out that the *Dastar* decision rests on dubious interpretations of the terms "origin" and "goods" in the Lanham Act. See, e.g., Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Hous. L. REV. 263, 270, 273 (2004); Laura A. Heymann, *The Birth of the Authorship: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1440-44 (2005).

²⁶⁹ Cf. Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1496-97 & n.125 (2004) (noting the sway of the copyright lobby over the direction of copyright legislation).

²⁷⁰ See, e.g., Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1698-99 (1999) (arguing that trademark dilution is applied without clear limits or standards); Michael J. Schwarz, Note, *Demonstrating the Requisite Level of Proof for a Federal Trademark Dilution Claim: Establishing Actual Dilution Following Moseley v. Victoria's Secret*, 25 PACE L. REV. 157, 174, 176 (2004) (arguing that the Supreme Court decision does little to provide actual guidance as to what kinds of evidence is needed to prove actual dilution).

lack the resources and expertise to engage in fine analysis of intellectual property codes. This Article posits that the easiest way to arrive at such certainty, while still balancing concerns of incentive and access, is to take seriously the dynamic, communicative properties of the resource at issue and to tailor secondary use rights accordingly.

C. *Consumer Psychology and Consumption*

Consumers have interests on both sides of the secondary use debate. Consumers choose between expressive goods at least in part based on brand identity messages or cues from the work's owner.²⁷¹ Stable brand and message identities allow for easy and convenient product selection. The process of consuming the work, however, stimulates subjective association, fantasy, and imagery.²⁷² These associations form part of the significance of the work to the user.²⁷³ Shared communication of the experience of consumption helps to establish a social meaning of the work that may be different from the meaning put forth by the work's copyright owner.²⁷⁴ These associations, although stimulated by and inextricably linked to the work, should not be considered part of the original copyright owner's domain.

1. Choice

Consumer psychology research points to two principal aspects that inform choice of entertainment, or "hedonic," materials: attention and identity. Choice of any consumer product depends on audience attention and understanding, but these elements have the greatest impact

²⁷¹ See DANIEL MILLER, *MATERIAL CULTURE AND MASS CONSUMPTION* 190-91 (1987); see also John Deighton, *The Interaction of Advertising and Evidence*, 11 J. CONSUMER RES. 763, 764, 766 (1984) (demonstrating that advertising arouses initial expectations that consumers try to confirm through experience with a product).

²⁷² MILLER, *supra* note 271, at 190-91 (discussing from an anthropological perspective the process of transforming through consumption an alienable good to a cultural artifact endowed with particular inseparable connotations); Elizabeth C. Hirschman & Morris B. Holbrook, *Hedonic Consumption: Emerging Concepts, Methods and Propositions*, 46 J. MARKETING 92, 92 (1982).

²⁷³ See Hirschman & Holbrook, *supra* note 272, at 93-95.

²⁷⁴ Cf. JEROME BRUNER, *ACTS OF MEANING* 12-13 (1990) (stating that culture is shared and participatory; we depend on shared modes of discourse to negotiate the meaning and interpretation of cultural objects); KATHERINE NELSON, *MAKING SENSE: THE ACQUISITION OF SHARED MEANING* 249-51 (1985) (explaining that development of meaning is an interactive process that depends on internal interpretive systems, the context of the use, and how the communication is interpreted within a given community).

for hedonic goods because, unlike food or household staples, they have no independent functions that would require purchase.

a. Attention

The most salient feature of the current information economy is the sheer number of works competing for the attention of an audience.²⁷⁵ Twenty years ago, producers of expressive goods faced a marketplace consisting of relatively "few outlets and essentially a captive audience."²⁷⁶ A scarcity of informational product existed in the face of mass demand. New methods of information distribution, such as television, the Internet, and portable digital devices, have changed all this. Information can reach us at our desks, at home, and as we travel between the two.²⁷⁷ We are also subject to an expanding volume of media products.²⁷⁸ This wealth of information creates a poverty of attention.²⁷⁹

A familiar text, work, or personality allows consumers to pick out products of interest and tune out the rest.²⁸⁰ Buying on the basis of gut feelings about a product, such as a general positive attitude or "liking" created by brand identity, saves consumers cognitive energy.²⁸¹ They can sidestep feelings of doubt and hesitancy that naturally result from paying closer attention to any consumptive choice.²⁸²

The importance of attention helps to explain the tenacity of parody even in the tightly controlled proprietary marketplace. By placing an older work in a new context, either in an advertisement or in a product itself, producers offer familiarity and surprise, two elements likely to captivate an audience.²⁸³ In a consumer research study exam-

²⁷⁵ See WOLF, *supra* note 206, at 84.

²⁷⁶ *Id.* at 84–85.

²⁷⁷ See David W. Schumann, *Media Factors That Contribute to a Restriction of Exposure to Diversity*, in THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra* note 215, at 233, 242, 247.

²⁷⁸ According to one industry estimate, fifteen years ago the average adult saw or heard 500–800 messages per day including television, radio, billboards. WOLF, *supra* note 206, at 256. In 1999, the number had more than tripled to 3000 per day. *Id.*

²⁷⁹ See WOLF, *supra* note 206, at 84.

²⁸⁰ *Id.* at 223 ("In today's environment, *mind share*—how well the public knows your brand and cares about it—often precedes market share.").

²⁸¹ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 60.

²⁸² *Id.*

²⁸³ See Rik Pieters et al., *Breaking Through the Clutter: Benefits of Advertisement Originality and Familiarity for Brand Attention and Memory*, 48 MGMT. SCI. 765, 767, 777 (2002); see also Yih Hwai Lee & Charlotte Mason, *Responses to Information Incongruity in Advertising: The Role of Expectancy, Relevancy and Humor*, 26 J. CONSUMER RES. 156, 156–57, 167–68 (1999).

ining advertising effectiveness, researchers found that people spend more time on and have greater memory for advertising messages that use familiar elements in unfamiliar, unexpected ways.²⁸⁴ Studies show that humor also can increase a consumer's response to a message.²⁸⁵ Humorous messages command more attention, but they also act "as a distraction, disarming possible criticism."²⁸⁶ One way to view parody then is as a device that fools consumers into paying attention to something they would ordinarily disregard.

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

2. Identity

After awareness, consumer research suggests that the choice to consume a given work depends on that work having some salient meaning or symbolic value.²⁸⁷ This is what Posner and Landes mean when they argue that the transformation of Mickey Mouse from Dis-

(reporting that messages that presented relevant information in unexpected ways showed higher recall and elicited more positive attitudes among potential consumers).

²⁸⁴ Pieters, et al., *supra* note 283, at 773; see also THOMAS H. DAVENPORT & JOHN C. BECK, *THE ATTENTION ECONOMY: UNDERSTANDING THE NEW CURRENCY OF BUSINESS* 195 exh.11-1 (2001) (finding that factors that attracted attention to email messages included that the message concerned topics of personal interest and that the content was presented in a new, unusual or unique way).

²⁸⁵ See Lee & Mason, *supra* note 283, at 168.

²⁸⁶ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 132; Lee & Mason, *supra* note 283, at 168.

²⁸⁷ See JANOS LASZLO, *COGNITION AND REPRESENTATION IN LITERATURE: THE PSYCHOLOGY OF LITERARY NARRATIVES* 96 (1999); Richard P. Bagozzi et al., *The Role of Emotions in Goal-Directed Behavior*, in *THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES* 37, 50 (S. Ramneshwar et al. eds., 2000) (hypothesizing that many consumer behaviors, such as seeing movies, are the result of anticipated emotions); Morris B. Holbrook & Elizabeth C. Hirschman, *The Experiential Aspects of Consumption: Consumer Fantasies, Feelings, and Fun*, 9 J. CONSUMER RES. 132, 138 (1982).

ney's grinning spokescharacter to a raffish derelict or hen-pecked husband will harm the value of the character himself.²⁸⁸ Popular characters, sounds and images provide useful information. We can expend less effort choosing between films for example, if one is a sequel or derivative. We do not need to spend time and energy researching the plot of the film; we know we are interested in the character or story.

Specifically, consumer research shows that we choose hedonic goods based on the experience we think they will offer us.²⁸⁹ Attractive qualities in expressive works include works that we think will be transporting, that contain a character or storyline in which we would like to envision ourselves, or that offer access to a desired group or situation.²⁹⁰ In this way, most consumers interact with expressive products not with the aim of transforming the product, but with the desire to be transformed by the product.²⁹¹ For example, we tend to choose to purchase music based on its ability to draw us in and offer an absorbing experience.²⁹²

Once again, secondary users benefit by defining their own work in opposition to a previous one. Communicating a salient identity to distracted consumers is difficult. Producers seeking to market to one target segment can use existing goods as informational shortcuts. For example, the popular Middle Eastern brand Mecca Cola is beloved because it is marketed explicitly as an opportunity to reject American imperialism in the form of the American brand standard Coca

²⁸⁸ See Landes & Posner, *supra* note 7, at 487–88.

²⁸⁹ See LASZLO, *supra* note 287, at 96 (1999); Bagozzi et al., *supra* note 287, at 50 (hypothesizing that many consumer behaviors such as seeing movies are the result of anticipated emotions); Holbrook & Hirschman, *supra* note 287, at 138.

²⁹⁰ Russell W. Belk et al., *The Missing Streetcar Named Desire*, in *THE WHY OF CONSUMPTION: CONTEMPORARY PERSPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES*, *supra* note 287, at 98, 112–14; Morris B. Holbrook et al., *Using Versus Choosing: The Relationship of the Consumption Experience to Reasons for Purchasing*, 20 *EUROPEAN J. MARKETING* 49, 52, 57–58 (1986) (finding that people buy novels and records more for social than utilitarian reasons); cf. BRUNER, *supra* note 274, at 54 (stating that fiction draws us in by offering an ambiguous array of vicarious possibilities that readers can “try on for fit”); Scott Jones et al., *Marketing Through Sports Entertainment: A Functional Approach*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION*, *supra* note 215, at 309, 311–12 (stating that consumers watch sports as a way of aligning themselves with a favored sports hero or property); William Chipps, *Hitching Brands to the Stars*, *BILLBOARD*, Aug. 21, 2004, at 40 (noting that consumers want to purchase products used, worn or touted by favorite celebrities).

²⁹¹ Hughes, *supra* note 7, at 957.

²⁹² Kathleen T. Lacher, *Hedonic Consumption: Music as a Product*, 16 *ADVANCES IN CONSUMER RES.* 367, 368, 371 (1989).

Cola.²⁹³ The video game company that based a series of ads on blowing up Lever's Snuggle fabric softener bear gained instant credibility with adolescent male gamers.²⁹⁴ These products catch the eye of a target market by repurposing symbols of lifestyles, the cuddly safety of childhood, or the brash consumerism of the United States, about which their audience is ambivalent.

The same effects hold true when previous works are incorporated into the work itself. The rap group 2 Live Crew identified itself as dangerous, outside, and urban by reworking a nostalgic seventies tune.²⁹⁵ Alice Randall sent a message about the prominence of black Americans in culture by upending the racial hierarchies in the original *Gone With the Wind*.²⁹⁶ Each artist made their message more interesting by framing it in terms of a text with which a significant part of the audience was already invested.

Overuse or inconsistent use of such signifiers, however, ruins their informative value and impedes their utility for audience choice.²⁹⁷ The works themselves may be less desirable for consumption if their meanings are altered. For example, music that has been used for a variety of commercial purposes may cease to transport listeners easily. Characters that act every which way will make poor vehicles for individual fantasy. Overuse and widespread conflicting uses may interfere with the ability of users effectively to choose works to consume. Although owners may have no right to dictate the meaning of their works to members of the audience, they do have some claim to preserving the ability of audiences to choose to engage with their works.

Others have argued that widespread use will have mostly positive effects on audience desire and the value of individual works.²⁹⁸ For example, the value to me of seeing a certain film, *The Aviator*, say, increases as more of my friends see it.²⁹⁹ Seeing the film then provides not only temporary enjoyment, but a basis for connection and discussion with a desired peer group. This is also true of scholarly works. The value of this Article increases the more people who read it and

²⁹³ O'SHAUGHNESSY & O'SHAUGHNESSY, *supra* note 210, at 88.

²⁹⁴ See *Conopco*, 53 U.S.P.Q.2d at 1148-49.

²⁹⁵ See generally *Campbell*, 510 U.S. 569.

²⁹⁶ See generally *Suntrust*, 268 F.3d 1257.

²⁹⁷ See Hughes, *supra* note 7, at 942-43.

²⁹⁸ Stewart E. Sterk, *What's in a Name?: The Troublesome Analogies Between Real and Intellectual Property* 22 (Benjamin N. Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 88, 2004), available at <http://ssrn.com/abstract=575121>.

²⁹⁹ See *id.*

quote its ideas. Such positive externalities are termed "network effects."³⁰⁰ While this is a good argument for free dissemination of exact copies of works, it is more complicated when it comes to derivatives. The theory depends on my friends and me all having seen the same version of *The Aviator* or we will have no basis for comparison. Network effects fail if we cannot easily exchange information about our shared experience.

To be sure, some derivatives do increase the value of originals. Sales of books tend to increase after the release of film and DVD versions, for example.³⁰¹ In such cases, however, the derivative is complementary to the original. It is unclear what the release of badly made, offensive, or critical derivatives might have on consumer perceptions of and desire for an original work. Furthermore, copyright and other proprietary schemes ensure that only one authorized derivative is released in each category. Without copyright, audiences could be bombarded with multiple sequels to popular films, film versions of popular books, and commercials featuring characters from each.³⁰² The ubiquitous presence of multiple texts may decrease the desirability of every part of the franchise even though individual uses may have found an audience in isolation. Consumers will also have to spend more time and energy sorting through competing messages, something they may be unwilling to do when it comes to works chosen for escapist, experiential reasons.

3. The Audience's Personal Use of Expressive Works

Once a consumer has access to a work or has it in his possession, the relationship changes. Cultural works provide a variety of complex and important functions for users. These experiences extend beyond simple entertainment or desire to pass time.³⁰³ Users engage with cultural works as a way of projecting and exploring their idealized "true" selves.³⁰⁴ Engagement with adventure and risks not present in daily

³⁰⁰ See Pessach, *supra* note 78, at 1085 (describing cultural network effects).

³⁰¹ Sales of books from the Lord of the Rings trilogy shot up after the release of film and DVD versions, for example. Amazon Sales Rank for Lord of the Rings, <http://www.amazon.com> (search "Books" for "Lord of the Rings"; sort by "Bestselling"; select "J.R.R. Tolkien Boxed Set (The Hobbit and The Lord of the Rings) [BOX SET]"; then scroll down to "Product Details").

³⁰² See Abramowicz, *supra* note 125, at 5, 23.

³⁰³ See Holbrook & Hirschman, *supra* note 287, at 138; see also Russell et al., *supra* note 215, at 275, 276 (listing reasons why people watch soap operas).

³⁰⁴ See Eric J. Arnould & Linda L. Price, *Authenticating Acts and Authoritative Performances: Questing for Self and Community*, in *THE WHY OF CONSUMPTION: CONTEMPORARY PER-*

life allows for emotional release and fantasy.³⁰⁵ Such works also can assist in acclimating to new situations or establishing cultural norms.³⁰⁶ Watching a film about a painful situation, such as the divorce in *Kramer v. Kramer*, can help individuals process difficult experiences and painful emotions, for example.³⁰⁷ The knowledge that many others have experienced the same works can inform our sense of appropriate reactions to novel situations.³⁰⁸ Even works of fashion dictate rules of appearance that consumers can choose whether and how to adopt.³⁰⁹ Cultural works also assist in defining and establishing social networks.³¹⁰ Common consumption of the new hit show or novel creates a shared experience.³¹¹ In the absence of tightly knit

SPECTIVES ON CONSUMER MOTIVES, GOALS, AND DESIRES, *supra* note 287, at 140, 145; Russell et al., *supra* note 215, at 277; cf. BRUNER, *supra* note 274, at 33, 101 (stating that the self is shaped in reference to cultural systems of interpretation).

³⁰⁵ Hirschman & Holbrook, *supra* note 272, at 96; see also Arnould & Price, *supra* note 304, at 150 (reporting that consumers of rafting trips gain self-assurance and confidence through memories of the experience); Melanie C. Green et al., *The Power of Fiction: Determinants and Boundaries*, in THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra* note 215, at 161, 169 (describing how participants who felt transported into a story came to see characters as friends and remembered narrated events as real).

³⁰⁶ See Maria Knizeva, *Between the Ads: Effects of Nonadvertising TV Messages on Consumption Behavior*, in THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra* note 215, at 213, 218, 220 (noting that media sorts reality into meaningful social categories that consumers can use to interpret their daily lives and can help to acculturate foreigners to new environments); cf. BRUNER, *supra* note 274, at 68 (stating that human propensity to share stories and find interpretations within dominant moral and institutional schemes is one of the most powerful forms of social stability).

³⁰⁷ Hirschman & Holbrook, *supra* note 272, at 96.

³⁰⁸ See *id.*

³⁰⁹ Craig J. Thompson & Diana L. Haytko, *Speaking of Fashion: Consumers' Uses of Fashion Discourses and the Appropriation of Countervailing Cultural Meanings*, 24 J. CONSUMER RES. 15, 15-16, 35-38 (1997); see also Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property and the Incentive Thesis*, 91 VA. L. REV. (forthcoming 2005) (manuscript at 7-9, on file with author), available at <http://ssrn.com/abstract=704721>.

³¹⁰ See MILLER, *supra* note 271, at 209-10, 212; Hirschman & Holbrook, *supra* note 272, at 99; Russell et al., *supra* note 215, at 279; cf. Arnould & Price, *supra* note 304, at 154-58 (arguing that certain acts of consumption, such as viewing or participating in Christmas pageants, river-rafting trips, tourism, and football games, contribute to self-conception and connection to community).

³¹¹ See WOLF, *supra* note 206, at 38 (finding increasingly common ground with family and colleagues in shared entertainment experiences); Arnould & Price, *supra* note 304, at 154-55; Timothy C. Brock & Stephen D. Livingston, *The Need for Entertainment Scale*, in THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION, *supra* note 215, at 255, 272 (concurring with Wolf).

communities or shared rituals, expressive goods provide outlets for interacting with others.³¹²

At the same time, the act of consuming a work alters its meaning for the individual. When reading, watching a performance, or listening to music, users not only process the sensory attributes of the work itself, but also generate internal, multisensory imagery.³¹³ This can include real memories triggered by association, fantastical imagery inserting ourselves in or in relation to the work, and pure affective arousal.³¹⁴ In this way, consumers of a work encode their experience of the work differently in memory.³¹⁵ Users enhance their experience of a work by sharing and contrasting their own consumptive experience with others.³¹⁶ Some claim that this ability to communicate and share one's experience with the work is a crucial step in processing and internalizing memory of the work.³¹⁷ At one extreme, people strongly affected by experiences with expressive works may join fan clubs, participate in fantasy reenactments, or create "fan fiction" in the form of unauthorized derivatives.³¹⁸

Only a copyright zealot would suggest that an individual's experience of a text somehow belongs to the copyright owner. And yet, many of the lawsuits surrounding secondary use of expressive works

³¹² See MILLER, *supra* note 271, at 215; Arnould & Price, *supra* note 304, at 140, 141, 148–60; Kniazeva, *supra* note 306, at 218–21; Russell, et al., *supra* note 215, at 277. See generally Hirschman & Holbrook, *supra* note 272, at 92–97.

³¹³ LASZLO, *supra* note 287, at 98; Hirschman & Holbrook, *supra* note 272, at 92–94.

³¹⁴ See LASZLO, *supra* note 287, at 96–98; Athinodoros Chronis & Ronald D. Hampton, *Living in Another World: The Role of Narrative Imagination in the Production of Fantasy Enclaves*, 31 ADVANCES IN CONSUMER RES. 193, 193 (2004); Green et al., *supra* note 305, at 169.

³¹⁵ See, e.g., WALTER KINTSCH, *THE REPRESENTATION OF MEANING IN MEMORY* 107–08, 115–16 (1974) (finding that representations are stored in memory on a semantic rather than literal basis and individual memory of texts may differ based on differences in environment and presentation). Cognitive research posits that people encode stories in the form of schemas or scripts that assimilate the details of the story with preexisting knowledge about its subject. ROBINSON-RIEGLER & ROBINSON-RIEGLER, *supra* note 29, at 464–65. People's operative schemas, however, may differ depending on their place in the culture. See BRUNER, *supra* note 274, at 64; LASZLO, *supra* note 287, at 103–07.

³¹⁶ See Tushnet, *supra* note 100, at 545–46; see also BRUNER, *supra* note 274, at 13, 33, 68 (arguing that as cultural beings our way of life depends on shared meaning and concepts which are negotiated through discourse about interpreting narratives and symbols); WOLF, *supra* note 206, at 38 (entertainment products put people on the same wavelength and "replace a sense of shared community"); Brock & Livingston, *supra* note 311, at 272 (concurring with Wolf).

³¹⁷ See GILLESPIE, *supra* note 29, at 148 (arguing that memory and cognition are themselves participatory and that through imaginative reconstruction and critical reflection with others we come to understand ourselves and our relationships); see also BRUNER, *supra* note 274, at 33.

³¹⁸ Russell et al., *supra* note 215, at 279; Tushnet, *supra* note 103, at 651–58.

result from a user's attempt to communicate a subjective understanding of the work to others. Alice Randall claimed that she wrote her "parody" of *Gone With the Wind* as a way of "dealing with my response to a text, portraying my response to a text."³¹⁹ Her response was also intended to communicate what she felt was a common view among African-Americans explaining, "I think...the time has come for America to understand how an African-American woman, and many African-Americans, view the book that has influenced our country's culture and how we view ourselves as a country."³²⁰ Fans who "dress up" as comic book characters online or who publish unauthorized sequels or spin-offs are acting similarly.³²¹ These individuals are making use of what is in some sense their own experience. It can be argued that the ability to enjoy the consumptive experience and share it with others is what consumers believed they paid for when they bought access to the work.

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

III. TOWARD A BALANCED TEST FOR SECONDARY USE

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

First, our general attitudes towards iconic works, which are most often the subject of disputes, are resistant to change. We are more likely to pay attention to works that conform to what we already believe and to discount works that conflict with our attitudes.³²² This

³¹⁹ Interview by CNN with Alice Randall, (June 22, 2001), <http://archives.cnn.com/2001/SHOWBIZ/books/06/22/randall.cnn/>.

³²⁰ *Id.*

³²¹ For example, the designer of the City of Heroes game objected to by Marvel Comics sought to "make the experience of playing City of Heroes just like my childhood comic-book experience" by allowing users to design their own fantasy superheroes based on actual comic book characters. Michael Lafferty, *Cryptic's Jack Emmert Takes a Few Moments from Polishing Issue 3 of City of Heroes to Talk About What Lies Ahead for Gamers*, PC GAMEZONE, http://pc.gamezone.com/news/12_10_04_06_16PM.htm (last visited Sept. 11, 2005); see also Tushnet, *supra* note 103, at 657.

³²² See Schumann, *supra* note 277, at 235.

suggests that people attracted to "parodic" reworkings of texts already share the attitude of the new version, while those who prefer the old will disregard it.

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

1. Resistance

The first doctrine of relevance to secondary use is attitude resistance. Consumer purchasing decisions are to some extent based on attitudes.³²³ We buy what we have a positive feeling toward and we avoid what we dislike.³²⁴ Once we have formed strong attitudes about an object, we tend to resist change.³²⁵ This may be because often certain attitudes are linked as part of an overall self-schema.³²⁶ People who live in big cities, for example, tend to prefer different cars, clothes, political candidates, and cultural works than those from rural areas.³²⁷ Changing one's belief may call into question the entire self-schema.³²⁸ To avoid dissonance, we tend to ignore or discount messages that call our attitudes into question and we give greater attention to those that reinforce our beliefs.³²⁹ The more familiar and rote a perception or belief is, the less likely we are to alter it either consciously or unconsciously through new information.³³⁰ While this state

³²³ See ALICE H. EAGLY & SHELLY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 216 (1993).

³²⁴ See Paul M. Herr & Russell H. Fazio, *The Attitude-to-Behavior Process: Implications for Consumer Behavior*, in *ADVERTISING EXPOSURE, MEMORY, AND CHOICE* 119, 131-32 (Andrew A. Mitchell ed., 1993).

³²⁵ EAGLY & CHAIKEN, *supra* note 323, at 559; see Green et al., *supra* note 305, at 172-73.

³²⁶ See Schumann, *supra* note 277, at 234-35.

³²⁷ See generally JOHN SPERLING ET AL., *THE GREAT DIVIDE: RETRO VS. METRO AMERICA* (2004).

³²⁸ EAGLY & CHAIKEN, *supra* note 323, at 584-89; see Schumann, *supra* note 277, at 235.

³²⁹ EAGLY & CHAIKEN, *supra* note 323, at 590-608.

³³⁰ James L. McGaugh, *Emotional Activation, Neuromodulatory Systems, and Memory*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 255, 255 (Daniel L. Schacter ed., 1995); see also Green et al., *supra* note 305, at 172-73 (noting

of affairs may undercut the possibility of cultural dialogue through reworkings of popular texts, it also suggests that as a practical matter such reworkings may not have much affect on overall audience perception. People who have a long history of positive relations with a work, such as an iconic novel like *Gone With the Wind*, are likely to discount any information that might persuade them to change their attitude.³³¹ Those already ambivalent about the work and its portrayal of race relations will enjoy seeing these problems exposed through a work like Randall's *Wind Done Gone*. Similarly, people who love Dick and Jane for their innocence will tend to ignore any negative connotations from the suburban Yiddish version. Those who have always found Dick and Jane a little saccharine and stiff will enjoy seeing the duo confront a more dangerous world than they have been used to. The newer works do not so much steal an audience from the original as they allow a richer discussion for those so inclined. These works are unlikely to chip away much at underlying attitudes about iconic originals because those attitudes are so rote and well-rehearsed.³³² Furthermore, continued marketing and promotion of the original versions will only reinforce the strength of dominant consumer attitudes.

With newer works or ones that are not yet familiar, memory and attitude is more vulnerable to change. Information to which we are frequently exposed and of which we are often reminded is less susceptible to distortion.³³³ Newly formed perceptions, by contrast, are more vulnerable to alteration by conflicting information.³³⁴ These findings support suggestions that newer works deserve greater protection than more established ones.³³⁵ Perhaps owners deserve an absolute protection from unlicensed commercial derivatives for one year following publication, for example, with wider use permitted later.

2. Source Effects

Research on perception and memory also reveals that users process messages differently depending on the source. With so many mes-

the strength of attitudes formed through experience of fiction, though also noting at least one theory as to why those attitudes may be more vulnerable to counterpropaganda).

³³¹ Cf. Schumann, *supra* note 277, at 235-36 (using studies in the sociology of media consumption to argue that people restrict their exposure to dissonant media messages).

³³² McGaugh, *supra* note 330, at 255-56.

³³³ *Id.*

³³⁴ *Id.* at 256, 265.

³³⁵ See Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 (2002) (proposing a greater latitude of fair use for older works).

sages clamoring for our attention, we decide which to pay attention to partially based on the credibility or attractiveness of the source.³³⁶ A source's credibility refers both to its perceived expertise on a topic and its trustworthiness as a communicator.³³⁷ Where consumers have little attention or involvement with the subject of a message, as they might with advertising or promotion of a new media product, they tend to evaluate the message based on peripheral cues such as the message source.³³⁸ They more readily accept information from a source perceived as credible and discount information from sources perceived as biased or untrustworthy.³³⁹ For example, one experiment comparing high to moderate credibility sources asked individuals to rank several abstract modern poems based on use of alliteration.³⁴⁰ They were then shown an article that identified the poem they ranked second to last as a superior example of alliteration and were then asked to rank the poems again.³⁴¹ Those who were told that the article had been written by

³³⁶ See DAVENPORT & BECK, *supra* note 284, at 195; Shelly Chaiken, *Heuristic Versus Systemic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOCIAL PSYCHOL. 752, 753, 763 (1980) (finding that perceptions of a source's expertise affected opinion of a message and hypothesizing that source cues affect opinion change because they influence both attention to a message and predisposition to its content).

³³⁷ R. Glen Hass, *Effects of Source Characteristics on Cognitive Responses and Persuasion*, in COGNITIVE RESPONSES IN PERSUASION, *supra* note 230, at 141, 143.

³³⁸ See Shelly Chaiken & Durairaj Maheswaran, *Heuristic Processing Can Bias Systemic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. PERSONALITY & SOCIAL PSYCHOL. 460, 466, 469 (1994) (describing experiment in which students evaluated an unfamiliar product based on descriptions from sources of varying credibility); see also RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE 54, 142 (1986) (finding that individuals with low involvement in subject matter are more likely to use cognitively less taxing "peripheral processes" such as source expertise to evaluate the validity of a message).

³³⁹ Chaiken & Maheswaran, *supra* note 338, at 464; Hass, *supra* note 337, at 154-55 (noting, however, an exception where the subject is already predisposed to believe in or trust the opinion expressed); see also Paulette M. Gillig & Anthony G. Greenwald, *Is It Time to Lay the Sleeper Effect to Rest?*, 29 J. PERSONALITY & SOCIAL PSYCHOL. 132, 135 (1974) (noting tendency to discount information from low credibility sources); Rochelle Lynn Chaiken, *The Use of Source Versus Message Cues in Persuasion: An Information Processing Analysis* 17-26 (Dec. 1977) (on file with the author) (summarizing research studies); cf. Tulin Erdem & Joffre Swait, *Brand Credibility, Brand Consideration, and Choice*, 31 J. CONSUMER RES. 191, 192, 196-97 (2004) (finding, with some variation across product class and individual expertise, that consumers are more likely to include high-credibility brands than low-credibility brands in initial purchase consideration sets and to choose such brands for purchase because highly credible brands have lower perceived risks and information costs).

³⁴⁰ Hass, *supra* note 337, at 158.

³⁴¹ *Id.*

T.S. Eliot were likely to change their opinion of the poem's merit.³⁴² Those who were told the article was written by a college student seeking a teaching position in English were much less inclined to change their opinion than the former group.³⁴³

Source credibility effects can explain the phenomenon observed by Tushnet and others that users seem not to mind unauthorized reworkings of popular texts in the form of fan fiction or parody so long as one "orthodox" version exists.³⁴⁴ It may be that consumers are perfectly capable of contextualizing reworkings of expressive texts if they have sufficient information about the source. Those who prefer the authorized version will stick with that; those looking to explore alternatives can do so freely so long as unauthorized versions are clearly marked and do not contain misleading source information.³⁴⁵ Thus, works clearly identified as emanating from an unauthorized source, either in a labeled "parody" work such as the Yiddish with Dick and Jane book, or in the context of a sketch comedy show, for example, should be expected to have less involuntary impact on consumer attitudes than confusing or ambiguous secondary uses.

3. Frequency Effects

Frequency and repetition, by contrast, can confuse and exhaust audiences. As noted above, after an initial level of familiarity, overexposure to a communication elicits boredom and dislike.³⁴⁶ In a study of attitudes towards television commercials, research demonstrated that greater exposure to similar commercials decreased liking and positive feelings both for the commercials and the products advertised.³⁴⁷ Variations in the commercials designed to enhance attention had little ame-

³⁴² *Id.*

³⁴³ *Id.*; see also J.P. Das et al., *Understanding Versus Suggestion in the Judgment of Literary Passages*, 35 J. ABNORMAL & SOCIAL PSYCHOL. 547, 547-561 (1967).

³⁴⁴ See Tushnet, *supra* note 103, at 672-73; see also Goldberger, *supra* note 209, at 353 (noting anecdotal evidence that audiences do not mind inconsistencies across works so long as one version is deemed official or canonical).

³⁴⁵ By "source" information, I do not mean that in the ordinary case a simple disclaimer of affiliation would suffice. As demonstrated in the trademark context, disclaimers can enhance confusion by associating the defendant's goods directly with the plaintiff. See Mitchell E. Radin, *Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives*, 76 TRADEMARK REP. 59, 65 (1986). In this context, "source" would have to include at a minimum (a) clear and conspicuous indication that the work is "unauthorized" and (b) the identity of the new author if it is likely to be meaningful to consumers.

³⁴⁶ See *supra* notes 231-32 and accompanying text.

³⁴⁷ Calder & Sternthal, *supra* note 231, at 185.

liorating effect.³⁴⁸ Similar effects were found in another study using non-commercial radio messages.³⁴⁹ Repeated exposure to a message may also lead to involuntary changes in perception, even if the recipient initially discredited the source as not credible or biased.³⁵⁰ In this way, frequent exposure may override the efficacy of other informational cues such as source and so confuse consumers as to authorized and illicit interpretations.³⁵¹ To avoid this aspect of "overgrazing," secondary uses most likely to distort audience perception should remain subject to property remedies like an injunction.³⁵² These would include mass media advertisements incorporating proprietary works and other mass promotions of secondary works that reach audiences unbidden and have the potential to distort audience memory for a work.³⁵³ So, for example, secondary use in pop-up ads, television advertising, flyers, posters, and perhaps even pervasive forms of mass media distribution such as general radio promotion for songs or wide release for films would remain subject to injunction. Works which must be sought out to be consumed such as books, plays, website parodies, or those that are subject to small-scale distribution, such as casual emails, could not be

³⁴⁸ *Id.*

³⁴⁹ Cacioppo & Petty, *supra* note 231, at 99.

³⁵⁰ See Lynn Hasher et al., *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107, 107-12 (1977) (noting that experiment subjects were more likely to accept repeated statements about subjects such as politics, science and art as true over similar non-repeated statements); see also Scott A. Hawkins & Stephen J. Hoch, *Low-Involvement Learning: Memory Without Evaluation*, 19 J. CONSUMER RES. 212, 214 (1992) (stating that consumers accept repeated and familiar messages as true without evaluating the content of the message); Herbert E. Krugman, *The Impact of Television Advertising: Learning Without Involvement*, PUB. OPINION Q. 349, 354 (1965); cf. Alice H. Eagly & Shelly Chaiken, *Attitude Strength, Attitude Structure and Resistance to Change*, in ATTITUDE STRENGTH: ANTECEDENTS AND CONSEQUENCES 413, 427 (Richard E. Petty & Jon A. Krosnick eds., 1995) ("[W]ell-documented successes in changing strong attitudes have involved bombarding the targeted people with a large amount of information consistent with the desired attitude(s)."); Sawyer, *supra* note 230, at 254 (observing that although initial responses to obviously manipulative messages may be negative, repeated exposure to the messages may allow for dissipation of the negative responses and subsequent re-evaluation of the message based on quality and believability of the message).

³⁵¹ See Kathryn A. Braun, *Postexperience Advertising Effects on Consumer Memory*, 25 J. CONSUMER RES. 319, 332 (1999) (finding that consumers may confuse the true nature of product experience with a subsequent ad-induced description of it).

³⁵² Cf. *id.* at 321, 332-33 (finding that subsequent misinformation can alter beliefs without producing a conscious sense of confusion); Gavan Fitzsimons et al., *Non-Conscious Influences on Consumer Choice*, 13 MARKETING LETTERS 269, 273 (2002) (same).

³⁵³ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580 n.14 (1994) (suggesting that works with "wide dissemination" are more likely to substitute for the original than works with "minimal distribution"). See generally Braun, *supra* note 351.

enjoined. Owners would thus retain strong property boundaries against the most harmful types of secondary use.

4. Hierarchy of Processing

A fourth theory relevant to this area is research postulating high and low systems of cognitive processing. This research argues that individuals process certain types of information using more or less cognitive effort.³⁵⁴ Systemic processing involves relatively high degrees of attention and logical processing of message content.³⁵⁵ By contrast, we use low-involvement processing for messages that seem unimportant, trivial or when we lack sufficient attention or expertise to logically evaluate the subject matter.³⁵⁶ In low-involvement processing, we use cues such as source or familiarity to determine our attitude toward the communication and we tend to ignore the details of precise information contained in the message.³⁵⁷ For this reason, low-involvement messages can actually have greater unconscious impact on our attitudes.³⁵⁸ Although we have not consciously evaluated the truth or credibility of such messages, they remain stored in memory and may unconsciously impact our opinions and desires the next time we consider a topic related to that message.³⁵⁹ So, for example, when we see an advertisement describing Morton Salt as "easy to pour," we do not really pay attention, but we store a few bits of information from the ad without any conscious elaboration.³⁶⁰ Over time, and with repeated exposure, Morton Salt becomes associated in our minds with "easy to pour."³⁶¹

The theory has relevance for secondary use because certain types of expressive works tend to be processed along one path or the other. Depth of processing to some degree depends on individual goals in

³⁵⁴ See, e.g., PETTY & CACIOPPO, *supra* note 338, at 54; Chaiken & Maheswaran, *supra* note 338, at 460.

³⁵⁵ Chaiken & Maheswaran, *supra* note 338, at 460; Chaiken, *supra* note 336, at 752.

³⁵⁶ PETTY & CACIOPPO, *supra* note 338, at 54; Chaiken & Maheswaran, *supra* note 338, at 460; Chaiken, *supra* note 336, at 752; Hawkins & Hoch, *supra* note 350, at 213.

³⁵⁷ Chaiken & Maheswaran, *supra* note 338, at 460; see PETTY & CACIOPPO, *supra* note 338, at 54; Hawkins & Hoch, *supra* note 350, at 214.

³⁵⁸ Hawkins & Hoch, *supra* note 350, at 213-14; Krugman, *supra* note 350, at 354.

³⁵⁹ Hawkins & Hoch, *supra* note 350, at 213-14; see also ROBERT HEATH, *THE HIDDEN POWER OF ADVERTISING: HOW LOW INVOLVEMENT PROCESSING INFLUENCES THE WAY WE CHOOSE BRANDS* 95 (2001) (noting that a marketing campaign that promoted the "refreshment" aspect of Heineken contributed to consumers subconsciously associating Heineken with the concept of refreshment).

³⁶⁰ Hawkins & Hoch, *supra* note 350, at 214.

³⁶¹ *Id.*

approaching a type of communication.³⁶² Those actively seeking information about an imminent decision are more likely to use systemic processing than those seeking diversion or pleasure.³⁶³ Certain types of works, however, are susceptible to generalization. Longer literary works, for example, demand greater cognitive involvement regardless of individual goals.³⁶⁴ Quick and simple images such as cartoons or catchy melodies, on the other hand, are more likely to receive heuristic processing.³⁶⁵ Although knowledge about a source may lead us to discount such works when they emanate from authors other than the original and so blunt their impact, this effect may be incomplete.³⁶⁶ If we want to provide maximum protection to copyright owners, then we would want to be more concerned with likely low-involvement processing works than with dramatic or literary works that demand more sustained cognitive attention. In this respect, the older copyright acts, which provided for different bundles of rights depending on the type of work, may have more internal logic than the current system of mostly uniform rights.

³⁶² EAGLY & CHAIKEN, *supra* note 323, at 330.

³⁶³ See Richard E. Petty, John T. Cacioppo, and David W. Schumann, *Central and Peripheral Routes to Advertising Effectiveness: The Moderating Role of Involvement*, 10 J. CONSUMER RES. 135, 138 (1983); Richard C. Vincent & Michael D. Basil, *College Students' News Gratifications, Media Use and Current Events Knowledge*, 41 J. BROADCASTING & ELECTRONIC MEDIA 380, 380-89 (1997) (college students approaching graduation consumed all types of media more instrumentally to gain knowledge about the world they were about to enter).

³⁶⁴ See, e.g., EYSENCK, *supra* note 29, at 77-78 (tasks that involve processing of meaning receive greater depth of processing); Fergus I.M. Craik & Robert S. Lockhart, *Levels of Processing: A Framework for Memory Research*, 11 J. VERBAL LEARNING & VERBAL BEHAVIOR 671, 680 (1972) (hypothesizing that tasks that require analysis of meaning of words lead to greater memory retention due to greater depth of processing required by semantic elaboration as opposed to syntactic or structural judgments).

³⁶⁵ Cf. Hawkins & Hoch, *supra* note 350, at 223 (advertisers prefer jingles and rhymes because they increase memory without stimulating elaborative processing). Ease of consumption is a general motivating factor for low-involvement consumers. See *id.*

³⁶⁶ For example, some studies have found a "sleeper effect" for messages from low credibility sources. Darlene B. Hannah & Brian Sternthal, *Detecting and Explaining the Sleeper Effect*, 11 J. CONSUMER RES. 632, 632 (1984). Although such messages are initially discounted, over time listeners may retain the information while forgetting its source, leading them to gradually accept the message over time. *Id.* Other studies, however, have failed to replicate this affect, or have found it to be very limited. Gillig & Greenwald, *supra* note 339, at 138-39.

5. Implications for Judicial Analysis of Secondary Use Under Copyright

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

Judges could easily incorporate this analysis within the existing fair use framework. The fourth factor under the current fair use test asks judges to determine the effect of the secondary work on the market for the original.³⁶⁷ No standards currently exist by which to measure market harm. Although many have argued that only uses that substitute for the original in the market should count, widespread licensing of expressive works challenges our definition of what the "market" should be. Is it only uses for which the owner has already licensed the original? Uses that the owner might want to license in the future?³⁶⁸ Or, as many owners argue, any use that lowers the licensing value of the brand more generally? The above rules directly address the issue of harm to expressive value, and allow judges a cleaner framework for adjudicating the fourth factor in secondary use cases.³⁶⁹ Such a test would remove the need for a special "parody" ex-

³⁶⁷ *Campbell*, 510 U.S. at 590.

³⁶⁸ See Goldstein, *supra* note 65, at 232-34 for an argument in favor of this broader definition.

³⁶⁹ As an alternative, such factors could be used to frame a more contextual inquiry into "substantial similarity" between an original and a derivative work. Because these factors help distinguish between uses that consumers will find confusing and those that they will contextualize effectively, they are relevant to the question of what kinds of unauthorized derivative works overstep the boundary between permissible conjuring of an original work and impermissible "copying" of that work. See Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 194-202 (1994) (arguing generally that a finding of substantial similarity should depend on likelihood of harm to the owner's incentive to create). These factors might also be useful in more narrowly defining trademark uses that potentially "dilute" older marks.

ception except perhaps in the relatively rare cases where artists seek to mass disseminate a commercial parody to an involuntary audience.

Proponents of secondary use might argue that restrictions on methods of promotion or types of work unfairly burden an important type of expression and interfere with its finding an audience. To the extent that restrictions on dissemination and advertisement burden secondary works, this is not necessarily a bad thing. The disadvantage of allowing greater personal and commercial use of popular copyrighted works is that it becomes cheaper to obviously piggyback on existing works than to create more original texts.³⁷⁰ In an attention economy, works positioned off of popular brands will have an easier time getting attention and establishing a personality relative to consumer expectations. Limits on advertising and methods of distribution may help to remedy this imbalance and ensure sufficient investment in more original works. Compulsory license fees or actions for profit allocation, such as Netanel's or Rubinfeld's schemes, may also be appropriate in certain commercial contexts.³⁷¹

CONCLUSION

Copyright's cognitive elements have gone unexamined for too long in favor of an analysis grounded in real property theory. Rules based on pastures and cattle have limited force when applied to rights in information. A more explicit grounding of copyright principles in the mechanics of human cognition, similar to the types of analysis commonplace under trademark law, provides a better balance between rights of owners and needs of users. In many ways, such a theory is no more controversial than suggesting that the fee simple estate in real property conform to the known dynamics of physical space. Courts once considered air rights part of a landowner's domain.³⁷² This definition changed when air traffic increased the social value of public air space to the point where it outweighed the private need for such rights.³⁷³ Similarly, the copyright owner's estate may be narrowed to account for valuable expressive uses that do not do much harm to the reproduction and distribution rights meant to be reserved to the owner. Acknowledgement of copyright's conceptual underpinnings

³⁷⁰ I do not mean to assert that many or most cultural works do not borrow extensively from previous forms and texts, but just to suggest that gradations in originality and obviousness of borrowing exist.

³⁷¹ See *supra* notes 123–124 and accompanying text.

³⁷² BLACKSTONE, *supra* note 137, at *18.

³⁷³ See *United States v. Causby*, 328 U.S. 256, 261 (1946).

thus allows for compromise between the competing economic and free speech models of secondary use.