

COMMERCIALIZING COPYRIGHT

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SHANI SHISHA*

Abstract: Much of modern copyright law is cloaked in the language of neutrality. No matter how successful or popular, all copyrighted works are shielded by the same rights. In theory, our system neither celebrates nor condemns commercial success. All works are created equal under the law. This standard account is radically askew. In reality, questions of commercial success pervade virtually every aspect of copyright doctrine. Courts consider whether the work is commercially successful in cases spanning a range of doctrinal contexts, including the scope of protectable subject matter, the standards of liability, the limits of fair use, and the range of available remedies. Commercial success looms over all of copyright law—and its dominion is swelling.

This Article brings together doctrine, history, and theory to analyze this increasingly important phenomenon. It canvasses a variety of seemingly disparate doctrines that tap into notions of success in both direct and subtle ways. It grapples with the practical and normative implications of our success-driven system and asks whether and under what conditions courts should take account of the work's success. After demonstrating that questions of commercial success scaffold every major copyright doctrine, I argue that these rich patterns resist the standard heuristics used to conceptualize our copyright regime as a uniform and neutral body of law. In the end, this Article reveals that success plays a surprisingly important and complex role in copyright jurisprudence, implicating profound questions about the relationship between markets and incentives, the structure of copyright doctrine, and the proper scope of copyright law.

INTRODUCTION

Neutrality is the lifeblood of modern copyright doctrine. No matter how successful or popular, all copyrighted works are supposedly shielded by the

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same rights.¹ As a matter of black-letter doctrine, all works are created equal.² Indeed, the Ninth Circuit has proclaimed that “nothing in copyright law suggests that a [commercially successful] work deserves stronger legal protection.”³ Courts have repeatedly emphasized that evidence of commercial success is irrelevant, perhaps even foreign, to copyright doctrine.⁴ The conventional wisdom is that our system neither celebrates nor condemns commercial success.

This familiar picture is critically incomplete. In reality, questions of commercial success pervade virtually every aspect of copyright doctrine. As this Article shows, courts routinely consider whether the work is commercially

¹ See, e.g., Brian L. Frye, *Image Reproduction Rights in a Nutshell for Art Historians*, 62 IDEA 175, 188 (2022) (“Every work of authorship is protected in the same way, irrespective of the nature of the work.”); Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 MICH. L. REV. 231, 237–38 (2014) (“[Copyright’s protection scheme is] predicated on the one-size-fits-all principle. . . . Expressive works confer upon their authors a uniform bundle of rights for a uniform statutory duration.”); Gregory N. Mandel, *Proxy Signals: Capturing Private Information for Public Benefit*, 90 WASH. U. L. REV. 1, 26 (2012) (“[C]opyright law . . . primarily take[s] a one-size-fits-all approach to intellectual property protection.”); Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361, 1389 (2009) [hereinafter Carroll, *One Size Does Not Fit All*] (discussing copyright’s one-size-fits-all regime); Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 846 (2006) [hereinafter Carroll, *One for All*] (“[I]ntellectual property law protects the owner of each patented invention and each copyrighted work of authorship with a largely uniform set of exclusive rights.”); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 578 (2005) (describing a “one-size-fits-all copyright doctrine that embraces everything from simple portraiture to massive architectural works, from Emily Dickinson’s poems to computer operating systems”). But see Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 221 (2012) (pointing out that courts “vary the protection that different works receive depending on their level of originality”).

² See Frye, *supra* note 1, at 188 (emphasizing that all works are “protected in the same way”); Bell & Parchomovsky, *supra* note 1, at 231 (“However important or unimportant, inventions and original works receive the same scope of protection, for the same period of time, backed by the same variety of legal remedies.”); Mandel, *supra* note 1, at 26 (suggesting that copyright “take[s] a one-size-fits-all approach”); Hughes, *supra* note 1, at 578 (observing that copyright doctrine operates on the basis of a one-size-fits-all principle). Interestingly, a number of foreign jurisdictions, including Germany and France, provide authors with additional rights to share in the revenue stream from a commercially successful work. See Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 67 (2013) (discussing foreign approaches).

³ *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1068 (9th Cir. 2020) (en banc) (“[N]othing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.”).

⁴ See, e.g., *Darden v. Peters*, 488 F.3d 277, 287 (4th Cir. 2007) (viewing evidence of commercial success as essential to trademark infringement but foreign to copyright law); *Paul Morelli Design, Inc. v. Tiffany & Co.*, 200 F. Supp. 2d 482, 487–88 (E.D. Pa. 2002) (noting that commercial success is not a relevant factor in evaluating whether a work is original enough to qualify for copyright protection); *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1075 (9th Cir. 2000) (noting that, rather than consider “whether [the work] has commercial value,” courts instead “evaluate whether it has copyrightable elements”).

successful in cases spanning a variety of doctrinal contexts—the scope of protectable subject matter, the standards for copyright infringement, the limits of fair use, and the range of available remedies.⁵ In these and other domains, notions of market success seethe beneath the surface.⁶

For example, questions of commercial success tend to arise in cases dealing with fictional characters. In particular, courts appeal to the notion of fame—the popularity or success of the work—to determine whether a fictional character is distinctive enough to qualify for copyright protection.⁷ Perhaps more pointedly, courts also rely on evidence of commercial success to assess whether the defendant copied the protected work, whether the defendant’s copying constitutes fair use, and whether the plaintiff suffered harm as a result of the defendant’s actions.⁸ Success looms over all of copyright law—and its imprint is steadily growing.

It is something of an embarrassment for modern copyright law that so many of its doctrines depend on such a poorly defined and rarely acknowledged principle. Some commentators contend that our system is best understood as a one-size-fits-all regime, one in which all works are treated alike.⁹ Others seem to recognize, if only implicitly, that courts sometimes depart from this evenhanded approach.¹⁰ Yet no scholar to date has offered a full, systematic account of how questions of success shape copyright law.

⁵ See *infra* Part II. Throughout this Article, I use the labels “success” and “commercial success” interchangeably to refer to *market* performance. A successful work is thus a *commercially* successful one.

⁶ See *infra* Part II (discussing the interplay between market success and copyright doctrine).

⁷ See *infra* notes 184–223 and accompanying text (exploring questions of commercial success in the context of fictional characters).

⁸ See *infra* Part II (discussing the impact of commercial success on questions of copyright infringement).

⁹ See, e.g., Frye, *supra* note 1, at 188 (noting that all works are protected in the same way); Bell & Parchomovsky, *supra* note 1, at 237–38 (describing copyright as a “one-size-fits-all” system); Carroll, *One Size Does Not Fit All*, *supra* note 1, at 1389 (discussing this one-size-fits-all regime); Carroll, *One for All*, *supra* note 1, at 846 (surveying copyright’s uniform set of rights).

¹⁰ See, e.g., Caitlin E. Oh, Comment, *Inside Out, Upside Down: Circuit Court Confusion Over Character Copyrightability*, 72 EMORY L.J. 629, 634 (2023) (describing the “fame-based” standard that courts use to determine whether a fictional character is eligible for copyright protection); Shyamkrishna Balganesh & Peter S. Menell, *Proving Copying*, 64 WM. & MARY L. REV. 299, 366–67 (2022) (noting that successful works fare better under the “access” doctrine). More broadly, previous work has called into question the myth of uniformity in federal IP law. See generally Sharon K. Sandeen, *The Myth of Uniformity in IP Laws*, 24 J. INTELL. PROP. L. 277 (2017) (discussing conflicts between how federal circuit courts interpret intellectual property laws). Sandeen inveighs against the presumption that federal intellectual property law is a uniform, consistent, and predictable body of law. *Id.* at 281–89. As Sandeen explains, three key problems are at work. *Id.* at 282–89. First, legal disputes regularly implicate both federal and state law. *Id.* at 286. Second, courts must interpret imprecise statutory standards, and they often do so inconsistently. *Id.* Third, judges apply fact-specific doctrines in an unpredictable manner. *Id.* at 288. Note, however, that this Article attends to a different

Against this backdrop—a phenomenon that is ubiquitous, important, and understudied—this Article makes three key contributions. First, it offers a comprehensive survey of the ways in which notions of commercial success bear upon copyright law. To be sure, the idea that market prospects could affect what authors choose to create or monetize is not new.¹¹ Nor are more discrete considerations of commercial success in limited doctrinal contexts.¹² But this Article probes deeper. It seeks to introduce clarity into an inchoate body of law by cataloging a range of disparate doctrines that tap into notions of success. Ultimately, this Article demonstrates that success drives almost every copyright policy question.¹³ The result is the first full, critical account of commercial success.

Second, drawing on this descriptive account, this Article constructs a more nuanced theoretical portrait of commercial success. Although success is a formidable force driving much of modern copyright law, it also presents a thorny puzzle that deeply befogs both doctrine and theory.¹⁴ To see why, consider the traditional justification for copyright law. Scholars conventionally view our copyright system as a vehicle for incentivizing creativity.¹⁵ Literary and artistic works are often difficult to create but easy to copy.¹⁶ Without legal exclusivity, the argument runs, copyists will flood the market with cheap copies, thereby discouraging investments in new creations.¹⁷ Thus, in order to ensure that authors are able to recuperate their costs, copyright law provides them

(if related) issue. The main thrust of my argument here is not that the law is (or is not) predictable; rather, it is that courts effectively consider the work's success as a matter of both design and practice.

¹¹ See *infra* notes 449–454, 589–590, and accompanying text (suggesting that the prospect of commercial success might explain the growing prominence of franchise films and related sequels in the film industry, as well as the rise of data-driven content in the streaming industry).

¹² Balganesch & Menell, *supra* note 10, at 367 (explaining that popular works are treated differently under copyright's access doctrine).

¹³ See *infra* Part II (analyzing a variety of copyright doctrines).

¹⁴ See *infra* Part III (developing a theoretical account of the relationship between commercial success and copyright law).

¹⁵ See Shyamkrishna Balganesch, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1572 (2009) (noting that copyright's "primary purpose" is to provide authors with an incentive to produce expressive works); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

¹⁶ See Joseph P. Fishman, *Honest Copying Practices*, 93 NOTRE DAME L. REV. 267, 267 (2017) ("One of intellectual property theory's operating assumptions is that creating is hard while copying is easy."); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1688 (2006) (similar); James Gibson, *Re-Reifying Data*, 80 NOTRE DAME L. REV. 163, 164 (2004) (similar).

¹⁷ See, e.g., Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 325 (2018) (noting that our system "prevents free riders from making cheap copies that would deprive the original author of the ability to profit").

with exclusive rights in their works.¹⁸ Cost recoupment is the touchstone of this standard story: by keeping free riders at bay, our system presumptively allows authors to recover their initial investments.

This utilitarian account is intuitively straightforward. Nevertheless, few seem to have recognized an underlying puzzle: the most successful works—those most likely to be copied by free riders—are also the ones least deserving of copyright protection.¹⁹ It is not hard to understand why. Commercially successful works, by definition, tend to be profitable, and the authors of these works, in turn, are far more likely to recuperate their costs.²⁰ So, to the extent that copyright turns on cost recoupment, successful works fit rather uneasily with our system.²¹ Successful works therefore complicate the orthodox justification for copyright law.

Finally, having worked through this theoretical puzzle, the Article charts a path toward doctrinal reconstruction.²² To do so, it offers a taxonomy of success-driven doctrines that operate along two distinct axes.²³ First, some courts invoke commercial success as an evidentiary tool, focusing on doctrinal contexts in which market success can fill a gap in the factual record.²⁴ Second, courts sometimes single out successful works for preferential treatment on the basis of free-riding or unjust-enrichment impulses—these courts, in other words, believe that any unauthorized use of a successful work is inherently unjust or parasitic.²⁵

After identifying these patterns, this Article develops an alternative analytical framework for thinking about commercial success.²⁶ It proposes, somewhat counterintuitively, that courts embrace a legal presumption *against* strong

¹⁸ See John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409, 1415 (2013) (“Were copying to be freely allowed, copiers could sell their copies at lower prices than creators, given their lower total costs. In order to allow authors, artists, and (arguably) intermediate content firms to recoup the sunk costs of initial creation, copyright law bestows a limited monopoly upon the author of a work.”); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 129 (2004) (“Because ideas are so easy to spread and so hard to control, only with difficulty may creators recoup their investment [A]bsent intellectual property protection, most would prefer to copy rather than create ideas”).

¹⁹ See *infra* notes 378–476 and accompanying text (discussing the theoretical implications of this puzzle).

²⁰ See *infra* notes 378–476 and accompanying text (same).

²¹ See *infra* Part III (discussing this apparent paradox).

²² See *infra* Part IV (constructing a doctrinal framework for evaluating commercial success).

²³ See *infra* notes 527–564 and accompanying text (developing a typology of different success-driven doctrines).

²⁴ See *infra* notes 527–564 and accompanying text (discussing contexts in which courts employ commercial success as an evidentiary tool).

²⁵ See *infra* notes 527–564 and accompanying text (highlighting a range of doctrines motivated by free-riding and unjust-enrichment instincts).

²⁶ See *infra* Parts IV–V (suggesting an alternative way of understanding commercial success).

copyright protection in cases involving successful works. At first blush, this approach seems radical. In a legal culture that prizes market performance, it may be difficult to conceive of a better system—one that is administrable, normatively attractive, and conceptually coherent. Nevertheless, if the copyright system truly cares about cost recoupment, judges ought to get out of the business of valorizing successful works. This Article suggests that one way to accomplish this is to craft a context-sensitive presumption disfavoring successful works.²⁷ This is not to say, of course, that copyright protection should be withheld from successful works altogether. Rather, I argue only that courts need to consider commercial success as a single, nonexclusive factor in adjusting the scope of copyright protection.²⁸

In a broader sense, this Article shows that copyright law is a generative site for debates about the relationship between law and the market. Specifically, it asks what the proposed approach might suggest about the different ways in which the market shapes, alters, and refines the preferences of consumers and authors.²⁹ By critically examining the myth of the singular market, this Article offers fresh insights about the promise and pathos of copyright policy.

The argument proceeds in five parts. Part I traces the history of copyright markets.³⁰ It explores how copyright doctrine developed in the nineteenth century against an assortment of commercial interests and then presents empirical data suggesting that most copyrighted works have little to no market value.³¹ Part II—the backbone of my descriptive account—turns from history to doctrine, demonstrating that copyright law is populated by a parade of doctrines that confront questions of commercial success in both direct and indirect ways.³²

Part III provides a panoramic account of copyright theory and highlights the disjuncture between successful works and the traditional justification for copyright law.³³ Given this tension, Part IV offers a blueprint for reform by mapping out different conceptions of success-driven doctrines and proposing a rebuttable presumption against commercially successful works.³⁴ Such a presumption would operate only in specific and limited circumstances by compelling courts to stack the deck *against* successful works.³⁵ Part V explores a number of countervailing considerations that might enrich—and, in places,

²⁷ See *infra* Part IV (explaining how to implement a presumption against successful works).

²⁸ See *infra* Part IV (same).

²⁹ See *infra* Part V (weighing the different perspectives of the proposed approach to copyright).

³⁰ See *infra* notes 43–118 and accompanying text.

³¹ See *infra* notes 43–118 and accompanying text.

³² See *infra* notes 119–347 and accompanying text.

³³ See *infra* notes 348–492 and accompanying text.

³⁴ See *infra* notes 493–564 and accompanying text.

³⁵ See *infra* notes 493–564 and accompanying text.

complicate—this debate.³⁶ This Part examines how the proposed framework would affect both immediate and remote incentives, whether it would be administrable, and what it might suggest about the metaphor of the market.³⁷

Before proceeding, one prefatory caveat bears mention. Some copyright disputes implicate two discrete works—the plaintiff’s work and an allegedly infringing work created by the defendant.³⁸ This Article focuses on the former: in discussing a successful work, I mean only the *original* work owned by the plaintiff. Whether courts ought to police the success of the *infringing* work is a separate question altogether, and one that this Article does not fully address.

I. PRACTICE AND HISTORY

Our creative universe bristles with possibility. Yet the prospect of commercial success is a source of both promise and dismay. In a world that is increasingly punctuated by a deluge of creative content, few authors manage to stand out—and fewer still manage to accomplish any measure of lasting success.³⁹ Section A of this Part explores a variety of commercial and economic interests that have shaped the development of copyright law during the nineteenth century.⁴⁰ Section B then discusses the commercial realities that attend various creative industries.⁴¹ What emerges is a bleak picture: the prospect of commercial success is often little more than a distant mirage.⁴² Most copyrighted works have little market value, and most authors will not be able to recoup their costs, much less turn a profit.⁴³

A. Commercial Interests and Romantic Authorship

During the nineteenth century, the fledgling copyright system repeatedly brushed up against a rapidly commercializing world.⁴⁴ No brisk overview can do justice to the rich scholarship on the evolution of copyright law, but this Section surveys a number of noteworthy themes that emerged during the nineteenth century.

³⁶ See *infra* notes 565–593 and accompanying text.

³⁷ See *infra* notes 565–593 and accompanying text.

³⁸ See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 514–15 (2023) (highlighting the commercial success of both Lynn Goldsmith and Andy Warhol).

³⁹ See *supra* note 20 and accompanying text (noting that most works are commercially unsuccessful).

⁴⁰ See *infra* notes 44–76 and accompanying text.

⁴¹ See *infra* notes 77–118 and accompanying text.

⁴² See *infra* notes 77–118 and accompanying text (noting the challenges of commercial success).

⁴³ See *supra* note 20 and accompanying text (noting that 99% of printed titles do not recuperate writing and publishing costs).

⁴⁴ See *infra* note 52 and accompanying text (discussing how financial interests drove copyright protection in the nineteenth century).

First, a romantic conception of the ingenious, solitary author played a central role in shaping eighteenth- and nineteenth-century copyright law.⁴⁵ This conception of authorship drew upon the image of a lone author laboring to create an original work out of thin air.⁴⁶ The “original work,” in turn, was understood to signal a sharp departure from “traditions and existing materials”—it was depicted, in other words, as an entirely novel creation.⁴⁷ This conception of authorship emphasized the twin constructs of the “solitary author” and the “original work.”⁴⁸ Both were cast in individualistic terms: the author as a lone, heroic creator and the work as a singular creation.⁴⁹

This concept of authorship was partially forged by commercial stakeholders, particularly book publishers, who sought to secure a legal entitlement to protect their literary works.⁵⁰ With this view of authorship baked into the copyright system, copyright owners pushed to expand and strengthen copyright protections over their works.⁵¹ As markets for intellectual goods grew to become more lucrative and industrialized during the nineteenth century, a consensus soon emerged, buoyed by financial interests, that stronger copyright protection was a matter of considerable economic significance.⁵²

It is no surprise, then, that some of copyright’s most fundamental principles crystalized in the nineteenth century against a mix of market interests and notions of romantic authorship.⁵³ Take, for example, the originality require-

⁴⁵ See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 192–93 (2008) (discussing the romantic image of the heroic author).

⁴⁶ *Id.* at 193.

⁴⁷ *Id.*

⁴⁸ See *id.* at 192–93.

⁴⁹ *Id.*

⁵⁰ See RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 31–50 (2004) (surveying this history); see also Bracha, *supra* note 45, at 193–95 (discussing the impact of property rights on authorship).

⁵¹ See generally KEVIN J. HICKEY, CONG. RSCH. SERV., IF12339, COPYRIGHT LAW: AN INTRODUCTION AND ISSUES FOR CONGRESS (2023), <https://crsreports.congress.gov/product/pdf/IF/IF12339> [<https://perma.cc/62UJ-3H5T>] (describing the expansion of copyright law).

⁵² Shani Shisha, *The Folklore of Copyright Procedure*, 36 HARV. J.L. & TECH. 61, 108 (2023).

[D]uring the twentieth century, the United States became a chief exporter of intellectual goods. Previously, Americans had primarily consumed contents produced by foreigners and imported into the United States. In the late twentieth century, however, the United States became the world’s largest exporter of intellectual goods. These shifts have prompted the U.S. government to pursue stronger intellectual property protections both domestically and abroad. There was, then, a widespread conviction that strong intellectual property protection was a matter of economic significance.

Id. (internal citations omitted).

⁵³ Oren Bracha’s work on the ideology of authorship provides a helpful survey of the relevant issues. See generally Bracha, *supra* note 45.

ment—the threshold requirement that a work of authorship be sufficiently original.⁵⁴ Some early courts appeared to insist upon a strict originality requirement. They construed the originality doctrine to require that creative works display a degree of novelty or artistic merit as a condition for copyright protection.⁵⁵ Nineteenth-century courts, however, eventually whittled down the originality requirement, adopting instead a minimalist threshold that virtually any work could satisfy.⁵⁶

In the 1903 case of *Bleistein v. Donaldson Lithographing Co.*, the U.S. Supreme Court leaned on notions of commercial value and romantic authorship to hold that a circus advertisement poster was eligible for copyright protection.⁵⁷ In dispensing with the claim that the poster lacked originality, Justice Holmes stressed that the work was “the personal reaction of an individual upon nature.”⁵⁸ Justice Holmes then went on to make what is arguably his most famous admonishment—that “[i]t would be a dangerous undertaking” for courts to “constitute themselves final judges” of the artistic merit of creative works.⁵⁹

Justice Holmes quickly followed this pronouncement, recognized today for encoding a principle of aesthetic neutrality, with a more practical averment.⁶⁰ The poster at issue, Justice Holmes stated, was commercially valuable.⁶¹ When the work “command[s] the interest of any public, [it has] a commercial value—it would be bold to say that [it has] not an aesthetic and educational value.”⁶² Under this accounting, if the work has commercial value, it is original enough to warrant copyright protection.⁶³ After all, “the taste of any

⁵⁴ 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in *original* works of authorship” (emphasis added)); see also *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) (“As this Court has explained, the Constitution mandates some minimal degree of creativity . . . and an author who claims infringement must prove ‘the existence of . . . intellectual production, of thought, and conception.’” (internal citations omitted)).

⁵⁵ See Bracha, *supra* note 45, at 204–07 (overviewing cases).

⁵⁶ *Id.* at 200–09 (covering this trajectory).

⁵⁷ 188 U.S. 239, 251–52 (1903).

⁵⁸ *Id.* at 250.

⁵⁹ *Id.* at 251.

⁶⁰ See Joseph P. Liu, *What Belongs in Copyright?*, 39 COLUM. J.L. & ARTS 325, 331 (2016) (“Going back to Justice Holmes and *Bleistein*, the courts have insisted that they are not in the position to make . . . aesthetic judgments.”); John Tehranian, *Dangerous Undertakings: Sacred Texts and Copyright’s Myth of Aesthetic Neutrality* (observing that courts facially subscribe to a principle of aesthetic neutrality), in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 418, 418 (Matthew David & Debora Halbert eds., 2015).

⁶¹ *Bleistein*, 188 U.S. at 252.

⁶² *Id.*

⁶³ Barton Beebe, *Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 373 (2017). As Beebe notes, “Holmes retreated to the market’s judgment of [the works’] worth or otherwise to the infringer’s judgment of their worth. If the works have ‘commercial value’ . . . then the works have sufficient merit—‘their worth and their success’—to

public is not to be treated with contempt.”⁶⁴ The market, according to Holmes, is the ultimate arbiter of merit, and a commercially valuable work thus deserves copyright protection.⁶⁵ By calling upon idealized notions of romantic authorship and commercial value, Holmes was able to do away with a more stringent standard of originality.⁶⁶

Subsequently, with a much-diluted originality requirement in place, copyright protection could readily extend to all kinds of materials that were only modestly original.⁶⁷ Copyright owners were consequently able to exploit new markets for mass-produced commodities.⁶⁸ The nineteenth-century marketplace was soon awash in “new materials and formats whose ability to meet [a strict originality bar] was questionable,” with commercial interests working against a rigid originality requirement.⁶⁹ In this new world, captivated as it was by market demand, new kinds of cheap, mass-distributed works proliferated.⁷⁰

The spread of commodity markets also inspired a related shift in the conception of the originality requirement. In the eighteenth century, many thought of intellectual resources as possessing “intrinsic value derived from their objective qualities and not dependent upon subjective human desires.”⁷¹ Such views, however, were eventually displaced by a new understanding of value as contingent upon market demand.⁷² Publishers and writers, operating within mass-distribution markets for books, increasingly referred to books as mere “commodities whose values were synonymous with market demand.”⁷³ In

promote progress.” *Id.* (internal citations omitted). Simply put, “Holmes stood up for popular taste—the taste of any public is not to be treated with contempt’” *Id.* (internal citations omitted).

⁶⁴ *Bleistein*, 188 U.S. at 252.

⁶⁵ Beebe, *supra* note 63, at 373.

⁶⁶ See *id.* (discussing Justice Holmes’ invocation of commercial value); *Bleistein*, 188 U.S. at 251–52 (drawing upon notions of commercial value and romantic authorship to justify copyright protection for a circus poster).

⁶⁷ Bracha, *supra* note 45, at 207. Eaton Drone, the author of a then-influential copyright treatise, offered a ringing indictment of the watered-down originality threshold: “[T]he requirements of the law as to the importance or value of a production are so slight that valid copyright will attach to almost any publication, and to many that appear to be of little or no consequence.” EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYWRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 211 (1879).

⁶⁸ See Bracha, *supra* note 45, at 210–12. “For the first time, conditions [in the nineteenth century] appeared for the emergence of a national mass market for books: broad demand, mass production capabilities, relatively cheap book commodities, and national patterns of production and marketing.” *Id.* at 210.

⁶⁹ *Id.* at 212. As Bracha observes, “[t]he traditional artisan-based printing craft was gradually replaced by a capitalist commodity industry.” *Id.* at 210–11.

⁷⁰ *Id.* at 212.

⁷¹ *Id.* at 218.

⁷² *Id.*

⁷³ *Id.* at 219.

short, the inherent conception of value gave way to a more crude understanding of market demand.⁷⁴ This conceptual shift explains why courts sought to further cabin the originality requirement.⁷⁵

The important lesson here is that commercial interests played a central role in delimiting the boundaries of copyright law. The next Section explores the realities and risks of creative markets: the problem, in brief, is that most works simply fail to resonate with consumers.⁷⁶

B. Creative Markets: Past and Present

The image of an iconoclastic artist toiling away to create a work of lasting commercial value—one that will dazzle consumers and stir a popular frenzy—has long gripped our collective imagination.⁷⁷ But, in truth, the prospect of commercial success has always been decidedly elusive: most creators, after all, will never produce anything of real commercial value.⁷⁸

Perhaps no study better illustrates the point than Christopher Sprigman's work on copyright formalities.⁷⁹ From 1790 to the late twentieth century, U.S. copyright law operated on the basis of a conditional system.⁸⁰ Those who wished to claim copyright protection had to satisfy certain procedural conditions, known as "copyright formalities."⁸¹ These formalities included four principal requirements. First, authors had to register their rights with a clerk at the local district court.⁸² Second, authors were required to promptly deposit a copy of the work with the district court.⁸³ Third, authors had to give notice of their rights.⁸⁴ The notice mandate consisted of two separate requirements: publishing a proof of registration in a local newspaper, and affixing to every pub-

⁷⁴ *Id.*

⁷⁵ *Id.* at 218–20.

⁷⁶ See *infra* notes 77–118 and accompanying text (discussing the failure of the market approach).

⁷⁷ Ian Fillis, *The Production and Consumption Activities Relating to the Celebrity Artist*, 31 J. MKTG. MGMT. 646, 647 (2015). The celebrity artist first emerged during the Italian Renaissance. *Id.*; see also Caroline Dakers, "Peeps," or "Smatter and Chatter": Late-Victorian Artists Presented as Strand Celebrities, 52 VICTORIAN PERIODICALS REV. 311, 311 (2019) (describing the role that Victorian art periodicals played "in building and maintaining the public's interest" in celebrity artists).

⁷⁸ See Eileen Kinsella, *A New Study Shows That Most Artists Make Very Little Money, with Women Faring the Worst*, ARTNET (Nov. 29, 2017), <https://news.artnet.com/market/artists-make-less-10k-year-1162295> [<https://perma.cc/P78A-RJ69>] (finding, on the basis of a survey of American artists, that three-quarters of artists make less than \$10,000 per year for their art).

⁷⁹ See generally Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

⁸⁰ Shisha, *supra* note 52, at 68–70.

⁸¹ *Id.* at 68 & n.36 (citing Sprigman, *supra* note 79, at 487).

⁸² Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124, 125 (amended 1831) [hereinafter 1790 Act].

⁸³ *Id.* at 125.

⁸⁴ *Id.* at 124.

lished copy of the work the same proof of registration.⁸⁵ Finally, and most importantly, the federal copyright statute compelled copyright owners to renew their rights after an initial term of fourteen years.⁸⁶ Once renewed, the copyright term would be extended for an additional fourteen-year term.⁸⁷ Subsequent amendments doubled the initial term of protection as well as the renewal term, such that copyright holders eventually were entitled to claim copyright protection for a cumulative term of fifty-six years.⁸⁸

These formalities presented a daunting obstacle.⁸⁹ Compliance with copyright formalities, especially in the horse-and-buggy days of the nineteenth century, was a burdensome task.⁹⁰ Copyright formalities therefore served as a costly screening mechanism: individual authors often failed, by choice or omission, to meet the requisite procedure.⁹¹ Because noncompliance typically led to forfeiture, authors who failed to comply with these formalities were unable to obtain copyright protection.⁹²

Critically, the registration and notice requirement encouraged authors to weigh the commercial value of their works.⁹³ Compliance with these requirements made sense only when the author anticipated the work to yield a commercial value exceeding the costs associated with copyright formalities.⁹⁴ Sprigman estimates that less than half of all works published between 1801 and 1870 were registered with the copyright office.⁹⁵ And although any such calculations necessarily rely on incomplete records, it is clear that many authors elected not to register their works because the registration costs outstripped any royalties they could earn.⁹⁶ Many works, then, had little commercial value.⁹⁷

⁸⁵ *Id.*; Act of Apr. 29, 1802, ch. 36, § 1, 2 Stat. 171, 171.

⁸⁶ 1790 Act § 1.

⁸⁷ *Id.*

⁸⁸ Act of Feb. 3, 1831, ch. 16, § 16, 4 Stat. 436, 439 (amended 1870); Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (amended 1976).

⁸⁹ Shisha, *supra* note 52, at 68–69.

⁹⁰ *Id.* at 72. In the most obvious sense, delivering physical copies to the local district court for the purpose of registration or deposit was logistically complicated in the pre-digital era. *Cf. id.* & n.89 (discussing a case in which a Supreme Court reporter was required to submit individual deposits for eighty reports to the State Department).

⁹¹ *Id.* at 72; see also Sprigman, *supra* note 79, at 502–21 (describing the “filtering” function of copyright formalities).

⁹² Sprigman, *supra* note 79, at 492–93.

⁹³ *Id.* at 514.

⁹⁴ *Id.*

⁹⁵ *Id.* at 503–13.

⁹⁶ *Id.* at 502 (concluding that many authors “did not project a net present value for royalty revenue from their work that exceeded” the costs of registration).

⁹⁷ *Id.*

As it turns out, even authors who did satisfy *some* formalities—the registration, deposit, and notice requirements—sometimes failed to renew their rights after the initial copyright term had expired.⁹⁸ This may seem curious. Clearly these authors were sophisticated enough to satisfy the procedural formalities necessary to apply for and obtain copyright protection. Why, then, did they fail to renew their rights?⁹⁹ After all, copyright renewal required only that the copyright owner re-register their copyright.¹⁰⁰

Sprigman points to a likely explanation: many authors could not be bothered to renew their rights because their works were not worth the trouble.¹⁰¹ These authors chose to let their copyrights lapse after realizing that their works had little lasting value.¹⁰² The figures on renewal rates are stark: historically, only 15% of works were renewed, and the remaining 85% fell into the public domain after a brief initial term of protection.¹⁰³ The practical effect of the renewal requirement, therefore, was to measure whether the work had lasting commercial value.¹⁰⁴ Because the vast majority of authors chose not to renew their rights, Sprigman concludes that “only a small portion of works retain[ed] enough value at the end of an initial term to merit renewal.”¹⁰⁵ That means that most copyrighted works had little enduring market value.

This has become all the more true in recent decades. Thanks to recent technological developments, authors today are able to create and distribute creative content with astonishing ease and speed.¹⁰⁶ Given the staggering ocean of content produced daily, it is hardly surprising that most authors toil in

⁹⁸ *Id.* at 519–21.

⁹⁹ *Id.*

¹⁰⁰ 1790 Act § 1 (providing that the author may renew her rights after the initial fourteen-year term expires by “caus[ing] the title . . . to be a second time recorded” and by publishing proof of registration in a newspaper).

¹⁰¹ See Sprigman, *supra* note 79, at 519 (“Authors would not bother, however, to renew works that ceased to profit them at the end of the initial term and for which they held no realistic expectation of future profit.”).

¹⁰² *Id.* at 521 (arguing that “only a small portion of works retains enough value at the end of an initial term to merit renewal”).

¹⁰³ *Id.* at 520 (first citing Barbara A. Ringer, *Renewal of Copyright*, in 1 STUDIES ON COPYRIGHT 503, app. at 616–20 (Arthur Fisher memorial ed. 1963); and then citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 236 (2003)).

¹⁰⁴ *Id.* at 519.

¹⁰⁵ *Id.* at 521; see also LANDES & POSNER, *supra* note 103, at 238 (noting that “the fact that only a small fraction of works [were] renewed implies that most copyrights [had] little economic value after [the initial term of protection]”).

¹⁰⁶ Kristin Thomson, Kristen Purcell & Lee Rainie, *Section 6: Overall Impact of Technology on the Arts*, PEW RSCH. CTR. (Jan. 4, 2013), <https://www.pewresearch.org/internet/2013/01/04/section-6-overall-impact-of-technology-on-the-arts/> [<https://perma.cc/M4WY-PU7X>] (showing that over 90% of people agree that “[t]he internet has increased engagement in the arts by providing a public platform” that artists can use to share their work).

complete anonymity.¹⁰⁷ Consumer attention is a scarce and finite resource, and there is simply too much content to choose from. The reality is that most works never get noticed.¹⁰⁸

Take, for example, the music industry. Most recorded music never reaches the point of commercial viability. As one observer noted, there are millions of songs currently available on Spotify that have never been streamed by anyone—not even once.¹⁰⁹ Even for those exceptional works that do reach the point of viability, commercial value is rapidly exhausted—typically within a few months to a year.¹¹⁰

Another case study is the video game industry, a behemoth that has grown in recent years to become, by some measures, the world's largest content industry.¹¹¹ The video game industry is profoundly top-heavy: its distribution of demand resembles an L-curve, meaning that very few games ever become popular.¹¹² All of the remaining games—the overwhelming majority—fail to get off the ground, attracting only a miniscule number of players.¹¹³ In fact, the most popular 10% of games capture roughly 90% of the total demand.¹¹⁴ These findings suggest that the large majority of works languish in obscurity as a tiny crop of ultra-popular games command a huge share of the overall profits.¹¹⁵

¹⁰⁷ Sarah Cascone, *How Hard Is It to Make It as an Artist? A New Study Shows There Are Many Paths to Success—and Failure*, ARTNET (June 12, 2018), <https://news.artnet.com/art-world/artist-financial-stability-survey-1300895> [<https://perma.cc/H7PF-HR9Q>] (stating that only 17% of artists earn more than three-quarters of their income from art).

¹⁰⁸ Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 143–44 (2020).

¹⁰⁹ See Glynn S. Lunney, Jr., *Copyright and the 1%*, 23 STAN. TECH. L. REV. 1, 4 (2020) (noting that “at least as of 2013, there were four million songs on Spotify that had never been streamed, not even once”); Kristelia A. García & Justin McCrary, *A Reconsideration of Copyright’s Term*, 71 ALA. L. REV. 351, 383 (2019) (“It is important to note that the vast majority of copyrightable information goods never reach the point of commercial viability at all; in some cases, these works are motivated by something other than financial gain.”).

¹¹⁰ See García & McCrary, *supra* note 109, at 378 (“The average album loses approximately one-third of its initial song sales volume within the first two months of release and falls to half of its initial peak after only four months. By the end of the first year, average sales are only around 20% of the initial volume.”). Indeed, analyzing a random sample of albums released over a ten-year period, Kristelia García and Justin McCrary find that most albums experience a stunning drop in the number of sales less than a year after being released. *Id.*

¹¹¹ BJ Ard, *Creativity Without IP? Vindication and Challenges in the Video Game Industry*, 79 WASH. & LEE L. REV. 1285, 1290–91 (2022) (“The [video game] industry now generates greater revenues than Hollywood, music, and streaming services combined.”); Shani Shisha, *Fairness, Copyright, and Video Games: Hate the Game, Not the Player*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 694, 696 (2021) (reporting that “video games now make up the largest entertainment market in the world by an order of magnitude”).

¹¹² Lunney, *supra* note 109, at 6–7.

¹¹³ *Id.* at 37–50.

¹¹⁴ *Id.* at 44.

¹¹⁵ *Id.* at 37–44.

The business of producing creative content, then, is a perilous enterprise. And nowhere is this more evident than in the publishing industry. The reality is that “[t]he typical book sells only a few copies right after publication and then disappears forever.”¹¹⁶ The publishing industry, much like the other industries discussed above, relies on a winner-takes-all system.¹¹⁷ Superstars command enormous profits, while everyone else is left scrambling for scraps. Ultimately, “for every hit, there are many, many flops.”¹¹⁸

In sum, this Part advanced two broad observations. The first is that copyright law historically developed against a smorgasbord of commercial interests. From the late eighteenth century to the present, copyright owners, driven by a desire to meet market demand, pressed to expand and strengthen the copyright system. The second observation is that, although commercial interests have long played an outsized role in our creative world, the vast majority of copyrighted works have no commercial value at all. Against this background, the next Part examines how notions of commercial success play out in modern copyright doctrine.

II. DOCTRINE

In a legal environment that celebrates neutrality, it is easy to understand why copyright doctrine is supposedly indifferent to commercial success. According to conventional wisdom, courts have no business judging the merits—*aesthetic, commercial, or otherwise*—of the copyrighted work.¹¹⁹ Although modern copyright law draws some distinctions between different kinds of works, primarily on the basis of subject matter or originality, these distinctions have little to do with commercial success.¹²⁰ Copyright, in short, is thought to be emphatically success-neutral.

This account, however, falls apart under the glare of close inspection. In truth, commercial success has commandeered vast swaths of copyright law. This Part offers a careful exegesis of the relevant case law, demonstrating that questions of success have long shaped the contours of copyright doctrine. Section A begins by exploring how questions of market success drive real-world outcomes as part of the plaintiff’s *prima facie* case for copyright infringe-

¹¹⁶ Rachel Soloveichik, *Books as Capital Assets*, 45 J. SCHOLARLY PUBL’G 101, 118 (2014).

¹¹⁷ García & McCrary, *supra* note 109, at 386–87.

¹¹⁸ *Id.* at 371–72.

¹¹⁹ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (discussing reasons why courts should avoid making judgments about the value of art).

¹²⁰ See, e.g., Balganes, *supra* note 1, at 221 (arguing that courts are able to calibrate the scope of copyright protection *ex post* based on the degree of originality); 17 U.S.C. § 106(6) (encoding a narrow public performance right with respect to sound recordings).

ment.¹²¹ Section B then discusses the role of success in cases dealing with disputes over fictional characters.¹²² Next, Section C shows that commercial success has established a firm foothold in the fair use analysis.¹²³ Finally, Section D documents the different ways in which commercial success suffuses the law of copyright damages.¹²⁴

A. Access

To make a *prima facie* case of copyright infringement, the plaintiff must prove both actual copying and improper appropriation.¹²⁵ The first prong, alternately described as “factual copying,” “copying in fact,” or “actual copying,” rests on a factual inquiry.¹²⁶ The plaintiff must demonstrate, through direct or indirect evidence, that the defendant extracted material from her work.¹²⁷ Under the second prong, the court examines whether the defendant’s copying was substantial enough to rise to the level of infringement.¹²⁸

Notably, although a great deal of scholarly energy has been directed at the second prong of the infringement analysis, the factual copying prong has sparked relatively little interest to date.¹²⁹ That may seem unsurprising because

¹²¹ See *infra* notes 125–183 and accompanying text (discussing the ways in which market success impacts outcomes).

¹²² See *infra* notes 184–223 and accompanying text (exploring the courts’ reliance on evidence of commercial success in determining whether fictional characters are copyrightable).

¹²³ See *infra* notes 224–316 and accompanying text (discussing fair use).

¹²⁴ See *infra* notes 317–347 and accompanying text (considering questions of commercial success in the context of copyright damages).

¹²⁵ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13D.02 (Matthew Bender ed., 2023).

¹²⁶ See, e.g., *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879, 887 (7th Cir. 2021); *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1204 (10th Cir. 2014); *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 267–68 (2d Cir. 2001).

¹²⁷ See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (explaining that one of the elements essential to a plaintiff’s case is proof “that [the] defendant copied from [the] plaintiff’s copyrighted work”), *abrogated on other grounds, as recognized in Heyman v. Com. & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975).

¹²⁸ *Id.* at 468–69.

¹²⁹ See, e.g., Clark D. Asay, *An Empirical Study of Copyright’s Substantial Similarity Test*, 13 U.C. IRVINE L. REV. 35, 35–36 (2022) (charting opinions that applied the substantial similarity test between 1978 and 2020); Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright’s “Substantial Similarity” Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 571–72 (2019) (examining the mechanics of the substantial similarity test); Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 WASH. U. L. REV. 681, 681–82 (2016) (discussing incoherence in the substantial similarity test); Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 STAN. L. REV. 791, 791 (2016) (reconsidering whether copyright law and policy considerations ground the infringement analysis); Shyamkrishna Balganes, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267, 267 (2014) (considering how juries analyze substantial similarity); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 719 (2010) (reconsidering the substantial similarity test).

the factual copying inquiry is conceptually straightforward: there can be no infringement without actual copying.¹³⁰ But, as a practical matter, there is rarely any direct evidence of copying.¹³¹ Infringers seldom operate out in the open—typically, there are no eyewitnesses to an act of infringement, and defendants are not in the habit of openly admitting to copying someone else’s material.¹³² Consequently, the plaintiff often has to fall back on circumstantial evidence to demonstrate actual copying.¹³³ Courts have recognized two pieces of circumstantial evidence that could together support an inference of actual copying: (1) evidence that the defendant had access to the work; and (2) similarities probative of copying.¹³⁴

The question of access is acutely relevant to our discussion. An inference of access can result from a particular chain of events.¹³⁵ Imagine, for example, that the defendant was present at a particular location where the protected work was exhibited.¹³⁶ In these circumstances, a court may infer that the defendant had a reasonable opportunity to view the work.¹³⁷ Alternatively, courts sometimes derive an inference of access from the fact the work is widely disseminated. And, as it turns out, “widely disseminated” is often a shorthand for “commercially successful.”¹³⁸ Courts consider evidence of commercial success

One rare exception is Professor Balganesch and Professor Menell’s 2022 law review article, *Proving Copying*. See Balganesch & Menell, *supra* note 10, at 310–19 (discussing the factual copying prong in evaluating the inverse ratio rule).

¹³⁰ See Balganesch & Menell, *supra* note 10, at 311 (collecting a variety of cases to support the proposition that there can be no infringement without copying). A work can be infringing only if it was not independently created. See, e.g., Christopher Buccafusco, *There’s No Such Thing as Independent Creation, and It’s a Good Thing, Too*, 64 WM. & MARY L. REV. 1617, 1620–21 (2023) (“A later work infringes only if it is, at least in part, a copy of the plaintiff’s work rather than a wholly original, independent creation.”); *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (“No matter how similar the plaintiff’s and the defendant’s works are, if the defendant created his independently . . . the defendant is not liable for infringement.” (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991))), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc).

¹³¹ 4 NIMMER & NIMMER, *supra* note 125, § 13D.04; see *Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005) (“Plagiarists rarely work in the open and direct proof of actual copying is seldom available.”).

¹³² *Johnson*, 409 F.3d at 18.

¹³³ 4 NIMMER & NIMMER, *supra* note 125, §§ 13D.04 (direct evidence), 13D.05 (access).

¹³⁴ *Rentmeester*, 883 F.3d at 1117 (“When the plaintiff lacks direct evidence of copying, he can attempt to prove it circumstantially by showing that the defendant had access to the plaintiff’s work and that the two works share similarities probative of copying.”).

¹³⁵ 4 NIMMER & NIMMER, *supra* note 125, § 13D.05.

¹³⁶ *Id.*

¹³⁷ *Id.* § 13D.05(B)(1).

¹³⁸ *Id.* § 13D.05(C); see *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) (noting that evidence of commercial success could support a finding of widespread dissemination); *Lois v. Levin*, No. 22-CV-00926, 2022 WL 4351968, at *3 (C.D. Cal. Sept. 16, 2022) (citing *Loomis*, 836 F.3d at 997); *Unicolors, Inc. v. A&M LLC*, No. 16 Civ. 6853, 2018 WL 11219450, at *6 (S.D.N.Y. Dec. 18, 2018) (similar); *Webb v. Stallone*, 910 F. Supp. 2d 681, 686 (S.D.N.Y. 2012), *aff’d on other grounds*, 555 F.

to determine whether the work is widely disseminated.¹³⁹ As a result, the access inquiry tends to favor successful works, such as a photo featured in *Playboy*, a successful arcade game, a top-selling product, and other works that have been so successful as to shore up an inference of access.¹⁴⁰

Consider *Straughter v. Raymond*, a case that underscores the centrality of commercial success to the access analysis.¹⁴¹ The plaintiff's work, a song titled "The Reasons Why," was successful enough to reach "number 32 on the Billboard Chart."¹⁴² Viewing the facts in the light most favorable to the plaintiff, the court found that "there [was] a reasonable possibility that [the] defendants had access to" the plaintiff's song.¹⁴³ Given that the song had achieved some level of commercial success or fame, the court held that "a reasonable jury could conclude that there is more than a 'bare possibility' that defendants had the opportunity to hear [it]."¹⁴⁴

Similarly, in *Acuff-Rose Music, Inc. v. Jostens, Inc.*, the U.S. District Court for the Southern District of New York invoked the work's popularity, "evidenced by its top five ranking," to prop up an inference of access.¹⁴⁵ Another example is *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, where the Second Circuit con-

App'x 31 (2d Cir. 2014); *Hoch v. MasterCard Int'l Inc.*, 284 F. Supp. 2d 1217, 1220–21 (D. Minn. 2003) (discussing widespread dissemination).

¹³⁹ See, e.g., *Batiste v. Lewis*, 976 F.3d 493, 503 (5th Cir. 2020) (clarifying that "a work's widespread dissemination in a relevant market in which the defendant took part" may be "sufficient to show a reasonable opportunity for access" (internal quotations omitted)); *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 395–97 (5th Cir. 2001) (finding that evidence of dissemination among members of the relevant industry is sufficient to raise a triable issue of access); *Tee Turtle, LLC v. Abmask*, No. CV 21-3572, 2021 WL 3598747, at *2 (C.D. Cal. Apr. 29, 2021) (finding evidence of access based on the commercial success of the plaintiff's work, which has been "the number one selling product on Amazon among all toys and games" and has "received significant media attention"); *Gray v. Perry*, No. 15-CV-05642, 2018 WL 5095118, at *2–5 (C.D. Cal. Oct. 17, 2018) (holding that access presents a triable issue of fact in light of the work's popularity on YouTube).

¹⁴⁰ See *Tee Turtle*, 2021 WL 3598747, at *2; *Playboy Enters., Inc. v. Starware Publ'g Corp.*, 900 F. Supp. 433, 437 (S.D. Fla. 1995) ("Virtually every adult in this country has had 'access' to the copyrighted photographs published in *Playboy* Magazines."); *Midway Mfg. Co. v. Bandai-Am., Inc.*, 546 F. Supp. 125, 145–46 (D.N.J. 1982) (finding that defendants had access to "one of the most popular video arcade games to date [that] has been widely published in both America and Japan"), *aff'd*, *Bandai Am. Inc. v. Bally Midway Mfg. Co.*, 775 F.2d 70 (3d Cir. 1985); *Odegard, Inc. v. Costikyan Classic Carpets, Inc.*, 963 F. Supp. 1328, 1336–37 (S.D.N.Y. 1997) (finding evidence of access when plaintiffs' carpet designs were displayed around locations that the defendants had visited); *Klitzner Indus., Inc. v. H.K. James & Co.*, 535 F. Supp. 1249, 1255 (E.D. Pa. 1982) (finding evidence of access for an advertisement published in a magazine).

¹⁴¹ No. CV 08-2170, 2011 WL 3651350, at *13 (C.D. Cal. Aug. 19, 2011). The plaintiff, Ernest Straughter, held the rights in the musical composition for the song "The Reasons Why." *Id.* at *2. The plaintiff alleged that the defendants' song "Burn" infringed his copyright in "The Reasons Why." *Id.*

¹⁴² *Id.* at *1–2, *13.

¹⁴³ *Id.* at *13.

¹⁴⁴ *Id.* (internal citation omitted).

¹⁴⁵ 988 F. Supp. 289, 293 (S.D.N.Y. 1997), *aff'd*, 155 F.3d 140 (2d Cir. 1998).

cluded that the defendant had access to the work because the plaintiff's "song was [number one] on the *Billboard* charts in the United States for five weeks, and it was one of the [top thirty hits] in England for seven weeks that same year."¹⁴⁶ Or, to take another example, consider *Gray v. Perry*, where the court found that Katy Perry had access to a song "played more than [six] million times on YouTube and MySpace" and nominated for a Grammy.¹⁴⁷

One of the most notable cases dealing with access is *Loomis v. Cornish*.¹⁴⁸ Will Loomis, the composer of a song called "Bright Red Chords," brought an action for copyright infringement against the songwriters of the hit song "Domino."¹⁴⁹ Loomis asserted that the defendants lifted a two-measure vocal melody from his song.¹⁵⁰ The district court granted summary judgment for the defendants, holding that Loomis failed to prove that the "Domino" songwriters had access to his work.¹⁵¹ On appeal, Loomis presented evidence suggesting that his song had saturated a local market in Santa Barbara, California.¹⁵² Because some of the "Domino" songwriters were present at a recording studio in Santa Barbara during that time, Loomis claimed that there was a reasonable possibility of access.¹⁵³

The U.S. Court of Appeals for the Ninth Circuit disagreed. The fact that some of the defendants spent a few days at a Santa Barbara studio, the court held, was not suggestive of access.¹⁵⁴ Although the court again reiterated that "[i]n most cases . . . evidence of widespread dissemination centers on the degree of a work's commercial success," it dismissed Loomis's theory that access could be inferred merely by dint of the defendants' brief stay at a local studio.¹⁵⁵

Underlying the court's reasoning was an assumption that success in a *local* market is insufficient.¹⁵⁶ On this view, to establish a presumption of access by way of widespread dissemination, the plaintiff must prove that the work is successful on a *national* scale. In other words, the work must be so widely disseminated as to suggest that the defendant had an opportunity to access it regardless of whether the defendant was present at a certain location at a particu-

¹⁴⁶ 722 F.2d 988, 998 (2d Cir. 1983) (internal quotations omitted).

¹⁴⁷ No. 15-CV-05642, 2020 WL 1275221, at *1, *14 (C.D. Cal. Mar. 16, 2020).

¹⁴⁸ 836 F.3d 991, 995 (9th Cir. 2016).

¹⁴⁹ *Id.* at 993–94.

¹⁵⁰ *Id.* at 993.

¹⁵¹ *Loomis v. Cornish*, No. CV 12-5525, 2013 WL 6044349, at *4–5 (C.D. Cal. Nov. 13, 2013), *aff'd*, 836 F.3d 991 (9th Cir. 2016).

¹⁵² *Loomis*, 836 F.3d at 995.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 995–99.

¹⁵⁵ *Id.* at 997–98.

¹⁵⁶ *See id.* at 998 (finding that a defendant's "brief stay in Santa Barbara" was insufficient evidence of access).

lar point in time.¹⁵⁷ Nevertheless, in a spate of subsequent cases, courts have found that dissemination of the work in a relevant, subnational market—one in which both the plaintiff and the defendant operate—can give rise to a presumption of access.¹⁵⁸

Some measure of confusion also envelops the definition of “widespread dissemination.” The case law provides little guidance on the kind of robust dissemination that could trigger a presumption of access. Although commercial success no doubt plays an important role in the access inquiry, courts often differ in their views as to what counts as a “popular” or “successful” work.¹⁵⁹ Indeed, the Ninth Circuit has expressly declined to articulate a bright-line rule, insisting instead on a case-by-case analysis.¹⁶⁰

Notwithstanding these ambiguities, courts often acknowledge that commercial success lurks below the access inquiry—and some question whether that is a good thing.¹⁶¹ Consider *Skidmore v. Led Zeppelin*.¹⁶² Michael Skidmore, a trustee for the estate of Randy Wolfe of the band Spirit, filed suit against the famed rock group Led Zeppelin, alleging that “Stairway to Heaven” reproduced a portion of Wolfe’s original composition for the song “Taurus.”¹⁶³

¹⁵⁷ *Id.* at 997.

¹⁵⁸ See, e.g., *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 395–97 (5th Cir. 2001) (finding widespread dissemination on the basis of a copyrighted rug design that was distributed primarily among members of a particular industry—the rug trade); *Gray v. Perry*, No. 15-CV-05642, 2018 WL 5095118, at *3–4 (C.D. Cal. Oct. 17, 2018) (rejecting the view that only nationwide dissemination could prompt an inference of access); *Woodland v. Hill*, No. 22-CV-03930, 2022 WL 19250191, at *3 (C.D. Cal. Dec. 8, 2022) (stating that the plaintiff may allege widespread dissemination by introducing evidence that his work “saturated the relevant market in which both he and [the defendant] participate”).

¹⁵⁹ See, e.g., *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (finding that a work that sold 17,000 copies over a period of 13 years “cannot be considered widely disseminated”), *overruled on other grounds by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1051 (9th Cir. 2020) (en banc); *Jason v. Fonda*, 526 F. Supp. 774, 776–77 (C.D. Cal. 1981) (concluding that there was an insufficient record to support an inference of access when between 200 and 700 copies of the work were available through various bookstores), *aff’d*, 698 F.2d 966 (9th Cir. 1982); *Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1144–45 (9th Cir. 2009) (refusing to draw an inference of access where the work sold only about 2,000 shirts per year). *But see* *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946) (holding that a jury may reasonably infer access when the work has sold more than a million copies), *abrogated on other grounds, as recognized in* *Heyman v. Com. & Indus. Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975).

¹⁶⁰ *Loomis*, 836 F.3d at 997 (“The evidence required to show widespread dissemination will vary from case to case.” (quoting *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 847 (9th Cir. 2012))). Other courts beyond the Ninth Circuit have largely followed suit. See, e.g., *Batiste v. Lewis*, 976 F.3d 493, 503 (5th Cir. 2020) (noting that, although the Fifth Circuit has not expressly adopted the “widespread dissemination” theory, it has “found a work’s widespread dissemination in a relevant market in which the defendant took part sufficient to show a ‘reasonable opportunity for access’” (quoting *Peel & Co., Inc. v. Rug Mkt.*, 238 F.3d 391, 395–97 (5th Cir. 2001))).

¹⁶¹ See, e.g., *Skidmore*, 952 F.3d at 1068–69.

¹⁶² 905 F.3d 1116, 1121 (9th Cir. 2018), *reh’g en banc granted*, 925 F.3d 999 (9th Cir. 2019).

¹⁶³ *Id.* at 1121–22.

One of the central questions at trial was whether the defendants had access to “Taurus.”¹⁶⁴ After a five-day trial, the jury returned a verdict for the defendants, finding that, although the defendants had access to “Taurus” prior to creating “Stairway to Heaven,” the song was not substantially similar to “Taurus.”¹⁶⁵

Skidmore appealed to the Ninth Circuit, which ruled en banc on the inverse ratio rule.¹⁶⁶ The inverse ratio rule allows a court to settle for lesser proof of similarity when the plaintiff introduces stronger evidence of access.¹⁶⁷ When the defendant had easy and clear access to the plaintiff’s work, a lower degree of similarity may suffice for an inference of actual copying.¹⁶⁸ By contrast, when there are strong similarities between the works, courts have lowered the threshold for evidence of access.¹⁶⁹ In fact, some courts have even intimated that in the presence of “striking” similarities, one may do away with evidence of access altogether.¹⁷⁰

The inverse ratio rule has been under sustained attack for some time.¹⁷¹ In *Skidmore*, the Ninth Circuit followed the lead of several other circuit courts in rejecting the inverse ratio rule.¹⁷² In the process, the court took pains to note that the question of access is intimately tied to the work’s commercial success.¹⁷³ As the court observed, because successful works tend to be distributed at scale, a jury could more readily infer access when such works are at issue.¹⁷⁴ In other words, an inference of access can flow from the work’s popularity in the marketplace.¹⁷⁵ This means that courts, somewhat alarmingly, tend to place a heavy thumb on the scale in favor of popular works.¹⁷⁶

¹⁶⁴ *Id.* at 1124.

¹⁶⁵ *See id.* (discussing jury findings).

¹⁶⁶ *Skidmore*, 952 F.3d at 1068–69.

¹⁶⁷ *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018), *overruled by Skidmore*, 952 F.3d 1051.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See, e.g., Bernal v. Paradigm Talent & Literary Agency*, 788 F. Supp. 2d 1043, 1052 (C.D. Cal. 2010) (“[I]n rare cases, a plaintiff can prove copying even without proof of access ‘if he can show that the two works are not only substantially similar, but are so strikingly similar as to preclude the possibility of independent creation.’” (quoting *Meta-Film Assocs., Inc. v. MCA Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984))).

¹⁷¹ Beyond the Ninth Circuit, a number of other circuit courts have already repudiated the rule or otherwise questioned its desirability. *See, e.g., Peters v. West*, 692 F.3d 629, 634–35 (7th Cir. 2012); *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994); *Arc Music Corp. v. Lee*, 296 F.2d 186, 187–88 (2d Cir. 1961).

¹⁷² *Skidmore*, 952 F.3d at 1068–69.

¹⁷³ *Id.* at 1068.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (“[N]othing in copyright law,” the Ninth Circuit declared, “suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.”).

Note, however, that the court did not spell out *why* it would be wrong to treat popular works differently than unpopular ones.¹⁷⁷ Indeed, some commentators have seized on the court's haphazard reasoning to suggest that popular works may well warrant preferential treatment.¹⁷⁸ Part IV of this Article offers some thoughts on why such preferential treatment might be hard to defend.¹⁷⁹ Meanwhile, the larger point here is a rather simple one: questions of commercial success matter, and we should start paying attention.

As this Section shows, courts tend to fixate on the work's market success in an effort to ascertain whether the work has been widely disseminated.¹⁸⁰ When they find that the work has been disseminated at scale, courts typically conclude that there is a reasonable possibility the defendant had access to the work.¹⁸¹ In fact, judges often say so explicitly, acknowledging that commercial success is the lynchpin of the access analysis.¹⁸² The net result is that success matters a great deal in copyright litigation—it is simply easier to prove access when the plaintiff's work is a successful one.¹⁸³

B. Fictional Characters

Copyright protects certain original characters.¹⁸⁴ Examples include Mickey Mouse, Superman, James Bond, Rocky Balboa, Godzilla, and Tarzan.¹⁸⁵

¹⁷⁷ *Id.*

¹⁷⁸ *See, e.g.,* Balganesch & Menell, *supra* note 10, at 367.

¹⁷⁹ *See infra* notes 527–564 and accompanying text (discussing preferential treatment).

¹⁸⁰ *See supra* notes 125–179 and accompanying text (unpacking cases that invoke market success to determine if a work was widely disseminated).

¹⁸¹ *See, e.g.,* Arnstein v. Porter, 154 F.2d 464, 469 (2d Cir. 1946) (allowing a jury's inference of access from commercial success), *abrogated on other grounds, as recognized in* Heyman v. Com. & Indus. Ins. Co., 524 F.2d 1317, 1319 (2d Cir. 1975).

¹⁸² *See, e.g.,* Loomis v. Cornish, 836 F.3d 991, 997 (9th Cir. 2016) (stating that “evidence of widespread dissemination centers on the degree of a work's commercial success and on its distribution through radio, television, and other relevant mediums”); *Lois v. Levin*, No. 22-CV-00926, 2022 WL 4351968, at *3 (C.D. Cal. Sept. 16, 2022) (same); *Unicolors, Inc. v. A&M LLC*, No. 16 Civ. 6853, 2018 WL 11219450, at *6 (S.D.N.Y. Dec. 18, 2018) (same); *Webb v. Stallone*, 910 F. Supp. 2d 681, 686 (S.D.N.Y. 2012) (“A work is ‘widely disseminated’ when it has had ‘considerable commercial success’ or is ‘readily available on the market.’” (quoting *Silberstein v. Fox Ent. Grp.*, 424 F. Supp. 2d 616, 627 (S.D.N.Y. 2004))), *aff'd on other grounds*, 555 F. App'x 31 (2d Cir. 2014); *Hoch v. MasterCard Int'l Inc.*, 284 F. Supp. 2d 1217, 1220 (D. Minn. 2003) (holding that a determination of widespread dissemination depends on the “number of copies distributed, commercial success or notoriety, and national performances or distribution”).

¹⁸³ *See supra* notes 125–182 and accompanying text (discussing the impact of commercial success).

¹⁸⁴ 1 NIMMER & NIMMER, *supra* note 125, § 2.12.

¹⁸⁵ *Toho Co. v. William Morrow & Co.*, 33 F. Supp. 2d 1206, 1216 (C.D. Cal. 1998) (Godzilla); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (James Bond); *Anderson v. Stallone*, No. 87-0592, 1989 WL 206431, at *7 (C.D. Cal. Apr. 25, 1989) (Rocky Balboa); *Warner Bros. v. Am. Broad. Cos.*, 530 F. Supp. 1187, 1193–95 (S.D.N.Y. 1982)

More controversially, copyright protection can also extend to certain character-related objects, such as the Batmobile or Freddy Krueger's glove.¹⁸⁶ Circuit courts, however, are splintered over the appropriate test for determining whether a character is copyrightable.¹⁸⁷ Recently, in *Daniels v. Walt Disney Co.*, the Ninth Circuit invoked two separate tests to evaluate whether a character can be protected.¹⁸⁸ At issue in *Daniels* was Disney's blockbuster movie, *Inside Out*, which centered on five color-coded characters representing different human emotions.¹⁸⁹ The plaintiff, Denise Daniels, brought suit for infringement, alleging that Disney had copied her anthropomorphic characters typifying human emotions.¹⁹⁰

The U.S. District Court for the Central District of California granted Disney's motion to dismiss, and the Ninth Circuit affirmed.¹⁹¹ In reaching its decision, the Ninth Circuit harnessed both the "story being told" test and a three-prong test inquiring as to (1) whether the character has "physical as well as conceptual qualities"; (2) whether the character is "sufficiently delineated"; and (3) whether the character is distinctive enough.¹⁹²

Let us begin with the "story being told" test, under which courts evaluate whether the character is so central to the underlying work that it "constitutes the story being told" rather than a "chessman in the game of telling the story."¹⁹³ Here, the court found that the plaintiff's characters, called Moodsters, did not dominate the story to such a degree that the story itself could be recon-

(Superman), *aff'd*, 720 F.2d 231 (2d Cir. 1983); *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 519 F. Supp. 388, 391 (S.D.N.Y. 1981) (Tarzan), *aff'd*, 683 F.2d 610 (2d Cir. 1982); *Walt Disney Prods. v. Air Pirates*, 345 F. Supp. 108, 116 (N.D. Cal. 1972) (Mickey Mouse), *aff'd in part, rev'd in part*, 581 F.2d 751 (9th Cir. 1978).

¹⁸⁶ *DC Comics v. Towle*, 802 F.3d 1012, 1021–22 (9th Cir. 2015) (Batmobile); *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001) (Freddy Krueger's glove); *New Line Cinema Corp. v. Easter Unlimited, Inc.*, No. CV 89-2017, 1989 WL 248212, at *3 (E.D.N.Y. July 19, 1989) ("Copyright protection is extended to the component part of the character which significantly aids in identifying the character." (quoting *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir. 1979))).

¹⁸⁷ See, e.g., *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771–74 (9th Cir. 2020) (applying both the *Towle* and the "story being told" tests to determine if a character is copyrightable).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 770.

¹⁹⁰ *Id.*

¹⁹¹ *Daniels v. Walt Disney Co.*, No. 17-CV-4527, 2018 WL 3533363, at *6 (C.D. Cal. May 9, 2018), *aff'd*, 952 F.3d 1149 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 958 F.3d 767 (9th Cir.), and *aff'd*, 958 F.3d 767 (9th Cir. 2020).

¹⁹² *Daniels*, 958 F.3d at 771–74.

¹⁹³ *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954).

ceived as “a character study.”¹⁹⁴ The characters, in other words, were not prominent enough to satisfy the “story being told” test.¹⁹⁵

Daniels fared no better under the Ninth Circuit’s three-part test. The court found that the Moodsters satisfied the first prong of the test—they had both physical and literary qualities—but failed to meet the other two requirements.¹⁹⁶ Looking to the second prong, the court held that the Moodsters were not adequately delineated because they did not display a consistent and identifiable set of traits.¹⁹⁷ Instead, their physical attributes varied across different iterations of the franchise: initially boasting an “insect-like appearance,” the Moodsters later evolved to take the shape of “small, loveable bears.”¹⁹⁸ For this reason, the Moodsters also failed to scale the third hurdle of the test: they were not “especially distinctive” and did not exhibit unique and highly recognizable traits.¹⁹⁹

Crucially, this third prong, which turns on the character’s distinctiveness, often provides cover for a more subtle inquiry into the character’s success or fame.²⁰⁰ As the district court observed, the Moodsters were “distributed only twice” and attracted “only 1,400” viewers.²⁰¹ Therefore, the court found that the plaintiff’s characters were simply not successful enough to “engender the kind of widely identifiable recognition of the characters’ traits” under the third prong of the test.²⁰²

In this way, the question of distinctiveness can be framed in terms of market success.²⁰³ Because the Moodsters enjoyed only limited commercial dissemination, they were not recognizable enough to warrant copyright protection.²⁰⁴ Thus understood, this test serves as a vehicle for protecting successful works—namely, works that are broadly disseminated, widely recognized, and commercially profitable.²⁰⁵ What is striking here is that courts have fashioned

¹⁹⁴ *Daniels*, 958 F.3d at 774. As the court noted, the larger story simply did not “exhibit[] any prolonged engagement with character development or a character study of [t]he Moodsters.” *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 771–73.

¹⁹⁷ *Id.* at 772.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 773 (internal quotations omitted).

²⁰⁰ See, e.g., *DC Comics v. Towle*, 802 F.3d 1012, 1021–22 (9th Cir. 2015) (applying the three-prong test by looking at how the Batmobile was portrayed over twenty years of movies and television shows).

²⁰¹ *Daniels v. Walt Disney Co.*, No. 17-CV-4527, 2018 WL 3533363, at *2 (C.D. Cal. May 9, 2018), *aff’d*, 952 F.3d 1149 (9th Cir.), *opinion amended and superseded on denial of reh’g*, 958 F.3d 767 (9th Cir.), and *aff’d*, 958 F.3d 767 (9th Cir. 2020).

²⁰² *Id.* (internal quotations omitted).

²⁰³ See *id.* (determining that the characters were not distinctive due to a lack of popular success).

²⁰⁴ *Id.*

²⁰⁵ See *id.* (comparing the Moodsters’ modest viewership to other cases where the court had denied protection due to a lack of video sales).

a test that, by design, is attentive to questions of commercial success. Indeed, others have described the Ninth Circuit's test as a "fame-based" standard.²⁰⁶ This fame-based standard serves as a one-way ratchet: it prizes successful works and concomitantly excludes unsuccessful ones.²⁰⁷ For example, in *Rice v. Fox Broadcasting, Co.*, the Ninth Circuit declined to extend copyright protection to a character that had "appeared in only one home video that sold approximately 17,000 copies."²⁰⁸ Given the character's limited commercial success, the court said, it lacked "widely identifiable traits."²⁰⁹

Although it remains true that the three-part test stops short of expressly scrutinizing the character's success or fame, the test is exceedingly hospitable to famous or successful characters.²¹⁰ Courts are quick to find that well-known characters, especially ones associated with iconic, successful franchises, are independently copyrightable.²¹¹ And the inverse is true as well. When courts find that a character is not sufficiently distinctive, they often do so by drawing unflattering analogies to other, more iconic characters.²¹² In *Daniels*, for example, the court highlighted the stark contrast between the little-known Moodsters and other, more popular characters, like James Bond, Godzilla, and the Batmobile.²¹³ The effect is that the question of success casts a long shadow over cases dealing with fictional characters.²¹⁴

Further, notions of commercial success can surface even when courts fail to cite any particular test.²¹⁵ Consider *New Line Cinema Corp. v. Russ Berrie & Co.*, in which the U.S. District Court for the Southern District of New York concluded that Freddy Krueger's glove is eligible for copyright protection.²¹⁶ The court stated that, as a general matter, "[c]opyright protection is extended to the component part of the character which significantly aids in identifying

²⁰⁶ See, e.g., *Oh*, *supra* note 10, at 634 (discussing this "fame-based" application).

²⁰⁷ See, e.g., *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (declining to protect characters featured in a single work that sold 17,000 copies), *overruled on other grounds by* *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *Oh*, *supra* note 10, at 652 (describing the Ninth Circuit's test as a kind of tacit "fame-based standard").

²¹¹ *Id.* at 643 (discussing early case law based on the Ninth Circuit's test that "validat[ed] fame" by protecting "an iconic character," thus ensuring that "a large film company's character was copyrightable").

²¹² See, e.g., *Rice*, 330 F.3d at 1175 (comparing the character at issue to Godzilla, James Bond, and Rocky Balboa).

²¹³ *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771, 773 (9th Cir. 2020).

²¹⁴ *Id.*

²¹⁵ See *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 295, 302 (S.D.N.Y. 2001) (finding that Freddy Krueger's widely recognizable glove is eligible for copyright protection).

²¹⁶ *Id.*

the character.”²¹⁷ At the same time, the court pointed out that Freddy Krueger’s glove was central to an immensely successful franchise.²¹⁸ Given its success, the franchise “has spawned . . . additional licensing and merchandising revenue,” relying in part on a key piece of merchandise—“a replica of the Freddy Glove worn by the main character in the Nightmare Series.”²¹⁹ The *Russ Berrie* court therefore found that a widely recognizable object deserves to be protected.²²⁰

Questions of success thus tend to inevitably crop up when courts confront fictional characters.²²¹ Perhaps this should be unsurprising. Recall that commercial success is baked into some of the tests that courts use to determine whether a character is copyrightable.²²² Because character distinctiveness is often repackaged in terms of “recognizability,” courts are more likely to protect characters that arise out of profitable, iconic franchises.²²³ The key takeaway here is that commercial success plays a pivotal role in these cases.

C. Fair Use

Fair use is copyright’s most important and capacious defense to claims of infringement.²²⁴ It is a fundamental cornerstone of our creative ecosystem, enabling “parodists, bloggers, news reporters, researchers, authors, artists, consumers, and educators” to engage in “socially beneficial uses of copyrighted

²¹⁷ *Id.* at 302 (quoting *New Line Cinema Corp. v. Easter Unlimited, Inc.*, No. CV 89-2017, 1989 WL 248212, at *3 (E.D.N.Y. July 19, 1989)).

²¹⁸ *Russ Berrie*, 161 F. Supp. 2d at 295. As the court noted, “[t]he Nightmare Series has enjoyed significant financial success through worldwide box office, home video and pay television revenues.” *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 302.

²²¹ See *supra* notes 184–220 and accompanying text (analyzing the relationship between commercial success and fictional characters).

²²² See *supra* notes 210–211 and accompanying text (discussing how the Ninth Circuit’s standard implicates commercial success).

²²³ Under the Ninth Circuit’s test, courts often ask not whether the character is sufficiently developed or distinctive, but whether it is *recognizable* enough to trigger protection. See, e.g., *Daniels v. Walt Disney Co.*, No. 17-CV-4527, 2018 WL 3533363, at *2 (C.D. Cal. May 9, 2018) (asking whether the characters at issue have produced “widely identifiable recognition of . . . character[] traits”), *aff’d*, 952 F.3d 1149 (9th Cir.), *opinion amended and superseded on denial of reh’g*, 958 F.3d 767 (9th Cir.), and *aff’d*, 958 F.3d 767 (9th Cir. 2020). And that slippage—from distinctiveness to recognizability—can explain why courts often turn to questions of commercial success.

²²⁴ See Abraham Bell & Gideon Parchomovsky, *Propertizing Fair Use*, 107 VA. L. REV. 1255, 1257–58 (2021) (“[Fair use is] the most significant and most capacious defense against copyright infringement . . . [and] an indispensable part of the constitutional balance between freedom of speech and protected copyrighted expression.”); Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 MINN. J.L. SCI. & TECH. 273, 273 (2015) (“Fair use is possibly the most important doctrine in all of copyright.”).

materials.”²²⁵ In assessing fair use, courts look to four statutory factors: (1) “the purpose and character” of the defendant’s use, “including whether such use is of a commercial nature” and whether it is transformative; (2) “the nature of the copyrighted work”; (3) “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and (4) “the effect of the use upon the potential market for or value of the copyrighted work.”²²⁶

Where does success come into the picture? As this Section will explain, commercial success can tip the scales either in favor of or against fair use.²²⁷ In some instances, courts conclude that the defendant’s use is not fair because it will likely usurp the market for a commercially successful work.²²⁸ That is, when the plaintiff’s work is successful, courts find that there is a risk of market harm under the fourth factor.²²⁹

For example, in *North Jersey Media Group v. Pirro*, the U.S. District Court for the Southern District of New York held that the defendant’s conduct was not excusable as fair use because it harmed the market for a successful work.²³⁰ The publisher of a New Jersey newspaper sued Fox News for posting a copyrighted photograph on its Facebook page.²³¹ The photo was an iconic image depicting three firefighters raising the American flag against the smoldering ruins of the World Trade Center on September 11, 2001.²³² The court found that the defendant’s conduct presented a serious risk of market harm under the fourth factor.²³³ The infringed photo held “historical meaning” and garnered over one million dollars in licensing fees.²³⁴ The court thus found that the defendant’s use was not fair given its impact on an exceptionally lucrative market for the work.²³⁵ Put simply: success was taken as evidence of market harm.

Similarly, in *Ty, Inc. v. West Highland Publishing, Inc.*, the U.S. District Court for the Northern District of Illinois referenced the work’s popularity in

²²⁵ Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 908 (2020).

²²⁶ 17 U.S.C. § 107.

²²⁷ See *infra* notes 228–316 and accompanying text (discussing how commercial success factors into fair use).

²²⁸ See *N. Jersey Media Grp. v. Pirro*, 74 F. Supp. 3d 605, 623 (S.D.N.Y. 2015) (declining to find fair use due to market harm to a commercially successful work); *Ty, Inc. v. W. Highland Publ’g, Inc.*, No. 98 C 4091, 1998 WL 698922, at *15–16 (N.D. Ill. Oct. 5, 1998) (highlighting commercial success when rejecting fair use).

²²⁹ See *Pirro*, 74 F. Supp. 3d at 623 (applying a work’s commercial success to fair use analysis).

²³⁰ *Id.*

²³¹ *Id.* at 610–11.

²³² *Id.* at 609–10.

²³³ *Id.* at 621–23.

²³⁴ *Id.* at 622.

²³⁵ *Id.* at 623.

discussing—and eventually rejecting—the defendant’s claim of fair use.²³⁶ The plaintiff, the manufacturer of popular plush toys known as “Beanie Babies,” sued for infringement after the defendant created a series of unauthorized books and products—coloring books, trading cards, newsletters, and a hand-book—containing photos of Beanie Babies.²³⁷ In finding against fair use, the court described in great detail the success of the plaintiff’s products: Beanie Babies were “arguably the most popular toys on the market” at the time; they were the source of “enormous demand and popularity”; and the plaintiff “sold over 100 million” toys.²³⁸ Thus, the court found that the fourth factor favored the plaintiff—the defendant’s products presented a risk of market harm due to the “immense popularity” of the plaintiff’s work.²³⁹

Another example is *Dr. Seuss Enterprises, L.P. v. ComicMix, LLC*.²⁴⁰ ComicMix created an illustrated book, *Oh, the Places You’ll Boldly Go! (Boldly)*, which combined literary and visual themes from two separate creative franchises: Star Trek and Dr. Seuss.²⁴¹ Dr. Seuss Enterprises sued for copyright infringement.²⁴² The court held that the book did not qualify as fair use.²⁴³ The court’s inquiry under the fourth factor was rather conclusory, finding that ComicMix’s use was harmful because Dr. Seuss’s work is incredibly successful.²⁴⁴ Emphasizing that Seuss has a “strong brand” and a richly developed market for derivatives—including “fine art, toys, video games, stage productions, motion pictures, and books”—the court found clear evidence of potential harm under the fourth factor.²⁴⁵

Commercial success can also shape the fourth factor in more subtle ways—for example, when the plaintiff’s work turns out to be a commercial failure. In such cases, courts occasionally surmise that there is no real risk of market harm. Consider the Second Circuit’s decision in *Cariou v. Prince*.²⁴⁶ Patrick Cariou published a book of portraits depicting Rastafarians in Jamaica.²⁴⁷ Cariou brought an action for infringement after Richard Prince, a well-known appropriation artist, lifted several photos from Cariou’s book and re-

²³⁶ No. 98 C 4091, 1998 WL 698922, at *1, *16 (N.D. Ill. Oct. 5, 1998).

²³⁷ *Id.* at *1.

²³⁸ *Id.* at *1, *16.

²³⁹ *Id.* at *15–16.

²⁴⁰ 983 F.3d 443, 461 (9th Cir. 2020).

²⁴¹ *Id.* at 448.

²⁴² *Id.* at 450.

²⁴³ *Id.* at 451–61.

²⁴⁴ *Id.* at 458–61.

²⁴⁵ *Id.* at 449, 461.

²⁴⁶ 714 F.3d 694, 708–09 (2d Cir. 2013), *holding modified by* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99 (2d Cir.) and *by* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021).

²⁴⁷ *Id.* at 698.

worked them into a series of paintings later exhibited at art galleries.²⁴⁸ The court held that twenty-five of Prince's artworks made fair use of the infringed photos.²⁴⁹ Most relevant to our discussion is the court's analysis of the fourth factor, which took a fairly narrow view of market harm.²⁵⁰ The court went on to explain that "Cariou has not aggressively marketed his work, and has earned just over \$8,000 in royalties from [his book] since its publication."²⁵¹ Worse still, Cariou managed to sell only "four prints from the book, and only to personal acquaintances."²⁵² The court determined that Prince's artworks had no "impact on the marketing"—and, by extension, the value—of Cariou's photos.²⁵³ The result is that the fourth factor here tilted in favor of fair use.

To take another example, consider *Corbello v. DeVito*.²⁵⁴ Rex Woodard was the ghostwriter of the autobiography of musician Tommy DeVito.²⁵⁵ Woodard's widow sued for infringement, alleging that DeVito and his bandmates used the unpublished autobiography as the basis for a Broadway musical.²⁵⁶ The court found that the defendants' conduct was fair use.²⁵⁷ In considering market harm, the court held that the fourth factor here weighed "strongly" in favor of fair use because the plaintiff's work was valueless.²⁵⁸ As the court put it, the plaintiff "had been unable to find any company interested in publishing the [autobiography]."²⁵⁹ Under these circumstances, there was no market harm because there was no market for the work in the first place.²⁶⁰

In short, questions of commercial success affect the fourth factor in two interconnected ways. When the work is successful, courts tend to assume that

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 706–10.

²⁵⁰ *Id.* at 708–09. The court stated that the relevant question "is not whether the secondary use suppresses or even destroys the market for the original work and its potential derivatives, but whether the secondary use *usurps* the market for the original work." *Id.* at 708 (quoting *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006)).

²⁵¹ *Id.* at 709.

²⁵² *Id.*

²⁵³ *Id.* In the court's words:

Nor does anything in the record suggest that Prince's artworks had any impact on the marketing of the photographs. Indeed, Cariou has not aggressively marketed his work, and has earned just over \$8,000 in royalties from *Yes Rasta* since its publication. He has sold four prints from the book, and only to personal acquaintances.

Id.

²⁵⁴ 262 F. Supp. 3d 1056, 1068–69 (D. Nev. 2017), *aff'd sub nom.* *Corbello v. Valli*, 974 F.3d 965 (9th Cir. 2020).

²⁵⁵ *Id.* at 1059–61.

²⁵⁶ *Id.* at 1059.

²⁵⁷ *Id.* at 1076–77.

²⁵⁸ *Id.* at 1068–69.

²⁵⁹ *Id.* at 1068.

²⁶⁰ *Id.*

the defendant's use is not fair, given the risk of market harm.²⁶¹ By contrast, when the protected work is *not* successful, courts instead find that the fourth factor militates in favor of fair use.²⁶²

Nonetheless, it would be a mistake to overstate the significance of these trends. Not all courts agree that market harm should depend on commercial success.²⁶³ Some courts stress that the relevant benchmark is not an existing market but a *potential* one.²⁶⁴ And so it should not matter that the work is currently unsuccessful. Rather, what matters is that the defendant's use could encroach upon potential markets that the plaintiff might choose to enter *in the future*.²⁶⁵ On this account, the potential market is distinct from the owner's present intent.²⁶⁶ Therefore, courts often assess market harm by reference to "traditional, reasonable, or likely to be developed markets" for derivative works.²⁶⁷ Sometimes the issue is cast as a matter of choice: even if the copyright owner has not yet developed a market for the work, he or she might choose to do so in the future.²⁶⁸ A copyright owner has the right to decide whether or not to saturate the market with derivative copies of his or her work.²⁶⁹ This means that even unsuccessful works can suffer market harm, at

²⁶¹ See *N. Jersey Media Grp. v. Pirro*, 74 F. Supp. 3d 605, 623 (S.D.N.Y. 2015) (declining to find fair use in the case of a commercially successful picture).

²⁶² See *Cariou v. Prince*, 714 F.3d 694, 708–09 (2d Cir. 2013) (finding fair use where the copyright holder struggled to sell his work), *holding modified by* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir.) *and by* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021). In *Google LLC v. Oracle America, Inc.*, the U.S. Supreme Court dismissed the plaintiff's claims of market harm partly because the plaintiff had failed to develop a successful market for a derivative work of the kind that the defendant created. 141 S. Ct. 1183, 1206 (2021). Because the plaintiff's "many efforts to move into [the market that the defendant occupies] had proved unsuccessful," the jury "could have found that [the defendant's use] did not harm the actual or potential markets for [the plaintiff's work]." *Id.*

²⁶³ See *infra* notes 264–270 and accompanying text (discussing cases where commercial success is applied differently).

²⁶⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 541 (1985) ("More important, to negate a claim of fair use it need only be shown that "if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'" (internal citations omitted)).

²⁶⁵ See *id.* at 568 (stating that, in order to find against fair use, a court must only conclude that if a work were to become widespread, it might harm the potential market for the work).

²⁶⁶ *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012).

²⁶⁷ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (quoting *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997)); see *id.* (discussing the relevance of the fourth factor to analysis of potential markets).

²⁶⁸ See *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) (arguing that the fact a copyright holder had not yet developed a market for his or her work does not preclude protection (citing *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987))).

²⁶⁹ *Id.*; see also *Castle Rock Ent., Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 145–46 (2d Cir. 1998).

least if one attends more broadly to potential or reasonable markets rather than existing ones.²⁷⁰

To illustrate, consider *Letterese & Associates, Inc. v. World Institute of Scientology Enterprises*.²⁷¹ Leslie Dane authored a book on sales techniques.²⁷² The exclusive licensee of the copyright in Dane's book sued the Church of Scientology for incorporating portions of the book into the Church's instructional materials.²⁷³ In evaluating the fourth factor, the court recognized that the plaintiff "failed to develop a profitable market for [the book]."²⁷⁴ All the same, the court found that this failure did not mean that the work lacked value.²⁷⁵ As the court clarified, the fair use inquiry pivots on the potential—rather than actual—market for the work, and the copyright owner is entitled to change his or her mind.²⁷⁶ Put another way, the plaintiff was not required to demonstrate that it developed or would develop a market for the work.²⁷⁷ The court accordingly held that the defendant's use may displace a potential market for the work, even though the work itself failed to generate profits.²⁷⁸

To this point, this Article has shown that commercial success can—but not always will—drive the analysis of market harm under the fourth factor.²⁷⁹ I will now consider how success might impact the first factor of the fair use inquiry. Recall that the first factor turns on the purpose of the defendant's use—that is, courts are asked to evaluate whether the defendant's use is commercial and, more significantly, whether it is transformative.²⁸⁰ The defendant's use is

²⁷⁰ *Castle Rock Ent., Inc.*, 150 F.3d at 146.

²⁷¹ 533 F.3d 1287, 1317–18 (11th Cir. 2008).

²⁷² *Id.* at 1293.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1317.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 1317–18.

²⁷⁹ See *supra* notes 125–278 and accompanying text (discussing the relevance of commercial success to market harm).

²⁸⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

The central purpose of [the first factor inquiry] is to see . . . whether the new work merely supersede[s] the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.

Id. (internal citations and quotations omitted).

more likely to qualify as fair when it is noncommercial and transformative.²⁸¹ In this context, the work's success might push starkly in favor of fair use.²⁸²

Success often plays a critical role when a work inspires a parody. The U.S. Supreme Court has long acknowledged that a parody can constitute fair use.²⁸³ A parody will typically qualify as transformative: it injects new expression, meaning, or message into an original work.²⁸⁴ In parody cases, the transformative character of the defendant's use will often prove conclusive.²⁸⁵

For instance, in 1994, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that 2 Live Crew's rap song, "Pretty Woman," amounted to a parody of Roy Orbison's rock ballad, "Oh, Pretty Woman."²⁸⁶ For that reason, 2 Live Crew's song was fair use.²⁸⁷ After finding that it was transformative under the first factor, the Court held that the song was unlikely to harm the commercial market for the original work.²⁸⁸ Indeed, the parody and the original work usually serve different roles.²⁸⁹ Even though a scathing parody can harm the market for the original—say, by eliminating demand for the original or artistically and commercially destroying it—this sort of market harm is not cognizable under the fourth factor.²⁹⁰ The Court clarified that the owner's market for derivative uses "includes only those that [the plaintiff] would in general develop."²⁹¹ And because a copyright owner is unlikely to license criticism or parody of his or her work, copyright law does not recognize derivative markets for criticism or parody.²⁹² Ultimately, when asked to weigh in on a legitimate parody, courts focus on the first factor while discounting the fourth.²⁹³

Importantly, a parody often targets a popular work.²⁹⁴ As the Supreme Court explained, the parodist must borrow the "heart" of the original in order to effectively convey his or her message.²⁹⁵ For a parody to function, its audi-

²⁸¹ Asay, Sloan & Sobczak, *supra* note 225, at 911–12, 946–49 (concluding, based on empirical evidence, that courts discount the second, third, and fourth factors when the defendant's use is found to be transformative under the first factor).

²⁸² See *Campbell*, 510 U.S. at 579.

²⁸³ *Id.* at 580–81.

²⁸⁴ *Id.* at 578–79.

²⁸⁵ *Id.* at 579 ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

²⁸⁶ *Id.* at 571–73.

²⁸⁷ *Id.* at 576–94.

²⁸⁸ *Id.* at 591.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 591–92.

²⁹¹ *Id.* at 592.

²⁹² *Id.*

²⁹³ See *supra* note 281 and accompanying text (analyzing how courts weigh the fair use factors).

²⁹⁴ *Campbell*, 510 U.S. at 586 (observing that "parodies almost invariably" target "publicly known" works).

²⁹⁵ *Id.* at 586–89.

ence must be able to identify what the parody is critiquing.²⁹⁶ That is why the object of a parody is typically a successful work—one with which the audience is familiar.²⁹⁷ By its very nature, a parody is referential: it ridicules or comments on an existing work.²⁹⁸ That existing work must be somewhat successful or recognizable; otherwise, the parody will fall flat.²⁹⁹

In *Suntrust Bank v. Houghton Mifflin Co.*, for example, the owner of the copyright in *Gone with the Wind* sued for infringement after the defendant published a fictional spoof titled *The Wind Done Gone*.³⁰⁰ The defendant's work ridiculed the original's "depiction of slavery and the Civil-War era American South."³⁰¹ To do so, the defendant borrowed heavily from the original, appropriating its characters, plot, and some of its major scenes.³⁰² After finding that *The Wind Done Gone* was a parody of the original, the court made quick work of the plaintiff's claims of market harm.³⁰³ There was little doubt that the plaintiff's work was exceptionally successful. It was "one of the best-selling books in the world, second in sales only to the Bible."³⁰⁴ Further, the copyright owner has vigorously pursued derivative markets and has even licensed a second sequel in exchange for a seven-figure fee.³⁰⁵ *Gone With the Wind*, the court announced, "is one of the most famous, popular, and enduring American novels ever written."³⁰⁶ Accordingly, previous derivative works of the original proved highly lucrative.³⁰⁷

Despite the work's spectacular success, however, the court found no evidence that the defendant's parody "would supplant demand" for licensed derivatives.³⁰⁸ As is often true for parodies, the court refused to find that the defendant's work would impact the market for the original.³⁰⁹ Admittedly, the

²⁹⁶ See *id.* at 588 (noting that a parody must borrow enough of the original work to allow the audience to recognize it).

²⁹⁷ *Id.* (observing that an effective parody incorporates elements of the original "which the parodist can be sure the audience will know").

²⁹⁸ Leonard Diepeveen, *Parody and Pastiche* ("Parodies are referential in a particular way: every parody is an actual or alleged citation of a made thing."), in OXFORD RESEARCH ENCYCLOPEDIAS: LITERATURE (2020), <https://oxfordre.com/literature/display/10.1093/acrefore/9780190201098.001.0001/acrefore-9780190201098-e-1106> [<https://perma.cc/Y3EK-82HQ>].

²⁹⁹ See *Campbell*, 510 U.S. at 588 (stating that parody must borrow the most recognizable features of a work so that the audience understands the reference).

³⁰⁰ 268 F.3d 1257, 1259 (11th Cir. 2001).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 1274–76.

³⁰⁴ *Id.* at 1259.

³⁰⁵ *Id.* at 1259, 1274.

³⁰⁶ *Id.* at 1271–72.

³⁰⁷ *Id.* at 1274.

³⁰⁸ *Id.* at 1274–75.

³⁰⁹ *Id.* at 1274–76.

court declined to establish a rule that would categorically disfavor famous works.³¹⁰ But the ultimate result here, as in other parody cases, is that the defendant's work was deemed fair use in large part because it engaged with an existing, widely successful work.³¹¹ Even the most lucrative works can fall prey to a parody.

To conclude, commercial success can inform the fair use calculus in different and conflicting ways.³¹² Sometimes commercial success is taken as evidence of market harm under the fourth factor.³¹³ Because the plaintiff developed a successful market for the work, courts view any unauthorized use by the defendant as potentially harmful to the work's market.³¹⁴ In these instances, success weighs against fair use. On other occasions, though, courts accord a parodist wide latitude to lampoon an existing work, no matter how successful or popular.³¹⁵ When dealing with a parody, courts tend to underplay the significance of the fourth factor and reject as irrelevant (or otherwise non-cognizable) any evidence of market success.³¹⁶

D. Damages

A prevailing copyright plaintiff is entitled to choose between two primary measures of damages.³¹⁷ First, the plaintiff may recover "actual damages" coupled with "any profits of the infringer that are attributable to the infringement."³¹⁸ In doing so, the plaintiff may recover the value of any license that he or she might have been able to secure but for the infringement, plus any of the

³¹⁰ *Id.* at 1272. As the court put it, "the Supreme Court has squarely foreclosed" the argument that defendants might enjoy "extra latitude" to copy from famous works. *Id.* For this proposition, the court cited *Harper & Row Publishers*:

It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. . . . To propose that fair use be imposed whenever the social value of dissemination outweighs any detriment to the artist, would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.

Id. (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)).

³¹¹ *Suntrust Bank*, 268 F.3d at 1276–77.

³¹² *Compare id.* (finding fair use), with *N. Jersey Media Grp. v. Pirro*, 74 F. Supp. 3d 605, 623 (S.D.N.Y. 2015) (declining to find fair use).

³¹³ *See Pirro*, 74 F. Supp. 3d at 622–23 (refusing to find fair use where the original picture was commercially successful).

³¹⁴ *Id.*

³¹⁵ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994) (justifying the use of memorable portions of Roy Orbison's song).

³¹⁶ *See id.* (noting that successful parody requires borrowing enough of a work to be recognizable).

³¹⁷ 17 U.S.C. § 504(a).

³¹⁸ *Id.* § 504(b).

infringement-related profits the infringer had realized.³¹⁹ Alternatively, if the work was timely registered, the plaintiff may instead elect to recover statutory damages.³²⁰ The Copyright Act entitles the plaintiff to recover statutory damages ranging from \$750 to \$150,000 per work, based on the infringer's degree of culpability and the court's assessment of a "just" award under the circumstances.³²¹

An assessment of damages—whether the plaintiff elects to recover actual or statutory damages—depends on the work's commercial performance.³²² In evaluating actual damages, courts examine what profits the plaintiff would have made but for the infringement.³²³ Ordinarily, this means that the plaintiff must introduce evidence of—and the court must appropriately probe into—the work's market performance.³²⁴ Such evidence can be critical; courts have repeatedly held that the measure of actual damages must derive from a factual basis rather than undue speculation.³²⁵ Absent compelling evidence as to the volume of revenues the plaintiff lost, the measure of lost profits may prove too speculative.³²⁶

If the plaintiff is unable to present evidence of past profits, the court may instead assess the "fair market value" of the licensing deal the plaintiff would have made if his or her rights had not been infringed.³²⁷ The "fair market value" inquiry, in turn, will often rest upon other sales or licenses executed by a similarly situated third party, as well as the licensing fees the plaintiff previously charged for separate but comparable works.³²⁸ For instance, in *Simhaq v. Kid Carter Touring, Inc.*, the plaintiff brought an action for infringement after the defendant posted the plaintiff's work—a painting of a "cosmic lion"—on

³¹⁹ *Id.*

³²⁰ *Id.* § 504(c).

³²¹ *Id.* § 504(c)(1)–(2).

³²² *See id.* § 504(b) (stating that a copyright owner is entitled to recover the actual value of infringement, as measured by the infringer's profits).

³²³ *See, e.g.,* *Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 472 (2d Cir. 1985); *Banff Ltd. v. Express, Inc.*, 921 F. Supp. 1065, 1068 (S.D.N.Y. 1995); *see also* 5 NIMMER & NIMMER, *supra* note 125, § 14.02 (discussing actual damages).

³²⁴ *See Banff Ltd.*, 921 F. Supp. at 1068–69 (discussing evidence of the market performance of the sweaters at issue).

³²⁵ *See, e.g.,* *On Davis v. Gap, Inc.*, 246 F.3d 152, 163 (2d Cir. 2001) (discussing how to find actual damages (citing *Bus. Trends Analysts, Inc. v. Freedonia Grp.*, 887 F.2d 399, 404 (2d Cir. 1989))), *as amended* (May 15, 2001).

³²⁶ 5 NIMMER & NIMMER, *supra* note 125, § 14.02(A)(1).

³²⁷ *Madden v. DreamWorks, LLC*, No. 07 CV 5273, 2009 WL 10706573, at *3 (E.D.N.Y. July 6, 2009) ("[T]he Second Circuit has held that a copyright owner may support an 'actual damages' award under 17 U.S.C. § 504(b) by establishing a 'fair market value' for a lost licensing opportunity." (citing *Davis*, 246 F.3d at 165–72)).

³²⁸ *Id.* at *4 (discussing how to factor licensing fees into the fair market value calculation).

the defendant's Instagram page.³²⁹ The court awarded the plaintiff \$1,325 in actual damages on the basis of (1) a comparable licensing fee charged by the stock photography agency Getty Images; and (2) the plaintiff's evidence as to the fees he would charge for use of the work on corporate websites.³³⁰ The court's evaluation of fair market value took account of comparable fees charged by another entity, as well as evidence of the work's market performance in a different setting—the fees charged for use of the work “on a corporate or promotional” website.³³¹ In short, courts rely on evidence of commercial success to compute actual damages as well as the “fair market value” of the plaintiff's work.

Perhaps more surprisingly, courts often rely on evidence of market success even in cases involving statutory damages.³³² The Copyright Act entitles the plaintiff to recover statutory damages ranging from \$750 to \$30,000 per work, but the award may be reduced to a sum of no less than \$200 in cases of innocent infringement or increased to a per-work sum of \$150,000 in cases of willful infringement.³³³ The copyright statute, however, provides little guidance on how courts might adjust the award *within* the statutory range.³³⁴ Instead, Section 504 provides that the court may calibrate the award as it sees “just.”³³⁵ To make matters worse, courts are deeply divided over the proper justification for statutory damages.³³⁶ Some believe that statutory damages derive from a compensatory rationale, whereas others focus more readily on punitive or deterrence-driven objectives.³³⁷

³²⁹ No. 20-CV-2057, 2021 WL 3810754, at *1 (E.D.N.Y. Aug. 11, 2021), *report and recommendation adopted*, 2021 WL 3793876 (E.D.N.Y. Aug. 26, 2021).

³³⁰ *Id.* at *5.

³³¹ *Id.*

³³² *See, e.g.*, *Stross v. Z Lifestyle LLC*, No. 20-CV-177, 2020 WL 13556135, at *7 (S.D. Cal. Nov. 5, 2020) (using commercial success to calculate statutory damages).

³³³ 17 U.S.C. § 504(c).

³³⁴ *See id.*

³³⁵ *Id.* § 504(c)(1).

³³⁶ *See infra* note 337 and accompanying text (discussing rationales for statutory damages). Some courts cite a compensatory rationale, noting that statutory damages should generally approximate the plaintiff's actual harm. *See, e.g.*, *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 670 F. Supp. 1133, 1140 (E.D.N.Y. 1987) (“Undoubtedly [statutory] damages should bear some relation to the actual damages suffered . . .”), *aff'd sub nom.* *Fitzgerald v. Baylor Publ'g*, 862 F.2d 304 (2d Cir. 1988). Occasionally, however, courts instead invoke principles of either deterrence or retribution as proper justifications for statutory damages. *See, e.g.*, *Energy Intel. Grp. v. CHS McPherson Refinery, Inc.*, 300 F. Supp. 3d 1356, 1380 (D. Kan. 2018) (noting that “a statutory damages award may properly be ‘wholly punitive’ in nature”); *Energy Intel. Grp. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 272 (5th Cir. 2020) (emphasizing that “the modern Copyright Act's statutory damages regime has a significant deterrent and potentially punitive purpose”).

³³⁷ *See* Shani Shisha, *Infringement Episodes*, 97 S. CAL. L. REV. (forthcoming 2024) (manuscript at 20–26) (on file with author) (discussing the competing rationales that underlie copyright's statutory damage schemes).

In practice, courts often assess statutory damages by reference to an existing baseline—the plaintiff’s actual losses.³³⁸ Here, too, courts evaluate the market value of the licensing fees the plaintiff previously collected.³³⁹ In *Stross v. Z Lifestyle LLC*, for instance, a professional photographer sued for infringement, alleging that the defendant had incorporated the plaintiff’s photo into an online article.³⁴⁰ The court granted the plaintiff’s motion for a default judgment and looked to evidence of actual loss in its assessment of statutory damages.³⁴¹ Based on the plaintiff’s claim that he would have charged \$6,600 for commercial use of the photo, the court awarded the plaintiff roughly twice the lost licensing fee—\$12,000—in statutory damages.³⁴²

Many other courts follow a similar, two-step formula to compute statutory damages by first identifying the plaintiff’s actual losses and then applying a multiplier to the measure of lost profits.³⁴³ The use of multipliers can be inconsistent or otherwise unpredictable. Some courts, like in *Stross*, apply a single-digit multiplier, whereas others apply far larger multipliers.³⁴⁴

In short, commercial success is deeply entwined in the damages calculus.³⁴⁵ In evaluating actual damages, courts appeal to the work’s market performance by scrutinizing the volume of previous sales or licensing fees the plaintiff executed.³⁴⁶ The case law on statutory damages tends to follow a partly overlapping path. Typically, courts begin by identifying a baseline—the plaintiff’s actual losses—and then applying a multiplier to adjust the total award within the statutory range.³⁴⁷ Commercial success, in other words, dominates the damages analysis.

³³⁸ See, e.g., *Stross*, 2020 WL 13556135, at *7 (using actual losses to calculate statutory damages).

³³⁹ *Id.*

³⁴⁰ *Id.* at *1.

³⁴¹ *Id.* at *5–7.

³⁴² *Id.* at *7.

³⁴³ Shisha, *supra* note 337, at 26; see, e.g., *Lauratex Textile Corp. v. Allton Knitting Mills Inc.*, 519 F. Supp. 730, 733 (S.D.N.Y. 1981) (applying a multiplier of seven times the actual damages); *Time Warner Cable of New York City v. Googies Luncheonette, Inc.*, 77 F. Supp. 2d 485, 489 (S.D.N.Y. 1999) (applying a multiplier of eight); *Markos v. Yacht Charters of Miami.com, LLC*, No. 19-22284-CV, 2019 WL 8989936, at *4 (S.D. Fla. Oct. 2, 2019) (report and recommendation of magistrate judge), *adopted by* No. 19-22284-CIV, 2019 WL 8989935 (S.D. Fla. Oct. 23, 2019) (applying a multiplier of three).

³⁴⁴ Shisha, *supra* note 337, at 26–30.

³⁴⁵ See *supra* notes 317–344 and accompanying text (discussing how commercial success impacts damage calculations).

³⁴⁶ See, e.g., *Madden v. DreamWorks, LLC*, No. 07 CV 5273, 2009 WL 10706573, at *3 (E.D.N.Y. July 6, 2009) (applying commercial success in actual damage calculation).

³⁴⁷ See *Stross*, 2020 WL 13556135, at *6–7 (using market value of goods to calculate statutory damages).

III. THEORY

Modern copyright law is strewn with considerations of commercial success.³⁴⁸ Across different doctrinal domains—the access inquiry, fictional characters, fair use, and damages—courts ask whether the protected work is commercially successful.³⁴⁹ Nevertheless, successful works present something of a quandary for copyright theory. This Part explains why. After offering a brief, high-level sketch of copyright theory, I highlight an apparent conundrum: the most successful works are also, in a deep sense, the ones least deserving of copyright protection, at least if one accepts the prevailing account of U.S. copyright law. Section A discusses copyright’s incentive-access paradigm.³⁵⁰ Section B explores how successful works fit into this standard paradigm.³⁵¹ Section C highlights questions of uniformity and customization in copyright law.³⁵² Section D examines the relationship between commercial success and copyright’s market signals.³⁵³ Section E addresses a host of questions involving incentives and predictability.³⁵⁴

A. The Incentive-Access Paradigm

Copyright law affords authors a limited term of market exclusivity—so long as the work is under copyright, only the copyright holder may reproduce, adapt, distribute, publicly display, or publicly perform the work.³⁵⁵ Although a number of different justifications swirl in the distance, courts and commentators principally justify modern copyright law based on the need to provide economic incentives to authors of expressive works.³⁵⁶ From the perspective of

³⁴⁸ See *supra* Part II (surveying modern copyright law and discussing the attention to and assessment of commercial success).

³⁴⁹ See *supra* Part II.

³⁵⁰ See *infra* notes 355–377 and accompanying text.

³⁵¹ See *infra* notes 378–420 and accompanying text.

³⁵² See *infra* notes 421–438 and accompanying text.

³⁵³ See *infra* notes 439–445 and accompanying text.

³⁵⁴ See *infra* notes 446–492 and accompanying text.

³⁵⁵ 17 U.S.C. § 106.

³⁵⁶ See Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 620 (2015) (“Utilitarianism, or instrumentalism, is the dominant purpose of American copyright law.”); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1749–56 (2012) (discussing a variety of intellectual-property theories); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 433 (2007) (“Nothing is more fundamental to copyright law than the concept of incentives.”); Balganes, *supra* note 15, at 1576–77 (“[C]opyright law in the United States has undeniably come to be understood almost entirely in utilitarian, incentive-driven terms.”); Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (“[C]opyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.”) (quoting *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y.

economic policy, works of authorship resemble public goods in that they are both nonexcludable and nonrivalrous. Information goods are nonexcludable in the sense that, once created, it would be difficult for their creators to exclude others from using and consuming them.³⁵⁷ Such works are nonrivalrous in the sense that the use or consumption of the work by one individual does not frustrate the ability of others to use the work.³⁵⁸

Most critically, information goods are also susceptible to cheap copying—it is generally cheaper, we assume, to copy a work than to create one.³⁵⁹ So, in a world without copyright, authors will not be able to recoup their initial investments in producing and distributing creative works.³⁶⁰ Copyright resolves this problem by providing authors with a limited set of legal rights to exclude others from using the work in certain ways.³⁶¹ Therefore, our law turns a nonexcludable good into a partially excludable one.³⁶²

Cost recoupment is the *raison d'être* of this standard story. Copyright enables authors to exclude copyists, and this ensures that authors are able to recover their costs by charging a supracompetitive price for the work.³⁶³ The

1992)); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright Clause] . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .”).

³⁵⁷ See Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 193–94 (2006) (explaining that intellectual goods are non-excludable).

³⁵⁸ See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 40–44 (2003) (discussing the emergence of digital commons).

³⁵⁹ See *supra* note 16 and accompanying text (citing sources that advance this argument).

³⁶⁰ Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1204 (1996) (observing that, without copyright protection, the author would presumably “realize no financial return on his investment in creating the work”). As Glynn Lunney explains:

By avoiding the initial authorship investment, the copier could profitably market his copies at a lower price than could the original author. Competition from such copies would limit the price the original author could charge for her copies and would deprive her of a reasonable opportunity to recover her initial authorship investment.

Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 492–93 (1996).

³⁶¹ See 17 U.S.C. § 106 (entitling the copyright owner, inter alia, to prevent others from reproducing and distributing copies of the work).

³⁶² Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 238 (2014).

³⁶³ Sag, *supra* note 357, at 194 (“[I]n a competitive market the market price will be that of the lowest cost producer, which the author will never be. As such, without some mechanism to appropriate the benefits of their investments, authors and publishers will underinvest in the production of information products.”). Supracompetitive prices are prices that produce profits beyond the competitive level—i.e., prices that are above the marginal cost of production. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 995–96 (1997) (noting that competi-

Constitution's Intellectual Property Clause is thought to embrace this utilitarian account by empowering Congress to enact laws aimed at promoting progress in science and the useful arts.³⁶⁴ Scholars and courts insist that the Constitution trades in the language of utility; copyright is not about moral entitlements or notions of fairness.³⁶⁵ Rather, copyright serves as a means to an end—"promot[ing] the [p]rogress of [s]cience and [the] useful [a]rts."³⁶⁶

The promise of market exclusivity that accompanies copyright protection presents two considerable concerns.³⁶⁷ First, by excluding free riders, copyright owners can charge a premium for their works and price some consumers out of the market.³⁶⁸ Those consumers will be denied an opportunity to access or otherwise consume the work.³⁶⁹ Second, and more fundamentally, copyright protection allows owners to exclude not just consumers but also future creators.³⁷⁰ That is a problem because all creation is inherently cumulative: to varying degrees, all authors draw from or build on existing works.³⁷¹ Because cop-

tion will typically drive the price toward the marginal cost of production, while market exclusivity will enable owners to raise the price of the work above the marginal cost).

³⁶⁴ U.S. CONST. art. I, § 8, cl. 8.

³⁶⁵ See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

³⁶⁶ U.S. CONST. art. I, § 8, cl. 8.

³⁶⁷ Sterk, *supra* note 360, at 1204–05 (identifying two central problems that arise from the grant of exclusive rights to authors).

³⁶⁸ *Id.* at 1205–06; see Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1852–53 (2014) (discussing economic justifications behind copyright law); Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1438 (2010) (discussing intellectual property law in the information age); Lunney, *supra* note 360, at 492–98 (discussing the incentive-access paradigm).

³⁶⁹ Lunney, *supra* note 360, at 495 ("[B]roadening copyright's protection may impede access to the work itself.").

³⁷⁰ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 332 (1989) ("The effect [of copyright protection] would be to raise the cost of creating new works . . .").

³⁷¹ See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 560 (2023) (Kagan, J., dissenting) ("[A]rtists don't create all on their own; they cannot do what they do without borrowing from or otherwise making use of the work of others. That is the way artistry of all kinds—visual, musical, literary—happens . . ."); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which . . . are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436))); see also Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 691 (2003) ("No expression is completely the independent

right limits access to protected works, it threatens to prevent future creators from engaging with existing works.³⁷²

Given this tension, copyright seeks to strike a balance between two conflicting interests: the interest in providing incentives to authors, and the interest in ensuring that the public and other authors are able to ultimately access existing works.³⁷³ Copyright policy, in short, emphasizes what is now known as the incentive-access framework: a measured tradeoff between the need to provide incentives and the desire to facilitate access.³⁷⁴ To effectuate this balance, copyright limits the reach and duration of any copyright entitlement.³⁷⁵ The ultimate goal of our system, then, is to provide authors with *just enough* incentives: the exclusive power conferred on authors should be no stronger than is necessary to incentivize the creation of the work.³⁷⁶ Any pricing power beyond that level—namely, above the level of cost recoupment—would generate additional costs (in terms of reduced access) without producing concomitant incentive benefits.³⁷⁷

B. A Theoretical Paradox

Although the incentive-access paradigm is the principal rationale animating American copyright law, commercially successful works align somewhat poorly with this account. To see why, consider the main risks that creators face: commercial failure and commercial success.³⁷⁸ The vast majority of copyrighted works—and, correspondingly, the majority of authors—fail to accomplish any measure of market success.³⁷⁹ For most creators, then, “the risk of failure . . . looms largest.”³⁸⁰ The typical work provokes no consumer interest, yields no profits, and goes largely unnoticed.³⁸¹ Across different creative industries—

work of its author; every author to some degree builds upon the work of those who have come before.”).

³⁷² Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1058–59 (2005); Sterk, *supra* note 360, at 1207–08.

³⁷³ See Sterk, *supra* note 360, at 1205–06 (discussing the need to strike a balance between protecting authors and allowing access to existing works).

³⁷⁴ See Lunney, *supra* note 360, at 492–98 (discussing the incentive-access paradigm).

³⁷⁵ See, e.g., 17 U.S.C. §§ 102–122 (defining copyright’s subject matter and specifying certain limitations on the scope of copyright protection).

³⁷⁶ See *id.*

³⁷⁷ See Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900, 1908 (2013) (“Conventional economic actors will only produce a good when they can appropriate sufficient returns to recoup the capitalized costs of providing the good.”).

³⁷⁸ Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1604–05 (2019).

³⁷⁹ *Id.* at 1605.

³⁸⁰ *Id.*

³⁸¹ See *supra* notes 77–118 and accompanying text (discussing the lack of commercial success for most works).

music, motion pictures, video games, publishing, and more—the picture remains fairly consistent.³⁸² Creative markets frequently trend toward a winner-takes-all system, one in which a small cadre of exceptionally successful creators thrive, while everyone else struggles to get by.³⁸³ A wealth of empirical research suggests that this has always been the case.³⁸⁴ Creative production is a hazardous undertaking, and most authors are destined to fail.³⁸⁵ From the perspective of an individual author, the risk is that no one will want to listen your music, read your book, or watch your content.³⁸⁶

When the work is commercially unsuccessful, copyright is of little value: the author will not be able to turn a profit, much less recoup his or her costs.³⁸⁷ Indeed, copyright law is a market-driven system; it shelters original works against unauthorized copying.³⁸⁸ But if the work does not excite market interest, no one will want to copy it in the first place.³⁸⁹ As one scholar explained fifty-odd years ago, “the copyright system rewards only commercially successful works and only after they have become successful.”³⁹⁰ It is something of a trite maxim that, if consumers are not willing to pay for the work, copyright is effectively valueless.³⁹¹

At the same time, some authors face an entirely different risk: the risk of commercial success. When the work is successful, copyright becomes relevant. Successful works are far more likely to attract imitators and copyists.³⁹² And the copyright system aims to confront this risk by preventing others from

³⁸² See *supra* notes 81–106 and accompanying text (surveying certain creative industries).

³⁸³ WILLIAM PATRY, *HOW TO FIX COPYRIGHT* 80 (2011) (“Our copyright laws are, and have always been, a winner-take-all system. If that is the desired policy, then our copyright laws are working fine.”).

³⁸⁴ See *supra* notes 79–105 and accompanying text (surveying empirical research on the structure of creative industries).

³⁸⁵ See Kinsella, *supra* note 78 (discussing how three-quarters of artists in the United States earn less than \$10,000 per year).

³⁸⁶ See Raustiala & Sprigman, *supra* note 378, at 1604.

³⁸⁷ Frye, *supra* note 1, at 188–89 (“The purpose of copyright is to encourage people to create works of authorship by enabling them to profit from works the public wants to consume. Copyright can’t predict what people will like—and it shouldn’t try. Indeed, it’s none of copyright’s business.”); see Raustiala & Sprigman, *supra* note 378, at 1605 (highlighting that the risk of failure looms larger than the risk of piracy).

³⁸⁸ Raustiala & Sprigman, *supra* note 378, at 1605.

³⁸⁹ *Id.*

³⁹⁰ Frank R. Curtis, *Protecting Authors in Copyright Transfers: Revision Bill § 203 and the Alternatives*, 72 COLUM. L. REV. 799, 812 (1972).

³⁹¹ PATRY, *supra* note 383, at 2 (“Without consumer demand for your book or musical work, owning a copyright is meaningless.”). Patry likewise observes that “[m]any businesses that rely on copyrighted material have a problem: not enough consumers are paying for their works.” *Id.* at 141.

³⁹² Raustiala & Sprigman, *supra* note 378, at 1604 (“[The risk of commercial success] is the risk that a work in fact proves to be popular, and that popularity attracts pirates whose unauthorized copies steal away potential customers for the author’s work.”).

copying a successful work.³⁹³ The American copyright regime seeks to ensure that the author is able to internalize the financial benefits associated with the work.³⁹⁴ This, in turn, should induce authors to invest in new creations.³⁹⁵ In a world without copyright, the level of investment in creative production will be comparatively lower, because a significant subset of authors would choose not to create at all.³⁹⁶

Copyright law, then, can properly address the risk of success but not failure.³⁹⁷ This means that exceptionally successful works—those that prove to be popular, lucrative, and broadly disseminated—should enjoy strong protection.³⁹⁸ Because these works face the greatest risk of free riding by copyists, they can most visibly benefit from copyright protection.³⁹⁹

This standard account, however, elides an enduring tension: the most successful works, though most vulnerable, are also the ones least deserving of copyright protection. Recall that intellectual works resemble public goods in that they are nonexcludable and nonrivalrous.⁴⁰⁰ For that reason, authors of expressive works have to rely on copyright protection to prevent others from cheaply distributing copies of their works.⁴⁰¹ Absent copyright protection, some authors will not be able to recoup their expenditures and would presumably choose not to create at all.⁴⁰² This account emphasizes cost recoupment: copyright protection allows authors to recover their investments.⁴⁰³

Nevertheless, inasmuch as the prospect of cost recoupment is central to this narrative, successful works fit poorly with the copyright system. Successful works are often highly profitable, and so their owners are well-positioned to recoup their initial investment with relative ease.⁴⁰⁴ This raises the question: in cases dealing with successful works, is strong copyright protection norma-

³⁹³ *Id.*

³⁹⁴ *See id.* (“The fundamental purpose of IP rights is . . . to ensure that any market success inures to the benefit of the creator of the original.”).

³⁹⁵ *Id.*

³⁹⁶ *See id.* (“To the degree creators are externally motivated by the prospect of financial gain . . . copyright protection is expected to raise investment in the production of new creative works relative to a world in which copyists are left free to compete with originators.”).

³⁹⁷ *Id.* at 1604–05.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *See supra* notes 355–377 and accompanying text (discussing the nonexcludable and nonrivalrous character of information goods).

⁴⁰¹ Raustiala & Sprigman, *supra* note 378, at 1604–05.

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *See, e.g.,* Alexandra Sakellariou, *Taylor Swift’s ‘Eras’ Movie Already Made Back Its \$20 Million Budget Before Hitting Theatres*, THE RICHEST (Sept. 30, 2023), <https://www.therichest.com/taylor-swifts-eras-movie-already-made-back-its-20-million-budget-before-hitting-theatres/> [<https://perma.cc/UAA7-BXG4>] (discussing the speed with which Taylor Swift recovered the cost for her *Eras* movie).

tively defensible? Is there any risk that the owners of such immensely popular works might fail to recover their costs?

To be sure, the authors of successful works often have little trouble recovering their costs, and many go on to become exceptionally wealthy.⁴⁰⁵ This does not mean that copyright is entirely redundant in cases involving commercially successful works, and it is certainly possible that these works would not be successful at all without copyright protection.⁴⁰⁶ As this Article explains below, it is difficult to predict *ex ante* which works would prove successful.⁴⁰⁷ So the question is not whether successful works deserve to be protected in the first place, but rather whether such works merit *strong* protection.⁴⁰⁸ One possible implication is that courts should take into account the question of cost recoupment in cases revolving around successful works. If the copyright system centers on cost recoupment, courts need to consider commercial success as a factor weighing *against* strong copyright protection.⁴⁰⁹ None of this is to say that commercial success should necessarily doom an infringement action; only that it should play a role—as one factor among many—in delimiting the proper scope of copyright protection.

Copyright scholars often warn that the copyright regime is overbroad.⁴¹⁰ Since its inception, American copyright law has expanded dramatically in every measurable aspect—scope, duration, and remedies.⁴¹¹ At fault for copyright's expansionist agenda, some say, is the tendency of policymakers to obsess over a small number of atypically successful works.⁴¹² This has led, for example, to a continual lengthening of the copyright term: initially, copyright

⁴⁰⁵ Lunney, *supra* note 109, at 65 (noting, in the context of copyright duration, that “if popularity coincides with profitability, these [popular works] are precisely the works that have likely already recouped their costs and that therefore least need additional protection”).

⁴⁰⁶ See Lunney, *supra* note 360, at 492 (noting that competitors could copy a work and avoid the author's initial investment cost without copyright protections).

⁴⁰⁷ See *infra* notes 446–492 and accompanying text.

⁴⁰⁸ See Lunney, *supra* note 360, at 492–98 (discussing harms to later works caused by robust protections).

⁴⁰⁹ See *supra* note 404 and accompanying text (illustrating the ability of highly successful works to recuperate costs).

⁴¹⁰ See, e.g., Lunney, *supra* note 360, at 497–98 (discussing economic harm caused by copyright protection).

⁴¹¹ Lemley, *supra* note 372, at 1042 (“By virtually any measure, intellectual property rights have expanded dramatically in the last three decades. Terms of protection are longer, the number of things that are copyrightable has increased, it is easier to qualify for copyright protection, copyright owners have broader rights to control uses of their works, and penalties are harsher.”).

⁴¹² See, e.g., García & McCrary, *supra* note 109, at 357 (emphasizing “advocates’ and legislators’ tendencies to focus on atypical works—i.e., those that are exceptionally successful, or unusually delayed in their earnings,” which in turn “leads to overprotection of the average work”); see also *id.* at 390 (“[L]obbying drives a disproportionate amount of attention toward especially successful content, resulting in selection bias that perpetuates overprotection in the space.”).

expired (unless renewed) after a brief term of fourteen years, but today copyright protection persists for seventy years after the death of the author.⁴¹³ This expansion has also been fueled in part by the lobbying efforts of large corporations, which sought to prevent their successful works from entering the public domain.⁴¹⁴ Commentators hence caution that policy debates tend to orbit around a limited array of uncommonly successful works.⁴¹⁵ The result is a copyright system that is skewed in favor of incumbent copyright holders, to the detriment of society at large.⁴¹⁶

Nevertheless, this Article demonstrates that even when successful works are at stake, the case for strong copyright protection is relatively frail. To the extent that our system aims to facilitate cost recoupment, it becomes clear that successful copyright owners—those that can easily and quickly recoup their costs—have little need for strong copyright protection.⁴¹⁷ Rather than provide an opportunity for cost recoupment, copyright law operates to reinforce a stratified world in which the rich get richer.⁴¹⁸

Although this discussion is far from conclusive, it gestures at an underlying pathology: commercially successful works—those that are most vulnerable to copying—are also the ones least deserving of copyright protection.⁴¹⁹ This suggests that, in cases implicating successful works, courts should consider readjusting or scaling back the scope of copyright protection. In what follows, this Article develops a more carefully nuanced account of commercial success and explores why, as a matter of sound policy, the copyright system ought to embrace a presumption against strong protection for successful works.⁴²⁰

⁴¹³ Compare 1790 Act § 1, with 17 U.S.C. § 302(a).

⁴¹⁴ See, e.g., Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: *Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2338 (2003) (explaining that “Disney has been among the most aggressive advocates of expanded copyright protection”).

⁴¹⁵ See *id.* (discussing how Disney is active in copyright advocacy).

⁴¹⁶ See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1349 (2015). As Fishman put it:

[O]ur regime is backward. Instead of catalyzing creativity, copyright calcifies it. If we could compensate creators adequately while minimizing restrictions downstream, creativity would be better off. But in our world of copyright constraint, what might have been follow-on expression is never expressed. Copyright has become the law of missed opportunities.

Id.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ See *supra* notes 378–418 and accompanying text (discussing the information-access paradox).

⁴²⁰ See *infra* notes 421–593 and accompanying text (articulating a proposal for dealing with commercially successful works).

C. Uniformity and Customization

According to the dominant story, copyright operates on the basis of largely uniform rules that govern all works in precisely the same way.⁴²¹ This means that copyright law, viewed within the incentive-access framework, can be both over- and under-protective. Recall that the goal of modern copyright policy is to provide each work with only as much protection as is necessary to encourage its creation—not an iota more.⁴²² Because the copyright system exhibits at least some measure of uniformity, however, copyrighted works will be either marginal, inframarginal, or supramarginal.⁴²³ In a system characterized by uniform rules, some works will be marginal in the sense that they will enjoy a level of protection that is precisely sufficient to encourage the creation of these works.⁴²⁴ Other works will be inframarginal—they will enjoy a level of copyright protection that is stronger than is necessary to incentivize their creation.⁴²⁵ Finally, some works will be supramarginal; these works will be subject to insufficient protection, and so we should expect suboptimal levels of creation for such works.⁴²⁶

Accordingly, the modern copyright regime can be either over- or under-protective.⁴²⁷ Given that our system is at least partly uniform, any shifts in the level of copyright protection would affect different kinds of works in starkly disparate ways. Strengthening copyright protection could empower copyright holders to internalize more of the economic benefits associated with their works.⁴²⁸ This may incentivize some authors to produce previously supramarginal works.⁴²⁹ At the same time, this scenario would generate additional costs when it comes to previously marginal or inframarginal works—these works, after all, already benefitted from a sufficient or excessive level of protection.⁴³⁰ The same is true for policy proposals designed to hem in the scope of copyright protection: any reduction in the level of protection would turn previously inframarginal works into marginal ones, but would also produce additional costs for the owners of previously marginal or supramarginal

⁴²¹ See *supra* note 1 and accompanying text (canvassing sources that emphasize uniformity in copyright).

⁴²² See *supra* note 374 and accompanying text (discussing the goals of copyright policy).

⁴²³ Bracha & Syed, *supra* note 362, at 240–41.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ See *id.* at 240 (“[A]ny additional increment of copyright protection will add social value by incentivizing the creation of previously supramarginal works.”).

⁴³⁰ *Id.*

works.⁴³¹ In a system that rests on uniform rules, there is always a tradeoff between works that are over-protected and those that are under-protected.

But a customized system—or, as this Article suggests, a partially customized regime—could avoid some of the pitfalls that haunt a uniform copyright system.⁴³² To that end, this Article proposes that courts develop a presumption leaning against commercially successful works. In economic terms, successful works can be described as inframarginal works—works that are subject to excessive levels of protection.⁴³³ Because such works are so successful, their owners can recover their costs quickly and easily.⁴³⁴ Thus, this Article suggests that courts tailor the scope of copyright protection *only* for inframarginal works.⁴³⁵ By moving toward a partially customized system of this kind, this regime could avoid or greatly mitigate some of the risks of over- or under-protection that ordinarily arise in a uniform system.

With this theoretical framework properly in view, this Article turns to explore some of the likely effects of the proposed system.⁴³⁶ The next Section discusses how a presumption against successful works might undercut copyright's market signal.⁴³⁷ Section E then examines how such a presumption would affect both immediate and remote incentives.⁴³⁸

D. Market Signals

As a market-based enterprise, copyright enlists a centralized market signal to communicate to authors where to direct their investments.⁴³⁹ This signal is effective precisely because the owners of more successful works get to internalize more of the economic value of their works.⁴⁴⁰ As Paul Goldstein notes, the signals of consumer preference serve to “trigger and direct” the in-

⁴³¹ *Id.*

⁴³² See *infra* Parts IV–V (outlining an alternative framework for thinking about commercially successful works).

⁴³³ See Bracha & Syed, *supra* note 362, at 240–41 (discussing inframarginal works).

⁴³⁴ See *supra* note 404 and accompanying text (providing an example of the speed at which the owners of commercially successful works can recover their costs).

⁴³⁵ See *infra* Parts IV–V (outlining solutions to the current bias toward commercially successful works in copyright law).

⁴³⁶ See *infra* Parts IV–V.

⁴³⁷ See *infra* notes 439–445 and accompanying text (discussing market signals).

⁴³⁸ See *infra* notes 446–492 and accompanying text (analyzing the impact on incentives).

⁴³⁹ See generally Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970); see also Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649, 669 (2007) (referencing Demsetz, *supra*).

⁴⁴⁰ See Frischmann, *supra* note 439, at 669–70 (applying market signal theories to subsequent producers).

vestments of authors.⁴⁴¹ A central question, however, is whether the proposed presumption would unsettle these signals. The risk is that copyright's market signals may be undermined if the scope of protection afforded to successful works were limited.⁴⁴² A tailored system would thus address one problem—the overprotection of successful works—while potentially creating another.

Although this is a valid concern, there are ways to allay the risk of disrupting market signals. This Article proposes that courts adopt a *soft* presumption against commercially successful works. This presumption would apply only to the most successful works and only under some circumstances.⁴⁴³ This system would direct courts to weigh commercial success only as a single, non-determinative factor. Under this approach, the work's commercial success might prove dispositive in some cases but not in others.⁴⁴⁴ This proposed presumption is an inconclusive one—it would act as a doctrinally relevant factor, but not as a categorical exclusion for successful works. This sort of presumption might weaken copyright's market signal, but only to a limited extent.

It is important to emphasize once again that this Article does not advocate for a system that would divest the authors of successful works of copyright protection in toto. Rather, it suggests that by compelling courts to consider the work's success as a colorable factor, we can better align the scope of protection with the underlying mission of our system. And by ensuring that courts do so only after the work has proven successful—namely, only after it has *already generated significant profits*—we can further reduce the risk of obscuring market signals.⁴⁴⁵ Copyright's market function turns on profit and price signals, and an ex post approach would kick into gear only when these signals are already present. Thus, although this proposal would offer an (admittedly attenuated) improvement over the status quo, it would not eliminate the market signals associated with a uniform market system.

E. Predictability and Ex Ante Incentives

Will the proposed presumption curb ex ante incentives for the creation of expressive works? Generally speaking, a customized system should do a better job of tailoring incentives: it would ensure that the owners of inframarginal

⁴⁴¹ PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 178–79 (1994) (“The logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works. To stop short of these ends would deprive producers of the signals of consumer preference that trigger and direct their investments.”).

⁴⁴² *Id.*

⁴⁴³ See *infra* Part IV (further discussing this presumption).

⁴⁴⁴ See *infra* Part IV (same).

⁴⁴⁵ See Frischmann, *supra* note 439, at 669–70 (discussing market signals in copyright law).

works do not get compensated beyond the level of cost recoupment.⁴⁴⁶ But in reality, the success of a customized system rides on whether and to what extent authors can predict commercial success.⁴⁴⁷ To fully consider this issue, one must first appreciate the different circumstances under which authors might create expressive works.

To begin, suppose that authors operate under conditions of complete uncertainty. They do not have the faintest idea whether their work will turn out to be a commercial hit or an absolute flop. Nor do they know which *kinds* of works are more likely to succeed or fail. In such circumstances, a rule disfavoring commercially successful works should have little effect on the *ex ante* incentives of authors. Under conditions of a fully random lottery, creators will simply have no reason to direct their investments toward a particular category of works.

In the real world, however, sophisticated copyright owners often have more information about the prospect of success and the kinds of works that are more likely to spark commercial interest. This is why some creative industries rely on “derivable works.”⁴⁴⁸ In the movie industry, for example, studios have increasingly focused on sequels and franchises because the success of a single film is reasonably predictive of the success of direct sequels.⁴⁴⁹ The same rings true for the video game industry, where sequels and franchises have been proliferating over the past few decades.⁴⁵⁰ Another example involves data-driven industries. As others have explained, streaming leviathans such as Netflix have been increasingly leaning on data-driven content.⁴⁵¹ Netflix collects data about the streaming habits of its consumers—what they like to watch, for how long, how frequently, and so on.⁴⁵² As a result, the company can tailor the content it produces or commissions to the preferences of its consumers.⁴⁵³ Given the

⁴⁴⁶ See *supra* notes 421–438 and accompanying text (proposing a partially customized copyright system).

⁴⁴⁷ See *infra* notes 448–492 and accompanying text (raising the question of when authors can predict commercial success).

⁴⁴⁸ See Joseph P. Fishman, *Derivable Works*, 67 UCLA L. REV. 122, 126–27 (2020) (suggesting that movie studios often favor works that have foreseeable spinoffs).

⁴⁴⁹ *Id.* at 127 (“[S]tudios have increasingly been favoring [derivable] works over the last decade. This rapid growth of franchise films has been dubbed ‘the most meaningful revolution in the movie business’ since the 1950s.” (quoting BEN FRITZ, *THE BIG PICTURE: THE FIGHT FOR THE FUTURE OF MOVIES*, at xv (2018))); see also *id.* at 149–50 (discussing investments in derivative works).

⁴⁵⁰ Ard, *supra* note 111, at 1307–08, 1311.

⁴⁵¹ Raustiala & Sprigman, *supra* note 378, at 1584–98.

⁴⁵² *Id.* at 1584–90.

⁴⁵³ *Id.* at 1589. Take, as an example, the Netflix-produced hit show *House of Cards*. As Raustiala and Sprigman explain, Netflix concluded on the basis of data that “fans of the original U.K. series on which *House of Cards* was based would also be attracted to material that either starred Kevin Spacey or was directed by David Fincher.” *Id.* at 1586. Based on “three overlapping circles of viewer inter-

wealth of data at its disposal, Netflix can anticipate what content will satisfy the preferences of its audience.⁴⁵⁴

In all of these industries, copyright owners have figured out a way to predict which works are likely to succeed. Naturally, this is not always the case; there are certainly industries in which predicting success remains a fool's errand.⁴⁵⁵ The point, rather, is that claims of uncertainty are at least partly overstated.

Two additional scenarios seem relevant. One involves category predictability, meaning circumstances in which the author is able to predict that their work would fall broadly into the category of works that are more likely to prove commercially successful.⁴⁵⁶ For instance, if Netflix's data suggest that viewers are more likely to watch shows that blend romance and fantasy, the creators of such works may have reason to believe that they have a shot at winning big.⁴⁵⁷ A second scenario implicates conditions of substantial predictability—that is, cases in which the author can accurately predict whether their work will be successful.⁴⁵⁸

In both scenarios, the ultimate effects of a tailored system are uncertain. On the one hand, authors may have less of an incentive to produce likely-to-succeed works given that such works might enjoy a lower level of protection.⁴⁵⁹ But that seems improbable: the whole point, after all, is that the authors of successful works currently enjoy *excessive* incentives.⁴⁶⁰ Hence, even if the scope of copyright protection were reduced, that would not necessarily lead to a lower creative output.⁴⁶¹ Indeed, copyright does not aim to provide the larg-

est," Netflix concluded that "a *House of Cards* reboot starring Kevin Spacey and directed by David Fincher" would be a reasonably safe bet. *Id.* at 1586–87.

⁴⁵⁴ *Id.* at 1584–90.

⁴⁵⁵ See David Biello, "Hit" Songs Unpredictable, Thanks to Peer Pressure, *SCI. AM.* (Feb. 10, 2006), <https://www.scientificamerican.com/article/hit-songs-unpredictable-t> [<https://perma.cc/FL9Z-VUUM>] (discussing the difficulty of predicting which songs would be hit songs).

⁴⁵⁶ See Raustiala & Sprigman, *supra* note 378, at 1592–94 (analyzing the ways in which streamers use consumer search terms to make decisions based on future content).

⁴⁵⁷ See *id.* at 1593–94.

⁴⁵⁸ See *id.* at 1596–97 (discussing how Spotify playlists drive which works are commercially successful).

⁴⁵⁹ See *supra* notes 421–438 and accompanying text (arguing for lower levels of protection for successful works).

⁴⁶⁰ See *supra* note 433 and accompanying text (describing inframarginal works).

⁴⁶¹ If our system, such as it is, provides excessive incentives—that is, a level of protection that is higher than necessary to incentivize the production of works—then a reduction in the scope of incentives would be desirable. Assume, for example, that the optimal level of protection is X. Now assume that our current system provides a level of protection that is equivalent to X+5. In this scenario, even if the scope of protection were scaled back from X+5 to X, the level of incentives would nonetheless prove desirable as a matter of copyright policy.

est incentive possible, only the optimal incentive.⁴⁶² Many commentators, however, fear that our system has failed to strike an appropriate balance and is instead slanted heavily in favor of stronger incentives.⁴⁶³ That means that even if rewards were somehow decreased, that would be a move in the right direction.⁴⁶⁴

Quite apart from the standard incentive-access framework, there is another reason that a tailored system might be normatively attractive: it could reduce duplicative development costs. The promise of high rewards for successful works is likely to attract wasteful and duplicative investments.⁴⁶⁵ Take the motion picture industry, where many studios compete in the marketplace for action-packed summer flicks.⁴⁶⁶ The result is an abundance of action films—superhero movies, fantasy features, and thrillers of different flavors—that all compete for the same audience.⁴⁶⁷ Although these movies are not wholly duplicative, they serve as partial substitutes.⁴⁶⁸ In effect, a Harry Potter movie is a partial substitute for a Marvel flick in the sense that both target a roughly overlapping consumer base and satisfy a somewhat overlapping set of consumer preferences.⁴⁶⁹ Copyright's market signal function thus has the effect of directing investments toward partly duplicative works.⁴⁷⁰

Crucially, these concerns are most relevant in cases of category predictability, where authors may be driven to pursue duplicative projects that map onto a specific category of successful works.⁴⁷¹ My proposal would alleviate

⁴⁶² Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 125 (1999) (noting that “the goal of intellectual property law is only to provide the ‘optimal incentive,’ not the largest incentive possible”).

⁴⁶³ See generally, e.g., JESSICA LITMAN, *DIGITAL COPYRIGHT* (2d ed. 2006) (raising concerns around incentives).

⁴⁶⁴ See Lemley, *supra* note 462, at 125 (noting that after a certain point, increased protections only produce economic inefficiencies).

⁴⁶⁵ Bracha & Syed, *supra* note 362, at 241–43.

⁴⁶⁶ See *Market Share for Each Genre in 2022*, THE NUMBERS, <https://www.the-numbers.com/market/2022/genres> [<https://perma.cc/8N93-EV6W>] (reporting that action movies commanded more than half of the total movie market share in 2022).

⁴⁶⁷ See *id.*

⁴⁶⁸ See Bracha & Syed, *supra* note 362, at 241 (“The basic insight is that non-identical works can be partial market substitutes for each other.”).

⁴⁶⁹ Cf. Bracha & Syed, *supra* note 368, at 1845–46 (“The latest James Bond film, for example, competes with many other action-thriller films, and indeed with films of other genres and styles, that offer various viewers different levels of substitution for it.”).

⁴⁷⁰ Bracha & Syed, *supra* note 362, at 241–43. In fact, this is a byproduct of copyright's market signal function. Copyright relies on price signals—reflected in consumers' willingness to pay—as a mechanism for directing investments toward the most socially valuable works. See Demsetz, *supra* note 439, at 295. Under this allocative account, it is easy to see why concerns of duplicative investments might arise: firms will understandably seek to compete within the same category of ultra-successful works. See Bracha & Syed, *supra* note 362, at 241–43.

⁴⁷¹ See Raustiala & Sprigman, *supra* note 378, at 1592–94 (discussing category predictability).

this problem by reducing the rewards available to authors of successful works. In that way, this system could dissuade at least some authors from pursuing duplicative projects. That said, there is much uncertainty around the question of whether specific works are entirely wasteful. As others have noted, partial substitutes may be better tailored to the tastes of a subset of consumers.⁴⁷² And the sort of the market competition that stems from the ubiquity of partial substitutes is itself beneficial to the extent that it drives down prices, thereby blunting some of copyright's access costs.⁴⁷³

The central point here is that two distinct sets of justifications—one grounded in the classic incentive-access theory, and the other rooted in the desire to prevent duplicative investments—can both support the proposed framework.⁴⁷⁴ The precise effects of an ex post presumption may vary subtly depending on the author's level of certainty as to the prospect of commercial success: complete uncertainty, category predictability, or substantial predictability. Overall, however, the proposed approach would likely prove beneficial in some cases and neutral (or only modestly effective) in others.⁴⁷⁵

Of course, all of this presupposes that copyright's market function is the only or principal factor that authors consider in deciding whether and what to create. Yet it is also true that many authors are motivated to create not just out of a desire to make money, but also because they find the creative process satisfying or desirable for some other reason.⁴⁷⁶ Moreover, some creators fail to consider questions of financial gain in perfectly rational ways. Many creators dream (somewhat irrationally) of becoming world-famous superstars.⁴⁷⁷ Take away that dream—distant and implausible as it may be—and you risk turning away some potential authors. On this view, copyright can provide a powerful incentive for “those who are willing to gamble their all for the chance, however feeble, to grab the proverbial pot of gold.”⁴⁷⁸ By limiting the scope of pro-

⁴⁷² Bracha & Syed, *supra* note 362, at 243.

⁴⁷³ *Id.*

⁴⁷⁴ See Lunney, *supra* note 360, at 492–98 (discussing the incentive-access paradigm); Bracha & Syed, *supra* note 362, at 242–44 (explaining duplicative investments).

⁴⁷⁵ See *infra* notes 476–492 and accompanying text (unpacking the impacts of an ex post presumption).

⁴⁷⁶ See Christopher Buccafusco & Christopher Jon Sprigman, *Experiments in Intellectual Property* (discussing reasons for creation), in 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 579, 582–83 (Peter Menell & David Schwartz eds., 2019).

⁴⁷⁷ See Kinsella, *supra* note 78 (noting that the majority of artists make less than \$10,000 annually); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 41 (2011) (“Even if most literary, artistic and musical works are not highly valued by society, some are, and what . . . may motivate individuals to pursue their creative activities in the face of such dreadful odds of success is the hope of hitting the jackpot . . .”).

⁴⁷⁸ Zimmerman, *supra* note 477, at 41.

tection available to those who create successful works, we run the risk of slashing incentives.

A related concern is that the proposed approach would impact large, corporate content owners—those that manage a portfolio of copyrighted works of varying levels of success.⁴⁷⁹ If left with strong copyright protection only for their *unsuccessful* works, these firms would have little incentive to continue to invest in creating copyrighted works.⁴⁸⁰ In this telling, higher rewards for successful works are necessary to offset the losses that attach to unsuccessful ones.⁴⁸¹ So, if a production company pursues five projects but only one turns out to be successful, higher rewards for that successful project may be desirable.⁴⁸² Greater rewards may be an effective way to incentivize robust investment across a portfolio of different creative projects, many of which are likely to fail.⁴⁸³

For a variety of reasons, however, I find these objections wanting. For one thing, the proposed approach would kick in only *ex post* and only after the copyright owner has brought suit for infringement. More importantly, this Article does not suggest that we jettison copyright protection altogether; only that we incorporate a general presumption against successful works into certain doctrines. Such a presumption would not be dispositive—it would serve only as one factor out of many. Accordingly, in some cases but not in others, commercial success may lead a court to side with the defendant.

Why would an *ex post* approach be preferable to a categorical, *ex ante* rule? As a practical matter, an *ex post* presumption would lead to inconsistent results.⁴⁸⁴ In the context of fair use and fictional characters, for instance, courts would weigh commercial success as one relevant factor but would also continue to consider other factors—as they currently do—in determining whether to find for the plaintiff or not. The practical impact of commercial success would depend on the particular facts of the case and the specific doctrine at issue.⁴⁸⁵

⁴⁷⁹ Lunney, *supra* note 109, at 62–63.

⁴⁸⁰ *Id.*

⁴⁸¹ *See id.* (discussing the use of “portfolios” consisting of both successful and unsuccessful works).

⁴⁸² *Id.*

⁴⁸³ *Id.* This account finds support in F.M. Scherer’s classic work on the innovation lottery. *See generally* F.M. Scherer, *The Innovation Lottery*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY* 3 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., 2001). Scherer presents data suggesting that in both technological and artistic markets, the likelihood of failure is extraordinarily high and cannot be effectively mitigated through diversification. *Id.* at 7–15. Scherer then posits—building on Schumpeter’s work on the efficacy of lotteries—that the promise of great rewards to a small subset of superstars could be an effective way to stimulate investments. *Id.* at 15–19. To compensate for potential losses, our law should “sustain and reinforce” a system in which producers can recover extraordinary rewards. *Id.* at 20.

⁴⁸⁴ *See supra* notes 421–438 and accompanying text (proposing a more tailored approach to copyright).

⁴⁸⁵ *See supra* notes 421–438 and accompanying text (same).

For that reason, this policy proposal is unlikely to depress incentives to a measurable degree—it would make a difference only in some cases.

To an extent, such a soft presumption is a second-best solution. It falls short of categorically excluding successful works from copyright’s ambit.⁴⁸⁶ It does not push for full customization, but instead targets only a limited subset of works and only on an inconclusive, case-specific basis.⁴⁸⁷ But, as discussed above, a more subtle solution of this sort is necessary given the complexity of copyright policymaking and the need to ensure that copyright’s market signal function remains (at least partly) operative.⁴⁸⁸

Finally, even in cases involving corporate content owners, fears of reduced incentives are likely overblown. Consider the recording industry, where competitive and technological shifts have led to a dramatic decline in revenues.⁴⁸⁹ Strikingly, despite what has been described as a total “collapse in revenue,” the industry experienced little to no drop in creative output—and some have even suggested that music output has increased in the wake of these shifts.⁴⁹⁰ The data, limited as it may be, suggests a reason to question the alarmism that ordinarily accompanies debates about copyright reform.⁴⁹¹ Put simply, the proposed framework poses little risk to creative incentives. Claims to the contrary are both speculative and unlikely.

In Parts IV and V, this Article evaluates a number of additional objections to this revisionist account, pointing toward a more refined picture of when and how courts might confront commercial success.⁴⁹²

IV. TOWARD DOCTRINAL REFORM

In the preceding Parts, this Article explained that copyright doctrine sounds in the language of commercial success. Across a wide range of doctrinal contexts—the access inquiry, fictional characters, fair use, and copyright

⁴⁸⁶ See *supra* notes 421–438 and accompanying text (same).

⁴⁸⁷ See *supra* notes 421–438 and accompanying text (same).

⁴⁸⁸ See *supra* notes 421–438 and accompanying text (same).

⁴⁸⁹ Lunney, *supra* note 109, at 62–63.

⁴⁹⁰ *Id.*; see also Raustiala & Sprigman, *supra* note 378, at 1557–58. Raustiala and Sprigman report that “[i]n the nearly two decades since the digital file-sharing service Napster burst onto the scene, recording company revenues have plunged by almost sixty-seven percent.” Raustiala & Sprigman, *supra* note 378, at 1557. “But the doomsaying,” they explain, “was overblown.” *Id.* Over time, creative industries adjusted, and the best evidence suggests that although “[r]ecord company revenues shrank severely . . . more music is being produced than ever.” *Id.* at 1558.

⁴⁹¹ See Shani Shisha, *The Copyright Wasteland*, 47 *BYU L. REV.* 1721, 1774–77 (2022) (describing a century-old record of resistance by creative industries to any kind of technological or legal reform).

⁴⁹² See *infra* Parts IV–V (discussing further concerns surrounding commercial success).

remedies—courts consider the success of the protected work.⁴⁹³ The landscape of copyright doctrine is littered with questions of commercial success.⁴⁹⁴ Yet the prominence of market success masks a broader theoretical wrinkle: the most successful works are also the ones least deserving of copyright protection.⁴⁹⁵ Because the owners of such works are more likely to recoup their costs, they have little need for strong protection.⁴⁹⁶

This Part lays out an alternative analytical paradigm for thinking about commercial success.⁴⁹⁷ Section A advocates for a legal presumption *disfavoring* successful works.⁴⁹⁸ Section B examines how such a presumption might play out in practice.⁴⁹⁹ It offers a taxonomy of the different objectives that success-driven doctrines serve and demonstrates that a presumption against successful works might prove effective in some cases but not in others.⁵⁰⁰

A. A Framework for Successful Works

As noted earlier, a more granular understanding of copyright's prevailing justification, popularly known as the incentive-access framework, reveals a puzzle.⁵⁰¹ On the one hand, successful works are thought to be the most vulnerable works—those that merit maximal copyright protection given the risk of copying.⁵⁰² Copyright law purports to tackle precisely this risk: unauthorized copying. Because copyright is in fact a form of market regulation, it is most effective when applied to a successful work, one that enjoys some degree of market demand.⁵⁰³ By contrast, if the work is unsuccessful, there is little need for copyright protection; no one would want to copy it.⁵⁰⁴

But, on the other hand, successful works depart fundamentally from the traditional bases of copyright theory. The core problem is that the owners of successful works are more likely to recoup their costs easily and quickly.⁵⁰⁵

⁴⁹³ See *supra* Part II (describing the ways in which notions of commercial success underlie a wide range of copyright doctrines).

⁴⁹⁴ See *supra* Part II (same).

⁴⁹⁵ See *supra* Part II (discussing this tension).

⁴⁹⁶ See *supra* Part II (same).

⁴⁹⁷ See *infra* Part IV (proposing an alternative framework for considering commercial success).

⁴⁹⁸ See *infra* notes 501–526 and accompanying text (discussing the presumption against successful works).

⁴⁹⁹ See *infra* notes 527–564 and accompanying text (considering how to apply the presumption in practice).

⁵⁰⁰ See *infra* notes 527–564 and accompanying text (same).

⁵⁰¹ See *supra* notes 378–420 and accompanying text (discussing the incentive-access paradigm).

⁵⁰² See *supra* notes 392–397 and accompanying text (explaining that copyright protection is most relevant in cases involving successful works).

⁵⁰³ See *supra* notes 387–397 and accompanying text (same).

⁵⁰⁴ See *supra* notes 387–391 and accompanying text (same).

⁵⁰⁵ See *supra* note 405 and accompanying text (discussing cost recuperation).

From a policy perspective, that means that these copyright owners have little need for strong protection.⁵⁰⁶ When an exceptionally successful work is at issue, there is no need for strong copyright protection.⁵⁰⁷ So, if copyright policy is truly driven by the prospect of cost recoupment, as the conventional wisdom would have us believe, then successful works appear to inspire a conundrum: they are at once most in need of protection and least deserving of it.⁵⁰⁸

What does this mean for the future of copyright law? As a general matter, copyright is supposed to be success-neutral.⁵⁰⁹ But, as explained above, ours is essentially a market-based system, one in which there are winners and losers.⁵¹⁰ This has always been the case and, to an extent, will always remain so.⁵¹¹ The copyright regime is inevitably responsive to the market: winners are far more likely to have the knowledge and resources to enforce their rights, and, more significantly, they are the only ones with an incentive to do so. Copyright is relevant when the work has some commercial value.⁵¹²

Thus, even if considerations of success were expressly banished from the realm of copyright, this would not change the realities and risks that creators face: only a tiny subset of creators succeed, and the rest fail miserably.⁵¹³ The

⁵⁰⁶ See *supra* note 405 and accompanying text (same).

⁵⁰⁷ See *supra* note 404 and accompanying text (offering an example—Taylor Swift’s *The Eras Tour* movie—to demonstrate how quickly the owners of successful works can recover their costs).

⁵⁰⁸ See *supra* note 405 and accompanying text (discussing cost recuperation).

⁵⁰⁹ See *supra* note 1 and accompanying text (discussing principles of neutrality in copyright law). In fact, even the principle of aesthetic neutrality—the idea that courts should not pass judgment on the artistic or aesthetic qualities of the work—turns out to be rather unworkable. In theory, courts profess a commitment to aesthetic neutrality. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268 (11th Cir. 2001) (“[C]ourts should not judge the quality of the work or the success of the attempted humor in discerning its parodic character”); *id.* at 1273 (“[L]iterary relevance is a highly subjective analysis ill-suited for judicial inquiry.”). Nonetheless, as others have documented, courts often make hidden, implicit assumptions about the aesthetic value of the work. See Stacey M. Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263, 295–303 (2015) (arguing that courts make aesthetic judgments in assessing transformative use). See generally Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343 (2015); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 251 (1998).

⁵¹⁰ See, e.g., Derek S. Khanna, *Republican Study Committee Policy Brief: Three Myths About Copyright Law and Where to Start to Fix It*, 32 CARDOZO ARTS & ENT. L.J. 1, 4 (2013) (“Today’s legal regime of copyright law is seen by many as a form of corporate welfare that hurts innovation and hurts the consumer. It is a system that picks winners and losers, and the losers are new industries that could generate new wealth and added value.”); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1213 (2009) (noting that “[i]n an industry as big, dynamic, and competitive as fashion, there are always winners and losers”).

⁵¹¹ See *supra* notes 77–118 and accompanying text (discussing the past and present of copyright law).

⁵¹² See *supra* notes 378–420 and accompanying text (developing a theoretical account of the relationship between commercial success and copyright law).

⁵¹³ See *supra* notes 378–420 and accompanying text (same).

fundamental problem is not that courts consider commercial success; it is that they do so in the wrong way. If we care about cost recoupment, successful works should be protected to a *lesser* extent. Too often, however, courts get things backwards: they weaponize market success as a factor supporting stronger copyright protection.⁵¹⁴

The question, then, is not whether courts should do away with commercial success altogether. Instead, we need to direct our effort toward constructing a better framework for evaluating commercial success within specific contexts. Given the theoretical account sketched above, courts should harbor a healthy measure of skepticism about the scope of copyright protection afforded to successful works.⁵¹⁵ Accordingly, rather than foreclose reliance on commercial success, this Article suggests that courts treat market success as a strike *against* strong copyright protection.

This proposal is not radical. Copyright scholarship has long recognized that the copyright system tends to benefit a small coterie of rich and famous copyright owners. Christopher Buccafusco, for example, claims that our copyright regime privileges wealthier and older creators.⁵¹⁶ He explains that copyright's *prima facie* case depends on whether the defendant copied from the plaintiff's work or instead independently created a separate work.⁵¹⁷ Proof of copying is a requisite condition for liability because independent creation is a complete defense to infringement.⁵¹⁸ As a practical matter, it is rather easy to make a *prima facie* case of infringement: the plaintiff can register the work with the Copyright Office and enjoy a presumption of validity, while the defendant often faces a considerable burden in proving that they didn't copy from the work but rather independently created a separate one.⁵¹⁹ In that way, Buccafusco shows that the structure of copyright doctrine is likely to favor copyright plaintiffs—and those tend to be older and wealthier.⁵²⁰

Others echo a similar sentiment. Some posit that, in the digital era, where creators can produce and disseminate works inexpensively, the costs associated with our law far outweigh the benefits.⁵²¹ The practical effect here is that the copyright system imperils the capacity of poorly financed authors to engage in

⁵¹⁴ See *supra* notes 378–420 and accompanying text (same).

⁵¹⁵ See *supra* notes 378–420 and accompanying text (same).

⁵¹⁶ Buccafusco, *supra* note 130, at 1661–62.

⁵¹⁷ *Id.* at 1649–62.

⁵¹⁸ *Id.* at 1620–21.

⁵¹⁹ *Id.* at 1661. As Buccafusco makes clear, “[c]opyright law tends to presume that plaintiffs’ works are original, while defendants can face a daunting burden of establishing that their works were not copied, perhaps even by their subconscious minds.” *Id.*

⁵²⁰ *Id.* at 1661–62.

⁵²¹ Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1562–66 (2005).

creative production.⁵²² Likewise, some commentators observe that “copyright produces specific winners and losers,”⁵²³ suggesting that “[i]f copyright law is about incentives for individual creators, then caring about how copyright doctrines distribute the benefits of copyright law between the haves and have nots is fundamental.”⁵²⁴

This Article seeks to do just that: it offers a corrective blueprint for reallocating copyright’s benefits between the haves and have nots. One way to do so is to craft a general presumption against strong copyright protection in cases involving successful works.⁵²⁵ To be sure, this does not mean that protection ought to be withheld from profitable works. Rather, I argue only that courts need to consider commercial success as a single, non-dispositive factor weighing against strong copyright protection.⁵²⁶ And this framework should be limited to *clearly* successful works—think of a Taylor Swift album, a Quentin Tarantino movie, or an Andy Warhol piece. The next Section explains how courts might go about doing so.

B. Typology and Prescriptions

To understand how we might implement a presumption against successful works, it is important to consider the different objectives that commercial success serves in particular legal settings. Doctrinally, success operates in two distinct ways. First, some courts invoke commercial success as a rule of evidence.⁵²⁷ Second, courts occasionally extend preferential treatment to the own-

⁵²² See *id.* at 1564 (“[Recent technological] development[s] upset[] copyright’s distributive logic and change[] copyright from a system that seems, on balance, to benefit poorly financed creators, to one that endangers their ability to express themselves using powerful cultural artifacts.”).

⁵²³ Rebecca Tushnet, *Free to Be You and Me? Copyright and Constraint*, 128 HARV. L. REV. F. 125, 136 (2015); see also Khanna, *supra* note 510, at 4 (concluding that copyright law “picks winners and losers”).

⁵²⁴ Tushnet, *supra* note 523, at 136.

⁵²⁵ See *supra* notes 501–524 and accompanying text (discussing the presumption against commercial success). This Article is not the first to propose that successful works might be less deserving of strong protection. See Lunney, *supra* note 109, at 66 (“In order to avoid undue excess incentives, the more popular a work is, the less copyright protection it should receive.”). Indeed, prior scholarship has called attention to the practical effects that flow from the copyright system. See, e.g., Lunney, *supra* note 360, at 492–98 (discussing the incentive-access paradigm). This Article, however, demonstrates that the problem is not just *practical* but also *doctrinal*. See *supra* Part II (discussing doctrine). It is true that copyright law works to the benefit of the wealthy. But this is not only a predictable outcome for a market-based system—rather, notions of commercial success also underlie copyright *doctrine* in a more explicit manner. See *supra* Part II.

⁵²⁶ See *supra* notes 501–515 and accompanying text (discussing the proposed presumption).

⁵²⁷ See, e.g., *supra* notes 323–326 and accompanying text (examining how commercial success is employed as an evidentiary tool in assessing damages).

ers of successful works on the theory that any unauthorized use of a commercially successful work is inherently unjust and thus infringing.⁵²⁸

First, consider the evidentiary role of commercial success. In many of the contexts mapped in Part II, courts turn to commercial success to support the factual record on a particular issue.⁵²⁹ One example is the access inquiry.⁵³⁰ In the typical case, the plaintiff must prove that the defendant had access to the protected work.⁵³¹ The question of access often depends on circumstantial evidence, and courts have long found that commercial success is one piece of circumstantial evidence that might support an inference of access.⁵³² Generally speaking, the inferential chain goes something like this: when the protected work is successful, it is widely disseminated; and when the work is widely disseminated, a court or jury could infer that the defendant had a reasonable opportunity to access the work.⁵³³ If the plaintiff's song is playing on the radio and has been topping the relevant sales charts, one might conclude—as an inferential matter—that the defendant had a reasonable opportunity to encounter the work.⁵³⁴ The analysis of commercial success, in short, is an exercise in inference-based judgment. Success operates as a critical piece of indirect evidence.⁵³⁵

The same is true for two other areas of copyright law: fair use and damages. In calibrating damages, courts must evaluate the plaintiff's lost profits.⁵³⁶ Doing so would be near-impossible without attending to the market performance of the work.⁵³⁷ By examining the fees that the plaintiff typically charges for use of his or her work, courts can assess how much the plaintiff would have charged the defendant but for the infringement.⁵³⁸ By the same token, in the fair use context, some courts treat commercial success as evidence of market harm. When the work is successful, courts routinely assume that the defendant's use is not fair because it threatens to inflict market harm.⁵³⁹ When the converse is true—namely, when the work is not successful—some courts are

⁵²⁸ See *infra* notes 529–564 and accompanying text (analyzing the courts' preferential treatment of successful works).

⁵²⁹ See *supra* Part II (exploring various doctrinal contexts in which questions of commercial success arise).

⁵³⁰ See *supra* notes 125–183 and accompanying text (discussing the access inquiry).

⁵³¹ See *supra* notes 125–134 and accompanying text (discussing the plaintiff's burden in an infringement suit).

⁵³² See *supra* notes 138–147 and accompanying text (collecting cases in which commercial success was used to support an inference of access).

⁵³³ See *supra* notes 138–147 and accompanying text (same).

⁵³⁴ See *supra* notes 146–155 and accompanying text (same).

⁵³⁵ See *supra* notes 146–155 and accompanying text (same).

⁵³⁶ See *supra* notes 317–347 and accompanying text (discussing lost-profit damages).

⁵³⁷ See *supra* notes 317–347 and accompanying text (same).

⁵³⁸ See *supra* notes 317–347 and accompanying text (same).

⁵³⁹ See *supra* notes 231–245 and accompanying text (discussing the interplay between the fair use doctrine and commercially successful works).

more likely to countenance claims that the defendant's conduct is fair use.⁵⁴⁰ In short, success sometimes fills an evidentiary gap.⁵⁴¹

But success can also serve a very different function. Some courts leverage evidence of success to support their intuitions about notions of free riding or unjust enrichment.⁵⁴² Rather than focus on whether the defendant's conduct is actually infringing or whether it qualifies as fair use, these courts are determined to rule against the defendant simply because they deem his or her conduct to be inherently parasitic or unjust.⁵⁴³ The problem is that impulses of this sort are often hidden from view, untethered to copyright policy, and divorced from the law.⁵⁴⁴ Courts simply assume that the defendant is in the wrong for engaging with a popular work—whether or not such conduct is objectionable as a matter of doctrine or sound policy.⁵⁴⁵

Take the *ComicMix* case, where the U.S. Court of Appeals for the Ninth Circuit held that fair use did not shield the defendant's book, which combined artistic themes from *Star Trek* and *Dr. Seuss*.⁵⁴⁶ In discussing market harm, the court implied that the defendant's copying is not fair simply because it capitalized on the plaintiff's brand.⁵⁴⁷ As the court pointed out, the defendant "intentionally targeted and aimed to capitalize on" the plaintiff's market.⁵⁴⁸ The defendant's use of the work was problematic "because of *Seuss*'s strong brand."⁵⁴⁹ The court, in other words, was aghast at what it viewed as an attempt by the defendant to enrich itself by seizing on the "strong brand" of a successful work.

As noted above, it is not at all clear that such questions should figure in the market harm analysis: the consensus among courts is that the issue of harm does not depend on an existing market.⁵⁵⁰ It should not matter, then, that the plaintiff has a "strong brand" or that the work has proven successful.⁵⁵¹ The

⁵⁴⁰ See *supra* notes 246–262 and accompanying text (discussing fair use).

⁵⁴¹ See *supra* notes 246–262 and accompanying text (same).

⁵⁴² See, e.g., *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 461 (9th Cir. 2020) (finding evidence of potential market harm partly due to the "strong brand" of *Dr. Seuss* books).

⁵⁴³ *Id.*

⁵⁴⁴ Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 140–42 (2010) (surveying and critiquing the prevalence of free riding arguments in trademark law); Lemley, *supra* note 372, at 1033–46 (describing a trend toward a "free riding" model of intellectual property law and arguing that such a move would be at odds with the basic convictions that underlie intellectual property theory and policy).

⁵⁴⁵ See Lemley & McKenna, *supra* note 544, at 137 ("[F]ree-riding claims fall back on empty circularity.").

⁵⁴⁶ 983 F.3d at 448.

⁵⁴⁷ *Id.* at 460.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 461.

⁵⁵⁰ See *supra* notes 264–278 and accompanying text (discussing the relevance of success).

⁵⁵¹ See *supra* notes 264–278 and accompanying text (same).

relevant question is whether the defendant's use is likely to usurp *potential* or *reasonable* markets for the work.⁵⁵² So the work's commercial success, or lack thereof, simply should not matter. The inquiry hinges on potential markets, not existing ones.⁵⁵³

In practice, however, courts sometimes invoke commercial success as near-conclusive evidence of market harm.⁵⁵⁴ Judges are often motivated in part by unjust enrichment impulses. They believe it would be unfair to allow the defendant to free ride on the plaintiff's efforts, regardless of whether the defendant's use harms the kind of potential market that the plaintiff might reasonably pursue. Indeed, free riding intuitions were at work in *ComicMix*, where the court faulted the defendant for benefiting from the plaintiff's brand.⁵⁵⁵ But it does not—or, at least, should not—matter that the defendant *benefited* from the work; rather, the relevant question is whether the defendant *harmed* the plaintiff's market.⁵⁵⁶

A similar pattern can be glimpsed in cases where courts consider fictional characters. Though a variety of different tests abound, courts essentially examine fictional characters by reference to two principal questions: whether the character is sufficiently delineated and whether it is distinctive.⁵⁵⁷ Technically, these tests leave little room for an inquiry into commercial success: the relevant question is not whether the character is successful, but whether it is original.⁵⁵⁸ Nonetheless, courts often drift away from the question of originality and instead turn their gaze to the issue of *recognizability*.⁵⁵⁹ Here, too, instincts of free riding grow more pronounced—it is often the case that a successful char-

⁵⁵² See, e.g., *ComicMix*, 983 F.3d at 461 (noting that “the law does not limit the scope of the relevant market to products that are already made or in the pipeline”).

⁵⁵³ See *supra* notes 264–278 and accompanying text (discussing the role of potential markets under the fourth factor).

⁵⁵⁴ See, e.g., *ComicMix*, 983 F.3d at 461 (emphasizing Dr. Seuss's strong brand).

⁵⁵⁵ *Id.*

⁵⁵⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (explaining that, under the fourth factor, courts should consider (1) “the extent of market harm caused by the particular actions of the alleged infringer”; and (2) “whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market” (quoting 3 NIMMER & NIMMER, *supra* note 125, § 13.05(A)(4))).

⁵⁵⁷ See *supra* notes 184–223 and accompanying text (discussing fictional characters).

⁵⁵⁸ See, e.g., *Daniels v. Walt Disney Co.*, 958 F.3d 767, 771–74 (9th Cir. 2020) (applying two different tests—the *Towle* and “story being told” tests—to determine if a character is copyrightable).

⁵⁵⁹ See, e.g., *Daniels v. Walt Disney Co.*, No. 17-CV-4527, 2018 WL 3533363, at *2 (C.D. Cal. May 9, 2018) (finding that the plaintiff's characters did not “engender the kind of ‘widely identifiable’ recognition of . . . traits” (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003))), *aff'd*, 952 F.3d 1149 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 958 F.3d 767 (9th Cir.), and *aff'd*, 958 F.3d 767 (9th Cir. 2020).

acter is automatically presumed to be “recognizable” and thus protectable.⁵⁶⁰ Court use recognizability as a smokescreen to protect successful works.⁵⁶¹

All of this suggests that courts deploy commercial success to promote one of two goals: to support the circumstantial record or to expand copyright protection on the basis of unjust enrichment impulses. What are we to make of this intricate landscape?

First, this Article suggests that the proposed principle—that courts disfavor strong copyright when the work is successful—should *not* apply in contexts where commercial success serves a purely evidentiary role. Such contexts include the access inquiry and the damages analysis. In both instances, courts harness commercial success as a piece of direct or indirect evidence. It is hard to see how courts could address these issues without tackling commercial success: widespread dissemination does lend itself to a presumption of access, and damages ultimately boil down to an assessment of market performance.⁵⁶² In these circumstances, courts should be allowed to attend to commercial success as they currently do—namely, on an evidentiary basis.

Second, when commercial success serves a mixed or non-evidentiary role, the suggested presumption should weigh against the plaintiff. In such cases, courts are routinely driven by reflexive notions of free riding.⁵⁶³ This is so in cases dealing with fair use and fictional characters.⁵⁶⁴ When such disputes arise, courts should consider commercial success as a factor that tips against the copyright owner. Doing so is defensible as a matter of copyright policy. In summary, this analysis points toward a presumption that (1) is not conclusive; (2) weighs against clearly successful works; and (3) applies only in cases where commercial success serves no legitimate evidentiary purpose.

V. OBJECTIONS AND REFLECTIONS

Having given the proposed framework a more concrete shape, this Article now turns to a number of countervailing considerations that might enrich—and, in places, complicate—the resulting landscape.⁵⁶⁵ Section A evaluates whether the proposed framework would affect prospects for the dissemination of successful works.⁵⁶⁶ Section B assesses whether the proposed framework

⁵⁶⁰ See *id.* (comparing the plaintiff’s character to a variety of iconic characters, including Sherlock Holmes, Superman, Tarzan, and James Bond).

⁵⁶¹ *Id.*

⁵⁶² See *supra* Part II (discussing the access doctrine and copyright damages).

⁵⁶³ See *ComicMix*, 983 F.3d at 460–61.

⁵⁶⁴ See *supra* notes 184–316 and accompanying text (discussing fictional characters and fair use).

⁵⁶⁵ See *infra* notes 566–593 and accompanying text.

⁵⁶⁶ See *infra* notes 569–577 and accompanying text.

would be administrable.⁵⁶⁷ Section C asks what a presumption against success can tell us about the oft-invoked metaphor of the monolithic “market.”⁵⁶⁸

A. Widespread Dissemination

In the traditional telling, the copyright system seeks to encourage—rather than snuff out—robust dissemination of expressive works.⁵⁶⁹ Copyright law aims to make creative works broadly accessible to the public.⁵⁷⁰ Critics might thus argue that the proposed system would run afoul of this very ideal by depriving broadly disseminated works of strong protection.

This argument befuddles more than it reveals. First, recall that copyright protection serves to *limit* access to copyrighted goods by barring copyists from creating and distributing unauthorized copies.⁵⁷¹ In doing so, copyright law allows the author to charge a higher price for the work, meaning that some consumers will be priced out of the market.⁵⁷² That is the tradeoff at the heart of our copyright regime: copyright protection means reduced access.⁵⁷³ The result is that strong protection for successful works may ultimately shortchange the public—after all, reducing the scope of protection attaching to such works could lead these works to be disseminated at a *larger* scale.⁵⁷⁴

Second, the copyright regime aims to ensure that copyrighted works are made available to consumers as well as *future creators*.⁵⁷⁵ A work can be made accessible to the former but not the latter—such as when the owner decides to license the work for passive consumption but refuses to license it to those who wish to create derivative works.⁵⁷⁶ And that should give us pause. The copyright system rests on the assumption that short-term copyright constraints will

⁵⁶⁷ See *infra* notes 578–582 and accompanying text.

⁵⁶⁸ See *infra* notes 583–593 and accompanying text.

⁵⁶⁹ See Balganes, *supra* note 15, at 1577–81 (discussing copyright incentives).

⁵⁷⁰ *Daniels v. Walt Disney Co.*, No. 17-CV-4527, 2018 WL 3533363, at *2 (C.D. Cal. May 9, 2018), *aff'd*, 952 F.3d 1149 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 958 F.3d 767 (9th Cir.), and *aff'd*, 958 F.3d 767, 775 (9th Cir. 2020).

⁵⁷¹ See Lunney, *supra* note 360, at 492–98 (discussing the incentive-access paradigm).

⁵⁷² See *supra* notes 355–377 and accompanying text (same).

⁵⁷³ See *supra* notes 368–375 and accompanying text.

⁵⁷⁴ Lunney, *supra* note 360, at 492–98.

⁵⁷⁵ *Id.* at 495. I draw here a distinction between active creators and passive consumers. Active creators are those who draw on an existing work, however loosely, in order to create a new one. Passive consumers, by contrast, are those who merely access the work—namely, watch the movie, read the book, or listen to the music. See generally Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003).

⁵⁷⁶ See, e.g., *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 460–61 (9th Cir. 2020) (noting that copyright holders have a right to refuse to license their content to prevent market saturation).

facilitate subsequent creation in the long term.⁵⁷⁷ Put differently, there are strong policy grounds for limiting the scope of protection extended to successful works, if only in an effort to promote the kind of dissemination that copyright is most clearly concerned with—dissemination to future creators.

B. Administrability

Another source of skepticism involves the administrability of the proposed system. Courts have few tools to assess with any degree of sophistication whether and to what extent a particular work is commercially successful.⁵⁷⁸ So a legal presumption compelling courts to disfavor successful works might prove difficult to enforce in practice.

And yet this objection misfires, too. First, as others have noted, the adversarial process has proven effective at “cut[ting] through . . . [the] accounting . . . tricks used to minimize the appearance of profits” in certain creative industries.⁵⁷⁹ Second, the proposed framework would bear only on cases involving *obviously* successful works—think of a Madonna album or a Disney movie. In such cases, even the most elaborate accounting tricks can do little to obscure success.⁵⁸⁰ Third, copyright owners have a strong incentive to allege and prove that their works are commercially successful. In some litigation contexts, such as the access analysis or the damages inquiry, successful works fare better.⁵⁸¹ Importantly, as explained above, this Article proposes that in these contexts, where commercial success serves a legitimate evidentiary role, the presumption against successful work need not apply.⁵⁸² Consequently, plaintiffs would still have a strong incentive to allege commercial success.

⁵⁷⁷ See Lunney, *supra* note 360, at 498.

⁵⁷⁸ Lunney, *supra* note 109, at 61–62.

⁵⁷⁹ *Id.* at 61. More notably, Hollywood studios are notorious for employing a variety of different accounting ploys to “guarantee[] that the movie is never, ever seen as ‘profitable.’” See Mike Masnick, *Hollywood Accounting Strikes Again: Universal Sued for Screwing Over Its Own Sister Company*, TECHDIRT (Mar. 4, 2013), <https://www.techdirt.com/2013/03/04/hollywood-accounting-strikes-again-universal-sued-screwing-over-its-own-sister-company/> [<https://perma.cc/R4PZ-ZQYV>]. Nevertheless, courts are often quick to dismiss such tricks. Lunney discusses one example, *Buchwald v. Paramount Pictures Corp.*, where the plaintiff sued Paramount for adapting his screenplay into the hit movie *Coming to America*. No. C 706083, 1990 WL 357611, at *1 (Cal. Super. Ct. Jan. 8, 1990); see Lunney, *supra* note 109, at 61–62. Having been found liable for infringement, Paramount asserted that the movie generated no net profits despite grossing millions in the box office. *Buchwald v. Paramount Pictures Corp.*, No. 706083, 1992 WL 1462910, at *1 (Cal. Super. Ct. Mar. 16, 1992). The court promptly rejected this argument and ordered Paramount to pay the plaintiff \$750,000. *Id.* at *3–5.

⁵⁸⁰ *Buchwald*, 1992 WL 1462910, at *1–6 (measuring the work’s degree of commercial success).

⁵⁸¹ See *supra* notes 125–223 and accompanying text (discussing numerous doctrinal contexts in which commercially successful works fare better).

⁵⁸² See *supra* notes 527–565 and accompanying text (discussing the proposed presumption).

C. The Market as a Metaphor

Finally, I would like to offer a few thoughts on the vision of copyright law this framework appears to solemnize. This Article conceptualizes copyright as a market-based enterprise. It recognizes that this system arises out of—and, to an extent, entrenches—a world of winners and losers. Because copyright is so solicitous of market performance, it tends to benefit winners and disadvantage losers.

Even if adopted, the proposal advanced here would do little to unsettle this reality. Copyright, at its core, is a legal system that operates on the basis of market success.⁵⁸³ So even if courts viewed successful works with a critical eye, the vast majority of losers—creators who fail to satisfy or otherwise attract market demand—would remain, unfortunately, on the outs.⁵⁸⁴ No single legal reform could magically transform losers into winners.

Indeed, this Article accepts that copyright is, and perhaps should be, subservient to the market. In relying on the market, copyright evinces an air of epistemic humility: a belief that policymakers and courts should not be in the business of shaping consumer perceptions about what qualifies as meritorious creativity.⁵⁸⁵ Instead, by adhering to a principle of aesthetic non-discrimination, the law appeals to a seemingly objective measure—“consumers’ willingness to pay”—to determine value.⁵⁸⁶

But the market remains something of an imprecise metaphor—a monolithic black box. By uncritically embracing this contested vision of “the market,” copyright admittedly glosses over the many ways some individuals are prevented from participating in the market and the various ways works are made or enjoyed.⁵⁸⁷ And though such questions lie decidedly beyond the scope of this Article, this much is clear: the market is not purely responsive to consumer preference but also plays a central role in *shaping* these very preferences.⁵⁸⁸ The relationship between market forces and consumers is thus dialectical.

⁵⁸³ See *supra* Part II (discussing the ways in which commercial success permeates copyright doctrine).

⁵⁸⁴ See *supra* Part II (same).

⁵⁸⁵ See *supra* notes 60–66 and accompanying text (discussing the interaction of law and consumer preferences).

⁵⁸⁶ Michael J. Madison, *Book Review—William Patry, How to Fix Copyright*, 3 IP L. BOOK REV. 29, 34 (2013).

⁵⁸⁷ See *id.* (“‘The market’ is a monist metaphor, and a kind of black box, that conceals the plural ways in which creative work is created and enjoyed, and the ways in which many individuals are precluded from participating in ‘markets’ as they wish to.”).

⁵⁸⁸ See Raustiala & Sprigman, *supra* note 378, at 1596–97 (discussing how Spotify shapes market preferences).

Consider the model of data-driven creativity described in Part III.⁵⁸⁹ Streaming giants such as Netflix rely on the trove of data that they collect to tailor their content to consumer preferences.⁵⁹⁰ But the problem is that by relying almost exclusively on *current* trends—in ways that were previously neither possible nor precise—companies like Netflix are increasingly narrowing the universe of creative genres, formats, and styles available for consumption and inspiration.⁵⁹¹ By calcifying contemporary trends and turning away from the types of risky content that do not mesh with current preferences, market forces can produce an entrenching effect: eventually, we will be left with a trimmed-down cache of currently-in-vogue types of content.⁵⁹²

Thus, far from merely reflecting consumer preferences, the market also shapes the kinds of content that consumers can and want to consume.⁵⁹³ Copyright policy, in turn, needs to take note of these limitations. But this is not to say that copyright law should break from the market altogether. As flawed as the free market fiction may be, the alternative—a system in which judges or lawmakers are given free rein to make express judgments about creative merit—may well prove more dangerous still.

In the end, this Article is both modest and ambitious. It is modest in that it does not question the role of the market as the basis for copyright law. At the same time, it is ambitious in the sense that it pushes courts to think seriously about the broader mission of our system. It spotlights the disconnect between market success and copyright theory: successful works are simply less deserving of strong copyright protection. Acknowledging this relationship is a step in the right direction.

CONCLUSION

Commercial success is copyright's ghost in the machine. At first glance, it may seem as though success plays a rather trivial role in certain limited contexts. But when one considers the full range of doctrines that accommodate notions of market success, the trickle grows into a torrent. In practice, success drives much of modern copyright law.

⁵⁸⁹ See *supra* notes 451–454 and accompanying text.

⁵⁹⁰ Raustiala & Sprigman, *supra* note 378, at 1584–98. These companies can dramatically reduce the commercial risks they face. *Id.* Perhaps that is why Netflix has been producing so many vampire-themed shows of late; these shows almost certainly play into the preferences of young consumers. Abby Monteil, *Why Are Vampires Taking Over TV?*, DECIDER (Oct. 7, 2021), <https://decider.com/2021/10/07/why-vampires-taking-over-tv> [<https://perma.cc/N44B-QESD>].

⁵⁹¹ See, e.g., *supra* note 466 and accompanying text (suggesting that, consistent with consumer preferences, action movies dominate the box office).

⁵⁹² Cf. *supra* note 466 and accompanying text (same).

⁵⁹³ See Raustiala & Sprigman, *supra* note 378, at 1596–97.

This Article is the first to explore the nature, evolution, and impact of this success-driven system. Normatively, it argues that the most successful works—those most likely to be copied—are also the ones least deserving of copyright protection. This Article’s core claim, then, is that courts should adopt a presumption disfavoring successful works. This approach may seem like a sharp departure from our centuries-old system of commercial neutrality. But the proposed approach is hardly new—as this Article shows, courts have long grappled with questions of commercial success across a variety of seemingly distinct domains of copyright law. Yet for all its salience, commercial success does not get nearly as much airtime as it deserves. Commentators almost universally paper over the central role that success plays in shaping the boundaries of copyright doctrine. After decades of relative obscurity, it is time we draw commercial success out of the shadows.