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Render Copyright unto Caesar: On Taking Incentives Seriously

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This Essay suggests we bifurcate our thinking. Conventional copyright rules by money, so let it rule the money-bound. Let a different set of rules evolve for more complex uses, particularly when the users have a personal relationship with the utilized text. Much recent scholarship contains dramatic suggestions to secure a freedom to be creative, rewrite, and be imaginative. My work has long sought to defend such freedoms, but I believe we understand imagination and its conditions too little to employ it as a starting point. I suggest instead that we acquire a better conceptual map of the generative process and the mix of incentives that serve it.

In particular, this Essay asks us to consider the role of free receipt. An example may be found in the Talmud, which tells of a carob tree being planted by an old man who would not live to eat its fruit. When a passerby expressed surprise, the old man replied, “I found [ready grown] carob trees in the world; as my forefathers planted these for me so I too plant these for my children.”¹

The perception that one has received a gift can stir a desire to give gifts of one’s own. Out of this desire, one creates, and the reciprocal creation starts a new cycle of generativity. Moreover, one may experience the free receipt of anything that one has not created *as if it were* a gift, whether or not there was an actual willing donor. Copyright scholars need to consider whether the current expansion in copyright—an expansion that requires new authors to pay for an ever larger proportion of the expression they receive and use—might have

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¹ The translation is from the *Soncino English Talmud*, B. Taanit 23a, excerpted at <http://www.maqom.com/Honi.html> (visited Nov 15, 2003).

a previously under-recognized cost, namely, muffling the emotions of free receipt that might otherwise stimulate generative activity.

Gratitude is not the only explanation of why unearned receipt can spur one's own efforts. Resentment and the desire to throw off the discomfort of a perceived obligation may also suffice, as might a wish to compete with the giver for status or power, or a wish to secure an unearned gift by deserving it. Despite the remarkable variation in etiology ascribed to the phenomenon, a growing consensus in literary theory,² behavioral psychology,³ and anthropology⁴ suggests that one reaction to costless receipt is a corresponding desire to give, share, or produce something of equivalent or greater value.

Such an urge may be insufficient to provide a living for those who produce art or software. For one thing, reciprocation is not the only form that the reaction can take. Instead, like the planter of the carob tree, the recipient of bounty may choose to pay the debt "forward." Leaving the source of the bounty uncompensated is sometimes morally improper, and sometimes imprudent from the perspective of providing efficient incentives.⁵

Yet morality is not always offended when beneficial acts go less than fully rewarded, and incentives are not always and inevitably at risk when a positive externality goes un-internalized. This Essay argues that, as to the potential borrowers most likely to be affected by the emotions of free receipt, neither morality nor economics requires

² See, for example, Lewis Hyde, *The Gift: Imagination and the Erotic Life of Property* (Vintage 1983) (arguing that authorial production often results from gratitude); Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* xiii (Oxford 2d ed 1997) (claiming that authorial production often results from a desire to cast off perceived burdens from the past).

³ See, for example, Gary E. Bolton and Axel Ockenfels, *ERC: A Theory of Equity, Reciprocity, and Competition*, 90 *Am Econ Rev* 166 (2000) (explaining how perceived equity, reciprocity, and competition factor into decisionmaking via actors' pecuniary payoffs and their relative payoff standing); Ernst Fehr and Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 *Q J Econ* 817 (1999) (arguing that economic environment determines whether fairness considerations or purely selfish motives dominate equilibrium behavior). The introduction of money, for example, can sometimes change preferences or behavior in a way that remains even when the money is thereafter removed. See Uri Gneezy and Aldo Rustichini, *A Fine Is a Price*, 29 *J Legal Stud* 1, 14 (2000).

Suggestions for explaining the observed phenomena differ widely. See, for example, Jeroen van de Ven, *The Economics of the Gift* (CentER Discussion Working Paper No 2000-68, July 2000), online at <http://papers.ssrn.com/id=244683> (visited Nov 15, 2003) (discussing different motivations for giving); Gary Charness and Ernan Haruvy, *Altruism, Equity, and Reciprocity in a Gift-Exchange Experiment: An Encompassing Approach*, 40 *Games & Econ Beh* 203 (2002).

⁴ Because of the desire to reciprocate, gift-giving can function as a form of exchange; nevertheless it often does not involve immediate reciprocity. For a useful overview, see C.A. Gregory, *Gifts*, in John Eatwell, Murray Milgate, and Peter Newman, eds, 2 *The New Palgrave: A Dictionary of Economics* 524 (Macmillan 1987). For a classic treatment, see Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (Routledge 1990) (W.D. Halls, trans).

⁵ This Essay does not argue that monetary incentives are unnecessary to encourage creation. Its point rather is that we need to identify the optimal mix of monetary and nonmonetary incentives for various contexts within the cultural industries.

the imposition of a duty to refrain from copying. It therefore urges that we turn to investigating how monetary and nonmonetary models interact in calling forth new work.⁶

Part I discusses the gifts all artists receive, namely, a tradition and world they have not made. Part II argues that neither morality nor economics rules out consideration of free receipt. This Part draws on John Locke's intuition that property owners have moral obligations arising out of mutually received gift—obligations that should limit copyright owners' ability to restrain others—and suggests that the economic justifications for copyright are similarly limited. Part III casts a cautionary eye on attempts to increase the role of liability-rule remedies in copyright; Part IV suggests possible rules that might be implemented if the costs of commodification prove sufficiently substantial. Throughout, this Essay proposes areas for further research.

I. TRADITION AS GIFT

Consider the middle quatrain of Shakespeare's Sonnet 87:

For how do I hold thee but *by thy granting*,
 And for that riches *where is my deserving?*
 The *cause* of this *fair gift* in me is wanting,
 And so my *patent* back again is swerving.⁷

Written as to a deserting lover, "Sonnet 87 (not by design) also can be read as an allegory of any writer's (or person's) relation to tradition."⁸ We receive images, tales, language, and structure from the past. As co-inheritors, any recipient may claim equality against the other recipients. But because the "fair gift" was given in excess of our desert, we hold it insecurely. A writer's sense of insecurity might be fruitful. But this insecurity might be eliminated or muted if the receiving author (Shakespeare in this case) had paid for a license, as would probably be required under today's copyright law.⁹

In prior work, I have used economics and notions of just desert to argue that our current law imposes too many prohibitions on borrow-

⁶ For example, in some contexts a small payment extinguishes intrinsic motivation without itself inducing effort, while a large payment may more than compensate for the extinction vel non of the intrinsic motive. See, for example, Ernst Fehr and Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J Econ Persp 159, 170–72 (2000); Uri Gneezy and Aldo Rustichini, *Pay Enough or Don't Pay At All*, 115 Q J Econ 791 (2000).

⁷ William Shakespeare, *Sonnet 87*, in Stanley Wells, ed. *Shakespeare's Sonnets and a Lover's Complaint* 101 (Oxford 1985) (emphases added).

⁸ Bloom, *Anxiety of Influence* at xiii (cited in note 2).

⁹ See Richard A. Posner, *Law and Literature* 397–99 (Harvard rev ed 1998) (concluding that there is a strong probability that Shakespeare "would have been guilty of infringement" under modern standards).

ing.¹⁰ Here I suggest that imposing a duty to pay for use might in particular be inappropriate for a subclass of potential defendants: namely, persons who are peculiarly well placed to be motivated by perceptions of gift because they have a personal relationship to the text.

II. THE LOCKEAN CONCEPTION OF GIFT AND THE PUBLIC DOMAIN

All artists create using much they have not themselves created, both in terms of physical and human surroundings and in terms of cultural heritage. The holders of a common cultural tradition resemble the inhabitants of Locke's state of nature: their riches are largely not of their own making.

An artist's relationship to her tradition sometimes involves quotation and imitation in ways that implicate copyright law. That law insufficiently recognizes that, because predecessors also built on tradition, the claims that they can rightfully assert against the makers of later art should be limited. Current copyright law understates those limits, largely because the law conceives of the "public domain" as an area free of obligations. Under current law, anyone can copy from the public domain, and claim copyright in what he has added, regardless of whether doing so will impair others' use of the underlying domain that all inherited together. John Locke's position was different.

Believing that "God . . . has given the Earth to the Children of Men, given it to Mankind in common,"¹¹ Locke treated free access to the common as something that must be given priority over honoring an individual's claim to the fruits of her labor. When someone employs her labor to make the land or its fruits useful, she has a private claim over the result only provided she leaves "enough, and as good" for others.¹² The proviso requiring "enough, and as good" reflects a moral intuition regarding what we undeservedly receive: when we reap what we have not sown, we have a duty not to shrink the shares

¹⁰ See, for example, Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 Loyola LA L Rev 159 (2002) (arguing that existing copyright terms are economically unjustified); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L J 1533 (1993).

¹¹ John Locke, *The Second Treatise of Government* § 25, in *Two Treatises of Government* 265, 286 (Cambridge 1988) (Peter Laslett, ed).

¹² Locke argued that unanimous consent was not required before one co-owner appropriated. Any other co-owner who complained about the appropriation in circumstances where the complainer had "as good" available was merely "covetous" and "quarrelsome":

He that had as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to, and not the Ground which God had given him in common . . .

of those whose position is the same as ours. This was part of Locke's generally assumed obligation not to do harm.¹³

Although many have argued that private ownership of land violates the Lockean proviso, ownership of property *other than land* has appeared by contrast an easy case to justify. Thus, John Stuart Mill wrote:

It is no hardship to any one to be excluded from what others have produced: . . . he loses nothing by not sharing in what otherwise would not have existed at all.¹⁴

Because intellectual property can be used by many simultaneously, satisfying the proviso seems even easier for copyright claimants. That is not the case. An author who claims copyright in what she intermixes with the common sometimes can in fact do harm, including harm to others' use of the pre-existing material. I argue that borrowing is often justified to avoid or mitigate these harms.¹⁵ But before exploring the resulting liberties, it would be useful to identify the narrow compass within which the obligation to avoid harm and the claim to private ownership can coexist compatibly.

A. When a Duty to Refrain from Use of Others' Work Can Justifiably Be Imposed

1. Using another's efforts as a mere means to one's own ends: the instrumentalist user.

This Essay distinguishes between two types of uses that can be made of predecessor work. In one class belongs the copying by an artist/user who uses a pre-existing work simply to save effort and expense, as a fungible instrument. In the second class belongs the copying by any artist/user who has been affected by the prior work in some way other than a simple stimulated desire for "more." Copyright sweeps everybody into its reach, but it is the first group, whom I call "instrumental" users, who stand as the proper target at copyright's conceptual core.¹⁶ These persons aim to take for their own use benefits

¹³ See Gordon, 102 Yale L J at 1540–48 (cited in note 10) (arguing that a prohibition against doing harm stands as the primary basis of the Lockean right to property and the proviso that limits it).

¹⁴ John Stuart Mill, 2 *Principles of Political Economy* ch II, § 6 at 233 (Longmans, Green 1926) (W.J. Ashley, ed).

¹⁵ Note that I make no argument for a right of action against the person whose speech causes harm. Rather, I am suggesting a liberty for the harmed person to engage in "more speech."

¹⁶ By copyright's core, I mean the structure in which a private party's right to stop others from copying her work is most justified. Whether real fact patterns exist that match such a core is a separate issue. We need to understand the central, idealized model, where everything fits, before moving to reality.

toward which the author had labored, not because of a personal relationship between the user and the copied creation, but simply because using the creation facilitates the user's other ends. In relation to the text, such persons are as close to purely self-interested economic actors as can be imagined. In Locke's words, the instrumentalist is the person who "desired the benefit of another's Pains which he had no right to, and not the Ground"¹⁷ that was the common gift.

Preventing an instrumentalist from using the work for his own profit makes him no worse off than if the pre-existing work had never come to his notice. Excluding instrumentalists from the laborer's product still leaves them with "enough, and as good" as the laborer herself possessed. Denying them use of a work or making them pay for it simply restores them to their status quo ante, the classic function of corrective justice.

2. Harm to the first author's plans.

Unlimited liability is not morally proper even against the instrumentalist user. In the Lockean system, an owner's rights are limited not only by the proviso, but also by the condition that the claimant must have "labored" to produce the thing over which exclusivity is claimed. Laboring is a purposive notion.¹⁸ The liability of instrumentalist users is therefore defined not only with reference to their motive, but also with reference to the result of how that motive is pursued: the harmful effect on the laboring author.

Sometimes, incidental to her primary activity, a laborer produces beneficial effects that spill over into other areas. It is difficult to see moral reasons for condemning a third party (even an instrumentalist user) for making productive use of the spillover. The behavior of in-

Early American copyright statutes did not reach far beyond instrumental users, but copyright law has drastically expanded since the 1790s. Thus, cases like *Folsom v Marsh*, 9 F Cas 342, 344-45 (CCD Mass 1841), confirmed that most transformative uses were not infringing; today, the fair use doctrine is the primary remnant of the broad privilege early copyright gave the public to make transformative uses. For the history, see Pierre Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L Rev 1449, 1451-53 (1997).

¹⁷ Locke, *Second Treatise* § 34 at 291 (cited in note 11).

¹⁸ Lawrence Becker argues that purpose is essential to the notion of "labor," for one "labors toward" a particular goal. See Lawrence Becker, *Property Rights: Philosophic Foundations* 48-50 (Routledge & Kegan Paul 1977). A similar constraint can be seen in notions of corrective justice. When an infringer usurps the copyright owner's intended market, justice is achieved by simultaneously removing the unjustified gain from the defendant and restoring it to the plaintiff. Both are restored to the status quo ante. Consider Aristotle, *The Nicomachean Ethics* 84-86 (D. Reidel 1975) (Hippocrates G. Apostle, trans); Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 Ratio Juris 211 (1989). A much more ambiguous status applies to a person who benefits from another's efforts without interfering with the goals toward which the laborer had worked. For exploration of this point in regard to intellectual property, see Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 Va L Rev 149, 238-48 (1992).

strumentally motivated users has a clearly wrongful quality only insofar as it interferes with the plans of the laboring author.¹⁹

A focus on harm to the plaintiff's expected plans is also central to the standard economic justification of copyright. This justification proceeds as follows: without a duty to obtain licenses, copyists could sell at a price that does not cover the cost of creation; if copying is cheap and consumers would accept the unauthorized copies as exact substitutes, copyists could arise who would drive authors or their royalty-paying publishers into debt; the fear of this possibility causes a decrease in creative incentives; to avoid this decrease in incentives, copyright is instituted. This argument takes the form of a prisoner's dilemma game.²⁰ When the copyist does not interfere with the expected market of the author or her authorized publisher, there is no prisoner's dilemma.

In sum, the instrumentalist is someone who has not been affected by the work's content. Barring his use (or requiring him to pay a license fee tied to the revenue he anticipates) would not impose a net harm on him. From a moral and economic perspective, he should refrain from copying that interferes with the laborer's plans, and Locke's logic justifies making him subject to suit when he violates that duty.

B. When There Is No Duty to Refrain from Use

Beyond instrumentalist users, there is a second group, defined by having a connection with the work itself. Because they do not merely seek the "benefit of another's Pains," the proviso is unlikely to be satisfied when suit is brought against them. Such persons may be entitled to some freedom to borrow even when their use interferes with the original author's plans.²¹ To such a "content-oriented user," the text is not just a commodity, an instrument, or a tool that can be exchanged with other tools. Such a user has an emotional reaction to the text that

¹⁹ Admittedly, an authorial laborer can adopt a broad conception of her plans. (For example, "I envisage production of my work in all media in all languages on all planets with all accompaniments and all variations possible, forever.") At some point a normative choice must identify the interests in which the author has a stake significant enough to warrant protection from injury.

²⁰ The copyright version of the prisoner's dilemma game goes something like this: "To cooperate" means "to invest in creating new writings." (For example, one could "cooperate" by investing one's own time in creating a writing, or by paying royalties to someone else who has devoted her efforts to such a project.) "To defect" means "to publish work created by others without paying them." Defenders of intellectual property argue that without copyright, people will avoid becoming authors or royalty-paying publishers lest they become the "cullies" of nonpaying copyists who will capture the market by charging a lower price. See generally Wendy J. Gordon, *Intellectual Property Law*, in Peter Crane and Mark Tushnet, eds, *Oxford Handbook of Legal Studies* 617 (Oxford 2003).

²¹ I am assuming a "use" such as copying here, not destruction or alteration.

is nonfungible. The need to react to the text may involve use of the text; suppressing the need will violate the proviso.

I do not contend that enforcing copyright will always suppress or distort the borrower's creative impulse. If the second-generation author can effectively use the work by paying, and if paying does not interfere with her expressive use, then from the perspective of the proviso she is like an instrumentalist and must pay. If however paying *does* interfere, then the proviso is implicated.

Lewis Hyde and others have forcefully argued that calculation can indeed interfere with artists making new work;²² David Lange has argued that it can interfere with audiences enjoying and integrating others' works.²³ If so, the content-oriented user is left with two choices. Either one—refraining from the expressive use, or paying in a way that affects the expressive use—leaves the content-oriented user without “enough” in the sense of “ability to use her experience for art.” It also leaves her without “as good” to the extent that at some prior temporal point, more such freedom was available.

Some content-oriented users should be restrained by law; some should not. Among those whom the law should not restrain from using predecessor art are those new authors whose perceptions have been deeply and negatively affected by encountering the predecessor work. An example is Alice Randall, author of *The Wind Done Gone*,²⁴ an Afro-centric critical sequel to *Gone with the Wind*²⁵ that was, for a while, banned from store shelves for copyright infringement.²⁶ Randall stated that she would rather have been “born blind”²⁷ than have read *Gone with the Wind*. Such an author's position in life has been negatively affected by the predecessor work. To forbid Randall the tools necessary to deal fully with the change can make her worse off than if she had never encountered the work at all.

In some ways, her situation resembles the position of a reliance party in promissory estoppel. In both cases, the law may limit the freedom of the actor who had reason to realize that the other party will likely come to change position: like some promisors, the first author communicates words that will infiltrate and change the percep-

²² See, for example, Hyde, *The Gift* at 152 (cited in note 2).

²³ David Lange, *The Public Domain: Reimagining the Public Domain*, 66 L & Contemp Probs 463 (2003).

²⁴ Alice Randall, *The Wind Done Gone* (Houghton Mifflin 2001).

²⁵ Margaret Mitchell, *Gone with the Wind* (Scribner 1936).

²⁶ See *SunTrust Bank v Houghton Mifflin Co.*, 136 F Supp 2d 1357 (ND Ga 2001) (enjoining production, display, distribution, advertising, sale, or offer for sale of the book *The Wind Done Gone*), revd, 268 F3d 1237 (11th Cir 2001) and 252 F3d 1165 (11th Cir 2001).

²⁷ Alice Randall, Interview, *The Connection* (July 16, 2001), online at <http://archives.theconnection.org/archive/2001/07/0716b.shtml>. Randall's hyperbole does not obscure the underlying statement: integrating *Gone with the Wind* into her life was something that *hurt*.

tions and perhaps the behavior of the recipient. Once the text or promise has been proffered and has been foreseeably relied on, the precise intent of the person authoring the text or promise becomes less important: arguments of fairness come into play against allowing the author of the text or promise to withdraw it at whim.²⁸ Just as sometimes a gratuitous promisor must pay to avoid harming a relying promisee, an author must sometimes allow some use to avoid harming the affected readers.

Barring audiences from using the works they encounter can leave them without a key condition needed for their own creative expression. Before the invention of copyright, authors possessed freedom²⁹ to use all the world around them (including those portions of the world authored by others). The institution of copyright risks leaving a new creator without “enough, and as good” access to the material of her life.

One can sketch a rough continuum to describe the many utilizers whose motives are not solely instrumental and whose economic effects are not purely substitutive. At one pole are the authors like Alice Randall, who should be empowered to use the prior work by a self-defense privilege based on a kind of reliance. Thus, I argue that these are persons against whom the laborer has no perfected property right, for the product of the labor did her harm. If her self-help to undo the harm requires use of the property, the Lockean proviso would allow such use. Even some litigated cases have recognized such self-defense as legitimately privileged; against harmful speech it is legitimate to use “more speech” even when that involves copying.³⁰

²⁸ An alternative analogy is the privilege of “self-defense”: the second author (recipient) should be able to use the donor’s work in order to defeat its harmful effects. See Gordon, 102 Yale L J at 1603 (cited in note 10). See also Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, in Niva Elkin-Koren and Neil Weinstock Netanel, eds, *The Commodification of Information* 149, 171–72 (Kluwer Law 2002). See also note 30.

²⁹ I do not mean to overstate. In the 1600s there was no copyright, but freedom was not full either—censorship abounded. See, for example, *Censorship*, in *Shakespeare’s Life and Times*, online at <http://web.uvic.ca/shakespeare/Library/SLTnoframes/literature/censorship.html> (visited Jan 13, 2004) (discussing censorship in England during the Elizabethan age).

³⁰ Jerry Falwell, as part of a fundraising effort, sent his supporters photocopies of a copyrighted *Hustler* magazine attack on him. The Ninth Circuit wrote:

[A]n individual in rebutting a copyrighted work containing derogatory information about himself may copy such parts of the work as are necessary to permit understandable comment. Falwell did not use more than was reasonably necessary to make an understandable comment when he copied the entire parody from the magazine. . . . [T]he public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness.

Hustler Magazine, Inc v Moral Majority, Inc, 796 F2d 1148, 1153 (9th Cir 1986). Thus, although the First Amendment barred Falwell from suing *Hustler* for the emotional damage the attack caused him, see *Hustler Magazine, Inc v Falwell*, 485 US 46 (1988), the First Amendment did not

Close to this group are the new artists whose encounter with the predecessor work was not harmful, but who have integrated the prior work into themselves. They are not sufficiently protected by copyright's dichotomy between owned "expression" and publicly usable "ideas."³¹ Thus, James Joyce deeply questioned "copyright's notion that ideas and facts are anterior to their particular expressions, and thus separable, yielding to paraphrase, transmissible without either disfigurement or infringement."³² Prohibiting someone from using others' expression—as copyright does—can divide the enjoined person from a part of herself.³³

To illustrate these users, let us begin with the poet Stephen Spender. He writes:

Paul Valéry speaks of the "*une ligne donnée*" [a line that is given] of a poem. One line is given to the poet by God or by nature, the rest he has to discover for himself.

My own experience of inspiration is certainly that of a line or a phrase or a word or sometimes something still vague, a dim cloud of an idea which I feel must be condensed into a shower of words. . . . It occurs in what seems to be an active, male, germinal form³⁴ as though it were the centre of a statement requiring a beginning and an end, and as though it had an impulse in a certain direction.³⁵

What is most interesting for copyright purposes occurs when the *ligne donnée* comes from another's work. For example, artist J.S.G. Boggs writes:

Creative people are prisoners. That is to say, that they get "captured," and the only way out is to beat a path away from the point of captivity. If my attention is "captured," it is impossible to simply get away. The bars are not physical. They are produced by the intellectual, the emotional, or, more unusually, a combination

bar the court from giving Falwell a "self-help privilege" of self-defense assertable under the label of fair use.

³¹ See 17 USC § 102(b) (2000) (stating that copyright does not extend to ideas).

³² Paul K. Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* 189 (Cornell 2003) (discussing the "Oxen of the Sun" episode in *Ulysses*).

³³ See generally Wendy J. Gordon and Sam Postbrief, *On Commodifying Intangibles*, 10 Yale J L & Humanities 135 (1998) (arguing that one reason for placing ideas in the public domain is to guard against persons receiving parts of themselves pre-alienated).

³⁴ Let us forgive Spender his gender bias; after all, a woman poet in the same circumstances could probably talk about the pressure a gravid mother feels when a child is being born.

³⁵ Stephen Spender, *The Making of a Poem*, in Brewster Ghiselin, ed., *The Creative Process: A Symposium* 112, 118 (Mentor 1952) (emphasis added).

of the two. But, they are as functional as any jail cell ever constructed in the material world.³⁶

T.S. Eliot thought that the work of a poet was “to capture those feelings which people *can hardly even feel, because they have no words for them.*”³⁷ But even as to a free man, capable of expressing himself fully without need to quote, allowing one poet the privilege of quotation without the need for potentially painful negotiation helps the public greatly without much harming the person quoted. With such transformative use, there is no prisoner’s dilemma. An example of pure benefit that should nevertheless be allowed is Bob Dylan’s frequent but trivial borrowings in his album, *Love and Death*, from the English translation of a Japanese book.³⁸ One suspects that these bits and pieces would have drifted out of Dylan’s mind in a day or two—so that they did not significantly imprison him. Nevertheless, in a day or two other fragments of received culture would probably have taken their place. To sift these out may interfere with the creative process; to deny the book’s copyright holder a right to sue would probably cause more gain than loss to society.³⁹

Such freedom from copyright is also likely to benefit authors in the long run, as evidenced by the long tradition among fine artists and composers of tolerating each other’s uses. More documentation of these customs and their limits is needed, but we can preliminarily speculate that this form of gift allowed artists to use each other’s work under a custom of tolerance that served their mutual self-interest.

Now that copyright terms typically endure seventy years beyond the life of the author, that custom of gift may alter. That does not mean that generosity toward borrowing has ceased to serve authors’ interests; rather, copyright term extension has changed the players.

³⁶ J.S.G. Boggs, *Who Owns This?*, 68 Chi Kent L Rev 889, 889 (1993). A conceptual artist, Boggs creates portraits of dollar bills.

³⁷ T.S. Eliot, *What Dante Means to Me*, in Peter S. Hawkins and Rachel Jacoff, eds, *The Poet’s Dante* 28, 38 (Farrar, Strauss, and Giroux 2001) (emphasis added). Eliot himself often “borrowed lines” from Dante, “to arouse in the reader’s mind the memory of some Dantesque scene, and thus establish a relationship between the medieval inferno and modern life.” Id at 31.

³⁸ See Jonathan Eig, *Did Bob Dylan Lift Lines from Dr. Saga? Author Is Flattered*, Wall St J A1 (July 8, 2003).

³⁹ This argues that some socially desirable uses—beyond those privileged by Locke’s proviso not being met—require freedom from copyright to occur. The justification here sounds primarily in consequentialist welfarist arguments, rather than in natural law. It could sound in natural law as well, if the rights lost by the initial laborer are fungible with other gains the copyright system gives her. I have argued that since current copyright gives first-generation authors so much more than that to which they are morally entitled, and takes from the public (including second-generation authors) liberties to which the public is morally entitled, the system as a whole should “pay back” to the public what it has lost, a payment that should come out of the copyright’s “extra-moral” revenues. This kind of analysis makes social welfare part of a corrective-justice analysis; copyright must serve the public to repay it for its loss of natural liberty. See Gordon, 102 Yale L J at 1608–09 (cited in note 10).

There is no reciprocity between a publisher or author on one side and, on the other, an heir or testamentary trustee such as SunTrust Bank. While publishers and authors may grant permissions in the hope of obtaining future reciprocity, neither a bank nor a non-artist heir is likely to need a liberty of allusion. The duties of heirs and executors are also likely to make them more protective of their decedent's narrowly defined self-interest than the deceased authors themselves would have been. As one cannot argue with the dead, heirs may feel it necessary to protect the dead even where the dead themselves may have been generous.⁴⁰

Gift suggests reciprocity, but intergenerational gift suggests another mode of payment: gift from the prior generation to the present, and the present generation to the future. Ordinary gift is a circle: donor gives to donee, and later the donee reciprocates by giving to donor. Intergenerational gift does not involve exact reciprocation, but it has deep roots in property traditions, and perhaps in our instincts. Carol Rose calls on it in regard to the environment: a "combination of respect for the thing itself, together with care for other users, is what it means to have a 'gift' that comes to us from beyond our control—a gift that we pass along as yet another gift to those who follow."⁴¹ Moreover, when we are speaking of artistic creation, the early generations would not necessarily lose thereby. They had a freedom to copy their surroundings that copyright seeks to deny to their successors.⁴² Disney copies from folk tales; perhaps current law should not prohibit folk from copying from Disney.

Whether prior work is shared voluntarily or not, the person free of copyright obligations receives what feels like a gift. The way the sensation of receipt operates in the receiver's psyche is much debated. On one side stands the optimistic view of gift, epitomized by Lewis Hyde. He argues that the sensations stirred in an artist by an existing artwork create a fecund gratitude out of which new work arises.⁴³ On the other side stands the dark view of gift, one that emphasizes the resentment to which gift can give rise and the relations of unequal status that it can enforce. Exemplars here include Derrida,⁴⁴ Rzepka,⁴⁵ and

⁴⁰ Paul Saint-Amour intriguingly suggests that post-mortem copyright can serve as a form of mourning, often unhealthily extended. See Saint-Amour, *The Copywrights* at 121–58, 199–220 (cited in note 32).

⁴¹ Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 *Envir L* 1, 31 (1994).

⁴² For further development, see the discussion of intergenerational equity in Gordon, 102 *Yale L J* at 1577–78 (cited in note 10), and Wendy J. Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 *L & Contemp Probs* 93, 103 (1992).

⁴³ Hyde, *The Gift* at 47 (cited in note 2).

⁴⁴ Jacques Derrida, *Given Time* 13–14 (Chicago 1974) (Peggy Kamuf, trans) (showing how gifts can impose debt obligations).

Bloom.⁴⁶ In either the light or the dark view, when a prior work is experienced, something emotional can occur. Copyright, by requiring monetary payment, may reduce the felt need to make an emotional payment.

Predecessor art is not the only source of the sense of receipt and gratitude, nor of receipt and anxiety. But it is one source, and like the other sources, must be respected. The artist does not always have a choice about what he is given, what seizes him. It is bad enough, as Vincent Van Gogh once wrote, when an artist “is inwardly consumed by a great longing for action” but feels “as it were imprisoned in some cage, because he does not possess what he needs to become productive.”⁴⁷ Emotional shackles may be unavoidable. We must be wary of the additional inhibitions that the law may impose.

III. CAN INSTITUTIONAL RE-ENGINEERING OF LEGAL REMEDIES MAKE IT EASIER TO SATISFY THE PROVISIO?

Most of the world’s use is neither purely instrumentalist nor purely transformative. What to do? Full copyright enforcement could harm the utilizer, but free use could harm the laborer. In such cases, the proviso that the laborer leave “enough, and as good” is violated. There seems to be no way to avoid harm. Refrain from enforcement, and the laborer/author is harmed. Enforce a copyright, and the user is harmed.

Faced with this dilemma, several commentators (including me) have suggested crafting a copyright remedy that would *avoid* the worst harm to the user: denying an injunction, and awarding the copyright owner only a right to an allocable share of the user’s profits⁴⁸ or an award of damages or reasonable royalty.⁴⁹ A money-only remedy holds out the possibility of transforming a user with mixed status into

⁴⁵ Charles J. Rzepka, *Sacramental Commodities: Gift, Text, and the Sublime in De Quincey* 52–58, 295–98 (Massachusetts 1995).

⁴⁶ Bloom writes:

Weaker talents idealize; figures of capable imagination appropriate for themselves. But nothing is got for nothing, and self-appropriation involves the immense anxieties of indebtedness, for what strong maker desires the realization that he has failed to create himself?

Bloom, *Anxiety of Influence* at 5 (cited in note 2).

⁴⁷ Vincent Van Gogh, Letter to Theo Van Gogh (1880), in 1 *The Complete Letters of Vincent Van Gogh* 198 (New York Graphic Society 1959).

⁴⁸ In earlier work I have suggested that if such persons earn a net profit, then perhaps the law should impose on them a duty to give a share of those profits to the predecessor author. See Gordon, *Excuse and Justification* at 169 n 57, 188–92 (cited in note 28). A similar position, more fully articulated and recommended with less doubt, appears in Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 Yale L J 1 (2002).

⁴⁹ See, for example, Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 Colum L Rev 1600, 1622–24 (1982) (exploring judicially imposed licenses).

one who, like an instrumentalist, would not be harmed by the laborer's assertion of right. Even the Supreme Court has suggested an openness to denying injunctive relief against expressive infringers.⁵⁰

This apparently ideal solution, however, has difficulties of its own. The incentive issue is sometimes phrased as a mere issue of quantity: does sufficient payment flow to authors? But that is not the only issue; *how* money and permission come together with the work also matters.⁵¹ Markets are not just invisible conveyor belts that carry resources from one application to another; they change how resources are used. Adopting expanded monetary remedies has the potential for eroding the good effects of free receipt that otherwise might be experienced by potential defendants. Abjuring injunctions could also constrict the way that all authors (as potential plaintiffs) view their work. Copyright and its monetary market mechanisms can coexist with many but not all noneconomic norms governing art.

We need to separate two areas in our minds. In one corner of the ring is the instrumentalist user who sees the work he uses as a commodity without emotional ties. Copyright deals well with him. In the rest of the ring, a myriad of other folks bustle about. We need to think separately about the different classes of alternative persons, and come up with new models.

This is difficult in part because of one thing copyright does well for the noneconomic sphere. It gives authors control over how their work is used, rather than just a monetary payment. The more the law pushes authors toward seeing their work in a cash-only nexus, the more danger it poses of devaluing the work in the artists' own minds. Common observation suggests that intrinsic motivations tend to produce better work, at least in the highly skilled vocations, than extrinsic motivations.⁵² But extrinsic motives could increasingly displace intrinsic ones if an author is entitled only to a sum of money. Unfortunately, the way to achieve the more integrated mode of reward (that is, control rather than mere payment) is via injunction, which is problematic

⁵⁰ See *Campbell v Acuff-Rose Music, Inc.*, 510 US 569, 578 n 10 (1994) (“[C]ourts may also wish to bear in mind that the goals of the copyright law . . . are not always best served by automatically granting injunctive relief.”) (internal citations omitted).

⁵¹ See, for example, Dan Ariely and José Silva, *Payment Method Design: Psychological and Economic Aspects of Payments 2* (working paper Aug 20, 2002) (on file with author) (“Based on ideas from behavioral economics, we contend that the disutility of paying can be substantially influenced by the method of payment.”); Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 Yale L J 369 (2002); Josh Lerner and Jean Tirole, *Some Simple Economics of Open Source*, 50 J Indust Econ 197 (2002) (outlining the motivations that drive free software developers).

⁵² My claims are, I believe, verifiable by examining everyday life. Experimental data tends in the same direction, but is of course far from robust. For some of that data, see Theresa M. Amabile, *Creativity in Context: Update to The Social Psychology of Creativity* 149–52 (Westview 1996) (analyzing the effects of evaluation on intrinsic motivations and creativity).

because injunctions are precisely what cause the most extreme free speech difficulties.

There is much we can learn about the costs of replacing the injunctive option with expanded monetary recoveries.⁵³ For example, empirical studies could examine the ways in which creators already dominated by compulsory or blanket licensing in one nation (for us, the composers of popular music⁵⁴) may differ from similar creators in nations where such money-only reward has a smaller role. For now, I call only for a *conceptual* separation. We should conceptually render unto Caesar the concepts that are Caesar's, and then proceed to think constructively about the rest of the world.

IV. IMPLEMENTATION

Research has commenced on how receiving money can dampen effort⁵⁵ and analogous issues need to be addressed in the artistic context. The legal literature is filled with studies related to deterrence; the role of affirmative incentives needs concomitant attention. Even a neoclassical economist should admit that the emotional toll of payment is at minimum a kind of transaction cost that needs to be taken into account.⁵⁶ Given the data that already exists, I suspect that we will find a wide range of contexts in which imposing on noninstrumentalists a duty to negotiate and pay for licenses generates on the whole more costs than benefits for society. If this is true (and if, as I argued above, there are no moral or economic arguments that would *prima facie* require imposing such duties) we might wish to operationalize the insight. But how? It would hardly be practicable to adopt a rule that said, "No liability against anyone who relates to the text noninstrumentally." Not only might too many instrumentalists erect a pretense of noninstrumental motives (causing false positives), but too many noninstrumentalists might fear their situation may be misinterpreted (causing chilling effects). More objective criteria must be sought.

⁵³ Research has already begun on the practicability of compulsory licenses. Among other difficulties, determining the appropriate amounts of payment can be daunting. See S.J. Liebowitz, *Alternative Copyright Systems: The Problems with a Compulsory License* (working paper Aug 2003), online at <http://www.utdallas.edu/~liebowit/intprop/complpff.pdf> (visited Nov 15, 2003).

⁵⁴ Anyone can make a recording of a previously recorded song under compulsory license, see 17 USC § 111, and virtually all performance media and locales obtain blanket licenses from ASCAP and BMI.

⁵⁵ See, for example, Gneezy and Rustichini, 29 *J Legal Stud* at 14–15 (cited in note 3) (reporting that experimental subjects who received low compensation performed less well than subjects to whom money was not mentioned).

⁵⁶ See Ariely and Silva, *Payment Method Design* (cited in note 51) (exploring different modes of payment, and finding a significant effect from "the pain of paying").

A plausible substitute might be a rule such as this: a person who makes transformative use, in a context where the use is not ordinarily accompanied by pre-use negotiation or licensing, should be free of liability. The making of a transformative use captures most of those who relate to the text for its own sake, and the requirement of noncommercial context captures most of those whose artistic tasks would be distorted by the need to engage in advance negotiation. Such a rule would *preserve* copyright liability against entities like movie producers, who are already so immersed in commercial necessities that buying a copyright license is hardly likely to have any distorting impact.

The proposed rule has some connection to existing doctrine. For example, portions of the copyright statute extend special liberties to users of copyrighted works in nonprofit or noncommercial settings.⁵⁷ Further, in fair use cases, courts ask both whether the defendant's use is transformative and whether that use is part of the ordinary market to which the plaintiff can expect to license.⁵⁸ However, the perspective I suggest here puts more focus and importance on the defendant's ordinary expectations regarding market involvement. Given the lack of moral justification for rights asserted against noninstrumentalist users, I think it appropriate to shift the locus of perspective from plaintiffs to such defendants.⁵⁹

Another area where research is needed is on the effect of denying injunctions but expanding the grant of monetary relief. For example, although much useful work has inquired into workplace settings and incomplete contracting to see how and whether monetary payments either "crowd out" or supplement voluntary incentives,⁶⁰ rela-

⁵⁷ For example, the statute allows copyrighted music to be performed for free during most classroom sessions, see 17 USC § 110(1)–(2), and grants the organizers of benefit concerts a conditional liberty to have live singers and bands sing copyrighted musical works for free before paying audiences, so long as no payment or other compensation is made to the performers, promoters, or organizers, see 17 USC § 110(4).

⁵⁸ "Only 'traditional, reasonable, or likely to be developed markets' are to be considered [as weighing against a defendant] in this connection, and even the availability of an existing system for collecting licensing fees will not be conclusive." *Princeton University Press v Michigan Document Services, Inc.*, 99 F3d 1381, 1387 (6th Cir 1996) (en banc), quoting *American Geophysical Union v Texaco Inc.*, 60 F3d 913, 930–31 (2d Cir 1994). In both these cases, photocopying was held not to be a fair use. One of the key findings against the defendant was that ready markets existed through which they could have received authorization or authorized copies.

⁵⁹ In actuality, the question I am asking is neutral: would a market exchange produce results less desirable than would a lack of payment? The expectations and behaviors of both parties must be considered for that complex question to be answered.

I have long argued that "market failure" can be a ground for fair use. What is argued here and in *Excuse and Justification* is that the conventional list of market imperfections does not exhaust the possibilities. Even where there are low transaction costs, perfect knowledge, and the rest, the mere existence of a monetary transaction can be costly.

⁶⁰ Many lawyers were introduced to the issue in William M. Landes and Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J Legal Stud 83 (1978) (suggesting that imposing a legal duty to aid might decrease intrinsic de-

tively little research has focused on the arts.⁶¹ I share Margaret Jane Radin's skepticism about claims that any monetization will trigger the collapse of entire fields of emotional connection into cash calculation.⁶² Nevertheless, the law can transform persons' conceptions of themselves and others, and amidst the growth of liability rule solutions more work needs to be done on how such transformations erode incentives. My own suspicion is that in the end, the traditional all-or-nothing choice between fair use and full liability is preferable to routinely awarding monetary remedies in copyright cases affected by the public interest. Not only might the switch to monetary remedies encourage a growth in pro-plaintiff doctrine (a growth that hardly needs any more fertilizer), but it also might undermine authors' emotional conception of their task.

If after investigating these costs of commodification, monetary remedies remain the best way to proceed, I suspect that the most limited, "profit only" remedy will prove to generate the best mix of incentives and liberties: allow defendants engaging in transformative, non-commercial uses to keep the proceeds from their work (including a reasonable compensation for their own efforts and expenses), but make them liable for giving the owners of copied works an allocable share of any profit beyond that amount. Restitution law has long been conscious of the difference between monetary and nonmonetary benefits. Suits seeking monetary disgorgement have the possibility of returning everyone to the status quo, and are more favored by restitution law than are suits over other sorts of benefits (such as services rendered). Ordering disgorgement of the latter poses the danger of making the defendant worse off than before the interaction began. Imposing liability on a noncommercial and transformative user poses the same risk, and potentially without concomitant public benefit.

CONCLUSION

At the moment, copyright is stuck: apparently, its institutions cannot implement all applicable norms. That may be a permanent condition. But consider the parallel problem, decades ago, when the Supreme Court was forced to recognize that the "private law" category of defamation law had implications for free speech. The Court did not respond by fully depriving public figures of the right to sue for

sires to rescue). For an overview of experiments examining how explicit incentives can reduce rather than increase effort, see Fehr and Gächter, 14 *J Econ Persp* at 170–72 (cited in note 6).

⁶¹ One exception is the work of Theresa Amabile and her colleagues, who have done numerous experiments on the artistic production of children. See note 52.

⁶² See Margaret Jane Radin, *Contested Commodities* 95–114 (Harvard 1996) (resisting the "domino" notion that allowing some commodification will inevitably lead to all things being commodified).

defamation. Rather it adopted a creative rule: that when making false statements regarding public figures, media would be liable—but only for malice or reckless disregard for the truth.⁶³ Similarly creative flexibility is needed in copyright. I have suggested elsewhere that solutions may lie in abolishing the “subconscious copying rule,”⁶⁴ significantly broadening fair use,⁶⁵ altering remedies,⁶⁶ and requiring proof of specific intent in some copyright cases.⁶⁷ Another potential rule change, suggested here, is to eliminate or narrow the copyright owner’s right to sue those borrowers who engage in transformative uses, and who (unlike movie makers) are not so immersed in the commercial sphere that their creative fuel would be dampened by requiring them to seek advance permissions. This Essay also suggests that the apparent benefits of a pending change in remedial practice be reexamined; we may be better off with the traditional choice between full relief and free use than in a regime where courts routinely order compulsory licenses in copyright cases.

This Essay urges that some of the behavioral expertise now accumulating be turned to the question of authorial productivity. One cannot deny the importance of money, but one should ask whether there might be something special about creative activity that requires the money to flow in a particular way.

⁶³ See *New York Times v. Sullivan*, 376 US 254, 279–80 (1964). The Court has so far declined to carry out such an innovation in copyright cases. In fact, back in 1985, the Court used such a caustic tone in so declining that one infers the Court viewed such treatment for copyright as a kind of *reductio ad absurdum*. See *Harper & Row, Publishers, Inc v. Nation Enterprises*, 471 US 539, 555–60 (1985). Today, the Court probably would not take such a suggestion so lightly.

⁶⁴ See Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U Chi L Rev 1009, 1028–32 (1990).

⁶⁵ One of my suggestions regarding fair use has been adopted in a kind of boomerang fashion. In *Fair Use as Market Failure*, I argued that private users’ making of exact copies could be fair use when such persons did not constitute a potential market that could practicably be exploited by the copyright owner. See Gordon, 82 Colum L Rev at 1640 (cited in note 49). That suggestion has been turned on its head, to suggest that practicability should be the *only* limit on copyright’s reach, and that *all* potential markets should be monopolized by a copyright owner. For a useful review of the literature, see Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J Intel Prop L 1 (1997).

⁶⁶ See Gordon, *Excuse and Justification* at 169 n 57, 188–92 (cited in note 28); Gordon, 82 Colum L Rev at 1622–23 (cited in note 49).

⁶⁷ See Gordon, 57 U Chi L Rev at 1028–32 (cited in note 64).