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REVIEW

Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship[†]

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Copyright: Principles, Law and Practice. Paul Goldstein. Little, Brown, 1989. Three volumes: pp lvi, 724 (Volume I, Chapters 1-6); pp xlviii, 706 (Volume II, Chapters 7-16); pp vii, 991 (Volume III, Appendices, Tables, and Index). \$275.

For many years copyright was a backwater of the law. Perceived as an esoteric and narrow field beset by hypertechnical formalities, the discipline and its practitioners were largely isolated from scholarly and case law developments in other areas. There were exceptions, of course. Well before the explosion of intellectual property litigation in the last twenty years, persons such as Zechariah Chafee, Jr. and Judge Learned Hand brought a wealth of learning and broad perspective to copyright. But by and large copyright looked only to itself for guidance.

Today, copyright scholars are increasingly reaching across disciplinary boundaries for sources of insight and analogy. Economics and philosophy as well as doctrines from other areas of the law have been employed. But courts have often rebuffed attempts to

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use the learning of other fields,¹ and balkanization persists in much of the commentary as well.

One major reason for the increasing breadth of copyright scholarship is the 1976 Copyright Act, which simplified and rationalized the complexities and formalisms of prior law, making in-depth analysis of broad issues easier and more attractive. But the trend began earlier. In my view at least three pre-1976 works mark the transition to a broader sort of copyright scholarship. One was Benjamin Kaplan's *An Unhurried View of Copyright*,² an exploration simultaneously leisurely and incisive of copyright's history, context, and policies. Another was Stephen Breyer's important investigation of copyright's economic justifications.³ A third was Melville Nimmer's treatise, which better than any reference work before it provided a thorough and analytic guide to the area.⁴

That the discipline has reached a new maturity is confirmed by Paul Goldstein's treatise.⁵ This new work by an acknowledged leader in the field provides a coherent and comprehensive view of copyright and related sources of protection of intellectual property that is animated and unified by an explicit normative structure. The Goldstein treatise knits copyright's various doctrines into a whole that can be evaluated and placed in larger context.

This essay will begin with a description of the Goldstein treatise and of recent developments in the law that it surveys. The essay will then examine the treatise's treatment of a variety of top-

¹ For example, Chief Judge Oakes of the Second Circuit Court of Appeals in a concurring opinion urged the use of the First Amendment, precedent from nuisance law, and economic analysis to secure for the publisher of a critical biography the liberty to print quotations from the subject's letters and diaries. Oakes's colleagues agreed that the biography should not be enjoined, but only on the nonsubstantive ground of laches. The Second Circuit's majority opinion exhibits a lack of receptivity to the kind of broad scholarship and concern for writers' freedom that animated the opinion of Judge Oakes. Also see the valuable opinion of Judge Leval in the lower court. *New Era Publications, Int'l, ApS v Henry Holt & Co.*, 695 F Supp 1493 (S D NY 1988), aff'd on other grounds, 873 F2d 576, 585 (2d Cir 1989), petition for reh'g den'd 884 F2d 659 (2d Cir 1989), cert den'd, 110 S Ct 1168 (1990). See also Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J Copyright Society USA 167 (1989). And see Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv L Rev 1105 (1990); and Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv L Rev 1137 (1990).

² Benjamin Kaplan, *An Unhurried View of Copyright* (Columbia, 1967).

³ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv L Rev 281 (1970).

⁴ Melville B. Nimmer and David Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (Matthew Bender, 1989) (4 vols) ("*Nimmer on Copyright*").

⁵ Paul Goldstein, *Copyright: Principles, Law and Practice* (Little, Brown, 1989). All parenthetical volume and page references in text and notes are to this treatise.

ics, most of which potentially illuminate one of our culture's central concerns: the extent to which new authors, artists, and audiences should be able to use prior works to express themselves. Among the topics treated here are issues of derivative works; federal preemption of state law restraints on the use of ideas; copyright's idea/expression dichotomy; and the subconscious copying rule. Part II of the essay then uses some of the discipline's new tools to address an aspect of a central and controversial question: whether courts should restrain the use of copyright as a tool of private censorship.

In carrying out this latter task in Part II, the essay draws upon the treatise's normative apparatus as well as other sources. As a substantive matter, this portion of the essay tentatively concludes that it is consistent with both the norms of copyright and other patterns in the law to deny enforcement to copyright owners who, having injected their work into public discourse, seek to use the copyright statute to protect themselves or that work from criticism, hostile interpretation, and scrutiny. But the most important point here may be not substantive but methodological, an indication of the kind of far-ranging interdisciplinary inquiry that is necessary if the hardest questions in copyright are to be answered.

I. THE TREATISE: ITS MILIEU, STYLE AND SUBSTANCE

A. Entering the Information Age: A Quarter-Century of Copyright

Melville Nimmer published the first edition of his now-famous treatise on copyright in 1963. By then it had long been acknowledged that existing copyright law, a patchwork of emendations grafted onto the 1909 Copyright Act, was cumbersome and outdated. But achieving a comprehensive revision proved difficult. Repeated efforts were made, and the revision process heated up again in the early 1960s, with a "mockup revision bill" introduced in Congress in 1964.⁶ Copyright experts welcomed Nimmer's treatise for, among other things, the support it implicitly provided for a thorough revision of the legislation.⁷

In the ensuing quarter century there have been many changes in the relevant law. Congress thoroughly revised the Copyright Act

⁶ See HR 11947, 88th Cong, 2d Sess (July 20, 1964), in 110 Cong Rec 16256 (July 20, 1964); and S 3008, 88th Cong, 2d Sess (July 20, 1964), in 110 Cong Rec 16260-61 (July 20, 1964). Senator McClellan and Representative Cellar "introduced [the bill] pro forma by request of the Copyright Office." Benjamin Kaplan, *Nimmer on Copyright*, 78 Harv L Rev 1094, 1094 (1965).

⁷ See Kaplan, 78 Harv L Rev at 1095.

in 1976.⁸ Among the more significant alterations has been a lengthening of the term during which a copyright can subsist before the work enters the public domain,⁹ and the replacement of state protection for unpublished writings with federal copyright.¹⁰ The revised Act also eased the statutory formalities that had long bedeviled copyright proprietors, notably the requirements of renewal and the necessity of properly affixing a copyright notice to all published copies. Works created after January 1, 1978, the effective date of the new Act, were freed from renewal requirements altogether,¹¹ and certain errors in notice were prospectively deemed harmless or curable.¹² More recently, in order that the United States could join the many nations that subscribe to the Berne Convention, Congress rendered most of the remaining formalities nonmandatory for new works and the new publication of existing works.¹³

Even more important developments in copyright have taken place in the past few decades outside the legislative arena. The United States has witnessed a steady decline in heavy manufacturing, while the industries most affected by intellectual property law—such as entertainment and computer software—have flourished. In the same period, tape recorder, photocopier, VCR, and computer ownership has dramatically increased,¹⁴ enabling private individuals to cheaply and easily reproduce others' copyrighted

⁸ An Act for the General Revision of the Copyright Law, Pub L No 94-553, 90 Stat 2541 (1976), codified at 17 USC §§ 101 et seq (1988). All section number references in subsequent footnotes are to this Act.

⁹ §§ 302-04.

¹⁰ See notes 49-50 and accompanying text.

¹¹ Congress counterbalanced the resulting decrease in complexities by enacting a "termination right" more complex than renewal had ever been. §§ 203, 304(c). Unlike renewal, however, failure to exercise the termination right does not invalidate the copyright. *Id.*

¹² §§ 405-06. Works published prior to the effective date of the 1976 Act that entered the public domain for failure to comply with then requisite formalities are not saved by the new provisions. Today one cannot be sure of the copyright status of a work created or distributed in prior years without researching the details of its publication, renewal, notice affixations, and transfers, and analyzing the impact of those events under the then-relevant law. See text at notes 29-30 (discussing the Goldstein treatise's coverage of still-applicable provisions of former law).

¹³ See Berne Convention Implementation Act of 1988, Pub L No 100-568, 102 Stat 2853 (1988); see also Jane C. Ginsburg and John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 Colum-VLA J L & Arts 1, 9-17 (1988).

Some formalities remain applicable to new works and new publication of existing works, but failure to comply with these formalities does not divest a proprietor of his or her copyright. See, for example, §§ 401(d) and 402(d). But see §406(c) (lack of copyright notice on copies publicly distributed prior to the Act's effective date can still divest copyright).

¹⁴ See, for example, U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights In an Age of Electronics and Information* 9-11 (GPO, 1986).

works.¹⁵ These changes have made copyright law, not long ago considered to be among the "most esoteric of subjects,"¹⁶ an area of mainstream study and everyday discussion.

The usual barometers of legal activity have, predictably, responded in kind to the statutory and practical changes affecting copyright in the last few decades: litigation on copyright and other interests in intellectual property has steadily increased,¹⁷ and copyright scholarship has also grown. The Nimmer treatise itself, already two volumes before the 1976 Act, was expanded to four volumes to embrace the new legislation.

When it appeared, the Nimmer treatise was received as "undoubtedly the most thoughtful and thought-provoking treatment of American copyright law."¹⁸ In recent years several excellent one-volume texts on copyright have come on the market,¹⁹ but a short treatise cannot achieve the comprehensiveness of Professor Nimmer's four-volume effort. Professor Paul Goldstein's new three-volume treatise, by contrast, represents a substantial challenge to Nimmer's preeminence. With its publication, Professor Goldstein, already a leading presence in the copyright field,²⁰ has made another major contribution.²¹

¹⁵ I am indebted to participants in the University of Chicago Law and Economics workshop for bringing home to me, in the context of a discussion unrelated to this essay, the importance of this point.

¹⁶ Henry G. Henn, *Nimmer on Copyright*, 16 Stan L Rev 1146, 1146 (1964).

¹⁷ See, for example, Paul Goldstein, *Publicity: The New Property*, 8 Stanford Lawyer 9-10 (Winter 1982-83).

¹⁸ Henn, 16 Stan L Rev at 1148 (cited in note 16).

¹⁹ One of my personal favorites among the one-volume treatises is Marshall A. Leaffer, *Understanding Copyright Law* (Matthew Bender, 1st ed 1989). Other useful treatments include William F. Patry, *Latman's The Copyright Law* (BNA, 6th ed 1986) (the respected descendant of Herbert A. Howell, *The Copyright Law* (BNA, 3d ed 1952)); and Neil Boorstyn, *Copyright Law* (Law Co-op, 1981 & Supp 1988). A copyright treatise by Professor Howard Abrams is scheduled to appear shortly, to be published by Clark Boardman.

²⁰ Professor Goldstein is the Stella W. & Ira S. Lillick Professor at Stanford Law School. In addition to his many articles, Professor Goldstein's achievements include his copyright casebook, *Copyright, Patent, Trademark, and Related State Doctrines: Cases and Materials on Intellectual Property* (Foundation, 3d ed 1990); and his writings in the related area of tangible property law, see *Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance* (Foundation, 2d ed 1988); and *Real Property* (Foundation, 1984). Professor Goldstein was also the Chairman of the Advisory Panel to the 1986 OTA Report, *Intellectual Property Rights in an Age of Electronics and Information* (cited in note 14), and is of counsel to the firm of Morrison & Foerster in San Francisco.

²¹ It will not be my task here to compare the Nimmer and Goldstein treatises. Even were I interested in such comparisons, it is still probably too early to assess the impact of Professor Nimmer's 1985 death on the future course of his treatise, now being edited by his son David. See Michael J. Lynch, *Updating the Law of Copyright*, 12 The Criv Sheet 13, an insert in 21 Am Assn of L Libr Newsl (March 1990).

B. The Treatise: A Structural Overview

The textual material of the Goldstein treatise is divided into eight parts. The first is an unusually helpful introduction that orients the reader to the underlying principles of copyright (Vol I at 3-22), summarizes the applicable law (Vol I at 23-44), and gives an overview of the practical aspects of copyright practice, providing along the way some useful suggestions for both litigation and planning. (Vol I at 44-54) The substance of the other textual parts is clear enough from their titles: "Subject Matter, Formalities, Ownership, and Term" (Vol I at 55-509); "Rights" (Vol I at 511-724); "Infringement" (Vol II at 1-143); "Defenses" (Vol II at 145-243); "Remedies" (Vol II at 245-377); "Procedure" (Vol II at 379-466); and "Other Sources of Protection: State, Federal and International Law." (Vol II at 467-706)

This textual material, which comprises the first two volumes of the treatise, is well-organized and clearly written. It is usefully cross-referenced to related topics within the treatise, and is supported in the footnotes by ample references to leading cases and commentary. Given the range of topics covered, however, the decision to limit the text to two volumes makes Professor Goldstein's treatment of particular topics somewhat more abridged than one would like. I hope that he adds another volume of text in the next edition, giving a more leisurely treatment of precedent and history and citing more secondary sources—including his own articles, references to which appear only sparsely.

The treatise's third volume contains the index and tables, but also functions as a mini-library. Except for case reports, this volume provides most of the primary materials that a conscientious practitioner of copyright will need: the 1909 and 1976 Copyright Acts and other relevant statutes; legislative history; Copyright Office regulations; as well as international copyright conventions. It also provides forms useful in copyright practice. In addition, Professor Goldstein has integrated the amendments of the Berne Implementation Act of 1988 into the text of the 1976 Act (Vol III at 4-97), and helpfully provides the pagination of the original legislative reports in brackets.

The materials for Volume III have been carefully selected. No single volume—even one with nearly a thousand pages, as this one has—could contain all of the potentially relevant legislative history. For example, the revision that culminated in the 1976 Act began many decades earlier, and current works can still be affected

by the 1909 Act and a number of minor pieces of legislation.²² Volume III does contain the most important documents relating to the 1976 act, namely the House and Conference Reports, and a significant portion of the legislative history of the Sound Recording Amendment of 1971 and the Semiconductor Chip Protection Act of 1984. For deeper coverage of the applicable legislative history, one would inevitably need to go beyond one's own bookshelf.²³

For the sake of newcomers to the field, the treatise could perhaps have included a listing of other applicable sources, such as the Final Report of the Commission on New Technological Uses of Copyright Works (CONTU),²⁴ and useful research tools such as the *Kaminstein Legislative History Project*.²⁵ Other sources on the border between primary and secondary materials that might have been mentioned include the many *Studies on Copyright*,²⁶ each written by a prominent copyright expert under a commission from Congress, and the recent report from the Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information*.²⁷ Professor Goldstein refers to a wide range of sources in his footnotes, of course, but a central list of such materials, along with a bibliography of ordinary secondary sources (books and articles on copyright and related matters) would have made a useful addendum.²⁸

²² See notes 29-30 and accompanying text.

²³ See, for example, the six volumes of E. Fulton Brylawski and Abe Goldman, eds, *Legislative History of the 1909 Copyright Act* (Rothman & Co., 1976), or the seventeen volumes in George S. Grossman, ed, *Omnibus Copyright Revision Legislative History* (Wm. S. Hein & Co., 1976). A unique resource providing extensive legislative materials on the 1976 Act is Alan Latman and James F. Lightstone, eds, *The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* (Rothman & Co., 1981) (6 vols). Despite the complexity of its indexing system, the *Kaminstein* volumes offer invaluable access to decades of congressional hearings, reports, and other material.

²⁴ United States, National Commission on New Technological Uses of Copyrighted Works, Final Report (Library of Congress, 1979) ("*CONTU Report*").

²⁵ Latman and Lightstone, *Kaminstein Legislative History Project* (cited in note 23).

²⁶ See Copyright Society of the USA, ed, *Studies on Copyright* (Rothman & Co., Arthur Fisher Memorial ed 1963) (two volume compilation).

²⁷ Cited in note 14. As noted in note 20, Professor Goldstein chaired the project's Advisory Panel.

²⁸ An excellent if brief bibliography of important secondary materials is available in Alan Latman, Robert A. Gorman, and Jane C. Ginsburg, *Copyright for the Nineties: Cases and Materials* at 811-22 (Michie, 3d ed 1989). See also J. Paul Lomio and Susan Kuklin, *Selected Bibliography of Copyright Materials With Annotation*, 4 Legal Ref Serv Q 39 (Spring 1984); *CONTU Report* at 135-141 (cited in note 24); and Henriette Mertz, *Copyright Bibliography* (US Copyright Office, 1950).

C. On Navigating a Difficult Course: Selected Issues of Style and Substance

At least three challenges confront the scholar who pens a treatise in this field: the many statutory layers that can attach to a given work of authorship; copyright's controversial normative underpinnings; and the need to provide evaluations of existing law, and suggestions for the future, without distorting the map of present and past. The following sections discuss the way the treatise meets these three challenges.

* * * *

The initial challenge facing the writer on copyright is documenting the many changes that the law has undergone in recent decades. Since failure to comply with a formality required some years in the past may have placed a work permanently in the public domain, and since authors' deaths and other events can affect the current validity of copyright assignments in ways determined by "prior" law, even now-repealed statutes remain applicable to current controversies. For example, copyrights of newly created works need not be renewed. (Vol I at 436-37) Yet the most recent Supreme Court case on copyright concerned a renewal question. At issue was Alfred Hitchcock's classic suspense film *Rear Window*, a derivative work based on a short story under an assignment of copyright that was no longer valid because the assignor had died prior to renewal.²⁹ The Court held that the movie could not be lawfully reissued without the consent of the new holders of copyright in the story, the decision turning largely on requirements superseded for all works entering federal copyright in 1978 or later.³⁰

The relevant statutory schemes thus create a palimpsest of chronological layers to which a copyright text must provide a useful map. This Professor Goldstein does quite well, providing a technical outline and alerting the reader to the fact patterns that

²⁹ The 1976 Act makes clear in § 304 that works already subject to renewal at the time the new Act became effective would remain subject to renewal requirements. If the author dies before renewing, the right to renew passes to statutorily-designated beneficiaries who will, if they renew, own the copyright for the duration of their renewed term. § 304(a). Renewal rights are alienable, so that an author could enforceably promise in advance both to renew and to convey the renewed copyright to an assignee. However, the author's agreement would not bind the new owners of the renewal copyright if the author died prior to renewal. See *Stewart v Abend*, 1990 US LEXIS 2184.

³⁰ Id at *25-26.

implicate prior law. For this and a multitude of other reasons, the treatise will serve as an excellent guide to the perplexed.

A second challenge facing the writer on copyright arises from the ambiguities of copyright's normative and empirical underpinnings. As will be discussed below at more length, various theories may play a role in copyright. Professor Goldstein himself identifies at least four: "natural justice," "the economic argument," "development of the national culture," and an argument that copyright "makes for social cohesion."³¹ To ignore the normative possibilities in treating any particular provision of the copyright laws would be unfortunate, yet it would be an immense burden to analyze fully the competing goals, to examine what their precise relationships should be, and to gather data and assess the available empirical evidence to determine how well the statute fulfilled these goals. Professor Goldstein has chosen a felicitous middle ground, focusing on the two major strains of argument. He indicates both that the dominant purpose of copyright is instrumental—to "serve the general public interest in an abounding national culture"—and that theories of natural rights have some place, albeit subordinate and ill-defined, in the copyright scheme. (Vol II at 5; Volume I at 8-9; Volume II at 685-86) He then employs the instrumental model to analyze the nature of the choices Congress made when it enacted the various provisions of the Copyright Act. (See, for example, Vol I at 4-5; Vol I at 516-17; Vol II at 197.) Use of this model brings unity to the treatise's treatments of disparate topics, and, by pinpointing hypotheses on which Congress's decisions may rest, clarifies for researchers empirical and normative issues needing attention. Professor Goldstein also analogizes to other areas of the law and their use of various norms, drawing for example, on the cost-benefit calculus apparent in certain nuisance law doctrine. (Vol II at 197 n 23)

The third challenge is posed by the desirability of providing the reader more than description. When a leading authority pens a treatise, we have the opportunity to learn not only what that person thinks the state of the law *is*, but also what he thinks it *should* be. The concomitant danger is that the author might confuse prescription with description, might make errors of ascription (inadvertently attributing his own views to the courts or to Congress), or might mar an otherwise sound discussion by advocating only one side of the issue.

³¹ Vol II at 685-86, quoting Stephen Stewart, *International Copyright and Neighboring Rights* 3 (Butterworth's of New Zealand, 1983).

Professor Goldstein willingly shares with the reader his opinions on how the law should be, but there is no air of polemic here. His normative views are labeled as such and ordinarily the reader can easily separate them from the treatise's description of what Congress or the courts have in fact done. Goldstein presents his positions without undue diffidence, yet with a dispassion that reflects respect for the reader.

The next two subsections illustrate the treatise's meeting of this third challenge by exploring Professor Goldstein's treatments of two topics on which he has clear views: derivative works and preemption. Following this, the essay returns to consider further the treatise's use of an instrumental model to meet the challenge posed by copyright's normative difficulties.

1. Derivative works.

The newcomer to copyright typically expects that any work original or creative enough to be copyrighted could not also infringe another copyright. And indeed, judges interpreting the original copyright statutes largely took the position that any substantial creative effort, even when it was applied to someone else's copyrighted work, could not infringe a copyright. For example, a translation could be both copyrightable and free of any control by the person who owned the copyright in the work being translated.³² Over time, however, this changed. The rule that creative adaptations could be copyrighted was retained³³ (with one exception, mentioned below), but the law now gives the underlying work's copyright owner the exclusive right to authorize or make derivative works,³⁴ subject to the public's generally applicable privileges³⁵ and some minor additional limitations.³⁶ The statute also provides that "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which

³² See Kaplan, *An Unhurried View of Copyright* at 9-12, 17-32 (cited in note 2) (English and American law).

³³ The 1976 Act explicitly provides that derivative works are entitled to a copyright. §§ 102, 103. The copyright "extends only to the material contributed by the author of [the derivative] work," and not, of course, to the "preexisting material." § 103.

³⁴ § 106(2). Rights over specified derivative works had been gradually increased over the years, culminating in this general grant. See Kaplan, *An Unhurried View of Copyright* at 9-12, 17-32 (cited in note 2).

³⁵ For example, the public always has the privilege to make fair use of a copyrighted work, § 107, and the right to use a copyrighted work's ideas and other unprotectable elements. § 102(b).

³⁶ See, for example, §§ 203(b), 304(c)(6)(A) (certain uses of derivative works can continue after terminating the underlying grant).

such material has been used unlawfully.”³⁷ This means that a derivative work is ineligible for copyright if it pervasively uses copyrightable elements of another’s copyrighted work without permission.³⁸

One of the best-informed persons to analyze and comment on the history and policy tensions inherent in rights to derivative work is Professor Goldstein himself, and in a 1983 article he persuasively argued that pervasive infringements should not forfeit copyright in a derivative work whose value lies primarily in new efforts and non-infringing use of other sources.³⁹ As Goldstein has argued, even if the infringed work has a pervasive underlying presence in the new work, denying the second creator a copyright in what she has added removes incentives for creation while giving the first creator more protection than he needs⁴⁰ or deserves.⁴¹

Copyright law’s harsh treatment of the derivative creator is not inevitable. Patent law makes the opposite and arguably preferable choice, entitling the inventor of an improvement who has proceeded without permission from the owner of the original patent to an “improvement” patent. Although the owner of the improvement patent cannot sell the improved invention without the agreement of the owner of the underlying invention, the owner of the original invention cannot use the improvement without the improver’s consent.⁴² This seems likely to yield a more equitable division of revenue than under copyright law, where a person who proceeds without permission forfeits all copyright in her creation;⁴³ also under

³⁷ § 103(a).

³⁸ So, for example, an anthology containing one infringing poem might be copyrightable as to the arrangement and selection of the other poems, but a translation of a copyrighted book would necessarily be so suffused with protectable elements unlawfully borrowed from the copied work (such as the original author’s paragraph structure) that it could not sustain a copyright. Copyright Law Revision, HR Rep No 94-1476, 94th Cong, 2d Sess 57-58 (1976) (reprinted in Vol III at 114-15).

³⁹ *Derivative Rights and Derivative Works in Copyright*, 30 J Copyright Society USA 209, 244 (1983).

⁴⁰ *Id.*

⁴¹ *Id.* (by implication). Also see Wendy J. Gordon, *Intellectual Property and the Restitutionary Impulse* (draft manuscript on file with the University of Chicago Law Review) (examining the nature and limits of claims to “deserve reward”).

Professor Goldstein’s normative assessment of a first author’s entitlements may have shifted somewhat. Compare Goldstein, 30 J Copyright Society USA 237-38, 244 (cited in note 39) with Vol I at 7-8, Vol II at 247-49, 277-80 (role of injunctions).

⁴² Peter D. Rosenberg, *Patent Law Fundamentals* § 1.03 at 1-10 n 35, § 16.02 at 16-14, 16-16 (Clark Boardman, 2d ed 1980).

⁴³ One might seek to justify the copyright rule by the first author’s putative “moral right” to control the presentation of his work. Despite occasional flirtations, American law by and large has not adopted this European notion of *droit moral*; and it should not do so,

patent law, the interests of the "improver" are protected vis a vis third parties.⁴⁴ So much might be said against Congress's handling of this issue in the copyright law.

And yet, despite his belief that Congress should not have denied copyright to works that pervasively employ without permission the copyrighted aspects of a preexisting work, Professor Goldstein's treatment of § 103(a), the relevant statutory provision, not only makes the existing rule clear, but begins with a statement of the congressional rationale. (Vol I at 216-17; Vol II at 142-43)⁴⁵ Only then does Goldstein go on to state his own position, consigning much to a short footnote (Vol I at 217 n 9) that focuses only on the problem of allowing a third party who has copied the derivative work to use that work's own infringement as a defense. In fact, one wishes that Professor Goldstein had been willing to spin out his critical analysis a bit more and incorporate his more recent thoughts, or at least to cite his more developed treatment of the issue elsewhere.⁴⁶

2. Preemption of state law.

Professor Goldstein is not always so retiring in presenting his views, particularly with regard to preemption (Vol II at 470-646), an area of longstanding interest to him.⁴⁷ The preemption question

at least not without substantial limitations. The notion, as interpreted abroad, seems to ignore the moral rights of *audiences*, see, for example, text at notes 86-94, 133, and may pay insufficient respect to values Americans associate with the First Amendment.

⁴⁴ The line between permitted "inspiration" (the borrowing of unprotected ideas and themes) and unlawful appropriation of copyrighted expression is a vague and wavering one; see discussion in note 69. Under current copyright law, if a poem inspires a play that subsequently is judged to make an infringing and pervasive use of the poem, a motion picture company that in turn copies the play in detail would need only the *poet's* permission to make a movie of it. The playwright's contribution would be ignored. See Vol I at 217 n 9 (desirability of preserving derivative work's copyright as against a third party).

⁴⁵ The rule denying copyright to the infringing portions of derivative works is usefully reiterated, as are other general principles, in factual contexts where they are likely to be implicated. See, for example, Goldstein's discussion of phonograph records (Vol I at 172) and computer databases (Vol I at 219 n 19). Beginners in copyright might, however, appreciate a mention of this derivative work rule in the introductory overview. At an early point in the treatise, Professor Goldstein discusses the availability of copyright for a deliberate but creative rewording of Keats's "Ode on a Grecian Urn," but neglects to mention that such a copyright would be available only because Keats's poem is in the public domain. Vol I at 63.

⁴⁶ See note 39.

⁴⁷ See, for example, Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L Rev 1107 (1977); *Kewanee Oil Co. v. Bicron Corp.: Notes on a Closing Circle*, 1974 Sup Ct Rev 81; "Inconsistent Premises" and the "Acceptable Middle Ground:" A Comment on Goldstein v. California, 21 Bull Copyright Society USA 25 (1973); *The Competitive Mandate: From Sears to*

is an important one, for it largely governs the extent to which state law protection for intangibles is permissible. A host of state rights are potentially available to protect intellectual products either directly or indirectly; these include rights arising under the doctrines of unfair competition, misappropriation, trade secrets, privacy, contract, and quasi-contract, as well as the right of publicity. Determining which of such nonfederal rights survive the supremacy of federal law can be a complex and uncertain undertaking, particularly since the 1976 Copyright Act set forth a new section on preemption, § 301.

Section 301 of the 1976 Act defeats the assertion of a state law right⁴⁸ if three tests are met: (1) the work sought to be protected is written down, filmed, tape recorded, or otherwise "fixed" under authority of its proprietor; (2) it is otherwise within the subject matter of copyright; and (3) the state right is "equivalent to any of the exclusive rights within the general scope of copyright."⁴⁹ (See Vol II at 473) The full contours of § 301, and of intellectual property preemption generally, have not been definitively adjudicated.⁵⁰

Lear, 59 Cal L Rev 873 (1971); *Federal System Ordering of the Copyright Interest*, 69 Colum L Rev 49 (1969).

⁴⁸ There may be other sources of invalidity as well. See notes 53, 61-62.

⁴⁹ § 301(b).

⁵⁰ Congress enacted § 301 of the 1976 Act with two goals in mind. First, it sought to displace state "common law copyright" in unpublished writings with federal copyright protection, substituting a manageable unitary system for the difficult two-tier system (which primarily gave federal protection to published works and state protection to unpublished works). HR Rep No 94-176 at 129-30 (cited in note 37). Second, § 301 sought to draw a clear line between federal and state protection. *Id.* at 130. The first goal was accomplished; the second remains distant.

One reason the line between federal and state protection remains blurred is a last-minute amendment to § 301 that was accompanied by a thoroughly confused discussion on the floor of the Congress, which Professor Goldstein does a lovely job of explicating. Vol II at 484-85. Another reason is the shifting views of the Supreme Court. The Court's preemption position reached a high-water mark with the *Sears* and *Compco* decisions in 1964, which Professor Goldstein says indicated "that the Court also intended to preempt state protection of subject matter that falls outside the scope of protectable subject matter." Vol II at 496. See *Sears, Roebuck & Co. v Stiffel Co.*, 376 US 225 (1964); and *Compco Corp v Day-Bright Lighting, Inc.*, 376 US 234 (1964). Since then, the Court's decisions have been so much more tolerant of state laws that Goldstein, among others, has speculated that *Sears/Compco* may be considered overruled. Vol II at 497. Only recently, however, the Court reaffirmed the core holding of those two early cases, making clear that the patent law's refusals of protection create "federal right[s] to 'copy and to use'" that are, like any federal law, supreme over state law. *Bonito Boats, Inc. v Thunder Craft Boats, Inc.*, 489 US 141, 109 S Ct 971, 985 (1989) (state statute prohibiting the direct molding of unpatented boat hulls held preempted).

It is too early to tell if the *Bonito Boats* approach applies to copyright law as well. Much of the opinion is written as if applicable solely to patent law, yet the Court's statutory analysis was informed by reference to the constitutional clause (Art 8, § 8, cl 8) that applies

The treatise's discussion of preemption contains a fairly high proportion of normative commentary and controversial interpretation. To some extent this is unavoidable; given the large number of currently unanswered questions in the preemption area, interpretations of many of the cases and of portions of the statute itself will inevitably be controversial. Further, the shift in emphasis is not distracting to the reader. On the contrary, Professor Goldstein's handling of this difficult topic is remarkably clear. The treatise not only gives an overview of preemption in the abstract (Vol II at 470-503); it also offers the reader a substantive and fairly extensive description of the various state law rights that border copyright (a compilation quite valuable in itself), and follows each treatment of state law with an exploration of how preemption would or could apply to the right under discussion. (Vol II at 503-646) The tone remains dispassionate, and the treatise maintains a fairly clear line between description and prescription. Nevertheless, a newcomer to copyright, particularly one intent on finding answers to a narrow inquiry quickly, might well mistake some of the treatise's interpretations as stating the "black letter law" in an area where little is black letter certain.

Most notably, the neophyte might be confused by the strength with which Professor Goldstein concludes that § 301 does not preempt state grants of monopoly in ideas.⁵¹ The Copyright Act of

to both copyright and patent. 109 S Ct at 975-79, 983. See Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 Stan L Rev 1343, 1449 n 461 (1989) (exploring differences between copyright and patent in the context of the constitutional Copyright and Patent Clause). Further, the Court's mode of reasoning (finding an enforceable "federal right to 'copy and to use'" within the interstices of federal intellectual property law, 109 S Ct at 985) is potentially transferable to copyright. See Gordon, 41 Stan L Rev at 1399 n 251, 1403 n 266. Other patent preemption cases have been quite important to copyright doctrine, Vol II at 495-97, and *Bonito Boats* could revive the preemptive leanings of the Court's early pronouncements on the subject.

The treatise gives no extended treatment to the case, perhaps because the opinion issued so close to the treatise's publication date. Volume II refers to *Bonito Boats* only in footnotes. See, for example, Vol II at 472 n 5, 495 n 3, and 497 n 16.

⁵¹ When Professor Goldstein first introduces the subject, he notes that placing ideas "outside the subject matter of copyright" is a question of judgment (Vol II at 487-88) ("the thorniest interpretational problem"; the "soundest reading of the statute"), but subsequent treatments offer as uncontroverted the view that § 301 leaves states free to protect ideas, leaving only cross-references to warn the unwary. Vol II at 495, 507. ("Preemption does not, however, extend to subject matter such as ideas and facts that fall outside the scope of copyrightable subject matter"; "[s]ubject to preemption under the Patent Act, states can also protect any 'idea, procedure, process, system, method of operation, concept, principle, or discovery' from which § 102(b) withholds copyright protection"). See also Vol II at 512, 528, 624.

1976 specifically provides in § 102(b) that copyright does not protect ideas that might be contained in a work of authorship,⁵² and the reasons for freeing ideas from ownership are strong. (Vol I at 34-81) The treatise reasons that § 102(b) should be read as indicating that ideas are not "within the subject matter of copyright" and that their use can therefore be restrained by state law insofar as § 301 is concerned.⁵³

There is certainly case law and commentary supporting the treatise's approach. (Vol II at 488 n 61) But there is also case law and commentary going the other way⁵⁴ that may be of increasing interest in light of a recent Supreme Court decision construing the effect of patent law on state intellectual property protection.⁵⁵

Let me outline some of the arguments that might be made in support of the opposing view that ideas *are* within the scope of copyright and therefore subject to § 301 preemption. First, it is

⁵² "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery. . . ." § 102(b).

⁵³ Under this view, a state grant of monetary or injunctive remedies against someone who uses another's ideas will be valid under § 301, even if the idea is written down as part of a work of authorship and even if the state grant includes control over reproduction, distribution, or other "rights equivalent to copyright." Professor Goldstein notes, however, that preemption of state protection for ideas may occur under the Supremacy Clause independently of § 301, Vol II at 489 n 65, 501-02, 529-30, and that the First Amendment may place additional limitations on a state's efforts to give property rights (or other dissemination-reducing rights) in ideas. Vol II at 489, 501-02. He also notes that the states themselves are often sensitive to the public interest in leaving ideas free of property-like protection. Vol II at 488.

⁵⁴ See Howard B. Abrams, *Copyright, Misappropriation and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 S Ct Rev 509, 566-69; Ralph S. Brown, *Unification: A Cheerful Requiem for Common-Law Copyright*, 24 UCLA L Rev 1070, 1092-99 (1977). For case examples see *Garrido v Burger King Corp.*, 558 S2d 79, 81-82 (Fla App 3d Dist 1990) (claim for conversion and theft of advertising ideas contained in written and visual materials held preempted; §§ 301 and 102 expressly considered); *Walker v Time-Life Films*, 615 F Supp 430, 441 (S D NY 1985) (claim for misappropriation of, inter alia, "ideas and concepts" from a book held preempted under § 301), aff'd 784 F2d 44, 53 (2d Cir 1986); *Peckarsky v ABC*, 603 F Supp 688, 695-96 (D DC 1984) (unfair competition and unfair trade practice claims based on use of facts and (by implication) ideas held preempted under § 301); also see *Mitchell v Penton/Industrial Publishing Co., Inc.*, 486 F Supp 22, 26 (N D Ohio 1979) (action for misappropriation of facts preempted; unclear if court used § 301 or Supremacy Clause analysis). And see 3 *Nimmer on Copyright* § 16.04[C] at 16-25 n 42 (cited in note 4) (suggesting that ideas may be within the subject matter of copyright); and 1 *Nimmer on Copyright* § 1.01[B] at 1-25, 26 n 106.

⁵⁵ *Bonito Boats, Inc. v Thunder Craft Boats, Inc.*, 109 S Ct 971 (1989). As Professor Goldstein notes, Vol II at 502, 529, Supreme Court cases on preemption can help inform interpretations of § 301. Although *Bonito Boats* was decided after the enactment of § 301, it makes clear that the Court's earlier decisions favorable to preemption should not be ignored. See note 50. In addition, *Bonito Boats* is potentially applicable to preemption arguments not based on § 301. See notes 53 and 61.

hard to imagine how an idea, once expressed in words or otherwise given form, could fail to be part of a "work of authorship," and such works are the very subject matter of copyright.⁵⁶ More broadly, it can be argued that the subject matter test in § 301 is "intended to distinguish" areas in which Congress drew a deliberate balance from those that Congress left "unattended."⁵⁷ Under this interpretation, the copying of all the elements that Congress "attended to" by listing as unprotectable in § 102(b) (such as ideas, processes, concepts, systems, discoveries, and perhaps by analogy, facts) must be governed solely by federal law.⁵⁸

The treatise itself suggests that making ideas incapable of ownership is part of an economic calculus that discriminates carefully between those elements of a work for which property-like protection will further social goals and those for which it will not. Under such a view, there seems to be a congressional determination that ideas are elements of works "within the subject matter of copyright" that, in order to further the system's overall goals of encouraging knowledge and cultural growth, should not be ownable.⁵⁹ If so, state protection that upsets the calculus would seem to be a good candidate for preemption. (Vol II at 477)

⁵⁶ To communicate an idea, one ordinarily writes a letter, makes an outline, prepares a report, or shows slides: all are "works of authorship" protectable (as to their expression but not their ideas) under federal copyright law. (An oral communication containing ideas is also potentially a "work of authorship," Vol II at 504-07, but would escape preemption under § 301 because it is not fixed in a tangible medium of expression.)

Two partial exceptions to my view that ideas are almost inevitably part of "works of authorship" should be noted. Even a scientific idea, if it is described in a writing or picture, is part of a copyrightable "work of authorship," but it is probably more appropriate to speak of the potential preemption of state protections for scientific ideas in terms of patent law rather than copyright. Also, a scientific idea embodied in a three-dimensional machine or structure is probably not part of a "work of authorship" because the Act defines "pictorial, graphic and sculptural works" to exclude any "useful article" that has only "mechanical" and "utilitarian" aspects. § 101.

⁵⁷ See Ralph S. Brown and Robert C. Denicola, *Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical and Artistic Works* 490 (Foundation, 4th ed 1985) (raising the possibility).

⁵⁸ Under this view, state grants of rights over ideas, processes, and the like would be preempted if those intangibles were fixed in a tangible medium of expression and the state rights were "equivalent" to rights granted by the Copyright Act. Compare Brown and Denicola, *Cases on Copyright* at 490-92 (cited in note 57). Federal law, such as patent, would be available to protect such intellectual products where applicable.

⁵⁹ The Nimmer treatise, for example, argues that when Congress denied copyright protection to ideas it was not excluding them from "the subject matter of copyright," but rather was stating "merely a limitation on what elements within such subject matter may be considered protectible." 3 *Nimmer on Copyright* § 16.04[C] at 16-25 n 42 (cited in note 4). As the Goldstein treatise notes, works that "fail to meet" copyright's standards for protections but that fall within the general scope of copyright face potential preemption under § 301. Vol II at 490.

The ends-focused model of copyright's subject matter might not lead to results in preemption cases drastically different from the results that would be predicted by the treatise. The approach suggested would not automatically lead to the preemption of state law protection of ideas, since even a court's conclusion that ideas were within the overall scope of copyright's subject matter would be only one of several hurdles that a defendant must surmount before invoking § 301 to defeat a state right.⁶⁰ Conversely, the approach advocated by Professor Goldstein would not make all state protection for ideas permissible; as Goldstein notes, state protection for ideas might still be forbidden by the First Amendment (Vol II at 489) or preempted by a Supremacy Clause analysis independent of § 301.⁶¹ Each of these alternative avenues, however, has difficulties of its own.⁶²

Professor Goldstein is one of the commentators who have been eloquent and insightful on the importance of free access to ideas. (Vol I at 81-83; Vol II at 228) Given this importance, and given the uncertainties of using Supremacy Clause and First Amendment analyses as safe harbors against state protectionism, analysis of § 301's preemption of state idea protection should take special care not to suggest closure on the issue, at least until the Supreme Court has spoken definitively.

⁶⁰ See text at note 49. A state contract law, for example, might still survive preemption if it provided a "non-equivalent" form of protection for ideas. Vol II at 515, 525, 529-30.

⁶¹ Professor Goldstein suggests that the Supremacy Clause may have independent preemptive force; a state's protection of unfixed works, or ideas and facts contained in fixed works, could be preempted if it interfered with overall federal goals. Vol II at 489 n 65, 501, 529-30. Professor Goldstein notes that this position is debatable, and that some courts might look solely to § 301 for preemption analysis. Vol II at 501, 530.

⁶² As the treatise notes, it is arguable that § 301 provides the sole benchmark for preemption inquiry, in which case preemption based on an independent Supremacy Clause analysis would be unavailable. Vol II at 501. Even assuming that this supplemental analysis is available, the appropriate standard for the Supremacy Clause inquiry is not clear. Vol II at 495-503, 512.

As for the First Amendment, Professor Goldstein notes that the Supreme Court has so far been reluctant to apply it to intellectual property rights. Vol II at 238-43; 616-18. However, the Amendment's low profile in the area may be explained by the presence in copyright of doctrinal protections for free speech, such as the idea/expression dichotomy (see notes 68-70 and accompanying text) and the fair use doctrine. Vol II at 242. The fair use doctrine is a flexible privilege to use other's copyrighted material that defies easy summary. Described non-exhaustively in § 107, it provides safe harbor for uses that might otherwise be infringing.

Where such doctrines are absent, as they might be in state law, explicit use of the First Amendment becomes more likely. Under this view, state intellectual property law could gradually become subject to a set of constitutional privileges, not unlike state defamation law. See *New York Times v Sullivan*, 376 US 254 (1964); and *Hustler Magazine, Inc. v Falwell*, 485 US 46 (1988).

Professor Goldstein's views on the copyrightability of pervasively infringing derivative works and on the preemption status of ideas are treated differently by the treatise: they are more retiring in one instance, more prominent in the other. But in both cases Professor Goldstein meets the challenge of presenting his views in a way that is clear and dispassionate.

D. The Instrumental Model: Applications

As mentioned above, one of the challenges facing the author on copyright is posed by the discipline's somewhat ambiguous normative structure; the treatise meets this challenge by employing throughout a normative instrumental model, called at various points "utilitarian" but using largely economic modes of argument. (Vol I at 3-13) It is based on the Constitution's Copyright and Patent Clause, which aims to "promote the Progress of Science and useful Arts."⁶³ Professor Goldstein employs the instrumental model as a criterion to analyze current copyright practice and predict future developments. Though the treatise's use of economics is likely to prove somewhat controversial given the ongoing debates over copyright's norms, it provides helpful guidance on a surprisingly wide range of topics, and ameliorates a treatise's natural tendency toward discontinuity by providing a consistent framework for the treatment of disparate topics. Also, despite the treatise's frequent recourse to economic concepts and terminology, Professor Goldstein does not view economics as a normative monolith superseding all other forms of analysis. Before addressing the normative issues on their own terms,⁶⁴ it may be helpful to review some examples of his use of economic language and analysis.

1. Copyright in U.S. government works.

Professor Goldstein has long used economics in his work,⁶⁵ and its terminology and concepts obviously come naturally to him. But while his summaries introducing new topics tend to be steeped in economic vocabulary, his discussion of policy is by no means limited to economic concepts. For example, in discussing why Congress specified that United States government works should not be

⁶³ US Const, Art I, § 8, cl 8.

⁶⁴ See Section IIB; also see Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 Minn L Rev 579 (1985).

⁶⁵ See, for example, 30 J Copyright Society USA 209 (cited in note 39); and *The Private Consumption of Public Goods: A Comment on Williams & Wilkins Co. v. United States*, 21 Bull Copyright Society 204 (1974).

copyrightable,⁶⁶ Professor Goldstein begins by suggesting that Congress preferred supporting these works “by taxes levied at progressive rates [rather] than by the regressive price mechanism of a private property system.” (Vol I at 14) It sounds at first as if Professor Goldstein sees the only issue to be the best way to provide economic incentives for production given the diminishing marginal utility of income, but he later discusses the additional issues inherent in the question of whether copyright should subsist in government works, such as the importance to our democratic polity of giving citizens access to, and the free ability to replicate, the significant dictates, decisions, and reports of their government.⁶⁷ (Vol I at 88 n 21, 88-89, 97) It thus gradually becomes clear that economics is not the sole normative model at work. Indeed, even Goldstein’s introductory use of economic language (i.e., “regressive price mechanism”) can be interpreted as an essentially noneconomic point: price structures that penalize the poor are to be avoided where goods such as access to political materials are at issue.

2. Idea/expression dichotomy.

Professor Goldstein shows the connections that can exist between economic and other policy arguments particularly smoothly in his discussion of the “idea/expression dichotomy,” the doctrine in copyright law that copyright protection subsists not in ideas but only in the “particular form or collocation of words”⁶⁸ and other *expressions* of ideas.⁶⁹ Though this doctrine is probably most com-

⁶⁶ § 105.

⁶⁷ Note, however, that this policy is imperfectly implemented. For example, Congress left the question of copyright on state and local governmental works to the judiciary, L. Ray Patterson and Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L Rev 719, 751-55 (1989), and the judiciary has not always fully protected this public interest. See *id.*

⁶⁸ *International News Service v Associated Press*, 248 US 215, 234 (1918).

⁶⁹ Words are not the only mode of expression. Music and pictures, for example, can express ideas, too. A symphony transmits not only a particular collocation of notes, but also the idea of symphonic form. The former is protectible; the latter is not.

Similarly, a particular painting might embody an idea, such as that of superimposing several views of a figure on itself to convey motion as in Marcel Duchamp’s “Nude Descending a Staircase.” Copying the expression of the particular painting would be infringement, but copying the underlying idea—even if it originated with the artist copied—would not be.

However, the question of how much can be copied before “expression” is deemed to be taken is always hard to predict, and will be determined case by case. The way one structures or marshals ideas can itself be a form of expression, depending on the level of detail and other factors. One would imagine that the level of detail copied would have to be fairly high before a court would find infringement, but things are not always so. See *Roth Greeting Cards v United Card Co.*, 429 F2d 1106 (9th Cir 1970). See also Vol II at 25-26.

monly understood in humanistic terms (of cultural value, First Amendment interests, and the like), it can also be understood economically, as Professor Goldstein demonstrates. He usefully distinguishes three kinds of ideas: ideas as marketing concepts, ideas as solutions, and ideas as fundamental building blocks. Of the latter he says:

The reason for withholding copyright protection from creative building blocks lies in the very object of copyright law: to stimulate the production of the most abundant possible array of literary, musical and artistic expression. To give creators a monopoly over such fundamental elements would reduce their incentive to elaborate these elements into finished works. More important, to give one creator a monopoly over these basic elements would effectively stunt the efforts of other creators to elaborate on these elements in the production of their own works.⁷⁰ (Vol I at 78-79)

3. The subconscious copying rule.

Recommendations based on analyses of incentives and costs inevitably rest on empirical foundations. While one would be unlikely to challenge the empirical assumptions underlying Professor Goldstein's treatment of the non-protectability of basic ideas, one might take issue with some of the treatise's other analyses on empirical grounds. For example, in light of his sensitivity to the costs copyright is capable of imposing on future authors, Professor Goldstein's approval of the rule that subconscious copying triggers liability is surprising. (Vol II at 162)

Imposing liability on a second author or artist who was unaware he was copying from another's copyrighted work is an application of copyright's general strict liability approach, and might be defended on several grounds. Most obviously, allowing an "unconsciousness" excuse might encourage a deliberate copyist simply to lie about his state of mind. Of course, the attractiveness of this consideration is limited by one's confidence in juries' ability to

⁷⁰ See also William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J Legal Stud 325, 332, 347-49 (1989) (a more extensive economic analysis of the cost-reducing function of nonprotectability). For additional useful discussions of the need to protect future authors' abilities to create, see Jessica Litman, *The Public Domain*, 39 Emory L J — (forthcoming 1990); and David Lange, *Recognizing the Public Domain*, 44 L & Contemp Probs 147 (Autumn 1981). Unfortunately, the courts are often less eager to protect future authors than present ones.

judge witnesses' truthfulness, and this is not the consideration to which Professor Goldstein points.

Goldstein favors the "subconscious copying" rule apparently because he believes that unaware users of others' work could avoid such copying at fairly low cost, with just a bit more vigilance. (Vol II at 162) This seems an unrealistic expectation, however, at least where artists are concerned. Demanding that an artist maintain a detailed memory of his predecessors' works could significantly distort the creative process.⁷¹ The social costs of this distortion need to be taken into account under any economic model. Professor Goldstein focuses on who "as between the copyright owner and the infringer . . . is better placed to guard against mistake." (Vol II at 162) Goldstein is correct that this approach is a familiar one, but it seems too narrow, even if a cheapest cost avoider calculus is to be applied. The approach suggests that avoiding mistakes is always preferable, while in fact sometimes the cost is greater in seeking to avoid all mistakes than in allowing some to be made. This is the now-hoary lesson of the Hand Formula.⁷²

In addition, the subconscious copying rule may operate unfairly. The person who accidentally and in good faith replicates something heard or seen earlier is surprised by the copyright owner's claim. Were the penalty merely a requirement that the new creator pay the prior creator some fee for use, a finding of liability might cause little if any harm. Under copyright law, however, the unconscious copyist is penalized much further. He has no copyright in what he has produced if the prior work was used "unlawfully"⁷³ and pervasively, and his aggrieved predecessor may obtain an injunction against the new project, blocking not only the dissemination of copied elements but any newly-created ones that are intermixed, as well. Although the two parties may negotiate a license, this set of rules gives the first creator an extraordinarily powerful bargaining position, allowing her to command proceeds more fairly attributable to the new author's contributions, since she can stop the new project fully in its tracks,⁷⁴ regardless of how much effort, expense, and emotion the new artist has invested. Further, the second artist may in fact owe no debt, at least in a moral sense, to the person claiming infringement. It is possible

⁷¹ See Litman, 39 Emory L J at — (cited in note 70).

⁷² See *United States v Carroll Towing Co.*, 159 F2d 169 (2d Cir 1947).

⁷³ See the discussion in text at notes 37-38.

⁷⁴ Professor Goldstein recognizes these remedial problems. Vol I at 7-8; Vol II at 248-49, 272-80. See also Goldstein, 30 J Copyright Society USA at 236-39 (cited in note 39).

that sometimes even an artist's subconscious forgets a composition encountered years earlier, and the similarity of form is merely coincidence. But the law at present cannot distinguish such cases.⁷⁵ Juries often infer a causal connection between the access years ago and the creation today with a logic that is practically, though not formally, irrefutable.⁷⁶

One's opinion of the subconscious copying rule may depend on one's view of the creative process. I find it hard to imagine that subconscious copying only occurs through carelessness, or that it can be avoided at minimal cost. Under what one might call an "influence" view of creativity, subconscious copying occurs constantly, and usually bears valuable fruit.

One such view is contained in the theories of critic Harold Bloom, who suggests that all art is a creative misreading of one's predecessors, a Freudian rebellion against what came before;⁷⁷ seen this way, all works are potentially derivative.⁷⁸ Terry Eagleton summarizes Professor Bloom's view as follows:

[A]ny particular poem can be read as an attempt to escape this 'anxiety of influence' by its systematic remoulding of a previous poem. The poet, locked in Oedipal rivalry with his castrating 'precursor' will seek to disarm that strength by entering it from within, writing in a way which revises, displaces and recasts the precursor poem; in this sense all poems can be read as rewritings of other poems . . .⁷⁹

With the past at the center of their work, many artists could not function if a catalogue of that past, and lawyer-like attention

⁷⁵ See Litman, 39 Emory L J at — (cited in note 70) (suggesting the impossibility of empirically distinguishing between subconscious copying and coincidence). Professor Litman does not recommend abandoning the subconscious copying rule, however; rather, like Professor Goldstein, she focuses on other devices to preserve the public domain.

⁷⁶ Goldstein discusses the functioning of the "access" and "substantial similarity" rules in copyright infringement. Vol II at 7-21.

⁷⁷ See Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (Oxford, 1973).

⁷⁸ Technically speaking, a work is not derivative unless a substantial amount of protectable expression has been taken from the prior work; if that expression has been taken without permission, the derivative work infringes. A work that takes only ideas, themes, or other nonprotectable elements from prior works is neither an infringement nor a derivative work. (Vol I at 222) At issue here, however, is the chilling effect on artists, and artists are not usually copyright experts. Thus, the fact that a work could be a *potential* infringement is as important in practical terms as *actual* infringement.

⁷⁹ Terry Eagleton, *Literary Theory: An Introduction* 183 (U Minn, 1983). Though Eagleton here is faithfully replicating the male imagery of the Freudian Oedipus complex, in my view the same dynamics—of feeling and fighting the influence of those who have shaped one's vision in order to "clear a space for [one's] own imaginative reality"—are operative in much women's writing as well.

to whether the things borrowed are "idea" or "expression," become prerequisites for publication. As Benjamin Kaplan has suggested, the romantic notion of independent creativity is fairly new, but has had an unfortunately strong impact on copyright;⁸⁰ the classical approach to art understood and honored (albeit overmuch) the role the past plays in the new.⁸¹

When the subconscious copying rule is linked with the ubiquity of communications media, a real threat to new artists may emerge. Writers seem to perceive it already. For example, a recent award-winning story depicts the supposed state of art midway in the twenty-first century, when virtually everything composable has been composed.⁸² The author, Spider Robinson, argues strongly for a limited copyright term; he envisions composers' despair if repeated denials of copyright were to force them to conclude that most of their new compositions were drawn from music that they had heard before.⁸³

Exaggerated as Robinson's story may be, its general point is sound: copyright exists for future authors and audiences as much as for present authors and listeners. Only a heightened sensitivity to possible future dangers can protect persons not here to speak

⁸⁰ "[T]he new literary criticism, I suggest, tended to justify strong protection of intellectual structures in some respect 'new,' to encourage a more suspicious search for appropriations even of the less obvious types, and to condemn these more roundly when found." Kaplan, *An Unhurried View of Copyright* at 24 (cited in note 2) (citations omitted).

⁸¹ *Id.* at 22-25.

⁸² See Spider Robinson, *Melancholy Elephants*, in Isaac Asimov and Martin H. Greenberg, eds., *The New Hugo Winners: Award-Winning Science Fiction Stories* 99, 106-11 (Wynwood, 1989) (I am indebted to Jessica Litman, in 39 *Emory L J* — (cited in note 70) for directing me to the Spider Robinson story).

⁸³ Robinson, *Melancholy Elephants* at 106-11. The story does not specify why copyright is denied in unconsciously derivative works. I attribute the denials to § 103(a). However, the story may erroneously be supposing that novelty (part of the standard for patentability) rather than originality is the relevant standard for protectability in copyright. This error does not undermine the theme's basic validity, as the categories of novelty and originality tend to overlap as a functional matter if three conditions obtain: (1) the "unconscious copying" rule; (2) the likelihood that a large proportion of everything composed or created in a given field has been encountered by virtually everyone in that field; and (3) the rule of § 103(a) that copyright protection does not extend to any part of a work in which another's copyrighted work has been used unlawfully. (On the latter, see discussion in text at notes 37-38.) Thus, if one has heard all the relevant compositions and composes a song that resembles throughout and in substantial part an existing composition bearing a current copyright, the new song would probably be found to be using the prior song "unlawfully" and would not be entitled to copyright. In this way, the explicit requirement of originality could become in practice nearly a requirement of novelty. Goldstein raises a related point. Vol I at 66-67. (I am indebted for this point to students in my Theoretical Foundations of Intellectual Property Law seminar.)

for themselves, and take account of the costs and benefits that current policies will bear for future generations.

Though Professor Goldstein favors the subconscious copying rule, that does not mean he is unaware of these concerns. Rather, his assent to the rule may bespeak his preference for other responses.⁸⁴ Professor Goldstein's approach to preserving the public domain appears to vary with the type of expression and use being considered. For example, he recognizes the limited vocabulary available for musical composition (Vol I at 133, 224-25; Vol II at 82-86), and seems to advocate a more demanding "originality" standard for copyrighting music than other works.⁸⁵ (Vol I at 137, 224-25) With respect to the idea/expression question, his approach is different. Here Professor Goldstein prefers to preserve free use of the "building blocks of creation" in close cases not by denying copyright in minimally expressive works, but by adjusting the infringement standard (i.e., judicially shrinking the reach of the author's exclusive rights). Under this approach, the plaintiff seeking to enforce copyright in a minimally expressive work would be required to prove something approaching exact replication. (Vol I at 79-80) Reconsideration of the subconscious copying rule could add valuably to this repertoire of tools for preserving productive interchange between present and prior creators.

II. NEW VERSUS OLD AUTHORS AND THE PROBLEM OF PRIVATE CENSORSHIP: LOOKING BEHIND THE TEXTS

Virtually all the issues canvassed above embody the tension inherent in any attempt to honor the interests of two generations of creators. For example, the essay has discussed the need for new adaptive artists to have a copyright in their own productions; the dangers that the "subconscious copying rule" poses to new creators, particularly in an age of ubiquitous media; and the importance of a vigorous preemption doctrine to preserve artists' liberty to use their predecessors' ideas lest state intellectual property protection erode the freedom that Congress meant to confer by with-

⁸⁴ When and if the exhaustion of possibilities pictured by the Robinson story in fact approaches, rejecting the doctrine of subconscious copying is only one possibility. The term of copyright might also be shortened, the scope of protectible subject matter reduced, the "originality" and "authorship" prerequisites for copyright stiffened, the variety of available remedies restricted, or the reach of the owners' exclusive rights curtailed.

⁸⁵ He also appears to approve special handling for music infringement cases. (Vol II at 84, 86)

holding ownership of ideas. The instant section examines that tension directly.

A. On Keeping the Costs of Creation Low: Is There Shelter for the Necessary Freedom to Borrow?

The primary tool for accommodating the interests of new generations is the idea/expression dichotomy, which seeks to assure that the fundamental building blocks of creation can be used freely, with no need to seek out and bargain with the party who placed the idea in the stream of culture. But it is far from clear that courts today are using the doctrine to safeguard this necessary freedom with the requisite vigilance. The line between "ideas" and "expression" is, not surprisingly, a hazy one, and should a new artist happen across the line he will be guilty of creating an unauthorized derivative work.

An artist who takes only "ideas" and not "expression" may still not be safe. The Goldstein treatise's position on preemption suggests that the author of the prior work may be able to maintain a state law cause of action. In discussing the applicability of the European doctrine of "moral rights" in this country, for example, the treatise points out that although American law lacks an explicit analogue to the Continental right of "integrity," an author may be able to obtain protection against "travesties" of his work under federal law if expression is used, and under state law even though only ideas are being used.⁸⁶ (Vol II at 635, 645)

Yet, as Harold Bloom's evocative model of the creative process suggests, art sometimes requires the hostile use of predecessors' work.⁸⁷ The author of a new work is unlikely to obtain permission from a prior author if he wishes to criticize the prior work or use the prior author's material in a way that rejects or undercuts the meaning the predecessor meant to invest in her materials or symbols. It may be precisely the travesty that is most in the need of freedom.⁸⁸

⁸⁶ The so-called "integrity" right is a protection against distortion, and thus a power of manipulation: it allows an author to say "This is my symbol, my character, my image: use it only as I want you to use it. If you think my use distorts a truth, you must find some way to address that problem without making direct use of my distortion."

⁸⁷ While one might disagree with Bloom's view that "creative misreadings" of what has come before is essential to the creation of all new poems, it surely describes accurately an important part of many authors' aesthetic maturation.

⁸⁸ Compare Tom Stoppard, *Travesties* 85-87 (Grove, 1975); see also George Orwell, 1984 32-33 (Signet Penguin, 1981) (indicating the importance of being able to utilize "documentary proof" to resist the state's power to redefine language and truth).

It is true that "creative misprision" (to use Bloom's phrase describing the habit of artists to misread their predecessors) can often proceed without infringing a prior work. But that is not always the case. For example, central to the post-modernist movement in art is commenting on existing culture, often by employing the specific icons and images others have popularized.⁸⁹ Whether the art at issue is a photo-collage showing the Statue of Liberty swimming for her freedom⁹⁰ or a retelling of Hamlet from the point of view of its minor characters,⁹¹ much art might not be created if consent were required from the person whose work is being commented on. More generally, an artist or speaker sometimes needs to use the expressions, symbols, and characters that represent what he is attempting to rebut, integrate, or criticize in order to make his point clearly. In holding that the state may not criminally prosecute someone for burning a flag in political protest, even the Supreme Court has recognized that the hostile use of symbols originated by others can be essential to self-expression.⁹²

We are social creatures, and there are many symbols less noble than the flag that have a power over our minds. As the Court observed, "Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind. Causes and nations . . . and . . . groups seek to knit the loyalty of their followings to a flag or banner, a color or design."⁹³ Advertisers and entertainment conglomerates also seek to knit loyalty through the use of symbols.

⁸⁹ "The referent in post-Modern art is no longer 'nature,' but the closed system of fabricated signs that make up our environment." John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 Colum-VLA J L & Arts 103, 111 (1988). Carlin argues that "some arrangement needs to be developed whereby artists' traditional freedom to depict the environment in which they live and work is upheld." *Id.* at 140-41. There is an art form known as "appropriation" that consists of making an audience see pre-existing art in a new light or take a different stance toward it. Sometimes it involves making substantial changes; sometimes it does not. See generally *id.*

⁹⁰ As in Michael Langenstein's "Swimmer of Liberty," pictured in Latman, Gorman & Ginsburg, *Copyright for the Nineties* at 159 (cited in note 28) (though I speculate about the reasons for Ms. Liberty's dip).

⁹¹ As in Tom Stoppard's *Rosencrantz and Guildenstern are Dead* (Grove Press, 1967).

⁹² See *Texas v. Johnson*, 491 US —, 109 S Ct 2533, 2538-40 (1989); and *United States v. Eichman*, 1990 US LEXIS 3087. But see *The San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 US 522 (1987) (unauthorized use of the word "Olympics" to promote the Gay Olympics, a non-profit athletic event, violates the U.S. Olympic Committee's property right in the word).

I use the flag cases heuristically rather than doctrinally. As a matter of First Amendment doctrine, there are various grounds upon which the cases can be distinguished from intellectual property cases.

⁹³ *Johnson*, 109 S Ct at 2539, quoting *West Virginia Bd. of Ed. v. Barnette*, 319 US 624, 632 (1943).

To free one's self or one's neighbors from an unquestioning loyalty, or simply to retain cultural vitality, it is sometimes necessary to use a received symbol in an unexpected way, a way that the originators would not have wanted. As was observed when the Disney organization successfully restrained a counter-cultural comic parody of Mickey Mouse that implicitly mocked both Disney and the suburban lifestyle legitimated in the Disney canon:

Prodigious success and its responsibilities and failures draws parody. That's how a culture defends itself. Especially from institutions so large that they lose track of where they stop and the world begins so that they try to exercise their internal model of control on outside activities.⁹⁴

How might these necessary freedoms be preserved? The recommendations briefly canvassed in the first parts of this review essay may not provide a sufficiently safe harbor for a hostile use that a copyright owner wants to suppress. Even if the idea/expression dichotomy is respected, and state control of ideas preempted, it is possible that a second creative person will take enough of the first copyrighted work's expression to be viewed as infringing. Even a rejection of the judicial rule that imposes liability for "subconscious copying" would be irrelevant if the second artist used the prior work deliberately. And even if the statutory provision denying copyright to derivative works that are fully intermixed with prior works were repealed, the second author would still be unable to distribute what he has made without the permission of the first author.⁹⁵

How would we go about discovering whether current law respects the value of these hostile uses, and whether it could legitimately give them a greater freedom than other uses from charges of infringement? Is it appropriate under current law to take into account the value of hostile works and the special difficulties they face?⁹⁶

⁹⁴ Stewart Brand, *Dan O'Neill Defies U.S. Supreme Court: A Really Truly Silly Moment in American Law*, *Coevolution* Q 41 (Spring 1979).

⁹⁵ The question of whether a derivative work can have a copyright is separate from the question of whether another party also has a copyright-based legal interest in the derivative work. See § 106 (author's exclusive rights). The rights of several persons routinely co-exist in the same work or object. See, for example, Gordon, 41 *Stan L Rev* at 1361-65 (cited in note 50) (common law doctrines such as tort and property), and 1422-25 (conflicts among intangible and tangible property entitlements).

⁹⁶ I am addressing here only the threshold question of whether some special consideration should be given to hostile uses. I do not suggest that all hostile uses should automatically be permitted; the question of what weight to give to the factors discussed here, and

Their preservation, given current law, is best ensured through relatively open-ended doctrines such as fair use,⁹⁷ the idea/expression dichotomy,⁹⁸ and, possibly, the infringement, originality, or authorship standards. These several doctrines tend to be used equitably—not in the procedural sense but in Aristotle's, wherein equity is a means of correcting for the law's inevitable overinclusiveness.⁹⁹ But the purpose and justification of such flexible doctrines is usually that they allow the judge or other decisionmaker "to say what the legislator himself would have said had he been present, and would have put into his law if he had known."¹⁰⁰ Even equity, then, must be consistent with the norms of the existing legal regime, and we must identify the goals of that regime in order to determine whether giving a significant degree of freedom to hostile works is legitimate within it. Clearly, that is a task beyond the

how they might be appropriately accommodated within copyright doctrine, is outside the scope of this essay. Thus, I do not examine whether it would be desirable to look at an individual copyright owner's possible suppression motives—as Judge Oakes has suggested might be done under the "clean hands" doctrine when injunctions are sought, *New Era Publications Int'l, ApS v Henry Holt*, 873 F2d 576, 589 n 5 (concurring opinion) (case discussed in note 1)—or whether the possibility of censorship might be better taken into account in some other manner, as by adopting presumptions applicable to broad types of works.

⁹⁷ The statutory section on fair use in fact singles out "criticism and comment" as deserving of solicitude, § 107, and parody has long been considered an important exercise of fair use. See, for example, Sheldon N. Light, *Parody, Burlesque and the Economic Rationale of Copyright*, 4 Conn L Rev 615 (1979). These are types of works that a copyright owner may well wish to censor, and their special status may indicate that private censorship should be taken into account as a general matter. But current fair use doctrine does not offer a determinative answer to the question; fair use questions are decided on a case-by-case basis, *New Era Publications Int'l, ApS, v Carol Publishing Group*, 1990 US App LEXIS 8726 (2d Cir), and while some opinions suggest a sensitivity to these issues, see *id.*, also see *Rosemont Enterprises v Random House*, 366 F2d 303, 311-13 (2d Cir 1966) (Lumbard, C.J., concurring), others do not. See *New Era Publications Int'l, ApS v Henry Holt*, 873 F2d 576, 583-84 (discussed in note 1). The Supreme Court has yet to issue an opinion in a case involving suppression, offering to date only dicta that is sparse and ambiguous. See for example, *Stewart v Abend*, 1990 US LEXIS 2184.

⁹⁸ I mean to include in this category the judicially-created doctrines that preserve freedom for ideas even when they are inextricably bound with expression; in particular, the doctrine of merger (see Vol I at 80) and the doctrine that the standard of infringement can be heightened for expression that permits only limited variation. See *Continental Casualty Co. v Beardsley*, 253 F2d 702, 706 (2d Cir 1958) ("the proper standard of infringement is one which will protect as far as possible the copyrighted language and yet allow free use of the thought beneath the language").

⁹⁹ Aristotle writes, "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission . . ." Aristotle, 10 *Ethics*, in *The Nicomachean Ethics* 133, D. Ross trans, revised by J.L. Ackrill & J.O. Urmson (Oxford, 1984).

¹⁰⁰ *Id.*

scope of this essay. Nevertheless, some useful observations about both methodology and substance can be proffered even in this brief compass.

B. Identifying Relevant Principles and Policies

There are at least two possible referents when searching for antecedents consistent with giving hostile works some degree of freedom: copyright itself, viewed as an isolated set of doctrines, or copyright within the context of the law as a whole. Let us begin with the copyright law, canvassing briefly some of the available principles and policies, and then examining what the Goldstein treatise has to say about the copyright statute's purposes. As already mentioned, copyright has one dominant purpose but many subsidiary ones, and it is not yet clear from either Congress or the courts how the various policies should be ranked and weighted. The essay will explore this mix of purposes and ways we might resolve the problem this mixture poses.

1. Maximizing social welfare.

There are many norms by which a property system might be judged or justified. One type of justification is instrumental and aggregative, producing legal rules dictated by a social welfare function aimed at maximizing some particular variable. In copyright, the three most salient candidates for maximization are dollars (economic value "as measured by . . . willingness to pay"),¹⁰¹ utility, and the "progress of science."¹⁰²

Each of these variables has its own definitional ambiguities and internal variations, but their major deficiencies and strengths are fairly clear and familiar. The chief advantage of economic inquiry is that dollars are measurable; the chief disadvantage is that its criterion of value reflects existing distributions of wealth. The strength of utilitarianism is that it treats people as equals regardless of wealth; yet utility is difficult or impossible to measure and to compare interpersonally. The "progress of science" is the constitutional explanation for copyright, but it too is difficult to measure, and its use as a criterion poses an additional institutional difficulty: judges who have been admonished by years of copyright jurisprudence to beware the inexpertise of "persons trained only to

¹⁰¹ See generally Richard A. Posner, *Economic Analysis of Law* 9 (Little, Brown, 3d ed 1986).

¹⁰² See Brown, 70 Minn L Rev 579 (cited in note 64).

the law" in evaluating cultural worth¹⁰³ might be required to determine whether protecting a given work, or freeing a given use from a copyright owner's claim of protection, would better advance the progress of knowledge.¹⁰⁴

In seeking to maximize social welfare, moreover, each of these approaches seems to suffer from another potential deficiency—paying insufficient attention to individuals. Under an aggregative inquiry, the interests of a person who has done nothing morally culpable can be sacrificed in order to serve the "greater good" (however measured).¹⁰⁵

2. Authors' rights.

The authors' rights tradition contains two strands that are commonly blended,¹⁰⁶ but that in intellectual property law raise separate issues and play separate roles meriting individual treatment.¹⁰⁷ One strand is restitutionary. It has to do with securing, for those who create works of value, reward for their "just deserts." It can be viewed in various multiple ways: as a form of corrective jus-

¹⁰³ *Bleistein v Donaldson Lithographing Co.*, 188 US 239, 251 (1903) (Holmes).

¹⁰⁴ Alternatively, the progress of science criterion could be applied to types of work or the system as a whole, rather than to individual works. See *Mitchell Brothers Film Group v Cinema Adult Theater*, 604 F2d 852, 860 (5th Cir 1979).

¹⁰⁵ See Ursula LeGuin, *Those Who Walk Away from Omelas*, in *The Wind's Twelve Quarters* 224 (Harper & Row, 1975) (powerful allegory of a culture dependent on allowing harm to innocents). In practice, aggregative approaches may not lead to such extreme results. Mitchell Polinsky reminds us, for example, that persons whose interests are sacrificed in the pursuit of economic efficiency can be rewarded by transfer payments after the "larger pie" has been created. A. Mitchell Polinsky, *An Introduction to Law and Economics* 7-10, 119-127 (Little, Brown, 2d ed 1983). Even without transfer payments, utilitarianism would yield significant protection for individual interests. See, for example, Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv L Rev 1165, 1224 (1967) (both the utilitarian and fairness approaches to the Fifth Amendment yield significant protections for existing property entitlements, with utility, surprisingly, sometimes protecting entitlements that a pure fairness approach might not).

¹⁰⁶ Although these strands are usually seen as nonaggregative, they are also often intertwined with aggregative instrumental arguments. See, for example, David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J Copyright Society USA 421, 425-26 (1983).

¹⁰⁷ For an interesting investigation of one form that the restitutionary and personality approaches might take, and comparisons between them, see Justin Hughes, *The Philosophy of Intellectual Property*, 77 Georgetown L J 287 (1988). See also, Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St L J 491 (forthcoming 1990); Gordon, 41 Stan L Rev at 1446-69 (cited in note 50); Edwin C. Hettinger, *Justifying Intellectual Property*, 18 Phil & Pub Aff 31 (1989); Gordon, *Intellectual Property and the Restitutionary Impulse* (draft manuscript, cited in note 41); and Wendy J. Gordon, *Owning the Fruits of Creative Labor: Boundaries and Limits in Intellectual Property* (draft manuscript on file with the University of Chicago Law Review).

tice,¹⁰⁸ holding that the person who creates value should be paid for it, just as (arguably) those who generate harm should be made to compensate their victims;¹⁰⁹ as an offshoot of Lockean labor theory;¹¹⁰ as a notion of fairness; as a sort of strict liability for benefits; or as a variant of the law of unjust enrichment. The key notion in this branch of the so-called "authors' rights" or "natural rights" tradition is the claim to some reward, which might take the form of a claim to control.

The second "authors' rights" strand has to do with an author's personal stake in what she has made. It too can be found in Locke,¹¹¹ though arguably only with some strain, and its defenders often make use of the work of Hegel and his interpreters.¹¹² Its proponents might emphasize that "[w]e have the feeling of our personality being in some inexplicable way extended to encompass the objects we own."¹¹³ If people experience such cathexis to ordinary items of property, then how much closer, it is thought, must be the connection of the author to his creative works? Or proponents of the "personality view" might argue that property contributes to "self-actualization . . . personal expression . . . dignity and recognition as an individual person,"¹¹⁴ and that control over one's intellectual products is a form of property uniquely suited to these ends.

Searching for a definitive ordering among these policies and principles, the reader learns four things from the Goldstein treatise. First, one learns that an "instrumental" model, which views authors' rights simply as a tool for drawing from creators something that will benefit the public, is dominant in copyright (Vol I at 5-8 and nn 5-8). No determinate criterion of public benefit is specified; the yardstick of social desirability may be impact on "culture and education" (Vol I at 3, 4-5 n 1), economic value as measured by willingness to pay (Vol II at 190), or the sheer variety

¹⁰⁸ All of these issues are examined in more depth in Gordon, *Intellectual Property and the Restitutionary Impulse* (draft manuscript, cited in note 41).

¹⁰⁹ Compare George Sher, *Desert* 69-90 (Princeton, 1987).

¹¹⁰ See John Locke, *The Second Treatise of Government*, ch 5 (Bobbs-Merrill, 1952). Also see Gordon, *Owning the Fruits of Creative Labor* (draft of manuscript cited in note 107); and Hughes, 77 *Georgetown L J* at 296-330 (cited in note 107).

¹¹¹ See, for example, Karl Olivecrona, *Appropriation in the State of Nature: Locke on the Origin of Property*, 35 *J Hist Ideas* 211 (1974); Karl Olivecrona, *Locke's Theory of Appropriation*, 24 *Phil Q* 220, 225 (1974).

¹¹² See Hughes, 77 *Georgetown L J* at 330-66 (cited in note 107); and Margaret Jane Radin, *Property and Personhood*, 34 *Stan L Rev* 957 (1982).

¹¹³ Olivecrona, 35 *J Hist Ideas* at 215 (cited in note 111).

¹¹⁴ Hughes, 77 *Georgetown L J* at 330 (cited in note 107).

of works (Vol I at 197); or social desirability may be a value judgment left to Congress. (Vol I at 7) Second, one learns that the dominant instrumental model is not absolute (Vol I at 8-9; Vol II at 685-86): that the instrumental language of the Copyright and Patent Clause of the Constitution places only a "loose harness" on Congress (Vol II at 196); that considerations of "just" reward may have a proper if subordinate place in copyright (Vol I at 514-16 and n 9); and that the law even seeks to protect some of an author's personality interests, at least in some contexts (Vol I at 8-9 and at 515-16; Vol II at 249-50 and n 14, 191 n 11), though such protection may not be appropriate in others. (Vol II at 191-92) Third, and most important for the instant discussion, one learns by implication that there is no definitive ordering, no place in the case law or statute that will tell us where one of several legitimate policies is capable of extending or limiting the reach of another. Various observers have suggested the same, arguing for example that the Supreme Court has been less than consistent in deciding whether notions of "desert" play any proper role in copyright.¹¹⁵

Given this ambiguous mix of policies, with instrumentalism dominant but not exclusive, how should the equitable doctrines be construed? One might handle suppression cases by assessing the underlying policy concerns implicated by each fact pattern and deciding, according to some calculus, whether enforcing the author's prima facie rights of control or giving the hostile user the freedom to copy best serves the relevant goals. But, as noted above, determining the relevant calculus to accommodate the various goals is at this stage of copyright's development a difficult matter. This is not a sign of copyright's immaturity as a discipline; virtually all legal doctrines contain a mix of policies competing for strength.¹¹⁶ There may well be no "plateau" at which all the relevant norms will come into equilibrium.

Another way to handle the mix of policies is to minimize the conflict by identifying some dominant purpose. Thus, one might identify providing economic incentives as the dominant purpose of copyright, and recommend that special consideration be given to users whenever the copyright owner's motivations differ from that approved motive. That is the approach the Goldstein treatise takes

¹¹⁵ See, for example, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv L Rev 1659 (1988).

¹¹⁶ See, for example, Arthur A. Leff, *Law And . . .*, 87 Yale L J 989 (1978)(arguing that such mixes are inevitable).

on the suppression question, for example.¹¹⁷ Professor Goldstein argues that protection need not be given to a copyright owner who seeks to pursue "non-copyright interests," (Vol II at 191-92) defined apparently as any interest other than an interest in monetarily exploiting the work.¹¹⁸

A third way of reconciling these diverse policies is to investigate whether there is any result on which all relevant policies can converge. It is to this possibility that I now turn.

C. Safeguarding Hostile Uses from Suppression: A Search for Converging Policies

The treatise suggests that the two major strains in copyright are the economic or instrumental perspective, and the authors' rights perspective. This dual perspective parallels the configuration in property and tort law as a whole, where quandaries such as the suppression problem are sometimes analyzed in terms of whether the individual holding an entitlement is a "steward" entrusted with the resource solely for the social good that is likely to result from his productive use of it, or a "sovereign" to be left unregulated in managing the resource.¹¹⁹ Despite their potential for conflict, the sovereignty and stewardship models often generate results that converge.¹²⁰ It may be that copyright's various normative strands can be similarly reconciled in regard to particular issues. I shall suggest that in regard to at least some suppression issues—notably, those involving authors who have already made the

¹¹⁷ A similar approach was taken in 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, 1632-35 (1982) ("anti-dissemination motives").

¹¹⁸ He suggests that privacy for unpublished works may appropriately receive some deference, however. See Vol II at 191-92 n 11.

¹¹⁹ See Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 Harv L Rev 1137, 1139-41 (1990) (implicitly addressing sovereignty and stewardship models).

In intellectual property law, the sovereignty model correlates roughly with the "authors' rights" perspective. The stewardship model corresponds most closely with the economic perspective, and it also has echoes in the notion that copyright serves First Amendment values. See Vol II at 238-43 (First Amendment).

¹²⁰ It is their convergence in the usual case that permits their continued coexistence as competing perspectives. For example, one way to serve the "social good" is, arguably, to respect individual owners' investments in their property; compare Michelman, 80 Harv L Rev 1165 (cited in note 105) (utility arguments support paying compensation to owners disadvantaged by government activity in a fairly wide range of instances). Similarly, a way to serve the economic health of a society is, arguably, to honor owners' decisions as to how their property should be used. This latter argument is, at its extreme, Adam Smith's "invisible hand" notion.

copyrighted work part of the public debate or consciousness¹²¹—it may be possible to reach some consensus among the competing policies and principles, thus rendering it unnecessary to choose one dominant strand on which to rely. But such an analysis requires that one voyage some distance beyond the explicit words of the copyright statute.

1. The economics of suppression.

It may seem odd to contend that second-guessing an owner's decision about whether or not to license or sell a resource can be consistent with economics. In the suppression context, however, there exist many well-recognized economic phenomena that should diminish our confidence that the owner's decisions will in fact tend toward the "maximization of economic value" in any meaningful sense. Consider, for example, a historian who denies a hostile critic permission to quote fairly extensively from her book, or sets an extremely high price—say, \$10,000—which she believes will be the amount lost in revenues if the critic's hostile review is published. Also assume that the review would be ineffective without the quotations. If the critic, who stands to make, say, \$500 from the review, declines to purchase a license but publishes the quotations nevertheless, and the historian sues, the following reasons counsel that the courts not assume that because the historian's price was higher than the critic's offer it would produce more "value" to enjoin the unconsented use of the quotations rather than to allow distribution of the review.

First, the critic's fee is unlikely to represent all the value that publication of the review will bring to the affected audience, in part because the market for such goods rarely if ever gives their sellers a price that captures the resulting surplus.¹²² Thus, the buyer's likely maximum offer (\$499) is likely to significantly understate the actual value of the use in her hands.

Second, the historian's minimum price of \$10,000 is likely to significantly *overstate* the social value of the quotations remaining solely in the historian's hands, since much of that amount reflects

¹²¹ The arguments that follow apply most strongly to the enforcement of copyright in published works.

¹²² See Michael L. Katz, *An Analysis of Cooperative Research and Development*, 4 Rand J Econ 527, 527 (1986) (in the absence of price discrimination, a firm that invests in research and development "will be unable to appropriate all of the surplus generated by the licensing of its R & D"). Whether the historian's similar inability would exceed the critic's would be an empirical question.

mere pecuniary loss: if the review is published, many consumers of historical works will simply shift their purchases to other (perhaps better) historians, and there may be no net social loss at all.¹²³ There may even be a social benefit if an inferior history is ignored and a better one supported by the reading public.

Third, the historian's reputation and image are involved, and when such irreplaceable items are at stake "income" or "wealth" effects become significant.¹²⁴ When goods as important and irreplaceable as life or reputation are on the table persons are unlikely to sell what they own at any price;¹²⁵ yet if they have no legal entitlement to the thing at issue, their ability to buy it is limited by their available resources. In such cases,¹²⁶ where the effect of the initial grant of entitlements is so strong that it may well determine where the resource rests in the final analysis, the results of consensual bargains cannot be relied upon to yield any independent information about "value."

Of course, the above discussion is quite summary.¹²⁷ Nevertheless, it should suggest why the copyright owner's pursuit of a non-monetary interest could give an economically-oriented court special reason to inquire into the weight of the affected interests rather than simply deferring to the plaintiff's claim of right.

2. Authors' rights and suppression.

The authors' rights approach has, as mentioned, two principal lines of argument, one resting largely on the perceived appropriateness of rewarding valuable labor, the other on the perception that

¹²³ See Richard A. Posner, *The Problems of Jurisprudence* 440-41 (forthcoming, Harvard 1990) (using such effects to explain why landowners who create certain positive spillovers are not entitled to payment from those who benefit).

¹²⁴ Income effects are, roughly, the impact on one's preference brought about by a change in wealth, including the change brought about by being given, or being denied, an entitlement. See, for example, E.J. Mishan, *The Postwar Literature on Externalities: An Interpretive Essay*, 9 J Econ Lit 1, 18-21 (1971) ("income" or "welfare" effects illustrated arithmetically); see also Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St L J at 518-19 (cited in note 107) ("flip flop" of rights).

¹²⁵ See *Fisher v Dees*, 794 F2d 432, 437 (9th Cir 1987) (in the case of parody, "[s]elf-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee.").

¹²⁶ Compare Ronald H. Coase, *Notes on the Problem of Social Cost*, in R. H. Coase, *The Firm, the Market, and the Law* 157, 170-74 (U Chicago, 1988) (suggesting that income effects are unlikely to be significant in contexts not involving irreplaceable goods such as, in this context, reputation or self-esteem).

¹²⁷ For further exploration, see Wendy J. Gordon, *The Right Not to Use: Nonuse and Suppression in Intellectual Property*, (draft manuscript on file with the University of Chicago Law Review).

authors have a special personal attachment to their works. While conceivably either of these strands could be employed to argue that authors should be free to suppress others' unfriendly use of their work, such an argument does not inevitably follow from the arguments' terms. To the contrary, attention to questions of proper reward or personal development and psychological cathexis may better indicate that the power to suppress should not be given to artists.

Turning first to the restitutionary strain of argument, it appears to rest on the notion that a person should retain the benefits she generates. That notion in turn might be traced to any one of a number of arguments: a strict view of personal responsibility, perhaps, suggesting that every individual should keep the benefits she generates and pay for the harm she does; or perhaps a notion that the existing balance of goods among persons warrants respect as a *prima facie* matter, so that any unjustified taking of a benefit or imposition of a harm causes an imbalance or inequality that demands recompense. But these notions tend to be symmetrical;¹²⁸ they suggest that if "pay for the benefits you receive from others" is a relevant principle, so is "do no harm to others," or "pay for the harm you do others." If so, the author's right is limited by the very consideration that supports it. An author under an obligation to refrain from harm is not at liberty to withdraw her work at will from the use of those whom it has affected.

Another possible foundation for the restitutionary strain in "natural rights" argument is Lockean labor theory. Here, too, non-owners' rights against harm have an important role. A harm-based limitation on property rights is captured in Locke's theory by his proviso: one who labors in the common to draw forth water from the lake or pick apples from the field is entitled to that to which his labor is joined, as (arguably) is an artist who labors to give expression to ideas he draws from the public domain, but only so long as "enough and as good" is left for others.¹²⁹ If that proviso is not met—if giving exclusive dominion to the laborer will leave others worse off than they would have been in his absence—then the laborer is not entitled to property rights in what he has taken.

¹²⁸ In fact, if there were an asymmetry, it would probably be to give a stronger right against harm than to recapture benefits. See Saul Levmore, *Explaining Restitution*, 71 Va L Rev 625, 671-72 (1985) (suggesting that such an asymmetry exists in the common law).

¹²⁹ See Locke, *Second Treatise* ch 5, § 27 (cited in note 110). The condition that "enough and as good" be left for others is commonly known as the proviso or sufficiency condition.

The structure of this argument gives primacy to the harm principle, as it should, since it can be argued that Locke's affirmative argument also derives from a harm principle. To see this, consider Locke's primary argument for property:¹³⁰ Locke first argues that each of us has a property in his body and the labor of his body. Second, he posits that when one appropriates things from the common—picking apples, drawing water from the river—one joins one's labor to the things so taken. Third, he posits that because labor is property, others have no right to what the labor is "joined to." Here he is implicitly building upon his earlier expressed notions of what it means to have "property"—an entitlement not to have what one owns unjustifiably taken away or harmed.¹³¹ It would harm the laborer to take the apples or water from him because doing so would take the labor he had joined to these items of sustenance as well. Therefore, one who labors to draw forth objects from the common plenitude "has a property" in the things so gathered, at least if there is "enough, and as good" left for others, because others are under an obligation not to harm him by taking the things from him.¹³² In short, Locke's labor theory may depend upon a "do no harm" rule, and acting upon the theory (with no additional justification) is problematic when doing so itself *causes* harm.

In many contexts, allowing a copyright owner to suppress the works he has dispatched into the culture would indeed cause harm. The copyright owner has injected something into the common culture, and its audience may be unable to purge it from their memories once they have encountered it. Having changed the community's culture, the author may actively be committing a harm if he then withdraws the work from the community when its new artists seek to integrate, assess, and respond to its influence. Perhaps on

¹³⁰ See *id.* I give here my interpretation of Locke's "labor-joining" argument. Locke's *Second Treatise* also contains other arguments regarding, for example, the beneficial results of property ownership.

¹³¹ Locke, *Second Treatise*, ch 2 at ¶ 6, 8 (cited in note 110); and Karl Olivecrona, *The Term 'Property' in Locke's Two Treatises of Government*, 61 *Archiv für Rechts- und Sozialphilosophie*, 109, 113, 114 (1975) (relationship between notions of "property" and the natural law concept of *suum*).

¹³² See Locke, *Second Treatise* ch 5 at ¶ 27. The proviso that "enough, and as good" be left for others constitutes an additional "do no harm" principle. See also Lawrence C. Becker, *Property Rights: Philosophic Foundations* (Routledge & Kegan Paul, 1977). Similarly, Locke's argument regarding waste suggests he saw nothing wrongful in taking property from someone to whom it had no value. Locke, *Second Treatise* ch 5 at ¶ 37. If so, Locke would seem to view a non-harmful taking as non-wrongful, at least in the state of nature.

balance the first artist's work is still more valuable than not; if so, perhaps, some payment is owed to that first artist even when a hostile or critical use is made. But even if the restitutionary strain in "natural rights" theory will justify complete control and injunctive relief in some circumstances, it will not do so here: neither an entitlement to capture the effects one creates, nor Lockean labor theory, supports a complete right of exclusion against those whom the property negatively affects.¹³³

What of the "personality" theories? Clearly the artist who finds his work attacked will not be happy about it. And yet a regard for emotional attachments or self-actualization does not point solely in the direction of suppression and the artist's interests; audiences, too, develop attachments to the symbols surrounding them, and for audiences, as for artists, use of the symbols may be essential to self-expression and to making an impression on the world around them.¹³⁴

3. Reference to the common law.

Yet all this is at a fairly high level of generality, and debatable. To what other sources might one look to determine *what* a lawmaker should decide when faced with a claimed right to suppress? One possibility is to look to decisionmakers in analogous contexts. This leads us to the common law, particularly the area known as substantive restitution¹³⁵ or "unjust enrichment." This is the area of the common law most concerned with copyright's central issue, the question whether (and when) the law should impose noncontractual liability for benefits one person derives from another's efforts. Persons who feel it is illegitimate to be required to pay for copying should consider the restitution cases, in which persons who willfully take advantage of benefits made possible by others' efforts are sometimes required to pay for them.¹³⁶

¹³³ For a fuller development of this theme, see Gordon, *Owning the Fruits of Creative Labor* (draft manuscript, cited in note 107); Gordon, 41 Stan L Rev at 1460-65 (cited in note 50).

¹³⁴ See Jeremy Waldron, *The Right to Private Property* 4, 343, 378-81 (Clarendon, 1988) (arguing that the upshot of the Hegelian analysis is that, in Hegel's own words, "everyone must have property. . .").

¹³⁵ I here mean to distinguish restitution that itself provides the basis of a cause of action from restitution that serves simply as a remedy for the violation of rights provided by other doctrines.

¹³⁶ See Gordon, 41 Stan L Rev at 1454-65 (cited in note 50) (comparing the exceptions to the "intermeddler" rule with copyright).

The restitution cases are, however, marked by a strong concern with preserving the defendant from an erosion of his autonomy,¹³⁷ and with preserving the defendant from harm. Thus, when the choice is between leaving a laborer unrewarded and causing a net harm to the defendant, frequently the laborer is left without recourse.¹³⁸ If the common law is any guide, then, authors might not be entitled to copyright's rewards in cases where copyright enforcement would leave the defendant suffering a net harm. If so, authors who attempt to use copyright law to suppress works unfavorable to them should not be completely free to do so.¹³⁹ Some concern for the users' autonomy and safety from harm—some concern with the audience's own moral rights—is necessary. Thus it is not just the Lockean proviso that counsels giving some latitude to the user who is trying to recast for herself and others harmful symbols and text that have been thrust upon her.

The common law might offer guidance to some of the other questions canvassed above as well. A particularly useful source of analogy might be torts, which in many ways functions as the converse of intellectual property.¹⁴⁰ As a mirror provides a great deal of information through its reversed images, it may be that the literature of tort law, the civil branch of the law of harms, could contain significant wisdom applicable to the jurisprudence of benefits.

¹³⁷ See George E. Palmer, 2 *The Law of Restitution* 359 (Little, Brown 1978) ("long-standing judicial reluctance to encourage one person to intervene in the affairs of another by rewarding restitution of benefits thereby conferred.").

¹³⁸ See Levmore, 71 *Va L Rev* at 77-78, 84 (cited in note 128) (law denies restitution where a nonbargained "benefit" may not in fact make recipient better off; even at a "less-than-market" price the unsolicited benefit "may be undesirable to a wealth-constrained" recipient); see generally Gordon, *Intellectual Property and the Restitutionary Impulse* (draft manuscript, cited in note 41).

¹³⁹ The desirability of avoiding harm expresses itself as a legal principle with weight in many other areas of the common law as well. See Gordon, 41 *Stan L Rev* at 1362-65; 1461-63 (cited in note 50) (under common law systems property owners generally not privileged to do harm).

¹⁴⁰ A caveat regarding nomenclature is in order here. When property rights are violated, the resulting cause of action is typically classified as a tort. Copyright is no exception; copyright infringement is classified as a tort. See William F. Patry, *Latman's The Copyright Law* at 266 (cited in note 19). It would therefore be circular to refer to "tort law" as a source of insight for copyright if one meant only the branch of torts that effectuates owners' rights to exclude. But of course tort law does more than protect a property owner's right to exclude. It also mediates non-property relations, as in the law of negligence, and, through the law of nuisance, it helps define the hazier boundaries of a property owner's entitlements. In these latter areas tort cases tend to serve as a locus for substantive policy discussion about what rights should be granted. It is to this discussion and consequent experimentation that I refer when I suggest looking to "tort law" for informative analogies to some of our intellectual property questions.

First, both copyright and torts can be interpreted as serving non-instrumental ends. Whether in terms of morality, fairness, or "corrective justice," one can argue that an innocent victim injured by a harm-causer "deserves" to be made whole and that the defendant "ought" to pay. Similarly, it is often argued that a creative person "deserves" to be paid for what he has brought to the world, and that the user of another's work "ought" to give recompense for it. The question of what role should be played by a creator's claim to "fair return" is largely unresolved in copyright.¹⁴¹ It is likely that there is some grain of truth in that much-invoked but little-analyzed notion, "the natural rights of an author," and only systematic analysis can separate that grain from the rhetoric of perpetual and all-encompassing claims that now clings to it. Perhaps the literature exploring notions of "desert" and "corrective justice" in torts, and in criminal law as well, could be of assistance here.

Second, and perhaps more important, both copyright and torts serve a particular incentive function: they seek to "internalize externalities." That is, both copyright and torts seek to bring decisions' effects to bear on persons with power to affect how things are done. In copyright, the primary person to be affected is the creator; he is ordinarily the "best benefit generator" and is to be encouraged to produce by being given a right to capture a portion of the benefits he creates.¹⁴² In torts, the primary person to be affected is the tortfeasor; he is ordinarily the "cheapest cost avoider" and is discouraged from taking unnecessary risks with others' persons and possessions by the specter of a suit imposing liability for any harm caused. Thus, both doctrines aim at providing incentives.¹⁴³ Conceivably the lessons of one could be useful for the other.

We might try, for example, viewing the creative user problem from the perspective of the tort doctrines that recognize that the person best able to effectuate desirable action is not always the person in the defendant's position. For example, if a pedestrian is "contributorily" or "comparatively" negligent by running in front of a car, that behavior will eliminate or reduce any recovery that

¹⁴¹ See, for example, Vol I at 4-9; Vol II at 685-86. See also Fisher, 101 Harv L Rev 1659 (cited in note 115).

¹⁴² Persons with the potential to create valuable works have rights over the use others make of their products; the benefits the authors create are brought home via license or royalty fees, and productive behavior is encouraged.

¹⁴³ Copyright provides positive incentives to persons with control over potentially creative resources, and the law of torts provides negative incentives to persons with control over resources with destructive potential.

might be sought. The economic logic is familiar: when the pedestrian is better positioned than the driver to avoid an accident,¹⁴⁴ it is the pedestrian's behavior the law should seek to change; one way to change that behavior is to force pedestrians to bear some of their own costs if they choose to behave carelessly. The formal lesson of the logic is also familiar: in every transaction there are two parties, and deciding how to "internalize" costs between them is a choice that should depend on context rather on formal classifications such as plaintiff or defendant.¹⁴⁵ If all the harms that would not occur "but for" the defendant's driving were internalized to that driver, others who might become involved might have an inadequate incentive to be careful.

The same lesson could be applied, just as simply, to copyright. If all the benefits that could be traced to a first artist through a "but for" test were internalized to her, no one else would have a monetary incentive to build upon her work. If a creative copyist is in a better position to contribute to the culture than is the first artist, then perhaps the law should take care to direct positive incentives to such persons by, for example, giving them a copyright in their derivative works. It may be that tort tests of responsibility would remind us that "incentive" works both ways, and might even assist us in parsing where an "infringing derivative work" ends and a non-infringing work begins.

Copyright is less a field of law than a domain: while the bulk of American law regulates the behavior of persons in regard to tangible things and each other, copyright regulates the behavior of persons in regard to a particular species of intangible, the "work of authorship." Copyright, like the rest of American jurisprudence, has a law of property (Vol I at chapters 2-5), a law of tort (Vol I at chapter 6 and Vol II at chapters 7-10), a law of contract (Vol I at 405-36 and 480-511), a law of procedure and remedies (Vol II at chapters 11-14), a law of inheritance (Vol I at 450-57, 485-93), and even its own branches of criminal law (Vol II at 289-306) and international law (Vol II at chapter 16). It is only fitting that copyright can learn from what the rest of the law has to teach.

¹⁴⁴ See generally Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 134-40 (Yale, 1970) ("cheapest cost avoider").

¹⁴⁵ See R. H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

