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The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection

Lydia P Loren



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In the United States utilitarian theory posits that granting an exclusive right in creative expression will provide a necessary incentive to invest in the creation and distribution of expressive works. It is feared that without this incentive there would be insufficient motivation for creation. Indeed, it appears that the U.S. adheres completely to the notion that “no man but a blockhead ever wrote, except for money.” Yet the creation of many works, such as email and papal decrees, ordinarily are not motivated by monetary incentives. Nevertheless, current copyright protection fails to account for the creator’s motivation in determining the level of protection of the copyrighted work. Despite its extremely low threshold, copyright protection is not cost-free: granting exclusive rights in expression makes subsequent expression more costly, imposes wealth distribution costs, and creates distributive consequences affecting opportunities for expression. Society should avoid shouldering these costs when they are unnecessary. If copyright law is designed to guard against underproduction of intangible assets then it is entirely appropriate to provide less protection when there is little risk of underproduction. This article argues for less robust copyright protection for differently motivated works. Well-documented industry capture of the legislative process in the field of copyright law makes legislative recalibration of the scope of protection unlikely. This article provides a more realistic approach: courts should incorporate a motivational inquiry when determining the level of similarity needed to demonstrate non-literal infringement and should also expressly consider creator motivations when analyzing the second and fourth fair use factors. Reducing the robustness of copyright protection for differently motivated works will decrease the costs to society and better facilitate the underlying goal of copyright law: the promotion of knowledge and learning.

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Lydia Pallas Loren¹

In June 2006 the Vatican forcefully asserted its copyright in all papal texts, sending a bill for past royalties to one publishing house and indicating that “prior agreement” with the Vatican would be necessary for newspapers to publish excerpts from officially released papal documents.² If the Vatican were to assert its copyright against a publisher or a newspaper in U.S. courts, how would its claim be treated? Presumably the creation and distribution of papal texts are motivated by considerations other than monetary reward. Thus, it is safe to assume that the Pope and the Vatican do not *need* the incentive created by copyright law in order to create or distribute papal writings. Should this affect the eligibility for or the scope of copyright protection? Papal texts are not the only category of works where the incentive of the copyright is not the primary motivating force for the creation and dissemination of the work. If the driving motivation for the creation of certain works is unrelated to copyright protection, should that play a role in determining the existence of copyright protection or the scope of copyright rights that the law provides such works?

Current U.S. copyright law, while based on a utilitarian theory, does not expressly consider motivation in determining protection afforded to copyright owners. Indeed, when looking solely at U.S. copyright law, it appears that the U.S. adheres completely to the notion that “no man but a blockhead ever wrote, except for money.”³ This

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² Richard Owen, *Vatican 'Cashes In' By Putting Price On The Pope's Copyright*, The Times, January 23, 2006.

³ BOSWELL'S LIFE OF JOHNSON 19 (G. Hill ed. 1934). Samuel Johnson's famous quote has been included in several important copyright decisions in the United States. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994); Castle Rock

article argues that while the grant of copyright protection without reference to motivational factors may be appropriate, the law should take creator and distributor motivation into account in determining how robust the copyright protection afforded should be.

The approach argued for in this article will result in less robust, or “thin,”⁴ copyright protection for those types of works that do not require the incentive of the copyright to be created and distributed.⁵ As explained in Part I, this approach is entirely consistent with the utilitarian underpinnings of U.S. copyright law. If copyright law is designed to guard against underproduction of intangible assets that, without the legal rights afforded by copyright, would be a public good,⁶ then it should not be problematic to provide less protection for those types of works that appear to not risk underproduction absent legal protection. Providing less protection to certain categories of works, however, may do harm to an authors’ rights view of copyright law. This harm could be counterbalanced by a stronger right of attribution than is currently provided to authors of creative works under U.S. copyright law.⁷

It is time to take into account the social cost of uniform levels of protection in copyright law. All works are not created equal: different types of works are motivated by different considerations. Fundamentally, many works that meet the extremely weak requirement of some minimal degree of originality are not created as a result of the monetary incentive offered by copyright protection. In addition to papal and other religious texts, examples of other types of works created and distributed without the primary motivation being the marketable right provided by copyright law include, but are by no means limited to: email and other personal communications, model legal codes, standard portrait photography, amateur/home photography, architectural works,

Entm’t, Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, (2d Cir. 1998). I offer no comment on this quote when considered in the context of papal writings.

⁴ Courts and commentators often refer to “thin” copyright protection for those works that, while eligible for copyright protection, have less creativity or originality. See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 349 (1991); Ets-Hokin v. Skyy Spirits, Inc., 323 F.3d 763, 766 (9th Cir. 2003); TransWestern Pub. Co. LP v. Multimedia Marketing Associates, Inc., 133 F.3d 773, 776 (10th Cir. 1998).

⁵ Lisa Ramsey has proposed such reduced protection for advertising works. Lisa Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH. TELE. & TECH. L. REV. 189, 246-47 (2006).

⁶ COHEN ET AL, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6-8 (2d ed. 2006).

⁷ As discussed more below, providing a stronger right of attribution may be more in line with the desires of creators whose motivations for creating new works are non-monetary. For a general discussion of the significant effects that an author’s name can have see Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME LAW REV. 1945, 1949-70 (2006); Laura A. Heymann, *The Birth of Authorship: Authorship, Pseudonymity, and Trademark Law*, 80 Notre Dame L. Rev. 1377 (2005).

advertising artwork and advertising copy,⁸ scholarly articles,⁹ and legal documents.¹⁰ In this article, these types of works are referred to as “differently motivated works.”¹¹ While the protection afforded by copyright law may be important for a variety of reasons to the creators or distributors of differently motivated works, robust copyright is not necessary. Thus, with respect to differently motivated works, there is no reason why society should endure the cost of uniformly robust copyright protection for these types of works.

After surveying the normative reasons for candidly using motivation for creation as a basis for distinguishing different levels of protection in Part I, Part II examines the costs associated with copyright protection. Part III argues that complete elimination of copyright protection for differently motivated works would be inappropriate. Part IV describes how the current Copyright Act does not expressly consider motivational realities in granting or calibrating copyright protection.

The final sections of the article explore the ways in which copyright law could vary the level of protection afforded to differently motivated works. While statutory changes could best accomplish the much needed recalibration, industry capture of the legislative process in the field of copyright law is well documented¹² making legislative change unlikely. Thus a more realistic approach is for courts to interpret the current statute and provide appropriately “thin” protection. As explored in Part V, courts should incorporate a motivational inquiry in establishing the level of similarity needed for non-literal infringement and should engage in a more searching analysis of the second and fourth fair use factors when a differently motivated work is at issue. Finally, Part VI provides some preliminary ideas on statutory changes that would accomplish appropriate tailoring of rights.

⁸ See Ramsey, *supra* note 5.

⁹ See, e.g., Jessica D. Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779 (2006).

¹⁰ This list is not meant to be exhaustive but merely illustrative of the types of works that should be granted a narrower scope of copyright protection. There certainly are other types of works that may fit the criteria. The types of works identified here will be used to illustrate the points asserted throughout this article.

¹¹ In settling on the phrase “differently motivated works”, I rejected “non-economically motivated works” as many of these types of works are directly economically motivated. For example portrait photographers are motivated by the compensation they receive from their clients and subjects, lawyers are motivated by the payment of fees to create legal documents. Being motivated by economics, however, is not the same as being motivated by the marketable right granted by copyright law.

¹² Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

I. WHY MOTIVATION IS AN APPROPRIATE CONSIDERATION IN DETERMINING SCOPE OF COPYRIGHT PROTECTION

Should courts explicitly consider motivation in determining the scope of copyright protection? The answer to this normative question depends on what one believes to be the purpose of copyright law. Generally, justifications for copyright protection fall into three broad categories: Utilitarian, Natural Rights, and Author's Rights. The utilitarian justification is based on a belief that without the protection afforded by copyright law creative works would be under-produced.¹³ The natural rights justification holds that providing a legal means of protection for the products of a man's creativity is the morally right course of action.¹⁴ A Hegelian based author's rights view of copyright posits that providing protection for the creations of the mind helps individuals become fully self-realized.¹⁵ Continental European copyright laws stem from an author's rights conception recognizing the bond between creator and the intangible work created.¹⁶

In the United States the justification for copyright protection is overwhelmingly utilitarian.¹⁷ The law grants protection for copyrighted works in order to achieve a goal – the advancement of knowledge and learning.¹⁸ It is believed that without the marketable right of the copyright there would be insufficient incentives for the creation and distribution of creative works.¹⁹

The intangible asset that the law identifies as the copyrighted work can be thought of as a “public good” in the economic use of that phrase. Characterized by non-rivalous consumption and non-

¹³ COHEN, *supra* note 6, at 6-8.

¹⁴ Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544-45 (1993).

¹⁵ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 972 (1982). See also Wendy J. Gordon, *supra* note 14.

¹⁶ Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992 (1990); Wendy J. Gordon, *supra* note 14, at 1533.

¹⁷ Ramsey, *supra* note 5, at 217-223; Cf. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

¹⁸ This purpose behind copyright law is expressly stated in the Constitution. U.S. Const. art. I, sec. 8, cl. 8. Exclusive rights granted to authors are meant to “promote progress in science.” *Id.* (emphasis added). At the time of the framing of the Constitution, “science” connoted broadly “knowledge and learning.” Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 11 n.13 (1966) (noting that the most authoritative dictionary at the time listed “knowledge” as the first definition of “science”).

¹⁹ Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989).

excludability, without legal protection it is feared that, like all public goods, copyrighted works will be under produced.²⁰ The grant of exclusive rights to creators of copyrighted works is designed to correct for potentially sub-optimal production by providing a marketable right to those creators. This marketable right creates an incentive for production. As a marketable right, the magnitude of the incentive is, in theory, perfectly calibrated by the invisible hand of the market. The more “in demand” a work or type of work is, the greater the potential reward and thus the greater the incentive will be to create and distribute those types of works. The value of creators’ and distributors’ rewards is linked to the market for the works themselves, with greater profits made possible by copyright protection.

The utilitarian theory posits that without the legal protections afforded by copyright, creative individuals and entities would not have the same level of incentive to create and distribute new works. Without legal protections, popular works would be copied by competitors and the price driven down to the marginal cost of each copy. The original creator and distributor might not be able to recoup expenses incurred in the creation of the work and, at a minimum, would not be able to obtain as much profit in the face of direct competition.²¹ Preventing copying through copyright law allows for higher profits for copyright owners, thereby creating the incentive to invest in the creation and dissemination of new works. As the Supreme Court recently stated, "copyright law serves public ends by providing individuals with an incentive to pursue private ones."²²

When considering the effects of the marketable right created by copyright, it is important to remember that knowledge is advanced not only by new works being created, but by those new works being shared with other as well.²³ Thus, when discussing the incentives created by copyright, it is also important to consider the incentives necessary to achieve dissemination.²⁴ When start-up costs for dissemination are

²⁰ COHEN, *supra* note 6, at 6-7.

²¹ Cf. Stephen Breyer, *The Uneasy Case For Copyright: A Study Of Copyright In Books, Photocopies, And Computer Programs*, 84 HARV. L. REV. 281 (1970). Professor (now Justice) Breyer argues that there are other means for publishers to recoup investment, including lead-time advantage and brand loyalty.

²² *Eldred v. Ashcroft*, 123 S. Ct. 769, 785 n.18 (2003).

²³ Both initial disclosure to others and public distribution facilitate the advancement of knowledge. First publication can be an important right for all copyright owners and is protected through the reproduction right. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

²⁴ The complicated dynamics between authors and publishers, or creators and disseminators more broadly, remains part of the copyright world that cannot be ignored. See Maureen A. O'Rourke, *A Brief History Of Author-Publisher Relations And The Outlook For The 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425 (2003). While the

costly or the risk of recouping insufficient returns is high, copyright protection's elimination of direct competition allows distributors to charge higher prices and thereby recoup start-up investment faster and reduce the risk of insufficient returns. However, the distributors of differently motivated works also have other motivations for distribution, beyond pure profit. The cost of dissemination is real, although in a digital world that cost may be significantly reduced for certain types of distribution methods.²⁵ Because of this real cost, under-dissemination may remain a concern even for works whose creators are in no way motivated by the marketable right created by copyright. Thus some level of copyright protection may be necessary, although fully robust copyright protection may not be.

Pausing at this juncture to consider some of the categories of works identified at the outset of this article may help to provide some insight into the effect of providing copyright protection for these types of works. It would seem that the Vatican has sufficient incentive to both create and distribute papal texts without regard for the rights afforded by copyright protection. The Vatican seeks to provide guidance to those of the Catholic faith on a wide array of matters. That guidance comes in the form of written communications authored by the Pope and other church officials and distributed through the Vatican to churches and believers worldwide. Copyright protection for these works permits the Vatican to recoup the cost of creating and producing copies of the works, and, to the extent copyright protection allows the Vatican profits beyond the marginal cost of production of those copies, helps offset the operational cost of the Vatican itself.²⁶ Copyright law therefore can be viewed as providing a subsidy to the Catholic Church.²⁷ However, even in the absence of copyright protection, there appears to be little risk of underproduction, under disclosure or under dissemination of these types of works.

The creation of email messages and personal communications also appears to be sufficiently motivated by incentives unrelated to those provided by copyright protection.²⁸ The distribution of these items, at

use of internet distribution of certain types of creative works by creators can be accomplished without the need for distributors, distributors still play an important role off the internet and on the internet as well.

²⁵ See Raymond Shih Ray Ku, *The Creative Destruction Of Copyright: Napster And The New Economics Of Digital Technology*, 69 U. CHI. L. REV. 263 (2002).

²⁶ See *supra* notes 17-19 and accompanying text.

²⁷ For a discussion of copyright as a form of authors' welfare, see Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229 (2003).

²⁸ A particularly interesting example of this principle is demonstrated by cease and desist letter sent by lawyers to alleged copyright infringers. Those letters are created not because of the incentive that copyright protection provides, but rather to protect the

least to one recipient, does not require the incentive of the Copyright Act; they are created for the purpose of being shared in this manner. It is also unlikely that affording copyright protection to these works provides an incentive for the sender to further distribute them. Again, the risk of underproduction or insufficient disclosure or dissemination appears minimal. The protection of copyright for these correspondences may, instead, decrease their subsequent distribution by the recipients by allowing the author of the email to object to subsequent reproduction.²⁹

The production of model legal codes appears to be motivated by concerns for legal reform, or by the concerns of the members of the organization proposing any particular model law.³⁰ Model codes offer a way to create industry standards with legal enforceability. Model codes are often drafted by industry organizations seeking to achieve the benefits associated with favorable legal codes as well as the benefits that can accompany standardized legal codes. The marketable right granted by copyright law and the potential for supra-competitive pricing made possible by copyright protection is not the primary motivation for the creation of model codes. Model codes have been held to be protected by copyright. Though the model code may retain protection, even after it is enacted, the enacted version is no longer subject to copyright protection.³¹ Copyright protection permits these organizations to charge a price for copies of the model code that is greater than the marginal cost of production, greater than they would be able to charge in a market with direct competitors selling the same work.³² To the extent that copyright law provides protection for model codes, that protection permits these organizations to earn profits that help offset the costs of creating those codes. It is unlikely, however, that the potential for supra-competitive pricing that copyright protection facilitates leads to increased creation of model codes.³³ The industry has sufficient incentive to create and distribute these works without a robust copyright right.

marketable right in a copyrighted work. Yet the copyright office has registered and courts have acknowledge the copyright in the cease and desist letter itself. *See, e.g.* In re 43sb.com LLC, No. MS-07-6236-EJL-MHW (Dis. Idaho 11/16/07) available at http://pub.bna.com/eclr/076236_111607.pdf.

²⁹ *See id.*

³⁰ For example, building-contractor associations are a main proponent of model building codes and stand to benefit by the enactment of the codes they create.

³¹ The protection for model codes becomes almost non-existent once that code is enacted into law. *See Veeck v. Southern Bldg. Code Congress Intern, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003) [hereinafter *Veeck*].

³² *Veeck*, 293 F.3d at 794-95.

³³ To the extent that some groups may enter the model code business in order to profit from sales of the works, those may not be the groups society would be most interested in having draft model legislation. While there are also problems with industry groups writing the codes that govern the players in that industry, affording model codes less

It is likely that portrait photography, like those available in shopping malls across the country or hired by contract for events such as weddings or high school graduation, would be created even without the protection that the photographer³⁴ obtains under copyright law. The photographers are paid to create these images by clients who are not initially motivated by the marketable right that copyright protection affords. The existence of copyright protection may affect pricing schemes used by portrait photographers, but it is unlikely that it motivates additional creativity or distribution.³⁵ Yet copyright protection for these types of works can interfere with legitimate uses by the consumer.³⁶

Amateur and home photography also is not motivated by the monetary incentive provided by copyright protection. People take pictures to capture memories and to document both life's milestones and trivialities. Copyright protection has nothing to do with providing an incentive for the creation of these types of photographs. In the age of the internet, mass public distribution of these images also does not appear to be motivated by financial gain. Photographic images on sites such as

robust copyright protection would likely not significantly reduce industry group incentive to create such codes.

³⁴ In many situations of portrait photography today the photographer is employed by a corporation and is taking the photographs within the scope of her employment. In these situations, the author of the work would be the corporation. *See* 17 U.S.C. § 101 (definition of "work made for hire").

³⁵ It is possible that the existence of copyright protection for these images helps keep the initial price for the creation of these images lower. If a photographer factors in the profits that are possible from the marketable copyright rights in the photographs, she may initially charge less to the client, figuring to make additional profits through the copyright.

Industry pricing practice may differ for other types of professional portrait photography. As any parent of a teenager can convey, the industry practice surrounding "senior pictures" varies widely. One recent example relayed to me involved payment of over \$150 for an initial set of approximately 10 photographic proofs. Additional prints from those proofs were also extremely expensive when ordered through the photographer. No assignment of copyright could be obtained. When asked what type of prints the parent was going to order, the response was that the parent planned to scan the proofs and make their own prints at home. This anecdote may, in fact, indicate that copyright protection in the digital age is meaningless for the photographer, thus explaining the high price for the initial proofs. If that is the case then robust copyright protection is unnecessary as these works will be created regardless of the level of copyright protection.

³⁶ Just try taking one studio produced portrait photograph to a copy store to include as one of over 20 home photographs in a personalized calendar as a gift for the grandparents. Stores routinely refuse to reproduce such images. *See* Copyright and Your Photographic Products, Fred Meyer Brochure (on file with author). Additionally, privacy concerns and rights of publicity claims may restrict the ability of the photographer, as creator of these works, from authorizing further distribution.

flickr and picasa abound³⁷ and while these distribution sites offer participants a choice concerning the assertion of copyright ownership, it is almost as if that choice is an afterthought, certainly not a motivating factor in the creation of the vast majority of images.

The creation and distribution of works designed to advertise a product or a service are also not primarily motivated by the marketable right granted by copyright law.³⁸ The creation and distribution of advertising is motivated by the desire to increase awareness, and ultimately sales, of a product or service. The creative individuals producing the advertisements are paid directly by the company's employing them. The companies, in turn, recoup their investment in the advertising through increased sales of the product or services advertised.³⁹ The copyright protection afforded advertising works does not motivate their creation and dissemination. If the scope of protection for these types of works were reduced it is highly unlikely that fewer of them would be produced and distributed.⁴⁰

As these examples illustrate, if providing copyright protection is meant to address the potential sub-optimal production and distribution of creative works, calibrating protection based on the primary motivation for creation and distribution seems reasonable. It is appropriate to afford less protection to creators of works who do not need the incentive copyright protection is designed to provide because under-production is not a threat. Some minimal level of protection may be necessary to offset the cost of distribution, but the scope of copyright protection necessary is not likely to be as great as with other categories of works. Using primary motivation for creation and distribution to shape the scope of copyright protection is justified through this straightforward account of the utilitarian purpose of copyright.

There is an additional subset of differently motivated creative works that is also worth considering. It is well known in psychological literature, and more fundamentally on an intuitive level, that some of the most highly creative works are created by individuals who are not motivated by monetary gain.⁴¹ Many artists, authors, musicians, poets, and other highly creative individuals create as a means of expressing themselves, rather than for an extrinsic reward. "Such intrinsic

³⁷ See <http://www.flickr.com> and <http://www.picasa.com>.

³⁸ Ramsey, *supra* note 5 at 217-23. Professor Ramsey also questions the net social benefit of the government encouraging the creation and dissemination of advertising. *Id.* 229-36.

³⁹ *Id.* at 218.

⁴⁰ *Id.* at 219-23.

⁴¹ TERESA AMABILE, CREATIVITY IN CONTEXT 115 (1996) (discussing the Intrinsic Motivation Principle as a fundamental principle in our understanding of human creativity). See also Kwall, *supra* note 7, at 1949-70 (exploring the theological and secular perspectives on inspirational motivations).

motivations can include the desire for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author.”⁴² Works in which the intrinsic dimension of creativity⁴³ is high also do not, under the utilitarian story of copyright, need the marketable right granted by copyright to induce their creation. For these works, less robust protection for the economic right granted by copyright protection should be coupled with some protection for the non-economic rights that U.S. copyright law does not currently protect: rights of attribution and integrity.⁴⁴

A market based approach to copyright law assumes that all individuals are motivated by monetary reward.⁴⁵ The effect of this underlying assumption on the scope of copyright protection afforded should be reexamined. This plea for reexamination comes at a time when those in the field of economics are calling for more consideration of the rational actor assumptions⁴⁶ and at a time when social science research and literature is gaining greater prominence as an influencing force in the design of incentives created by legal rules.⁴⁷ Given the costs of copyright protection, as described in the next section, the scope of copyright protection afforded different types of works should factor in the full range of motivations for creation and distribution of original works of authorship.

II. THE COSTS OF ROBUST COPYRIGHT PROTECTION

Investigating the costs of copyright protection strengthens the conclusion that motivation should be considered explicitly when determining the strength of copyright protection granted to different types of works. Providing legal rights for creators of works of authorship involves a cost to society. The costs created by copyright protection include the increased cost of “inputs” to the creative process as well as the opportunity cost of the investment in the creation of new works. Additionally, the wealth distribution effect of copyright protection shifts resources from consumers and users of copyrighted

⁴² Kwall, *supra* note 7, at 1947.

⁴³ *Id.*

⁴⁴ *Id.* at 1991-2012. Professor Kwall endorses the need for greater protection of these non-economic rights, but does not argue that a reduction in the scope of protection for the economic rights is warranted. This article makes the case for a reduction in scope of economic rights, although not a complete elimination of those economic rights.

⁴⁵ See BOSWELL'S LIFE OF JOHNSON, *supra* note 3 and accompanying text.

⁴⁶ See, e.g., Louis Uchitelle, *Encouraging More Reality In Economics*, N.Y. Times, January 6, 2007.

⁴⁷ Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007).

works to copyright owners and should not be ignored in evaluating the success of a copyright system.⁴⁸

Scholars have begun to explore the cost of uniform protection for intangible assets that derive from different technologies and different creators, and that operate in different markets.⁴⁹ More tailored rights that take into account these differences could reduce the cost to society without sacrificing the underlying goal of copyright protection: promoting the advancement of knowledge and learning. Several problems contribute to why copyright law does not contain such tailoring,⁵⁰ but the resulting uniformity of protection translates into unnecessary costs to society.

The tailoring argued for in this article would reduce the costs of copyright protection when enduring those costs is unnecessary because the creation and distribution of those works is differently motivated. Thus, the goal would be to achieve the maximum level of creative output at the lowest cost. The following sections explore aspects of the costs of providing copyright protection.

A. Raising the Cost of Inputs to Creativity

When a piece of creative authorship is given copyright protection, reuse of the expression embodied in that work by a follow-on creator risks infringement liability.⁵¹ To assure oneself of avoiding infringement liability, authorization from the copyright owner is the safest route. Such authorization can come at varying costs. All authorizations incur the transaction costs associated with locating and negotiating authorization, and many authorizations are not granted for

⁴⁸ See Glynn S. Lunney, Jr., *The Death Of Copyright: Digital Technology, Private Copying, And The Digital Millenium Copyright Act*, 87 VA. L. REV. 813, 900-02 (2001).

⁴⁹ See, e.g., Michael W. Carroll, *One For All: The Problem Of Uniformity Cost In Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006). Professor Carroll argues that “perfectly tailored rights that promise innovators only the expected value required to induce socially desirable innovation would be theoretically optimal if intellectual property rights were the only policy tool available to promote innovation”. *Id.* at 848 (footnoted omitted). See also Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 SUP. CT. ECON. REV. 1 (2004); Dan L. Burk & Mark A. Lemley, *Biotechnology’s Uncertainty Principle*, 54 CASE W. RES. L. REV. 691, 695-706 (2004).

⁵⁰ Professor Carroll identifies some reasons as “uncertainty about innovation, information asymmetries between policymakers and innovators, administrative costs of tailoring, and the political economy of intellectual property policymaking.” Carroll, *supra* note 49, at 845.

⁵¹ Infringement liability is not certain as the test for infringement requires substantial similarity, or sufficient verbatim copying. Additionally, in certain contexts fair use shields the reuse of expressive content from liability.

free. The license fee charged for the use of the expression in a follow-on work can vary widely. The combination of the transaction costs and the price charged when a license can be negotiated can have several negative consequences: fewer new works are created, new works will cost consumers more, and the new works that are created are different and sometimes not as culturally rich or as authentic as they could have been if the costs of reuse were lower.

Evidence of the works not created because of these costs is difficult to obtain, as it is evidence of a negative. However, the nightmare anecdotes abound. For example when a documentary film maker sought to use footage of stage hands of the opera Ring Cycle in San Francisco watching the television cartoon “The Simpsons” backstage for 4.5 seconds, the price quoted for the use of those 4.5 seconds was \$10,000. This price was prohibitive for the documentary budget and instead the actual footage was digitally altered to replace the footage.⁵² This example demonstrates the real costs and consequences associated with robust copyright protection.⁵³ In any tailoring regime, reduced control over reuse of expressive content in subsequent works should be a central goal.

B. Wealth Transfers and Distributive Effects

A fundamental result of granting copyright protection is that consumers pay more for creative works. As explained above, the exclusive rights facilitate copyright owners receiving a price for their work that is above the price that would otherwise result in a competitive market. This can be viewed as a cost the public pays as a result of copyright protection, but in reality it is merely a wealth transfer from consumers to distributors and creators of copyrighted works.⁵⁴

A further cost that the existence of the exclusive rights granted by copyright law imposes, as explored in the previous section, is borne by the creators of new works and ultimately by consumers of those new works. If one of the inputs to a new work is protectable elements of a pre-existing copyrighted work, authorization to use those elements is necessary in order to make the use lawful.⁵⁵ The need to obtain

⁵² LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 95-99 (2004).

⁵³ Other examples are recounted in KEMBREW MCLEOD, *FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY* (2005).

⁵⁴ See Bell, *supra* note 27, at 229.

⁵⁵ The required authorization may be obtained from the copyright owner or may be found in the Copyright Act itself in sections such as those providing fair use rights, 17 U.S.C. § 107, mechanical copying rights, 17 U.S.C. § 115, or other statutory limitations, §§ 107-123.

permission from the copyright owner of the pre-existing work creates costs and can create hold-up problems, raising the cost of creation for the new work, both of which ultimately increase the cost for consumers of new works. Again, however, this can be viewed as a mere wealth transfer from consumer to copyright owner. In the end, Congress has made the choice that the transfer of wealth afforded by the copyright law promotes the end goal of the regime: promoting knowledge and learning. In the United States, we approve of this wealth transfer as a means to “get what we want” – the creation and distribution of creative works.⁵⁶

Some brush aside wealth transfers, confident that, absent market failures, the market will sort things out and marketable items, including the rights embodied in copyright protection, will be transferred to the entity that places the most value on that item. Wealth distribution effects, however, may have a significant effect on achieving the underlying goal of copyright.⁵⁷

[A] regime that couples creativity and money also affects the distribution of creative opportunities. Some creators want the monetary incentive that copyright provides; others do not. Some creators can bear the expenses that copyright imposes; others cannot. . . . Should we understand the copyright regime as a subsidy that makes their creativity possible? Or as a tax that makes it unaffordable? How should we think about these possibilities in light of enduring values about the distribution of expressive opportunities?⁵⁸

Others have noted the skewed effect that increased copyright protection has had, benefiting the highly organized content owning industries while adversely affecting amateur and non-commercial producers of expressive content.⁵⁹ In light of the goals of copyright law, we should be disturbed by unequal distribution of expressive opportunities and the detrimental effects of greater enclosure of the inputs to creativity. Distributing

⁵⁶ Lunney, *supra* note 48, at 900-903 (questioning the wisdom of pointing to the growth in the copyright industries in recent years as evidence of increased creative output, suggesting, instead, that growth may be the result of the bold extension of additional rights to copyright owners, which has allowed copyright owners to capture more consumer surplus without adding new works into the marketplace).

⁵⁷ Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEXAS L. REV. 1535 (2005).

⁵⁸ *Id.* at 1537-38.

⁵⁹ Kwall, *supra* note 5 at 1996; Neil Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 65 (2001); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354-408 (1999).

opportunities to create expressive works, even those that embody elements of pre-existing works, contributes to the expansion of knowledge and learning for all.⁶⁰ While the costs associated with these distribution effects are present for all copyrighted works, good policy should seek to minimize this cost when the works involved do not require robust copyright protection to insure their creation and distribution.

As technology has advanced, the economics of creativity and distribution have changed significantly. Far more people have the technical capability to create new works remixing components from the culture around them.⁶¹ As a result, the societal costs of copyright protection, relative to the gains, are now far greater.⁶² If the goal of copyright law is to promote knowledge and learning for all citizens,⁶³ the wealth distribution effects caused by copyright protection may create an impediment to achieving that goal. In cases where this wealth redistribution is unnecessary, such as for differently motivated works, the scope of copyright protection should be reduced.

C. Opportunity Costs

Still another cost of copyright protection, unassociated with wealth transfers, should be considered: opportunity costs. The marketable right provided by copyright protection is designed to create an incentive to invest in the creation and distribution of new works. However, when one invests in that activity, they are forgoing investments in other activities. The other non-creative activities forgone might produce greater social welfare. This is the opportunity cost created by copyright protection. These opportunity costs should not be ignored in evaluating the success of any copyright regime⁶⁴ or in evaluating the appropriate scope of protection to afford to different types of works.

⁶⁰ Van Houweling, *supra* note 57, at 1548.

⁶¹ Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J.GENDER RACE & JUST. 69, 70 (2000).

⁶² *Id.*

⁶³ Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000).

⁶⁴ Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 487-88, 589-99 (1996). Of course, it may be the case that if a creator is not motivated by monetary concerns in the initial creation of a work, he may, nonetheless, become motivated once the market feedback mechanism kicks in. If the market is "telling" the author to create more of that type of work, then the proxy of the market, at least, is indicating that the socially optimal quantity of that type of work has not yet been reached. Alternatively, a creator not motivated by monetary concerns may remain unmotivated by any feedback from the market, in which case even the existence of copyright protection is irrelevant as an influencing factor.

The types of works on which this article is focused would be created even in the absence of copyright protection as they are not primarily motivated by the monetary reward system made possible by copyright protection.⁶⁵ Thus, opportunity cost is not significant cost for these types of works.

D. Costs of Perceived Unfairness in Copyright Law

There is a not-so-subtle cost to the current copyright regime that results from its mismatch with social norms. Individuals not well versed in copyright law find it odd, perhaps even startling, that certain activities in their daily lives may violate copyright law. As John Tehranian has observed:

[T]hree key trends bear close observation. First, copyright law is increasingly relevant to the daily life of the average American. Second, this growing pertinence has precipitated a heightened public consciousness over copyright issues. Finally, these two facts have magnified the vast disparity between copyright law and copyright norms and, as a result, have highlighted the need for reform.⁶⁶

Professor Tehranian asserts that “even the most law-abiding American engages in thousands of actions that likely constitute copyright infringement.”⁶⁷

When the mismatch between social norms and the law are significant citizens lose trust in that law.⁶⁸ This may explain, in part, the widespread disregard for copyright protection through user posted material on sites such as youtube.com and through peer-to-peer file sharing even in spite of strong rulings from the courts that this activity constitutes infringement. The widespread disregard of the law is a real cost that should be taken into account when considering the design of a legal regime.

A variety of elements are leading users of copyrighted works to distrust the law and ultimately to disregard it. Copyright protection

⁶⁵ In several of the examples, there are other monetary rewards, just not ones created by copyright law. Legal pleadings, for example, are created by lawyers who are reaping monetary rewards for their work. Those monetary rewards, however, are not created as a result of copyright protection.

⁶⁶ John Tehranian, *Infringement Nation*, 2007 UTAH L. REV. 537, 539. Photographs of toys constitute derivative works of those toys. *Schrock v. Learning Curve Int'l, Inc.*, 2008 WL 224280 (N.D. Ill. 2008).

⁶⁷ *Id.* at 543.

⁶⁸ Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U.J. INT'L L & POL. 219, 225 (1997).

requires only two elements: (1) fixation and (2) originality.⁶⁹ The first element is notoriously easy to satisfy – merely writing something down or typing a document in a computer results in an eligible fixation. The second element, originality, requires only a modicum of creativity, again a standard that is very simple to satisfy.⁷⁰ No registration is required and no notice of copyright is needed.⁷¹ And, that protection lasts for an extremely long time.⁷² Furthermore, once a work obtains protection, using even fragments of that work can constitute infringement.⁷³ All of this feeds a public perception of a law out of step with reality.⁷⁴

III. WHY TAILORING SCOPE RATHER THAN COMPLETE ELIMINATION OF COPYRIGHT PROTECTION FOR DIFFERENTLY MOTIVATED CREATIONS IS APPROPRIATE

A. Reasons to Not Eliminate Protection Completely

The costs identified in the previous section could be a basis to argue for the complete elimination of any copyright protection for differently motivated works. However, several reasons counsel against eliminating copyright protection for these works.

1. Distribution Costs May Necessitate Some Protection

While copyright protection may not be needed to motivate the creation of these types of works, some minimal level of protection may be necessary to create incentives for distribution. The role of the publisher or distributor is undergoing significant change in the digital era, but distribution still entails costs, even if those costs are reduced in an interconnected world.

Providing copyright protection for works whose creation is not motivated primarily by the monetary incentive created by copyright can serve an important purpose of encouraging distribution of that work. The strongest means of assuring distribution of creative works is to require distribution as a condition of obtaining copyright protection. While in the

⁶⁹ 17 U.S.C. § 102(a).

⁷⁰ *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349 (1991).

⁷¹ *See infra* notes 121-23 and accompanying text.

⁷² For new works created today copyright protection lasts for the life of the author plus 70 years. For works made for hire, pseudonymous and anonymous works, copyright lasts for 95 years from publication or 120 years from creation, whichever expires first.

⁷³ Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005).

⁷⁴ *See* Tehranian, *supra* note 66.

first copyright acts of this country publication was required to obtain federal copyright protection, the 1976 Copyright Act eliminated publication as the defining act for federal protection.⁷⁵ Even though distribution is not required for protection, the existence of copyright protection facilitates distribution by providing assurances that once the work is released to the public the copyright owner will be able to control some unauthorized uses of the work.⁷⁶

2. Cost of Error Counsels in Favor of Some Protection

A second reason to reject complete elimination of copyright protection for differently motivated works involves consideration of the cost of errors.⁷⁷ Errors may be made in at two different points in the proposed analysis. There could be an erroneous classification of a category of works as differently motivated when the creation of works in that category are, in fact, motivated by the incentive of copyright. Errors also could be made in determining whether a particular work belongs in a category of works that is differently motivated. The cost of these errors would be an underproduction of works in that category. The cost of these errors would be higher if the result were complete elimination of copyright protection. The incentive that is, in fact, needed would be completely absent. By opting instead to provide some protection, the potential cost of erroneous decisions on either of these questions is significantly reduced.

3. Fairness Necessitates Some Protection

If copyright protection were eliminated for differently motivated works, creators of different works would be treated significantly

⁷⁵ 17 U.S.C. § 102 (defining works eligible for protection as those that are “fixed in any tangible medium of expression”). The 1909 Copyright Act eliminated publication as a requirement for protection for certain works, allowing those unpublished works to obtain protection through registration.

⁷⁶ The digital world has largely altered the landscape and therefore the calculations that copyright owners must make concerning the ease of replication once a work has been first published. The duplication and distribution made possible by the internet counterbalances the protections afforded to copyright owners when considering how little unauthorized reproduction can be controlled. In the end, however, all that may be necessary is “some assurance that copying will be limited.” Trotter Hardy, *Property (and Copyright) in Cyberspace*, U. CHI. LEGAL F. 217, 222 (1996).

⁷⁷ See Michael P. Van Alstine, *The Cost of Legal Change*, 49 UCLA L. REV. 789, 845 (2002). Dennis S. Karjala, *The Relative Roles of Patent and Copyright in the Protection of Computer Programs*, 17 J. MARSHALL J. COMPUTER & INFO. L. 41, 53 (1998) (arguing that some protection is necessary for computer software, but not “thick” protection).

differently, raising issues of fairness in the distribution of entitlements under the Copyright Act.⁷⁸ While the primary basis for copyright protection in the United States is utilitarian, there are distinct strains of natural rights justification.⁷⁹ The unfairness of eliminating protection completely would make calls for such reform sufficiently unpalatable so as to be unobtainable.

However, many creators of differently motivated works are concerned with a different aspect of protection—being identified as the author of the work when that work reappears and having control over whether they are identified as the creator of that work when it appears in modified form or in a different context. The behavior of millions of creators of certain types of works is illustrative. The proliferation of web sites such as flickr and YouTube where home photographers post photographs and home videos by the millions, often with dedications to the public domain or under creative commons licenses, demonstrates that these creators are largely unconcerned with the monetary rewards facilitated by copyright. It seems these works have been created and are being efficiently distributed without influence by copyright. These creators, however, often want credit as the creator of their works.⁸⁰ Taking fairness into account for these differently motivated works may translate into granting a strong right of attribution for these copyright owners,⁸¹ while providing only a minimal set of marketable rights.

The proposal offered by this article would result in different copyright owners being treated differently. Under an author's rights justification for copyright law, motivation should play no role in determining the scope of the protection. The only relevant determination is whether the creator is an author and therefore is deserving of certain rights in the works she creates. Yet the requirements for protection in the United States lead to some creators being denied protection for their works. For example clothing designers⁸² and creators of works that may

⁷⁸ See Bell, *supra* note 24, at 272-75 (comparing the distribution of entitlements provided by the Copyright Act to those provided by welfare benefits).

⁷⁹ See Yen, *supra* note 17.

⁸⁰ The early experiences with Creative Commons licenses were that 97-98% of creators selected the licenses that required authorial attribution. See Lydia Pallas Loren, *Building A Reliable Semicommons Of Creative Works: Enforcement Of Creative Commons Licenses And Limited Abandonment Of Copyright* 14 GEO. MASON L. REV. 271, n.98 (2007). See also Kwall, *supra* note 7, at 1991-2011 (arguing in favor of an attribution right for works that are intrinsically motivated). Professor Kwall argues that "moral rights protections that are narrowly crafted to promote public education regarding the authorship and original artistic meaning of the work represent appropriate measures to achieve the very objectives of the Copyright Clause." *Id.* at 1986.

⁸¹ See Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006).

⁸² Kau Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1702-04 (2006); Laura

require painstaking attention to detail but which do not involve authorial or creative judgment,⁸³ are, nonetheless, not granted copyrights in their creations. Because not all creations are protected by copyright, unfairness already exists in the law. Choices have been made concerning what to protect based on the underlying goals of the statute. Providing less protection for differently motivated works would be a similar choice, although some copyright protection would be provided. Providing certain creators instead with enhanced moral rights protection would also reduce the costs associated with robust economic rights.

For infringement of the types of works not motivated by copyright in the first place, an infringement action is often not about monetary rewards or marketable rights. Sometimes creators attempt to use copyright to prevent circulation of damaging information,⁸⁴ to prevent unflattering biographies,⁸⁵ or to protect privacy interests. Alternatively, the copyright owners may assert that the real reason they require control is to prevent consumers from being confused by “unofficial” versions of the work.⁸⁶ In these instances, allowing robust copyright protection for these types of works would mean protecting values that the Copyright Act is not meant to promote. Indeed, for the most part, courts reject attempts to use copyright to censor unflattering biographies⁸⁷ or damaging information.⁸⁸ And concerns about confusing the public as to the “official” versions of a text are far better addressed by trademark law.⁸⁹ While the opinions rejecting copyright claims that fundamentally are attempting to protect a different interest do not seem to weigh creators’ motivation in their infringement analysis, motivational considerations may be influencing the courts. Instead of allowing it to continue to discretely influence infringement determinations, explicit consideration of motivation should be encouraged.

C. Marshall, *Catwalk Copycats: Why Congress Should Adopt A Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305, 309 (2007).

⁸³ *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987) (rejecting copyright protection for reproduction of public domain art prints completed using an exacting and time-consuming process). *See also* *The Bridgeman Art Library, Ltd. v. Carol Group.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

⁸⁴ *See Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

⁸⁵ *See, e.g., Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991) (permitting use of unpublished letters in an unflattering biography); *New Era Publ’ns Intern., ApS v. Carol Pub. Group*, 904 F.2d 152 (2d Cir. 1990) (permitting use of unpublished journal entries and letters in scholarly biography).

⁸⁶ This concern was identified by the Vatican in its pronouncement on its copyright policy. *See Owen, supra* note 2.

⁸⁷ *See, e.g., Wright*, 953 F.2d at 731 (permitting use of unpublished letters in an unflattering biography); *New Era Publ’ns Intern., ApS*, 904 F.2d at 152 (permitting use of unpublished journal entries and letters in scholarly biography).

⁸⁸ *See Online Policy Group*, 337 F. Supp. 2d at 1195.

⁸⁹ *See Heymann, supra* note 7.

4. Treaty Obligations

Complete elimination of protection for differently motivated works would likely violate international treaty obligations. The major international copyright treaty, the Berne Convention, requires member countries to grant copyright protection to “literary and artistic works.”⁹⁰ Those works are defined as “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”⁹¹ The Berne Convention contains no express statement of a requirement of originality or creativity, although it does use the phrase “intellectual creations.”⁹² This phrase appears in the context of defining collections of works that member states are obliged to protect although some have asserted that “[i]t is commonly understood, . . . that all works under the Berne Convention must possess some ‘intellectual creation,’ which is often used interchangeably with ‘originality.’”⁹³ The TRIPs Agreement incorporates the Berne Convention requirements wholesale.⁹⁴

While these conventions require protection, the minimum level of protection required is not nearly as robust as the rights granted under the current Copyright Act in the United States. For example, Berne requires only that authors of works be granted “the exclusive right of authorizing adaptations, arrangements, and other alterations of their work.”⁹⁵ The Copyright Act, however, grants to copyright owners the right to prepare “derivative works” based upon the copyrighted work⁹⁶ which the Act defines as

⁹⁰Berne Convention for the Protection of Literary and Artistic Works art. 2, July 24, 1971, 1161 U.N.T.S. 36 (hereinafter the “Berne Convention”).

⁹¹The definition goes on to provide examples: “books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.” *Id.*

⁹²*Id.* art. 2(3). See also, Daniel J. Gervais, *Feist Goes Global: A Comparative Analysis Of The Notion Of Originality In Copyright Law* 49 J. COPYRIGHT SOC’Y U.S.A. 949 (2002).

⁹³DANIEL C.K. CHOW & EDWARD LEE, INTERNATIONAL INTELLECTUAL PROPERTY 130 (2006).

⁹⁴Agreement on Trade-Related Aspects of Intellectual Property Rights pt. I, art. 9, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299 (hereinafter TRIPs Agreement).

⁹⁵Berne Convention, *supra* note 90 art. 12.

⁹⁶17 U.S.C. § 106(2).

“a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work”.

Courts have encompassed within derivative works items such as photographs of copyrighted toys⁹⁷ and plates depicting a single image from a full-length motion picture.⁹⁸ The Berne Convention standard does not appear to require control over these types of uses of copyrighted material. Thus, adjusting the level of protection would be permissible under international treaties while complete elimination would likely violate current treaty obligations.

5. First Amendment and Non-discrimination Principles

Elimination of copyright protection for certain types of works would likely encounter objections based on the First Amendment. While the Supreme Court has held copyright law, generally, is consistent with the First Amendment,⁹⁹ it has also rejected the notion that any congressional action in the area of copyright is categorically immune from First Amendment scrutiny.¹⁰⁰ The Court has held that further First Amendment scrutiny may be necessary when congressional action “alters the traditional contours of copyright”¹⁰¹ Elimination of protection for original works of authorship that are not primarily motivated by the marketable right of the copyright would likely be viewed as an alteration of a traditional contour of copyright and thus subject to First Amendment scrutiny.¹⁰²

⁹⁷ Schrock v. Learning Curve Int'l, Inc., 2008 WL 224280 (N.D. Ill. 2008).

⁹⁸ Gracen v. Bradford Exchange, 698 F.2d 300, 302 (7th Cir.1983).

⁹⁹ As the Court observed in *Harper & Row*: “[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

¹⁰⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

¹⁰¹ *Id.*

¹⁰² In *Eldred* the Court did not provide any guidance on what are the traditional contours of copyright law or how to determine those traditional contours. The Tenth Circuit has attempted to provide some guidance on interpreting the traditional contours of copyright law. *Golan v. Gonzales*, 501 F.3d 1179, 1188-1192 (10th Cir. 2007).

Even when subjected to First Amendment scrutiny, eliminating protection for a category of work previously protected could arguably be constitutional. The Copyright Act confers a benefit on certain categories of speech rather than imposing consequences based on speech activities. Under First Amendment analysis, conferring a benefit is treated differently than government regulation restricting speech. As the courts have recognized in the trademark area, refusal to protect an individual's speech under federal law does not prevent the individual from engaging in that speech and is not a violation of the First Amendment.¹⁰³ Similarly, refusing to grant a copyright to creators of certain types of works in no way restricts their ability to engage in that speech. While it is likely that elimination of protection could pass constitutional muster, the potential First Amendment challenge nonetheless provides an additional reason to resist drastically altering copyright law.

B. Potential Concerns Raised by Tailoring

Increased tailoring of copyright rights also leads to negative effects that must be considered. Tailoring leads to increased complexity which has associated costs. Tailoring also requires line drawing which, when done in the context of expressive works, can raise First Amendment concerns. Also, line drawing in the context of copyright law specifically encounters the principles embodied in the aesthetic non-discrimination doctrine. Finally, the task of line-drawing itself involves costs.

Currently the Copyright Act exudes complexity,¹⁰⁴ and thus we should hesitate before increasing the problems that can arise from complex laws. The more varieties that exist in the levels of protection afforded, the more potential there is for error on the part of a court adjudicating claims and on the part of individuals seeking ex ante to conform their behavior to the law. Counterintuitive complexity in the law presents more significant challenges for individuals. When complexity facilitates a law that comports with common sense, the complexity actually increases a sense of fairness in the law and, ultimately, a higher level of compliance with the law. Reducing the scope of protection for works that do not need a robust level of protection may be more in line with a sense of fairness in the copyright system.

¹⁰³ See, e.g., *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1374 (Fed. Cir. 1994) (rejecting First Amendment challenge to the refusal to register the a mark as scandalous and immoral). See also, *Ritchie v. Simpson*, 170 F.3d 1092, 1099 (Fed. Cir. 1999).

¹⁰⁴ See Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L. Q. 835, 885 (1999).

As discussed above, the courts view copyright law as consistent with the First Amendment.¹⁰⁵ While the Supreme Court has held that heightened First Amendment scrutiny is appropriate when a change in the law alters the traditional contours of copyright,¹⁰⁶ adjusting the scope of protection would not constitute a fundamental change in the law. Copyright law has long recognized varying levels of protection, albeit typically on a continuum of works based on the quantum of creativity they possess.¹⁰⁷ Varying the level of protection based on the primary motivations for particular types of work would be similar to aspects of copyright law already part of the recognized doctrine.

For over a century, copyright law has embodied an aesthetic non-discrimination doctrine. First articulated by Judge Holmes in *Bleistein v. Donaldson Lithographing Co.*,¹⁰⁸ courts are not to judge the artistic merit of a work in determining whether a work is eligible for copyright protection. As Holmes warned, “[i]t would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹⁰⁹ But even Holmes recognized that the nature of the work at issue in *Bleistein*, a pictorial illustration created to be used in an advertising poster for a circus, “may be a circumstance for the jury to consider *in determining the extent of [the copyright owner’s] rights . . .*.”¹¹⁰ The approach urged here is to embrace this recognition that the nature of the work, and in particular the motivating forces for the creation and distribution of those types of works, should expressly be considered in determining the extent of the copyright owner’s rights.

Notwithstanding the conclusion that there are no First Amendment or aesthetic non-discrimination problems associated with reducing, but not eliminating, protections for differently motivated works, there remains the cost of engaging in such categorizations. The difficulties associated with identifying the types of works that should be targeted for reduced levels of protection are a real.

If undertaken by Congress, the costs will include the time and effort involved in determining appropriate categories and then the time

¹⁰⁵ See *supra* Part III.A.5.

¹⁰⁶ *Eldred*, 537 U.S. at 221.

¹⁰⁷ See *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991). Courts have also recognized varying levels of protection on the basis of the level of utility that shapes the expression in the plaintiff’s work. *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1446-47 (9th Cir. 1994) (noting the “thinness” of the protection for software and requiring the defendant’s work be “virtually identical” to the plaintiff’s work in order to find infringement) *cert. denied*, 513 U.S. 1184 (1995).

¹⁰⁸ 188 U.S. 239 (1903).

¹⁰⁹ *Id.* at 251.

¹¹⁰ *Id.* (emphasis added).

and effort expended in defending those determinations from lobbies motivated to preserve the economic rents certain industries have secured under the current structure of copyright. It is difficult to find an example in the current Copyright Act evidencing a decision by Congress to reduce protections already afforded.¹¹¹ The examples of reduced protections currently contained in the Copyright Act were enacted in the context of granting protections where none existed before,¹¹² or were part of an overhaul of the entire statute where the tradeoffs made for the complete package of reforms involved overall increased levels of protections.¹¹³ Congressional reduction of protections is not only costly but the likelihood of such reforms is also quite slim. If the line drawing is undertaken by the courts, the cost is still real. Courts, however, are accustomed to engaging in line drawing.

In the end, the costs incurred in providing a more tailored approach are outweighed by the reduction in cost created by unnecessarily robust copyright protection for differently motivated works.

IV. THE IRRELEVANCY OF MOTIVATION UNDER CURRENT COPYRIGHT DOCTRINE

A. Eligibility for Protection

Under U.S. copyright law, the motivation for the creation of a particular work, or even a category of work, is not relevant to a determination of whether a particular work is eligible for copyright protection. All that matters under U.S. copyright law is whether the work is fixed and whether it is original.¹¹⁴ Thus, works created by accident,¹¹⁵ without thought, or with no consideration of the material rewards that might result,¹¹⁶ obtain copyright protection so long as they

¹¹¹ Jessica Litman, *Digital Copyright* (2000) (describing copyright lawmaking as a “one-way ratchet up”).

¹¹² Sound recording amendments are an excellent example of this dynamics. When Sound Recordings were granted a copyright protection in 1971, specific provisions were included to reduce the level of protection. *See, e.g.*, 17 U.S.C. § 114. In 1996 when sound recordings were afforded some performance rights, the rights granted were not as robust as those of other copyright owners. 17 U.S.C. § 106(6).

¹¹³ *See, e.g.*, 17 U.S.C. § 110 (limitations on the rights of copyright owners in certain types of works enacted as part of the 1976 Copyright Act).

¹¹⁴ 17 U.S.C. § 102.

¹¹⁵ “A copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations.” *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 105 (2d Cir. 1951).

¹¹⁶ *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (acknowledging copyright protection for the Zapruder film, a home movie of the presidential motorcade during which JFK was shot).

are fixed and original. Clearly papal texts are eligible for copyright protection,¹¹⁷ as are email and other personal communications,¹¹⁸ model legal codes,¹¹⁹ advertising works, and amateur photography.

The determination at the outset to not inquire into motivation for creation leads to a range of items being copyrighted that many might find counter-intuitive. For example, the vast majority of personal correspondence is sufficiently fixed and original to garner copyright protection. In the United States, and indeed in almost all countries, copyright protection is afforded to works even without registration for protection and without notice of the author's claim to copyright protection.¹²⁰ Thus a simple email to one's friend is copyrighted upon creation regardless of the message's lack of a copyright notice (the simple "c" within a circle) and regardless of a failure to register the message for protection with the copyright office.¹²¹

The choice to not filter works based on motivation at this stage is likely to be an efficient one. U.S. copyright law does not make a distinction based on categories of works, let alone creative motivation within those categories. Instead, in the United States, the law awards copyright protection to all fixed, original works.¹²²

B. Scope of Rights Protected by Copyright Law

All copyrighted works are given the same basic rights under copyright law, specified in section 106 of the Copyright Act, including the fundamental rights to reproduce the work in copies, to distribute copies of the work, and to make derivative works based on the

¹¹⁷ One might be tempted to consider that papal texts are actually the work of god and therefore not protected. However, the Vatican does not assert that the words of the pope are the words of god, thus the pope is the "author" of the works he creates. *See, e.g.,* *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997) (concluding that the work that the parties agreed was received from celestial beings was a composite work and subject to a valid copyright).

¹¹⁸ *See* Litman, *supra* note 9.

¹¹⁹ *See* Veeck, *supra* note 31.

¹²⁰ Indeed, international treaty obligations require that no formalities be imposed in order to obtain copyright protection. *See* Berne Convention art 5.

¹²¹ Registration is not required, although certain benefits do flow from registration, such as serving as prima facie evidence that the work is original and owned by the registrant. 17 U.S.C. § 412.

¹²² "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . ." 17 U.S.C. §102. The U.S. Constitution permits Congress to award copyright protection to all "writings" of an "author." U.S. Const. art. I., § 8, cl. 8. While the 1909 Copyright Act used those words to identify the works eligible for protection, the 1976 Act utilizes words that do not risk a constitutional collision when a court determines that a work does not qualify for protection. *Id.*

copyrighted work.¹²³ Certain categories of copyrighted works are also granted the right to publicly perform the work.¹²⁴ The same is true for the right to publicly display the copyrighted work: only certain categories of works are granted this right. For all of the rights granted, however, the motivation for the creation of the work does not play a role in determining what rights a copyright owner obtains. While all copyright owners are granted the same set of basic rights, two fundamental aspects of copyright law significantly shaped the scope of the protections afforded: the substantial similarity inquiry and the statutory limitations on the rights of copyright owners, including the critically important fair use defense.¹²⁵

1. Substantial Similarity

First, except in the case of an exact reproduction, the scope of the right to control reproductions and the right to control the creation of derivative works is determined by what constitutes a “substantially similar” copy in an infringement analysis.¹²⁶ This type of case is often referred to as a case of “non-literal infringement.” Substantial similarity enters the analysis when the allegation is one of a violation of the right provided in section 106(1), the right to control reproductions in copies, and also when the allegation is one of a violation of the right provided in section 106(2) the right to prepare derivative works based on the work. If a defendant is accused of non-literal infringement or of creating a derivative work, a court will need to inquire whether the defendant’s work is substantially similar to the plaintiff’s work.¹²⁷ Without the

¹²³ 17 U.S.C. §106.

¹²⁴ *Id.* Only certain categories of works are granted a right to publicly perform a work, while other categories of works are granted a right to publicly display a work. *See* 17 U.S.C. §106(4) & (5). Sound recording copyright owners are granted a more limited public performance right: the right “to publicly perform the copyright work by means of a digital audio transmission.” 17 U.S.C. §106(6).

¹²⁵ 17 U.S.C. §107.

¹²⁶ *See, e.g.,* *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004); *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127 (2d Cir. 2003).

¹²⁷ The degree of similarity is relevant at two points in the infringement inquiry. First, because independent creation is an absolute defense to infringement, to infringe a defendant must be found to have copied from the plaintiff’s work. Unless the defendant admits copying, copying is typically demonstrated through circumstantial evidence of copying, by showing defendant’s access to the plaintiff’s work and the similarity between the two works. *See, e.g.,* *Selle v. Gibb*, 741 F.2d 896, 902 (7th Cir. 1984). Additionally, courts also then use the degree of similarity in determining whether the defendant has improperly appropriated the protectable elements of the plaintiff’s copyrighted work. *See, e.g.,* *Three Boys Music Corp. v. Michael Bolton*, 212 F.3d 477 (9th Cir. 2000). As argued in this article, it is this latter inquiry into substantial similarity that should be affected by motivational concerns.

required degree of similarity, a court will conclude that there is no infringement.

Courts routinely require greater similarity for different types of works. For example, when a work is considered to be more factual in nature, courts require greater similarity in order to hold the defendant liable for infringement.¹²⁸ Computer software, due to its functional nature, also requires a greater degree of similarity for a court to find non-literal infringement.¹²⁹ On the other hand, when the work is considered more creative, less similarity is needed for a court to find the similarity sufficiently “substantial” and thus infringing.¹³⁰ These varying degrees of similarity are sometimes referred to “thin” and “thick” copyright protection.¹³¹ Courts generally do not base the “thickness” of copyright protection on the motivation of the creator of the work at issue or on the class of works to which that work belongs.¹³² As explored in more detail in Part IV, in the case of papal decrees and other types of differently motivated works, the motivation for the creation should be relevant to a determination of the degree of similarity required in order to infringe.

2. Fair Use

The second manner in which the scope of copyright protection is varied based on the type of work at issue involves the statutory limitations on copyright owners’ rights. All of the rights granted to copyright owners are expressly subject to many statutory limitations,¹³³ codified in sections 107 through 123 of the Copyright Act.¹³⁴ Some of these limitations apply only to certain categories of copyrighted works, while other limitations apply to certain types of rights belonging to all copyright owners.

One of the most important limitations on the rights of all copyright owners is found in the fair use doctrine. In the United States the fair use analysis is currently structured around the four factors set out

¹²⁸ *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985); *Stewart v. Abend*, 495 U.S. 207, 237 (1990); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1481 (9th Cir. 1988).

¹²⁹ *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

¹³⁰ *See, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001).

¹³¹ *See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349 (1991); *Fleener v. Trinity Broad. Network*, 203 F. Supp.2d 1142, 1149 (C.D.Cal. 2001).

¹³² *See, e.g., Bellsouth Adver. & Publ’g Corp. v. Donnelley Info. Publ’g, Inc.*, 999 F.2d 1436 (11th Cir. 1993) (en banc), *cert. denied*, 510 U.S. 1101 (1994).

¹³³ 17 U.S.C. §106 states that the rights granted to copyright owners are “subject to sections 107-123....”

¹³⁴ *Id.*

in section 107 of the Copyright Act. Courts have not interpreted any of the four factors as requiring an inquiry into the motivations that led to the creation and/or distribution of the allegedly infringed work. While the Supreme Court has indicated that all four factors must be considered and no presumptions should be employed,¹³⁵ it has become clear in the case law that often the first and fourth factors dominate the analysis, with the third and second factors trailing in significance, in that order.¹³⁶ Additionally courts tend to analyze the second and third factors in relation to the first and fourth factors.¹³⁷ Generally courts focus more on the defendant's activities without much inquiry into the actions of the plaintiff copyright owner or the class of creators for that particular type of work.¹³⁸

The first factor involves examining "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."¹³⁹ As this factor focuses solely on the defendant's use, this factor does not involve any inquiry into the motivation for the creation of the plaintiff's work or the type of work allegedly infringed. Instead, under the first factor courts primarily focus on whether the defendant's use is "transformative" and the extent of commercial motivation on the defendant's part. Whether a use is transformative or, in the words of one court, "substitutive,"¹⁴⁰ weighs significantly in the balance of the fair use determination.

The other factor which heavily influences the fair use determination is the fourth factor: "the effect of the use upon the potential market for or value of the copyrighted work."¹⁴¹ Courts sometimes identify this factor as "the most important factor" or at least "primus inter pares,"¹⁴² despite Supreme Court admonitions against elevating one factor above others.¹⁴³ When defendant's use has a substitutive effect in the market, supplanting demand for the plaintiff's original copyrighted work, courts rarely hold the defendant's use to be a fair one. Even if the effect is on the licensing market for the work,

¹³⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

¹³⁶ Lydia Pallas Loren, *Redefining The Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 27-28 (1997).

¹³⁷ *Id.*

¹³⁸ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

¹³⁹ 17 U.S.C. § 107(1).

¹⁴⁰ *Campbell*, 510 U.S. at 598.

¹⁴¹ 17 U.S.C. § 107(4).

¹⁴² *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996). *See also* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1077 (1997) (noting the tendency of the courts to focus primarily on market harm "to the exclusion of all else").

¹⁴³ *Campbell*, 510 U.S. at 583-85

courts consider that to weigh against a finding of fair use.¹⁴⁴ As explored more in Part V.D., the fourth factor focuses on determining the market consequences of permitting the defendant's use and thus could be tied expressly to a consideration of the motivating forces for the creation and distribution of the type of work at issue.

The Supreme Court has indicated that the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," should be evaluated in relation to the type of use that the defendant has engaged in (the first factor).¹⁴⁵ Viewed through the lens of the first factor, the Supreme Court has found copying of an entire work to be fair¹⁴⁶ and also copying of only a small fraction of a work to be infringement.¹⁴⁷ It is clear that the third factor involves both qualitative and quantitative considerations.¹⁴⁸ In the end, this factor focuses on the use made by the defendant and is unrelated to the motivations of the creator of the work.

The second factor, a relatively moribund factor, dictates exploration of the "nature of the copyrighted work." Many courts have erred in their interpretation of this factor, determining that the second factor weighed in favor of the copyright owner because the work was clearly copyrightable.¹⁴⁹ If the work was not copyrightable, there would not be prima facie infringement and thus there would be no need for an analysis of fair use. Courts that have appropriately considered this second factor have essentially determined that what matters is where the plaintiff's work falls on a continuum of copyrighted works. Works that are closer to the "core" of copyright protection, such as highly creative works of visual art, fictional literary works, and musical works, are given more protection by courts because the second factor will be seen as weighing against a finding of fair use.¹⁵⁰ Works more factual in nature or more functional are given less protection by the second factor weighing in favor of fair use. Other aspects of the "nature of the copyrighted work" that courts have considered include whether the work has been published,¹⁵¹ and if the work is out of print.¹⁵² As explored

¹⁴⁴ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994); Princeton Univ. Press, 99 F.3d 1381.

¹⁴⁵ *Campbell*, 510 U.S. 569.

¹⁴⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774, (1984).

¹⁴⁷ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

¹⁴⁸ *Campbell*, 510 U.S. 569.

¹⁴⁹ *Byrne v. British Broadcasting Corp.*, 132 F. Supp. 2d 229, 235 (S.D.N.Y. 2001); *Hofheinz v. AMC Productions, Inc.*, 147 F. Supp. 2d 127, 138 (E.D.N.Y. 2001); *TY, Inc. v. Publications Intern. Ltd.*, 2000 WL 1499449 (N.D.Ill), *rev'd* 292 F.3d 512 (7th Cir. 2002).

¹⁵⁰ *Campbell*, 510 U.S. 569.

¹⁵¹ *Harper & Row*, 471 U.S. at 556.

more fully in Part V.C, this second factor invites inquiry into the nature of the copyrighted work and should include consideration of what motivates the creation and distribution of that type of work.

C. Examples of Statutorily Based Tailoring

The Copyright Act currently contains some tailoring of the rights granted to copyright owners based on different categories of works. For example, section 110 limits the rights of a copyright owner for nondramatic musical works¹⁵³ permitting certain public performances that would otherwise be within the scope of the copyright owner's rights. Nondramatic musical works also are subjected to a compulsory license that permits anyone to record their own sound recording of such a work once an authorized version has been released.¹⁵⁴ Additionally, sound recordings are not granted a general public performance right, but instead are given a more limited "right to perform the work publicly by means of a digital audio transmission."¹⁵⁵ The rights of a sound recording copyright owner are further limited by requiring an actual reproduction of the sounds, taking "sound alike" outside the reproduction and derivative work rights generally granted to copyright owners.¹⁵⁶ Further limits are placed on the rights of copyright owners of works classified as useful articles,¹⁵⁷ computer programs,¹⁵⁸ and architectural works.¹⁵⁹

These examples of specific statutory tailoring demonstrate that adjusting the levels of protections for different types of works is possible even within the statute. Presently, however, the statute does not contain any specific tailoring based on the motivating considerations as urged by this article.

V. CONSIDERING MOTIVATION WITHIN THE CURRENT COPYRIGHT FRAMEWORK

¹⁵² Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002) (urging courts to consider duration issues in this factor as well).

¹⁵³ 17 U.S.C. §§ 110(6), (7) & (8).

¹⁵⁴ 17 U.S.C. § 115.

¹⁵⁵ 17 U.S.C. § 106(6).

¹⁵⁶ 17 U.S.C. § 114.

¹⁵⁷ 17 U.S.C. § 113. "Useful article" is a term of art in the Copyright Act, defined in Section 101. 17 U.S.C. § 101.

¹⁵⁸ 17 U.S.C. § 117.

¹⁵⁹ 17 U.S.C. § 120.

As developed in Parts I and II, it is appropriate to consider the motivational drive for the creation and distribution of copyrighted works when establishing the level of copyright protection to afford any particular work. Part IV demonstrated that current copyright doctrine does not expressly consider motivation in this way and identified three places in copyright doctrine where such consideration would be possible: the substantial similarity analysis and the second and fourth factors of the fair use inquiry. This section provides more detail on how such considerations could be implemented by courts.

A. Identifying Types of Works to be Afforded Less Robust Protection

Before addressing the means by which judicial interpretation of the Copyright Act could reduce the strength of protection for certain types of works, it is important to establish how a court would determine whether a particular copyrighted work falls into the category of a work that should be afforded thinner protection. Courts already recognize reduced protection for factual works, engaging in line drawing about the type of work at issue, thus the task to be undertaken is not unfamiliar to judges. The key will be to define what constitutes a non-monetarily motivated creation.

When considering motivations, it is important that courts look not at the motivation of a particular author of a particular work, but rather at the typical motivations that lead to the creation and distribution of the type of work at issue. Three reasons counsel against using a subjective inquiry. First, the subjective inquiry is not likely to lead to the desired result, as many examples of highly creative works find their origin in nonmonetary motivations. Using subjective motivation of a particular author could therefore result in abuse within the industry as publishers seek to take advantage of highly talented individuals and dedicated artists who love their craft and will often attest that they are “not in it for the money.” Second, if the subjective motivations of the individual plaintiff were at issue, the temptation would be great for plaintiffs to simply aver to monetary considerations being significant in their motivations.¹⁶⁰

¹⁶⁰ One way to guard against post-hoc explanations would be to examine the timing of the registration of the copyright in the particular work. While copyright registration is not required to obtain protection, there are significant evidentiary and monetary benefits to be gained by prompt registration. *See* 17 U.S.C. §§ 411, 412. If a creator is motivated by monetary concerns it is therefore likely that such a creator will register his work promptly. Delay in registration could be a proxy be used as circumstantial evidence of true motivation.

Finally, a more objective inquiry into the motivations for a particular category of work would allow potential users of the work, *ex ante*, some ability to judge how robust the copyright protection for a type of work is likely to be. If a subjective inquiry into motivation were necessary, most users would not be able to judge whether a particular creator's motivation will affect the scope of protection for a particular work.

Courts should therefore ask, and litigators should be prepared to answer: is the copyrighted work of a type that would be created and sufficiently distributed in the absence of strong copyright protection? This is not an inquiry into whether the work would be created and distributed if no copyright protection were available, rather it is an inquiry into whether weak copyright protection is sufficient protection. In considering the categories of works identified above,¹⁶¹ each would meet that test. The creators of those types of works engage in creation either for non-monetary reasons, or for monetary reasons that are not related to the marketable rights provided by copyright protection. Additionally, each of those types of works would have been distributed even with weaker protection. As discussed above, it is important that courts consider not only the motivation for creation but the effect that weaker copyright protection may have on the economic dynamics of distribution.

The objective inquiry may result in some creative individuals choosing to no longer create new works. These are the individuals for whom a subjective inquiry would have dictated strong protection: they need the heightened incentive in order to invest time and energy in the creation and distribution of their work. However, by using an objective inquiry we are, by definition, selecting types of works where the majority of creators of those works will continue creating even with weaker copyright protection.

As courts developed this inquiry, categories would emerge and industries would adapt to the revised levels of protection. If employed properly, the end result would be a reduction in the social cost of providing the copyright incentive for the creation and dissemination of creative works.

B. Degree of Similarity Affected by Motivation for Creation

While courts have not explicitly embraced an inquiry into the motivation for the creation of a particular type of work as relevant to determining the scope of copyright protection, it is both appropriate and

¹⁶¹ See *supra* Part I.

possible to do so under current copyright doctrine. First, in determining the magnitude of similarity necessary to meet the similarity requirement in an infringement analysis, the type of work being infringed is typically considered. In doing so, courts often consider the level of creativity evidenced in the plaintiff's work. For example, to infringe compilations of factual elements, courts have required near identity in the defendant's work.¹⁶²

Similarity in this context is used to determine improper appropriation. If the defendant's work is not sufficiently similar to the plaintiff's, no improper appropriation has occurred and there is no infringement of plaintiff's copyright. The degree of similarity required is decided on the facts of the case, often using both quantitative and qualitative measures. Courts should expand their inquiry and consider the primary motivation for the creation and distribution of the type of work at issue as relevant to the degree of similarity required in order to infringe a particular work. Using a formulation proposed by Nimmer, courts have identified two different types of similarity: "fragmented literal similarity" and "non-fragmented comprehensive similarity."¹⁶³ In both of these types of infringement inquiries, consideration of the motivations of creators of the type of work at issue would be appropriate. When creators and distributors of a particular type of work are not primarily motivated by the marketable right granted by copyright, greater similarity should be required in order to find infringement.

Consider as an example a case that is used in many copyright and intellectual property casebooks: *Steinberg v. Columbia Pictures Industries, Inc.*¹⁶⁴ In that case the plaintiff, Saul Steinberg, sued for infringement of a work that had been commissioned for use on the cover of *The New Yorker* magazine. The work, often referred to as a New Yorker's view of the world, could be classified as advertising copy.¹⁶⁵

¹⁶² Feist; *Schroeder v. William Morrow 7 Co.*, 566 F.2d 3 (7th Cir. 1977); *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988); *Penelope v. Brown*, 792 F. Supp. 132, 135 (D. Mass. 1992); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977).

¹⁶³ NIMMER ON COPYRIGHT § 13.03[A] (2005); *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986); *but see* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 412-14 and n.27 (LexisNexis 2005) (proposing a different terminology: "verbatim similarity" and "pattern similarity").

¹⁶⁴ 663 F. Supp. 706 (S.D.N.Y. 1987). For example, this case is used in *Cohen, supra* note 6, at 336; GORMAN AND GINSBERG, COPYRIGHT: CASES AND MATERIALS 572 (7th ed. 2006); MERGES, MENELL AND LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 474 (4th ed. 2006).

¹⁶⁵ Some may take issue with this classification arguing that magazine covers are often produced by artists and are highly creative. Even though highly creative, the bulk of the compensation expected by artists for these covers comes from the commissioning entity—the magazine—to whom all copyright rights are assigned. The artist does not profit from the copyright except to the extent that copyright affects the willingness of

The motivation for the creation of the image was the commission payment by *The New Yorker*. Even with weaker copyright protection, magazines like *The New Yorker* would still have sufficient incentive to purchase attractive cover artwork, and to use that artwork by publicly distributing its magazines. Their business is selling magazines and more attractive covers presumably help achieve that goal. The defendants in that case had created a poster, a portion of which emulated Steinberg's work and the remainder of which consisted of images of the actors in a movie that the poster was designed to advertise.¹⁶⁶ The court determined that the image in the poster was sufficiently similar to the plaintiff's work, despite significant differences and major portions of the poster that contained other images. While a portion of defendants' work clearly copies Steinberg's work, if the court had taken into consideration the motivational influences as outlined in this article, it would have been more appropriate to find no infringement. The defendant's work was not overwhelmingly similar to the copyrighted image. At the same time, weaker copyright protection for this type of work would not reduce significantly the amount of these types of works created and distributed.

C. Incorporating Creative Motivation into the Fair Use: The Second Factor

Fair use is designed to allow for *ex post* ordering of copyright rights by courts. It would be entirely consistent with the fair use analysis for courts to consider motivation for the creation and dissemination of the type of work at issue when analyzing the second fair use factor. While the wording of section 107 allows courts to consider factors outside of the four listed in that section,¹⁶⁷ the second factor, the "nature of the copyrighted work"¹⁶⁸ invites consideration of the motivations behind creation and distribution of a particular type of work.¹⁶⁹

the magazine publisher to pay for the commission and the amount it is willing to pay. Further, it is unlikely that the commissioning entity factors the various potential licensing opportunities for derivative works of its covers into the price it is willing to pay for the commission.

¹⁶⁶ See also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (additional example of a magazine cover being used as a basis for a movie poster advertisement).

¹⁶⁷ Section 107 states: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . ." The use of the word "include" to introduce the four factors draws upon the definitions provided in the Copyright Act which provides that "The terms 'including' and 'such as' are illustrative and not limitative." 17 U.S.C. § 101.

¹⁶⁸ 17 U.S.C. § 107(2).

¹⁶⁹ Reconciling such an approach with international treaty obligations is also possible using a robust interpretation of "fair remuneration" in the permitted exceptions test of

The analysis of the second factor has been relatively inconsequential in most court opinions. The nature of the copyrighted work might be significant if the work was unpublished¹⁷⁰ or if the court finds that the work lies far from the “core of copyright protection,” such as a heavily factual work or a compilation of factual or public domain information.¹⁷¹ Allowing courts to explicitly consider the motivational dimensions of a type of work would permit courts to tailor the costs of protection to the level of robustness necessary to motivate creation and distribution of a particular type of work.¹⁷² The other three factors should also be considered, so as to prevent the second fair use factor from becoming a proxy for denying copyright protection altogether.

Using this proposed consideration in the fair use analysis would mean that if a newspaper quoted substantial portions of a recent papal decree, the second fair use factor would weigh in favor of a finding of fair use. A court would inquire into the nature of papal decrees and other documents from churches designed to provide guidance to church members. The creation and dissemination of such documents, a court would likely conclude, are motivated not by the market-based incentives that copyright law creates, but by other considerations. That conclusion should influence the result in a fair use analysis, weighing in favor of fair use and thus creating a less robust scope of protection for that type of work.

D. Incorporating Creative Motivation into the Fair Use: The Fourth Factor

The fourth factor in the fair use analysis focuses on the market effect that permitting the defendant’s use will have. In particular, courts consider not just the use by the particular defendant in the case, but the effect if the use should become widespread.¹⁷³ From the first articulation

both the Berne Convention and the TRIPs Agreement. *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT’L L. 75 (2000).

¹⁷⁰ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Faulkner v. National Geographic*, 294 F. Supp. 2d 523 (S.D.N.Y. 2003).

¹⁷¹ *Gulfstream Aerospace Corp. v. Camp Systems Intern, Inc.*, 428 F. Supp. 2d 1369, 1378 (S.D. Ga. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (Cal. 2003); *A&M Records, Inc. v. Napster, Inc.*, 293 F.3d 1004, 1016 (9th Cir. 2001); *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003). *Cf.* *Campbell* (concluding the work at issue lies in the core of copyright protection, but that such conclusion is not helpful in a case involving parody).

¹⁷² Professor Ramsey has previously suggested consideration of the fact that the work is advertising copy as weighing in favor of fair use under the second factor. Ramsey *supra* n.5 at 248-249. *See also*, Carroll, *supra* note 49 (suggesting such tailoring to ameliorate the cost of uniform copyright protection).

¹⁷³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

of the fair use doctrine, courts have been concerned with the effect on the output of creative works and their distribution. Justice Story in *Folsom v. Marsh*, directed courts to examine “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”¹⁷⁴ Focusing on the diminishment of plaintiff’s profits is the point of the fourth factor.

The fourth factor, however, should be put in context and related not only to the nature and purpose of the use, as the Supreme Court has directed, but also to the nature of the copyrighted work at issue. If the work is one whose creation and distribution is not motivated primarily by monetary concerns, then more of an effect on profits would be permissible without harming the underlying goal of copyright. Allowing the express consideration of motivational realities to affect the evaluation of the effect any market harm might have could be a means to appropriately tailor the rights of copyright owners in differently motivated works.

VI. POSSIBLE STATUTORY AMENDMENTS TO REDUCE PROTECTION

Statutory amendments to reduce the level of protection afforded the types of works identified in this article could take the form of specific limitations on the rights granted to copyright owners. Section 107 is but one statutory section out of 17 separate sections that place limits on the rights of copyright owners. As discussed above,¹⁷⁵ some of those other statutory limits are targeted at specific types of works, such as nondramatic musical works,¹⁷⁶ sound recordings,¹⁷⁷ useful articles,¹⁷⁸ computer programs,¹⁷⁹ and architectural works.¹⁸⁰ Consistent with the arguments put forth in this article, certain types of works not requiring robust protection could be identified and defined in the statute and an appropriate statutory limitation enacted.

One possible significant limitation would be to eliminate or reduce the right to control derivative works. A limitation focused on reducing the most significant societal cost of copyright protection, the increased cost of producing and distributing new works with added

¹⁷⁴ 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

¹⁷⁵ See *supra* Part IV.C.

¹⁷⁶ 17 U.S.C. §§ 110(6), (7) & (8); 115, 116.

¹⁷⁷ 17 U.S.C. § 114.

¹⁷⁸ 17 U.S.C. § 113. “Useful article” is a term of art in the Copyright Act, defined in Section 101. 17 U.S.C. §101.

¹⁷⁹ 17 U.S.C. § 117.

¹⁸⁰ 17 U.S.C. § 120.

creativity,¹⁸¹ would do the most for furthering the underlying goals of copyright protection. The Copyright Act contains precedent for such a limitation. When Congress added protection for sound recordings to the Copyright Act in 1971,¹⁸² it included a limitation that prevented “sound-alike” works from constituting infringement of the sound recording copyright.¹⁸³ Similarly, Congress could enact a limitation on the derivative work right for differently motivated works and thereby reduce the wealth distribution effects and reduce the cost of “inputs” for future creative works.

The likelihood of statutory change of the magnitude suggested here, however, is extremely low. The problems of industry capture of the legislative process in the field of copyright law are discussed at length in other articles.¹⁸⁴ As described by one scholar, copyright lawmaking has been a one-way ratchet:¹⁸⁵ greater and greater protections have been afforded to copyright owners, with very little limitations placed on those new protections, let alone limitations on already existing protection. For purposes of this article, the current state of copyright law-making is taken as a given. Recognizing the slim reality of legislative change, there are, nonetheless, provisions in the current statute that courts can and should interpret to achieve some more modest reductions in the strength of protection for works where incurring the cost of robust protection is unnecessary.

CONCLUSION

Current U.S. copyright law provides relatively uniform protection for copyrighted works. This uniformity of protection imposes costs on society when such costs are not necessary to motivate creation and dissemination of certain types of works. The law should take into account the primary creative motivation for types of creative works in determining the scope of protection to afford. The scope of protection can be varied through determinations of how similar an alleged infringing work needs to be to violate the copyright owner’s rights and through consideration of the second fair use factor. If a court determines that reducing the scope of protection would not significantly undermine

¹⁸¹ See *supra* Part II.A.

¹⁸² Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972).

¹⁸³ 17 U.S.C. § 114(b). This limitation was significantly influenced by the dynamics of the music industry and the powerful lobby forces behind the different positions at stake. See Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE WESTERN L. REV. (2003).

¹⁸⁴ Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 879 (1987).

¹⁸⁵ JESSICA D. LITMAN, DIGITAL COPYRIGHT 80 (1st ed. 2001).

the motivations for creation and dissemination of the type of work at issue, that finding should weigh heavily in the degree of similarity required for non-literal infringement and in analyzing whether defendant's use is a fair use.

By reducing the robustness of copyright protection for these differently motivated works the costs to society would be decreased, which, in the end, would better help facilitate the underlying goal of copyright law: The promotion of knowledge and learning.