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## The Copyright Wasteland

Shani Shisha

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# The Copyright Wasteland

Shani Shisha\*

*The Copyright Act grants certain exclusive rights to authors of creative works. But many of these exclusive rights are notoriously underspecified. And while a rich body of case law grapples with one copyright entitlement – the right to reproduce the copyrighted work – courts rarely engage in earnest with other exclusive rights. As a result, courts appear to have only a rudimentary understanding of the precise scope of copyright law. Because courts focus almost singularly on questions of reproduction, other exclusive rights fall by the wayside.*

*This Article contends, counterintuitively, that the problem is traceable to a much-maligned feature of our copyright system: statutory damages. The Copyright Act allows plaintiffs to recover damages without proof of actual harm. But in practice, critics say, statutory damages often prove excessive, punitive, or otherwise arbitrary. Recent studies show that plaintiffs leverage the specter of statutory damages to obtain favorable settlements on the basis of borderline claims. This Article argues that statutory damages also frustrate the development of substantive copyright law. Statutory damages are awarded per infringed work, no matter how many different rights had been violated in that work. Once courts find an infringement of any right – usually, the right of reproduction – they have little incentive to consider additional violations. If the defendant is found to have reproduced the plaintiff's work, little else matters. Courts thus gloss over certain exclusive rights and dwell instead on questions of reproduction. The result is a doctrinal wasteland – a vast sphere of little-explored exclusive rights. This Article spotlights the problem, considers*

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*its implications, and forges a path toward mending copyright's doctrinal wasteland.*

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## INTRODUCTION

Copyright law is in disarray. The problem is one of both design and application. The Copyright Act grants authors a bundle of exclusive rights, such as the rights to reproduce, adapt, perform, and distribute their creative works.<sup>1</sup> But many of these exclusive rights are underspecified: the statute “does not answer many questions”<sup>2</sup> about copyright’s “vividly unclear”<sup>3</sup>

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1. 17 U.S.C. § 106(1)–(4) (2018).

2. Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CIN. L. REV. 581, 591 (2004) (“The Copyright Act is a long and dense body of statutory law. Despite its length and complexity and the wide range of issues it addresses . . . the statute does not answer many questions or create much predictability when disputes about copyright arise.”).

3. Shyamkrishna Balganesha & Jonah B. Gelbach, *Debunking the Myth of the Copyright Troll Apocalypse*, 101 IOWA L. REV. ONLINE 43, 47 (2016) (“[C]opyright’s entitlement structure is vividly unclear.”).

entitlement structure. And while a rich body of case law wrestles with one exclusive entitlement—the right to reproduce the copyrighted work—courts rarely engage in earnest with other exclusive rights.<sup>4</sup> As a result, courts appear to have only a rudimentary understanding of the precise scope and substance of copyright entitlements. Because the case law focuses almost singularly on questions of reproduction, other exclusive rights fall by the wayside. And although scholars and courts agree that copyright law should remain somewhat flexible,<sup>5</sup> it is difficult to wring any meaningful lessons about the scope of copyright’s exclusive rights out of the muddled case law. The question is why.

This Article argues, counterintuitively, that the courts’ failure to grapple with exclusive rights is an outgrowth of the remedial scheme of copyright law. Specifically, I argue that copyright law remains underdeveloped because statutory damages allow courts to systemically eschew certain exclusive rights. The Copyright Act enables successful plaintiffs to recover damages without proof of actual harm.<sup>6</sup> But statutory damages are awarded on a per-work

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4. See *infra* Part I.

5. Rather than relying on rigid rules, copyright law enlists a host of open-ended doctrines to accommodate technological changes. See generally Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2190 (2000) (arguing that the clash between copyright and new technology often whirls through a cycle consisting of (1) disequilibrium, (2) adaptation and adjustment, and (3) legislative consolidation); Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1833 (2009) (recognizing the challenge of adapting copyright law to rapid technological changes); Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 15, 44–49 (Ruth L. Okediji ed., 2017) [hereinafter Samuelson, *Copyright Limitations*] (noting that open-ended exceptions to copyright liability are necessary to ensure “flexibility and adaptability over time”). Relatedly, some scholars have argued that copyright law is bound to remain at least partly vague. See Timothy Endicott & Michael Spence, *Vagueness in the Scope of Copyright*, 121 L. Q. REV. 657, 660 (2005) (celebrating the vagueness of copyright doctrine and suggesting that vagueness is sometimes both inevitable and desirable); Bradley E. Abruuzzi, *Copyright and the Vagueness Doctrine*, 45 U. MICH. J.L. REFORM 351, 352 (2012) (“It should go without saying that copyright law is ‘vague,’ . . . . The simple, first-order question of whether a given instance of speech infringes another’s copyright gives rise to multiple subsidiary legal questions, many of them interrelated, and all of them potentially dispositive of an infringement claim.”); Christina Bohannon, *Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 672 (2010) (recognizing the vagueness of copyright doctrine). I revisit the thesis that copyright law ought to remain flexible in Part IV.A below. See also text accompanying *infra* notes 281–287.

6. 17 U.S.C. § 504(c)(1) (2018) (defining statutory damages). Statutory damages have been part of our copyright system for centuries. The very first copyright statute in the United

basis, no matter how many different rights had been infringed in the plaintiff's work.<sup>7</sup> And once courts find a violation of *any* right—usually, the reproduction right—they have little incentive to consider additional violations. If the defendant is found to have reproduced the plaintiff's work, little else matters. Whether other rights had been infringed is of little practical significance. Courts thus paper over certain exclusive rights and focus instead on questions of reproduction.

So understood, statutory damages discourage courts from confronting copyright's exclusive rights. The resultant landscape—which I dub here the “copyright wasteland”—is a vast stratum of little-explored exclusive rights.

To date, the literature on statutory damages has failed to reckon with the stakes of this relationship between per-work awards and exclusive rights. Although statutory damages were originally designed to address the evidentiary challenges of proving actual harm,<sup>8</sup> our remedial scheme now seems unmoored from this rationale. Scholars have argued that statutory damages often prove excessive, punitive, or otherwise ill-principled.<sup>9</sup> In particular, critics charge that statutory damages tend to produce excessive awards.<sup>10</sup> One recent study has likewise found that copyright plaintiffs

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States, the Copyright Act of 1790, allowed successful plaintiffs to recover a sum of “fifty cents for every sheet which shall be found in [the infringer's] possession.” Act of May 31, 1790, § 2, 1 Stat. 124, 125 (repealed 1834) [hereinafter 1790 Copyright Act].

7. *Id.* Section 504(c)(1) provides that “the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally . . . .” 17 U.S.C. § 504(c)(1) (2018). I say more on the law of statutory damages in section II.A.

8. Aggrieved plaintiffs face a number of difficulties in proving the extent of their damages. First, the defendant and the plaintiff may be operating in different markets. Second, the plaintiff is often ill-positioned to assess the sales records of the defendant. Third, it may be difficult to quantify damages in relation to the counterfactual scenario in which no infringement took place. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 446 n.22 (2009); see also David McGowan, *Irreparable Harm*, 14 LEWIS & CLARK L. REV. 577, 586–88 (2010) (discussing the problem of immeasurability in assessing copyright damages); Daniel M. Jochowitz, *Proof of Harm: A Dangerous Prerequisite for Copyright Protection*, 10 COLUM.-VLA J.L. & ARTS 153, 157–58 (1985). For a brief primer on the justifications for statutory damages, see text accompanying *infra* notes 181–187.

9. See *infra* Section II.B.

10. *Id.*

routinely resort to overclaiming.<sup>11</sup> They harness claims of willful infringement – triggering a potential award of \$150,000 per work – to extract generous settlements from defendants who are unable or unwilling to shoulder the risk of potentially ruinous damages.<sup>12</sup>

Worse still, critics have long recognized that the jurisprudence surrounding statutory damages is driven by punitive instincts. Most notably, Pamela Samuelson and Tara Wheatland claim that the needle moved decidedly away from “the largely compensatory impulse underlying statutory damages.”<sup>13</sup> Because courts focus too readily on deterrence and punishment, they tend to dole out awards that are “punitive in effect and often in intent.”<sup>14</sup> And these trends have occasioned a body of case law that is itself punitive, inconsistent, and sometimes arbitrary.<sup>15</sup>

Taken together, these critiques paint a profoundly bleak picture of our remedial scheme. Yet by focusing on high-profile cases of outsized awards, copyright scholars have overlooked the more fundamental relationship between statutory damages and substantive copyright law. Missing from the debate is a systemic assessment of the interplay between the underlying structure of copyright law, clustered around six exclusive rights, and the remedies available to copyright plaintiffs. This Article is the first to examine this relationship and its import for the development of copyright law.

To illustrate the perils of the copyright wasteland, this Article examines two copyright entitlements. The first is the exclusive right to make derivative works. The derivative work right empowers a copyright owner to prevent others from creating adaptations of the owner’s work – say, by translating a book or adapting a play into a movie. But it is not entirely clear what types of adaptations this entitlement encompasses. Think, for example, of a trivia quiz based on a popular television show,<sup>16</sup> or a lexicon-style book based on a preexisting book series.<sup>17</sup> Are these the types of adaptations that fall

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11. Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 66 UCLA L. REV. 400, 407–08 (2019).

12. See text accompanying *infra* notes 195–198.

13. Samuelson & Wheatland, *supra* note 8, at 445.

14. *Id.* See also text accompanying *infra* notes 203–210.

15. Samuelson & Wheatland, *supra* note 8, at 480–91.

16. See text accompanying *infra* note 66.

17. See text accompanying *infra* notes 75–76.

within the reach of the derivative work right? The statutory definition leaves something to be desired,<sup>18</sup> and the problem is especially pronounced in this context because a derivative work almost always incorporates some portion of a prior work. Thus, an infringement of the derivative work right often involves claims of unauthorized reproduction. Courts, however, need not render a finding on both accounts: once a single violation has been established, the issue of liability is settled. Because statutory damages attach to an infringed work, it is immaterial *how many* different rights had been infringed in that work. The net result is that the derivative work right often turns out to be inconsequential—courts can simply skirt a full exploration of the derivative work right and instead focus on reproduction. The confusion around derivative works is therefore attributable, in part, to the per-work structure of statutory damages.

A second example is the right of distribution.<sup>19</sup> Much like the derivative work right, the concept of distribution is cloaked in mystery. While courts in recent years have grown increasingly attentive to questions of distribution, one central issue remains in doubt: whether an act of distribution must implicate both transfer and *receipt* of a copy of the copyrighted work. And this ambiguity, too, stems in large part from our per-work system. Since the right of reproduction is front and center in most copyright disputes, the distribution right is often set aside as dicta. The number of statutory awards depends not on the number of separate infringements, but rather on the number of individual works infringed. The upshot is that once courts find unauthorized reproduction, they have little incentive to consider additional infringements.

After describing the copyright wasteland, the Article begins to work through its implications.<sup>20</sup> First, it argues that the courts' failure to confront exclusive rights cannot be squared with the incentive-access framework animating copyright law. The law seeks to strike a balance between the need to incentivize the production of creative works and the need to ensure that these works ultimately become accessible to users and future creators.<sup>21</sup>

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18. See *infra* Section I.A.

19. See *infra* Section I.B.

20. See *infra* Part III.

21. For an overview of the economic approach to copyright law, see Wendy J. Gordon & Robert G. Bone, *Copyright*, in II ENCYCLOPEDIA OF LAW AND ECONOMICS 189 (Boudewijn

But the law cannot properly effectuate this balance when copyright entitlements are muddled. If exclusive rights matter because they provide incentives to creators, these rights must hold some discernible substance.

The copyright wasteland also seems to fly in the face of natural-rights theories of copyright law. Despite the conventional understanding of copyright as a system for incentivizing authorship, natural-rights theories hold considerable sway in policy debates and reflect deep moral intuitions about intellectual property. Consider, for example, the Lockean labor theory; the idea that a person “deserves to own something that he or she has created through productive labor.”<sup>22</sup> But if copyright aims to vindicate the author’s rights in the fruits of her labor, the law has to offer some vision of the scope and nature of these rights. If authors are entitled to exclusive rights because they poured effort into their creative works, these rights have to mean something. Theories of copyright, in short, all draw from the same premise: exclusive rights matter. And courts should be able to tell us what these rights mean.

Second, an impoverished body of copyright law can disrupt competition. Market incumbents often wield broad, ill-defined copyright entitlements in an effort to stifle competition. Indeed, for more than a century, large content industries—motion picture, television, print, and music—have relied on vague copyright doctrines to prevent market entrants from challenging incumbents. An underdeveloped corpus of copyright law can thus prove inimical to competition.

Third, the current state of copyright law is difficult to reconcile with the Anglo-American ideal of the rule of law—in brief, the conviction that the law must be public, forward-facing, stable,

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Bouckaert & Gerrit De Geest eds., 2000); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. ECON. PERSPS. 3, 11–18 (1991); David W. Barnes, *Congestible Intellectual Property and Impure Public Goods*, 9 NW. J. TECH. & INTELL. PROP. 533, 533 (2011); Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy*, 1 U. OTTAWA L. & TECH. J. 1, 1–2 (2004) [hereinafter Samuelson, *Economics in Copyright Law*]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325 (1989). In *Mazer v. Stein*, 347 U.S. 201, 219 (1954), the Supreme Court recognized this utilitarian rationale: “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”

22. William W. Fisher, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, 1, 12, <https://perma.cc/CD8H-KKFU>.

and clear. Copyright law fails to satisfy this ideal. It relies instead on a glut of murky entitlements. Predictably, then, copyright's scheme of broadly defined exclusive rights is out of step with fundamental principles of the rule of law.

The Article then responds to some possible objections and demonstrates that my account of the copyright wasteland is resistant to a variety of potential concerns.<sup>23</sup> One objection is that underdeveloped rights can be beneficial (or at least tolerable) to the extent that they ensure flexibility over time. Another possible objection is that the prominence of reproduction over other exclusive rights will eventually wane: courts will invariably shift their attention from reproduction to various exclusive rights in response to the rise of streaming technologies. Finally, the Article considers whether, in some circumstances, courts might be able to properly tackle different exclusive rights despite the prevalence of per-work damages.

Nevertheless, as I explain below, these objections are ultimately unpersuasive or insignificant. They cannot justify an underdeveloped body of case law, and they fail to address the structural problems that ail our per-work system. Statutory damages have worked considerable harm to our creative landscape. They stunt the development of substantive copyright law, deprive us of a vocabulary to think about the scope of copyright entitlements, and impede competition.

On the strength of these findings, this Article urges a revision of copyright remedies.<sup>24</sup> It considers a variety of possible reforms and proposes an alternative system relying on two central elements: (1) a shift from per-work to per-violation awards, coupled with (2) concomitant efforts to reduce the scope of statutory damages. Although the immediate impact of a remedial shift is not readily clear, this proposal would scale back the scope of statutory damages and provide proper incentives for the development of substantive copyright law. Indeed, given the weight of evidence militating against statutory damages, a drastic reform may prove timely.

This Article makes three principal contributions. First, it excavates and systemically analyzes an underappreciated problem

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23. *See infra* Part IV.

24. *See infra* Part V.

in copyright law. While scholars have largely focused on the *remedial* qualities of statutory damages, this Article takes a closer look at the implications of statutory damages for *substantive* copyright law.

Relatedly, this Article's second contribution is to identify an alternative explanation for the ambiguity that pervades copyright law. A prominent strand of scholarship suggests that copyright law is underdeveloped by design. The law is highly complex.<sup>25</sup> It regulates a wide variety of creative activities.<sup>26</sup> And it governs an ever-shifting landscape that is awash in emerging technologies.<sup>27</sup> For these reasons, the argument goes, copyright law is destined to remain vague.<sup>28</sup> This Article, by contrast, shows that copyright law is underdeveloped partly because statutory damages allow courts to train their energies on one particular issue—the question of reproduction. Other copyright entitlements get a short shrift. This Article thus offers a novel account of why copyright ambiguity persists in light of our regime of statutory damages.

This Article's third contribution is prescriptive. It considers a tentative menu of possible reforms that break sharply from the ones previously contemplated by copyright scholars. For the most part, scholars have proposed cabinining the scope of statutory awards by (1) directly reducing the range of available awards, (2) limiting statutory damages to certain types of cases or plaintiffs, or (3) articulating limiting principles for the exercise of judicial discretion in awarding damages. These proposals, however, leave in place the current per-work scheme. This Article seeks to reorient reform proposals to better confront the copyright wasteland. It does so by suggesting that we reconsider the per-work structure of statutory damages.

A word of clarification at the outset: I do not mean to suggest that there is something unusually acute about the ambiguity of copyright law. Other bodies of law are fraught with doctrinal confusion and indeterminacy. Copyright law is no exception.

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25. See *infra* text accompanying notes 39–41.

26. The Copyright Act reaches a broad swath of cultural goods, including plays, books, music, GPS (graphic, pictorial, and sculptural) works, dance and mime, motion pictures, computer programs, and architectural works. 17 U.S.C. § 102(a) (2018).

27. See Merges, *supra* note 5, at 2190; Depoorter, *supra* note 5, at 1833.

28. See Endicott & Spence, *supra* note 5, at 660; Abruzzi, *supra* note 5, at 352; Bohannon, *supra* note 5, at 672.

Instead, my argument is that the *cause* of this predicament is specific to the copyright context; statutory damages, I argue, drive the courts' reticence to engage with much of the substance of copyright law. This is not to say that courts would necessarily get everything right if per-work damages were eliminated. But they would at least try – and that would be a substantial improvement.

It is also important to note that statutory damages are not the *only* force behind the copyright wasteland. Scholars have offered a number of explanations for why courts devote undue attention to the reproduction right. One common sentiment is that courts view reproduction as more central to the economic interests of copyright holders.<sup>29</sup> Another possible explanation is that the concept of reproduction seems (at least facially) more intuitive and less convoluted in comparison to other exclusive rights.<sup>30</sup> And perhaps the emphasis on reproduction is the product of benign inertia: courts are simply focusing on historically familiar notions of reproduction – notions that have deep roots in copyright jurisprudence.<sup>31</sup>

This Article identifies another catalyst behind the copyright wasteland. It argues, critically, that statutory damages allow courts to privilege reproduction *at the expense of other exclusive rights*. Courts would not be able to treat certain exclusive rights as dicta – as they often do today – if these rights were in fact relevant to the result of the case. If the ultimate amount of damages depended on the number of infringed rights, courts would be compelled to address each of these rights in order to decide the case. So, while statutory damages are not the *only* reason that courts shirk some exclusive rights, per-work awards surely play an important role in depressing the development of copyright law.

The argument proceeds in five parts. Part I introduces the copyright wasteland. It explores two exclusive copyright

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29. See text accompanying *infra* notes 230–240.

30. *But see* Skidmore v. Led Zeppelin, 952 F.3d 1051, 1065–69 (9th Cir. 2020) (reviewing some of the problems that plague the doctrines of unlawful reproduction, including the inverse ratio rule and the conflation of probative and substantial similarity at different steps of the analysis).

31. Initially, United States copyright law recognized only a single exclusive right: the reproduction right. 1790 Copyright Act, *supra* note 6, § 1. Over time, copyright protection expanded to include a wider repertoire of exclusive rights. For example, a public performance right was first codified in the 1856 Act. See Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139. Further, the 1909 Act was the first to introduce an exclusive right to adapt or translate a preexisting work. Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075, 1075.

entitlements—the derivative work right and the distribution right—and demonstrates that courts have avoided substantive expositions of these exclusive rights while focusing on questions of unauthorized reproduction. After describing the copyright wasteland, Part II tracks its root cause: statutory damages. It provides an overview of the literature on statutory damages and argues that the copyright wasteland is a byproduct of the law’s remedial scheme. Part III offers a normative assessment of the copyright wasteland. It argues that an underdeveloped body of doctrine is at odds with the core objectives underlying copyright law. Part IV evaluates and rejects a number of potential objections, and Part V considers concrete proposals for reform. A brief conclusion follows.

### I. THE PROBLEM

Copyright law is omnipresent. Questions about the scope of copyright law arise when we share a photograph online,<sup>32</sup> create a meme,<sup>33</sup> stream live content,<sup>34</sup> or embed content posted elsewhere on the Internet.<sup>35</sup> Though seemingly mundane and widely shared, these practices could all provoke claims of copyright infringement. And that’s unsurprising. Over time, copyright law has steadily expanded to regulate an ever-growing repository of human activity.<sup>36</sup>

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32. See Danielle Prager, *A Guide to Online Images Copyright and Fair Use Laws*, RIVAL IQ (Jan. 25, 2019), <https://www.rivaliq.com/blog/guide-copyright-fair-use-laws-online-images>.

33. See, e.g., Colleen McCorskey, *Copyright for Meme-Makers*, PUBLIC KNOWLEDGE (Aug. 6, 2018), <https://www.publicknowledge.org/blog/copyright-for-meme-makers>; Giacomo Bonetto, *Internet Memes as Derivative Works: Copyright Issues Under EU Law*, 13 J. INTELL. PROP. L. & PRAC. 989, 989 (2018).

34. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2502–03 (2014) (holding that retransmission of live television broadcasts to Internet users constitutes copyright infringement). See *infra* Section III.C.

35. See *Goldman v. Breitbart News Network*, 302 F. Supp. 3d 585, 586 (S.D.N.Y. 2018) (holding that the use of Twitter’s embedding function to display a photograph is infringing). But see *Perfect 10, Inc. v. Amazon.com*, 487 F.3d 701, 716–17 (9th Cir. 2007). Adopting the “server test,” the *Perfect 10* court held that Google’s displaying of the copyrighted content did not implicate the public display right—and thus did not constitute copyright infringement—because the contents were not stored on Google’s servers. *Id.* See also *Flava Works, Inc. v. Gunter* 689 F.3d 754, 755–56 (7th Cir. 2012) (applying the same test in the context of video sharing). By contrast, the court in *Goldman* held that the right of public display is infringed whenever the defendant takes “active steps to put a process in place that result[s] in a transmission of the [content] so that [it] could be visibly shown,” regardless of whether the infringing content was hosted on the defendant’s server. *Goldman*, 302 F. Supp. 3d. at 594.

36. For an overview of the expansionist currents that underlie modern copyright law, see JESSICA LITMAN, *DIGITAL COPYRIGHT* 77–78 (2001); LAWRENCE LESSIG, *REMIX* 101–02

The law now governs a rich array of everyday activities that were once beyond its reach. As one scholar quipped, modern copyright law “touches everyone and everything.”<sup>37</sup>

And yet despite the storied pedigree of copyright law – dating back to 1710<sup>38</sup> – vast swaths of the copyright landscape remain hazy. We have only a somewhat rudimentary understanding of the precise scope and content of copyright law.<sup>39</sup> The copyright statute grants copyright owners a bundle of exclusive, time-limited rights to reproduce, adapt, distribute, perform, and display their creative works.<sup>40</sup> But the statutory text is markedly imprecise, and many of these rights are underspecified: the Copyright Act fails to define with clarity key terms such as “distribution” or “public performance.”<sup>41</sup> And while a long line of cases has focused on one core feature of our copyright regime – the right to reproduce the copyrighted work – courts rarely engage in earnest with many of the other rights afforded to creators. This is perhaps best evidenced by Melville Nimmer’s 1963 copyright treatise, where infringement

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(2008); NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 54–80 (2008); Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996, 12:00 PM) [hereinafter Samuelson, *Copyright Grab*], <https://www.wired.com/1996/01/white-paper/>; Michael Landau, *Has the Digital Millennium Copyright Act Really Created a New Exclusive Right of Access?: Attempting to Reach a Balance Between Users’ and Content Providers’ Rights*, 49 J. COPYRIGHT SOC’Y U.S.A. 277, 279–82 (2001); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 37–40 (2003); Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 123–25 (2002).

37. Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 34 (1994).

38. Statute of Anne, 1710, 8 Ann., c. 19. See also Oren Bracha, *The Statute of Anne: An American Mythology*, 47 HOUSTON L. REV. 877 (2010).

39. Balganesch & Gelbach, *supra* note 3, at 47 (observing that “copyright’s entitlement structure is vividly unclear”); Bartow, *supra* note 2, at 591 (characterizing the Copyright Act as a “long and dense” body of law that fails to provide much predictability); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 741 (1987) (“There is no objective framework for defining how much copying is too much.”); Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457, 457 (2014) (arguing that “[c]opyrights are really complicated.”); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 3 (2010) (“The copyright statute is old, outmoded, inflexible, and beginning to display the symptoms of multiple systems failure.”); Andrew Gilden, *Reading the Readers*, 102 IOWA L. REV. ONLINE 174, 182 (2017) (noting that many elements of copyright infringement – including “[s]ubstantiality, reasonableness, propriety, and proportionality[–] are all highly subjective concepts”).

40. 17 U.S.C. § 106 (2018).

41. 17 U.S.C. § 101 (2018).

is treated simply as an incident of unauthorized reproduction, without any reference to other exclusive rights.<sup>42</sup>

Copyright law is thus in a state of flux. The law is premised on a utilitarian rationale; that is, the law seeks to encourage authors to create (more and better) expressive works by granting them exclusive rights in such works. But if we do not know what these rights mean, how might we assess whether they accomplish their goal of incentivizing creativity?

Recognizing this grim state of affairs, the American Law Institute recently launched a copyright restatement project aimed at clarifying “general copyright law.”<sup>43</sup> Christopher Sprigman, the reporter for the restatement project, pointed out that the law is “in a bad state, and has been for some time now,”<sup>44</sup> suggesting that various areas of copyright law present “difficult interpretive questions” that are deserving of clarification.<sup>45</sup> Another prominent scholar, Pamela Samuelson, noted that copyright law is beset by a constellation of problems, including “considerable uncertainty, lack of clarity, and undue complexity [on many important aspects of the law].”<sup>46</sup>

The following discussion takes up two examples to support this proposition: the derivative work right and the right of distribution. These exclusive rights remain surprisingly underexplored despite the decades-long body of case law interpreting the Copyright Act. The remainder of this Part will illustrate that courts have done little to delimit the precise bounds of these rights. This discussion will provide important background for the broader argument; namely, that these (and other) exclusive rights remain underdeveloped in large part thanks to our regime of statutory damages.

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42. 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT ch. 12 (1963). Spanning some 55 pages, Chapter 12 of Nimmer’s treatise discusses “infringement actions” solely by reference to doctrines involving copying. *See id.* at 610–43.

43. *Restatement of the Law, Copyright*, AMERICAN LAW INSTITUTE, <https://www.ali.org/projects/show/copyright> (last visited Mar. 30, 2022).

44. Letter from Christopher Sprigman, Professor of Law, NYU Sch. of Law, to Richard Revesz, Director, Am. L. Inst. 1 (Sept. 2, 2014) (on file with author).

45. *Id.* at 4.

46. Letter from Pamela Samuelson, Professor of Law, Univ. of Cal. Berkeley Sch. of Law, to Lance Liebman, Director, Am. L. Inst. 1 (Sept. 12, 2013).

*A. Derivative Works*

The derivative work right entitles a copyright owner to prevent others from preparing “derivative works based upon the [owner’s] copyrighted work.”<sup>47</sup> The precise scope of the derivative work entitlement is fuzzy: some advocate a somewhat narrow conception of derivative works, while others favor a more sweeping vision of adaptation rights. I return to these definitional woes shortly, but for now it will suffice to say that courts and commentators disagree over whether any secondary work based (in some loose sense) upon a preexisting work necessarily runs afoul of the derivative work right.

To better understand the longstanding debate over the scope of the derivative work entitlement, it is worthwhile to briefly recount its theoretical anchors. Consistent with the instrumental theory underpinning U.S. copyright law, derivative work rights are best understood as providing incentives to those who create original works of authorship.<sup>48</sup> On this account, derivative works produce additional revenue streams—they allow authors to tap into the success of a preexisting work by exploiting downstream adaptations of that work.<sup>49</sup> Accordingly, derivative works are thought to bolster the incentives to invest in the creation of the underlying work.

Michael Abramowicz offers another iteration on this familiar theme, focusing on the timing of follow-on adaptations. An exclusive adaptation right, he argues, might afford copyright owners additional breathing room to assess the demand for the original work before rushing to release down-the-line adaptations.<sup>50</sup> Put another way, a derivative work right functions

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47. 17 U.S.C. § 106 (2018).

48. See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1910–11 (1990); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994) (embracing the argument that derivative rights provide additional incentives for upstream creation).

49. Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1348 (2015) (“Since derivative markets offer authors additional revenue streams on top of the primary market for the underlying work, giving them exclusive access to those derivative markets may spur investment in the underlying work.”); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 216 (1983).

50. Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005).

as “a tool that allows authors to take their time.”<sup>51</sup> It serves not only to incentivize initial creation, but also to “centralize[] the power to authorize and coordinate secondary innovation,” thus “avoiding the wasteful overlapping activity associated with races to capture the rents from secondary uses of primary works.”<sup>52</sup>

Finally, an exclusive entitlement to prepare derivative works could allow copyright owners to engage in price discrimination; they can charge one price to passive consumers and another (typically higher) price to adapters who would likely be willing to pay more.<sup>53</sup>

With these justifications in view, it is easy to see why some courts have taken an expansive view of derivative works.<sup>54</sup> Courts often insist that the derivative work right covers any adaptation that is based, however loosely, on a preexisting work. This broad vision of derivative works is arguably supported by the language of the Copyright Act, which specifies that derivative works may take “any . . . form in which the work is recast, transformed, or adapted.”<sup>55</sup>

Consider, for instance, *Addison-Wesley Pub. v. Brown*,<sup>56</sup> an early case predating the codification of the derivative work right in 1976.<sup>57</sup> In *Addison-Wesley*, the publishers of two physics textbooks

51. *Id.* at 320.

52. Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 272–73 (2014).

53. Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives–Access Paradigm*, 49 VAND. L. REV. 483, 631 (1996). For an overview of the interaction between intellectual property law and price discrimination more broadly, see William W. Fisher III, *When Should We Permit Differential Pricing of Information?*, 55 UCLA L. REV. 1 (2007); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1369 (1998) (suggesting that “all intellectual property law operates by fostering price discrimination” in allowing owners to distinguish between purchasers who are public performers, adapters, public displays, and so on); James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination, and Digital Intellectual Property*, 53 VAND. L. REV. 2007 (2000).

54. See generally Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1509–10 (2013) [hereinafter Samuelson, *Quest*] (noting that some courts have construed the derivative work right as providing copyright owners with broad latitude to “control all markets into which any emanation of their works might travel”).

55. 17 U.S.C. § 101 (2018).

56. *Addison-Wesley Publ'g v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963).

57. The derivative work right was first codified as a standalone right in 1976. Previous permutations involved only specific, limited incidents of derivative works. In 1870, Congress first provided authors with the right to control translations and dramatizations of their

sought to enjoin the release of an unauthorized “manual” that offered solutions to corresponding problems in the original textbooks.<sup>58</sup> The court found that the manual constituted an illegal reproduction of the textbooks. It held that copyright protection extends to “various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration.”<sup>59</sup> The court described the manual as “parasitical”<sup>60</sup> and considered whether the manual had “translated” the copyrighted matter into “another ‘language.’”<sup>61</sup> And although its analysis was dressed up in the language of reproduction,<sup>62</sup> the court effectively treated the manual as a derivative work—a secondary work that is linked to, and based upon, a preexisting work.

More pointedly, *Addison-Wesley* mobilized a but-for test for identifying a derivative work. This test asks whether the secondary work would have been created but for the original work.<sup>63</sup> The but-for test drove the analysis here: the manual would not have existed but for the textbooks. The court explained that the solutions

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works. Copyright Act, ch. 230, § 86, 16 Stat. 198, 212 (1870) (*repealed* 1909). In 1909, the list of protected derivative works was further expanded. See Copyright Act of 1909, Pub. L. No. 60-349, § 1(b), 35 Stat. 1075, 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810, 18 U.S.C. § 2318, 44 U.S.C. §§ 505, 2113 (2006)). Most importantly, however, “[n]ot until the Copyright Act of 1976 (1976 Act) did U.S. law grant authors a general right to control the preparation of derivative works.” Samuelson, *Quest*, *supra* note 54, at 1509.

58. *Addison-Wesley*, 223 F. Supp. at 222.

59. *Id.* at 227 (citing *Nutt v. Nat’l Inst., For Improvement of Memory*, 31 F.2d 236, 238 (2d Cir. 1929)).

60. *Id.* at 228.

61. *Id.* at 226. The plaintiffs asserted that the defendants engaged in a form of literal translation, relying on Section 1 of the 1909 Copyright Act, which provided an exclusive right to “translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work.” Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) [hereinafter 1909 Act], *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), Copyright Act of 1976, 90 Stat. 2541 (1978). The court, however, rejected this expansive construction of “translation.” *Addison-Wesley*, 223 F. Supp. at 226.

62. The court focused on unauthorized copying because the 1909 Copyright Act did not recognize a standalone right to prepare derivative works.

63. This view finds support in an early draft of the 1976 Copyright Act. The draft, published in 1963, defined a derivative work as a “work based and dependent for its existence upon one or more pre-existing works . . . .” THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 62 (Alan Latman & James F. Lightstone eds., 1981) (emphasis added).

had “no independent viability”<sup>64</sup> and could not have “exist[ed] in vacuo.”<sup>65</sup> Indeed, the solutions only made sense when keyed onto corresponding problems in the original textbooks. That is why, on this approach, the manual constituted a derivative work.

The but-for test epitomizes a broad vision of derivative rights. It casts a wide net—perhaps too wide. It aims to ensnare every secondary work that was inspired by a preexisting work, even when the secondary work did not incorporate or borrow material from the underlying work.

Another case evidencing a broad vision of derivative works is *Castle Rock*, where the Second Circuit held that a trivia quiz based on the show *Seinfeld* was an infringing derivative work.<sup>66</sup> In what sense did the quiz recast, transform, or adapt the show? The quiz consisted of questions about fictional “facts” extracted from the *Seinfeld* universe. Were these fictional elements truly recast or transformed merely by virtue of being repackaged in quiz format? The quiz was surely linked to the show’s fictional universe. But what is the nature and extent of the link required between the original and secondary work? Is the link between a television show and a trivia quiz sufficiently robust to support a finding that the latter is derivative of the former?

The *Castle Rock* court did not mention, much less resolve, any of these questions. It focused instead on the question of copying. As the court noted, “no one dispute[d] that [the plaintiff] own[ed] valid copyrights in the *Seinfeld* television programs and that defendants actually copied from those programs in creating [the quiz].”<sup>67</sup> And because the copied portion was substantial,<sup>68</sup> the court concluded that the plaintiffs established a prima facie case of copyright infringement.<sup>69</sup> The court then proceeded to assess whether the defendants’ copying could be excused as fair use.<sup>70</sup> At no point, however, did the court offer anything resembling a

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64. *Addison-Wesley*, 223 F. Supp. at 223.

65. *Id.* at 224.

66. *Castle Rock Ent. v. Carol Publ’g Grp.*, 150 F.3d 132, 141 (2d Cir. 1998). Another notable example is *Twin Peaks Prods., v. Publ’ns Int’l*, 996 F.2d 1366 (2d Cir. 1993), where the court held that a guidebook to the *Twin Peaks* television show was a derivative work. *Id.* at 1373.

67. *Castle Rock*, 150 F.3d at 137.

68. *Id.* at 138–41.

69. *Id.*

70. *Id.* at 141–46.

discussion of the derivative work right. Save for one stray reference halfway through the reproduction analysis,<sup>71</sup> the court had nothing to say on the issue of adaptation. Whatever else the decision might have achieved, it offered no insight into the nature and scope of the derivative work right.

To be sure, some may take *Castle Rock* to stand for the proposition that the derivative work framework covers any adaptation that simply borrows material from an underlying work. After all, the court ultimately held that the quiz reproduced portions of the show—and that was enough to implicate the plaintiffs’ derivative work right. That idea also finds support in the legislative history of the Copyright Act. As the Committee on the Judiciary explained in its report on the proposed bill, the derivative work language was engineered to capture secondary works that incorporate some expressive portion of an original work: “[T]o constitute a violation of section 106(2), the infringing work *must incorporate a portion of the copyrighted work* in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.”<sup>72</sup>

On this view, evidence of copying is dispositive. If the defendant’s adaptation draws expressive material from a preexisting work, it will necessarily trigger an infringement of the derivative work right.

Even so, a number of scholars have read the statutory language to encode a far more limited right. Section 101 of the Copyright Act defines a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, [or] condensation . . . .”<sup>73</sup> And Pamela Samuelson suggests that, as a practical matter, the derivative work right “has proven unproblematic and uncontroversial in cases involving the nine exemplary derivatives

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71. In rejecting the applicability of the “total concept and feel” test, the court explained that the test “is simply not helpful in analyzing works that, because of their different genres and media, must necessarily have a different concept and feel. Indeed, many ‘derivative’ works of different genres, in which copyright owners have exclusive rights may have a different total concept and feel from the original work.” *Id.* at 140 (citation omitted).

72. H.R. REP. NO. 94-1476, at 62 (1976) (emphasis added).

73. 17 U.S.C. § 101 (2018).

and close analogues.”<sup>74</sup> The basic idea appears to be that the derivative work right should govern only the limited universe of enumerated derivatives and closely analogous works.

Meanwhile, some courts have also taken a narrow view of derivative works. One example is *Warner Bros. v. RDR Books*,<sup>75</sup> where the court held that a lexicon (encyclopedia-like) book based on the Harry Potter universe did not constitute a derivative work. While the court concluded that the book infringed the defendants’ right of reproduction, it nonetheless reasoned that the lexicon book injected “the copyrighted material [with] another purpose” and thus amounted to more than a simple “recast[ing]” of the original work.<sup>76</sup> This case stands in stark contrast to *Castle Rock*, where the Second Circuit held that a Seinfeld-inspired quiz qualified as an infringing derivative work.

A more striking illustration of a minimalist approach to derivative works can be found in some of the opinions of Judge Richard Posner. A case in point is *Ty v. Publications Int’l*,<sup>77</sup> where Judge Posner staked out a remarkably narrow vision of the derivative work right. Contrary to both *Castle Rock* and *Warner Bros.*, Judge Posner seemed to assume that secondary creators should generally be allowed to engage with someone else’s preexisting work through the production of follow-on work.

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74. Samuelson, *Quest*, *supra* note 54, at 1509.

75. *Warner Bros. Ent., v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

76. *Id.* at 539. The court’s reasoning appears to conflate two separate doctrinal questions: (1) whether the defendant prepared a derivative work; and (2) whether the defendant’s actions are permissible under the fair use standard. The Copyright Act defines a derivative work as one that “transforms” a preexisting work. And this definition is often confused with the requirement that courts examine whether the defendant’s use of the copyrighted work is “transformative” in determining whether it constitutes fair use. In the context of derivative works, to “transform” a preexisting work is to incorporate a portion of the preexisting work into a new form. In the context of fair use, however, “transformative” use requires more than a consideration of the differences between the preexisting and secondary works. It calls for an assessment of whether the secondary user “imbue[d] the original with a further purpose or different character.” Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 84 (2012) (quotation marks omitted). That is, the question of transformative use under the fair use analysis demands an assessment of “the *motivation and meaning* of [the differences between the two works.]” *Id.* at 56. (emphasis added). The *Warner Bros.* court seems to have muddied the waters. It suggested that the work at issue was transformative — that it amounted to more than a mere recasting — and therefore was not derivative. But what the court appears to be discussing here is the question of fair use, which is distinct from the question of whether the work at issue is derivative.

77. *Ty, Inc. v. Publ’ns Int’l*, 292 F.3d 512 (7th Cir. 2002).

*Ty v. Publications* involved a collector's guide to a series of copyrighted works. Despite the similarities to the lexicon book in *Warner Bros.* and the trivia quiz in *Castle Rock*, Judge Posner likened the collector's guide to a book review. As he put it:

A guide to Parisian restaurants is not a recasting, transforming, or adapting of Parisian restaurants. Indeed, a collectors' guide is very much like a book review, which is a guide to a book and which no one supposes is a derivative work. Both the book review and the collectors' guide are critical and evaluative as well as purely informational; and ownership of a copyright does not confer a legal right to control public evaluation of the copyrighted work.<sup>78</sup>

Invoking the broad policy goals that underwrite copyright law, Judge Posner resisted a broad reading of the derivative work right. While some courts appear to conceive of any follow-on work as derivative, Judge Posner suggests that a secondary work has to *directly* engage with an underlying work to be considered derivative: it must recast the underlying work in some meaningful way. And, mindful of the need to permit critical assessments of protected works, Judge Posner touts the "purely informational" nature of the secondary work as a factor weighing against infringement.

As this brief analysis demonstrates, the case law on derivative works is deeply befogged. Courts have understood the derivative work right to mean different things in similar cases. Consider three of the cases discussed above, all involving analogous types of review guides or fan-driven books based upon preexisting works: *Ty v. Publications*, *Castle Rock*, and *Warner Bros.* These cases portray wildly disparate visions of derivative works. Some courts deploy a but-for test. Others insist that derivative works require reproducing a substantial portion of a preexisting work's expression into a new work. And still some courts favor a far more restricted approach, refusing to recognize derivative works even where the defendant reproduced substantial portions of the original work, as in the Harry Potter lexicon case.

Indeed, "mysteries abound about the proper scope of the derivative work right."<sup>79</sup> These mysteries have wide-ranging implications.

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78. *Id.* at 520-21.

79. Samuelson, *Quest*, *supra* note 54, at 1510.

Perhaps most strikingly, many commentators have come to question whether the derivative work right is necessary at all. David Nimmer posits that the right to make derivative works is “superfluous” because a derivative work almost always reproduces some portion of the underlying work.<sup>80</sup> As Joseph Fishman notes, “[i]n practice, [the derivative work right] does little that the capacious reproduction right has not done already. Because any derivative will incorporate some independently copyrightable element of the original work, an infringement of the derivative work right will usually infringe the reproduction right as well.”<sup>81</sup> Others seem to share that view.<sup>82</sup>

But there’s a more systemic lesson here. In many of the cases discussed above, courts largely discounted the derivative work right and focused instead on questions of reproduction. And even when courts appeared to address derivative works, they usually did so in passing. Think, for instance, of *Castle Rock*, a case dealing with a trivia quiz based on a television show. Because the quiz was an unauthorized secondary work, the plaintiffs alleged an infringement of their derivative work right. Surely, then, one

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80. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.09[A][1] [hereinafter 2 NIMMER] (“Unless sufficient of the pre-existing work is contained in the later work so as to constitute the latter an infringement of the former, the latter by definition is not a derivative work. Therefore, if the latter work does not incorporate sufficient of the pre-existing work as to constitute an infringement of either the reproduction right or of the performance right, then it likewise will not infringe the right to make derivative works because no derivative work will have resulted.”).

81. Fishman, *supra* note 49, at 1347.

82. See, e.g., Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 334–35 (2005); Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is Galoob A Mirage, or Does the Form(GEN) of the Alleged Derivative Work Matter?*, 20 SANTA CLARA HIGH TECH. L.J. 991, 1020 (2004) (arguing that the right to prepare derivative works is indistinguishable from the other four exclusive rights); Jed Rubinfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 50 (2002) (“Under present law, the copyright owner’s ‘reproduction right’ (the exclusive right to reproduce) is viewed as already encompassing much of what would otherwise be covered by the ‘derivative works right’ . . . .”); *Twin Peaks Prods., v. Publ’ns Int’l*, 996 F.2d 1366, 1373 (2d Cir. 1993); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1018 (1997) (“[I]t is not evident what section 106(2) [the derivative work right] adds to the rights already granted under section 106(1) [the reproduction right].”); Goldstein, *supra* note 49, at 215–17; Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1215–16 (1996) (contending that, in many cases, derivative rights simply allow copyright owners to extract economic rents); OMRI RACHUM-TWAIG, COPYRIGHT LAW AND DERIVATIVE WORKS: REGULATING CREATIVITY 133 (2019) (“[A] review of the derivative works right case law reveals that the overlap between it and the reproduction right is almost full, and that Nimmer’s claim that the derivative works right is superfluous is not far from the truth.”).

would have expected the court to confront the issue, if only nominally. But it didn't. The court did not even bother to try. It discussed at length the reproduction right, and then turned to a similarly rich analysis of the fair use doctrine. Curiously absent from the discussion was the derivative work right.

In a sense, *Castle Rock* is illustrative of a broader trend. More often than not, derivative works are treated as an afterthought—a mere extension of the reproduction right. The overlap between the reproduction right and the derivative work right stems in part from the doctrines governing copyright infringement. Courts have done little to distinguish between mere reproductions and derivative works. In practice, judges often leverage the substantial similarity test to analyze improper appropriation in cases involving both sets of rights.

In *Litchfield v. Spielberg*,<sup>83</sup> for example, the plaintiff asserted that a script she had written was used by the defendants as the basis for their blockbuster movie *E.T.* The Ninth Circuit held that the two works were not substantially similar, and thus no improper copying could be inferred.<sup>84</sup> The court also concluded that the movie is not a derivative work for the same reason: “A work,” the court explained, “is not derivative unless it has been substantially copied from the prior work.”<sup>85</sup> On this approach, the derivative work right is wholly subservient to the right of reproduction: a derivative work cannot arise in the absence of copying. The result is that it is unclear whether, and to what extent, the derivative work right is separable from the right of reproduction.

The problem is further augmented by the courts' jurisprudence on copying and substantial similarity. The doctrines that govern copying are remarkably flexible. Courts recognize both literal and nonliteral copying.<sup>86</sup> Courts also apply both qualitative and quantitative measures to determine whether the amount copied from the primary work rises to the level of substantial similarity.<sup>87</sup>

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83. *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984).

84. *Id.* at 1358.

85. *Id.* at 1357.

86. See Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821 (2013) [hereinafter Samuelson, *Nonliteral Copyright Infringement*]; *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), *abrogated in part by* *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968).

87. Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*,

And, notwithstanding the de minimis defense,<sup>88</sup> courts often find copying where only a modest amount of the prior work was in fact reproduced, and even when the prior work was not copied verbatim but rather recolored or recast in some nonliteral way. In *Roy Export Co. v. Columbia Broadcasting System*, the court held that the copying of one minute and fifteen seconds from the plaintiffs' movie (whose runtime was one hour and twelve minutes) constituted "qualitatively substantial" copying—enough to defeat a fair use defense.<sup>89</sup> Similarly, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Supreme Court found that the copying of a few hundred words from a book encompassing some five-hundred pages was enough to support copyright infringement.<sup>90</sup>

To make matters worse, courts often look to the "total concept and feel" of the work<sup>91</sup> and are willing to entertain nonverbatim

43 AM. BUS. L.J. 515, 529 (2006) (noting that courts examine whether the amount copied "is either quantitatively significant or qualitatively important to the original copyrighted work to be substantially similar and, thereby, actionable under copyright law."); Samuelson, *Nonliteral Copyright Infringement*, *supra* note 86, at 1845 (footnote omitted) ("Substantial similarity sometimes seems to be a vacuous phrase in nonliteral infringement cases, especially when courts find infringement based on quantitatively small appropriations said to be qualitatively substantial.").

88. The de minimis defense, derived from the axiom "de minimis non curat lex" ("the law does not concern itself with trifles"), exempts from liability "actual copying that is so trivial that it falls below the required element of substantial similarity." Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 185 (2002). The use of the de minimis defense to curb copyright liability is particularly pronounced in the music industry. *See, e.g.*, *Newton v. Diamond*, 349 F.3d 591, 592 (9th Cir. 2003) (holding that the copying of single notes from a musical score constituted de minimis use, although the sample was looped in the infringing song dozens of times); Mike Suppappola, *Confusion in the Digital Age: Why the De Minimis Use Test Should Be Applied to Digital Samples of Copyrighted Sound Recordings*, 14 TEX. INTELL. PROP. L.J. 93, 101–11 (2006); Tyler B. Burns, *And They Sayin' It's Because of the Internet: Applying the De Minimis Exception to Digital Sound Sampling in the Wake of VMG Salsoul, LLC v. Ciccone*, 10 DREXEL L. REV. 445, 457–62 (2017) (reviewing the case law on the de minimis principle in cases that involve music sampling).

In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit sought to dispense with the de minimis defense in holding that the use of even tiny snippets of a copyrighted work requires permission from the copyright owner. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir. 2005). *But see* *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 874 (9th Cir. 2016) (recognizing a de minimis defense against infringement in musical compositions and explicitly rejecting the Sixth Circuit's repudiation of the de minimis principle).

89. *Roy Exp. v. Columbia Broad. Sys.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982).

90. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548–49 (1985).

91. *See* *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995) (noting that under various tests for substantial similarity—both the "ordinary observer" test or the "more

copying of a single (often incidental) element lifted from a larger, multi-element work.<sup>92</sup> Accordingly, just about anything could plausibly constitute unlawful reproduction. Indeed, even a two-second sample of a sound recording—a de minimis use if there ever was one—was found to be an infringing copy when incorporated into a new composition.<sup>93</sup>

Given this robust conception of reproduction, the derivative work right and the reproduction right frequently converge. As a consequence, the derivative work right may in fact be “superfluous,” as Nimmer exclaims. One court put it more bluntly: “[There exists] no distinction between the two forms of infringement [derivative works and reproduction] and [the court] address[es] both by asking whether the [prior work] was substantially similar to [the allegedly infringing work].”<sup>94</sup> Moreover, in *Mulcahy v. Cheetah Learning*,<sup>95</sup> the Eighth Circuit clarified that the same doctrinal tests control both reproduction and derivative works: “While substantial similarity is the test we use in determining copyright infringement, here the issue is whether [the defendant’s] book is a derivative work. In general, the two tests are similar.”<sup>96</sup>

Courts, in other words, fail to engage with the derivative work right. They rarely attend to some of the more vexing questions that

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discerning” inquiry—the court ought to judge the works’ “total concept and feel.” (citing *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 500 (2d Cir. 1982)). For a discussion of the Ninth Circuit’s articulation of the “total concept and feel” test under the intrinsic prong of the extrinsic/intrinsic test, see Christopher Jon Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright’s “Substantial Similarity” Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 578–80 (2019). The Second Circuit has, at times, appealed to the “total concept and feel” test in applying its “more discerning observer” test. *Id.* at 583–84.

92. See *Ponte*, *supra* note 87, at 529–30 (discussing cases of music sampling, where the plaintiff alleges that a small portion of her work—often a single element that does not “capture[] the overall character or structure of the original work”—was copied.).

93. See *Bridgeport Music, Inc.*, 410 F.3d at 795.

94. *Well-Made Toy Mfg. v. Goffa Int’l*, 354 F.3d 112, 117 (2d Cir. 2003), *abrogated on other grounds by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (observing that the same substantial similarity test applies regardless of whether the defendant’s work constitutes a reproduced work or a derivative work).

95. *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849 (8th Cir. 2004).

96. *Id.* at 853. In making this assertion, the court cited Nimmer’s copyright treatise to clarify that “[u]nless sufficient of the pre-existing work is contained in the later work so as to constitute the latter an infringement of the former, the latter by definition is not a derivative work.” *Id.* (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 809[A] 8–138 (2004)).

pervade the derivative work framework. What purpose does the derivative work right serve? Can a derivative work arise in the absence of copying? Is substantial similarity a necessary element of the analysis? If so, how might courts go about identifying derivative works? After all, a derivative work is a *new* work based upon a preexisting one: the author of a derivative work must contribute something new or *different*. How might courts navigate the spectrum between similarity and differentiation?

Some scholars have attempted to grapple with these issues.<sup>97</sup> Courts, on the other hand, have never really tried.<sup>98</sup> The case law yields scant guidance on the limits of the derivative work right. Since almost any derivative work incorporates some element of a prior work, derivative works can be, and often are, analyzed as incidents of reproduction.<sup>99</sup> In effect, courts treat the reproduction right as analogous to the derivative work right.

But that approach is inapposite. The derivative work right is distinct from the reproduction right in some respects. Mark Lemley offers a glossary of situations in which derivative works do not implicate reproduction.<sup>100</sup> Most prominently, reproduction arises only where the defendant has created a copy of the work, and a copy requires fixation in a tangible medium of expression. A derivative work, however, does not turn on the existence of a fixed copy.<sup>101</sup> Consider *Addison-Wesley Pub. v. Brown*, where the court

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97. See, e.g., Samuelson, *Quest*, *supra* note 54. Working through the language of the Copyright Act, Samuelson sorts the nine statutory examples of derivative works into three categories. *Id.* at 1518–23. The first category involves abridgements or short versions of preexisting works. These works typically borrow substantial portions of the underlying work. The second category consists of faithful renditions – think, for example, of translations or art reproductions. Such works may extend the underlying work to different mediums, but nonetheless involve a substantial degree of similarity to the original. A third category includes transformative works, such as dramatizations, fictionalizations, or musical rearrangements. These works typically adapt the underlying work into a new medium, and sometimes a new genre. And while such works borrow something from the underlying work, they often involve a diminished degree of fidelity to the original. In short, Samuelson develops a framework for classifying derivative works by reference to questions of similarity, differentiation, and demand for the original work. *Id.*

98. On rare occasions, courts have tried to define with greater precision the amount of creativity required to meet the bar for derivative works. See, e.g., *Ent. Rsch. Grp., v. Genesis Creative Grp.*, 122 F.3d 1211, 1222–23 (9th Cir. 1997).

99. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357; *Well-Made Toy*, 354 F.3d at 112.

100. Lemley, *supra* note 82, at 1018–19.

101. *Id.* See also H.R. REP. NO. 94-1476, at 62 (1976) (“[R]eproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet,

implicitly invoked the but-for test to find that a work can be derivative even when it does not borrow expressive material from the underlying work.<sup>102</sup> Another example is *Midway Manufacturing Co. v. Artic International, Inc.*<sup>103</sup> where the Seventh Circuit considered whether circuit boards that speed up video games are unlawful derivative works.<sup>104</sup> Although the boards did not lift any material from the underlying video games, the court concluded that they constitute unauthorized derivative works.<sup>105</sup>

Similarly, an exclusive right to make adaptations may allow the copyright owner to exert greater control over her work. It entitles the owner to license reproduction but prevents unauthorized modifications of the work.<sup>106</sup> Yet that merely underscores the practical effects of a robust derivative work entitlement—namely, increased licensing flexibility. It remains unclear, however, *why* or *whether* we should afford copyright owners exclusive control over adaptations as a matter of policy.

This discussion draws out two insights. The first is that courts have failed to meaningfully engage with derivative works. They often treat derivative works as mere incidents of reproduction, and some have even gone as far as explicitly holding that the right of adaptation is synonymous with the right of reproduction. Second, as this brief overview makes evident, the courts' opaque analysis of derivative works is problematic because the two rights are, in fact, distinct in any number of respects.

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pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.”).

102. See *supra* text accompanying notes 56–65.

103. *Midway Mfg. v. Artic Int'l*, 704 F.2d 1009 (7th Cir. 1983). But see *Lewis Galoob Toys, v. Nintendo of Am.*, 780 F. Supp. 1283, 1291 (N.D. Cal. 1991), *aff'd*, 964 F.2d 965 (9th Cir. 1992).

104. *Midway*, 704 F.2d at 1010.

105. *Id.* at 1013–14.

106. See Kindra Deneau, *The Historical Development and Misplaced Justification for the Derivative Work Right*, 19 B.U. J. SCI. & TECH. L. 68, 96 (2013) (“What makes more sense is retaining the derivative work right as a subset incorporated into all of the other rights to give authors the continued flexibility to separately retain derivative revision rights when entering into licensing agreements.”).

### B. Distribution

Much like the derivative work right, the right of distribution is “largely dormant.”<sup>107</sup> Defined in Section 106(3), the distribution right is the right to “distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>108</sup> Here, in a nutshell, is the puzzle: Does the right of distribution require *actual* dissemination—namely, proof that copies of the work exchanged hands? Two interpretations seem colorable. Broadly understood, the distribution right might reach situations in which a copy was *merely offered* to the public, even absent proof of receipt by third parties. On a narrower reading, however, the exclusive right to distribute would extend only to cases where a copy of the work was offered to, and *received by*, members of the public.

One clue as to the scope of the distribution right can be gleaned from the legislative history. The distribution right, first codified in the Copyright Act of 1976, was preceded by the right to publish. Peter Menell argues that the right to publish was initially understood to encompass every instance of “making known”: it extended to any means by which the defendant made the plaintiff’s work known to the public, capturing both “physical printing as well as proclamation.”<sup>109</sup> In other words, the right to publish was understood as the right to make the work available, allowing the copyright owner to prevent others from making the work available to the public by any means, whether or not the work actually exchanged hands.<sup>110</sup> On this theory, publication reached any act of “exposing” or “offering” the work to the public.<sup>111</sup>

Menell also takes pains to demonstrate that the right to distribute should be read broadly in light of the ratification of the Geneva Phonogram Convention.<sup>112</sup> The Phonogram Convention

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107. Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC’Y U.S.A. 1, 6 (2011).

108. 17 U.S.C. § 106(3) (2018).

109. Menell, *supra* note 107, at 34.

110. *Id.* at 35 (“Thus, the ‘right to publish’ would have been understood by legislators and judges in the formative period of copyright law to encompass making a work available to the public, whether or not copies were actually distributed.”).

111. *Id.* at 36.

112. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67.

sought to combat record piracy and prevent the distribution of “duplicates” to the public, among other things.<sup>113</sup> Distribution to the public, in turn, was understood to mean “any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public . . . .”<sup>114</sup> This language suggests that the right to distribute reached cases in which duplicates were merely offered to the public, even if no copies exchanged hands. And Congress was aware of this language and its implications as it was debating the Sound Recording Amendments Act of 1971—shortly before the passage of the 1976 Copyright Act.<sup>115</sup> Menell therefore contends that, consistent with the legislative history of the Copyright Act, the right to distribute should be construed as providing a right to offer copies to the public.

Others, by contrast, insist that this broad vision of distribution is plainly misplaced. Criticizing Menell’s work as “highly selective,”<sup>116</sup> Jessica Litman pointed out that the 1976 Act recognizes the right to distribute copies “by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>117</sup> This language suggests that distribution is limited to actual transfer of copies, and so it is implausible that possession of a (publicly accessible) copy can constitute distribution under the Copyright Act.

Rick Sanders trots out a number of related arguments to dispute Menell’s account.<sup>118</sup> First, it is not at all clear that the statutory language of Section 106(3) is sufficiently ambiguous to justify resort to legislative materials. Since “distribution” is ordinarily understood to convey a physical movement of objects, the term has a clear and plain meaning.<sup>119</sup> Second, Menell’s reliance on certain materials is bewildering. He points to a 1963 meeting convened by the Copyright Office and attended by government officials, industry representatives, and copyright scholars.<sup>120</sup> But no members

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113. *Id.* at 325.

114. *Id.*

115. Menell, *supra* note 107, at 50–51.

116. Jessica Litman, *Fetishizing Copies*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 107, 121 (Ruth L. Okediji ed., 2017).

117. 17 U.S.C. § 106(3) (2018).

118. See Rick Sanders, *Comment for the Right of Making Available*, U.S. COPYRIGHT OFF., [https://www.copyright.gov/docs/making\\_available/comments/docket2014\\_2/Aaron\\_Sanders.pdf](https://www.copyright.gov/docs/making_available/comments/docket2014_2/Aaron_Sanders.pdf) (last accessed Mar. 14, 2022).

119. *Id.* at 4–5.

120. *Id.* at 5.

of Congress attended the meeting. It would therefore be a mistake to assign *Congressional* intent to materials reflecting discussions in which Congress played no role.<sup>121</sup> Third, it was a different Congress that eventually enacted the Copyright Act more than a decade later—and any inference about the legislative intent of a *previous* Congress need not control.<sup>122</sup> Fourth, there is good reason to be skeptical of Menell’s categorical claims that “publishing” was originally understood to refer to offers for sale. The only court to have addressed the issue under the 1909 Act reached the opposite conclusion, holding that offers to sell did not implicate the publishing/vending right.<sup>123</sup> Menell also appears to discuss two different concepts of “publishing.” Under the 1909 Act, a work published without a copyright notice entered the public domain.<sup>124</sup> In a long line of cases, courts developed tests for determining whether the work was “published” without a copyright notice.<sup>125</sup> But these decisions have little bearing on the distribution right.<sup>126</sup> Whether the work was “published” in the context of compliance with the notice requirement is *not* directly relevant to the question of whether the defendant violated the exclusive rights to publish or vend. Put crudely, the term “publishing” meant different things in different contexts.<sup>127</sup>

Similarly instructive is a recent study undertaken by the Copyright Office on the “making available” right.<sup>128</sup> As the study notes, “few questions are as central to copyright jurisprudence as whether and how the creative works of authors may be accessed and disseminated on the Internet.”<sup>129</sup> The study purports to examine whether U.S. copyright law is consistent with the WIPO

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121. *Id.*; see also *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005) (criticizing reliance on committee reports authored by “unelected staffers and lobbyists”).

122. Sanders, *supra* note 118, at 5–6.

123. *Id.* at 6 (citing *Greenbie v. Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957)).

124. 1909 Act, *supra* note 61, ch. 320, § 12 (conditioning federal copyright protection upon “publication of the work with the notice of copyright”).

125. See generally Deborah R. Gerhardt, *Copyright Publication: An Empirical Study*, 87 NOTRE DAME L. REV. 135 (2011) (providing an empirical analysis of copyright publication jurisprudence).

126. See *id.* at 138–39.

127. See *id.* at 175–79.

128. U.S. COPYRIGHT OFF., THE MAKING AVAILABLE RIGHT IN THE UNITED STATES: A REPORT OF THE REGISTER OF COPYRIGHT (Feb. 22, 2016), [https://www.copyright.gov/docs/making\\_available/making-available-right.pdf](https://www.copyright.gov/docs/making_available/making-available-right.pdf) [hereinafter Making Available Study].

129. *Id.* at 1.

Internet Treaties, which provide copyright owners with an exclusive entitlement to authorize “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”<sup>130</sup> The making available right turns on access rather than receipt; namely, it prevents others from making the copyright owner’s work available to the public—regardless of whether third parties actually *receive* (through downloads or otherwise) copies of the work.

Does the right of distribution require proof that third parties received copies of the work? The study finds that, as a matter of positive law, the question remains unresolved:

The courts of the United States have been less consistent in their analyses and decisions . . . . [S]ome district courts have questioned the existence of the right under U.S. law, ultimately failing to recognize a cause of action where copyright owners cannot prove that downloads or receipt occurred. Others have wholly rejected the right out of hand, failing to discuss or even acknowledge the international obligations of the United States. At the appellate level, courts have yet to conclusively resolve these issues in cases involving works in digital format.<sup>131</sup>

Given the state of the case law, it is unclear whether the distribution right applies to cases where the work was made publicly available. Although the study finds that other exclusive rights can “collectively meet and adequately provide the substance of the making available right,”<sup>132</sup> it concludes that the right to distribute might fail to reach cases in which there is no proof of receipt.

This discussion reflects a fundamental disagreement over the scope of the distribution right. But, as the study makes clear, judicial attention to this question has been lackluster at best. And the reason for that oversight is simple enough: because a violation of the distribution right is ordinarily accompanied by unauthorized reproduction, courts typically focus on reproduction while glossing over issues of distribution. As a result, Menell says, “the treatment of the distribution right [in most early cases of digital distribution] was dicta in that the courts found violation of

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130. WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65.

131. Making Available Study, *supra* note 128, at 3.

132. *Id.* at 4.

the reproduction right.”<sup>133</sup> Indeed, in many cases reproduction was front and center while the question of distribution appeared in dicta and provoked little substantive discussion.

One example is *Universal City Studios Productions, LLP v. Bigwood*.<sup>134</sup> The plaintiffs alleged that the defendant had illegally reproduced and distributed their copyrighted works using file-sharing software. Yet although the plaintiffs could readily show that the defendant uploaded pirated contents to various file-sharing platforms, they could not definitively establish that third parties had actually downloaded these files.

The court nonetheless held that the defendant had illegally reproduced and distributed the plaintiffs’ works.<sup>135</sup> But, puzzlingly, the court offered little in the way of substantive analysis. After finding that the defendant reproduced the plaintiffs’ works, the court quickly brushed aside the question of distribution. It summarily noted that the defendant infringed the right of distribution by merely making “copies of the Motion Pictures available to thousands of people over the internet.”<sup>136</sup> The court cited two authorities to support this proposition and then restated its conclusion.<sup>137</sup> Put simply, the court avoided a substantive discussion of distribution. In doing so, it overlooked the ongoing debate over the scope of distribution where there is no evidence that the work exchanged hands.

Perhaps the most influential early case recognizing a broad distribution right is *Hotaling*.<sup>138</sup> In *Hotaling*, a library made unlawful copies of the plaintiff’s work and then sent the copies to different library branches across the country.<sup>139</sup> Members of the public could only access the copies within the libraries. The court held that merely storing the copies in a publicly accessible catalogue—even

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133. Menell, *supra* note 107, at 10.

134. *Universal City Studios, Prods. v. Bigwood*, 441 F. Supp. 2d 185 (D. Me. 2006).

135. *Id.* at 190.

136. *Id.*

137. These authorities are *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (holding that “Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); and *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (holding the placing an unauthorized copy of a work in a library’s index might amount to distribution under the Copyright Act).

138. *Hotaling*, 118 F.3d 199.

139. *Id.* at 201.

without proof that members of the public actually accessed the copies – amounted to unauthorized distribution.<sup>140</sup>

Another decision pointing in the same direction is *In re Napster Inc. Copyright Litigation*,<sup>141</sup> where the district court stated that the right to distribute is violated whenever the defendant “offer[s] to distribute copies of that work for purposes of further distribution, public performance, or public display.”<sup>142</sup> The emphasis on “offering” copies suggested that distribution hinges on access rather than receipt. And, in the same vein, *Atlantic Recording Corp. v. Anderson*<sup>143</sup> found that placing copyrighted works “into a shared folder on [the defendant’s] computer while being connected [to a peer-to-peer file-sharing platform]” constituted a violation of the plaintiff’s right of distribution.<sup>144</sup> But the court here did not even bother with the semblance of analysis: it simply stated its conclusion – that distribution involves offering copies to the public – while ignoring the lack of evidence showing actual receipt of such copies.

In most cases, however, courts have rejected a broad reading of the right to distribute. Take, for example, *Perfect 10 v. Amazon, Inc.*<sup>145</sup> The plaintiff, Perfect 10, operated a subscription website for pornographic images. Perfect 10 asserted that Google had infringed its rights by displaying and distributing thumbnail versions of its images in Google’s search engine results. While much of the discussion circled around the issue of fair use,<sup>146</sup> the court also addressed the question of distribution. Yet its discussion of distribution was spectacularly terse. The court found that “Google does not own a collection of Perfect 10’s full-size images and does not communicate these images to the computers of people using Google’s search engine.”<sup>147</sup> The court hence concluded that, “[t]hrough Google indexes these images, it does not have a collection of stored full-size images it makes available to the public.

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140. *Id.* at 203.

141. *In re Napster, Inc. Copyright Litigation*, 377 F. Supp. 2d 796, 802–05 (N.D. Cal. 2005).

142. *Id.* at 805.

143. *Atlantic Recording Corp. v. Anderson*, No. H-06-3578, 2008 WL 2316551 (S.D. Tex. Mar. 12, 2008).

144. *Id.* at \*7–8.

145. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007).

146. The Ninth Circuit ultimately sided with Google and found that its use of the plaintiff’s images was likely fair and thus permissible. *Id.* at 1168.

147. *Id.* at 1162.

Google therefore cannot be deemed to distribute copies of these images.”<sup>148</sup> These laconic comments fail to meaningfully engage with the distribution right or clarify why the offering of images did not constitute distribution in this case, as opposed to some of the other cases referenced above.<sup>149</sup>

Likewise, the court in *Atlantic Recording Corp. v. Brennan* was skeptical of the “making available” theory. The plaintiffs, some of the country’s largest record companies, claimed that the defendant had reproduced and distributed their works by downloading and uploading copyrighted works via file-sharing software. But the court was quick to dismiss the plaintiffs’ “making available” theory. It emphasized that “the allegation of infringement based on mak[ing] the Copyrighted Recordings available for distribution to others” is contestable.<sup>150</sup> A violation of the distribution right, the court noted, requires “actual distribution of copies.”<sup>151</sup> The court cited both *Perfect 10 v. Amazon, Inc.* and William Patry’s copyright treatise to buttress this point.<sup>152</sup>

More broadly, some district courts have declined to apply *Hotaling* in cases involving distribution. Recall that, in *Hotaling*, the court appeared to recognize a making-available right. But subsequent courts have held that *Hotaling* is limited to circumstances where it is *impossible* to prove actual dissemination. Because the defendants in *Hotaling* did not keep records of the public’s use of the copies, it was impossible to identify any specific individuals who accessed them.<sup>153</sup> That is why some courts have

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148. *Id.*

149. One possible explanation is that the court applied a variation of the server test, suggesting that Google did not distribute copies of the plaintiff’s images because it never had those images in the first place. As the court explained, “Google’s search engine communicates HTML instructions that tell a user’s browser where to find full-size images on a website publisher’s computer, but Google does not itself distribute copies of the infringing photographs. It is the website publisher’s computer that distributes copies of the images by transmitting the photographic image electronically to the user’s computer.” *Id.* This is to say that Google did not host the images on its servers, but rather embedded images hosted on third-party servers. Therefore, Google’s offering of the images did not constitute a violation of the distribution right. Still, the court’s reasoning appears to entirely sidestep the central question of access-or-receipt and is thus of little precedential value.

150. *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 282 (D. Conn. 2008) (citation marks omitted).

151. *Id.* (citing 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:9 (2007) (emphasis added)).

152. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:9 (2007); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

153. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

understood *Hotaling* to apply only to cases where evidentiary obstacles would foreclose proof of receipt.<sup>154</sup> As one court declared, “*Hotaling* did not announce a rule of general applicability, but instead articulated a principle that applies only in cases where it is impossible for a copyright owner to produce proof of actual distribution.”<sup>155</sup>

In sum, although the weight of authority increasingly appears to be cutting against the “making available” theory, the case law remains divided. Some courts treat the right to distribute as requiring evidence of actual dissemination,<sup>156</sup> while others suggest that distribution does not require proof of receipt.<sup>157</sup> And copyright treatises have also been of two minds when it comes to the right of distribution.<sup>158</sup> As the Copyright Office conceded in its study on

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154. See, e.g., *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 982 (D. Ariz. 2008); *Brittney Gobble Photography, LLC v. Sinclair Broad. Grp.*, No. SAG-18-03403, 2021 WL 5359671, at \*19–20 (D. Md. Nov. 17, 2021).

155. See *Sony Music Ent. v. Cox Commc’ns*, 464 F. Supp. 3d 795, 810 (E.D. Va. 2020) (quoting *BMG Rights Mgmt. v. Cox Commc’ns*, 149 F. Supp. 3d 634, 666 (E.D. Va. 2015)).

156. See, e.g., *Howell*, 554 F. Supp. 2d at 981 (observing that infringement of the distribution right turns on “actual dissemination of either copies of phonorecords”); *BMG Rights Mgmt.*, 149 F. Supp. 3d at 670 (holding that distribution requires “actual dissemination of the copyrighted work” or “the transfer (or download) of a file containing the copyrighted work from one computer to another”) (internal quotation marks omitted); *London-Sire Recs., v. Doe 1*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (finding that, absent proof of actual receipt of copies, no infringement can be inferred with respect to the right of distribution at the pleading stage); *SA Music, LLC v. Amazon.com*, No. 20-CV-0579, 2021 WL 243430, at \*2 (W.D. Wash. Jan. 25, 2021) (holding that distribution requires “actual dissemination of either copies of phonorecords” or “the transfer (or download) of a file containing the copy from one computer to another”); *EVOX Prods., v. Verizon Media*, No. CV 20-2852, 2021 WL 3260609, at \*2 (C.D. Cal. May 5, 2021) (pointing out that the “making available” theory “fails as a matter of law”).

157. See text accompanying *supra* notes 134–143; see also *Motown Rec. v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at \*3 (E.D. Pa. Feb. 16, 2007) (suggesting, without analysis, that an infringement of the distribution right can arise where there is proof “of offers to distribute, that is, proof that the defendant ‘made available’ the copyrighted work”); *Arista Recs. v. Greubel*, 453 F. Supp. 2d 961, 969–71 (reasoning, in the context of a motion to dismiss, that “making copyrighted works available to others” may suffice to constitute an infringement of the distribution right); *Arista Recs., v. MP3Board*, No. 00 CIV. 4660, 2002 WL 1997918, at \*4 (S.D.N.Y. Aug. 29, 2002) (holding that the distribution right may be violated even where the copyright owner is unable “to prove particular instances of use by the public when the proof is impossible to produce because the infringer has not kept records of public use”).

158. Until 2011, David Nimmer’s treatise recognized that “[i]nfringement of [the right of distribution] requires actual dissemination of either copies or phonorecords.” See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 4.01, 8.11 n.2 (2011). But in 2012, following Peter Menell’s paper on the “lost arc” of the distribution right, Nimmer had a change of heart. In an abrupt departure from earlier iterations, the 2012 edition of

the making available right, this is a “widespread area of disagreement,” and, “[t]o date, neither the U.S. Supreme Court nor any of the circuit courts has had occasion to directly rule on the issue.”<sup>159</sup> To be sure, this is a stunning admission. The Internet has been around for decades. The Copyright Act was enacted nearly forty-five years ago. That appellate courts have failed to make sense of the distribution right is nothing short of astonishing. And this is no incidental question arising from an outlier case. Rather, the question of access-or-receipt strikes at the heart of digital distribution.

This Part illustrated that some of the exclusive rights conferred on copyright holders are underdeveloped. They are underdeveloped in the sense that central questions about their substance—questions that run to their very core—have been left unresolved despite decades of lively case law. Focusing on the exclusive rights to distribute copies and to prepare derivative works, this Part demonstrated that, to date, important questions about the scope of these rights have drawn little attention from the courts. Of course, the problem is not that courts have reached the wrong conclusion on any of these issues, but rather that courts rarely address them in the first place. And when they do, they tend to engage in the sort of truncated analysis that assumes away the issue instead of confronting it head-on.

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Nimmer’s treatise suggests that distribution does *not* require actual dissemination. 2 NIMMER, *supra* note 80, § 8.11 (2012). The change did not go unnoticed. *See, e.g.,* Bartow, *A Restatement of Copyright Law*, *supra* note 39, at 483–86; Rick Sanders, *Will Professor Nimmer’s Change of Heart on File Sharing Matter?*, 15 VAND. J. ENT. & TECH. L. 857 (2013); Devlin Hartline, *Nimmer Changes his Tune: ‘Making Available’ Is Distribution*, COPYHYPE (Oct. 2, 2012), <https://www.copyhype.com/2012/10/nimmer-changes-his-tune-making-available-is-distribution>. Two other treatises are relevant to our discussion. Patry’s copyright treatise contends, without directly engaging with the access-or-receipt question, that “distribution [should not be read as] synonymous with publication.” 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:9 (2007). Goldstein’s treatise is even more explicit in rejecting the “making available” theory. It argues that:

The crux of the distribution right lies in the transfer, not the receipt, of a copy or phonorecord. Consequently, someone who simply buys or otherwise acquires a copy or phonorecord does not infringe the distribution right. Further, an actual transfer . . . must take place; a mere offer of sale will not infringe the right.

2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7:125–26 (3d ed. 2009 & Supp. 2009).

159. Making Available Study, *supra* note 128, at 22.

## II. THE CAUSE

I now turn to the heart of my argument. I argue that the phenomenon described in Part I—the courts’ failure to wrestle with some of the exclusive rights conferred on rightsholders—is an outgrowth of the remedial structure of copyright law. This is because the distinction between various exclusive rights has no practical relevance in most cases. Statutory damages attach to an infringed work no matter *how many* different rights had been violated in that work. Once a violation of *any* right has been established, additional violations are immaterial; the plaintiff will be awarded the same amount of damages regardless of how many different rights had been infringed. Moreover, because the reproduction right is especially capacious—and given the fact that almost every infringement case involves some degree of (literal or nonliteral) reproduction—courts have little incentive to consider additional violations beyond reproduction. When courts find a violation of the reproduction right, everything else is effectively dicta.

This Part begins by reviewing the remedial structure of United States copyright law. It then maps the scholarly literature on statutory damages. Many scholars have taken a dim view of statutory damages, arguing that plaintiffs invoke statutory damages to extract excessive settlements on the basis of borderline claims. Others, by contrast, suggest that statutory damages are both necessary and effective to the extent that they allow copyright owners to pursue meritorious, low-value claims. Missing from the literature, however, is an assessment of the relationship between statutory damages and the substance of copyright law. This Part will offer an exploratory analysis of the interplay between statutory damages and copyright doctrine.

### *A. The Law*

Statutory damages relieve the plaintiff of the burden of proving actual harm. The Copyright Act permits victorious plaintiffs to pursue one of two remedial routes: they can recover actual damages and infringement-related profits, or sue instead for statutory damages.<sup>160</sup> This remedial scheme is somewhat unusual; only a handful of Western countries allow recovery of statutory

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160. 17 U.S.C. § 504 (2018).

damages for copyright infringement.<sup>161</sup> It is also worth noting that the Copyright Act is surprisingly silent on the precise criteria for awarding statutory damages; it instructs courts to determine the amount of damages based on what they consider “just.”<sup>162</sup> In reality, courts typically consider a number of factors in assessing damages, including the profits generated by the defendant and the losses sustained by the plaintiff.<sup>163</sup> And while juries have some discretion in awarding damages,<sup>164</sup> judges still issue statutory awards in many cases.<sup>165</sup>

Statutory damages fall into three categories. First, in cases of regular infringement, the plaintiff can recover an award of statutory damages “in a sum of not less than \$750 or more than \$30,000” per work.<sup>166</sup> Second, the Copyright Act empowers courts to reduce the amount of statutory damages “to a sum of not less than \$200” per infringed work in cases involving innocent infringers.<sup>167</sup> As a general matter, innocent infringers bear the burden of establishing that they did not know, and had no reasonable grounds to believe, that their acts constituted copyright infringement.<sup>168</sup>

Third, in cases of willful infringement, the court may enhance the amount of statutory damages to a sum of “not more than \$150,000” per work.<sup>169</sup> The legislative history shows that increased damages for willful infringement were originally meant to apply to exceptional cases—nakedly egregious cases in which the infringer

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161. Pamela Samuelson, Phil Hill & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, but for How Long?*, 60 J. COPYRIGHT SOC'Y U.S.A. 529, 534–35 (2013).

162. 17 U.S.C. § 504.

163. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04(B)(1)(a) (2009).

164. *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 355 (1998) (recognizing a Seventh Amendment right to a jury trial on the question of statutory damages).

165. Samuelson & Wheatland, *supra* note 8, at 456 (“It is still quite common for judges to render statutory damage awards, but after *Feltner*, juries now also play a significant role in awarding statutory damages”). In addition, judges still retain some oversight power through the instructions they issue to jurors and on the basis of their power to remit or override excessive jury awards.

166. 17 U.S.C. § 504(c)(1).

167. 17 U.S.C. § 504(c)(2) (“In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.”).

168. *Id.*

169. *Id.*

brazenly flouted the law.<sup>170</sup> So while statutory damages are largely compensatory, there are exceptional circumstances in which courts might award punitive-like damages for willful infringement.<sup>171</sup>

But courts have done little to narrow down or clearly define “willful infringement.”<sup>172</sup> The test for willfulness hinges on the infringer’s state of mind.<sup>173</sup> Accordingly, courts can draw an inference of willfulness in cases where the defendant knowingly infringed the plaintiff’s rights.<sup>174</sup> In addition, the defendant’s constructive (rather than actual) knowledge that her conduct constituted copyright infringement may be sufficient to establish willfulness: a defendant has constructive knowledge of infringement when she evinced a reckless disregard for, or willful blindness to, the plaintiff’s rights, even if the defendant had no actual knowledge of infringement.<sup>175</sup> Courts have also considered a panoply of additional factors in assessing reckless disregard. For example, some courts look to the defendant’s history of prior infringements.<sup>176</sup> Others examine whether the defendant’s conduct stemmed from the lack of legal counsel.<sup>177</sup> And some courts have dismissed claims of willful infringement when the defendant had a reasonable, good-faith belief that her use was non-infringing, even

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170. See Samuelson & Wheatland, *supra* note 8, at 441.

171. *Id.* at 458 (citing S. Rep. No. 94-473, at 144–45 (1975)); see also *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 352 (1998) (stating that statutory damages “may serve purposes traditionally associated with legal relief, such as compensation and *punishment*.” (emphasis added)).

172. Samuelson & Wheatland, *supra* note 8, at 441.

173. See, e.g., *Erickson Prods. v. Kast*, F.3d 822, 833 (9th Cir. 2019) (“A determination of willfulness requires an assessment of a defendant’s state of mind”) (citing *Friedman v. Live Nation Merch.* 833 F.3d 1180, 1186 (9th Cir. 2016)).

174. 2 GOLDSTEIN, *supra* note 158, § 14.2.1.2.

175. *Olem Shoe Corp. v. Washington Shoe Corp.*, 591 Fed Appx. 873, 879 (11th Cir. 2015) (clarifying that the “reckless disregard” standard demands an assessment of whether “the infringer acted despite an objectively high likelihood that its actions constituted infringement . . . [and whether] this objectively-defined risk . . . was either known or so obvious that it should have been known to the accused infringer”) (citing *In re Seagate Tech.*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc)); *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 991 (9th Cir. 2017); *Barboza v. New Form, Inc.*, 545 F.3d 702, 707 (9th Cir. 2008) (noting that “merely reckless behavior” may constitute willful infringement); *Island Software & Comput. Serv. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003); see also 2 Goldstein, *supra* note 158, § 14.2.1.2.

176. *Depoorter*, *supra* note 11, at 412 (citing 4 NIMMER & NIMMER, *supra* note 163, § 14.04, 11–12).

177. *Id.*

if she had been notified that her conduct may constitute copyright infringement.<sup>178</sup> Moreover, when fair use is a close call, courts may be disinclined to make a finding of willful infringement.<sup>179</sup>

In short, copyright law entitles victorious plaintiffs to recover statutory damages ranging from \$750 to \$30,000 for any infringed work. The award may be reduced to a sum of no less than \$200 per work in cases of innocent infringement and enhanced to a sum of no more than \$150,000 per work in cases of willful infringement. The number of statutory awards depends not on the number of separate infringements, but rather on the number of individual works infringed, and, in some cases, the number of separate infringers.<sup>180</sup>

Still, although the case law has produced some measure of guidance on statutory awards, many commentators have criticized the courts' treatment of statutory damages as arbitrary, inconsistent, or unprincipled. Critics also argue that statutory awards often prove woefully excessive. By contrast, some observers insist that statutory damages enable copyright holders to bring low-value claims and overcome evidentiary challenges. The next subsection discusses these dueling accounts.

### B. Literature Review

Advocates of statutory damages point to the challenge of quantifying or assessing the actual harm associated with

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178. *RCA/Ariola Int'l, v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988).

179. *Depoorter*, *supra* note 11, at 412 (citing *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1392 (6th Cir. 1996)). It is an open question whether, and to what extent, fair use decisions are indeterminate and unpredictable. Much of the scholarship suggests that fair use decisions are murky and unprincipled. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) (arguing that fair use decisions "are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns"); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137-40 (1990) (claiming that fair use is both "muddled" and "inconsistent"); *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (bemoaning the "troublesome" nature of the fair use analysis). Nonetheless, recent studies find that fair use decisions are in fact more predictable than previously thought. See, e.g., Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) [hereinafter Samuelson, *Unbundling Fair Uses*]; Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905 (2020).

180. *Friedman v. Live Nation Merch.*, 833 F.3d 1180, 1189-92 (9th Cir. 2016).

copyright infringement.<sup>181</sup> On this view, “because actual damages are so often difficult to prove, only the promise of a statutory award will induce copyright owners to invest in and enforce their copyrights.”<sup>182</sup> Commentators further assert that “[f]ew bodies of law would be more difficult to reduce to a short and simple formula than that which determines the measure of [damages in copyright cases].”<sup>183</sup>

Take, for example, *Ringgold v. Black Entertainment Television*.<sup>184</sup> The plaintiff, Faith Ringgold, alleged that the defendant, a cable network, had infringed her copyright by using her poster in the background set for a sitcom television show that aired on the defendant’s network. The poster appeared in the background for one scene, was visible for less than thirty seconds, was not referenced in the dialogue, was not the focus of any shots, and was lawfully purchased.<sup>185</sup> The Second Circuit nevertheless rejected the defendant’s fair use claim.<sup>186</sup> But a question remained as to the actual harm that befell the plaintiff. How much of the revenues generated by the show were attributable to the infringement of the plaintiff’s rights? How might courts go about assessing infringement-related profits in such cases?

Indeed, plaintiffs may struggle to establish a causal link between infringement and the actual injury they suffered. Consider a case in which the plaintiff’s work was uploaded online by the defendant and then downloaded by third parties. In that scenario, the court would need to assess how many of these third-party downloads dislodged actual sales that would have otherwise taken place if the work had been distributed by the plaintiff. Owing to these challenges, copyright holders might choose not to bring legal action in the first place. Under conditions of uncertainty and given the high costs of litigation,<sup>187</sup> the risk of under-compensation looms large. Plaintiffs may consequently opt to forgo litigation altogether.

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181. *See supra* note 8.

182. 2 GOLDSTEIN, *supra* note 158, § 14.2, at 14:42.

183. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952).

184. *Ringgold v. Black Ent. Television*, 126 F.3d 70 (2d Cir. 1997).

185. *Id.* at 72–73.

186. *Id.* at 77–81 (holding that the defendants cannot invoke a fair use claim because they failed to license the work, thus adversely affecting its market).

187. *See Shyamkrishna Balganesh, Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) (“As of 2011, the average cost of litigating a copyright infringement case

This is especially true when the costs of proving harm outweigh the actual harm that resulted from infringement.<sup>188</sup> When the costs of litigation dwarf the expected award, copyright holders have little incentive to enforce their rights. And that seems especially likely in the context of low-value works.<sup>189</sup> Statutory damages allow plaintiffs to overcome these obstacles by ensuring a baseline of minimum damages. Without statutory damages, the argument goes, many infringement claims would go unaddressed—to the detriment of creators and society at large.

Critics of statutory damages, however, insist that the inverse is true. They counter that, in practice, statutory damages create the mirror-image problem of overcompensation. On this view, statutory damages produce outlandish awards, far exceeding the value of the plaintiffs' claims and veering dangerously close to the realm of retribution rather than compensation.<sup>190</sup> Arguments to this effect dominate much of the literature. As others have noted, "[v]irtually all of the law review literature in the United States has criticized the U.S. statutory damage regime."<sup>191</sup> The excessive scope of statutory damages is closely enmeshed with the advent of file-sharing. In today's digital environment, one can copy, download, and distribute digital copies at (almost) zero cost. The rise of digital consumption has allowed people to engage with a vast expanse of copyrighted goods that were previously inaccessible. But the magnificent wealth of available content also carries a risk. The one-award-per-work rule can be prohibitive when multiple awards add up in trivial cases involving multiple works. Think, for example, of

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through trial, for either plaintiff or defendant—excluding judgment and awards—was estimated to range from \$384,000 to a staggering \$2 million.”).

188. Ben Depoorter, *If You Build It, They Will Come: The Promises and Pitfalls of a Copyright Small Claims Process*, 33 BERKELEY TECH. L.J. 711, 715 (2018) (“While an infringement claim might have merit (i.e., a chance of success above 50%), the litigation costs often outweigh the expected award. For instance, even if the probability of the plaintiff prevailing in court is 80% and the damage claim will be \$10,000, the plaintiff has no financial incentive to pursue the claim if litigation costs are likely to exceed \$8,000.”) (footnote omitted).

189. *Id.* at 716 (explaining that negative-value, small-value claims may lead to systemic underenforcement, thereby “undermining the deterrent effect of the copyright system”).

190. The legislative history suggests that punitive damages should apply to “exceptional cases.” With one exception—cases of willful infringement—courts should instead issue compensatory awards that approximate the damages the plaintiff would have recovered had she not chosen to sue for statutory damages. *See* text accompanying *supra* notes 170–171.

191. Samuelson et al., *supra* note 161, at 530.

an individual who illegally downloads twenty songs and may thus face no less than twenty separate statutory awards.<sup>192</sup>

The critical point is not that courts necessarily award excessive damages in every single case, or even in most cases. After all, courts have a great deal of discretion to calibrate damages among and within the statutory parameters. Rather, what matters is that the hypothetical risk of increased damages casts a long shadow—long enough to deter many individuals from defending against claims of infringement. A defendant accused of willful infringement with respect to fifty copyrighted works could face an aggregate damages award totaling more than seven million dollars. Thus, many defendants, notwithstanding the merits of their claims, would choose to settle out of court.<sup>193</sup> And given the probability of success and the costs of losing, that may be the smart thing to do. Private individuals, small businesses, and non-profit organizations are more inclined to settle when the chances of victory are uncertain and the risks too grave.<sup>194</sup>

Opponents of statutory damages offer a somber look at the workings of statutory damages in the real world. And, crucially, their claims are supported by empirical evidence. A recent study by Ben Depoorter makes a powerful case against statutory damages.<sup>195</sup> Based on an analysis of docket records—including complaints, docket entries, and other documents from one thousand copyright disputes—Depoorter shows that statutory damages often play a strategic role. He finds that although plaintiffs pursue damages for willful infringement in 81% of cases, courts ultimately award enhanced damages only in 2% of cases.<sup>196</sup>

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192. Consider, for example, *Capitol Recs. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010). On retrial, the jury awarded the plaintiffs \$80,000 per song for a total damages award of \$1.92 million for twenty-four separate songs. The award was later remitted by the judge, who found the award “monstrous and shocking.” *Id.* at 1049. After the defendant rejected again a proposal to settle, the jury in the third trial awarded the plaintiffs an award of \$1.5 million, which the judge ultimately reduced to \$54,000: three-times the minimum statutory award of \$750 per work times twenty-four works. *Id.* at 999.

193. For a classic critique of settlements more broadly, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlements are objectionable because they deny courts the opportunity to deliver “justice” and properly interpret the law).

194. See SMALL BUSINESS ADMINISTRATION: IMPACT OF LITIGATION ON SMALL BUSINESS ii (2005), <https://www.sba.gov/sites/default/files/files/rs265tot.pdf> (“Many of the small businesses tried to settle their case prior to trial, but with mixed results.”).

195. Depoorter, *supra* note 11.

196. *Id.* at 407–08.

Put another way, plaintiffs regularly sue for increased damages, yet courts rarely acquiesce. This gap between what plaintiffs ask and what they receive implies that remedy overclaiming is rampant. By pointing to the higher-end range of statutory damages, plaintiffs are harnessing the specter of statutory damages to extract “generous settlement concessions”<sup>197</sup> on the basis of dubious claims.<sup>198</sup>

The core problem is that the stakes are not even. Both plaintiffs and defendants could lose and pay attorney’s fees, but only the defendant faces the risk of outsized damages.<sup>199</sup> The underlying structure of statutory damages, then, might encourage copyright trolling and spur wasteful litigation.<sup>200</sup>

Moreover, Pamela Samuelson and Tara Wheatland argue that courts are regularly driven by punitive impulses in awarding increased damages.<sup>201</sup> Although statutory damages were designed to address problems of under-compensation and are thought to principally derive from a compensatory rationale, courts frequently invoke statutory damages to punish or discipline defendants.<sup>202</sup>

Consider, for example, *Cohen v. G&M Realty*.<sup>203</sup> There, the court held that the defendant, the owner of a famous Long Island City warehouse, was liable for the destruction of forty-five graffiti works that were displayed on the warehouse walls.<sup>204</sup> The defendant initially allowed the plaintiffs, a group of graffiti artists, to paint over the walls of his warehouse, but then decided to demolish the warehouse and whitewash its exterior. The plaintiffs sued under the Visual Artists Rights Act (VARA).<sup>205</sup> They asserted that the

197. *Id.* at 408.

198. I use “dubious” here to refer to two varieties of questionable claims. One involves the practice of remedy overclaiming—namely, plaintiffs who bring lawsuits that are otherwise meritorious (in that they involve a plausible infringement of the plaintiff’s rights) but ask for inflated damages. Another scenario concerns meritless suits—that is, claims that do not involve a plausible violation of the plaintiff’s rights, say, because the defendant’s unauthorized use of the work clearly constitutes fair use.

199. Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105, 1121 (2015).

200. *Id.* at 1119–21.

201. Samuelson & Wheatland, *supra* note 8, at 480–91.

202. *Id.*

203. *Cohen v. G&M Realty*, 320 F.Supp.3d 421 (E.D.N.Y. 2018), *aff’d*, 950 F.3d 155 (2d Cir. 2020).

204. *Id.*

205. Joy Garnett, *5pointz Decision Establishes Stature for Graffiti Artists*, NAT’L COAL. AGAINST CENSORSHIP (Feb. 14, 2018), <https://ncac.org/news/blog/5pointz-decision->

defendant had violated their right “to prevent . . . any intentional or grossly negligent destruction of [a] work . . . .”<sup>206</sup> The court agreed. It found that the defendant had willfully infringed the plaintiffs’ rights, and ordered him to pay the maximum amount of statutory damages for each of the forty-five destroyed works.<sup>207</sup> The aggregate award totaled 6.75 million dollars.<sup>208</sup> And this award was expressly punitive. As the court explained, it was the defendant’s “insolence” that led to a maximum damages award in this case.<sup>209</sup>

From a policy perspective, *Cohen* is baffling. At least in some cases, courts appear to purposely award excessive (supra-compensatory) damages in order to punish defendants. And because statutory damages can quickly add up even in minor cases involving a large number of works, statutory awards may have a punitive effect that extends far beyond the limited category of “willful infringement.”<sup>210</sup>

Finally, critics have long argued that the case law surrounding statutory damages is inconsistent, murky, and sometimes arbitrary. Some commentators suggest that courts have failed to develop clear criteria for “accomplishing the largely compensatory goals” of statutory damages.<sup>211</sup> Nor have the courts done a particularly good job of laying down intelligible guidance in cases

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establishes-stature-for-graffiti-artists; Adam Gabbatt, *New York Graffiti Artists Triumph Over Developer Who Destroyed Their Work*, GUARDIAN (Nov. 9, 2017, 14:30 PM), <https://theguardian.com/artanddesign/2017/nov/09/new-york-graffiti-artist-win-lawsuit-5-pointz>.

206. 17 U.S.C. § 106A(a)(3)(B) (2012); see also Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 295, 330–36 (2013); Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 NOTRE DAME L. REV. ONLINE 54 (2016).

207. *Cohen*, 320 F. Supp. 3d at 428.

208. *Id.*

209. *Id.* at 447. After the plaintiffs filed for a preliminary injunction to prevent the demolition of the warehouse, Wolkoff promptly whitewashed the graffiti exterior. Outraged, the court castigated Wolkoff for his actions. The judge made clear that “[i]f not for Wolkoff’s insolence, [the maximum amount of statutory] damages would not have been assessed.” *Id.* If Wolkoff had waited for a full hearing before whitewashing the wall, “the Court would not have found that he had acted willfully,” and “a modest amount of statutory damages would probably have been more in order.” *Id.* The court thus imposed a hefty award to discipline Wolkoff for his attempt to short-circuit the legal process.

210. See Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Free Speech*, 38 FLA. ST. U. L. REV. 1, 23 (2010) (“The ‘one award per work’ rule can have enormously punitive consequences when a defendant has engaged in minor infringements of a large number of works.”).

211. See Samuelson & Wheatland, *supra* note 8, at 441.

of willful infringement.<sup>212</sup> The case law, in other words, is inattentive to the tripartite structure underlying statutory damages.<sup>213</sup> Although enhanced damages were originally crafted to address rare cases of willful infringement, courts occasionally “work backwards” in assuming that the maximum amount of enhanced damages is appropriate by default, unless some other mitigating factors are present.<sup>214</sup> And, in the same vein, we need not reach far for examples of inconsistent decisions imposing wildly disparate awards in factually similar cases.<sup>215</sup> Samuelson and Wheatland thus conclude that the jurisprudence on statutory damages is cloudy. Courts, they say, issue statutory awards that are “frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”<sup>216</sup> The upshot is that enhanced statutory damages may trench on constitutional due process limitations.<sup>217</sup>

To conclude, two competing accounts pervade the debate over statutory damages. Some commentators extol statutory damages for their potential to ensure optimal enforcement of copyright law. Others, however, warn that the law’s remedial scheme is excessive, punitive, and ill-principled. On the whole, I find the perspective offered by critics of statutory damages far more compelling for two reasons. First, opponents of statutory damages draw on empirical studies. In recent years, IP policymaking has been described as a “faith-based” practice, insulated from facts or reason.<sup>218</sup> It is therefore vital that we lean on empirical evidence in assessing the real-world impact of IP law. Second, critics view statutory damages against the broader landscape of copyright law. They emphasize that the law already skews heavily in favor of copyright holders.<sup>219</sup>

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212. *Id.*

213. *Id.* at 480–91.

214. *Id.* at 483–84 (discussing *Childress v. Taylor*, 798 F. Supp. 981 (S.D.N.Y. 1992)). As Samuelson and Wheatland note, “[a]nother unfortunate practice evident in the case law occurs when courts start with the statutory maximum and work backwards from there, insofar as the defendant is not at the most reprehensible end of the spectrum.” *Id.* at 483.

215. *Id.* at 485–91.

216. *Id.* at 441.

217. *Id.* at 491–97.

218. Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1338 (2015) (noting that some observers “don’t believe [IP law] is better for the world than other systems, or that it encourages more innovation. Rather, they believe in IP as an end in itself – that IP is some kind of prepolitical right to which inventors and creators are entitled.”).

219. See, e.g., Fishman, *supra* note 49, at 1349; WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004); JESSICA LITMAN, DIGITAL

Considered in context, then, statutory damages appear vastly more pernicious: they work greater harm when bolstered by an ever-expanding corpus of doctrines that already cut against users and in favor of owners.

### C. Statutory Damages and the Copyright Wasteland

Copyright owners have certain exclusive rights to use their creative works. If infringed, any of these rights could give rise to liability. But when statutory damages are at play, it does not matter *which* rights have been violated. And it is of little consequence *how many* individual rights had been infringed. Once a single violation has been established, everything else is effectively set aside as dicta. This is because the number of statutory awards depends not on the number of separate infringements, but rather on the number of separate works infringed. The discussion in Part I accordingly showed that courts have shied away from substantive exploration of copyright's exclusive rights. Drawing on two examples—the exclusive rights to prepare derivative works and to distribute copies of a work—this analysis revealed that the courts' fixation with reproduction has spawned an impoverished body of law.

Consider some of the cases discussed in Part I, like *Litchfield*<sup>220</sup> or *Mulcahy*,<sup>221</sup> where courts maneuvered around the derivative work right to find instead that the question of infringement could be settled simply as an issue of unauthorized reproduction. Or consider *Castle Rock*, where the court overlooked the derivative work

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COPYRIGHT (2001); LAWRENCE LESSIG, REMIX (2008); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (2008); Jane C. Ginsburg, *Can Copyright Become User-Friendly? - Review: Jessica Litman, Digital Copyright* (2001), 25 COLUM. J.L. & ARTS 71 (2001). As Christopher Sprigman and Kal Raustiala have explained:

[M]any scholars have questioned the wisdom of the continual expansion of the scope and duration of U.S. copyrights. Whereas copyrights once lasted only 14 years, they are now as long as the life of the author plus 70 years. And the effective scope of copyright has also expanded as new rights, more protective judicial interpretations, and generally creator-friendly amendments to the copyright statute interact to substantially increase the level of protection creators receive. The result is a shrinking public domain and a transfer of wealth from readers to writers.

Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming & the Dawn of Data-Driven Creativity*, N.Y.U. L. REV. (forthcoming 2020) (manuscript at 52).

220. *Litchfield v. Spielberg*, 736 F.2d 1352, 1352 (9th Cir. 1984).

221. *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 849 (8th Cir. 2004).

right but devoted considerable attention to issues of reproduction.<sup>222</sup> The same is true in the context of distribution. Many of the cases surveyed above – like *Bigwood*,<sup>223</sup> *Perfect 10*,<sup>224</sup> or *Brennan*<sup>225</sup> – reveal a persistent pattern: courts skate over questions of distribution while focusing on reproduction. As Menell stoutly pointed out, the issue of distribution “did not attract much attention in the years following the passage of the 1976 Act because litigants could assert violations of the right to reproduce in nearly any case involving the distribution right.”<sup>226</sup>

In brief, courts systemically shun certain exclusive rights. And they do so because they can. Statutory damages allow them to focus on a single right in each case because the amount of available damages is tied directly to the number of implicated works, not the number of infringed rights. In that sense, the sustained focus on reproduction is an artifact of our remedial regime. If things were different—that is, if damages were tethered to the number of infringed rights—courts would have no choice but to address every alleged infringement in every single case. Our current system, however, is one in which courts can prioritize the question of reproduction above everything else. And this system is made possible by per-work statutory damages.

Take the case of *Capitol Records, Inc. v. Thomas-Rasset*.<sup>227</sup> In a dispute involving a defendant who allegedly copied and made available twenty-four sound recordings,<sup>228</sup> the Eighth Circuit expressly declined to address the issue of distribution. In explaining its decision, the court stated:

For reasons set forth below, we conclude that [the plaintiffs] are entitled to the remedies they seek: damages of \$222,000 and a broadened injunction that forbids [the defendant] to make available sound recordings for distribution. But because the verdicts returned by the second and third juries are sufficient to

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222. *Castle Rock Ent. v. Carol Publ'g Grp.*, 150 F.3d 132, 140 (2d Cir. 1997).

223. *Universal City Studios, Prods. v. Bigwood*, 441 F. Supp. 2d 185, 185 (D. Me. 2006).

224. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1146 (9th Cir. 2007).

225. *Atl. Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 278 (D. Conn. 2008).

226. June M. Besek, Peter S. Menell, Irene Caboli, Devline Hartline, Justin Hughes, Pierre N. Level & William F. Patry, *The ALI Copyright Restatement Project: A Horse of a Different Color?*, 26TH ANN. CONF. INT'L INTELL. PROP. L. & POL'Y 6 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3200429](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200429).

227. *Capitol Recs., Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).

228. *Id.* at 899.

justify these remedies, it is unnecessary for this court to consider the merits of the district court's order granting a new trial after the first verdict. *Important though the "making available" legal issue may be to the recording companies, they are not entitled to an opinion on an issue of law that is unnecessary for the remedies sought or to a freestanding decision on whether [the defendant] violated the law by making recordings available.*<sup>229</sup>

With these brief comments, the court effectively gave away the game. It chose not to reach an issue that was "unnecessary for the remedies sought or to a freestanding decision on whether [the defendant] violated the law." It refused to weigh in on a legal question that had no bearing on the resolution of the case. Because the defendant was already held liable for making unlawful copies, it was irrelevant in terms of the "remedies sought" whether any other rights had been infringed—the statutory award would remain identical either way. The idea here is clear enough: courts will not rule on certain exclusive rights because they don't have to. When the plaintiff sues for statutory damages, an infringement of the reproduction right will generally suffice.

As these examples show, copyright's remedial structure can motivate courts to overlook certain exclusive rights. In infringement cases, courts face three seemingly distinct questions: (1) whether the plaintiff owns a valid copyright; (2) whether the plaintiff's rights have been infringed; and (3) what the appropriate remedy should be. However, thanks to copyright's remedial scheme, the second and third questions often merge. In cases involving claims of unauthorized copying *and* a plaintiff seeking statutory damages, courts have no incentive to consider any other exclusive rights. In that way, the remedial structure of copyright law blurs the line between questions of infringement and relief. The result is a doctrinal wasteland.

This raises an important question. Why have courts focused on one specific entitlement—the right of reproduction—to the exclusion of other exclusive rights? After all, an infringement of *any* exclusive right might trigger copyright liability. So although it is true that a single violation suffices, it is surprising that courts generally tend to focus on the *same* single violation. What might

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229. *Id.* at 902 (emphasis added).

explain reproduction's primacy? Why do courts prize reproduction above all other exclusive rights?

The answer has to do with the history of copyright law. Courts, lawyers, and scholars have long viewed reproduction as the touchstone of copyright law.<sup>230</sup> Indeed, many take unauthorized reproduction to be the paradigmatic case of copyright infringement. Jessica Litman, for instance, speaks of the "fetishization" of copies in copyright law.<sup>231</sup> Litman is critical of what she describes as an excessive focus on copies: because courts look for copies everywhere, they see copies everywhere. This trend led to a sweeping expansion of the reproduction right, informed by the conviction "that every appearance of any part of a work anywhere should be deemed a 'copy' of it, and that every single copy needs license or excuse . . . whether or not the copy has any independent economic significance, whether or not the so-called copy is incidental to some other use that is completely lawful."<sup>232</sup>

Litman documents a shift toward judicial reliance on and fixation with the reproduction right. She shows that courts have increasingly looked to the concept of reproduction even in cases where no actionable copies were at issue. And this trend has roots in the underlying logic of copyright law. The conventional view holds that unauthorized copying inflicts substantial economic harm on copyright owners.<sup>233</sup> In this telling, reproduction tracks the economic value of the copyrighted work. In the nineteenth century, making copies was both costly and time-consuming. It required access to physical infrastructure – large, industrial-grade printing machines.<sup>234</sup> Back then, reproduction was a fairly good proxy for distribution. To detect and prevent unauthorized distribution of their works, copyright holders could track the

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230. Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 550 (1997) ("The most fundamental of all rights in copyright is the exclusive right to reproduce the work."); R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 109 (2001) (noting that "[T]he reproduction right is the most fundamental and familiar of the copyright owner's exclusive rights"); Joseph P. Fishman, *Honest Copying Practices*, 93 NOTRE DAME L. REV. 267, 273 (2017) ("Reproduction is near universally understood to be the centerpiece of [copyright's] package of exclusive rights.").

231. Litman, *supra* note 116.

232. *Id.* at 109.

233. Ernest Miller & Joan Feigenbaum, *Taking the Copy Out of Copyright*, in SEC. AND PRIV. IN DIGITAL RTS. MGMT.: ACM CCS-8 WORKSHOP DRM 233 (Tomas Sander ed., 2002).

234. *Id.* at 236.

production of copies.<sup>235</sup> If third parties went through the lengthy and expensive process of printing copies, they probably intended to mass-distribute those copies. Thus, an exclusive entitlement proscribing unauthorized copying made sense in the pre-digital world.

But that is no longer the case.<sup>236</sup> These concerns don't map onto the digital horizon, where perfect copies of a work can be made at no cost. More fundamentally, reproduction is no longer indicative of distribution. Incidental copies are generated and temporarily stored on our devices when we stream movies, upload contents to the cloud, or even read e-books on certain platforms. Far from enabling mass-distribution, these activities implicate private consumption of copyrighted goods. And digital copies are often entirely invisible to consumers—the temporary copies generated while streaming a television show, for example, provide little added value to consumers. As a result, reproduction “no longer correspond[s] to moments where value is created for the consuming public.”<sup>237</sup> Indeed, economic harm is most likely to result from unauthorized distribution, not reproduction.<sup>238</sup> In many cases, “[the rightsholder] cannot be harmed by copies that are never distributed and . . . sit moldering in a warehouse.”<sup>239</sup> Some commentators have likewise called for eliminating the right of reproduction altogether.<sup>240</sup>

The courts' copy fetish is thus misplaced. It centers on reproduction although the existence of copies often poses no serious harm to rightsholders and yields little value to consumers.

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235. *Id.* (“In a world in which works are embodied in difficult-to-reproduce physical objects, it is reasonable to assume that, if someone goes to the trouble of making multiple copies, he intends to distribute them.”).

236. *Id.* In fact, some foreign jurisdictions implicitly recognize this mismatch between distribution and reproduction. Italian copyright law, for example, exempts from liability handmade copying for private uses. PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 381 (3d ed. 2012). This is because handmade copying is both costly and time-consuming—and typically does not lend itself to wide-scale distribution. Indeed, handmade copying is “unsuitable for circulating or diffusing the work in public.” *Id.* (quoting Italy, Copyright Act Art. 68(1)). Because handmade copying poses little risk of unauthorized distribution, it does not trigger copyright liability. So, to an important extent, under Italian copyright law what truly matters is distribution—not reproduction.

237. Christina Mulligan, *Copyright Without Copying*, 27 *CORNELL J.L. & PUB. POL'Y.* 469, 480 (2017).

238. Sara K. Stadler, *Copyright as Trade Regulation*, 155 *U. PA. L. REV.* 899, 944–45 (2007).

239. Miller & Feigenbaum, *supra* note 233, at 234.

240. Stadler, *supra* note 238; Mulligan, *supra* note 237.

Nonetheless, the lingering prominence of reproduction suggests an explanation for the state of modern copyright law—a system in which courts systemically disfavor other exclusive rights.

What emerges from this overview is a nuanced picture of the copyright wasteland. This account rests on a number of observations. The first is that statutory damages attach to an infringed work, irrespective of the number of separate rights violated. The second is that courts have disproportionately focused on one specific entitlement—the reproduction right. Third, and relatedly, this analysis reveals that courts often forgo a full examination of many other exclusive rights. Courts don't engage with these rights because they don't have to—once courts find an unauthorized reproduction, everything else falls into dicta. And, consistent with ideas of judicial economy, courts need not engage in wasteful adjudication of issues that are not necessary for deciding the case.<sup>241</sup> They instead decide cases on the narrowest possible grounds. As Chief Justice Roberts once mused, “[i]f it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.”<sup>242</sup>

At bottom, my argument is structural. I argue that statutory damages are *necessarily* at the root of the problem. Courts are at liberty to overlook certain exclusive rights only because these rights have no bearing on the ultimate result of the case. So there is an indirect causal effect at play here: courts can treat exclusive rights as dicta—as they often do—because statutory damages attach to an infringed work *no matter how many rights were infringed in that work*. The copyright wasteland, then, is an outgrowth of the law's remedial scheme.

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241. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739–40 (1995). Sunstein argues that courts prefer to engage in inquiries based on “low-level principles,” avoiding the harder questions embedded in “high-level” principles. *Id.*

242. Cass Sunstein, *The Minimalist*, L.A. TIMES (May 25, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-may-25-oe-sunstein25-story.html> (referencing an address delivered by Chief Justice Roberts at a graduation ceremony). See also *Citizens United v. FEC*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring) (quoting another source) (“[W]hile it is true that ‘[i]f it is not necessary to decide more, it is necessary not to decide more . . .’”).

## III. WHY SHOULD WE BE WORRIED?

The copyright wasteland is troublesome. Below I explain why. I begin by discussing the dominant theory of copyright law: the incentive-access framework. I explain that the copyright wasteland has the effect of disrupting the incentive-access balance that lies at the heart of copyright law. I then explore the ways in which underdeveloped rights might grate against natural-rights theories of copyright law. I next consider the anticompetitive effects of the copyright wasteland. I conclude by examining the conflict between a poorly developed body of copyright law and fundamental principles of the rule of law.

A. *Copyright Theory*

Copyright law in the United States is principally justified by the need to provide authors with economic incentives to produce creative works.<sup>243</sup> At the same time, copyright protection comes at a price: it affords copyright owners some measure of market exclusivity, thereby allowing them to charge higher prices and limit access to their works.<sup>244</sup> Copyright law thus strives to strike a balance between the need to encourage creative production and the desire to allow users and future authors to access creative goods.<sup>245</sup>

The incentive-access theory is at odds with the remedial structure of statutory damages. This Article suggests that copyright law is riddled with ill-defined, little-explored exclusive rights.

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243. See Wendy J. Gordon & Robert G. Bone, *Copyright*, in II ENCYCLOPEDIA OF LAW AND ECONOMICS 189 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. ECON. PERSPS. 3, 11–18 (1991). This approach has been widely recognized as the prevailing justification for U.S. copyright law. See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009) (“[C]opyright law in the United States has undeniably come to be understood almost entirely in utilitarian, incentive-driven terms.”); Alex Kozinski & Christopher M. Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S.A. 513, 524 (1999) (“The fundamental premise of our copyright law is that the best way to encourage the creation of valuable works is to let authors capture the market value of those works.”). See generally *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (recognizing that “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright Clause] . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .”).

244. See Gordon & Bone, *supra* note 243.

245. *Id.*

And this pathology, which springs from the per-work structure of statutory damages, has obvious implications for the incentive-access tradeoff. Without a workable account of the substance and reach of copyright's exclusive rights, we cannot assess whether, or to what extent, these rights provide too strong or too feeble an incentive for the production of creative works. When rights are poorly defined or underdeveloped, risk-averse individuals are likely to avoid using creative goods even in cases where doing so may be permissible.<sup>246</sup> The risk of incidental infringement might deter many individuals from engaging in otherwise permissible activities. In these situations, copyright law may excessively limit access to creative goods.

By contrast, underdeveloped rights may also work to the detriment of rightsholders, especially when sophisticated parties take advantage of the ambiguity surrounding these rights to escape infringement or use creative works in questionable ways.<sup>247</sup> In doing so, they may diminish authors' incentives for creative production. In these cases, the incentive-access balance may tilt against copyright owners.

In short, an underdeveloped corpus of copyright law can generate both under- and over-deterrence. It can skew the incentive-access balance in one direction or the other. And, whatever one's views on the proper allocation of copyright entitlements, it is clear that we should strive to develop a well-reasoned body of law; one that is relatively easy to follow and understand. That is the only way to properly measure and reconfigure, when appropriate, copyright's overarching balance between incentives and access.

Moreover, under this economic rationale, the ultimate goal of copyright law is to facilitate market transactions in copyrighted goods. But such transactions depend on the existence of clearly defined, tradable goods. If the goods in question are subject to copyright entitlements, we need to have some sense of what these entitlements mean. For this scheme to function, copyright's exclusive rights have to mean something—they have to provide

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246. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882 (2007).

247. See REBECCA GIBLIN, *CODE WARS* 46–73 (2011) (noting that, in the wake of the Ninth Circuit's Napster decision, many companies developed technologies specifically designed to work around the court's liability-expanding decision).

some measure of clarity as to the content and substance of the copyrighted goods and the legal entitlements enveloping them. For example, if users or future creators cannot tell what qualifies as a derivative work, they will struggle to negotiate or contract around that entitlement. For a market-oriented system, that is a problem.

The copyright wasteland also appears to sit uncomfortably with moral theories of copyright law. Although copyright is predominantly justified on the basis of economic instincts, some commentators endorse a moral theory of intellectual property. Moral accounts of copyright can sound in either labor or personhood. Building on John Locke's labor theory, some commentators contend that exclusive rights in intellectual goods constitute a deserved reward for the labor expended in creating such goods.<sup>248</sup> Others point to the writings of Hegel and Kant, suggesting that intellectual works are reflective of—and so entangled with—the personhood of the authors who created them.<sup>249</sup> Both accounts challenge the prevailing economic justification for copyright law. And, perhaps somewhat surprisingly, these moral theories appear to align much more closely with public perceptions of intellectual property among laypeople.<sup>250</sup>

According to these moral theories, copyright law should be understood as a scheme for vindicating the natural interests of authors in their works. Because intellectual works are the fruits of authors' labor, authors should be entitled to control these works. Likewise, since intellectual works were "birthed" by their authors, proponents of the personhood theory assert that authors should be allowed to control how their works are presented and perceived. Of course, these intuitions depart rather sharply from U.S. copyright doctrine.<sup>251</sup> But in some quarters of the globe, particularly continental Europe, theories of labor and personhood

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248. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 285–86 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 170 (Stephen Munzer ed., 2001).

249. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 *DUKE L.J.* 383 (1999); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 971–78 (1982).

250. Gregory N. Mandel, *What Is IP for? Experiments in Lay and Expert Perceptions*, 90 *ST. JOHN'S L. REV.* 659 (2016) (finding that a majority of lay people believe that intellectual property law is justified on the basis of moral and ethical intuitions).

251. Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 *TEX. L. REV.* 873, 882–86 (1997) (arguing that natural-rights theories cannot explain a wide array of copyright doctrines, including the doctrines of work-for-hire, assignment, and transfer).

remain salient.<sup>252</sup> Distilled to their essence, these justifications proceed from a familiar premise: authors should own the intellectual works they create. And if authors deserve to possess certain exclusive rights in their works, the law has to offer some vision of what these rights mean. In its current state, however, copyright law cannot produce a clear message about the scope of various exclusive rights. Theories of copyright, in short, all rest on a similar proposition: exclusive rights matter. And courts should be able to tell us what these rights mean. The copyright wasteland, then, is inconsistent with the moral intuitions undergirding copyright law.

### B. Competition

To an important extent, copyright law holds competition at bay. After all, copyright entitlements constitute a form of market exclusivity aimed at insulating copyright owners from competition. But in a deeper sense, copyright law is fundamentally about competition. The law's ultimate goal is to encourage innovation and creativity. And innovation is often the product of competition between market forces vying to meet market demand. Thus, the law stifles competition in the short term – by granting authors time-limited exclusive rights – in an effort to promote competition in the long term.

Nonetheless, copyright holders have a long and dismal history of resisting competition. Industry incumbents often view new market entrants as an existential threat. In particular, incumbents regularly try to eliminate, or at least constrict, new technologies or novel business models. If the new technology is allowed to take root, incumbents say, no one will make new music, produce new movies, or create new television content. And so incumbents often turn to copyright law, enlisting ambiguous doctrines in an effort to frustrate competition. These claims are almost always overstated. As some scholars have observed, the friction around new technology is essentially “about whether competition from new players can force incumbents to change their business models . . . .”<sup>253</sup>

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252. Shani Shisha, *Fairness and Copyright in Video Games: Hate the Game, Not the Player*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 694, 784 (2021).

253. Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 75 (2020).

The record is incontrovertible. For more than a century, rightsholders have forcefully insisted that new technologies pose a threat to their respective content industries. In the early twentieth century, musicians warned that the player piano—a device that played music from a piano roll—would spell doom for the music industry.<sup>254</sup> They argued that, if third parties were allowed to sell piano rolls, musicians wouldn't be able to get paid and the music industry would die out.<sup>255</sup> Similarly, the early publishing industry fanned fears that photocopiers would put publishers out of business, shatter the industry, and prevent new print content from being created.<sup>256</sup> And, in the same spirit, the movie and television industries joined forces to launch a crusade against the VCR, arguing that it would upend the industry by allowing commercial-skipping.<sup>257</sup> In all of these cases, market incumbents invoked copyright law to claim that new technologies infringe their rights and threaten their very existence.

A more recent example is *Am. Broad. Cos. v. Aereo, Inc.*<sup>258</sup> Recognizing consumer concerns over “high cable prices and inflexible bundling models,”<sup>259</sup> a New York start-up company named Aereo developed and offered a service that allowed subscribers to watch television programming online with a delay of a few seconds.<sup>260</sup> Subscribers could watch the content on any Internet-connected device.<sup>261</sup> Importantly, Aereo's architecture ensured that each subscriber only had access to a unique copy of the recorded content.<sup>262</sup> To do so, Aereo deployed thousands of tiny antennas; each antenna stored and transmitted the unique (“private”) copies of one subscriber.<sup>263</sup> If two subscribers wanted to

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254. Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 939–43 (2020); Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 300 (2004); Lemley & McKenna, *supra* note 253, at 90–91.

255. Lemley & McKenna, *supra* note 253, at 90–91.

256. Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. TELECOMMS. & HIGH TECH. L. 125, 128 (2011).

257. *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984).

258. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

259. See Rebecca Giblin & Jane C. Ginsburg, *We (Still) Need to Talk about Aereo: New Controversies and Unresolved Questions after the Supreme Court's Decision*, 38 COLUM. J.L. & ARTS 109, 111 (2015) (quotation marks omitted).

260. *Aereo*, 134 S. Ct. at 2503 (describing Aereo's business model and service).

261. *Id.*

262. *Id.*

263. *Id.*

watch the same television show, Aereo's system would utilize two separate antennas to generate and retransmit two separate copies – each tied to one subscriber and streamed to her alone.

Content owners sued Aereo. They alleged that Aereo's remote retransmissions infringed their public performance rights. Notably, however, Aereo carefully designed its system to avert infringement, paying close attention to the principles set forth in *Cartoon Network v. CSC Holdings (Cablevision)*.<sup>264</sup> In *Cablevision*, the Second Circuit held that remote-storage retransmissions did not implicate the public performance right. Cablevision offered a service that allowed subscribers to record programming and store it on remote servers.<sup>265</sup> Each subscriber, as in *Aereo*, only had access to a unique copy of the recorded content.<sup>266</sup> There was little dispute that a performance was taking place; the parties disagreed over *who* was performing and whether these performances were public. On both issues, the court sided with Cablevision. In holding that Cablevision's service did not infringe the public performance right, the court held that (1) copies of the recorded content were "made" by the subscribers, not Cablevision; and (2) the performance of these contents was not "public" because each subscriber only had access to a unique copy of the programming.<sup>267</sup>

Under *Cablevision*, then, Aereo's service did not run afoul of the public performance right. The central question was how to count transmissions. If each transmission of a broadcast signal is counted individually – because each transmission is tied to a unique subscriber – then the performance at issue is private; after all, no transmission reached more than a single subscriber. But if separate transmissions of the same content are counted as one aggregate transmission, the performance is public.

In a six-to-three decision, the Supreme Court took the latter approach, holding that Aereo's service constituted unauthorized public performance.<sup>268</sup> The Court was expressly hostile to Aereo's apparent attempt to circumvent copyright law. Instead of celebrating Aereo's effort to work within the bounds of the existing

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264. *Cartoon Network LP v. CSC Holdings* 536 F.3d 121 (2d Cir. 2008).

265. *Id.* at 124.

266. *Id.* at 139.

267. *Id.*

268. *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014).

case law, the Court faulted Aereo for engaging in gamesmanship.<sup>269</sup> The majority invoked legislative intent and looked to the statutory text, but the decision ultimately boiled down to the Court's intuition that Aereo was "substantially similar" to a cable provider.<sup>270</sup> Aereo looked and sounded like a cable provider – and, for the Court, that was enough. Rightsholders were thus successful in their attempt to wield a broadly defined (and ill-developed) legal entitlement to stifle competition. They did so despite the fact that at least one circuit court had previously found the entrant's business model legal.

Occasionally, however, copyright owners fail. Sometimes courts see maneuvers by incumbents for what they are – attempts to snuff out competition.<sup>271</sup> But often, aided by little-explored exclusive rights, courts side with incumbents. Time and again, courts have been all too willing to sacrifice competition in order to protect incumbents' rights. In a legal environment that is suffused with ambiguity and uncertainty, incumbents can routinely find a statutory hook for their claims against new entrants. The net result is that the copyright wasteland often proves inimical to competition.

### C. *The Rule of Law*

The rule of law ideal is in direct conflict with the copyright wasteland. As others have noted, this ideal draws principally from theories of autonomy and dignity.<sup>272</sup> It is grounded in the idea that people must be able to make sense of legal mandates if they wish to conduct their affairs in conformity with the law. That is why the law must be reasonably clear,<sup>273</sup> stable,<sup>274</sup> and public.<sup>275</sup>

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269. *Id.* at 2507–08 (noting that Aereo's peculiar use of thousands of antennas is invisible; it "means nothing" to subscribers and broadcasters – and thus cannot excuse infringement).

270. *Id.* at 2506.

271. *See, e.g.,* Sony Corp. v. Universal City Studios, 464 U.S. 417, 417 (1984).

272. Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331, 372–73 (2012).

273. *Id.* at 373; *see also* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 785 (1989) (noting that "rules must be capable of being followed").

274. Jeremy Waldron, *The Rule of Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016), <https://plato.stanford.edu/entries/rule-of-law> ("The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and prospectivity of the norms that govern a society.").

275. *Id.*

Its application should be prospective.<sup>276</sup> And it should be enforced by judges and officials who are “free from bias and immune to pressure.”<sup>277</sup> In essence, the Anglo-American ideal of the rule of law tends to prize “general, clear, well-publicized rules that are capable of being obeyed.”<sup>278</sup>

Legal rules that fail to satisfy these conditions are problematic because they frustrate an individual’s capacity to freely engage in those acts that the law does not preclude. And while the idea of clarity—that the law should be easily comprehensible—is itself partly contested,<sup>279</sup> there is no denying that “[c]lear rules are easy to follow, providing the objects of any prohibition maximal freedom by permitting them to know and to choose any of the paths available under the law.”<sup>280</sup> The rule of law, then, requires a commitment to clarity: rules must be clear enough to be followed.

But the copyright wasteland is antithetical to principles of clarity. Thanks to copyright’s remedial framework, certain exclusive rights languish in obscurity. Potential users struggle to ascertain which of their actions would trigger an infringement of these exclusive rights, because courts have not bothered to fully flesh them out. That means that, under the rule of law ideal, copyright law appears to deprive individuals of their autonomy. If individuals lack sufficient notice as to the types of activities that would give rise to infringement, their capacity to order their own affairs under the law is imperiled. In brief, the copyright wasteland runs headlong into the rule of law ideal.

#### IV. POSSIBLE OBJECTIONS

The preceding discussion advanced a rather bold argument about the copyright wasteland and its root cause: statutory damages. This Part considers a polyphony of possible objections and alternative explanations. I discuss the thesis that copyright law should remain flexible by accommodating open-ended

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276. *Id.*

277. William W. Fisher, *Legal Theory and Legal Education, 1920–2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 34, 39 (Michael Grossberg & Christopher Tomlins eds., 2008); see also Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 *COLUM. L. REV.* 1, 8–9 (1997).

278. Fisher, *supra* note 277, at 39.

279. Horowitz, *supra* note 272, at 373–74.

280. *Id.* at 373.

entitlements; the prediction that courts will gradually shift their attention from reproduction to other exclusive rights; the argument that courts may implicitly account for multiple infringements by calibrating the amount of damages; and the proposition that courts should be able to confront and earnestly discuss multiple exclusive rights in cases where reproduction is not at issue. I find that these objections ultimately collapse under close scrutiny.

### A. Flexibility

Our creative landscape has changed dramatically over the past few decades. Making copies is effectively costless today.<sup>281</sup> The digital age has opened up new possibilities for mass-consumption of creative goods.<sup>282</sup> And the advent of digital technologies has facilitated mass-scale public access to and use of creative works. In addition, content is increasingly licensed to consumers as part of an ongoing service, where consumers pay content owners a monthly fee in exchange for temporary access to copyrighted contents.<sup>283</sup> The process of creative production has also evolved in recent years. Large content producers, such as Netflix, now collect and analyze data about consumers' tastes. They then use that data to produce content that is tailored to consumers' preferences.<sup>284</sup> This model of data-driven production reduces the risks of commercial failure.<sup>285</sup>

When emerging technologies provide new means of making or distributing copies, questions emerge about the scope of copyright law. Of course, the Copyright Act itself was crafted with the goal of accommodating future technological developments. For example, "copies" are defined in Section 101 to include objects in which the work is fixed "by any method now known or later developed."<sup>286</sup> In a similar vein, the fair use doctrine rests on a statutory test that

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281. See *supra* text accompanying notes 234–236.

282. LITMAN, *supra* note 36, at 13.

283. Shisha *supra* note 252, at 709–12; see also Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 325–26 (2017); AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* 35 (2016).

284. Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1555–56 (2019).

285. *Id.* at 1604–06.

286. 17 U.S.C. § 101 (2018).

is flexible by design: Courts examine whether the defendant's use is fair on a case-by-case basis against four statutory factors.<sup>287</sup>

In other words, flexibility is central to copyright law. And so perhaps courts have been supine in their treatment of copyright's exclusive rights because they wish to carve out a margin of flexibility – vague entitlements are easier to apply to a wide range of future technologies. On this view, an ill-developed body of law may be desirable to the extent that it enables adaptability.

But this approach is wrongheaded. First, the interest in retaining a degree of flexibility is not necessarily in tension with the need to develop a coherent body of case law. As circumstances change, doctrines can be adjusted, adapted, or discarded. Flexibility does not demand ambiguity. Second, copyright law already relies on a number of open-ended doctrines that promise some quantum of flexibility. Most prominently, the fair use doctrine serves to prevent a rigid application of copyright law in cases where policy considerations counsel against liability.<sup>288</sup> The fact that *some* areas of copyright doctrine are flexible does not mean that *all* of copyright law should remain underdeveloped. It is difficult to see how the need for flexibility, without more, could support an impoverished body of substantive case law.

Nevertheless, a related line of inquiry suggests that copyright vagueness might be tolerable for a different reason. Specifically, Steven Horowitz argues that some degree of uncertainty is desirable under copyright's instrumental theory.<sup>289</sup> He explains that uncertainty bears on both copyright owners and users. But copyright's distribution of uncertainty is not symmetrical. Overall, copyright owners enjoy (1) a fairly clear entitlement preventing literal or close copying of their work, backed by (2) reasonably potent remedies to ensure deterrence and compensation.<sup>290</sup> So copyright owners' *core* entitlement – a robust reproduction right –

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287. Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 917 (2020) (suggesting that “[f]air use is meant to be a flexible standard . . . that courts can adapt to achieve the most just results in any given situation”); Samuelson, *Unbundling Fair Uses*, *supra* note 179, at 2540 (arguing that the fair use doctrine is a flexible tool designed to balance “the interests of copyright owners . . . and the interests of subsequent authors in drawing from earlier works . . . as well as the interests of the public in having access to new works and making reasonable uses of them.”).

288. Samuelson, *Copyright Limitations*, *supra* note 5, at 26–27.

289. Horowitz, *supra* note 272, at 331.

290. *Id.* at 337–42.

is fairly clear. And while it is true that the standard of “substantial similarity” is somewhat vague, Horowitz insists that the issues *most salient* to copyright holders remain predictably reliable: they have at their disposal a powerful legal entitlement that could reliably prevent third parties from producing or distributing market substitutes.<sup>291</sup>

Potential users fare worse. In deciding whether to use a preexisting work, potential users will often struggle to determine whether their actions would be permissible. One source of uncertainty is the idea/expression distinction; the principle that copyright extends only to “the expression of the idea – not the idea itself.”<sup>292</sup> The line between idea and expression is notoriously hard to draw.<sup>293</sup> Another area of uncertainty is the fair use doctrine, which is fact-sensitive and case-specific.<sup>294</sup> Uncertainty is also linked to the large number of statutory exceptions and defenses to copyright infringement. Faced with a wide array of detail-rich exceptions, users are unable to predict with certainty whether their use of the copyrighted work would be legally perilous; it is just too costly to figure that out.<sup>295</sup> Finally, as this Article suggests, users might struggle to assess the risk associated with a likely damage award. Copyright’s remedial scheme lacks a sufficiently clear standard for assessing damages, and statutory awards are sometimes entirely divorced from actual harm.<sup>296</sup>

To be sure, these issues affect copyright holders as well. Whether a specific statutory exception applies or whether the defendant’s use is fair is certainly a matter of concern for both users and copyright owners. But, by and large, rightsholders can operate on the assumption that they have a reliable copyright that protects against “the most troubling use of [their] work”<sup>297</sup> and is shielded by powerful remedies. On the other hand, potential users often operate under conditions of significant uncertainty when they wish

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291. *Id.*

292. *Mazer v. Stein*, 347 US 201, 217–18 (1954); *see also* 17 U.S.C. § 102(b) (2018) (excluding from copyright protection “any idea, procedure, process, system, method of operation, concept, principle, or discovery”).

293. Horowitz, *supra* note 272, at 343–44.

294. *Id.* at 344–47.

295. *Id.* at 347–48.

296. *Id.* at 353–55; *see also supra* text accompanying notes 201–217.

297. Horowitz, *supra* note 272, at 353.

to use existing material to create new works. Copyright's uncertainty, then, is asymmetrical in the sense that "potential users disproportionately bear the burden of [] uncertainty."<sup>298</sup>

Asymmetrical uncertainty, Horowitz says, is compatible with the instrumental framework of copyright law. Building on the prospect theory,<sup>299</sup> he concludes that copyright owners tend to be risk-averse while potential users are more likely to be risk-seeking.<sup>300</sup> And copyright's asymmetrical uncertainty is responsive to these patterns precisely. Copyright owners enjoy clarity in the areas most relevant to them—that is, a reliable entitlement barring literal or close copying.<sup>301</sup> Meanwhile, because users are risk-seeking, they would be willing to push the boundaries in areas of uncertainty most salient to them.<sup>302</sup> In other words, the risk sensitivity of both users and copyright holders—the former are risk-seeking while the latter are risk-averse—is consistent with the distribution of uncertainty in the copyright system.

Horowitz's account merits attention. Although he ultimately rejects uncertainty as irreconcilable with the rule of law, he also argues that some measure of uncertainty could be justified under the incentive-access framework. More concretely, however, Horowitz's account does not suggest that ambiguity in the scope of exclusive rights is itself desirable. First, he expressly disavows any inferences about the proper reach of copyright law.<sup>303</sup> He takes the scope of current copyright law as constant, and then presses a conceptual claim about uncertainty under modern doctrine. He does not argue that copyright's current level of uncertainty—where certain rights remain distressingly vague—is itself *optimal*. Second, Horowitz's framework is premised on the idea that copyright

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298. *Id.* at 354.

299. *Id.* at 358–59.

300. *Id.* at 360–71.

301. *Id.* at 360–63. Moreover, uncertainty in less salient areas prompts copyright holders to discount the value of their rights. That discounting effect might increase access to the work: it makes licensing cheaper and lawsuits less likely. *Id.* at 363–64.

302. *Id.* at 365–66.

303. *Id.* at 334 ("The premise is that, all else equal—most importantly, holding the substantive scope of copyright law constant—a user is less likely to use a copyrighted work if he is unable to predict whether his use would be deemed lawful. Thus stated, the conventional argument's core premise is a behavioral one, a prediction about the choices users make under conditions of uncertainty."); see also *id.* at 335 ("I do not here question whether copyrights are too broad or too narrow. My analysis takes their scope as a given and addresses whether they are too uncertain.").

holders care only (or primarily) about a muscular reproduction right. Crucially, though, Horowitz offers no evidence to support that claim. He pays little attention to copyright's full suite of exclusive rights, focusing instead on reproduction alone. The problem, of course, is that some copyright owners would likely be more attuned to different exclusive entitlements. Think, for example, of the motion picture industry, where a robust entitlement to prepare adaptations matters a great deal more than any other exclusive right.<sup>304</sup> The bottom line is that, even if one is willing to accept that copyright owners are somewhat risk-averse, the ambiguity enshrouding different exclusive rights nonetheless remains a source of concern.

### B. Reproduction

As Parts I and II showed, once courts find an unauthorized reproduction of the plaintiff's work, they effectively glaze over other alleged violations. But what are we to make of cases where reproduction is not at stake? Surely in these cases—ones in which reproduction is not an issue—courts must properly engage with other copyright entitlements.

Consider, for example, *Hotaling*. As discussed in Section I.B, the *Hotaling* court construed the distribution right as entrenching a making-available entitlement.<sup>305</sup> And, unlike many other courts, it attempted—perhaps unconvincingly<sup>306</sup>—to drill down into the substance of the distribution right. Yet the reality is that the court *had* to do so; there were no other exclusive rights in play. The plaintiff's claims of unauthorized copying were barred by the three-year statute of limitation: the lawsuit was filed in 1995, but the defendants' copying ceased by 1991.<sup>307</sup> In these circumstances, the *Hotaling* court had no choice but to confront the issue of distribution.

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304. See Joseph P. Fishman, *Derivable Works*, 67 UCLA L. REV. 122 (2020).

305. See *supra* text accompanying notes 138–140.

306. See, e.g., *Elektra Entm't Grp. v. Barker*, 551 F. Supp. 2d 234, 242–43 (S.D.N.Y. 2008) (“Respectfully, *Hotaling* did not cite any precedent in holding that making copyrighted works available to the public constitutes infringement . . . [its] interpretation, even if sound public policy, is not grounded in the statute”); *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 803 (N.D. Cal. 2005) (finding that *Hotaling* is “inconsistent with the text and legislative history of the Copyright Act of 1976”).

307. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997).

When claims of unlawful copying are *not* at issue, the court must direct its gaze elsewhere.

This scenario, however, is vanishingly rare. While there are certainly cases where reproduction is not at play, such cases are few and far between. And perhaps this should come as little surprise. Owing to the courts' capacious understanding of copying, questions of reproduction arise in virtually every case of copyright infringement. As discussed above, the reproduction right has been understood to capture any instantiation of the work—or any part of it, no matter how small—in any form, whether or not the copy is “invisible” or otherwise usable.<sup>308</sup> The conventional analysis is light on exclusive rights and heavy on fair use: courts find a violation of the reproduction right, and then swiftly move to examine whether that violation can be excused as fair use. The upshot is that the copyright wasteland is here to stay. Because no-reproduction cases are increasingly rare, it is indeed unlikely that courts will look beyond reproduction to examine other exclusive rights in a systematic fashion.

### C. *Implicit Accounting*

Yet another plausible hypothesis is that judges and juries account for various exclusive rights, if only implicitly, by awarding increased damages in cases that implicate multiple rights. The idea is that even when multiple rights are technically characterized as *dicta*, they may still impact the court's decision-making process: they may implicitly bleed into the damages calculus. And if that is the case, then perhaps the copyright wasteland isn't much of a wasteland at all. If various exclusive rights bear on the operative result of the case—say, by informally affecting the damages calculus—they are likely to draw judicial attention.

But this claim is improbable for a number of reasons. First, as far as I can tell, no study to date has found a clear correlation between the number of infringed rights and the amount of damages awarded.<sup>309</sup> Second, despite its intuitive appeal, this claim is incompatible with the case law. Part I discussed the courts'

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308. *See supra* text accompanying notes 231–232.

309. Previous studies have failed to find a correlation between the size of statutory awards and the type of infringement, the number of exclusive rights implicated, or the identity of the litigants. *See supra* text accompanying notes 211–215.

well-observed indifference to certain exclusive rights. Other scholars have also noted the inexplicable variance in statutory awards across factually similar cases.<sup>310</sup> At a minimum, these findings weigh against the claim that exclusive rights implicitly inform the damages calculus.

Third, this argument is not fully responsive to the broader thesis of this Article. The problem with the copyright wasteland is that we do not have a fully synthesized account of various exclusive rights. As a result, consumers have little notice of what they can and cannot do when interacting with protected works. So even if courts account for various rights by awarding increased damages in cases where multiple rights are at stake, the problem persists. Courts need to do more than simply tinker with damages to account for different exclusive rights; they need to engage with these rights head-on. They need to provide users with sufficient notice as to the *content* of these rights. And an implicit recognition of the importance of exclusive rights does not go far enough, because it fails to clarify the precise bounds of these rights.

Fourth, it is one thing for the court to implicitly recognize the importance of some rights; quite another for the court's intended audience to recognize that the court has done so. The gap between rhetoric and action is often hard to discern. And it simply isn't enough for the court to *implicitly* engage with copyright's exclusive rights. For the law to fulfill its purpose of balancing incentives against access, judicial treatment of these exclusive rights must be explicit and clearly perceptible.

As these rejoinders illustrate, the "implicit accounting" claim is neither plausible nor consequential. And it fails to meaningfully undercut my broader argument about the copyright wasteland and its deleterious effects.

#### *D. Streaming*

Technological changes have swept across the globe in recent decades. One example is our increased reliance on streaming technologies. Streaming is the future—indeed, the present—of distribution. Rather than purchasing specific titles, many consumers today obtain temporary licenses to access vast libraries

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310. *Id.*

of streamable contents.<sup>311</sup> Intellectual goods are distributed to consumers not through one-off transactions but rather on the basis of streaming licenses. Accordingly, another possible objection to my account is that, over time, courts will shift their focus to the right of distribution in response to the growth of digital streaming. Because streaming typically implicates issues of distribution, the courts' emphasis on reproduction will fade as questions of digital distribution grow in prominence.<sup>312</sup> The copyright wasteland, the theory goes, will soon be no more.

This argument has some intuitive appeal. Reproduction, as noted above, no longer drives consumption. Nor does it correspond to the value derived from the use of the copyrighted work. And courts are thus likely to turn their attention to other exclusive rights, especially distribution and public performance.

But if the past is any indication, that seems unlikely. In many respects, copyright law has failed to keep pace with technology. In the context of the first sale doctrine,<sup>313</sup> for example, courts have employed an interpretive framework grounded in ideas of physical ownership to determine whether digital distribution falls within the scope of the first sale doctrine.<sup>314</sup> In doing so, courts have largely failed to adapt one of copyright's most fundamental doctrines to the realities of the digital age.<sup>315</sup> And while there is at least one context in which courts have attended to the challenges

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311. Raustiala & Sprigman, *supra* note 284, at 1555–56; PERZANOWSKI & SCHULTZ, *supra* note 283, at 35–36; Shisha, *supra* note 252, at 709.

312. For an interesting take on the rise of streaming and its likely effects on copyright law, see Raustiala & Sprigman, *supra* note 284, at 1555–56 (arguing that streaming technologies allow content producers to harvest data about consumer preferences—and, in turn, the collected data might reduce the risk of content production and thus weaken the need for strong copyright protection).

313. 17 U.S.C. § 109 (2018) (providing that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”).

314. Aaron Perzanowski, *You Buy It, You Break It: A Comment on Dispersing the Cloud*, 74 WASH. & LEE L. REV. 527, 535 (2017) (arguing that the courts' treatment of digital intangible property has been “built around ownership of physical copies”).

315. *Id.*

confronting digital distribution,<sup>316</sup> other examples point in the opposite direction.<sup>317</sup>

More fundamentally, the copyright wasteland is not limited to any particular copyright entitlement. Instead, it is a *systemic* pathology closely linked to copyright's remedial scheme. If courts move away from reproduction to focus more keenly on distribution, the development of copyright law may still remain strenuous. The onus of the courts' analysis will indeed shift, but many exclusive rights will remain under-addressed. The problem will simply take a different form—some areas of doctrinal confusion (say, those involving distribution) will clear up, but new clouds of ambiguity will emerge. The core problem is that courts have no incentive to consider multiple infringements in any given case. And that problem will persist, whether or not distribution topples reproduction. The issue, in other words, runs to the heart of the engine, not its shell.

## V. TOWARD REFORM

Part II discussed the near-universal consensus among copyright scholars that statutory damages are poorly designed and grossly excessive.<sup>318</sup> The remedial scheme underlying copyright law promises too much and constrains too little: It permits recovery of hefty awards but imposes only the faintest of constraints on the courts' discretion in awarding damages. This Article widens the lens to consider the role of statutory damages in facilitating the copyright wasteland.

How should we move forward? In what follows, I do not mean to chalk out an exhaustive framework. Rather, I hope to jumpstart a conversation about future reform by working through a number of possible revisions to copyright's remedial scheme. One possibility would entail *both* per-work and per-violation statutory damages. Suppose, for example, that a defendant has reproduced

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316. The server test, discussed in *supra* note 35, represents an Internet-specific interpretation of the performance and display rights. See Jane C. Ginsburg & Luke A. Budiardio, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 COLUM. J.L. & ARTS 417, 420 (2019).

317. Some of these examples include issues that I have discussed above, including the access-or-receipt question in the context of digital distribution, the first sale doctrine, and various problems surrounding the definition of "copies" in the digital space.

318. See *supra* text accompanying notes 190–217.

and distributed copies of ten works without permission. If liable, the defendant would be on the hook for *twenty* awards – one for each of the infringed rights (reproduction and distribution) in each of the ten works. And if the court finds that the defendant had acted willfully, twenty maximum awards of \$150,000 might follow. The aggregate award may total three million dollars (twenty awards of \$150,000). That is a startling – indeed, daunting – prospect.

Admittedly, this scheme would mitigate the principal risk associated with the copyright wasteland. If statutory damages were contingent on the number of separate rights infringed, courts would be compelled to faithfully address every incident of alleged infringement. At the same time, however, this system would compound the risk of excessive awards. It would empower plaintiffs to sue for exorbitant fees and push defendants to settle out of court on pain of crushing damages. Another problem with per-work awards is that courts sometimes struggle to determine how many works were implicated.<sup>319</sup> For example, when the copyrighted work is a music album, the court would have to determine whether every track is a separate work or, alternatively, whether the entire album should be considered a single work.<sup>320</sup> Thus, the costs of this scheme – the risk of excessive damages and the difficulty of determining the number of works at play – may outweigh its benefits. It would resolve one problem (the copyright wasteland) but exacerbate another (excessive damages).

A more colorable proposal, I argue, would call for reducing the scope of statutory damages while establishing per-infringement, rather than per-work, awards. On this approach, the amount of damages available under the statute would be reduced substantially – say, from a maximum of \$150,000 to \$15,000.<sup>321</sup> And the number of statutory awards would turn solely on the number of infringed rights, no matter how many separate works are at stake. So, returning to example discussed above, the defendant

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319. Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1145–48 (2017).

320. *Id.* at 1145.

321. The point of reference here is the Copyright Alternative in Small-Claims Enforcement (CASE) Act. The CASE Act purports to establish a fast-track, small-claims board for adjudicating copyright disputes. Under the CASE Act, claimants can sue for statutory damages up to \$15,000 per registered work, with an overall cap of \$30,000. See H.R. 6496, 114th Cong. § 2 (2016) (§ 1403(e)), <https://www.congress.gov/114/bills/hr6496/BILLS-114hr6496ih.pdf>.

would face no more than two statutory awards—one for each infringed right.

It is hard to overstate the benefits of a per-infringement framework. First, because a per-infringement standard centers on infringed rights, it would prompt courts to properly confront copyright's exclusive rights. Second, per-infringement damages allow courts to avoid the challenge of identifying how many works were infringed. Third, a per-infringement framework may be more politically palatable than other alternatives. In fact, for most of our history, our copyright system relied on a per-infringement scheme—similar to the one that a number of other countries have come to embrace.<sup>322</sup>

Yet although it is tempting to think of per-infringement awards as manifestly superior to per-work awards, we might benefit still from a clear-eyed assessment of the risks associated with a per-infringement system. One concern is that per-infringement damages would produce excessive awards, much like our current per-work system. In some cases, per-infringement awards may in fact prove *more* burdensome than per-work awards. Think of cases in which the defendant is alleged to have infringed multiple rights in a single work; a per-work rule would yield only a single award while a per-infringement standard would trigger multiple awards—one for every infringed right. The ultimate impact of a per-infringement rule thus depends on the ratio of multi-work cases to single-work cases.<sup>323</sup>

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322. One example is Israel's per-infringement scheme. Article 56(a) of the Israeli Copyright Act instructs courts to award statutory damages "in respect of each infringement." Copyright Act, 5768-2007, 2007 LSA 34 (Isr.), <http://www.wipo.int/edocs/lexdocs/laws/en/il/il027en.pdf>.

323. All things considered, a per-violation standard may generate high awards at a greater frequency than do per-work awards. In fact, the 1976 Copyright Act moved away from the 1909 regime of per-infringement awards precisely because Congress believed that per-infringement awards produce excessive damages. See Samuelson & Wheatland, *supra* note 8, at 453:

The most significant respect in which Congress sought to narrow statutory damage awards in the 1976 Act was in its adoption of a rule that such awards should be made 'per infringed work,' instead of the 'per infringement' rule that had been in place under the 1909 Act. The legislative history of the 1976 Act reveals that Congress was persuaded that the 'per infringement' standard had sometimes resulted in excessive awards. The change to a 'per infringed work' standard was intended to lessen this risk.

Nevertheless, as Samuelson and Wheatland note, it is doubtful that the shift to per-work damages did much to curb the risk of outsized damages. *Id.* at 455.

Accordingly, because the effects of a per-infringement rule are unclear, any proposal to introduce per-infringement awards must be accompanied by concomitant efforts to cabin the scope of such damages — say, by directly reducing the scope or range of statutory damages;<sup>324</sup> by limiting statutory damages to a specific class of plaintiffs or a particular type of claims;<sup>325</sup> or by prescribing clear statutory guidelines for calibrating damages within the statutory ranges.<sup>326</sup> The proposed scheme thus pivots on two elements: (1) a shift from per-work to per-violation awards, paired with (2) affirmative steps to limit the scope of statutory damages.

Another concern is that per-infringement awards might undercut the compensatory rationale of statutory damages by severing the connection between damages and infringed works. If statutory damages aim to compensate copyright owners for the harm they suffered, surely such damages should attach to specific works. If five of the plaintiff's copyrighted works were distributed without authorization, an accurate calculus of the plaintiff's damages should take into account the lost licensing fees for each of the five works. This is because each work reflects a distinct source of harm. By contrast, the per-infringement rule discussed here turns only on the number of infringed rights, no matter how many works were infringed. One might therefore question whether this system can live up to its compensatory rationale.

But this concern is overstated. There is more than one way to compensate copyright holders for the harm they suffered. One way to do so is to provide a separate award for every infringed work. Another is to permit recovery of a separate award for every infringed right, regardless of how many works were implicated. And even under the latter approach, it is possible to control for the number of infringed works by increasing or reducing the size of the aggregate award. Imagine, for example, that the defendant copied five of the plaintiff's works. The current per-work standard would result in five separate awards, each subject to a \$750 minimum. A per-infringement standard, on the other hand, would trigger only a single statutory award. But the *size* of the award can be adjusted

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324. Matthew Sag made an interesting proposal along these lines, suggesting that first-time defendants in file-sharing cases face a reduced statutory award ranging from \$250 to \$3000. Sag, *supra* note 199, at 1139–40.

325. *Id.*

326. Garfield, *supra* note 210, at 42–46.

to approximate the plaintiff's harm: the court can issue, say, a single award of \$5,000, reflecting an assessment of \$1,000 per work. Or the court can instead issue a more modest award – one that falls below the current minimum threshold of \$750 per work – by awarding the plaintiff a sum of \$2,500 in damages, reflecting an assessment of only \$500 per work.

In other words, concerns about the law's compensatory function are inflated. The point, in short, is that a per-infringement rule might still afford courts a great deal of latitude to adjust the statutory award and properly compensate copyright owners.<sup>327</sup>

Another related concern is that plaintiffs might engage in strategic behavior to get around the per-infringement limit. They may do so by splitting up lawsuits. For example, rather than bringing one consolidated action for copyright infringement in five works, the plaintiff may choose to bring five separate lawsuits focusing on each of the infringed works. Plaintiffs may thus be able to eat their cake and have it too – by bringing multiple single-work lawsuits, they can effectively recover both per-work and per-infringement damages.

This is a substantial risk, and one we must recognize if we are to have an honest accounting of the risks and benefits of different approaches to statutory damages. It is far from evident, however, that this risk is indeed intractable. Bringing multiple lawsuits is both costly and time-consuming. And while some copyright holders certainly have the means to game the system in that way, many do not. Further, even if the risk of strategic gamesmanship is significant, it must be gauged against some of the more troubling aspects of our current system, where permissive rules of joinder and per-work damages have together enabled mass-scale lawsuits against dozens or hundreds of individual defendants at once.<sup>328</sup> These lawsuits arguably hint at a larger problem – copyright trolling – that is facilitated by our current system.<sup>329</sup>

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327. This point underscores a fundamental tradeoff. If courts are expected to calibrate the size of the award within the statutory range, it is necessary to ensure that the statutory range is sufficiently broad. But doing so would run counter to my proposal that we *reduce* the statutory range in order to cabin the scope of statutory damages. It is important to emphasize, however, that the fundamental question in this context is one of execution, not viability. It is about striking an appropriate balance between the need to provide a sufficiently broad range and the need to reduce the scope of statutory damages.

328. Sag, *supra* note 199, at 1141-42.

329. *Id.*

Still, some might counter that, in the face of uncertainty, we should maintain the status quo. But a mounting wave of evidence suggests that our current system is broken. Our per-work regime affects not only the remedial function of copyright law; it also exerts pressure on the law's underlying entitlement structure. And while my proposal would require some changes to this system, a per-infringement standard does not reflect a radical departure from the status quo. Rather, it is our commitment to a particular regime of statutory damages that should warrant a degree of skepticism. After all, statutory damages are something of an international anomaly—most countries do not allow recovery of statutory damages for copyright infringement.<sup>330</sup> A number of commentators have already called for eliminating statutory damages altogether.<sup>331</sup> Viewed in context, then, my per-infringement proposal presents a modest yet beneficial alternative to our current system.

The remedial scheme of copyright law is dogged by a cavalcade of problems. It produces outlandish awards that are often punitive. It creates skewed incentives for wasteful litigation. And, as this Article shows, it allows courts to avoid a full exposition of copyright's exclusive rights, thereby distorting the development of copyright law. The proposal advanced here has the potential to overcome some of these problems. But while a per-infringement system seems facially preferable to our current regime, more work is needed to determine whether such a system is indeed feasible or desirable.

This Article sets forth a novel account of the copyright wasteland and its impact on substantive copyright law. It lays bare the costs and benefits of copyright's remedial scheme. And it seeks to inspire future research on remedial reform. The first step in addressing the problem is to recognize it. We need to think

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330. Samuelson et al., *supra* note 161, at 534 (“Including the United States, only twenty-four of the 179 WIPO member states surveyed (or 13.4%) allow recovery of statutory damages for copyright infringement.”).

331. James DeBryin, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 111 (2012) (“Perhaps the best way for the law to adapt to the changing landscape of copyright in the digital age is actually to look to history. . . . The solution is the same today as it was then: eliminating statutory damages.”); Michael A. Carrier, *Increasing Innovation Through Copyright: Common Sense and Better Government Policy*, 62 EMORY L.J. 983, 985 (2013) (“The second copyright proposal that would foster innovation would be to eliminate statutory damages in cases of secondary liability.”).

seriously and creatively about paths for remedial reform if copyright is to reclaim its long-lost dominion as “the engine of free expression.”<sup>332</sup>

#### CONCLUSION

This Article argues that statutory damages stifle the development of copyright doctrine. Statutory damages are awarded per infringed work, no matter how many different rights had been violated in that work. And so, once courts find an infringement of the reproduction right, they have little incentive to consider additional violations. As a result, copyright law is deprived of meaningful guidance on the content and scope of some of its foremost doctrines. Remarkably, this relationship between remedies and substance has eluded scholarly attention to date. This Article analyzes the implications of this pathology and explores pathways for reform, focusing on the costs and benefits of copyright’s remedial scheme. It argues that copyright law would benefit from a rethinking of the relationship between remedies and substance. And although it is nearly impossible to generalize about the wide array of doctrines informing copyright’s exclusive rights, we can do much more to understand—and, where appropriate, recalibrate—modern copyright law.

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332. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).