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Copyright As Contract

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I. INTRODUCTION

Copyright is essentially a contract between the author and the public with the government acting as the agent of the public.[1] The consideration received by authors is defined by duration and breadth of exclusivity.[2] The consideration for the public is the creation of a "work" that will be available on a limited basis for the life of the author plus seventy years and then available without limit after that.[3] If there were no transaction costs at all, it would be possible to "pay" authors different amounts of exclusivity. Perhaps a greeting card would get one holiday season of exclusivity, if anything. Works that are not original and do not demonstrate a modicum of creativity would not qualify as consideration and receive no exclusivity in return.[4] And, in some cases, an author—say one writing a book that will be a guaranteed best seller—could be required to pay a considerable amount of the right to exclusivity that makes those earnings possible. By necessity the contract in question is a form contract which, unlike other forms, is drafted to the disadvantage of the drafter.[5]

This Article tracks the similarities of copyright law and contract law and suggests that viewing copyright as basically contractual would result in a much more rational system of copyright law. The analysis focuses on three specific areas. Part II is about the "bargain" principle of contract formation. In contract law this means there is reciprocity between what each party contributes to the exchange. In the context of copyright, as in any contractual arrangement, this would mean each party should attempt to strike the best bargain from its perspective. It makes sense for this to be true of the bargain struck by the

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[1] The actions of the agent are reflected today in the Copyright Act of 1976, 17 U.S.C. §§ 101–805 (2012). This possibility in the context of patent law has been noted by at least one court, *Davis Airfoils v. United States*, 124 F. Supp. 350, 352 (Ct. Cl., 1954); and a scholar, Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After* Eldred, 19 BERKELEY TECH. L.J. 1315 (2004).

[2] Duration for most works is now the life of the author plus seventy years. The breadth of protection depends on a variety of factors. The principal one is the availability of a work for fair use. 17 U.S.C. § 107 (2012). In addition, courts often refer to works as having thin protection as opposed to, presumably, broader protection. This typically refers to works that reflect little in the way of originality. *See, e.g.*, Beaudin v. Ben and Jerry's Homemade, Inc., 95 F.3d 1 (2d Cir. 1996); Santava v. Lowry, 323 F.3d 805 (9th Cir. 2003).

[3] This is the standard duration people for works completed in 1978 or after. Works completely prior to that time and various other works are subject to different periods of exclusivity (see 17 U.S.C. § 303).

[4] Originality is a statutory requirement, 17 U.S.C. § 102(a), and means roughly that the work is not copied. There is a requirement that the work include a "slight" or a "modicum" amount of creativity. This is expressed best in *Feist Publications v. Rural Telephone Serv. Co.*, 499 U.S. 340, 345–46 (1991).

[5] In this case the drafter would be Congress.

government on behalf of the public. In fact, the cost of copyright to the public is comparable to tax and should be as low as possible to achieve the desired end.

Part III takes on the notion of a breach. From a contractual perspective an infringement is comparable to a breach by the public because it is inconsistent with the promise of exclusivity. A breach by the author is a more difficult concept but can be viewed as a breach of the author's promise to create an original work that represents a modicum of creativity.[6] An author who claims exclusivity but does not deliver has, in effect, breached the copyright contract. The relative lack of formality in the case of the copyright contract as opposed to a conventional contract adds to the complexity of this analysis.[7]

Part IV considers remedies and argues for a remedy like the one used in contract law. The current basic monetary remedy works like a property rule as opposed to a liability rule.[8] It does this by firmly steering the secondary user into a negotiation with the copyright holder as a matter of self interest. In so doing, it protects interests that the Copyright Act does not grant.[9] Specifically, the current remedy is an indirect way of protecting moral rights,[10] which play only a minor role in U.S. copyright law.[11] In addition, current remedies are unnecessarily costly and inappropriate in a context in which the rights owned by the parties are ill-defined.[12]

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[6] *See* text at *infra* notes 41–48.

[7] As will be discussed, authors need not indicate in any formal sense whether they are entering into a copyright contract.

[8] Under 17 U.S.C. § 504 the infringer must pay damages plus any profit earned as a result of the infringement.

As will be described in greater depth below, see text at *infra* notes 60–62, a liability rule means that when a right may be violated without consent and the victim only receives compensation. In the case of a property rule, the interference with the rights of another must be consensual. In the field of intellectual property as well as others, a property rule is usually associated with injunctive relief which requires secondary users to negotiate for the right to use a protected work. The damage rules in copyright do not *require* a negotiation but firmly encourage it.

[9] One deviation from this proposal is the possible inclusion of punitive damages in contexts in which detection of infringement is difficult. *See infra* text at notes 56–58.

[10] Under the Berne Convention moral rights are defined as follows:

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

The Berne Convention for the Protection of Literary and Artistic Works (Paris Revision, 1971) Art. 6*bis*., July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

[11] The limited adoption of moral rights by the United States is found in the Visual Artists Rights Act of 1990. 17 U.S.C. § 106A.

[12] For an early theoretical defense of the status quo, see Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of the Damage Rule in Intellectual Property*, 39 WM. & MARY L. REV. 1585 (1998).

Part V reviews specific lessons from contract law that, if adopted, would result in a more rational system of copyright law. They include: (1) incentives for greater formality;[13] (2) distinguishing copyright dependent works from those that are not; (3) sanctions for the false claims of copyright; and (4) the use of a liability rule as opposed to a property rule in instances of infringement.

Before beginning the analysis and primarily for the benefit of those who may not understand the underpinnings of U.S. copyright law, a few observations may be useful. One of the reasons why contract law is an appropriate standard for copyright law is that U.S. Copyright law is utilitarian in nature. This follows from the Constitutional enabling provision that the purpose of copyright is to "promote the Progress of Science and Useful arts" and it achieves this by granting exclusive rights to "authors and inventors."[14] In short, copyright protection is not awarded to authors unless it is consistent with promoting public welfare.[15] Authors are a means to an end just as each party to a contract is a means to achieving his or her counterpart's ends. Not only does this invite a contractual approach to copyright, it also makes for an analysis that, unlike that in a context of moral rights, has a more economic orientation. For example, in theory, since exclusivity is granted to encourage creativity and that exclusivity is a cost to the public, it makes little sense to grant exclusivity beyond that necessary to bring forth the creative effort. This theme is unavoidable when assessing U.S. copyright law and will be reflected in the analysis that follows.

A final important point is that some of what is discussed below with respect to the deviation of U.S. copyright law from a contract law model is dictated by international agreement. These cases will be indicated throughout the analysis. The suggested revisions proposed in the final section are designed to comply with these international accords.

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[13] This would, of course, have to be consistent with the requirements of the Berne Convention, of which the United States is a member:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed. Berne Convention, *supra* note 10, art. 5.

[14] U.S. CONST. art. I, § 8, cl. 8.

[15] The public, as opposed to private, welfare notion underlies an important recent article on patent remedies. *See* Ted Sichelman, *Purging Patent Law or "Private Law" Remedies*, 92 TEX. L. REV. 517 (2014).

II. THE BARGAIN AND ITS TERMS

Copyright law is obviously necessary to offset the free riding effects that would mean there would be little motivation for many authors to be productive.[16] If authors are dependent on income from their works and unable to internalize the value because it can be taken freely by others, it seems clear the net effect on society would be negative. The fact that copyright law is necessary does not mean, however, it should become untethered to the fundamental reality that those granting exclusivity are doing so in order to benefit the public and that exclusivity is a cost to the public. There is no policy reason the cost to the public should be more than the minimum necessary.

In this transaction, government can fairly be viewed as both buyer and seller. The government sells exclusivity in order to buy the availability of an author's works. Authors, in turn, sell access and buy exclusivity. Nevertheless, there is no serious discussion suggesting that the duty of the agent is to authors as opposed to the public.[17]

Copyright law is necessary to achieve the desired ends primarily because of transaction costs. It would be impossible for authors through a massive system of private contracts to achieve the exclusivity necessary to protect any serious investment in their creative efforts. Thus, the starting point for assessing the copyright contract is a default position that represents what would happen in the absence of transaction costs. Presumably the (government) seller and the author would meet. The author would indicate what is offered—a greeting card rhyme, a song, a compilation, a great work of fiction—and the agent would indicate what would be offered in terms of duration and breadth of exclusivity to ensure the work would come into being. In short, the negotiation would focus on the value of the work and the amount of exclusivity—as measured by time and breadth—that would be "paid" for the work.

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[16] Creative activity like that addressed by copyright law is generally non-excludable and non-rivalrous which means, without copyright, authors would be unable to internalize the benefits of their works.

[17] *See* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("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.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."); Twentieth Century Musi Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

In this hypothetical negotiation a number of things might be expected. First, the agent of the public would be expected to bargain on behalf of the public. As a corollary, if no consideration in the form of exclusivity were required for the work to be produced, none would be offered. The work of the author would be gratuitous. Second, the agent would pay the lowest price possible for the work based on some general calculation of the work's value to the actual buyers. In this sense, the agent has tremendous market power since there are few substitutes for copyright. This power would be used to negotiate to the author's reservation price—the lowest the seller/author would find acceptable. In fact, for a well-known author who is likely to sell many books and may have received a multi-million dollar advance, the actual one-to-one bargain may mean the consideration from the author includes not just the availability of the work but a substantial sum of money in exchange for the privilege of exclusivity.

Obviously, the one-to-one process is impractical, but, given that it would otherwise be the ideal, it is useful to think about what the current copyright contract is like and whether it could be moved closer to the ideal. There are fundamental ways that copyright is inconsistent with the ideal but could be reshaped to be closer to the ideal. Before detailing those "contractual errors," below, though, some of the oddities of copyright law that separate it not just from a contract oriented approach but from even a rational system of intellectual property should be noted. First, the length of exclusivity sold by the government is largely disconnected from what is received by the public in return. The most creative works and the least are paid the same. The exclusivity offered—life plus seventy years[18]—is as much a function of age and health as opposed to the work itself. In effect, two authors completing equally valuable works receive greatly differing amounts of consideration from the public as far as exclusivity.

This does not mean all authors are ultimately compensated equally. The market makes huge distinctions with respect to ultimate compensation. Some writings end up on a shelf forever and others become best-sellers earning millions of dollars. Moreover, in addition to the time dimension of exclusivity, there is a substance dimension. Some works are only thinly protected[19] and some are more likely to be subject to fair use.[20] Thus, the public pays both in terms of exclusivity and the amount paid for the use of a work. In effect, these two interact to determine the ultimate consideration flowing from the public to

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[18] This would be the basic duration. There are other durations in the case of works for hire and similar works. 17 U.S.C. § 302.

[19] See cases cited in note 2, *supra*.

[20] 17 U.S.C. § 107.

authors. The actual period of exclusivity is, however, unknowable at the time a work is created and makes the notion of compensation based on value received irrelevant.

More irrational from the point of view of contracts is that "gift works" are paid for. These are works that would exist in the absence of copyright. One example would be aleatory art—works that are found and displayed without any thought of copyright.[21] In addition, it seems doubtful that all, or perhaps even most, creative people are driven by the notion that they have copyright protection. Finally, it seems likely that a great many "works" are compelled by market necessities but not by a promise of exclusivity. Although it is difficult to support this with an empirical assessment, one might compare the greeting card industry with the fashion industry. Fashion for the most part receives no copyright protection.[22] Greeting cards can be protected but, like fashion, production is likely driven by the need to continually offer something new to the public.[23] The distinctions between the text of one greeting card company and another are likely to be slight and awards more in line with novelty and not exclusivity. In fact, in this instance, copyright may lead to less creativity since there would be less pressure to present new ideas.

What is missing in these cases is what is essential in modern contract law—a bargain. Bargain in this sense means an element of reciprocity.[24] In contracts it means a car is sold because of the price offered and money is paid in order to receive a car. In copyright, this reciprocal element is missing. In other words, works are not forthcoming in a great number of instances as a result of copyright protection.[25] Indeed, there may be no cognitive connection between creative efforts and the promise of exclusivity.

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[21] Perhaps the outstanding example of an accidently created work is the famed Zapruder film of the John Fitzgerald Kennedy assassination. Although Zapruder made artistic choices, the only public value attributed to the film was the result of happenstance and certainly not the result of conscious decisionmaking. *See also* ALAN ROSENTHAL, NEW CHALLENGES FOR DOCUMENTARY 421–30 (Univ. of Ca. Press 1988).

[22] Fashions are creative works that are generally not covered by copyright. Yet there are constant innovations and design changes. *See generally* Dianna Michelle Martínez, *Fashionably Late: Why the United States Should Copy France and Italy to Reduce Counterfeiting*, 32 B.U. INT'L L.J. 509 (2014); Christine Quilichini, *Haute Couture, Legislation: Tailor Made High Fashion Design Protection in the United States*, 4 U. PUERTO RICO BUS. L.J. 228 (2013).

[23] For a discussion of the innovation given rise to by monopolistic competition see, Jeffrey L. Harrison, *Rationalizing the Allocative/Distributive Relationship in Copyright*, 32 HOFSTRA L. REV. 853, 854–55, 879–87 (2004).

[24] *See* OLIVER W. HOLMES, THE COMMON LAW 293–94 (1881) (tracing the "bargain" theory of contracts).

[25] Just how much copyright protection spurs creativity is an empirical question. The fashion industry stands as an example of innovation without serious protection. Many expressive elements in automobile design also fall into this category. Obviously, a great deal of creative

Even if some copyright protection is necessary, there appears to be no empirical evidence linking the production of creative works to a specific level of copyright protection. This is not to say that artists whose livelihoods depend on their efforts do not depend on copyright. The question is how much they care about the precise terms of the bargain. It is unlikely that decisions to approach their easels or word processors are directly related to whether the period of protection is life plus fifty years or longer.

When copyright is compared to contract, these factors combine to remove any element of a bargain on behalf of the public and two types of contractual errors stand out. One deals with opportunistic infringement actions, the other with the granting of market power.

A. OPPORTUNISTIC COPYRIGHT AND CLAIMS OF INFRINGEMENT

The opportunistic possibility occurs when an author would have produced the item in the absence of copyright, if copyright existed for a much shorter period, or when the work barely passes the minimum standard of a modicum of creativity. The authors have what is, in effect, a windfall copyright—protection that is well beyond that necessary to allow any anticipated period of internalization. Two costs emerge in these situations. First, the windfall copyright owner may in fact collect royalties. Second, it may institute infringement actions which, successful or not, generate public costs.

An excellent example of how these costs can be generated is *Beaudin v. Ben and Jerry's Homemade, Inc.*[26] There the manufacturers of hats with the familiar black and white blotches of Holstein cows brought an infringement action against the ice cream makers when it was discovered that the ice cream makers had begun selling their own line of cow blotch hats. The decision went against the plaintiffs but resulted in the initial trial court proceedings and an appeal to the Second Circuit Court of Appeals.[27] The court ruled that there was no substantial similarity between the two lines of hats.[28] The decision itself is sound, but the question from the perspective of contract law is why an expectation is created in the first place that one could monopolize a type of expression that is hardly original in any socially beneficial sense. Plus, why

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effort is put forth by those not expecting compensation. Copyright is also likely to be irrelevant when the value of a work is determined by who created it and not by anything intrinsic to the work itself. For example, the most insignificant doodle by Picasso would be highly valued whether copyrighted or copyrightable. In these cases it is not the expression that counts but the person making the expression.

[26] 95 F.3d 1 (2d Cir. 1996).

[27] *Id.* at 2.

[28] *Id.*

should the disposition of a dispute about a trivial and artificially created property interest be subsidized by the public?

Similar in effect is Sherry Manufacturing Co. v. Towel King,[29] a case that went through an appeal on the merits and returned on the issue of attorney's fees.[30] Here the seller of what can only be viewed as the kitschiest of beach towels was concerned that it had allowed its design to pass into the public domain.[31] Consequently, it created a derivative work that it viewed as copyrightable as a way of protecting the original.[32] It soon found that a competitor was using the same or a similar design and filed an infringement action.[33] The court eventually ruled that the derivative work did not contain enough originality to be copyrightable, and, thus, there was no infringement.[34] Nevertheless, when viewed through the lens of contract these are instances in which a poor bargain struck by the government led to even greater costs that those normally associated with exclusivity.

It seems doubtful that in either of these cases or in scores of others that the contract made, or that the author believes has been made, generated anything beneficial for the public at all. In some instances, the work would have been available without consideration. In both instances costs are generated for those the agent represents without an offsetting gain.

B. GRANTS OF MONOPOLY POWER

In the second group of cases, copyright and infringement actions are not opportunistic as described above because these works might not exist without a solid foundation of exclusivity. First, it must be noted that exclusivity is not the same as market or monopoly power.[35] To understand why copyright does not guarantee that an author has monopoly power one only has to think of unpublished manuscripts, child drawings, and everyday snapshots. All are likely copyrightable but cannot be sold at anything but a pittance. Nevertheless, in

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[29] 753 F.2d 1565 (11th Cir. 1985).

[30] Sherry Manufacturing Co. v. Towel King, 822 F.2d 1031 (11th Cir. 1987).

[31] *Towel King*, 753 F.2d at 1565.

[32] *Id.* at 1566.

[33] *Id.*

[34] *Id.* at 1569.

[35] Monopoly involves a single seller of a good or service for which there are no good substitutes. Sometimes the term "market power" and "monopoly power" are both used to indicate the ability to raise prices above competitive levels. *See* E. THOMAS SULLIVAN & JEFFREY L. HARRISON, ANTITRUST AND ITS ECONOMIC IMPLICATIONS 27–29 (6th ed. 2013). Mere exclusivity does not guarantee market or monopoly power when there is little or no demand for a work.

many instances, copyright does create market or monopoly power.[36] Well-known authors, celebrities, and their publishers may become wealthy not because of their writing, per se, but because of the exclusivity they receive in the copyright bargain. In these instances, exclusivity can be viewed as the grant of a franchise not unlike like that granted to a utility. The difference is that the grant of exclusivity to a utility includes a promise by the utility to make services generally available at a price that will generate a normal profit.[37] On the other hand, in most copyright cases,[38] the grant of the franchise does not limit the ability of the owner to exploit the franchise. It is paradoxical that a type of property that exists solely because the public permits it can then be used for profit maximizing purposes.

In many but not all instances[39] in which great wealth is at stake, the need and likely willingness to pay for copyright protection is very strong. Yet, under U.S. copyright law it is given away regardless of the willingness and ability of authors to pay. In other contractual settings, the desire for something and the ability to pay means higher prices are charged. In fact, copyright can be analogized to a form of privacy which is, in its own way, exclusivity. Those who value privacy very highly pay more to achieve it. Those for whom copyright is highly profitable are also likely to be willing and able to pay for exclusivity. Other than the transaction costs avoided by not requiring individual copyright negotiations, there appears to be no public benefit derived from not charging for copyright on the bases of willingness and ability to pay. Obviously this theory runs into practical limitations, but broad categories of charges could be developed. For example, one possibility is to grant copyright as it is done now but enact a surtax on those who generate profit by virtue of copyright.

If there is no charge, an alternative is to decrease what is granted, perhaps in the form of a shorter duration for highly profitable works. It is difficult to believe that John Grisham, for example, would put his pen down if the period of protection were life plus twenty-five years. In fact, the opposite may be the case: A shorter duration may mean a greater incentive to be productive. In

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[36] The importance of copyright in advancing monopoly or market power is complex. For example, in some instances the monopoly power is derived from the identity of the author. Insignificant scribbles by Picasso would instantly have market to monopoly power without copyright. On the other hand, the power of a novelist, no matter how renowned, is likely dependent on copyright because, except in the case of the original manuscript, the desirable part of the work can be infinitely copied.

[37] *See generally* THOMAS COTTER & JEFFREY L. HARRISON, LAW AND ECONOMICS: POSITIVE, NORMATIVE, AND BEHAVIORAL PERSPECTIVES 600–01 (West Academic Publishing 3d ed. 2013).

[38] The obvious exceptions are "fair use" and instances of compulsory licensing.

[39] The exceptions are instances in which the identity of the author is the primary source of value attributed to the work and the work exists in single or limited numbers. Painting and sculptures would fit this description.

sum, the copyright contract can be seen to be like any other government contract. Presumably the goal when purchasing weapons, roads, or space ships is to bargain in order achieves the most cost efficient outcome for citizens. In the context of copyright as contract, this means paying the least amount necessary acquire the benefits to the public from the creative effort. In copyright, though, the grant may mean simply mean higher prices.

III. THE BREACH

If the concept of copyright as contract is to hold there must be some place for the idea of a breach. There are a number of possibilities here, but two stand out. The first is that an infringement can be viewed as a breach without straining the analysis too far. If the public is viewed as one of the contracting parties, then the government as agent is promising exclusivity on its behalf. When an infringement occurs, so the argument goes, one of the principals in the contract has breached a promise made through the agent.[40] As will be seen below, more critical than whether an infringement is viewed as a breach, is the question of the remedy for the breach. That discussion will be reserved for later but is made more compelling by noting that an infringement is simply a broken promise that is made by the public to an author.

More interesting is the question of a breach by an author.[41] In this instance, it is useful to think again of the obligation of the author as a party to the copyright contract. An author can be said to promise to supply something that complies with the requirements for copyright whenever he or she claims to be entitled to copyright exclusivity. Thus, by including copyright notice, registering, or bringing an action for infringement, the author purports to have held up his or her end of the bargain. The least this can mean is that the work is original and reflects a modicum of creativity. There are a number of ways for a breach to occur, and all are complicated by the fact that copyright notice is not currently required for a work to be protected.[42]

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[40] This would be, of course, the promise of exclusivity made on behalf of the public. Interesting, if the principal/agent analogy is expanded, the retroactive extension of contract could be viewed as a breach between the public and its agent. For example, the movement from duration of life plus fifty to life plus seventy could be said to be breaking a promise to the public that works would enter the public domain at life plus fifty.

[41] Although this will seem like a foreign notion to many readers, the drafters of the Copyright Act were clearly aware of the possibility that copyright might appear to cover more than it legitimately can cover as far as exclusivity. *See* 17 U.S.C. § 403.

[42] Under the Berne Convention standards, no formalities may be required for an author to have copyright protection. *See* Berne Convention, *supra* note 10 (article 5 reads as follows: "The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country or origin of

It is possible that the author may in fact have no reasonable belief that the work for which copyright is claimed actually is an original[43] work containing a modicum of creativity.[44] As has been described in detail by Jason Mazzone, inaccurate claims of copyright are pervasive and costly.[45] In effect, if one pushed the contract analogy just an extra step, the authors have delivered nonconforming goods. These nonconforming "goods" can have more serious consequences than the usual case in which the buyer may simply respond by covering in the market.[46] In the context of copyright, discovery of nonconformity may be difficult and the consequence of not delivering what was promised may be that people are discouraged from using a work that by any standard is available to them already because it is not copyrightable.

Nonconforming works (to use the terminology of contract law) are not just those that lack originality and a modicum of creativity. Nonconformity also follows when the merger doctrine renders the work uncopyrightable.[47] In addition, claims of copyright when a work was not renewed, as was once

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the work. Consequently, apart from the provisions of this Convention, the extent of protect, as well as the means of redress afforded to the author protect his rights, shall be governed exclusively by the laws of the county where protection is claimed.").

Under U.S. law copyright notice *may* be included. 17 U.S.C. §§ 401–402. It is important to note that Section 403 limits the right to include notice in certain cases: Thus, under section 403, sections 401 and 402

> shall not apply to a work published in copies or phonorecords consisting predominantly of one or more works of the United States Government unless the notice of copyright appearing on the published copies or phonorecords to which a defendant in the copyright infringement suit had access includes a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

[43] This would flow naturally if an "author" simply copied a previously existing work.

[44] This would be a somewhat more difficult determination for an author to make. Similarly, the holding out of a work as copyrightable that is not because of merger is more difficult for the author to anticipate. *See supra* note 38. In the first instance of knowingly copying, the idea of fraud is probably more appropriate than in these instances.

[45] JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 9–25 (2011). *See also* Jason Mazzone, *CopyFraud*, 81 N.Y.U. L. REV. 1026 (2006) [hereinafter Mazzone, *CopyFraud*]; Jason Mazzone, *Curbing CopyFraud*, 14 VAND. J. ENT. & TECH. L. 993 (2012).

[46] U.C.C. § 2-712.

[47] Merger occurs when the expression of an idea cannot be meaningfully separated from the idea itself. Since copyright does not extend to ideas, the expression is not copyrightable. Thus, under section 102(b) of the Copyright Act: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

required,[48] or which have otherwise entered the public domain also amount to failure to deliver what was promised.

The contract law comparison is difficult when it comes to breach by an author for two reasons. First, it is possible that an author has no intention to enter into the copyright contract and will not claim an infringement has occurred. The problem is that, in the absence of a notice requirement, it can be difficult to know if an author is a party to the copyright contract. Since it will not be clear, a potential user of the work may believe it is protected and, thus, refrain from using a work that is available. In any case, the costs to the public of this uncertainty can hardly be viewed as the result of a breach by an author.

A second possibility occurs when an author mistakenly but innocently claims to have copyright protection but the work does not qualify because it lacks originality, creativity, or is subject to the merger doctrine. These authors will lose any infringement suits they file. However, that hardly addresses the breach of contract issue because the damages are in the form of the chilling effect on the use of copyrighted works by others who did have a legitimate right to use the work but believed otherwise. It may seem harsh to apply sanctions in these instances but it is useful to remember that contract law itself is essentially a strict liability regime in which excuses for nonperformance are relatively rare.[49] In addition, infringement, with some exceptions for the type of remedy,[50] also amounts to strict liability. Thus, any incorrect assertion that one has a right to exclusivity is, in essence, a breach when the author does not deliver what was promised regardless of fault.

This assignment of liability is in accord with assumption of the risk as applied in contract law. In that context, the party who assumes the risk of non-performance is still held liable even if the inability to perform is due to circumstances over which he or she has no control. In copyright it seems obvious that the party claiming to have a right to exclusivity is in a better position to assume the risk of whether that claim is valid. It is difficult to see the party claiming a copyright that turns out not to be valid as having encountered something unexpected, as would be the case for excuse in contract. Even if that were the case, the party claiming copyright is almost

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[48] Many works entered copyright prior to the 1976 Act. Until 1992 these works required renewal to qualify for a second copyright term. In 1992 renewal of the second term became automatic. Of course, none of this applied to works prepared after 1977 because those works are subject to a unitary term.

[49] Excuse for nonperformance of a contract is typically granted when the unexpected occurs and the party requesting to be excused has not assumed the risk of the event. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, Ch. (1981).

[50] Statutory remedies distinguish infringement from willful infringement. 17 U.S.C. § 504.

certainly in a better position to assume the risk that his or her work is not original, does not include a modicum of creativity, or may merge with an idea.

A more difficult question arises when a party claiming to own a copyright is met with a successful fair use defense. One view to take is that an unsuccessful effort to defeat a fair use claim is also breach. In a sense the author is claiming to own more than he or she does. There is no similar doctrine in contract law. Plus, in terms of the contract analogy described here, there has been no breach. The author must have complied with the promise to provide a copyrightable work that would have been infringed or the fair use defense would not be invoked. In effect, fair use arises when the author claims the contract has been beached by someone else. In sum, although there are similarities, it does not appear that a suit that fails because of a fair use defense is the equivalent of a breach. On the other hand, an argument that fair use does not apply which is not colorable under the facts or law may result in sanctions under Rule 11.[51]

IV. REMEDIES

It is difficult to separate questions of breach from those of the appropriate remedy. Two possible breaches are described—infringement and the incorrect or fraudulent claim of copyright. Copyright law treats the remedial issues in the context of the first breach in depth.[52] The discussion that follows demonstrates that the treatment is inconsistent with contract law but, more importantly, inconsistent with copyright policy. First, however, the intriguing question of a proper response to breach by the author is addressed.

A. THE AUTHOR'S BREACH

If a party has paid for the right to use a work when none was necessary, one can readily rely on the contract notion of reliance[53] to calculate a recovery.[54]

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[51] FEDERAL RULES OF CIVIL PROCEDURE, Rule 11.

[52] 17 U.S.C. § 504(b) ("The principal remedy is as follows: The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.").

In addition, authors may be entitled to statutory damages in lieu of subsection (b) damages. 17 U.S.C. § 504(c). Section 502 allow for injunctive relief. *Id.* § 502.

[53] Restitution would be equally effective.

[54] In contract law, the reliance recovery places the non-breaching party in the position he or she would have been in had the contract not been formed. A party who pays for the use of a work unnecessarily comparable to a party who had entered into a contract unnecessarily.

This, however, is hardly fully consistent with a more comprehensive contract-based approach to copyright. Although individuals may have paid unnecessary licensing fees, the broader contract is between the author and the general public—not simply one member of the public.[55] In addition, the basic contract remedy is expectancy—the difference in value between what was promised and what was received. Thus, ideally, each author who breaches the contract would be assessed the difference in value between what was actually produced and the value of what was promised. If the work is not copyrightable then the value of what was produced is, for copyright purposes, zero. The problem with the determination of damages lies on the other side of the calculation in that it is impossible to ascertain the value of a work that did not exist. All we know is that it would have met some relatively modest standard for creativity.

In these instances there is an imperfect substitute for actual damages and one that carries with it a small helping of poetic justice. If the author is rational, we know that he or she would not invest more in producing a work, registering it, and in litigating any supposed infringement than its possible value. The sum of these is a floor on what the author purports the value of the work to be to the public. It is, at least, a beginning point for an assessment of the value of what was promised. If the work is not copyrightable—the work delivered has no value—then the damages are equal to that anticipated value.[56]

While a possible for expectancy, this measure would not account for the value to the public once the work enters the public domain and it would not account for instances in which parties did not use a work that they had a right to use and possibly, therefore, turned to less satisfactory substitutes. Thus, it may be useful in the case of a breach of the author to depart from contract law and consider an element of punitive damages.[57] One of the rationales for punitive damages in tort law and even criminal law is the sense that not every person who is guilty of a wrong is actually discovered and must pay. In other words, the full externality caused by the tort or criminal act would not be fully internalized if only single damages were paid. The key to punitive damages is to raise the expected cost to others who may engage in the same wrong. Almost certainly not all breaching authors will be discovered and, thus, it makes sense to add a punitive element to damages assessed against those who are.

It is obvious that a critical issue in instances in which plaintiffs are other than individuals who have unnecessarily paid licensing fees is who would have standing. In these instances the connection between the breach and single

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[55] In effect, this remedy would be in addition to refunding any fees paid by individuals.

[56] This is simply the difference between what was promised and what was delivered.

[57] It is noteworthy that although punitive damages are not part of standard contract law, statutory remedies for copyright infringement do have a punitive element. 17 U.S.C. § 504.

individuals would be difficult to isolate. It would likely also be difficult to define the proper member of a class.[58] This argues for a more public approach like those available to the Justice Department or the Federal Trade Commission in the case of antitrust.[59] Almost certainly the best option is a statute that includes a significant penalty for a false copyright claim.[60] When it comes to infringers, the act allows for some flexibility with respect to the knowledge of the infringer.[61] This same pattern makes sense in the case of a false claim of copyright. In addition, the statutory approach would be consistent with other provisions found in the Act.

The lack of a requirement that an author provide notice or even register a work means that breaches by authors are even more difficult to address. In fact, without some form of notice requirement, it is difficult to fashion a meaningful remedy that would approach the ideal.[62] In particular, those who understand that notice is not necessary for a work to be copyrightable may not use works for fear of infringement claims when none is likely or successful. Thus, some form of an obvious declaration that the author is claiming to own the work is necessary but not sufficient to an effective remedial system. As it stands now, copyright law holds little promise for curtailing authors' breaches. Even if there were a notice requirement, there is little to discourage authors from making false claims of copyright.

One line of cases that initially seems useful is that dealing with copyright misuse. Some courts have found that misuse of copyright is a bar to a recovery for infringement.[63] It has been suggested that this could be extended to include efforts to enforce copyright when the plaintiff is actually not entitled to copyright.[64] Although this line of cases may seem to give hope for a judicial development of some kind of response to breaches by authors, further development seems unlikely. The misuse cases involve instances in which the author has a copyright but uses that leverage to exact something extra from a licensee. The cases do not involve a response to the problem of mislabeling and the analysis seems to track that of antitrust. The improper claim of copyright cases damages go well beyond those that would fall in the ambit of

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58 FED. R. CIV. P. 23.

59 *See, e.g.*, MAZZONE, *supra* note 45, at ch. 8.

60 In the case of private actions, this would be consistent with punitive damages.

61 17 U.S.C. § 504(c).

62 A possible response is discussed in text accompanying *infra* notes 148–50.

63 *See, e.g.*, Lasercomb Am. Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990). *But see* BellSouth Adver. & Pub'g Corp. v. Donnelley Information Pub'g Inc., 933 F.2d 952 (11th Cir. 1991); Metro. Reg'l Info. Systems, Inc. v. Am. Home Realty Network, Inc., 888 F. Supp. 2d 691 (D. Md. 2012).

64 *See* Mazzone, *CopyFraud*, *supra* note 45, at 1087–89 (suggesting the possibility).

using leverage and although these cases are consistent with good policy, they are unrelated to the problem of the author's breach.

B. BREACH BY THE PUBLIC

1. Property or Liability Rules? A breach by a member of the public is somewhat more complicated in part because the Act includes a comprehensive approach to the remedies for breach. The current remedial system is, however, misguided from virtually any perspective. The beginning point for understanding this is the seminal 1976 Article, "One View of the Cathedral"[65] by Guido Calibresi and Douglas Melamed. In that article the authors distinguish property rules and liability rules as methods of protecting rights. Liability rules, like those applied in a negligence case, require the party causing the harm to compensate injured parties for damages in order to restore them to pre-damage conditions.[66] Property rules, on the other hand, are those that require the permission of the party before his or her rights may be affected. This is typically the case when one party would like to acquire the property of another. Thus, one may damage the property of another through negligence and pay damages but one may not take the property without consent.[67]

Although the standard remedies in cases of copyright are monetary, the regime works like a property rule.[68] Infringers are liable for any damage caused by the infringement and must disgorge any profits resulting from the use of the protected work. The idea is to eliminate incentives to infringe by eliminating all benefits.[69] Consequently, the potential infringer would be better off by negotiating with the copyright owner because at least part of the profit resulting from an otherwise infringing use of the copyrighted work could be retained.

If the contracts model were adopted, the standard remedy would be damages only. Thus, when assessing the remedy for infringement, the question

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[65] Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Rules of Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[66] *See id.* at 1105–11 (it is important to note that the compensation is actually a means to require the party doing the harm to internalize the costs of that harm. For those concerned with efficient outcomes, this internalization is more important than actual compensation.).

[67] *Id.* (noting that liability rules are more appropriate when transaction costs are high—the parties would likely be unable to bargain with each other but those causing the harm should internalize the damage caused. When transaction costs are low, it is preferable for reasons of efficiency for the parties to bargain. To some extent property rules are backed by punitive measures including criminal sanctions.).

[68] In the case of injunctive relief, copyright remedies have a direct property rule effect.

[69] This would be in contrast to the "efficient infringement" in which a party might find an unexploited use for the work and pay damages to the author of the work and still profit. This has been explored by at least one scholar, David Fangundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791 (2013) and one court, *Walker v. Forbes, Inc.*, 28 F.3d 408 (4th Cir. 1994).

is: why should copyright deviate from the standard contract remedy. More precisely, given that property rules give rise to transaction costs, is there some justification for incurring those costs? As it turns out, and as the following demonstrates, there is no public policy basis for applying the property rule and a number of reasons why it should not be applied.[70] Before beginning the analysis, it is important to be clear that, under a liability rule in copyright, like that in contract law, the author would be entitled to full compensation including any lost profits resulting from an infringement of his or her work that are reasonably foreseeable.[71] The argument for a liability rule involves two steps. The first is that the usual concerns about property rules do not apply to copyright. The second is that property rules, especially in the context of poorly defined rights, drive up the cost of the copyright regime.

2. The Arguments For and Against Property and Liability Rules.

a. The Preference for Property Rules. The preference for property rules stems from three basic concerns: autonomy, efficiency, and distributive outcomes, all of which can be understood in the context of a simple example. Suppose you drive by a house and outside is parked a sleek sports car that you feel you must have. If a liability rule is applied, you could simply take the car and leave, in its place, a sum of money equal to its fair market value.[72] This is comparable to an infringement in which the infringer is only required to pay the loss of the author.

The first concern is that, as a matter of principle, there may be a preference for consent as a way to preserve the autonomy of the owner of the car.[73] This concern is relatively easy to understand. The second concern is efficiency-based and requires some background. From the standpoint of efficiency, exchanges that leave both parties better off are preferable for obvious reasons.[74] In this

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[70] In effect the question is less about efficient infringement than it is about which rule advances the aim of copyright law at the lowest cost.

[71] Contract law typically does not provide for punitive damages. This makes sense from an economic perspective because, unlike torts and other areas of law, harms do not go unnoticed. In copyright, however, infringements may go unnoticed and thus the habitual infringer may not fully internalize the harm caused. Copyright law allows for this to some extent by the availability of statutory damages, 17 U.S.C. § 504(c), but a more comprehensive regime of punitive damages may be warranted. The purpose, however, is not to compensate the plaintiff nor to disgorge profits made, as the property rule does, but to ensure the infringing party internalizes the harm caused.

[72] Taking the car as opposed to a consensual exchange amounts to changing a property rule to a liability rule. Calabresi and Mademed note that criminal law can be explained in part by a desire to prevent this from happening. Calabresi & Malemed, *supra* note 65, at 1124–27.

[73] In a high transaction cost context the value attributed to consent may have to be weighed against the possibility that nonconsensual transfer would have occurred but for the transaction costs.

[74] This is an application of the notion of Pareto Superiority, a concept in welfare economics that describes a particular measure of efficiency. *See* COTTER & HARRISON, *supra* note 37, at 45–46.

example, though, we cannot know if the owner of the car would have sold it for the market value. Market value is simply an average. The owner might have demanded more, not simply as a way of getting the highest price possible but also because without that higher price he or she would feel worse off. Moreover, it is a context—low transaction costs—in which the parties could have negotiated to discover if there was a price that left them both better off.[75]

In the context of efficiency concerns, it makes sense to think in terms of false positives and false negatives. A transaction that does not take place but which would have been beneficial is a false negative. When transaction costs are high, the possibility of false negatives increases. An exchange that takes place that is not ultimately beneficial[76] can be viewed as a false positive. Involuntary exchanges—like the theft, even with payment—run the risk of being false positives. A transfer does occur but it leaves at least one party worse off. Thus, voluntary exchanges, like those under property rules, avoid the false positive problem but because of transactions costs may lead to false negatives.

To understand the third concern, change the hypothetical and assume the person taking the car does leave $5,000, which is its market value. Further assume he or she takes it because he has a found a buyer for that particular car for $10,000. In effect, he or she profits as a consequence of the "theft." Some people, particularly the owner of the car, will feel that justice requires some sharing of the profit from its resale. Economists label this a distributive matter because it does not concern allocation of the car to its most valued use, only who ends up richer. That does not, however, render it unimportant.[77] Thus, under a liability rule, not only is there a risk that the owner is worse off, but the owner does not share in the profit associated with the resale. In sum, the three possible objections listed above to liability rules can be seen as dealing with three pervasive concerns of law: autonomy, efficiency, and distributive fairness.

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[75] The efficiency concern can be viewed as involving false positives and false negatives as found in antitrust law. A false negative occurs when a practice is not condemned even though it is on balance anticompetitive. A false positive is the result of condemning an activity that actually may be beneficial in terms of consumer welfare or efficiency more generally.

There is also a notion of transactional false positives and false negatives. Transactions that do not occur but which would make both parties better off are false negatives. A false positive is an exchange, likely nonconsensual, that leaves at least one party worse off. 3 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 651, at 96–97 (3d ed. 2008).

[76] Technically, as long as one party is better off the outcome is efficient even if the position of the second party remains unchanged.

[77] In economics, allocative matters are those that increase or decrease total wealth. Distributive matters concern how wealth is divided up. The classical supposition is that economics, as a science, cannot evaluate distributive questions since they involve interpersonal comparison of utility.

b. Why the Objections to Liability Rules Do Not Apply in Copyright. To understand why these objections lose their validity in the context of copyright, it is important to focus on what copyright law actually is intended to do. As already noted,[78] the long and universally held view is that U.S. copyright law is utilitarian—it is an instrument the government implements to increase overall wellbeing. The means to this end is to grant exclusivity that bars the use by others to those who create expressive works. This exclusivity is the cost to the public of having the work available.[79] It is comparable to a tax that is passed on to members of the public. In this context that tax should be no greater than the minimum needed to achieve the ends sought.[80]

Now return to concerns about liability rules and take them not quite in the order listed above. The efficiency concern is that payment of damages may result in inefficient infringements—false positives—because it would be unknown whether the author would have voluntarily exchanged the use of the work for the damages caused to the work by its use by others.[81] Before going further it is important to remember that damages here would include any loss in value of the work. This loss in value would include an amount equal to the discounted present value of any profits the author expected to make.[82] In a general way, one might say it is the decrease in the value of the income earning asset (the work) due to the infringement. The only way for the liability rule to result in an inefficiency is if the author would not have sold for that price or were not at least indifferent between selling at that price and not selling at all.[83]

In these instances the author would have to possess an attachment to the work that is excess of market value. There are two possible explanations for an

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[78] *See supra* notes 14–16 and accompanying text.

[79] *See* William Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

[80] Landes and Posner note that copyright law should maximize the difference between the benefits of creating additional works and the costs (including losses from limited access) of protecting the works. They state this in terms of maximizing the benefit of the costs and benefits of additional works. This is probably incorrectly stated because it maximizes the gain from marginal output which would stop protection at levels short of the social welfare maximizing level.

[81] In other words there is a danger of "false positives." As an economic matter, the idea of compensating through damages is more related to the Kaldor-Hicks or wealth maximizing standard of efficiency. Under that measure, it is not necessary that the author actually be compensated as long as the gains to the infringer were enough that the author could be fully compensated. *See* COTTER & HARRISON, *supra* note 37, at 51–52.

[82] To be sure, the entire analysis is somewhat awkward if it is true that those claiming damages had no cognitive connection to copyright when creating their works.

[83] In reality, there may be series of prices at which the hypothetical exchange would have taken place. These prices exist along what is called a contract curve. For example, if the lowest an author would accept is $1 and the most the secondary user would pay is $5, a contract curve exists between $1 and $5. Each point along that curve would leave both parties better off.

attachment in excess of market value. First, an author, fully aware of the property rule, knows that he or she can use market power to hold out for more than the actual loss suffered. Second, the author may have some subjective vision about how the work should be used which would not be reflected in loss earnings.

Taking these in turn, if an author would not sell because he or she realizes the property rule allows him to hold on to his work for more than fair market value, it does not mean that the liability rule creates the inefficiency. The liability rule accounts for the value of any exclusivity the author could expect and the value of the exclusivity that resulted in creation of the work. In effect, the property rule grants monopoly power that allows the author to bargain for a better distributive outcome. Eliminating the monopoly power of the author is not a form of inefficiency. Moreover, whatever power is granted to the author is actually inconsistent with the central goal of copyright as an instrument of a utilitarian policy. In effect, the property rule allows the author to raise the price beyond that which he or she agreed to when entering into the "copyright contract."

What about the possibility of subjective attachment or sentimental values? In the context of contract or tort law and liability rules, this is the usual objection. For example, in contract, whatever was bargained for was of greater value to the buyer than market value. In copyright, this would mean attributing some special importance to a work or wanting to control the use to which it might be put. This is not an unrealistic possibility.[84] Any effort to protect that preference, though, is comparable to protecting moral rights,[85] something that is rejected, with very limited exception, by the Copyright Act.[86] Expecting or demanding payment in excess of damages suggests the author believes, incorrectly, that his or her personal preferences are to be taken into consideration when determining what uses may be made of the work. But this is not the case in copyright law, as attested to by instances in which permission for payment has been rejected and the work is used anyway.[87] Indeed, the issues of subjective objections by authors have long been subordinated by virtue of fair use that allows for parody and ridicule.[88] The reality is that personal preferences about use are not among the rights granted by copyright.

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[84] This objection could rise to the level at which no amount of compensation would be adequate to satisfy the author or to some level at which the author could put aside his or her scruples for a price.

[85] *See supra* note 10 and accompanying text.

[86] The principal exception is the Visual Artists Rights Act found in section 106A of the Copyright Act. *See* 17 U.S.C. § 106a (2012).

[87] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[88] *Id.*

In short, in copyright, the possibility of false positives is slim even under a liability rule. If anything, the property rule raises the risk of false negatives in that it permits the copyright owner to prevent exchanges that would be efficient[89] and allows authors to assert moral rights when they are not part of what was granted under the Act.

If a liability rule in copyright results in no inefficiency, what about the other two possible objections: distributive outcomes and autonomy? On the first point, the right to a share of the profit for uses not anticipated by the author when the work was created means deviating from the bargain or contract principle the Supreme Court has attached to copyright.[90] When authors ask for and receive profits from infringing they receive economic rents. These are payments in excess of the amount necessary to make the copyright holder whole and, thus, in excess of the amount necessary to produce the work. The right to bargain over these rents raises transaction costs and reduces the likelihood an exchange will take place.

To many, this will seem like a fair trade-off. Higher transaction costs mean fewer exchanges but an increased likelihood that the author will share in the profit from reuse. The problem is that whatever appeal this tradeoff holds is based on a misconception of what the author has been granted. The Copyright Act does grant exclusivity but it does not grant monopoly or market power. The author attempting to leverage this right of exclusivity into a share of the profit asks for something that is not promised under the terms of the copyright contract. In fact, in other instances of government grants of exclusivity the owners are not entitled to assert monopoly or market power.[91] For example, one of the characteristics of government created exclusivity in other contexts is that the exclusivity may not be used to exact rents or monopoly profits.[92] There is no principled distinction between those instances and copyright. In copyright exclusiveness is granted to the extent the public benefits. The property right,

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[89] Not only may authors block efficient licensing by demanding more than a compensatory payment, the rule also creates the danger of bilateral monopoly. Bilateral monopoly exists when there is a single buyer and a single seller. Haggling over the best deal is a costly process that could eventually result in no exchange at all. *See* Walgreen v. Sara Creek Property Co., 966 F.2d 273 (7th Cir. 1992).

[90] See cases cited at note 90, *supra*. *But see* Eldred v. Ashcroft, 537 U.S. 186 (2003) (concerning the Constitutionality of retroactive extension of copyright duration, the argument was made that it involved a change in the contract already made between authors and the government. Curiously, the Supreme Court demurred with respect to this theory but noted that the contract also included a promise of possible future extensions.).

[91] Exclusivity in copyright includes no promise that an author will have market power. Market power depends on whether there a reasonable substitutes available.

[92] Economic rents are payments in excess of that amount necessary to draw a productive input into use.

and the ability to extract profits made by others, extends that grant beyond what is necessary for the public benefit. It seems counterintuitive to create property for the benefit of the public and then allow the owner of that property to earn monopoly profits from that property through the use of property rule protection. Plus, the liability rule already protects any reasonably expected profits.

Finally, some may object to liability rules because they allow for taking the property of another without permission. Rather than a monetized value, the sense may be that liability rules do not respect individual autonomy. This is an appealing argument but must rest on a view that the author believes what is taken is his or hers in the first place. This notion seems unrealistic in the context of a statute that has multiple exemptions, a fair use defense, and a battery of compulsory licenses. Because of all these possibilities, a distinction between a crashed car and the stolen car described at the outset comes into play. In both instances, rights are violated without consent. The driver of the car, though, can be said to have consented or assumed the risk that there will be car accidents. Or, put differently, his or her car may be taken without permission. The copyright holder is in a comparable position. He or she knows that there are a variety of ways in which a work may be taken without permission. Plus, there are a host of other exemptions[93] for would-be infringers most of which, like fair use,[94] can only be anticipated at a very general level. Many of those uses may be repugnant to the author, but that is of no consequence. The point is that any expectation of someone holding a copyright, like the driver of a car, that takings will only occur with permission would be unrealistic and uninformed. All authors assume the risks of nonconsensual transfers. Having agreed to the terms of the copyright contract, it is disingenuous to claim a lack of consent to involuntary uses.

3. The Property Rule in the Context of Copyright. The considerations examined above are important enough, when they hold, to find a liability rule unobjectionable and more consistent with the purported role of copyright law. This would be the extent of the argument if property rules were neutral in terms of promoting copyright policy. They are not and, thus, the argument for a liability rule is stronger when the costs of the property rule are examined.

a. Transaction Costs. The transaction cost based objections to property rules can be seen to exist at two levels. First, the cost of making the exchange happen may exceed the benefits of the exchange. The extent to which there are transaction costs is a case by case empirical determination. Whether those costs

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[93] The Copyright Act is riddled with exemptions—far too many to include in a footnote. For examples see sections 107–114 of the Act.

[94] 17 U.S.C. § 107.

then create false negatives is yet another inquiry. We do know that the costs exist and it would be hard to fathom that they produce no false negatives. Second, there are instances in which exchanges occur despite transaction costs. This, however, does not alter the character of transaction costs themselves. They are still a net loss to society because they do not actually result in the production of anything. As the discussion above suggests, the avoidance of liability rules in the context of copyright does not represent a compelling reason to encourage and absorb transaction costs.[95] In effect, the property rule not only increases the probability of false negatives but increases the cost of correct outcomes.

Even though it will be in many cases relatively easy for authors of works and those who want permission to use a specific work to locate each other, the idea that transaction costs are generally low is a false one. For example, one of the more stubborn areas in which transaction costs come into play is with orphan works—works that are under copyright but whose owners/authors are unknown.[96] Similarly, the provisions of the Act with respect to duration mean that the owners of the copyright may be two generations removed from the artist and, with or without registration, difficult to find.[97] Further adding to this problem are the complex terms in the Act with respect to when an author or his or her heirs may terminate an existing assignment.[98]

In addition to these complications, the necessity of bargaining between the author and the secondary user means that the user must have some knowledge of copyright law. In particular, since no notice of copyright notice is currently required,[99] the party wishing to use a work would have to know that a work may be protected even though there is no notice or registration. Even in the simplest cases, the idea of anything approaching a friction-free environment in which parties know that works may be protected and licenses are the result of simple phone calls to readily available authors and simple negotiation is farfetched.

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[95] Those reasons and their inapplicability of copyright remedies are discussed in the previous section.

[96] *See generally* Olive Huang, *U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans*, 21 BERK. TECH. L.J. 265 (2006); David R. Hansen, Kathryn Hashimoto, Gwen Hinze, Pamela Samuelson & Jennifer M. Urban, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1 (2013).

[97] It is important to note that works need not be registered in order to be protected by copyright law. *See* 17 U.S.C. § 408(a).

[98] The 1976 Act created means by which heirs may terminate prior copyright assignments. *See* 17 U.S.C. §§ 203, 304(c). For an example of the complexities that can arise see *Siegel v. Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d 1098 (Cal. 2008). Classic Media, Inc. v. Mewborn, 532 F.3d 978 (C.D. Cal. 2008).

[99] *See supra* note 97.

The burdens of a property rule, with respect to a wide range of transaction costs, are increased when bilateral monopoly conditions exist. Bilateral monopoly means there is a single buyer and a single seller. Economists[100] and others[101] have long recognized that when a bilateral monopoly exists the parties may both feel they have the power to establish a favorable price since they will regard their counterpart as having few or no choices. This results in strategic behavior that may lead to an impasse or a delay that is sufficiently long so that the benefits from the transaction decline or disappear.[102] This is not to say that this is always the case in copyright. For example, a film production company may view itself as having several choices with respect to a book to turn into a film. Or, it may view itself having little choice in the context of a single blockbusting best seller. The point is that there are always some transaction costs when property rules are invoked; the potential for monopoly power and bilateral monopoly conditions simply increase these costs. All of these factors add to the likelihood of false negatives and make the property rule difficult to justify especially in the context of a property right created to benefit the public generally.

b. Bargaining Under Conditions of Uncertainty. Beyond standard transaction costs, property rules are particularly cumbersome when conditions of uncertainty exist. And, in copyright, uncertainty is the norm. For example, when one party discovers the work of someone else that he or she would like to use, there are a number of possibilities. First, the secondary user may use the work without consequence because neither party understands the need for a license. Second, the secondary party uses the work and both parties believe, correctly or not, that the use is subject to one of the exemptions or defenses. Third, the work is not used because the secondary party mistakenly believes it would be too expensive and that the use would not fall within any the exceptions or a fair use defense. Fourth, the work may not be used because the parties are unable to agree on a licensing fee. Finally, the parties may be unable to agree on a licensing fee, the work may be used, and an infringement action may follow.[103]

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[100] *See* A.C. Pigou, *Equilibrium Under Bilateral Monopoly*, 18 ECON. J., no. 70, 2008, at 205; Roger D. Blair, David L. Kaserman & Richard E. Romano, *A Pedagogical Treatment of Bilateral Monopoly*, 55 S. ECON. J., no. 4, 1989, at 831.

[101] *See* Walgreen Co. v. Sara Creek Property Co., 966 F.2d 273 (1992); *In re Hoskins*, 102 F.3d 311 (7th Cir. Ind. 1996).

[102] *Id.*; *see also* DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 39 (Harvard Univ. Press 1994).

[103] *See, e.g.*, Campbell v. Acuff-Rose Music Inc., 510 U.S. 569 (1994).

Outcomes three through five are undesirable and are largely a function of combining a property rule with a system of imprecise property rights.[104] To understand this, consider the contrast between selling an automobile and selling the right to use a copyrighted work. Most car sellers will have a title to the car with a VIN number corresponding to that on the car. The age of the car, its mileage and its general condition will be known to the buyer and seller. There is likely to be little disagreement about what is owned or at least a general range of possible values. In the case of copyright, though, multiple questions arising from whether a work is original and contains a modicum of creativity,[105] the application of the merger doctrine,[106] the application of various exemptions[107] and fair use[108] mean that what one owns by virtue of claiming a copyright is unknown and perhaps unknowable. Possible changes in the duration of copyright and possible termination rights create further uncertainty.[109]

The impact of imprecision on agreements can be understood by examining the well-known analysis of settlements, another form of contract in which transaction costs and uncertainty play a major role.[110] As in copyright, a settlement involves the purchase of a right. In both cases, the defendant buys the plaintiff's right to pursue the case in court. In fact, the purchase of the license is in reality much like an ex ante settlement in that the author gives up a right to protest the use of his or her work in the future. In most instances of settlement, neither party will know the actual value of a case other than in terms of an expected outcome. The greater the clarity in the law and facts, the more likely it is that a settlement will occur because it increases the likelihood that the parties will have consistent valuations.[111]

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104 The first possibility cannot be traced to liability rules or property rules although it may mean the law breaks down as far as compensating authors for their work.

105 This is likely to have impact on the value of the work. A work may be protected even if it represents very little creativity. The question of what is protected and what is not may only be known after an alleged infringement.

106 For examples of uncertainty relating to the issue of merger *see Baker v. Selden*, 101 U.S. 99 (1880); Morrisey v. Procter & Gamble, Co., 379 F.2d 675 (1st Cir. 1967).

107 *See* 17 U.S.C. §§ 107–114.

108 The uncertainty of a fair use analysis is discussed below. *See infra* notes 123–35.

109 Copyright durations extended in 1978 and 1998, events unlikely to have been anticipated by authors in the 1950s, likely increased the value of works created in that period.

110 *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD., no. 4, 1984, at 1 (explaining why some cases settle and others do not). *But see* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997) (discussing settlement with reference to behavioral economics), See *also* John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129 (2009) (discussing values implicated in the settlement process).

111 *See* Ted Sichelman, *Purging Patent Law of "Private Law" Remedies*, 92 TEX. L. REV. 517, 524, 557–58 (2014) (applying this argument to patent remedies).

Consider this example: the amount at stake is $1,000 and both parties estimate there is an even chance of a decision going either way; the expected gain to plaintiffs is $500 minus attorney fees.[112] For the defendant, the expected loss is $500 plus attorney fees. In this example, assume attorney fees are $100. The expected benefit to the plaintiff is $400 and any settlement amount in excess of that will leave him or her better off. The expected loss to the defendant is $600 and any settlement amount less than that will leave him or her better off. The high likelihood of an agreement is obvious.[113]

Now change the analysis so the parties disagree on the facts or law. Perhaps the law is evolving and neither party knows the next step or there is legislation in the works that may affect their rights. Plaintiff believes he or she has a 80% chance of prevailing, meaning an expected gain of $700. Defendant believes he or she has an 80% chance of prevailing and, therefore views the case as involving an expected loss of $300. Plaintiff will not accept less than $700 to agree to settle and defendant will not pay more than $300. The outcome is no agreement.

As noted, the purchase of a license is similar to a settlement in that it is a contract made under conditions of uncertainty. The likelihood of an agreement is decreased if there is uncertainty and the parties disagree on the value of what is being purchased. In the context of licensing, this will often be the case. The combination of a property rule with ill-defined property rights means works will be exchanged less, and works will be generally less available to the public. This is not to say compromise is not possible when property rights are uncertain, but it is more likely when the rights are well-defined or at least the areas of uncertainly can be isolated and some value of the risk agreed upon.

c. Sources of Uncertainty Under Copyright. The sources of imprecision in copyright are myriad. Three are discussed here. The first is whether a work is copyrighted at all. Next is the fair use problem. Finally, the property rule itself creates uncertainty. Each of these illustrations makes use of cases drawn from litigation, but these are only representative of a virtually limitless number of examples.

4. Is There a Known Protectable Interest? This is in many respects the most fundamental area of uncertainty in copyright. An author may include copyright notice on the work and register it but, in fact, have nothing that is protectable. Conversely, an author may include no notice and not register the work and have a protectable interest.[114] With no official indicia of copyright, the parties are

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[112] This is .5 times $1,000.

[113] This is the simplest model of settlements. In reality, a number of other factors may work against settlement. *See* JEFFREY L. HARRISON & JULES THEEUWES, LAW AND ECONOMICS 480–94 (2008).

[114] Registration is required prior to an infringement action.

likely to find themselves in the position of the nonsettling parties described above. One party may see a simple work and conclude that it could not possibly be copyrightable while the author may assume it is. No transaction will take place and an infringement may occur depending upon, if a court considers the matter, which party made the correct assumption.[115] Even if the potentially infringing party understands that permission may be needed, there is little reason to approach the author who may be ignorant of the extent of his or her rights because that supplies the potential seller with information he may not have. In short, the best conditions for licensing occur when both parties have roughly the same idea of value and both know the other party is likely to know that value. In an area of law as ill-defined as copyright this is unlikely to occur.[116] Moreover, in a setting in which rights must be purchased, approaching the owner of those rights with an offer may be avoided because it suggests to the possibly ignorant seller that there is anything of value for which he or she must be paid.

A number of simple cases illustrate the understandable uncertainty in copyright. In *Emanation Inc. v. Zomba Recording Inc.*[117] the works were six supposedly Cajun statements that were played by pushing buttons on a plastic device called "Cajun in Your Pocket" that featured six buttons.[118] When the defendant recorded a rap song using some of the same sayings, the manufacturer of Cajun in Your Pocket claimed there had been an infringement. Ultimately, the case came down to whether the sayings—"We gon pass a good time, yeah, cher," and "You gotta suck da head on dem der crawfish"—that were repeated in the song "Shake Ya Ass" were original.[119] The court held that they were not and, thus, there was no infringement.[120]

Until that decision was made, however, there was no way for either party to know whether the manufacturer of the Cajun in Your Pocket had anything to sell. The plaintiff had registered the item, but that does not determine copyrightabilty. It may have not occurred to the defendant that permission was required. The defendant understandably will have little idea of what to offer for something that may be free.[121] But even if the defendant understood that the

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[115] Even this assumes both parties have a modest amount of knowledge about copyright.

[116] The extreme opposite of this is the typical property rule case described above of purchasing a car. They buyer will know he or she has no right to claim ownership in the car and the seller will be equally sure of the ownership of the car. Making an offer to buy the car does not reveal anything.

[117] 72 F. App'x 187 (2003).

[118] *Id.*

[119] *Id.* at 187–88.

[120] *Id.* at 191.

[121] In fact, the court held that the plaintiff's worked lacked originality. Nor as noted below, even if the parties had thought to bargain, they would be faced with virtually no way to know

use might be an infringement and that the remedy could be the author's damages plus profit due to the infringement, neither party would be likely to know where to even begin in terms of a negotiation. The author is likely to have little understanding of the profit from infringement, and this is not information the secondary user would be inclined to share. The secondary user is unlikely to know what damages to the author would be. In a sense, the poorly defined nature of the property interest and the divergence of views is evidenced by the willingness not just to go to trial but to push the matter to appeal.[122] In many cases, there is nothing about the work, or its notice and registration, that would signal to the secondary user that permission is required.

5. Fair Use. It is likely that the most perplexing and uncertainty-creating element of copyright law is the defense of fair use. The test involves weighing four factors, none of which are susceptible to definition except in vague terms. Yet this test ultimately determines whether the property rule will be invoked or not.

To understand the complexity and unpredictability of fair use, it is useful to examine two cases involving celebrity artist Jeff Koons. In a 1992 case, *Rogers v. Koons*,[123] Koons made a sculpture depicting a photograph taken by Art Rogers.[124] The photograph was of two people sitting with several puppies. The court described the puppies and the photograph as "charming."[125] Koons' version, although clearly a copy, included a number of changes.[126] He used the sculpture in a show called "Banality" that was allegedly to illustrate how mass production of media images reduce the quality of society.[127] He claimed it was a parodic work.[128] The Second Circuit Court of Appeals rejected the argument, noting that a parody required that "the copied work must be, at least in part, an object of the parody. . . ."[129] It also noted that the use presumptively had a negative impact on the original by decreasing the likelihood that another sculptor would buy the rights to create a three dimensional image of the photo.[130]

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what profits could be traced to the use of the work. Thus, even if they agree on likely liability, uncertainty about the consequences would still be substantial.

122 The lower court had also held for the defendant.

123 960 F.2d 301 (2d Cir. 1992).

124 *Id.* at 305, 308.

125 *Id.* at 304.

126 *Id.* at 308.

127 *Id.* at 304, 309.

128 *Id.* at 309.

129 The court evidently viewed parody and satire as falling into the same category. *Id.* at 309.

130 *Id.* at 311–12.

Fourteen years later, in *Blanch v. Koons*,[131] Koons returned to the Circuit Court of Appeals with a similar case involving his use of another photograph. This time he had copied an advertising photograph for an expensive pair of women's shoes. There was no sculpture or alternation but instead he digitally scanned the original work and assembled it into a collage with others. The final work showed four pairs of women's legs with shoes on dangling over a variety of desserts.[132] There was, as in Rogers, no question that copying had occurred. Thus, when the author of one of the photographs objected, a fair use analysis followed. In this instance Koons was successful. The court noted that the objective of Koons's use of the photograph was different from that of the author.[133] The author intended the photograph to convey some sense of eroticism.[134] Conversely, according to Koons, "[he] want[ed] the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives."[135] Similar to his intent in *Rogers*, though, Koons's objective was to use the work to make a broader commentary.

The purpose of describing these two cases is not to assess the soundness of their holdings or to attempt a reconciliation. The more pertinent question is whether one could have confidently ascertained the limits of the property rights of either plaintiff by examining the original works themselves and the works resulting from Koons's adaptations. In fact, it is not clear that a plaintiff or an attorney, having read *Rogers v. Koons*, could confidently predict the outcome in *Blanch v. Koons*. The distinctions between the decision in *Rogers* and *Blanch* are fine ones that can give rise to greatly differing views about the application of fair use. This uncertainty is a barrier against ex ante settlements.

6. The Property Rule. Interestingly, the property rule itself is a source of some elements of the uncertainty with respect to what is bought and sold. This is a slightly different matter than whether the rule gives rise to transaction costs—it cannot help but do that. In terms of the analysis here, the narrower question is whether the property rule makes valuation of the right more complex and less predictable than a liability rule. At best, the property rule is no worse than the liability rule, but a closer look makes it clear that the property rule imposes more uncertainty-based barriers to bargaining than does the liability rule.

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131 467 F.3d 244 (2d Cir. 2006).

132 There were several images that were digitally scanned and assembled into a collage. Eventually these were used to produce bill-board size paintings. *Id.* at 247.

133 *Id.* at 253.

134 *Id.* at 248.

135 *Id.* at 252.

Consider *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*[136] in which the defendant included, without permission, songs owned by the plaintiff in a Las Vegas stage production. The songs, from the play Kismet, constituted about 10% of the show Hallelujah Hollywood.[137] Under the Copyright Act, Frank Music was entitled to any damages suffered plus any profit attributed to the work that was infringed. This included any indirect profits that could be associated with gambling, rooms, and meals.[138] In other words, the show, in which Kismet was a part, led not just to profits associated with the show but also had a promotional element in that it attracted customers to engage in other profitable activities.

It should be noted that the determination requires the plaintiff to establish gross profit due to the infringement while the defendant has the burden of subtracting out other costs to determine what portion of the net profit is the result of the infringement. In Frank Music, this meant determining how much profit could be attributed to ten minutes of a 100-minute stage show. Ultimately, the appellate court held that 2% was not clearly erroneous.[139]

Like notice or lack thereof and the generally vague standards for fair use, the remedial issue itself injects uncertainty into the breadth of what is protected. This, in turn, increases the likelihood of disparate expectations with respect to the value of these rights and the difficulty of transactions. In the case of remedial ambiguity under a property rule, it is even difficult to establish a contract curve.[140] For example, in *Frank Music*, the copyright holder would, in theory, accept no less than the actual damages suffered, but would bargain for that amount and as much of the profits generated by the infringement as possible. The buyer would want to keep as much of the profit as possible and certainly will not pay more than damages plus profit earned by virtue of the would-be infringement. But asymmetrical information will come into play. The copyright holder may not know what potential profits are,[141] and the secondary users will not be anxious to disclose. The secondary user may have little insight into the damages the copyright holder can legitimately claim. In fact, both are unlikely to know the limits of the contract curve[142] and the risk that either one

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[136] 886 F.2d 1545 (9th Cir. 1989).

[137] *Id.* at 1548.

[138] *Id.* at 1550.

[139] *Id.*

[140] A contract curve describes the range of prices that would be acceptable to both parties.

[141] If the copyright holder does know the potential profits that does mean that the sums involved would be part of damages.

[142] *See supra* note 83. A contract curve is a range of prices the parties could agree on that would leave at least one of them better off and no one worse off.

will make a less than optimal deal simply adds to the bilateral monopoly problem. In short, transaction costs are increased.

V. PROPOSALS

Contract law teaches us several things about an ideal copyright system. Four of them are expanded upon in this concluding section.

A. THE IMPORTANCE OF FORMALITY

Many of the elements of contract law—offer, acceptance, consideration, Statue of Frauds—can be viewed as formalistic, perhaps to a fault. These requirements, though, help rationalize the system by creating a record of what each party is to receive and to contribute to the transaction. They also lower the burden on courts of determining the intent of the parties, whether there has been a breach, and whether there is an appropriate remedy.

Copyright law is characterized by very little in the way of formality principally because of the internationalization of copyright.[143] For the U.S. this meant a change from requiring copyright notice to *permitting* notice.[144] The costs of this lack of formality can be high in two ways: parties may assume a work is copyrighted and not use it when it fact it is not protected and they may assume it is not subject to copyright when it is. If one takes the view the Copyright Act is, in effect, a form contract that a party can opt into, there may be little way to determine if an author believes he or she is party to the contract. The fact is that some works with notice are not eligible for copyright protection and many works without notice are eligible. The problem is exacerbated in that all works without notice include pre-1989 works that are in the public domain whether they are otherwise copyrightable or not.[145] Consequently, the absence of notice has different implications depending on the date of the work.

A number of consequences flow from this. First, without notice, the secondary user who has seen notice on other works may not understand that those without notice may still be protected. Risk-averse secondary users will avoid use of any existing works without notice including those in the public domain. Finally, the author who was in no way motivated by the promise of exclusivity may learn that he or she owns a copyright later and, at that point,

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[143] Notice is permitted under sections 401 and 402 of the 1976 Copyright Act.

[144] *See* 17 U.S.C. §§ 401, 402 (2006). An incentive to include copyright notice persists in that the presence of notice will defeat a claim by an infringer that the infringement was not willful. A willful infringement opens to the door to enhanced statutory damages.

[145] This was subject to a narrow allowance for repairing the lack of notice. 17 U.S.C. § 405.

begin asserting rights that should be reserved only for purposes of advancing the aims of copyright.[146]

International agreements leave little room to reinstitute a notice requirement like that that once existed but incentives could be increased to provide notice.[147] Currently, the lack of notice may limit the availability of statutory damages. This could be expanded upon by offering enhanced damages any time a work with notice is infringed. In short, the incentive to provide notice would increase but no notice would be required in order to recover standard damages. This could be joined with a modification or expansion of section 403 of the 1976 Copyright Act. Sections 401 and 402 permit the inclusion of copyright notice. Section 403 permits authors of works that are predominately composed of United States government to include notice only if portions of the work that are protected are identified. In short, section 403 does not require notice but, if there is notice, the portions of the work that are protected must be identified. Similarly, all authors wishing to take advantage of remedial enhancement of damages by including notice could be required to identify the elements of a work they deem protected and those that are not.[148] The obvious analogy here is a contract that specifies the duties of both parties. Another possibility, although not recommended here due to the problems with property rules discussed above, is to only allow recovery of the profits made by the infringing party if the work included copyright notice.

B. APPLYING THE BARGAIN PRINCIPLE

Perhaps the most difficult problem to address relates to the notion of the bargain principle underlying consideration in contract. There are two aspects to this. First, when a work would be available without copyright protection, there is little reason to grant protection. Second, not every work requires the same copyright inducement in order to be created. As an extreme example, when a work creates great wealth, a shorter contract duration or a charge for any protection would be more consistent with contractual behavior.

Currently in a copyright action, there appears to be a presumption that any work qualifying for copyright protection is, in turn, a product of that protection.

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[146] At this point the negative impact of not requiring notice may be fairly small. Most works in circulation carry notice and the change in the law as of 1989 was that notice was not *required*. Nevertheless, as copyright practice evolves, the practice of not including notice may increase as will the uncertainty about which work may or may not be used without permission.

[147] *See supra* note 124.

[148] Even the portions identified as not protected may still be protected; otherwise, this proposal would amount to a notice requirement. The remedy for infringement of those portions viewed as not protected would result in decreased damages.

That is, the party creating the work did so because of the exclusivity granted. Common sense tells us that is actually not the case. A small step toward rationalizing copyright law would be to make that presumption rebuttable. In short, a secondary user who could show that there was no cognitive connection between the creation of the work and a belief in exclusivity would shift the burden to the author to demonstrate at least some element of reliance on the exclusivity copyright offers. Although possibly radical, such a requirement would have no impact on the output of creative works. Instead it would lower the cost to the public of exclusivity in cases in which it was of no consequence.[149] Moreover, it would adhere closer to the Constitutional provision that copyright exist "To promote" public welfare. There can be no incentive or promotion when works are created without regard for copyright protection.

C. THE CONCEPT OF BREACHING AUTHORS SHOULD BE DEVELOPED AND FORMALIZED

In contract law, parties who enter into a contract but do not perform are typically liable for damages. In a sense, copyright is consistent with this in that a party who claims to qualify for copyright protection and claims there is an infringement will not succeed on that claim if he or she had not performed. That, however, is only part of the problem. Even if there is no infringement action, a false claim of copyright generates damages for those who pay for licensing and those who are discouraged from using the work even though it is part of the public domain.[150]

Once an author claims copyright and does not "perform" there is, in effect, a contract breach. The damage is generalized and most private parties are not well suited for responding. In this sense, the contract analogy breaks down. In fact, there may be positive externalities associated with the exposure of false copyright claims.[151] In these instances, the proper remedy is an agency action. In effect, the false claim of copyright is more like misrepresentation or unfair competition. Fines and cease-and-desist orders, in cases of false copyright claims, are probably only at this point a distant possibility, for the policy for a reaction is a compelling one.

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[149] Whether this would require amendment of the Copyright Act is not clear. If one relies on the language of the Constitution, enforcement of the Act when an author has no expectation of exclusivity when creating a work does not "promote" the "Arts and Sciences." There may be room for a public policy defense to infringement actions to develop.

[150] *See generally* MAZZONE, *supra* note 45.

[151] An individual party successfully challenging the validity of a copyright claim may benefit but will not internalize the benefits to others of having the false claim exposed.

D. THE REMEDY FOR INFRINGEMENT SHOULD BE DAMAGES

The standard remedy in contract law is damages—the application of a liability rule. Whatever the basis for the rule in the context of contracts, copyright presents an even more compelling case. As noted in the discussion above,[152] property rules protect subjective values. In many instances, this makes sense from an economic standpoint. In copyright, though, this is turned on its head. Any subjective values are tantamount to moral rights. Not only does the Copyright Act protect moral rights at a very minimal level, it is clear that the Act invites works to be used in ways an author would find objectionable.[153] Any notion that subjective or sentimental values should be accounted for is inconsistent with the theme of the Act. Moreover, the current remedial regime merely adds to the costs of contracting. In fact, there are no legitimate copyright interests protected by a property rule that are not protected by a liability rule at a lower social cost.

VI. FINAL THOUGHTS

Copyright law could learn a great deal from basic contract law principles. The analogy is an appropriate one because the public does, in effect, buy the creative efforts of authors in exchange for limited exclusivity. Yet, the benefits of a contract law approach have, for the most part, fallen victim to political and narrow financial pressures that disconnect copyright from a general welfare-maximizing policy. The "deal" struck by the agents of the public bears little resemblance to a negotiated outcome. Starting from the point of view of what would happen in a low transaction costs context, this Article suggests adjustments that would lead to a better outcome are possible in the transaction costs environment of copyright law.

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[152] *See supra* notes 84–88.

[153] Criticism is one of the mainstays of fair use. In addition, it has been cited as a way to reconcile the restrictions on speech created by copyright with First Amendment protections. *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 554–59 (1985); Eldred v. Ashcroft, 537 U.S. 186, 218–28 (2003).