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ON LEGAL PROTECTION FOR ELECTRONIC TEXTS: A REPLY TO PROFESSOR PATTERSON AND JUDGE BIRCH

Douglas Y'Barbo*

Astronauts in the weightlessness of pixelated space
Exchange graffiti with a disembodied race
—Neil Peart, Virtuality

I. INTRODUCTION

The purpose of this Article is to respond to a recent article by Professor L. Ray Patterson and Circuit Judge Stanley F. Birch, Jr. entitled Copyright and Free Speech Rights, published in a prior issue of this Journal. Professor Patterson and Judge Birch (“the Authors”) have written a thoughtful article obviously worthy of reflection. Indeed, the provocative view taken by the Authors I suspect will become mainstream copyright law in the near future. At the highest meaningful level of abstraction, the Authors call for immunity against certain types of copying of protected works on First Amendment grounds. The Authors do not divulge their thesis right away; indeed, identifying the Authors’ thesis takes some work.

II. IDENTIFYING THE AUTHORS’ THESIS

A. COPYRIGHT LAW VERSUS THE FIRST AMENDMENT?

Immediately upon reading the article’s title, one wonders why, in 1997, someone—let alone a noted copyright scholar and a highly regarded jurist—would be interested in revisiting a topic long ago resolved, namely the conflict between Copyright and Free Speech.

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For instance, from the Supreme Court a little over a decade ago: "In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." And from Professor Goldstein just a few years ago: "[Compulsory licenses, fair use, and the idea/expression dichotomy] have buffered copyright from charges that it violates the First Amendment's guarantees of free speech and press."

The Authors claim that the First Amendment is not a regular part of copyright discourse. I am not convinced that it should be. Surely we should not require a judge to account for every contiguous legal regime that nominally implicates copyright law. First Amendment protections, as we shall see, are already embedded in contemporary copyright law. Therefore, we need not revisit them ab initio each time a copyright case is decided. Copyright law, left to its own devices, would not, I suspect, ultimately decay into a regime of absolute protection for original works of authorship. Indeed, copyright contains its own iterative mechanism. In other words, the legal rule that authors would prefer ex ante is not necessarily stronger protection; stronger protection increases the cost of access which in turn raises the cost to authors of creating new works. I shall illustrate this in the brief digression that follows.

B. BRIEF DIGRESSION I: TWO COMPETING PARADIGMS

In brief, I believe the Authors misstate entirely the core dilemma; the balance that copyright law must strike is not between authors and the public—to whom the First Amendment is directed—but between existing authors and future authors. The public, though properly excluded from any equation to determine the preferred degree of protection, is better off regardless of where the line is drawn that depicts the breadth of the author’s exclusive rights.

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Between a world with no protection for creative texts and one with protection (either in the form of monopoly protection or direct subsidy), the public is unquestionably better off in the latter. This requires some explanation.

There are two distinct rationales to justify protecting an author's works by means of a property right. These two rationales are used to justify the view that the only legitimate goal of intellectual property law is to calibrate the incentive benefits of legal protection against the deadweight loss of monopoly pricing versus the polar view that ownership of rights in one's creative works are analogous to rights of the person, and therefore resistant to sterile economic analysis, which might permit intrusion upon those rights if the author suffers no direct economic harm.

The first of these two rationales is the romantic vision of the independent creative genius, perhaps grounded in natural law, though its etiology is probably more complicated than that. This view compels the conclusion that an author has a property right in what he created just as if it were a parcel of land (though not of course necessarily in the physical article, but in the intangible expression). By contrast, the second view is that copyright is merely an instrument of public policy designed to encourage the creation of original works of authorship. It is alternatively known as the "instrumentalist" justification or the ex ante perspective. The latter rationale would support an easement across another's property if it did not harm the property, the former, perhaps not. Obviously, the scope of copyright protection is broader under the first rationale than under the second. Under the second, the infringement standard is calibrated roughly according to the economic incentives needed to encourage the author to create the work. More precisely: beginning with no protection whatever, what is the point where if the last increment of protectability was removed, the author's incentives to create the work would be quashed, or at least seriously diminished?

Which of these two competing rationales of copyright is embodied in modern copyright law? No doubt it is infused with both. And

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4 These two competing rationales are examined together in several works. See, e.g., Goldstein, supra note 3, at 15; Mark Rose, Authors and Owners: The Invention of Copyright 140 (1993).
the dominance of one over the other perhaps depends upon the subject matter, more than anything else. For instance, the infringement standard by which databases and factual compilations are judged reflects a hard-edged reality of minimal, incremental creativity driven only by the prospect of commercial gain. Economics, rather than aesthetics, controls this domain: the infringement standard is mechanically applied and looks only toward what the accused infringer took. By contrast, the infringement standard applied to literary works is premised on the notion of preserving the original author's aesthetic appeal, which innervates the entire work, rather than being embodied in one particular element or another. Hence, the infringement standard asks whether an "ordinary observer," after a leisurely—rather than critical—reading of both works would regard their aesthetic appeal the same. The standard applied to literary works seems to appreciate the work—or some ephemeral part of it anyway—as the author's personal property. On the other hand, the database standard seems to reflect not only an indifference towards the author, but also a recognition that the creation of original (hence useful) products must not be discouraged by permitting unrestricted copying.

Moreover, the particular commercial setting may favor one justification over the other. For instance, the difficulty with calibrating an infringement standard on economic incentives is that the threshold point varies drastically according to medium and industry. Indeed, in many industries, there is arguably little need for copyright protection to compel vigorous creation of original works of authorship, which of course, is an argument for narrow protection. For instance, in the software industry—an industry in which new products quickly become technically obsolete—the lead time advantage enjoyed by the first entrant may be sufficient incentive. Infringement of scholarly writing (by other scholars) is enforced, no doubt, by numerous professional and quasi-professional bodies whose sanctions can be far more severe than an infringement verdict in the courts. According to one commentator: "Plagiarism is an academic capital offense, punishable by academic death for students or faculty." Similarly, the film industry has a

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strict code which discourages stealing ideas from others in the
industry.⁷

The romantic conception, in contrast to the instrumentalist
justification, unfortunately suggests no reliable endpoint to
measure the proper level of protection, short of an absolute
proscription of copying in any manner. Thus, the instrumentalist
justification generally supports an infringement standard more
tolerant of copying than the romantic justification. And yet, a
higher level of copyright protection rarely benefits the author who
pays for that higher level of protection ex post in increased cost of
expression due to restricted access to others’ works upon which he
must necessarily draw. Therefore, an author somehow benefits no
matter where the line is drawn, so long as it is clearly drawn.

Hence copyright law must strike a delicate balance between
providing incentives to authors in the form of legal protection
against copying their works and not squelching those incentives by
so raising the level of protection that future authors may not draw
freely upon the stock of prior works without fear of infringement.
Hence, the balance is between ex ante authors on one end and ex
post authors on the other: the same author who is denied protect-
ability of the ideas contained in his novel against an accused
infringer, benefits ex post because he can borrow other authors’
ideas freely when creating his next work. Thus, his incentives to
create, though diminished by the narrow scope of protection in his
own works, is revived by a reduced cost of expression, or cost of
creating subsequent works, since he can borrow liberally from other
works without fear of infringing or obtaining a license. It is rare
that the same group is being balanced at both ends by the rule,
often a legal rule balances the interests of two different groups
such as debtors and creditors, common carriers and passengers,
businesses and consumers, or public corporations and private
investors. The significance of this astonishingly simple paradigm
is that beyond a certain point, increased copyright protection will
actually decrease authors’ incentives to create new works, because
curtailing access to the stock of available material raises their cost
of expression.⁸

⁸ Thus, at least in copyright law anyway, the tension over where to draw the line
separating protectable from unprotectable matter is largely overstated. Indeed, I see it as
a pointless exercise. Shifting the standard in either direction simultaneously benefits
So, when viewed *ex ante*, authors as an entire group, are by and large indifferent to the scope of protection afforded their works. Of course most authors and artists would disagree because they want the best of both worlds. Whether an artist becomes incensed when he or she finds out that a work is a substantial copy from a prior work does not infringe, depends, for instance, upon whether the artist is a rocker or a rapper, a celebrity author or biographer, or a postmodern artist or impressionist. My point is: clearly some authors and artists are net borrowers, while others are net contributors. In this section and in this Article, I am speaking generally. In an ideal world, legal protection in the form of copyright would be carefully titrated so that the level of protection exactly matches the point where one less unit of protection would substantially diminish the author's incentives to create the works. In other words, no more legal protection is given the author than is necessary. At least if one accepts the instrumentalist justification of copyright over the romantic conception, then copyright is not about helping the copyright owner squeeze every last dime out of his property right. Instead, it is about carefully calibrating the level of protection based on the necessary incentives required to

(views *ex ante*) and harms (viewed *ex post*) authors. So, within broad boundaries, there exists a spectrum of "correct" standards, beyond that, determining the scope of protection is a pure policy decision, not a legal or intellectual one. But although it is a policy decision, one should not expect it to be made by policy makers (i.e., legislators). That is because calibrating the desired scope of protection is confounded by the heterogeneity in the types of works (novels, movies, biography, sculptures, stuffed animals, and so on) and the types of industry within which the works are created and disseminated. Hence, the legal rule would have to take the form of highly-specific regulations directed to one work or industry at a time. This also implies that the rule may vary from medium to medium (e.g., one for computer software, another for literary works, and so on).


10 See Salinger v. Random House, Inc., 811 F.2d 90, 1 U.S.P.Q.2d 1673 (2d Cir. 1987) (holding defendant Random House was not protected by fair use when publishing a literary biography of plaintiff J.D. Salinger which included quotations, and paraphrased text from the letters of Salinger).

11 See Rogers v. Koons, 960 F.2d 301, 304, 22 U.S.P.Q.2d 1492, 1494 (2d Cir. 1992) (holding sculpture created by defendant Koons from a photograph taken by plaintiff was not protected by the fair use doctrine even though Koons intended the sculpture to be an accurate depiction of the photograph for purposes of social criticism, in the tradition of Andy Warhol, Robert Rauschenberg, and David Salle).
compel the author to create the work. Any additional protection will diminish the incentives of future authors to create, who must pay for that increased protection in the form of higher costs of creation. Therefore, the author-author tension ensures that copyright protection is stably constrained, without the need for explicit consideration of the public interest.

C. CONFLICT

The Authors begin by alerting us to a "conflict" between copyright law and the First Amendment. Since copyright law grants to authors a right to exclude others from copying, it is in natural and obvious conflict with the First Amendment, which regularly immunizes violations of such restrictions.

Yet despite what the Authors may say, there is nothing unusual, nor even interesting about a "conflict" between two different laws; that laws conflict is certainly not a penetrating insight. Indeed, copyright law conflicts with just about every other law with which it comes in contact. For example, copyright law conflicts with state uniform commercial codes on the issue of how to properly perfect a copyright as a security interest for loan collateral.12 It also conflicts with contemporary estates laws.13 And, copyright law also naturally conflicts with state and federal antitrust laws.

The fact is, both the guarantee of protected speech and a government-backed monopoly for original works of authorship derive from separate constitutional provisions. The majority view is, as Justice O'Connor made very clear in Harper & Rowe, that the two regimes exist in taught juxtaposition, despite their apparent opposing purposes.14

D. THE AUTHORS’ REAL THESIS

Professor Patterson and Judge Birch must have had something else in mind in writing their article if their purpose was not merely

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14 See Harper & Rowe, 471 U.S. at 559.
to identify a long-resolved conflict. Indeed they did. What I have identified as the real thesis of their article is this: due to advances in technology, the way in which people obtain access to copyrighted works has changed due, in turn, to the way in which authors/copyright owners make their protected works available to the public. Whereas before, Patterson and Birch argue, an author would sell *copies* of his work, today he sells *access* via an on-line provider. In other words, digital storage and transmission is rapidly replacing hard-copy publishing. Patterson and Birch’s point is that the Free Speech Clause subsumes a right of access, which was never a problem until access became the very thing being sold, which means withholding access from the public until purchased. To be more specific, simply reading a book borrowed from the public library is not infringement, nor has it ever been. Section 106 of the Copyright Statute lists the exclusive rights granted to the author, and the exclusive right to “use” is not one of them. So we know that the copyright law at least provides a minimum right of access or a right to use, if only implicitly. Yet, technically speaking, “pulling up” an electronically recorded document on a computer is more than just use; it is actually making a “copy” of the work, which is an infringement. The Authors argue, since access cannot occur without infringement, digital storage and transmission technology has foreclosed this important right by making mere access (“use”) an infringing act. Therefore, they argue, the First Amendment’s guarantee of a public right to hear is violated. This is a fair point.

Next, the Authors state that the First Amendment must be invoked to mitigate this obvious censorship caused by the copyright protection of creative works transmitted and stored by electronic media. Finally, the Authors suggest, without offering any evidence

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16 Hereafter, I shall use the term “author” to refer to the actual copyright owner or licensee (quite often the publisher).

17 Actually what Patterson and Birch say is that the First Amendment embodies a “right to learn.” They offer no support for this formulation, though my own research suggests that this is reasonably close. Years ago, the late Professor Meiklejohn argued that the First Amendment defines a “community right to hear” rather than an individual right to hear. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: CONSTITUTIONAL POWERS OF THE PEOPLE 26-28 (1965).
to corroborate their thesis, that copyright's overreaching in these instances is due to its misconception as a property right, when instead, the real focus should be on merely protecting the author from market harm.

In summary, according to Professor Patterson and Judge Birch: (1) copyrighted texts stored and transmitted by electronic media are overprotected by copyright since mere use or access cannot occur without copying the work, which is an infringing act; (2) the First Amendment must be invoked to constrain copyright's reach in this instance; and (3) the problem is due, in the first instance, to the misconception of copyright as a property right. I shall address these in turn, but before I do, I want to point to a crucial assumption unstated in the Authors' work, that the effect of infringement is to expose protected works to a larger audience. In the short run this is certainly true, though for how long it will hold is another matter. Diminished protection for creative works will inevitably curtail their creation, which no one seriously doubts.

E. COPYRIGHT LAW AND THE PUBLIC DOMAIN

Ultimately what is motivating the Authors is their perception that copyright law has undergone a "major transformation in terms of its function that alters its purpose." As evidence of this transformation, they point to the emergence of legal fictions (e.g., the author's employer becomes the author in certain instances; a radio transmission becomes a statutory "writing;" and a mere "compilation" of previously copyrighted materials is eligible for copyright protection). These fictions, the Authors argue, have actually frustrated the purpose of copyright law, which the Authors identify as the public's right to learn. I disagree. I disagree that these fictions have frustrated the purpose of copyright law, and I disagree that the purpose of copyright is to protect the public's right to learn. Below, I shall discuss each of these "fictions."

18 Notwithstanding the occasional effort to prove otherwise, see, e.g., Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970). Copyright results in a net increase in creative output; therefore, how is it possible that copyright can have a net "adverse . . . impact on the right of the people to know"? Patterson & Birch, supra note 1, at 3.

19 Patterson & Birch, supra note 1, at 12.
First, the purpose of a copyright is to encourage the creation of original works of authorship. Thus, the law functions most efficiently by identifying those actors who best respond to the incentives provided by copyright law. Sometimes that is the creator herself, sometimes it is her employer. For instance, if copyright law forbids the creator to transfer ownership of the copyright to the employer (e.g., publisher), the result—far from protecting the creator—would instead be diminished pecuniary award to the creator.

Second, subsuming radio transmissions under the rubric of a "writing" merely enables the copyright law to protect a radio broadcast, which often never appears in any more tangible form. Thus a radio broadcast is subsumed within the definition of a writing, rather than separate provisions, (e.g., on executive rights, infringement, etc.) in the code relating to radio broadcasts.

Third, and most importantly, the Authors are horrified that copyright law is responsible for removing texts from the public domain. Again, I strongly disagree with this assertion, though the Authors are not the only ones to express this view.20 Suppose an author creates a database of all intellectual property lawyers in Houston, Texas, separated by specialty, and cross referenced by firm. Included under each listing, along with the perfunctory biographical information are: reported cases tried by that lawyer, clients represented, and publications authored by that lawyer. Obviously, all of this information, separately, exists in the public domain. Indeed, I could probably compile such a database sitting in my office right now, using only a name directory of all Houston lawyers, and the electronic resources available on the Internet and WESTLAW. Yet an author could certainly obtain copyright protection for such a database.21 Next, suppose the

20 This fear has been expressed elsewhere. See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 209 n.8 (1996).

21 This work would be protectable as a "compilation" which is defined in the Copyright Code as a "work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1994). Section 103(b) states that, "[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." 17 U.S.C. § 103(b) (1994).
author makes the database available electronically (which is likely since it would need to be updated frequently) via the Internet, and he charges a fee to obtain a password to access the database. This is the informational holocaust with which Patterson and Birch are so concerned. But what has the author removed from the public domain? Nothing. A copyright has a scope, and either a particular element comprising the text lies within the scope or it does not. All of the original sources freely available to him that he used to compile the database are still available to everyone, just as they were before the author prepared the database. All that has changed is that now the public has the option of obtaining the information piecemeal from a variety of public domain sources, or to pay a fee and get the information more conveniently from a single source. Nothing has been removed from the public domain.

Consider another example. Several years ago, the film Driving Miss Daisy ("DMD") was released to the public and received critical as well as popular acclaim. As the reader may recall, this movie told the story of an elderly white Jewish person who, faced with advancing age and the consequent loss of independence, must enlist the assistance of a black helper (chauffeur). The relationship is initially tenuous, strained by the master's deeply held attitudes and beliefs toward both race and social class. Yet the relationship undergoes a metamorphosis from a purely employer-employee one to a devoted friendship, thereby depicting the erosion of firmly entrenched racial barriers, an erosion that occurs largely through the patient mentorship of the servant towards the master. My point is this: DMD is certainly "original" in the literary sense, though it is really no different from the Authors' (and my) database example. In other words, this work—like every other literary work ever created—is comprised of elements that the author contributed himself, and those that he borrowed from the works of others. For instance, the particular master/servant theme is perhaps the essence of this work, i.e., the element that gives DMD its aesthetic appeal—and yet it is hardly original. Indeed, this theme has a venerable literary tradition, from which DMD's author liberally

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22 See, e.g., Douglas Y'Barbo, On Section 411 of the Copyright Code and Determining the Proper Scope of a Copyright Registration, 34 SAN DIEGO L. REV. 343, 345 (1997) (providing a workable definition of "scope").
borrowed. This theme has been refined through such literary masterpieces as Cervantes' *Don Quixote*, Twain's *Huckleberry Finn*, Smollett's *Roderick Random*, Fielding's *Joseph Andrews*, Diderot's *Jacques the Fatalist*, and Dickens' *Pickwick Papers*. More specifically, elements from each of these works can be found in *DMD*. For instance, the transformation of the formal employer-employee relationship into a genuine friendship (i.e., the dissolution of the master/servant relationship) and the quasi-paternalistic tenor of the relationship (servant towards the master) which comprise a large part of the aesthetic appeal in *DMD*, are also major themes in *The Pickwick Papers*, and *Huckleberry Finn*. Nor is the treatment in *DMD* of the servant as a true equal—perhaps even a superior who educates the master—an original variation of the master/servant theme, having been previously explored in *Jacques the Fatalist*.

So, does *DMD* remove anything from the public domain? Should we condemn *DMD* as an impermissible usurpation of the public domain—and therefore deny it protection by copyright? According to the Authors we should.

III. ELECTRONIC MEDIA AND PUBLIC ACCESS

A. BRIEF DIGRESSION II: TECHNOLOGICAL CHANGE AND THE COPYRIGHT LAW

Before I engage the Authors' thesis, I shall require a second brief digression. With respect to technological advances and their potential impact on copyright law, we should be careful not to overreact. At present, an urgent movement has coalesced to develop a third intellectual property paradigm to protect nascent technologies (e.g., Internet-related software, artificial intelligence-related systems) thought to be insufficiently protected by current regimes. For instance, prior to 1971, record manufacturers were forced to rely upon state misappropriation law to protect sound recordings; then in 1971, Congress passed the Sound Recordings

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23 See Symposium *Toward a Third Intellectual Property Paradigm*, 94 COLUM. L. REV. 2307 (1994) (discussing the need for stronger legal protection in this field, as well as providing proposals for such protection).
Amendment to the Copyright Code. This perceived need, of course, implies a failure or inability of copyright and patent law to adequately protect these technologies, sufficient to encourage the desired level of investment. I find the current orthodoxy—that a new paradigm is needed to protect emerging technologies—seriously myopic.

If we enacted a new intellectual property law every time a new technology arose, then we would be overrun with them by now. Indeed, whenever such a new technology arises, Congress or the Supreme Court (sometimes both) have always provided a timely response—whether the change has been with respect to photographs, movies, phonographic records, high-speed photocopiers, or video cassette recorders. When they first appeared, all of these technologies posed apparently insurmountable difficulties for certain classes of authors, for which the Copyright Code provided no relief, and in every case, Congress promptly amended the Code. For instance, prior to 1865, a photograph was apparently not protected under the then-current copyright law (because it was not technically a writing). Therefore, in 1865 Congress amended the Copyright Act to expressly include photographic prints within its protectable subject matter. The next major technological advance was recorded music. Prior to 1905, the act of making a recording by, for instance, a piano roll or phonograph did not appear to infringe the copyright in the musical score. In 1905, Congress amended the Copyright Act to close that technological loophole. Another example occurred in 1912 when the Supreme Court first condemned infringement of a motion picture under the Copyright Code. One year later, Congress again amended the

Copyright Statute to include movies. The explosive advances in high-speed photocopying in the 1960s and 1970s created entirely unforeseen problems, particularly for publishers of scholarly journals, which the copiers generally claimed was a "fair use." In response, the 1976 Act included a provision (§ 108) which permits the owner of the copy to make a single additional copy. The increased use of home videotaping machines (VCRs) led to a similar problem—private viewers could tape an entire copyrighted television show and watch it later. Again, the Supreme Court responded to create a safe harbor for this type of copying ("time shifting"). These few examples should suffice to show that a technological advance that implicates the copyright law is followed immediately by a suitable legislative or judicial response.

B. EXECUTIVE AND LEGISLATIVE RESPONSE

The reader interested in the problem described in this Article should be aware of the executive and legislative responses to the problem. First, in February 1993, President Clinton formed the Information Infrastructure Task Force (IITF) to develop and implement the Administration's vision of the NII, or National Information Infrastructure. The IITF has three components: the Telecommunications Policy Committee (TPC), the Common Application of Technology (CAT), and the Information Policy Committee (IPC). The IPC in turn formed a group known as the Intellectual Property Rights Working Group, which was charged with the formidable task of assessing the adequacy of the Copyright Act to protect works created, stored, or disseminated in electronic media. The Group's recommendations were published in September 1995 in "Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights." This report is more commonly known as the

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“NII White Paper” or just “White Paper.” Overall, the White Paper recommended only modest changes to the copyright law.\textsuperscript{33} Identical bills were quickly introduced by Senator Orrin Hatch and Representative Carlos Moorehead, adopting the working group’s recommendations. This legislation called for, among other things, amending sections 101 (definitions) and 106(3) (enumerating the exclusive rights) of the Copyright Act to make clear that the right of public distribution applies to computer network transmission of copyrighted copies and phonorecords.

C. DOES ELECTRONIC TRANSMISSION AND STORAGE CURTAIL ACCESS TO COPYRIGHTED WORKS?

Second, what is the net effect of the development of the Internet on the public’s access to copyrighted works? Either the network transmission and storage results in a net increase in public access to copyrighted works or it does not.\textsuperscript{34}

“Electronic publishing,” from an author/copyright owner’s point of view, is simply an alternative means of disseminating his or her work. Whether to disseminate it in hard copy or electronically is driven by two factors: (1) the cost and (2) the target audience. The first of these is of interest here. Generally speaking, it is far cheaper to electronically publish than to publish by the usual hard copy means. Of course, the best way to reach the largest audience is to exploit both media, though this is often not possible. Recently, for instance, at least two law schools have decided to publish student-edited law reviews entirely on-line; no concurrent hard-copies will be printed, which is the very thing that Patterson and Birch are concerned about.\textsuperscript{35} I have no doubt that cost was the major issue here, given the shoe-string budgets and small subscription lists of most specialty legal journals. In other words, without the availability of electronic publishing, these journals would very likely not exist. So, electronic publishing provides either a medium in addition to hard copies, in which case there is no issue of

\textsuperscript{33} Id.

\textsuperscript{34} Many commentators see the Internet as a net benefit to public speech. \textit{E.g.}, R. Bruce Rich, \textit{Fundamental First Amendment Issues in Relation to On-Line Liability}, 11 ST. JOHN’S J. LEGAL COMMENT. 665 (1996).

\textsuperscript{35} The law schools are the University of Michigan and Boston University.
curtailed access, or an alternative medium. That electronic publishing is far cheaper than hard copy publishing suggests that the former was chosen over the latter for this reason, which in turn suggests that these works would either not exist without electronic publishing or would not be disseminated at all but for this medium. Therefore, any suggestion of curtailed access due to electronic publishing is suspect.

Indeed, almost anyone will tell you that electronic media has exponentially increased public access to copyrighted works. Millions of copyrighted documents are made available to the public through the Internet at no cost. Moreover, a user does not need to pay an on-line service provider, which is often the most significant cost to access. He or she can instead rely on a direct connection, and the cost of direct connections have been dropping rapidly.\(^3\)

Currently, there are more than 130 public-access free-nets around the United States.\(^3\) For instance, residents of Houston, Texas can now get Internet access absolutely free, and for those without a computer, the accounts can be used at terminals at area public libraries.\(^3\) The coalition providing this service, moreover, now plans to provide graphical Internet accounts to teachers in the Houston area.\(^3\) Across the entire United States, one in four libraries now offers free on-line services.\(^4\) In addition, the federal government has ambitious plans to boost that number.\(^5\) The Federal Communications Commission announced plans to help set up low-cost Internet access at libraries throughout the United States.\(^6\)

Additionally, the majority of the copyrighted works made available through the Internet are provided to the public with

\(^3\) On-line service providers, such as America On-line, for which the user is charged, do not technically charge for access to the Internet but rather offer such features as indexing, customer support (i.e., on-line help) and easy-to-use interfaces, which provide quicker access.


\(^3\) Id.

\(^3\) Id.


\(^4\) Id.

\(^6\) Id.
unrestricted access. Of course, access is restricted to some works, though these restrictions are the exception and not the rule.

How does this framework compare to Patterson and Birch's model scenario, which I shall assume is "the public library?" Anyone who has lived in a large urban area knows that getting to the public library is a challenge, and though it is nominally "free," in reality, it is anything but free: to park and to get a library card costs about twenty dollars in Chicago, for instance. Once at the library, the cost of the library card does not include one's copies of selected pages of the book; if you do photocopy, it costs about ten cents per page. Add to those costs search time, travel time, and opportunity costs, and it becomes obvious that public access to copyrighted works in hard copy is far from free.

I have just discussed the net effect of electronic media on public access to copyrighted works. The clear consensus is that the result is an overwhelming increase in access. No one would seriously doubt this. But suppose this increase in access is not enough for Patterson and Birch. The Authors may reply that, access aside, a comparatively small subset of works are available only online and for a fee. Practically speaking, this is a truly de minimis concern, as we shall see.

Again, consider all works published in electronic form. Some are made available free of charge, others are not. Of those works that are, many, and probably most, are also available in hard-copy form. Obviously, the only concern of Patterson and Birch is those works for which no free access is provided and no hard copy was published. The Authors attack the medium as a whole, so I direct my response to the medium as a whole.

The question becomes, what is the real cost of access to those works? I suggest that the cost is very low—indeed near zero—certainly too low to implicate the First Amendment, or any other constitutional provision. To see this, consider each work as having a price for access. The user does not typically pay for access to each work, even for those works that are not free, but rather is charged in the form of "service" or "access" fees. I suggest that this

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43 See, e.g., Jane C. Ginsburg, Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace, 95 COLUM. L. REV. 1466, 1476 (1995), and references cited therein (defining and discussing shareware).
access fee must be divided by the number of works made available for this fee—which is staggering—to arrive at the true access cost per work. Otherwise we cannot assess the true impact of the medium as a whole on public access. When we do this arithmetic, we find that the cost of access per work is very near zero.

Still, this seems unsatisfying. The Authors have identified a deep philosophical problem, one brought on by the inevitable advance of technology, and one not likely to go away. Therefore, I am troubled by simply offering a practical answer—one based on statistics and practical enforcement concerns. Is there a philosophical or jurisprudential answer to Patterson and Birch's claim?

D. ON-LINE ACCESS VERSUS INFRINGING BY COPYING

A crucial assumption to the Authors' thesis is that mere access to copyrighted works is infringement. They may be correct, though this assumption is far from trivial. The idea is that viewing a document or file on a computer's monitor requires downloading the file in digital form from the computer's RAM, hence, a "copy" of the document is made. Despite earlier decisions to the contrary, the prevailing view appears to be that copying digital information into a computer's RAM is "copying" for the purposes of § 106 of the Copyright Statute. Still, not everyone agrees that this is an infringing act.

44 For a highly detailed discussion of this issue and related ones, see Fred H. Cate, The Technological Transformation of Copyright Law, 81 IOWA L. REV. 1395, 1415 (1996); John Gladstone Mills, Entertainment on the Internet: First Amendment and Copyright Issues, 79 J. PAT. & TRADEMARK OFF. SOC'Y 461, 482 (1997).

45 Of course, loading the file onto the computer's hard drive or onto a diskette is also "copying". In fact, many personal computers allow the user to apportion some of the hard drive's space to act as a "RAM cache," thus effectively increasing the amount of RAM, and hence retrieval speed. This feature, of course, only strengthens the argument that RAM copies are infringing copies.

46 See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519, 26 U.S.P.Q.2d (BNA) 1458, 1460 (9th Cir. 1993) (holding that a RAM copy is an infringing copy); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.08A[1], at 8-113-115 (1997); CONTU Report at 13. But see Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1243 n.3, 219 U.S.P.Q. (BNA) 113, 126 n.3 (3d Cir. 1983) ("In contrast to the permanent memory devices a RAM (Random Access Memory) is a chip on which volatile internal memory is stored which is erased when the computer's power is turned off.").

The Copyright Code does not proscribe use; for example, reading a book is not infringing it: the copyright law excludes, based upon the list of exclusive rights granted to the author, mere “use.” The Authors know this; indeed, it is for this reason that they claim electronic storage and transmission media (versus hard-copy publishing) raise First Amendment concerns, because mere use (for example, making an ephemeral copy in the computer’s RAM) now becomes infringement. Put another way, there is no way to use a digitally stored text without infringing it.

The omission of “use” from the list of infringing acts can be read as implying a right under the copyright law to public access of copyrighted works. Yet, in some instances, this mere use/access may conflict with an author’s exclusive right. I suspect this is the “conflict” that the Authors actually had in mind, and indeed it is a genuine one. The question is then, do we continue to allow use—though it encroaches on the copyright owner’s exclusive rights—or do we proscribe use in this instance? I suspect, though I am not sure, the answer is yes to the former. This is the same answer that the Authors give—though we do not need to invoke the First Amendment to justify this result. More precisely, the argument that the Copyright Statute unambiguously provides an absolute right of access to copyrighted works is persuasive, or at least appealing. A right that cannot be usurped by technology. And according to this argument, authors who choose to commercially exploit their works over a different medium in which mere use conflicts with an infringing act, must also make another choice: to either refrain from publishing their work in that medium or license nominal access to the public.

In this next section, I shall discuss why I believe the problem the Authors have identified is particularly difficult to resolve. By this I mean that we should be skeptical of the trivial justification offered by the Authors: merely permitting the RAM copy because the market impact is negligible.

E. CONSUMER ACCESS VERSUS COMPETITOR ACCESS

The Authors also try to justify private copying by distinguishing it from normal commercial exploitation of the work. This consumer/competitor distinction is absurd. For one thing, what good is
healthy competition if there is no demand for the market’s goods/services? And for another, the traditional justifications, upon which the Authors implicitly rely for invoking fair use against private copying, may not apply in the cyberspace setting.

First, private copying has traditionally been justified on the ground that enforcement is too impractical; hence the copyright owner has impliedly licensed the work for private copying. The end users are too numerous, too disperse, and too difficult to identify, to efficiently sue. Of course, this argument in favor of a private copying exception has been largely discredited by law and economics scholars who argue that immunizing private use under these instances discourages the creation of collective licensing societies, such as ASCAP, BMI, and the Copyright Clearance Center. The essential purpose of these societies is to reduce transaction costs between the copyright owner and the millions of copiers. This solves the problem from both ends. For the user, one license allows the user to copy all works covered by the blanket license without negotiating separately with each author. And for the copyright owner, license revenues are pooled to create an effective enforcement mechanism.

Second, private copying is often justified on the ground that it is economically insignificant. In some settings this view is correct. For instance, a large bookstore certainly competes with public libraries, since a potential customer can go to the library, read the book, and photocopy a few important sections of it at a very low cost. But overall, economic harm from this source is negligible, and therefore publishers are more or less indifferent to private copying. Now imagine a different setting: the Internet. The difference here is that there is no bookseller or middleman between the publisher and the reader; all “customers” are identical, whether they are private copiers or large commercial organizations. Put another way, the development of the Internet, as a viable commercial means, allows copyright owners to market directly to the end user. This type of commercial setting destroys the “economic insignificance” justification, because the private copier can no longer argue that he or she is copying the work outside the normal mode of commercial exploitation.  

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49 Ginsburg, supra note 43, at 1477-78.
F. THE DYSON HYPOTHESIS

If the Authors see the increasing digitization of works of authorship as a threat to the public—which on balance, as I have argued, it is not—an equally serious countervailing threat to authors also arises. More specifically, Ester Dyson, celebrated computer guru, has offered an intriguing hypothesis to predict the effect of a cyber-society on the value of intellectual property. Dyson postulates that as copyright owners try to reach more and more customers, price per work will approach zero. Yet Dyson is not arguing that intellectual property should be free; only that it will be, or nearly so. The implication is obvious: to maintain the desired level of creation, incentives must increase (either in the form of direct subsidy or through the prospect of monopoly protection by copyright). It would be an odd place to start by doing just the opposite, as the Authors would have us do.

IV. THE FIRST AMENDMENT IN COPYRIGHT JURISPRUDENCE

A. THE PROBLEM WITH THE FIRST AMENDMENT

The First Amendment by itself does not provide workable answers to problems arising in copyright law. I do not disagree that reference to the First Amendment points us in the right direction—that is, that the RAM copy must be permitted so that mere use is not infringing in this instance. But the problem is that the First Amendment provides no constraint upon its own construction, i.e., how far do we go? The First Amendment has nothing to say about this question. Should the reading public be able to download a copy on diskette (suppose they cannot afford Internet

50 See generally Esther Dyson, Release 2.0: A Design for Living in the Digital Age (1997); Esther Dyson, Release 1.0 <http://www.edventure.com/release/1294.html> (setting forth Ms. Dyson's views piecemeal).

51 What about the author's rights—not just his rights to collect a monopoly profit, but his rights under the First Amendment? A bedrock principle of First Amendment law is that it protects the right not to speak, as well as the right to speak. See Rubin v. Coors Brewing Co., 514 U.S. 476, 492 (1995) (Stevens, J., concurring) (citing McIntyre v. Ohio Elecs. Comm'n, 514 U.S. 334, 342 (1995); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 214 (1984)). Would not a legal rule that compels disclosure to the public of the author's works violate her First Amendment rights?
access at home and on-line access is limited at the public facility)? Should they be able to print out a hard copy? Apparently the First Amendment would permit all of these activities—or at least a legal rule permitting these activities is not contrary to the First Amendment.

B. THE COPYRIGHT SCHOLARS' VIEW

The traditional rejoinder—from the copyright scholars' to the First Amendment scholars' concerns over the conflict with copyright—is that copyright is reconciled with the First Amendment through a number of limiting doctrines. These are: (1) infringement requires actual copying, thus independent creation destroys a copyright plaintiff's *prima facie* case; (2) distinguishing ownership of the copyright over ownership of the physical article, thus the copyright owner has no control over the physical article once it enters the stream of commerce; (3) the fair use doctrine; and (4) the idea/expression dichotomy. The fourth is by far the most important. In essence, this doctrine proscribes copyright protection beyond a certain level of abstraction. Hence, in the case of fiction works, elements like plot, theme, and style are not protectable, while dialogue (or the literal prose) is protectable. Thus, the idea/expression doctrine helps the copyright law avoid direct conflict with the First Amendment by immunizing a subsequent work which embodies the same "ideas" presented in the prior work.52 Consider, for instance, *Herbert Rosenthal Jewelry Corp.*

52 Numerous justifications have been offered in support of the idea/expression dichotomy. Richard Posner and William Landes have shown, by a formal model, that protecting ideas would result in a net decrease in creative output because authors' cost of expression would increase. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 347-48 (1989). They also suggest that it is Pareto Optimal: it is the rule that authors would prefer ex ante. Id. at 348-40. Another explanation is that the cost of "discovering" new ideas is low compared to creating expression, hence ideas need not be protected to compel their creation. Likewise, the high administrative cost of protecting ideas is no doubt important; it is simply too difficult to determine an idea's source, e.g., whether it is original or not. The "merger" and "scenes-a-faire" doctrines are closely related to the idea/expression doctrine. The former is a frequently invoked doctrine in copyright law, generally subsumed under the idea/expression concept and which refers to instances where there are a very limited number of ways to express the idea. When that occurs, the merger doctrine will often be invoked to render the expression unprotectable. The Third Circuit noted "[A]n expression will be found to be merged into an idea when 'there are no or few
v. Kalpakian, a case involving a pin in the shape of a bee, intended to be worn on a jacket lapel. The Ninth Circuit stated that:

What is basically at stake is the extent of the copyright owner’s monopoly—from how large an area of activity did Congress intend to allow the copyright owner to exclude others? We think the production of jeweled bee pins is a larger private preserve than Congress intended to be set aside in the public market without a patent. A jeweled bee pin is therefore an "idea" that defendants were free to copy.

V. THE LEGALLY PROTECTED INTEREST CONFERRED BY THE COPYRIGHT LAW

A. INTRODUCTION

The final point offered in the Authors’ work is that copyright is improperly characterized as a property right, when instead the real focus should be on market harm. I disagree, but only slightly.

other ways of expressing a particular idea.' " Educ. Testing Servs. v. Katzman, 793 F.2d 533, 539, 230 U.S.P.Q. (BNA) 156, 160 (3d Cir. 1986) (quoting Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253, 219 U.S.P.Q. (BNA) 113, 124 (3d Cir. 1983)). See also, id. (applying the merger doctrine to deny protection of mathematics questions on college entrance exams); Matthew Bender & Co. v. Kluwer Law Book Publishers Inc., 5 U.S.P.Q.2d (BNA) 1363, 1367 (S.D.N.Y. 1987) (holding tables presenting awards in medical malpractice cases were not copyrightable), Toro Co. v. R&R Prods. Co., 787 F.2d 1208, 1212-13, 229 U.S.P.Q. (BNA) 282, 1285-86 (8th Cir. 1986), (holding that a copyright did not protect a numbering system for replacement parts); Norton Printing Co. v. Augustana Hosp., 155 U.S.P.Q. (BNA) 133, 135 (N.D. Ill. 1967) (holding that a system for recording medical laboratory texts is not clearly uncopyrightable). The *scenés-a-faire* doctrine is a sweeping doctrine that is frequently relied upon—indeed over-relied upon in my opinion—in literary works cases. The way it works is this: since *scenés-a-faire* is generally defined as stock scenes that inevitably flow from a particular concept, genre, theme, or other; for instance, a story about life in a South Bronx police station is likely to feature a hard-drinking and cynical but dedicated Irish cop, so that particular character, at that level of abstraction is deemed unprotectable by *scenés-a-faire*. The reader can of course see that the more broadly one defines a work’s theme, the more expression is subsumed under it.

446 F.2d 738, 170 U.S.P.Q. (BNA) 557 (9th Cir. 1971).

Id. at 742 (emphasis added).
Indeed, I believe that the Authors have quite correctly identified market harm as the proper focus of the infringement analysis. Below I shall provide additional justification and perhaps clarification for the result the Authors’ reach.

B. PROPERTY RULES VERSUS LIABILITY RULES

The view taken in this Article is that copyright is best understood—both heuristically and practically—as a property right, at least if one accepts the orthodox definitions of the term “property.” According to this view, set forth in its original form by Calabresi and Melamed nearly 30 years ago, the extent and nature of the transaction costs in a particular case dictates whether one of the parties to a Coasian bargain ought to have an absolute property right (injunction) or simply a right to collect damages. More specifically, property rules are more appropriate when few parties are involved, when valuation of the harm is difficult, and when all other transaction costs between the parties are low. The clear consensus is that intellectual property regimes are best protected at least in part by property rules—as indeed they are.

And yet the difference may be overstated. More recent scholarship, most notably by Professor Polinsky, suggests that the real difference between property rules and liability rules is quite often insignificant. Copyrights are in fact protected by a combination of property rules and liability rules: injunctions are usually ordered when requested by the prevailing copyright owner, yet pure money damages are available in addition. Finally, the availability of statutory damages—which the plaintiff may elect in the event that he is unable to quantify his actual harm—suggests a recognition of the difficult valuations inherent in copyright infringement and therefore evidences a slight bias towards property rules.

C. COPYRIGHT AS A PROPERTY RIGHT IN A LEGALLY PROTECTED MARKET POSITION

1. Introduction. In this section, I outline my own view of the legal entitlement conferred by copyright. I shall first state my own position, followed by a brief summary of the support offered for it; this will be immediately followed by a more thorough argument. Like Professor Patterson and Judge Birch, I agree that market harm is the center of gravity of this legal right. Yet unlike the Authors, I believe it is a property right, though the discussion immediately preceding this section suggests that the liability rule/property rule taxonomy may be more contrived than real. In summary, I suggest that a copyright is best understood as a property right in relation to a legally preferred market position.

We know the Copyright Code defines a copyright claim in a text as though it were property. It expressly enumerates rights over which the copyright owner has exclusive dominion and later defines the unauthorized exercise of those rights as "infringement." Yet the real test of whether something—particularly an incorporeal something—possesses the attributes of property depends upon whether the property owner has the absolute right to exclude all others (i.e., is it an enforceable right, and against whom), and whether the owner has the right to exercise complete control over his or her property. Therefore, a regime based on the grant of property rights (i.e., exclusive rights to make copies, prepare derivative works and so forth) should condemn any—or almost any—unauthorized exercise of those exclusive rights as an improper intrusion upon the copyright owner's property against anyone. Copyright does not. Moreover, a regime based on the grant of a property right in a text should of course subsume a mechanism—either through an ex ante registration practice, or judicially, as a predicate to the infringement analysis—to determine the boundaries of that property right in the thing borrowed. Copyright does not.

Instead, the actual property right that copyright law protects relates to a narrowly drawn market position. A violation of this property right is determined by the likelihood of economic harm evidenced by erosion to that preferred market position. This is unusually difficult to measure; hence copyright law excuses any accused text, regardless of similarity with the original text, if the author of the accused text did not create that text relying upon the original text. In economic vernacular, the accused infringer is a "free-rider" if he relied upon the prior text in preparing his own. If free-riding, or the effect of the copying on the second author's cost of expression is the primary desideratum in copyright infringement, then one needs a way to identify it. That is what copyright law's copying/access requirement does. If the defendant derived, or is likely to have derived his work from the plaintiff's work, then the probability is greater that he reduced his cost of expression, a cost differential that he can exploit in the form of lower price approaching marginal cost, to the detriment of the original author who is unable to match that price and still recoup his own cost of expression.

Conversely, without copying, then regardless of similarity, the defendant did not take a free ride on the plaintiff's protectable expression. And yet, free-riding is not, without more, harmful; it merely reduces the expression costs to the subsequent author. So if he or she tucks the accused book away in a locked drawer, the original author is never harmed. All free-riding tells us is whether the potential for market harm exists. Therefore, if the defendant did copy from the plaintiff's text, then a further assay is required to predict probable market harm. The easiest way to do this is to ask the average consumer whether he would confuse the two works, led into thinking that the latter is derived from the former. Hence the ordinary observer test, e.g.: "[t]he lay listener's reaction is relevant because it gauges the effect of the defendant's work on the plaintiff's market."62 Thus, the genuine focus of the copyright infringement analysis is on the method by which the accused infringer created/acquired the work, and the effect of the accused work on the market for the original, rather than on the text copied.

Therefore, I argue, copyright is better understood as a property right in relation to a legally structured market position than one in relation to a text.

What follows is a more thorough discussion in support of the thesis that copyright is more like a property right in relation to a legally structured market position than a property right in relation to a text.

2. Definition of the Property Right. If a copyright were a property right in relation to the text itself (or more precisely in the expression embodied in the text itself) then at some point—either during the registration process, or later during the infringement analysis, reasonably precise boundaries of the property would have to be identified—as demonstrated in patent law. For instance, in patent law, "[b]efore analyzing a claim to determine whether infringement occurs, the court must properly interpret the claim." Following this model, the original (hence protectable) portions of the text would need to be segregated from the rest of the work, then the former portion assayed through a series of filters (e.g., scenes-a-faire, idea/expression dichotomy, etc.) to determine whether the test qualified for protection by copyright.

Of course, this procedure needs to be done because copying from a prior work is not infringement unless what is borrowed is, among other things, original. For instance, the theme of a work of fiction may be original, but is generally regarded by courts as too abstract to be protectable. Additionally of course, taking the entire sequence of events from a prior novel is not infringement if the author of that novel in turn borrowed the story from a newspaper account of actual events. So if a copyright were a property right in relation to the text itself, then this type of dissection would occur. Just as in a suit for trespass upon land, the boundaries of the plaintiff's property, unless conceded, first need to be determined, so also the portions of the text that are actually protected by copyright need to be identified. However, as we shall see, no such prior definition occurs.

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63 Ownership of the copyright should not of course be confused with ownership of the physical item embodying the protected expression. See 17 U.S.C. § 202 (1994) ("[O]wnership of a copyright . . . is distinct from ownership of any material object.").

The examination of a copyright application, unlike the rigorous battle to obtain a patent, is virtually pro forma, which means that the Copyright Office does not really pass on the issue of originality though it is a requirement for copyrightability. Originality is left entirely for the courts. Courts are well aware of this, if not its consequences:

[U]nlike a patent claim, a claim to copyright is not examined for basic validity before a certificate is issued.⁶⁵

It is undisputed that the Copyright Office has neither the facilities nor the authority to rule upon the factual basis of applications for registration or renewal, and that where an application is fair upon its face, the Office cannot refuse to perform the "ministerial duty" of registration "imposed upon [it] by the law."⁶⁶

There is no such [patent type] search or examination when a copyright is secured. It issues almost automatically and there is no prior art to contend with.⁶⁷

Hence, not only is a copyright registered ex parte, but there is virtually no check on the breadth of the applicant's claim. Even if that were possible—which it is not—it would still leave the virtually infinite sea of texts in the public domain. Not surprisingly then, no search is required of the copyright applicant, nor is one performed by the Copyright Office examiner.

Thus, originality/protectability is not determined during the registration process. That leaves the matter to the courts—or does

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it? Consider again the *Driving Miss Daisy* scenario that I introduced earlier.

A few years before, a different author wrote a novel, *Horowitz and Mr. Washington*, which also told the story of an elderly white Jewish person who, faced with advancing age and the consequent loss of independence, also reluctantly had to enlist the assistance of a black helper (physical therapist). After the film was released, the author of *Horowitz* sued the studio that produced *Driving Miss Daisy*, naturally alleging that the latter infringed the copyright in his novel. The screenwriter of *Driving Miss Daisy* conceded that he had read the play and that he had copied from it. Despite this, the court, on summary judgment no less, held that *Driving Miss Daisy* did not infringe *Horowitz and Mr. Washington*.68

To arrive at this result, the court did not bother to determine the protectable scope of Denker's text (i.e., what were the original/copyrightable elements). The word originality was not mentioned even once in the Denker opinion.69 Yet the Denker court did in fact determine the scope of protection in something, but it was not the text. Protectable material was not separated from unprotectable material based on originality; indeed, not a single prior work was mentioned in the court's opinion.70 Instead of discussing originality, the court denied protection based on idea/expression, scenes-a-faire, merger, and extent-of-dissimilar-element grounds.71 An ideal infringement analysis would of course consider all of the works in defining the scope of Denker's copyright claim, before deciding infringement. Yet that is obviously intractable, which explains why it was not done in this case nor is it ever done in disputes involving literary works, which should convince the reader that something other than a property right in relation to a text is being protected by copyright.72

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69 Id.
70 Instead, the court relied upon the discrete and comprehensive dissimilarities between the two works, and to a far lesser extent the idea/expression dichotomy, scenes-a-faire, and merger doctrines to determine the scope of protection. See id.
71 Id.
72 Therefore, I support the proposals for copyright reform offered in the literature which suggest that courts "ought to determine whether this taken thing was itself taken by the plaintiff from the cultural tradition known to those in the field." John Shepard Wiley, Jr., *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119, 184 (1991).
3. The Method of Copying. A second indicium that copyright is more closely modeled as a market-based harm rather than a pure property right in relation to a text is that the genuine focus of the infringement analysis examines the method of copying rather than the thing alleged to have been copied. Unlike patent law, a copyright plaintiff carries, as part of his or her prima facie case, the burden of affirmatively demonstrating that the defendant did not independently create the accused work (i.e., without copying from the plaintiff's work). More specifically, the copyright plaintiff must show that the defendant copied from the plaintiff's work. Proof of copying then permits the fact finder to infer that the accused infringer substantially reduced his overall cost of expression (i.e., cost of creating the work). This allows the infringer to set a price below the plaintiff's marginal cost, since the infringer has a lower cost of expression to recoup. This is the true sine qua non of copyright infringement; without this, then regardless of the quantitative extent of copying, infringement is rarely found, as we shall see. Indeed, a thorough review of the case law reveals an astonishingly low correlation between the frequency of infringement verdicts and the quantity of protectable expression taken from the first work.73 This observation alone suggests an alternate criteria

73 The skeptical reader is invited to compare the following sets of cases. See, e.g., cases comprising a "low-copying" group in which infringement was found, Robert R. Jones Assocs., Inc. v. Nino Homes, 858 F.2d 274, 8 U.S.P.Q.2d (BNA) 1224 (6th Cir. 1988) (holding that the builder of custom homes was entitled to the lost profits it would have received had the infringer not duplicated the design); Horgan v. MacMillan, Inc., 789 F.2d 157, 229 U.S.P.Q. (BNA) 684 (2d Cir. 1986) (reasoning that the test for whether photographs of a ballet constitute infringement was whether the photographs were substantially similar and not whether the ballet could be reproduced); Roy Export Co. v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137, 208 U.S.P.Q. (BNA) 580 (S.D.N.Y. 1980) (holding that the clip of a Charlie Chaplin compilation shown on the news at his death was a copyright infringement); Meredith Corp. v. Harper & Row Publishers, Inc., 378 F. Supp. 686, 827 F.2d 274, 229 U.S.P.Q. (BNA) 609 (S.D.N.Y. 1974) (granting an injunction against the publishers of a child psychology book because of clear and convincing proof of plagiarism); Hedeman Prods. Corp. v. Tap-Rite Prods. Corp., 141 U.S.P.Q. (BNA) 381 (D. N.J. 1964); Addison-Wesley Publ. Co., Inc. v. Brown, 207 F. Supp. 678, 133 U.S.P.Q. (BNA) 647 (E.D.N.Y. 1962) (granting an injunction against the party which published a set of solutions to a copyrighted physics text book); Warren v. White & Wykoff Mfg. Co., 228 F. Supp. 630, 4 U.S.P.Q.2d (BNA) 114 (9th Cir. 1987) (finding no copyright
by which copyright infringement is actually determined.

Therefore, liability for copyright infringement is premised on the method by which the accused infringer created his or her text, rather than on the amount of protectable expression common to both texts. In other words, if the accused infringer's text is identical to a prior one, it still does not infringe the prior text unless the accused text was derived from the prior text. This is not an affirmative defense to a charge of infringement, but the chief component of the plaintiff's prima facie case. This principle is impossible to reconcile with a regime granting a property right in expression embodied in a text.

Consider in contrast the test for patent infringement: "To establish infringement, every limitation set forth in a patent claim must be found in the accused product or process..." This test provides a sterile, highly analytical process which requires painstaking dissection of the terms comprising the claims in the patent. By contrast, consider a few exemplary formulations of the copyright infringement standard:

It is certainly not necessary to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that... the labors of the original author are substantially to an injuri-

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infringement though the designers of a trivia game had used the content of the plaintiff's book and some verbatim copying of uncopyrightable materials); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 205 U.S.P.Q. (BNA) 681 (2d Cir. 1980) (holding that there was no copyright protection in an author's historical account unless there was wholesale copying); Reyher v. Children's Television Workshop, 533 F.2d 87, 190 U.S.P.Q. (BNA) 387 (2d Cir. 1976) (reasoning that a copyrighted children's book was not infringed by a magazine with a similar story because the "total feel" of the two works was different); Affiliated Hosp. Prods., Inc. v. Merdel Game Mfg. Co., 513 F.2d 1183, 185 U.S.P.Q. (BNA) 321 (2d Cir. 1975) (holding that where a game was in the public domain, the defendant's use of the plaintiff's copyrighted rulebook in preparing the defendant's rule books did not constitute copyright information); Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303, 150 U.S.P.Q. (BNA) 715 (2d Cir. 1966) (holding that the publication of the book did not damage the publisher of a magazine article about a celebrity); Barris/ Fraser Enter. v. Goodson-Todman Enter. Ltd., 5 U.S.P.Q.2d (BNA) 1887 (S.D.N.Y. 1988) (finding that whether a television game show format was substantially similar so as to be infringing was a question of a fact).

ous extent appropriated by another that is sufficient to constitute a piracy pro tante.\textsuperscript{76}

Taking what is in essence the heart of the work is considered a taking of a substantial nature, even if what is actually taken is less than extensive.\textsuperscript{76}

Appropriation of the fruits of another's labor and skill in order to publish a rival work without the expenditure of the time and effort required for the independently arrived at result is copyright infringement.\textsuperscript{77}

And finally, from \textit{Arnstein v. Porter}, perhaps the most important decision in copyright law: "[t]he question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."\textsuperscript{78} What these excerpts illustrate is that, first, copyright infringement is premised on the method by which the accused infringer prepared his or her work, rather than the amount of protectable material copied; and second, the analysis rapidly distills to a fundamental matter of fairness.

And indeed, the copyright infringement test appears to have always been this way. A review of the 19th century copyright cases reveals an unmistakable fixation upon copying, which is offered to corroborate the conclusion presented in the previous section—that the method by which the accused infringer created his or her work is the center of gravity of the infringement analysis, and not the quantitative measure of the material taken. Consider how one court in 1845 phrased the infringement test: "[T]he real question

\textsuperscript{75} Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (emphasis added).
on this point is, not whether such resemblances exists, but whether these resemblances are purely accidental and undesigned, and unborrowed, because arising from common sources accessible to both the authors.\textsuperscript{79} A few years later in 1858, another court, relying upon the leading copyright treatise, framed the infringement test this way:

\begin{quote}
[T]he main question is, whether the author of the work alleged to be a piracy has resorted to the original sources alike open to him and to all writers, or whether he has adopted and used the plan of the work which it is alleged he has infringed, without resorting to the other sources from which he had a right to borrow.\textsuperscript{80}
\end{quote}

Finally, at about that same time (1862), a Federal court in Ohio posed the question essentially the same way:

\begin{quote}
[T]he true inquiry undoubtedly is, not whether the one is a facsimile of the other, but whether there is such a substantial identity as fairly to justify the inference that in getting up the guide, Mrs. Ewing has availed herself of Mrs. Drury's chart and has borrowed from it its essential characteristics.\textsuperscript{81}
\end{quote}

So, compared with patent law and trademark law, the most distinctive feature of copyright law is that the copyright infringement plaintiff must affirmatively disprove independent creation by the accused infringer.

4. The Ordinary Observer and Fair Use Tests. Finally, the ultimate infringement decision is left—in the case of fiction works anyway—to the "ordinary observer" who, after a deliberately unanalytical review of the two texts, condemns the latter as an infringement if it appears to him to have been derived from the

\textsuperscript{79} Emerson v. Davies, 8 F. Cas. 615, 625 (C.C.D. Mass. 1845) (No. 4,436).
\textsuperscript{80} Greene v. Bishop, 10 F. Cas. 1128, 1134 (C.C.D. Mass. 1858) (No. 5,763).
\textsuperscript{81} Drury v. Ewing, 7 F. Cas. 1113, 1116 (C.C.S.D. Ohio 1862) (No. 4,098). See also Haas v. Leo Feist, Inc., 234 F. 105, 107 (S.D.N.Y. 1916) (Hand, J.) (setting forth analogous reasoning to determine the existence of a copyright violation).
former text. This is a peculiar way to enforce a property right that resides in a text. In the case of patents for instance, the accused device and the relevant patent claim are compared, element by element. The overall similarity between the device and the claim is irrelevant; instead, what matters is whether every element comprising the claim is present in the accused device. Only then does the similarity become infringement. By contrast, copyright law deliberately eschews a piecemeal analysis of the two texts, in favor of the fact finder’s desultory hunch. Indeed, not only does copyright law not rely upon an analytical comparison of the two works, but it expressly forbids it, electing instead for the ordinary observer’s unreflective impression. If we assume that copyright grants a property right in relation to a text, then the ordinary observer test is among the least reliable or sensible means to enforce it. In many instances, the ordinary observer, by his deliberately casual inspection of the two texts, cannot possibly determine whether one contains protectable expression borrowed from the other (e.g., suppose one was a novel, the other a film). But what he or she can do, is determine whether a likely consumer will confuse the two works, believing one to be derived from the other. The only possible rationale for this legal standard then, is that it protects the copyright owner from harm to his or her preferred market position—harm whose proper measure is consumer confusion over the original and accused works. Nonfiction works are judged differently (i.e., the ordinary observer standard is not used), though with the same result, and as we shall see, for the same reason.

In the case of fiction works anyway, the infringement dispute is turned over to the ordinary observer, with these data: (1) plaintiff owns a copyright in the text at issue, which implies some minimal level of originality; (2) though precisely in what elements of that text the originality resides is not determined or is essentially undeterminable; and (3) the accused infringer created his work by copying from this text. Given this information, the ordinary observer is instructed to render an infringement verdict if the accused text strikes him as having been derived from the plaintiff’s text: “The test for substantial similarity is whether an average lay observer would recognize the alleged copy as having been appropri-
ated from the copyrighted work. Notice that he is not asked to perform the far simpler task: identify discrete elements of the plaintiff's work in the accused's work. Notice also that if the fact finder determines beforehand that the plaintiff does not own a valid copyright, or even if it does, and the accused infringer independently created its work, then the court renders summary judgment for the accused infringer and the ordinary observer is never invoked.

The ordinary observer test is relied upon to determine infringement in fiction works. It is not generally used to judge infringement in works of nonfiction. In this section, the standard used in nonfiction works shall be discussed, and this Article will argue that, though it appears very different from the ordinary observer standard, it too, is premised on the likelihood of market harm, rather than on an isolated comparison of the two texts. In the alternative, this Article will argue that both the fiction works and nonfiction works infringement standards, though superficially distinct tests, are actually directed to the identical endpoint.

In the case of nonfiction works, in contrast to fiction works, the precise boundaries of the protectable portion of the text are quite often readily determined. Yet, we shall see, the infringement analysis in these instances moves quickly away from a precise definition of the protectable portion of the text, and quickly towards liability based purely on market harm. Another brief digression is needed before we go further, however.

Copyright law is deeply fissured into two domains, two distinct bodies of law that are drastically different though, quite astonishingly, rarely discussed that way. In other words, two different legal standards exist to judge infringement of fiction works versus works of nonfiction. The typical infringement dispute over a nonfiction work involves literal (verbatim) copying by the accused infringer. The copyright plaintiff begins by identifying the discrete element(s) copied from his work. So long as what was taken is eligible for copyright protection, the infringement analysis per se is straightforward and proceeds quickly to the real infringement analysis—under

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82 Kretschmer v. Warner Bros., 1994 WL 259814, 8 (S.D.N.Y. 1994) (emphasis added) (citing Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022, 149 U.S.P.Q. (BNA) 800, 801 (2d Cir. 1966) and others). Notice that this is not unlike the "likelihood of confusion" test in trademark law—which is unquestionably premised on confusion of the ordinary consumer, rather than a recognition of a property right in a particular trademark.
the guise of the "fair use" defense, which is nothing more than a set of disparate exceptions to excuse otherwise infringing activity. Under fair use, the qualitative (not quantitative) importance of the portion taken is emphasized. Moreover, the similarity of the two works as a whole is almost never considered important to the infringement analysis. Complete work's similarity is only relevant later in the fair use analysis, particularly in the last prong of the analysis which scrutinizes the effect of the accused work on the market for the original. In contrast, fiction works are judged as a whole, without any particular regard to discrete elements.

For instance, consider this case which illustrates the non-fiction standard. In 1977, Charlie Chaplin died. Though an immensely popular figure much earlier, Chaplin was virtually unknown to younger film audiences. The reasons for this were that he had spent the last twenty years of his life outside the United States (having been forced out of the country on account of political pressure stemming from Senator McCarthy's anticommunism hysteria), and (perhaps in response to this) he deliberately withheld his later films from distribution within the United States. Upon Chaplin's death, the CBS network decided to prepare a major television biography. Given the subject, the biography would naturally have to include some sort of retrospective of Chaplin's films, but it would also discuss his personal and political life. This documentary was scheduled to air on television during prime time. However, CBS had a slight problem. While some of Chaplin's films were in the public domain, others were not. In fact, the owner of the copyright in some of the films had repeatedly refused to grant a license to CBS so that it could prepare its documentary. CBS went ahead anyway. To prepare its approximately ninety-minute documentary, CBS used excerpts from five of Chaplin's films whose copyrights were owned by a third party. Together, these excerpts comprised about nine minutes of a total of almost eight hours of film from which the excerpts were taken. CBS's use of the copyrighted works was no more than necessary; furthermore, the film excerpts constituted a transformative work—i.e., they were

used creatively rather than imitatively to produce an entirely new work drastically different from the plaintiff’s. Moreover the CBS documentary did not appropriate the economic value of the Chaplin films. Despite all of this, the court found the use to be an infringement. The ordinary observer, however, would have pardoned this use because the two Chaplin films when compared with the TV biography are aesthetically different, though some variants of the test focus upon whether the ordinary observer would recognize one as having been derived from the other.

In the vast majority of infringement disputes over non-fiction works, the infringement analysis is straightforward. Typically, the accused infringer borrows verbatim a discrete element from the plaintiff’s text, which is readily identifiable in the accused work (e.g., a quote, or a photograph). Hence, the infringement analysis proceeds fairly quickly toward the “real” infringement analysis: fair use. In essence, the fair use “defense” is a second infringement

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85 CBS’s fair use defense was rejected as well. Id. at 1147.

86 Perhaps the ordinary observer would condemn the TV biography, for the reason that I suggested above, i.e., that the ordinary observer would recognize that the TV biography was derived from the Chaplin films. Still, the most common formulation of the ordinary observer test is not the “derived from” variant but the “would regard their aesthetic appeal the same” one. This brings up an interesting point. Even though the TV biography is comprised of about 90% original material and only 10% from the plaintiff’s works, that 10% is still readily recognizable within the accused work. Even when viewed as a whole, a typical aspect of many copyright disputes over non-fiction works, the purloined material is incorporated into the accused work in such a way that it is readily recognizable within the accused work. This is similar to mixing gin and lime juice. Generally, though not always, fiction cases look different. The incorporation of borrowed material (e.g., a basic sequence of events) into the accused work is more like a chemical reaction between the borrowed material and the new stuff. The borrowed material is no longer separately recognizable once subsumed within the accused work; rather, it becomes an organic part of the whole. This is similar to combining carbon, hydrogen, and oxygen to get sucrose. Hence, the ordinary observer would overlook the borrowed material and excuse the copying. One exception among cases involving fiction works is “character” cases, where the accused infringer creates an entirely new work around a character (Sam Spade, Mighty Mouse) borrowed from the original. In these instances, the borrowed element is actually recognizable within the accused work. This might explain why these cases stand out among fiction work cases, which generally tolerate substantial copying without infringement, while character cases do not. See, e.g., Walt Disney Prod. v. Air Pirates, 581 F.2d 751, 199 U.S.P.Q. (BNA) 769 (9th Cir. 1978) (holding that comic book characters were recognizable enough within defendants “counter-culture” comic books to preclude summary judgment in defendant’s favor) and cases cited therein.
Indeed, fair use is litigated far more often than the prima facie infringement case. In fact, historically, rather than being an affirmative defense to a charge of infringement, fair use was procedurally and substantively intertwined with the infringement analysis; only recently have the two inquiries diverged. So it appears that the fair use doctrine (nonfiction works) and the ordinary observer standard (fiction works) generate parallel results, though by entirely different means.

Fair use is an enormous, and often disparate, collection of exceptions to liability, judicially codified since 1976 in the copyright law. By far the most important of these exceptions is 17 U.S.C. § 107(4): “the effect of the use upon the potential market for or value of the copyrighted work.” Therefore, fair use explicitly redirects liability toward economic harm, or at least putative economic harm, and away from an isolated determination of the scope of protectable expression of the plaintiff’s text. As evidence of this, the doctrine of fair use has been invoked in numerous instances to excuse even verbatim borrowing from the copyright owner’s work. For instance, in Sony Corp. of America v. Universal City Studios, Inc., the Supreme Court relied on fair use to immunize the copying of entire television shows by home video-cassette recorder (VCR) owners. This copying was excused on the ground that the copying did not curtail viewer demand for the television shows. Similarly, the Copyright Act of 1976 contains an explicit provision to permit whole-text copying of books and periodicals for educational purposes. This activity is immunized

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87 That the fair use inquiry is the “real” infringement analysis is no secret. See, e.g., Laura G. Lape, The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth, 98 DICK. L. REV. 181, 188 (1994) (“[C]ourts frequently either omit or give cursory treatment to the issue of infringement when the fair use defense is raised.”). On this, I believe Professor Lape is quite correct. Indeed, in nineteenth-century infringement cases, fair use was blended with the infringement analysis. Id. at 185.

88 See Wendy J. Gordon, An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory, 41 STAN. L. REV. 1343 (1989) (discussing among other things, the trend of denying enforcement of copyright claims which conflict with particular economic and utopian goals).

91 Id. at 447.
92 Id. at 456.
by similar reasoning. Consider also Consumers Union, Inc. v. General Signal Corp. There, the defendant incorporated a verbatim excerpt from plaintiff's magazine, which recommended defendant's product, into its advertisement. The court found this use to be fair—again, on the ground that the demand for plaintiff's work (i.e., that particular magazine issue) was not likely to be suppressed by the defendant's use of the borrowed material.

VI. CONCLUSION

The Authors conclude that the First Amendment must be invoked to resolve a conflict between the public's right to learn and exclusive rights granted to a copyright owner. Second, the Authors suggest that copyright law and the First Amendment are harmonized by reconceiving copyright infringement as a tort, providing protection against demonstrable market harm, and nothing else.

I have argued that the conflict the Authors identify has been long ago resolved. Second, I believe that the Authors have correctly suggested that market harm should be the center of gravity of the copyright infringement analysis. This Article simply provides additional doctrinal justification for the result they have offered.

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94 724 F.2d 1044, 221 U.S.P.Q. (BNA) 400 (2d Cir. 1983).
95 Id. at 1044.
96 Id. at 1051.