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## ARTICLE

### **FALSE SOVEREIGNS AND POOR STEWARDS: WHY COPYRIGHT LAW SHOULD LIBERATE THE TRANSFORMATIVE AUTHOR**

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#### INTRODUCTION

*“Good artists borrow, great artists steal.”* - Pablo Picasso.

At present, international copyright law gives authors the exclusive right to authorise or prohibit reproductions (in any manner or form), adaptations, and other alterations of their works.<sup>1</sup> Consequently, authors who seek to use substantial parts of existing works transformatively in the creation of a new work are legally obliged to negotiate a license with the right holder.

Yet examples of unlicensed transformative use of existing expression abound. Danger Mouse’s Grey Album, which mixed The Beatles’ “White Album” and Jay-Z’s “Black Album,” famously initiated the mash-up genre, in which authors mix together different pieces of music.<sup>2</sup> Shepard Fairey’s graphic art stylises iconic images, such as in the “Hope” poster for United States President Obama’s 2008 campaign.<sup>3</sup> Every day, individuals superimpose their own text on stills from copyrighted works, for instance of the character Fry from the “Futurama” cartoon, to create short, poignant visual works shared as “memes” online.<sup>4</sup>

Giving the initial author the power to prevent transformative use of their work leads to absurd results in practice. In 1996, a U.S. court granted an

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<sup>1</sup> Berne Convention for the Protection of Literary and Artistic Works, art. 9, 12, Sept. 9, 1986, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221.

<sup>2</sup> *The Mouse that Remixed*, NEW YORKER (Feb. 9, 2004), available at <http://www.newyorker.com/magazine/2004/02/09/the-mouse-that-remixed> (archived at <http://perma.cc/4Z79-SHPQ>).

<sup>3</sup> David Kravits, *Associated Press Settles Copyright Lawsuit Against Obama ‘Hope’ Artist*, WIRED (Jan. 11, 2011, 1:16 PM), <http://www.wired.com/2011/01/hope-image-flap/> (archived at <http://perma.cc/3SK4-U32Y>).

<sup>4</sup> Ashik Siddioui, *No TV Show Has Ever Loved Math as Much as Futurama*, WIRED (Nov. 15, 2013, 6:30 AM), <http://www.wired.com/2013/11/futurama-math/> (archived at <http://perma.cc/JMN4-2W6J>).

architect an injunction against Terry Gilliam's film "12 Monkeys" during its theatrical run because the film included a set based on a copyrighted drawing.<sup>5</sup> In 2009, the Associated Press sued Shepard Fairey for using one of its photographs as raw material for his idealised "Hope" poster.<sup>6</sup> While those parties settled,<sup>7</sup> Danger Mouse's critically acclaimed album still remains (legally) unavailable.<sup>8</sup>

This Article argues that right holder control of transformative use is inimical to copyright's underlying theories. Instead, it proposes that authors should be free to take substantial parts of copyrighted works in order to create new, transformative works, provided that they compensate the author of the original work. Compensation should equal that portion of the new work's value which can be attributed to the part taken from the original work.<sup>9</sup>

Such a rule of free transformative use with equitable compensation (referred to below simply as "free transformative use") would return copyright to its humble beginnings, since early English copyright protected only against literal copies.<sup>10</sup> Amending copyright's scope in this manner improves its internal consistency, by bringing the law in line with its underlying theories.

Section 1 briefly introduces the familiar Kantian, Lockean, utilitarian, and Kantian-Habermasian theories of copyright. Section 2 submits that under Kantian and Lockean theories, right holder control elevates the initial author to a false sovereign. Right holder control disregards the transformative author's

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<sup>5</sup> See Woods v. Universal City Studios, Inc., 920 F. Supp. 62, 63-65 (S.D.N.Y. 1996).

<sup>6</sup> Kravits, *supra* note 3.

<sup>7</sup> *Id.*; Lewis Wallace, *Lebbeus Woods: The Architect Who Dared to Ask 'What If?'*, WIRED (Feb. 15, 2013, 7:20 PM), <http://www.wired.com/2013/02/lebbeus-woods-conceptual-architect/all/> (archived at <http://perma.cc/U3JA-GQYE>).

<sup>8</sup> Bill Werde, *Defiant Downloads Rise from the Underground*, N.Y. TIMES (Feb. 25, 2004), <http://www.nytimes.com/2004/02/25/arts/defiant-downloads-rise-from-underground.html> (archived at <http://perma.cc/5QZE-TF9N>).

<sup>9</sup> See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 106 (2004) [hereinafter LESSIG, *FREE CULTURE*]; Paul Edward Geller, *Hiroshige vs. Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement*, 46 J. COPYRIGHT SOC'Y U.S.A. 39, 61 (1998); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 30 J. COPYRIGHT SOC'Y U.S.A. 253, 282 (1982) [hereinafter Gordon, *Fair Use as Market Failure*]; Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 186-87, 201 (2007); Jeb Rubinfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 55 (2002).

<sup>10</sup> Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 210-12 (1982) [hereinafter Goldstein, *Derivative Rights*]; Neil Weinstock Netanel, *Market Hierarchy and Copyright in our System of Free Expression*, 53 VAND. L. REV. 1879, 1900 (2000) [hereinafter Netanel, *Market Hierarchy*].

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equal Kantian autonomy in self-expression and her equal Lockean right to the fruits of her labour. Section 3 posits that right holder control runs counter to the utilitarian theory of copyright since right holders are arguably poor stewards of value. Conversely, free transformative use enables decentralised, non-market peer production to emerge alongside commercial offerings, which may be more efficient than right-holder-coordinated, vertically integrated production. Section 4 argues that Kantian-Habermasian theory supports free transformative use since it bolsters critical and reflective communications. Finally, section 5 reviews and rebuts arguments commonly raised against transformative use, including concerns about valuing contributions and enforcing rights to compensation, and makes a policy proposal. Arguments are phrased in the context of international copyright law generally, drawing on examples from American, British, and German law.

#### COPYRIGHT THEORIES

Copyright can be viewed from four distinct theoretical perspectives. At the individual level, copyright is linked to Kantian and Lockean natural rights. A Kantian view focuses on the relation between author and work: the work expresses the author's choices and reflects her personality.<sup>11</sup> There are two versions of Kantian copyright theory. A principled-Kantian stance views copyright as a speech right, giving the author control over her work as a vehicle through which she speaks to the public.<sup>12</sup> A materialist-Kantian perspective emphasises that agency requires material support: copyright serves to give authors a realistic prospect of being paid for their creative work, thereby supporting sustainable autonomous expression.<sup>13</sup>

A Lockean view focuses on the creation and distribution of a work's value.<sup>14</sup> It submits that the author has a right to the fruits of her labour. Mixing labour with a resource held in common yields a claim of ownership over the resulting creation.<sup>15</sup> This view is inversely linked to the principle that one

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<sup>11</sup> Abraham Drassinower, *A Rights-based View of the Idea/Expression Dichotomy in Copyright Law*, 16 *CANADIAN J.L. & JURISPRUDENCE* 3 (2003); Neil Weinstock Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in 6 *NEW DIRECTIONS IN COPYRIGHT LAW* 3, 30 (Fiona Macmillan & Edward Elgar eds., 2008) [hereinafter Netanel, *Why Has Copyright Expanded?*].

<sup>12</sup> Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 *LAW & PHIL.* 1, 4 (2012); Abraham Drassinower, *Authorship As Public Address: On the Specificity of Copyright Vis-À-Vis Patent and Trade-Mark*, 2008 *MICH. ST. L. REV.* 199, 222 (2008) [hereinafter Drassinower, *Authorship As Public Address*].

<sup>13</sup> ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* 17-18, 70-74, 81 (2011).

<sup>14</sup> Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 *J. CORP. L.* 992, 1001 (2009) [hereinafter Drassinower, *From Distribution to Dialogue*].

<sup>15</sup> Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the*

should not reap where another has sown.<sup>16</sup>

At the societal level, copyright is linked to utilitarian and Kantian-Habermasian theories. To a utilitarian, copyright serves to provide an incentive to create works and thereby promotes the public interest in receiving creative expression.<sup>17</sup> A narrow instrumentalist view aims to satisfy individual preferences efficiently, while a broader variant aspires to promote “progress.”<sup>18</sup> Thus, early English copyright aimed to encourage “learned men to compose and write useful books.”<sup>19</sup>

Finally, a Kantian-Habermasian perspective emphasises dialogical communication within the social, cultural, and political domain.<sup>20</sup> Copyright should support communication that is responsive, self-reflective, and critical of dominant ideologies and cultures. Such communication in turn enables a community to progress towards enlightenment, in which reason takes precedence over power and tradition.<sup>21</sup>

These four views reflect the two-sided nature of copyright’s subject matter: works as instances of economic value (Lockean and utilitarian) on the one hand, and works as instances of interpersonal communication (Kantian and Kantian-Habermasian), on the other. This essay will not lexically order, nor attempt to “balance,” these conflicting views.<sup>22</sup> Ultimately, the economic and normative values pursued by these perspectives are incommensurable. Lacking a common standard of measurement, one cannot meaningfully “weigh” congestion externalities against individual autonomy. Instead, the following sections argue that freeing transformative use will improve copyright’s internal coherence, since doing so accords with all four underlying theories.

#### FALSE SOVEREIGNS: KANTIAN AND LOCKEAN THEORIES

This section argues that Lockean and Kantian theories support free

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*Fair Use Doctrine*, 112 YALE L.J. 1179, 1184 (2003).

<sup>16</sup> Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1230, 1234 (1996).

<sup>17</sup> William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326, (1989) [hereinafter Landes & Posner, *Economic Analysis of Copyright Law*].

<sup>18</sup> Wendy J. Gordon, *Copyright Norms and the Problem of Private Censorship*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE INTERNATIONAL ANALYSES (Jonathan Griffiths and Uma Suthersanen eds., 2005) [hereinafter COPYRIGHT AND FREE SPEECH], at 67, 82 [hereinafter Gordon, *Copyright Norms*].

<sup>19</sup> The Statute of Anne, 1710, 8 Ann., c. 8 (Gr. Brit.).

<sup>20</sup> See Fiona MacMillan, *Commodification and Cultural Ownership*, in COPYRIGHT AND FREE SPEECH, *supra* note 18, at 35, 41.

<sup>21</sup> See Barron, *supra* note 12, at 18-22.

<sup>22</sup> See Drassinower, *From Distribution to Dialogue*, *supra* note 14, at 992 (lamenting the unquestioned dominance of the balance metaphor in copyright discussions).

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transformative use, provided that: (i) the transformative work does not substitute for the original; and (ii) the transformative author provides (a) compensation and (b) attribution to the initial author(s).

*Authors as sovereigns*

Copyright gives an author exclusive, transferrable, economic rights over reproduction, distribution, and communication of her work to the public.<sup>23</sup> Together, these rights protect an author's exclusive ability to present a work to the public, enabling her to charge an audience for access.<sup>24</sup> This transforms labour "from a one-time offering of services into [an asset] with the potential for earnings over an extended time."<sup>25</sup> By exercising this exclusive right, the author can enjoy material Kantian autonomy and reap her Lockean reward.<sup>26</sup>

Additionally, copyright grants authors in some countries non-transferable moral rights, including attribution and integrity.<sup>27</sup> These rights give an author ongoing creative control over her work, thus reflecting the close connection between author and work.<sup>28</sup>

Lockean and Kantian theories grant the author rights she is entitled to as a sovereign, reflecting her natural rights, which are in turn based on important normative values. (Such theories of rights differ from those in which rights are entrusted to an individual as a steward of value, because entrusting rights to an individual as a steward will likely maximise productive use of the related resource.)<sup>29</sup> Enforcing exclusive rights against copyist-competitors poses few problems since the copyist is neither speaking independently as an author,<sup>30</sup> nor creating new works of value. However, these theories do not support enforcing exclusive rights against transformative authors.

*The author's autonomy*

Free transformative use accords with Kantian theory, since autonomy entails both rights to respect for one's autonomy and obligations to respect the

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<sup>23</sup> Berne Convention for the Protection of Literary and Artistic Works, *supra* note 1, at art. 9, art. 11*bis*.

<sup>24</sup> Drassinower, *Authorship as Public Address*, *supra* note 12, at 200; Gordon, *Fair Use as Market Failure*, *supra* note 9, at 268.

<sup>25</sup> Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV. 145, 152 (2011) [hereinafter Merges, *Autonomy and Independence*].

<sup>26</sup> *See id.*

<sup>27</sup> Berne Convention for the Protection of Literary and Artistic Works, *supra* note 1, at art. 6*bis*; Neil Weinstock Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 383 (1993).

<sup>28</sup> Netanel, *Why Has Copyright Expanded?*, *supra* note 11, at 30.

<sup>29</sup> *See* Gordon, *Copyright Norms*, *supra* note 18, at 86 (distinguishing between property rights granted to individuals as sovereigns and as stewards).

<sup>30</sup> *See* Barron, *supra* note 12, at 25-26.

autonomy of others.<sup>31</sup> If copyright aims to protect an author's right to present her discourse to the public, it should not prevent subsequent authors from doing the same. Why empower EMI records, which holds the rights to The Beatles' music, to block Danger Mouse's artistic self-expression? Both authors have an equal claim to authorship as protecting their autonomy.<sup>32</sup> Authors should "have exclusive rights of reproduction only where such rights are consistent with everyone else's equal authorship."<sup>33</sup>

Similarly, the original author's moral rights should not limit the transformative author's autonomy. The right to integrity applies to the author's work when presented as a public discourse in *her* name, not to a distinct work presented in *another's* name.<sup>34</sup> Transformative authors bear moral and artistic responsibility for their works, which should not affect the initial author's "honour or reputation."<sup>35</sup> (This right could, in any event, only be exercised by the initial author; it is not transferrable to corporations such as EMI.)<sup>36</sup>

Nonetheless, the transformative author should respect the initial author's right of attribution. She must clearly credit the original authors whose work she has used as raw materials.<sup>37</sup>

#### *The author's right to her labour*

Free transformative use also accords with Lockean theory. While the initial author laboured in creating the original work, the transformative author equally laboured in creating the transformative work. Consider a musical mash-up consisting of three works: initial work A (Notorious B.I.G.'s "Dead Wrong"), initial work B (The xx's "Intro"), and the transformative work (in this case, Wait What's "Dead Wrong Intro"). The mashup artist creates a new musical piece by combining portions from different genres, styles, and decades,

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<sup>31</sup> Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059, 1091-92 (2008).

<sup>32</sup> See Drassinower, *Authorship as Public Address*, *supra* note 12, at 211-12; Netanel, *Market Hierarchy*, *supra* note 10, at 1900 (recognizing that authorship that builds on preexisting expression is still the work of an author); Treiger-Bar-Am, *supra* note 31, at 1081 (explaining Kant's recognition of a transformative author's autonomy in their altered creative product).

<sup>33</sup> Drassinower, *Authorship as Public Address*, *supra* note 12, at 212-13.

<sup>34</sup> See Netanel, *Why Has Copyright Expanded?*, *supra* note 11, at 32 (citing French case law that parodic cartoons, even those depicting characters in obscene situations, do not infringe the author's right of integrity).

<sup>35</sup> Berne Convention for the Protection of Literary and Artistic Works, *supra* note 1, at art. 6*bis*.

<sup>36</sup> Netanel, *Why Has Copyright Expanded*, *supra* note 11, at 32.

<sup>37</sup> See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 152, 162-63, 167 (2007).

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creating a new message and aesthetic experience through their juxtaposition.<sup>38</sup> The audience values this experience: “Dead Wrong Intro” has over 2 million views on YouTube and SoundCloud alone (in addition to a self-reported over 1 million downloads).<sup>39</sup> Part of this value undeniably stems from B.I.G.’s labour in composing and performing his lyrics and part from The xx’s work on their atmospheric and emotive music. Yet part of the value of the mashup also undeniably stems from Wait What’s choice to combine these works and his labour in transforming the two into a new work that is more than the sum of its parts.<sup>40</sup>

Each artist should have a Lockean right to be rewarded accordingly, since they have equal rights to the fruits of their labour. In this case, we could estimate roughly that a third of the value of the final product stems from each contribution. (Difficulties in assessing value will be discussed below, in section 6.b.) Thus, Wait What should compensate the late B.I.G.’s estate and The xx each with one third of his profits.

The initial authors clearly have no Lockean claim to all of the value of the transformative work, since they did not create all of it. They should not be permitted to reap what they have not sown. This Lockean view questions who is “stealing” in cases when right holders use the threat of injunction to extract all of the profits from unlicensed uses (such as when The Verve settled with Rolling-Stones-right-holders for 100% of their royalties following their unlicensed sampling in “Bitter Sweet Symphony”).<sup>41</sup>

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<sup>38</sup> LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 12, 74-75 (2008); see, e.g., Chris Salmon, *Click to download: Notorious B.I.G. meets the xx*, THE GUARDIAN (Apr. 8, 2010, 18:00 EDT), <http://www.theguardian.com/music/2010/apr/08/the-xx-notorious-big-wait-what> (archived at <http://perma.cc/8XYV-4QSM>) (“matching the Notorious B.I.G.’s cocksure rhymes with the soft, atmospheric tunes of the xx . . . to strip out the braggadocio . . . and replace it with real tenderness.”).

<sup>39</sup> *The Notorious B.I.G. vs. the xx – Dead wrong intro*, YOUTUBE (July 13, 2010), <https://www.youtube.com/watch?v=zuIYBvsYVGI> (last visited Mar. 18, 2015) (archived at <http://perma.cc/6FRZ-RAF5>) (showing over 1,800,000 views); *wait what – juicy-r*, SOUNDCLOUD (Mar. 18, 2010), <https://soundcloud.com/wait-what/wait-what-juicy-r-the-notorious-b-i-g-vs-the-xx> (last visited Mar. 5, 2015) (archived at <http://perma.cc/JHJ8-YA5S>) (showing over 470,000 plays); [about], WAIT WHAT (2011), <http://waitwhatmusic.com/about> (last visited Mar. 5, 2015) (archived at <http://perma.cc/RTK8-P3K3>).

<sup>40</sup> See Sasha Frere-Jones, *1+1+1=1 The new math of mashups*, NEW YORKER, Jan. 10, 2005, at 85, 86 (opining that Freelance Hellraiser’s mashup “A Stroke of Genius” is a “perfect pop song, better than either of its sources”).

<sup>41</sup> Ben Challis, *The Song Remains the Same: A Review of the Legalities of Music Sampling*, WIPO MAG. (Nov. 2009), [http://www.wipo.int/wipo\\_magazine/en/2009/06/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2009/06/article_0006.html) (archived at <http://perma.cc/9PKF-EBPY>).

Nor should the initial author be empowered to destroy the value of the transformative work by prohibiting its distribution. Doing so arguably violates the Lockean waste provision, which holds that if a labourer does not take advantage of the value she has created, she loses her exclusionary property rights in that portion of the good which is wasted.<sup>42</sup> (This waste-based argument depends in part on whether the author's management of a work's value is an efficient way of coordinating investment in re-use, discussed below in section 4.)

*Defining transformative works*

To function within the existing copyright system, free transformative use must not disrupt the author's exercise of the exclusive right to present a work to the public. If subsequent authors are permitted to distribute works which substitute for the original, competition will drive the price towards the marginal cost, at which price the initial author cannot sustain her Kantian autonomy or reap her Lockean rewards. Thus, transformative works must not be a good substitute for the original.<sup>43</sup>

Fortunately, altered works will by definition often be imperfect substitutes.<sup>44</sup> The more transformative the work, the less likely it is to act as a substitute.<sup>45</sup> Obviously, an online "meme" of the character Fry with superimposed text is no substitute for an episode of *Futurama*, since the works are in different formats. Yet even a transformative work of the same format and purpose as the original (music to entertain, for instance), need not constitute a substitute. While it competes with the original work in the general market for entertaining music, it will not necessarily satisfy the same audience demand.<sup>46</sup> A simple remix (which makes minor alterations to an existing recording) risks replacing the original, while a mash-up (which combines elements from different works) in most cases likely would not.

Provided the transformative work does not function as a substitute, the transformative author can distribute it *gratis* without disrupting the initial author's exercise of her rights. This accords with Kantian theory by respecting the transformative author's choices in relation to her work, without contravening Lockean theory, which requires that the initial author be rewarded for her input of labour with an effective property right, not that she

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<sup>42</sup> Damstedt, *supra* note 15, at 1194-95.

<sup>43</sup> See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 296 (1996) [hereinafter Netanel, *Copyright and a Democratic Civil Society*].

<sup>44</sup> Landes & Posner, *Economic Analysis of Copyright*, *supra* note 17, at 354.

<sup>45</sup> See *id.*

<sup>46</sup> Demand substitutability is a common concept in competition law, where it is used to define the relevant market for producers. RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 31 (7th ed. 2012).



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be allocated a monetary reward for every use of her work.<sup>47</sup>

To further improve “fit” with existing copyright law, a proposed rule change would distinguish *transformative* works from *derivative* works (which remain within the author’s control). Derivative works are works whose value depends on the extent to which they faithfully reproduce the original.<sup>48</sup> Merchandising exemplifies derivative works. For example, the value of a Mickey Mouse doll stems predominantly from its being a replica of the Disney character.<sup>49</sup>

Derivative works differ in the degree of independent and artistic choices required to make them, from mechanical form-shifting to abridgements and translations. This complicates the task of distinguishing between derivative and transformative works. Yet although translators and abridgers clearly expend valuable skilled labour, their skill arguably differs from the author in that it lies not in expressing creativity through their own intellectual creation,<sup>50</sup> but in faithfully recreating an existing work in a different language or shorter form. The translation or abridgement’s message and aesthetic experience are fundamentally identical to the original. Moreover, from a moral rights perspective, as the translation and abridgement purport to portray (a version of) the original work, the author should have creative control over them.

By contrast, the transformative work is itself an “original” work in the copyright sense, since a significant portion of its value and message originate with the transformative author’s selection and arrangement of portions of existing works, thus representing its own intellectual creation.<sup>51</sup> This is the type of expression and labour that Kantian and Lockean theories of copyright seek to protect. Experience from some legal systems suggests the distinction between derivative and transformative work is practicable: courts in the U.S. consider the “transformativeness” of a work under the fair use doctrine,<sup>52</sup> while courts in Germany analyse the “distance” between the original and the transformative work under the free use doctrine.<sup>53</sup>

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<sup>47</sup> See Netanel, *Market Hierarchy*, *supra* note 10, at 26.

<sup>48</sup> Goldstein, *Derivative Rights*, *supra* note 10, at 232, 237; Landes & Posner, *Economic Analysis of Copyright*, *supra* note 17, at 357.

<sup>49</sup> Landes & Posner, *Economic Analysis of Copyright*, *supra* note 17, at 356.

<sup>50</sup> See Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-6569 (setting out the EU originality standard for copyright protection).

<sup>51</sup> See Berne Convention for the Protection of Literary and Artistic Works, *supra* note 1, at art. 2(3) (stating that “[t]ranslations, adaptations, . . . and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work”).

<sup>52</sup> Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 740-41 (2011).

<sup>53</sup> See Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 20, 2008, docket number I ZR 112/06 (Ger.) (*translated at* Neil Conley & Tom Braegelmann, *Metall auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany*,

This distinction could be used to interpret the author's exclusive right over adaptations or other alterations narrowly as relating only to derivative works, not transformative works.<sup>54</sup> However, international copyright law explicitly protects the author's exclusive right to make cinematographic adaptations of literary and artistic works.<sup>55</sup> Yet under the above analysis, a film version of an existing novel is a transformative, not a derivative, work. Although some dialogue and dramatic sequences can be transposed from novel to film directly, the medium is so different as to require the director to make substantial independent, artistic choices concerning camera angles, editing techniques, acting instructions, and score.<sup>56</sup> These choices constitute independent expression and add new value, therefore resulting in a transformative work.

### *Conclusion*

In sum, copyright law should not falsely extend the author's sovereign rights over her work to cover other author's transformative works. Instead, it should recognise the initial and the transformative author's equal Kantian autonomy and Lockean rights to the fruits of their labour. Authors should be free to use portions of copyrighted works transformatively, provided that: (i) the transformative work does not substitute for the original; and (ii) the transformative author provides (a) compensation and (b) attribution to the initial author(s).

### POOR STEWARDS: UTILITARIAN THEORY

This section argues that a rule of free transformative use on the conditions identified above is consistent with the utilitarian theory of copyright. It first reviews the arguments advanced in favour of right holder control, before setting out the advantages of free transformative use.

### *Dynamic effects*

From a utilitarian perspective, copyright's exclusive rights function as incentives. As information is a public good, an author cannot easily prevent free-riding, copyist-competitors from rapidly driving down the price of a copy of the work towards its marginal cost.<sup>57</sup> At marginal cost, the author cannot

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56 J. COPYRIGHT SOC'Y U.S.A. 1017, 1020 (2009); see also Jonathan Griffiths, *Not Such a 'Timid Thing': The UK's Integrity Right and Freedom of Expression*, in COPYRIGHT AND FREE SPEECH, *supra* note 18, at 211, 226.

<sup>54</sup> See Berne Convention for the Protection of Literary and Artistic Works, *supra* note 1, at art. 12.

<sup>55</sup> *Id.* at art. 14.

<sup>56</sup> Geller, *supra* note 9, at 57; Goldstein, *Derivative Rights*, *supra* note 10, at 220; Rubinfeld, *supra* note 9, at 51-52.

<sup>57</sup> Gordon, *Fair Use as Market Failure*, *supra* note 9, at 268; Sterk, *supra* note 16, at

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recover the cost of developing the work, particularly since the cost of digital copying and distribution is close to zero.<sup>58</sup> This discourages authors from investing in creating works.

Copyright's limited monopoly rights enable the author to charge supra-competitive prices for access to the work. Although such pricing is allocatively inefficient (in that it fails to satisfy all consumers who value the work at its marginal price), it provides a dynamic incentive to authors to create new works.<sup>59</sup> Enforcing exclusive rights against copyist-competitors does not disrupt incentives, since copyists do not create new works.<sup>60</sup>

However, enforcing exclusive rights against other authors imposes dynamic losses, by increasing costs for transformative authors who must pay license fees to use portions of existing works as inputs.<sup>61</sup> Licensing also requires negotiations, thus adding transaction costs.<sup>62</sup> From a utilitarian perspective, the question is how to balance these two conflicting dynamic effects. This, in turn, raises two sub-queries: (i) how to value transformative uses, and (ii) which process will efficiently identify and promote valuable uses – right holder control or free transformative use?

*Right holder control: stewarding value*

Proponents of right holder control advocate property and market-based solutions to both sub-queries. Valuable transformative uses are those valued by individuals, namely those works which satisfy individual preferences. Right holder control enables a market in licenses to emerge, which, in turn, identifies the highest valued uses of existing works. Consider a film which transformatively uses the plot and characters from a novel. The rational right holder will license to the highest bidder, provided the bid is higher than the value she places on maintaining the exclusive right herself.<sup>63</sup> The movie producer who plans to make the film which appeals to the widest audience will be able to raise the most capital and enter the highest bid. In this manner, consensual transfers move resources to the person best able to use them to

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<sup>58</sup> Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81, 82 (2002) [hereinafter Benkler, *Intellectual Property*]; Landes & Posner, *Economic Analysis of Copyright*, *supra* note 17, at 326.

<sup>59</sup> Benkler, *Intellectual Property*, *supra* note 58, at 82; Netanel, *Copyright and a Democratic Civil Society*, *supra* note 43, at 288.

<sup>60</sup> Goldstein, *Derivative Rights*, *supra* note 10, at 236.

<sup>61</sup> Brief of George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 13, *Eldred v. Ashcroft*, 534 U.S. 1160 (2003) (No. 01-618), 2002 WL 1041846; Benkler, *Intellectual Property*, *supra* note 58, at 82; Landes & Posner, *Economic Analysis of Copyright*, *supra* note 17, at 335.

<sup>62</sup> Merges, *Autonomy and Independence*, *supra* note 25, at 149.

<sup>63</sup> Gordon, *Fair Use as Market Failure*, *supra* note 9, at 260.

satisfy individual preferences.<sup>64</sup>

Right holder control further enables investment by reducing congestion externalities. The total utility of a work might fall if numerous uncoordinated transformative uses lead to confusion of the work's message, tarnishing of its image, or saturation of the public's interest in the work.<sup>65</sup> Landes and Posner liken the effect to trademark dilution, citing a description of the Walt Disney Company's policy as carefully managing its character portfolio to avoid over-exposure.<sup>66</sup> The prospect of congestion externalities dissuades potential transformative authors, unable to obtain exclusive use, from investing in the transformative use of portions of existing works.<sup>67</sup> The resulting dynamic loss mainly affects productions which require large, risky investments. For example, movie producers may refrain from using novels as raw materials.<sup>68</sup>

In addition, licensing revenue performs a signalling function. It directs author investment towards creating works which subsequent authors will want to use as raw materials.<sup>69</sup>

Finally, although licensing introduces transaction costs, right holder control also provides dynamic incentives to privately reduce these costs. Licensors and potential licensees can invest in institutions and technologies which lower transaction costs, such as copyright collection societies.<sup>70</sup> In the future, digital systems may be able to drastically reduce transaction costs for licensing by setting fees and collecting and distributing revenues automatically.<sup>71</sup>

In sum, society should vest control over transformative uses in copyright holders, since private parties in markets do an efficient job distributing existing works as resources to the highest valued uses.<sup>72</sup> On this theory, the author

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<sup>64</sup> *Id.* at 260-61.

<sup>65</sup> William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 486-88 (2003).

<sup>66</sup> *Id.*

<sup>67</sup> Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects*, 18 HARV. J.L. & TECH. 435, 449-51 (2005).

<sup>68</sup> *See id.* at 448-49.

<sup>69</sup> Goldstein, *Derivative Rights*, *supra* note 10, at 227; Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1393 (1989) [hereinafter Gordon, *Inquiry*].

<sup>70</sup> Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC'Y U.S.A 133, 135-37 (2002-2003) [hereinafter Goldstein, *Fair Use*]; Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1138 (1977); Merges, *Autonomy and Independence*, *supra* note 25, at 158; Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2670 (1994).

<sup>71</sup> Goldstein, *Fair Use*, *supra* note 70, at 134.

<sup>72</sup> Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 3 UTAH L. REV. 619, 629-30 (2007); Robert P.

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should be awarded a property right as a steward of economic value, steering the crowdable transformative use of existing works towards the most valued uses by responding to market signals.<sup>73</sup> The validity of this theory depends on authors' ability to realise the highest economic value from existing works. Their efficacy can be questioned with regard to both sub-queries raised above: (i) whether markets identify the most valuable uses, and (ii) whether right holders will in fact license uses efficiently, so as to maximise value.

Valuing uses: market limitations

Relying on markets to identify the most valuable uses raises three concerns about valuation: (1) the pricelessness effect, (2) ability to pay, and (3) externalities. The pricelessness effect applies to the initial grant of the right between copyright owner and transformative author(s). The market will not allocate resources efficiently to those who value them most if the value parties assign depends on the initial allocation of the right.<sup>74</sup>

For example, assume that copyright owner A is awarded the right to control transformative uses. A carefully manages the use of her iconic work to preserve its value and plans to exploit it in as many ways as possible for the duration of the copyright term. Subsequent author B must offer A price to use A's work. B anticipates she will make £10,000 from the use, so will bid up to £10,000. Yet author A may value exclusive control of the work so highly that she will reject B's offer, making A's control the highest valued use.

Conversely, assume that author B is awarded the right to use A's work transformatively and copyright owner A must offer B a price to desist from creating her transformative work. A calculates her loss from the transformative use to be £20,000 and so will bid up to £20,000. Yet if B identifies with her work and values her ability to reach her audience highly, B will reject A's offer, making her use the highest valued. Insofar as exclusive control over iconic works and artistic expression are priceless goods, the initial legal entitlement will determine what appears to be the highest valued use.<sup>75</sup>

The two remaining issues relate to the markets' ability to identify the most valuable use from proposed transformative uses. First, markets measure individual preferences by willingness to pay. This metric is distorted by ability

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Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 306-07 (1993).

<sup>73</sup> Liebowitz & Margolis, *supra* note 67, at 449. See Gordon, *Copyright Norms*, *supra* note 18, at 86 (distinguishing between property rights granted to individuals as sovereigns and as stewards).

<sup>74</sup> Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A 149, 182-83 (2002-2003) [hereinafter Gordon, *Excuse and Justification*].

<sup>75</sup> *Id.* at 185-86.

to pay.<sup>76</sup> The most profitable uses will be those which appeal to a combination of audience size and audience ability to pay. Given existing patterns of income distribution, uses valued highly by groups with a lower ability to pay will not be realised.<sup>77</sup> With high global inequality, relying on markets systematically serves audiences in more economically developed countries better than audiences in lesser economically developed countries.<sup>78</sup>

Second, markets rely on the buyer's ability to internalise the benefits of her use.<sup>79</sup> Consider a documentary which uses existing works transformatively to point out latent prejudices in society, leading to a better informed citizenry.<sup>80</sup> The documentary-maker is unlikely to be able to internalise much of the external benefit. As a result, her private willingness to pay, as expressed in a licensing bid, undervalues the extent to which the work contributes value to society.<sup>81</sup> The market will systematically under-develop high-value, low-profit uses. This inability to account for positive externalities is particularly troubling for utilitarian theories which aspire to maximise lofty, abstract values such as "progress."<sup>82</sup>

#### Maximising value: licensing market malfunction

Even assuming that market signals accurately indicate value, right holders will direct subsequent uses to optimal outcomes only under the assumptions of: (i) perfect information, (ii) costless licensing, and (iii) rationality.<sup>83</sup> Yet right holders face vast informational demands and high uncertainty in setting license fees. Each request for licensing presents a unique proposition in terms of the requesting licensee, the portion of the work concerned, and the proposed transformative use.<sup>84</sup> Assume again that transformative author B believes she stands to make £10,000 and offers A up to that amount for the license. It is hard for A to predict whether B's transformative work will prove to be a commercial success *ex ante*, or to predict its effect on A's existing commercial uses of her original work.<sup>85</sup> Transformative use might spur demand for the

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<sup>76</sup> Gordon, *Inquiry*, *supra* note 69, at 1394.

<sup>77</sup> *Id.*

<sup>78</sup> Madhavi Sunder, *IP<sup>3</sup>*, 59 STAN. L. REV. 257, 284 (2006).

<sup>79</sup> Gordon, *Fair Use as Market Failure*, *supra* note 9, at 262.

<sup>80</sup> See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 51 (1997).

<sup>81</sup> See *id.*; Gordon, *Excuse and Justification*, *supra* note 74, at 151.

<sup>82</sup> Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2077 (2000); Loren, *supra* note 80, at 6, 51-52.

<sup>83</sup> Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1046 (1996-97) [hereinafter Lemley, *Economics of Improvement*].

<sup>84</sup> *Id.* at 1054.

<sup>85</sup> Brief of George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 7, *Eldred v. Ashcroft*, 534 U.S. 1160 (2003) (No. 01-618), 2002 WL 1041846; Landes & Posner,

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original work by introducing new audiences to it, or reduce demand by altering the public's perception of the original work.<sup>86</sup> Factoring in the transformative use's effect on potential, alternative future uses of the original work is even trickier.

Quantifying these potential effects and pricing the license accordingly requires A to collect and analyse relevant information, presenting a significant mental transaction cost. Faced with these high decision costs, a rational right holder may simply refuse all licensing requests (particularly from unfamiliar authors), or charge a single, high price for all proposed uses.<sup>87</sup> Any proposed transformative uses which do not exceed these high decision-transaction-costs will not be licensed, regardless of their value. As a result, high-volume low-value re-uses, such as online "memes," are unable to obtain licenses.

While investment in institutions or technologies may lower the potential licensee's costs of tracing and contacting right holders, it is unclear how it would lower right holders' decision costs. Right holders may keenly invest in institutions which encourage standardised consumptive end uses *en masse*, but will still want to consider transformative uses on a case-by-case basis and price them accordingly.<sup>88</sup>

Finally, behavioural economics suggests that human right holders may be irrationally averse to licensing. The 'endowment effect' may lead right holders to irrationally overvalue their exclusive rights and the revenues from existing uses, displaying a strong status quo bias.<sup>89</sup> This would make them excessively averse to the potential losses arising from a licensing request.<sup>90</sup>

*Free transformative use: unleashing creativity*

The above insights into market limitations and malfunctions question right holders' ability to function as effective stewards of value. This section proposes an alternative solution based on uncoordinated, decentralised, and non-market information production. In 2002, seventeen economists, including five Nobel Prize winners, posited that in copyright "diverse, abundant expression" rather than "successive refinements" creates value and that "a large number of disparate innovators may be better at producing abundance."<sup>91</sup>

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*Economic Analysis of Copyright*, *supra* note 17, at 328, 354.

<sup>86</sup> Landes & Posner, *Economic Analysis of Copyright*, *supra* note 17, at 354.

<sup>87</sup> See, e.g., LESSIG, *FREE CULTURE*, *supra* note 9, at 96 (citing anecdotal evidence of Fox asking a documentary maker for a \$10,000 license fee for using a short clip featuring a copyrighted work in the background of the shot).

<sup>88</sup> Lemley, *Economics of Improvement*, *supra* note 83, at 1054.

<sup>89</sup> See DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN SOURCES THAT SHAPE OUR DECISIONS* 133-38 (2009); Gordon, *Excuse and Justification*, *supra* note 74, at 184.

<sup>90</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 33-35 (2008); ARIELY, *supra* note 89, at 133-38.

<sup>91</sup> See Brief of George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 14,

Benkler has developed this position, identifying three inputs for information production: (i) existing information; (ii) human creativity; and (iii) the physical capital to fix, store, and transmit information.<sup>92</sup> Information production further consists of three roles: a) creation, b) distribution, and c) evaluation/accreditation.<sup>93</sup> Digital network technology has made the input of physical capital affordable to and owned by individuals throughout society, enabling them to distribute works digitally at low cost.<sup>94</sup> Consequently, 21st century information production must efficiently combine existing information and human creativity and evaluate/accredit the resulting works.

#### Decentralised, uncoordinated production

A rule of right holder control artificially favours vertically-integrated production, since an integrated firm can access the upstream works to which it holds the rights as raw materials for downstream uses at the marginal cost of zero.<sup>95</sup> “The larger and more diverse [its] inventory,” the better the opportunities for synergies between available inputs.<sup>96</sup> Firms coordinate production by controlling a set of resources through property rights and commanding a set of agents through managerial instruction within an employment relationship.<sup>97</sup> This model suited 20th century industrial information production, which was structured around capital-intensive communications technology.<sup>98</sup>

Yet this model of production also draws boundaries around the two types of inputs firms can use, delimiting the set of available raw materials a firm holds the rights to and the set of agents whose creativity it employs. These boundaries limit firms’ efficacy by preventing other agents from working with tied-up resources and tied-up agents from working with other resources.<sup>99</sup> This risks misallocating human creativity towards reworking owned-inventory. As Benkler puts it, Disney employees will work with Mickey and Goofy and

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Eldred v. Ashcroft, 534 U.S. 1160 (2003) (No. 01-618), 2002 WL 1041846 (arguing against extending the term of copyright protection).

<sup>92</sup> Yochai Benkler, *Coase’s Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 377 (2002) [hereinafter Benkler, *Coase’s Penguin*].

<sup>93</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 68 (2006) [hereinafter BENKLER, *WEALTH OF NETWORKS*].

<sup>94</sup> *Id.* at 3, 30; Eben Moglen, *Freeing the Mind: Free Software and the Death of Proprietary Culture*, 56 ME. L. REV. 1, 8 (2004).

<sup>95</sup> Benkler, *Intellectual Property*, *supra* note 58, at 95; Netanel, *Market Hierarchy*, *supra* note 10, at 1912.

<sup>96</sup> Benkler, *Intellectual Property*, *supra* note 58, at 88-89.

<sup>97</sup> Benkler, *Coase’s Penguin*, *supra* note 92, at 410.

<sup>98</sup> See BENKLER, *WEALTH OF NETWORKS*, *supra* note 93, at 376.

<sup>99</sup> Benkler, *Coase’s Penguin*, *supra* note 92, at 411.



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Warner Brothers employees with Bugs and Daffy, which may not be an optimal combination of inputs.<sup>100</sup>

Conversely, a rule of free transformative use utilises information's non-rivalrous nature and the ubiquity of inexpensive physical capital in the 21st century. It unleashes creativity, by allowing anyone to use any existing work as an input at its initial marginal cost and without licensing-based transaction costs. Instead of relying on managerial coordination, an unbounded set of agents can self-identify for the task of reworking portions selected from an unbounded set of informational inputs.<sup>101</sup> Vast numbers of individuals can explore their information environment and create works independently or in loosely associated, geographically dispersed peer groups.<sup>102</sup>

"People have different innate capabilities, personal, social, and educational histories, [and] emotional frameworks" leading to idiosyncratic insights into existing information, which result in divergent utilisation of that information as inputs.<sup>103</sup> Since the input, "human creativity," is highly variable and individuals have the best access to information about their own talents and motivation, it is efficient for individuals with new ideas for using existing resources to identify themselves.<sup>104</sup> For instance, Danger Mouse self-identified to create the Grey Album, by combining musical inputs he selected (disregarding copyright) in an idiosyncratic manner.

#### Non-market incentives alongside markets

Right holder control increases the costs of expression, forcing producers to recoup the higher entry costs by adopting market-based, commercial strategies.<sup>105</sup> Conversely, free transformative use lowers production costs, enabling information production not motivated by commercial profitability.<sup>106</sup> Since the remaining primary cost to authors is the input of their own creativity, any of the diverse reasons that drive individuals to communicate suffice to create content (be it to edify, inform, entertain, or merely for the intrinsic joy of creation).<sup>107</sup> "Low-cost, low-returns [production] strategies" become

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<sup>100</sup> Benkler, *Intellectual Property*, *supra* note 58, at 93-95.

<sup>101</sup> Benkler, *Coase's Penguin*, *supra* note 92, at 414-15.

<sup>102</sup> *Id.* at 375-76; BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 63, 68.

<sup>103</sup> Benkler, *Coase's Penguin*, *supra* note 92, at 414.

<sup>104</sup> *Id.* at 404, 414; Lemley, *Economics of Improvement*, *supra* note 83, at 1050.

<sup>105</sup> Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation towards Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 569-70, 576 (2000); Benkler, *Intellectual Property*, *supra* note 58, at 93.

<sup>106</sup> Benkler, *Coase's Penguin*, *supra* note 92, at 378; Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 410 (1999).

<sup>107</sup> BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 166-67; Benkler, *Free as the Air*, *supra* note 106, at 410; Benkler, *Coase's Penguin*, *supra* note 92, at 424-25.

sustainable.<sup>108</sup>

This may increase the input of human creativity by drawing on individual effort that would otherwise have been used for nonproductive consumption of information products. Thus, individuals can spend their free time engaging in creative endeavours, such as producing memes or mashups, instead of watching television.<sup>109</sup>

Free transformative use would not eliminate commercial production, but rather would enable non-market forms of production to emerge alongside it. The obligation to compensate original authors maintains the incentive and signaling functions of copyright. Since the initial author benefits from commercial transformative uses, she has an incentive to produce works which others want to use as raw materials. Moreover, if free transformative use proves more efficient than right holder control, a functioning system of compensation would lead to greater incentives for investment in works. This would resolve concerns with traditional compulsory licensing as imposing artificial ceilings on investment in works.<sup>110</sup>

#### Non-market signals of value

Uncoordinated non-market peer production risks drowning audiences in a torrent of low-quality transformative works, causing high congestion externalities. Volunteers may mis-self-identify for tasks, since some will misperceive their own abilities.<sup>111</sup> The resulting information overload would disrupt the information ecosystem, hampering existing commercial production. Nobody would hear the “Grey Album” amidst the cacophony of poor-quality mashups. Thus, information production needs a cost-effective way of judging and signalling the relevance and quality of works.

As argued above, markets are one way of signalling value. Firms perform relevance and accreditation functions internally, using market studies to indicate consumer preferences and coordinate production accordingly.<sup>112</sup>

Yet the relevance/accreditation function can itself be performed through a disaggregated peer production model online.<sup>113</sup> Users sift through and evaluate content and indicate their approval by viewing it, linking to it, or sharing it in their network.<sup>114</sup> Their behaviour forms patterns which can be used to order information.<sup>115</sup> For example, online sharing platforms such as YouTube can

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<sup>108</sup> Benkler, *Intellectual Property*, *supra* note 58, at 88.

<sup>109</sup> Benkler, *Coase's Penguin*, *supra* note 92, at 423.

<sup>110</sup> Goldstein, *Preempted State Doctrines*, *supra* note 70, at 1135 (raising this concern).

<sup>111</sup> Benkler, *Coase's Penguin*, *supra* note 92, at 415.

<sup>112</sup> *See id.* at 382; BENKLER, *WEALTH OF NETWORKS*, *supra* note 93, at 69.

<sup>113</sup> Benkler, *Coase's Penguin*, *supra* note 92, at 383-84, 391.

<sup>114</sup> BENKLER, *WEALTH OF NETWORKS*, *supra* note 93, at 12-13.

<sup>115</sup> Benkler, *Coase's Penguin*, *supra* note 92, at 391.

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use the over 2 million views of the “The Notorious XX” to rank it higher than other content of lesser quality. In this manner, aggregate user activity creates an orderly ranking of relevance and quality of content.<sup>116</sup>

In addition, individuals form small clusters around specific interests and engage in intense discussion on the relevance and value of certain content.<sup>117</sup> These clusters are connected, so accredited content can transfer from smaller focussed clusters to larger more general clusters. This system of peer review helps organise the abundance of works available online.<sup>118</sup>

Peer-produced methods of relevance/accreditation may be better than markets at identifying valuable uses. They do not conflate willingness to pay and ability to pay, but track consumer preferences directly, directing investment towards all users who place a non-negative value on goods.<sup>119</sup> In addition, unlike markets, they are not skewed against uses with high positive externalities. By lowering production costs, free transformative use instead enables high-value, low-profit production.

Effective relevance/accreditation further reduces the risk of congestion externalities from low-quality transformative uses online. Off-line push-media risk saturating audience interest with numerous low-quality re-uses. In online pull-media, low-quality transformative works will simply be ignored.

*Conclusion*

In sum, while right holder control favours vertically-integrated, market production, free transformative use encourages commons-based, non-market production, which relies not on firms’ internal managerial coordination and markets’ external price signals, but on decentralised information gathering and exchange.<sup>120</sup> A utilitarian must consider which form of production is likely to be most efficient in aggregate. This turns in part on whether the benefits of peer production (such as improved allocation of the inputs of creativity and existing information) outweigh its costs in terms of congestion externalities.

The extent to which congestion externalities actually discourage investment is questionable. Strong congestion externalities would lead to few instances of large, risky investments in transformative works based on existing works which suffer from non-exclusivity, such as works in the public domain. Yet many commercial films are based on public-domain works, from Homer’s “Iliad” (Warner Brothers’ 2004 “Troy,” with an estimated budget of

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<sup>116</sup> BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 171-72.

<sup>117</sup> *Id.* at 253-54, 258.

<sup>118</sup> *Id.* at 167, 242, 254, 258.

<sup>119</sup> See James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination, and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2030-31, 2033 (2000).

<sup>120</sup> BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 63; Benkler, *Coase’s Penguin*, *supra* note 92, at 375-76.

\$175,000,000)<sup>121</sup> to Rudyard Kipling's "The Jungle Book" (Walt Disney Company's 1967 cartoon), and Sir Arthur Conan Doyle's "Sherlock Holmes" (simultaneous production of Warner Brothers' motion pictures in 2009 and 2011 and a separate BBC series in 2010).

Ultimately, absent empirical evidence, the effect of copyright's scope on aggregate output is unclear.<sup>122</sup> Yet the above discussion makes clear that the case for awarding authors exclusive control over transformative uses as stewards of value is weak. The existing copyright system is understandably criticised for resembling an industrial policy promoting existing firms, rather than a coherent utilitarian theory.<sup>123</sup>

#### TOWARDS ENLIGHTENMENT: KANTIAN-HABERMASIAN THEORY

The Kantian-Habermasian perspective seeks to facilitate tolerant and responsive communications which reflect on and critique dominant ideologies, cultures, and traditions.<sup>124</sup> Culture consists of a set of commonly held meanings which enable communication among individuals.<sup>125</sup> This set of historically contingent beliefs, attitudes, and conditions forms the unexamined foundation of communication.<sup>126</sup> Cultural norms are powerful social forces: they shape perceptions and expectations, circumscribing the range of behaviours individuals consider realistically available to them.<sup>127</sup>

Since culture is produced by a dynamic process of engagement among community members, its norms are "revisable through critical examination" and communication.<sup>128</sup> The Kantian-Habermasian theory posits that enlightened individuals should not defer to established authority or tradition, but use their reason to examine cultural norms, identify latent prejudices and inconsistencies, and engage in tolerant communications with others accordingly.<sup>129</sup> Such communications support a community's collective

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<sup>121</sup> *Troy* (2004), IMDB, [http://www.imdb.com/title/tt0332452/?ref\\_=fn\\_al\\_tt\\_1](http://www.imdb.com/title/tt0332452/?ref_=fn_al_tt_1) (last visited Mar. 2, 2015) (archived at <http://perma.cc/7YSC-UDAZ>).

<sup>122</sup> Benkler, *Intellectual Property and the Organization of Information Production*, *supra* note 58, at 99.

<sup>123</sup> See BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 439; Sterk, *supra* note 16, at 1244

<sup>124</sup> Barron, *supra* note 12, at 8.

<sup>125</sup> BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 279, 282; Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 36 (2004).

<sup>126</sup> BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 282.

<sup>127</sup> *Id.* at 283; Balkin, *Digital Speech and Democratic Culture*, *supra* note 125, at 39 (2004).

<sup>128</sup> BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 282.

<sup>129</sup> Barron, *supra* note 12, at 16.

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emancipation.<sup>130</sup>

Copyright law orders the network of communications which shape culture and in which authors and audience are integral participants.<sup>131</sup> It should foster conditions conducive to the public use of reason and counteract manipulative, egoistic, or intolerant speech.<sup>132</sup> It need not defer to existing individual preferences, which are, to some extent, shaped by mass media advertising and marketing campaigns aimed at aligning consumer preferences with producer interests.<sup>133</sup> Instead, individuals should strive to transcend their empirically given wants and use their reason to think for themselves and determine their actions.<sup>134</sup>

From this perspective, utilitarian concerns with congestion externalities are misguided. Right holders may have a plausible *economic* case for protection from transformative uses, but lack a legitimate *copyright* claim. The trademark-dilution-analogy disregards copyright's distinctive nature. Trademarks serve as unidirectional communication in the marketplace, signalling the source of the products they distinguish.<sup>135</sup> The audience's role is to receive this information passively and consider products for purchase.<sup>136</sup> By contrast, works of authorship serve as multidirectional communication: they invite and elicit responses, addressing the audience as fellow participants engaged in a communal dialogue.<sup>137</sup> At the same time, they are themselves responses to previous works, embedded in an existing cultural conversation.<sup>138</sup>

Copyright should stimulate, not disrupt this conversation. If the Walt Disney Company seeks to avoid congestion externalities, it should seek trademark protection, not copyright. "[E]ven if conflicting uses over time distort . . . [a] work's meaning so as to destroy its commercial value, that Schumpeterian creative destruction is . . . an integral part of" cultural progress.<sup>139</sup>

On this view, right holder control lamentably gives a small number of large media corporations exclusive power over the use of important cultural artefacts, handing them a distinct speech advantage.<sup>140</sup> The success of 20th

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<sup>130</sup> *Id.* at 8,16, 23.

<sup>131</sup> See Drassinower, *From Distribution to Dialogue*, *supra* note 14, at 1005.

<sup>132</sup> Barron, *supra* note 12, at 23.

<sup>133</sup> BENKLER, WEALTH OF NETWORKS, *supra* note 93, at 290; Netanel, *Copyright Alienability Restrictions*, *supra* note 27, at 439-40.

<sup>134</sup> See Barron, *supra* note 12, at 10, 16.

<sup>135</sup> Drassinower, *Authorship as Public Address*, *supra* note 12, at 204, 222, 229.

<sup>136</sup> *Id.* at 229.

<sup>137</sup> *Id.* at 204, 230.

<sup>138</sup> *Id.* at 209.

<sup>139</sup> Netanel, *Why Has Copyright Expanded?*, *supra* note 11, at 20.

<sup>140</sup> See Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 3 DUKE L.J. 375, 412 (1990); Barron, *supra* note 12, at 5; Benkler, *Free as the Air*, *supra* note 106, at 398; MacMillan, *supra* note 20, at 46; Netanel, *Market*

century mass media has made its omnipresent iconic images powerful common reference points of popular culture.<sup>141</sup>

Corporations are unlikely to use this speech advantage to pursue cultural progress. Commercial mass media generally have no “interest in rendering culture transparent or writable,” preferring to keep control over the symbols they exploit.<sup>142</sup> In creating works, they aim to appeal to the widest possible audience with products that mildly interest many consumers, without offending any.<sup>143</sup> Such works will overwhelmingly reflect the values and culture of dominant social and ethnic groups at the expense of outlying minorities.<sup>144</sup> In licensing, their goal is to selectively license uses that will maximise the value of their inventory as a whole.<sup>145</sup> This results in conservative licensing policy, avoiding controversial transformative uses that might subvert their content’s carefully curated meaning.<sup>146</sup>

In sum, commercial media “underproduce information that challenges broadly shared cultural precepts.”<sup>147</sup> As Benkler points out, “power over information flows that mirrors economic power in society will tend to prevent effective political challenge to the prevailing order.”<sup>148</sup> While mass media may promote moderate reform, they will rarely challenge society’s “basic social, economic, and political structures.”<sup>149</sup>

This is inimical to Kantian-Habermasian progress. Allowing mass media to control important elements of the cultural environment restricts the communicative choices available to individuals.<sup>150</sup> As Shepard Fairey remarked regarding the AP’s copyright suit relating to his “Hope” poster: “reference is critical to communication” and “social commentary should not be stifled.”<sup>151</sup> Balkin and Netanel advocate empowering individuals to appropriate powerful cultural icons and use them in their own communications by “glomming on” to them, so as to loosen mass media’s hold on public

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*Hierarchy*, *supra* note 10, at 1905-06.

<sup>141</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 125, at 12.

<sup>142</sup> BENKLER, *WEALTH OF NETWORKS*, *supra* note 93, at 290.

<sup>143</sup> Benkler, *Free as the Air*, *supra* note 107, at 378-79; Benkler, *From Consumers to Users*, *supra* note 105, at 564, 576.

<sup>144</sup> Netanel, *Market Hierarchy*, *supra* note 10, at 1883-84.

<sup>145</sup> *Id.* at 1909.

<sup>146</sup> *Id.*

<sup>147</sup> Benkler, *Free as the Air*, *supra* note 93, at 379.

<sup>148</sup> *Id.* at 380.

<sup>149</sup> Netanel, *Market Hierarchy*, *supra* note 10, at 1922.

<sup>150</sup> Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 885 (1993).

<sup>151</sup> William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH 243, 275 (2012).

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discourse.<sup>152</sup>

Free transformative use empowers individuals to “glom on” to copyrighted work and communicate with minimal distortion from commercial imperatives.<sup>153</sup> Individuals and voluntary peer production groups are in a better position to “think for themselves” than mass media companies. Given the low costs of production, online authors need not seek private patronage or state subsidy: they are “beholden to no one” in deploying their own creativity.<sup>154</sup> They can freely subvert commercial firms’ loyalty-inducing use of symbols.<sup>155</sup>

Moreover, transformative uses may be particularly suited to responsive communications. By using existing works, the transformative author engages in an explicit conversation with past authors.<sup>156</sup> Digital mash-ups arguably follow a deconstructionist method: prying open original texts, disassembling them, draining them of the meaning intended by the author, and reassembling them anew.<sup>157</sup> This process need not subvert or parody the original work. In fact, many mashups pay homage to the original.<sup>158</sup> Nonetheless, dis- and reassembling existing works reveals “the multivocality of the text” to the audience, “questioning the very existence of a singular text or cultural authority.”<sup>159</sup> This encourages the listener to consider “what other worlds [might] exist and [which combinations] are possible.”<sup>160</sup>

Ultimately, transformative use can transform authors and readers. Allowing more people to engage in creating cultural meaning encourages them to think for themselves.<sup>161</sup> Having individuals see themselves not just as passive consumers of culture, but active contributors to it, can make them more critical readers of their own culture and more self-reflective participants in it.<sup>162</sup> As a culture consists of individual contributions accumulated over time, the result will be a more self-critical and reflective culture.<sup>163</sup>

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<sup>152</sup> Balkin, *Digital Speech and Democratic Culture*, *supra* note 125, at 41; Netanel, *Copyright and a Democratic Civil Society*, *supra* note 43, at 34.

<sup>153</sup> See Barron, *supra* note 12, at 27.

<sup>154</sup> Benkler, *Free as the Air*, *supra* note 106, at 410.

<sup>155</sup> Gordon, *Copyright Norms*, *supra* note 18, at 80-81.

<sup>156</sup> See Sunder, *supra* note 78, at 305.

<sup>157</sup> Kembrew McLeod, *Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic*, 28 *POPULAR MUSIC & SOC’Y* 79, 83 (2005).

<sup>158</sup> See Sunder, *supra* note 78, at 309.

<sup>159</sup> *Id.* at 306.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 276.

<sup>162</sup> BENKLER, *WEALTH OF NETWORKS*, *supra* note 93, at 15, 220; LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 7 (2001); LESSIG, *REMIX*, *supra* note 38, at 77-81.

<sup>163</sup> BENKLER, *WEALTH OF NETWORKS*, *supra* note 93, at 275-85; Balkin, *Digital Speech and Democratic Culture*, *supra* note 125, at 5.

COUNTERARGUMENTS AND POLICY PROPOSAL

This section first rebuts arguments commonly raised against free transformative use, including that such a rule is unnecessary due to copyright's existing features, as well as concerns that a rule of free transformative use would be impracticable. Then, it considers the practical options for introducing a rule change.

*Unnecessary*

The idea/expression dichotomy

The principle that copyright protects only expressions, not ideas, is argued to provide sufficient space for subsequent authors.<sup>164</sup> However, the idea/expression dichotomy fails to resolve Kantian-Habermasian concerns with appropriation of dominant cultural images, since those are protected as expressions.<sup>165</sup>

Moreover, the idea/expression dichotomy arguably creates perverse utilitarian incentives, since authors are encouraged to compete with successful works by altering expressive elements, without innovating on the underlying ideas.<sup>166</sup> This results in a marketplace crowded with works that differ superficially, but are fundamentally repetitive in their style and message.<sup>167</sup>

Transformative use enables the inverse process: experimenting with existing expressions in imaginative ways to communicate new ideas. This creates space for the emergence of new artistic styles such as postmodernist art and digital collage.<sup>168</sup> Encouraging authors to explore what is possible is arguably more conducive to "progress."

The idea/expression dichotomy is arguably the minimum necessary condition for the copyright system to function.<sup>169</sup> All authors borrow abstract concepts such as forms, techniques, and styles, from their predecessors.<sup>170</sup> Protecting general ideas under copyright would leave too little space for others

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<sup>164</sup> Gordon, *Copyright Norms*, *supra* note 18, at 78 (describing this position); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967-68 (1990).

<sup>165</sup> MacMillan, *supra* note 20, at 56.

<sup>166</sup> Goldstein, *Preempted State Doctrines*, *supra* note 70, at 1136.

<sup>167</sup> *Id.*

<sup>168</sup> See Gordon, *Copyright Norms*, *supra* note 18, at 79-80 (describing the post-modernist art movement); McLeod, *supra* note 157, at 80-81 (describing modernist collage aesthetic).

<sup>169</sup> Litman, *supra* note 164, at 967-68.

<sup>170</sup> Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1030 (1990) (book review); Waldron, *supra* note 150, at 897-98; James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 111 (1997).



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to create and communicate works.<sup>171</sup> Free transformative use looks beyond the minimum requirements for free expression, aiming to optimise conditions for creative expression. As Waldron puts it: transformative authors *could* make their observations without using copyrighted icons or images, but it would make the world “flat and colorless,” limiting the discussion’s diversity and richness.<sup>172</sup>

Limited duration

Copyright’s limited duration supports transformative uses.<sup>173</sup> However, current copyright terms mean works may be protected “for more than a century before . . . enter[ing] the public domain.”<sup>174</sup> This lag significantly hampers the efficacy of the public domain.

Leakiness

Merges argues that the copyright system’s inherent leakiness provides sufficient space for subsequent authors. Due to high enforcement costs, right holders often voluntarily waive their exclusive rights in the face of numerous minor online infringements. This leaves transformative authors with *de facto* freedom to experiment.<sup>175</sup>

Yet if, as argued above, transformative use accords with copyright theories, it should not be relegated to a legal grey zone, dependent on right holders’ benign neglect of low-visibility re-uses.<sup>176</sup> Even if some transformative authors are willing to create under such conditions, businesses will be hesitant to invest in distributing transformative works and online platforms may comply with threats of liability for hosting infringing material, resulting in effective collateral censorship.<sup>177</sup>

Moreover, new technology may reduce enforcement costs by improving automatic detection and notice-and-takedown procedures. Thus, *de facto* space for transformative authors rests precariously on future technological development.

Fair or free use exceptions

Some legal systems provide a copyright exception for transformative use.

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<sup>171</sup> Drassinower, *Rights-based View*, *supra* note 11, at 17.

<sup>172</sup> Waldron, *supra* note 150, at 886.

<sup>173</sup> See Gordon & Bahls, *supra* note 72, at 633.

<sup>174</sup> Netanel, *Market Hierarchy*, *supra* note 10, at 1901.

<sup>175</sup> Robert P. Merges, *Locke Remixed* ;-), 40 U.C. DAVIS L. REV. 1259, 1262, 1273 (2007).

<sup>176</sup> See Sunder, *supra* note 78, at 308.

<sup>177</sup> See LESSIG, REMIX, *supra* note 38, at 108; Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 435-36 (2009).

For instance, the US's "fair use" exception protects transformative uses which alter the original work by adding new expression or meaning for a different expressive purpose.<sup>178</sup> Similarly, the German doctrine of "free use" permits subsequent authors to use existing works to create new, independent works without the consent of the author of the original.<sup>179</sup> This German doctrine seeks to protect the freedom of the arts, or "Kunstfreiheit" and preserve sufficient room for the play of creativity, or "Spielraum."<sup>180</sup>

While the goals of fair/free use are laudible, relying on an exception introduces a stark, winner-takes-all choice between enforcement and injunction on the one hand, or fair/free use on the other.<sup>181</sup> This inevitably causes hardship in difficult cases and increases error costs, since a judicial false negative enjoins creative expression.<sup>182</sup> Relying on an exception also introduces uncertainty, since it is hard to predict *ex ante* whether the work will qualify under the exception (the United States and German exceptions are narrower than the broad transformative re-use proposed in this essay).<sup>183</sup> Given the expense of pursuing an exception in court, transformative authors may succumb to legal threats and stop distributing their work.<sup>184</sup> Finally, providing an exception without compensation to the original author raises Lockean concerns<sup>185</sup> and disrupts signalling incentive effects.

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<sup>178</sup> Netanel, *Making Sense of Fair Use*, *supra* note 52, at 722, 747; *see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576-77 (1994); *see also* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1266-68 (11th Cir. 2001).

<sup>179</sup> Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl. I at 1273 (Ger.), *translated at* [http://www.gesetze-im-internet.de/englisch\\_urhg/](http://www.gesetze-im-internet.de/englisch_urhg/) (archived at <http://perma.cc/PYY4-L9H3>); *see, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 20, 2008, docket number IZR 112/06, at §14-16 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 20, 2008, docket number I ZR 112/06, at §20-21 (Ger.) (*translated at* Neil Conley & Tom Braegelmann, *Metall auf Metall: The Importance of the Kraftwerk Decision for the Sampling of Music in Germany*, 56 J. COPYRIGHT SOC'Y U.S.A. 1017, 1020, 1033-34 (2009) (holding that free use applies by analogy to neighbouring rights in phonograms).

<sup>180</sup> Geller, *supra* note 9, at 49; *see e.g.*, BverfG, June 29, 2000, docket number 1 BvR 825/98 at §§ 14-28, 32 (Ger.), *available at* JURIS.

<sup>181</sup> Lemley, *Licensing Market*, *supra* note 9, at 191-92. *See* Gordon, *Fair Use as Market Failure*, *supra* note 9, at 282.

<sup>182</sup> *See* Lemley, *Licensing Market*, *supra* note 9, at 196 (arguing that a compensation-without-control rule ensures that courts do not wrongly enjoin creative expression).

<sup>183</sup> *Id.* at 185-86. *See, e.g.*, Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Nov. 20, 2008, I ZR 112/06 (§§ 22-24) (Ger.).

<sup>184</sup> LESSIG, *FREE CULTURE*, *supra* note 9, at 98, 107, 185, 187; Tushnet, *supra* note 37, at 142.

<sup>185</sup> *See* Merges, *Locke Remixed*, *supra* note 175, at 1270 (arguing that transformative authors should recognise the Lockean debt they owe original authors).

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*Impracticable*

Valuing contributions

Merges and Gordon argue that a rule of free transformative use is impracticable, since courts are inappropriate institutions for setting copyright prices.<sup>186</sup> Courts are ill-situated to accurately value the contribution of the portion of the original to a new work, since private parties have better access relevant information.<sup>187</sup>

Yet private parties remain free to use their information in negotiations under a free transformative use rule. Initial authors benefit from negotiations by gaining compensation, while transformative authors benefit from reduced legal uncertainty by negotiating profit allocation beforehand.<sup>188</sup> Consequently, production practices might not change drastically, since many transformative use cases presently end in settlements.<sup>189</sup> Moreover, transformative use rules could be formulated to increase incentives for negotiations by imposing punitive damages on transformative authors who fail to trace and negotiate with the initial author in good faith.

Negotiations would proceed differently against the backdrop of a free transformative use rule. The adversarial relation of right holder and infringer is replaced with a profit-sharing partnership. Right holders face lower decision costs, since they only need to decide on an appropriate profit allocation. Moreover, the absence of injunctive relief should end “tragedy of the anti-commons” problems associated with multiple right holders holding veto powers,<sup>190</sup> and prevent right holders from extracting the lion’s share of the surplus in return for permission.<sup>191</sup>

Nonetheless, parties will turn to courts if their counterpart fails to offer reasonable terms. Admittedly, assessing the “value” of a contribution to a work contains a subjective element. Yet judges can rely on objective factors (such as length of a sample in a song) and expert testimony (for instance, from musicologists) in reaching valuations.<sup>192</sup> Moreover, United Kingdom copyright law already relies on judges to assess the value of individual contributions to a

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<sup>186</sup> Gordon, *Fair Use as Market Failure*, *supra* note 9, at 1623.

<sup>187</sup> Merges, *Of Property Rules*, *supra* note 70, at 2658-59, 2664-65; *see* Gordon, *Fair Use as Market Failure*, *supra* note 9, at 1623.

<sup>188</sup> Rubinfeld, *supra* note 9, at 58.

<sup>189</sup> *See id.*; *see also* David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, in *THE CONSTRUCTION OF AUTHORSHIP* 343, 354 (Martha Woodmansee & Peter Jaszi eds., 1994) (citing copyright cases of sampling ending in settlements).

<sup>190</sup> Gordon & Bahls, *supra* note 72, at 640; Akerlof et al., *supra* note 61, at 13.

<sup>191</sup> Goldstein, *Derivative Rights*, *supra* note 10, at 237; Netanel, *Copyright and a Democratic Civil Society*, *supra* note 43, at 381-82.

<sup>192</sup> *See* Geller, *supra* note 9, at 65-66.

work in cases of joint authorship. Under United Kingdom case law, a joint author has a share in the proceeds of a work equal to his contribution to the work.<sup>193</sup> Finally, judges do not need to allocate profits perfectly; so long as they do not systematically misallocate profits, they will not disrupt the incentive system.

#### Enforcing compensation obligations

Landes and Posner object that under a rule of free transformative use, right holders would face high transactions costs in enforcing their right to compensation against numerous and dispersed users. The potential fee might be so small “that enforcement proceedings would be infeasible.”<sup>194</sup>

However, right holders need not enforce against every transformative use: they can wait for high-value transformative uses to emerge and enforce their right to compensation against those uses. This mirrors right holders’ present strategy of ignoring low visibility infringements under the existing copyright system, which also has high enforcement costs. Moreover, given their incentives to negotiate, right holders and transformative authors can develop institutions and technologies to reduce transaction costs.<sup>195</sup> In addition, if authors generally consider free transformative use a more coherent rule governing authorship in the digital environment, the higher perceived legitimacy will lead to more voluntary compliance (and reduced principled non-compliance).

#### *Policy proposal*

Present policy proposals tend to focus either on creating a broad exception to copyright protection for transformative uses (without compensation), as in the American or German model, or on maintaining right holder control and reducing licensing transaction costs. For instance, in the UK, the 2006 Gowers report proposed introducing an exception for transformative use under EU Copyright law, although the subsequent Hargreaves report quietly dropped this point.<sup>196</sup> Instead, UK policy has moved towards “streamlining” licensing through a voluntary, industry-led digital Copyright Hub.<sup>197</sup>

The above insights suggest that both proposals are misguided and that

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<sup>193</sup> *Bangboye v. Reed*, [2002] EWHC (QB) 2922, [42] (Eng.); *Fisher v. Brooker*, [2009] UKHL 41, [41] (appeal taken from Eng.).

<sup>194</sup> Landes & Posner, *Economic Analysis of Copyright*, *supra* note 17, at 358.

<sup>195</sup> Netanel, *Copyright and a Democratic Civil Society*, *supra* note 43, at 381-82.

<sup>196</sup> ANDREW GOWERS, GOWERS REVIEW OF INTELLECTUAL PROPERTY 68 (2006); IAN HARGREAVES, DIGITAL OPPORTUNITY (2011).

<sup>197</sup> RICHARD HOOPER & ROS LYNCH, COPYRIGHT WORKS: STREAMLINING COPYRIGHT FOR THE DIGITAL AGE 13, 15, 51 (2012); *see generally* H.M. Government, Government Policy Statement: Consultation on Modernising Copyright, (2012); THE COPYRIGHT HUB, <http://www.copyrighthub.co.uk/> (archived at <http://perma.cc/335X-DWXM>).

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legislatures should instead implement rules of free transformative use with equitable compensation. It is not clear whether implementing such a rule at the national level would contravene international copyright law, which provides for exclusive rights over reproduction and “adaptation” or “other alteration.” The so-called “three-step test” further provides that national limitations on authors’ exclusive rights must relate to special cases, not conflict with a normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the author/right holder.<sup>198</sup>

To avoid breaching international law, a State implementing a rule of free transformative use would have to argue either that: (i) transformative use does not fall under the exclusive rights of reproduction and alteration;<sup>199</sup> (ii) that a rule of free transformative use does not fall under the “three-step test” since it does not limit authors’ exclusive rights, but merely changes the available remedy;<sup>200</sup> or (iii) that such a rule accords with the three-step test, since “normal exploitation” of a work should not encompass licensing transformative use.<sup>201</sup> Ultimately, if such arguments fail, the rules of international copyright treaties should themselves be amended to make room for free transformative use.

#### CONCLUSION

This essay has argued that copyright can achieve better internal coherence by freeing transformative use, since doing so accords with all four underlying theories of copyright, provided that: (i) the transformative work does not substitute for the original; and (ii) the transformative author provides (a) compensation and (b) attribution to the initial author(s). Kantian and Lockean theories view copyright as part of an author’s natural rights, based on her autonomy in expression and her rights to the fruits of her labour. These

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<sup>198</sup> Berne Convention, *supra* note 1, at art. 9(2); WIPO Copyright Treaty art. 10(1), Dec. 20, 1996, 36 I.L.M. 65; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13 Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994); Council Directive 2001/29, art. 5(5), 2001 O.J. (L167) 10 EC.

<sup>199</sup> See e.g. P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, *CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT* 14 (2008) (arguing that the lack of definition of ‘reproduction’ in international instruments provides room for recognising limitations); MIREILLE VAN EECHOUDE ET AL., *HARMONISING EUROPEAN COPYRIGHT LAW* 84, 100 (2009) (arguing that what constitutes reproduction has not been harmonised at the European level).

<sup>200</sup> See HUGENHOLTZ & OKEDIJI, *supra* note 199, at 20 (arguing that the three-step test does not apply to provisions that restrict the exercise of economic rights, which are technically not limitations).

<sup>201</sup> See CRISTOPHE GEIGER ET AL., *THE THREE-STEP TEST REVISITED: HOW TO USE THE TEST’S FLEXIBILITY UNDER NATIONAL COPYRIGHT LAW* 36 (2013).

theories require copyright to respect the equality of the initial and subsequent transformative authors. Thus, the author of the original work must respect the transformative author's autonomy in her expression, as well as her rights to the fruits of her transformative labour. These individual-rights-based theories would reject limiting either author's rights in service of aggregate welfare or societal interest.<sup>202</sup>

Nonetheless, a rule of free transformative use is also consistent with theories which justify copyright at the societal level. Utilitarian theory views copyright as an incentive to promote authors' investment in works of creative expression. Proponents of the existing rule of right holder control argue that authors should be granted rights of control as stewards of value. Doing so enables licensing markets to emerge, which identify the highest valued uses of existing works. Right holder coordination further enables investment in transformative uses by reducing congestion externalities.

However, markets arguably provide poor signals of value in relation to transformative uses as a result of the pricelessness effect, distortions caused by differences in ability to pay, and their inability to account for positive externalities. Moreover, right holders will often make suboptimal licensing decisions, since they face vast informational demands in setting license fees, leading to high decision-transaction cost, and are prone to irrational risk-aversion. These insights into market limitations and market malfunction indicate that right holders likely make poor stewards of value.

Right holder control further artificially favours market-oriented production of works within vertically integrated firms. Firms' reliance on intellectual property rights and employment relationships limits their ability to efficiently combine inputs of existing information (in the form of works they hold the rights to) with human creativity (in the form of the agents they employ).

Conversely, free transformative use unleashes creativity by making information inputs available at their marginal cost to all. This empowers authors to self-identify for the task of combining portions of self-selected existing works in idiosyncratic ways. Combined with the low-cost of digital communications technology, this encourages forms of non-market, decentralised peer production to emerge alongside commercial firms. Online, aggregate user activity and peer review clusters can evaluate and accredit works, reducing congestion externalities from low-quality transformative uses. The resulting forms of production are less prone to distortion by ability to pay and more conducive to high-positive-externality uses. The obligation to compensate the original author maintains commercial incentives and helps direct investment in initial works. Although empirical evidence is lacking, these insights provide a strong, utilitarian case for free transformative use.

Finally, Kantian-Habermasian theory laments the utilitarian understanding of works solely as instances of value, emphasising instead that works are also

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<sup>202</sup> Gordon, *Inquiry into the Merits of Copyright*, *supra* note 76, at 1440.

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instances of interpersonal communication. As a result, works of authorship inherently entail strong, non-monetisable community interests in critical, dialogical communications, which are poorly served by private ordering through markets and property. A rule of free transformative use accords with Kantian-Habermasian theory, since it promotes critical and responsive communications by empowering individuals to use the iconic works of mass media transformatively. Individuals are more likely than corporations to think for themselves, question existing cultural norms, and engage in tolerant communications which assist a community's collective emancipation towards enlightenment.