For ~~Scott~~ Gene

=H2 Toward a Jurisprudence of Benefits: Reflections on the Maturing of ~~a discipline**d~~ Copyright**d

=B2 Wendy J. Gordon**d

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Copyright: Principles, Law and Practice. Paul Goldstein. Little, Brown, 1989. Three volumes: pp lvi, 724 (Volume I, Chapters 1-6); pp xlviii, 706 (Volume II, Chapters 7-16); pp vii, 991 (Volume III, Appendices, Tables, and Index). $275.

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For many years copyright was a backwater of the law. Perceived as an esoteric and narrow field beset by hypertechnical formalities, the discipline and its practitioners were largely isolated from developments in scholarship and case law in other areas. There were exceptions, of course. Well before the explosion of intellectual property litigation in the last twenty years, persons such as Zechariah Chaffee, Jr. and Judge Learned Hand brought ~~a wealth of~~ learning ~~and~~ broad perspective to copyright. But by and large copyright looked only to itself for guidance.

Today, copyright scholars are increasingly reaching across disciplinary lines for sources of insight and analogy. Economics and philosophy as well as doctrines from other areas of the law have been employed. But courts have often rebuffed attempts to use the learning of other fields,[1] and balkanization persists in much of the commentary as well.

One major reason for the increasing breadth of copyright

scholarship is the 1976 Copyright Act, which simplified and rationalized the complexities and formalisms of prior law, making in-depth analysis of broad issues easier and more attractive. But the trend began earlier. In my view at least three pre-1976 works mark the transition to a broader sort of copyright scholarship. One was Justice Benjamin Kaplan's An Unhurried View of Copyright,[2] an exploration simultaneously leisurely and incisive of copyright's history, context, and policies. Another was Judge Stephen Breyer's important investigation of copyright's economic justifications.[3] A third was Professor Melville Nimmer's treatise, which better than any reference work before it provided a thorough and analytic guide to the area.[4]

That the discipline has reached a new maturity is confirmed by Paul Goldstein's treatise.[5] This new work by an acknowledged leader in the field provides a coherent and comprehensive view of copyright and related sources of protection of intellectual property that is animated and unified by an explicit normative structure. The Goldstein treatise knits copyright's various doctrines into a whole that can be evaluated and placed in larger context.

This essay will begin with a description of the Goldstein treatise and of the general body of the law that it surveys. The essay will then examine the treatise's treatment of a variety of topics, all of which potentially illuminate one of our culture's central concerns: the extent to which new authors, artists, and audiences should be free to use prior works to express

themselves. The essay then uses some of the discipline's new tools to address a central and as yet unresolved question: whether copyright ~~can~~ be used as a tool of private censorship.

In carrying out this latter task, the essay draws upon the treatise's normative apparatus ~~and~~ other sources. As a substantive matter, this portion of the essay tentatively concludes that it is consistent with both the norms of copyright and other patterns in the law to deny enforcement to copyright owners who seek to use the copyright statute to conceal facts or protect themselves or their work from criticism, hostile interpretation, and scrutiny. But the most important point here may be not substantive but methodological, an indication of the kind of far-ranging interdisciplinary inquiry that is necessary if the hardest questions in copyright are to be answered.

=S1I.The Treatise: Its Setting, Style and Substance

=S2A.A Quarter-Century of Copyright

Melville Nimmer published the first edition of his now-famous treatise on copyright in 1963. By then it had long been acknowledged that existing copyright law, a patchwork of emendations grafted onto the 1909 Copyright Act, was cumbersome and outdated. But achieving a comprehensive revision proved difficult. Repeated efforts were made, and the revision process heated up again in the early 1960s, with a "mockup revision bill" introduced in Congress in 1964.[6] Copyright experts welcomed Nimmer's treatise for, among other things, ~~its~~ the implicit support ~~of~~ it provided for a thorough revision of the legislation.[7]

In the ensuing quarter century there have been many changes in the relevant law. Congress thoroughly revised the Copyright Act in 1976.[8] Among the more significant alterations has been a lengthening of the term during which a copyright can subsist before the work enters the public domain,[9] and ~~the creation of a complex compulsory licensing scheme for cable retransmission of broadcast signals.~~[10] replacing state protection for unpublished writings with federal copyright The revised Act also eased the statutory formalities that had long bedeviled copyright proprietors, notably the requirements of renewal[11] and the necessity of properly affixing a copyright notice to all published copies. Works created after January 1, 1978, the effective date of the new Act, were freed from renewal requirements altogether, and certain errors in notice were prospectively deemed harmless or curable.[12] More recently, in order that the United States could join the many nations that subscribe to the Berne Convention, Congress rendered ~~virtually all~~ most of the remaining formalities[13] inapplicable to new works and to the new publication of existing works.

Even more important developments in copyright have taken place in the past few decades outside the legislative arena. The United States has witnessed a steady decline in heavy manufacturing, while the industries most affected by intellectual property law--such as entertainment and computer software--have flourished. In the same period, tape recorder, VCR, and computer ownership has dramatically increased,[14] enabling private individuals to cheaply and easily reproduce others' copyrighted

works.[15] These changes have made copyright law, not long ago considered to be among the "most esoteric of subjects,"[16] an area of mainstream study and everyday discussion.

The usual barometers of legal activity have, predictably, responded in kind to the statutory and practical changes affecting copyright in the last few decades: litigation on copyright and other interests in intellectual property has steadily increased,[17] and copyright scholarship has also grown. The Nimmer treatise itself, already two volumes before the 1976 Act, was expanded to four volumes to embrace the new legislation.

When it appeared, the Nimmer treatise was received as "undoubtedly the most thoughtful and thought-provoking treatment of American copyright law."[18] In recent years several excellent one-volume texts on copyright have come on the market,[19] but a short treatise cannot achieve the comprehensiveness of Professor Nimmer's four-volume effort. Professor Paul Goldstein's new three-volume treatise, by contrast, represents a substantial challenge to Nimmer's preeminence. With its publication, Professor Goldstein, already a leading presence in the copyright field,[20] has made another major contribution. [21]

=S2B. The Treatise: An Overview

The textual material of the Goldstein treatise is divided into eight parts. The first is an unusually helpful introduction that orients the reader to the underlying principles of copyright (Vol I at 3-22), summarizes the applicable law (Vol I at 23-44), and gives an overview of the practical aspects of copyright

practice, providing along the way some useful suggestions for both litigation and planning. (Vol I at 44-54) The substance of the other textual parts is clear enough from their titles: "Subject Matter, Formalities, Ownership, and Term" (Vol I at 55-509); "Rights" (Vol I at 511-724); "Infringement" (Vol II at 1-143); "Defenses" (Vol II at 145-243); "Remedies" (Vol II at 245-377); "Procedure" (Vol II at 379-466); and "Other Sources of Protection: State, Federal and International Law." (Vol II at 467-706)

This textual material, which comprises the first two volumes of the treatise, is well-organized and clearly written. It is usefully cross-referenced to related topics within the treatise, and is supported in the footnotes by ample references to leading cases and commentary. Given the range of topics covered, however, the decision to limit the text to two volumes makes Professor Goldstein's treatment of particular topics somewhat more abridged than one would like. I hope that he adds another volume of text in the next edition, giving a more leisurely treatment of precedent and history and citing more secondary sources--including his own articles, references to which appear only sparsely.

The treatise's third volume contains the index and tables, but also functions as a mini-library. Except for case reports, this volume provides most of the primary materials that a conscientious practitioner of copyright will need: the 1909 and 1976 Copyright Acts and other relevant statutes; legislative

history; Copyright Office regulations; as well as international copyright conventions and forms useful in copyright practice. In addition, Professor Goldstein has integrated the amendments of the Berne Implementation Act of 1988 into the text of the 1976 Act (Vol III at 4-97), and helpfully provides the pagination of the original legislative reports in brackets.

The materials for Volume III have been carefully selected. No single volume--even one with nearly a thousand pages, as this one has--could contain all of the potentially relevant legislative history. For example, the revision that culminated in the 1976 Act began many decades earlier, and current works can still be affected by the 1909 Act and a number of minor pieces of legislation.[22] Volume III does contain the most important documents relating to the 1976 act, namely the House and Conference Reports, and a significant portion of the legislative history of the Sound Recording Amendment of 1971 and the Semiconductor Chip Protection Act of 1984. For deeper coverage of the applicable legislative history, one would inevitably need to go beyond one's own bookshelf.[23]

For the sake of newcomers to the field, the treatise could perhaps have included a listing of other primary materials, such as the Final Report of the Commission on New Technological Uses of Copyright Works (CONTU),[24] and useful research tools such as the Kaminstein Legislative History Project.[25] Other sources on the border between primary and secondary materials that might have been mentioned include the many Studies on Copyright,[26] each

written by a prominent copyright expert under a commission from Congress, and the recent report from the Office of Technology Assessment, Intellectual Property Rights in an Age of Electronics and Information.[27] Professor Goldstein refers to a wide range of ~~these and other~~ sources in his footnotes, of course, but a central list of such materials, along with a bibliography of ordinary secondary sources (books and articles on copyright and related matters) would have made a useful addendum.[28]

=S2C. Challenges to a Writer on Copyright

One particular challenge facing any writer on copyright is documenting the many changes that the law has undergone in recent decades. Since failure to comply with a formality required some years in the past may have placed a work permanently in the public domain, and since authors' deaths and other events can affect the current validity of copyright assignments in ways determined by "prior" law, even now-repealed statutes remain applicable to current controversies. For example, copyrights of newly created works need not be renewed. (Vol I at 436-37) Yet the most recent Supreme Court case on copyright concerned a renewal question. At issue was Alfred Hitchcock's classic suspense film Rear Window, a derivative work based on a short story under an assignment of copyright that was no longer valid because the assignor had died prior to renewal.[29] The Court held that the movie could not be lawfully reissued without the consent of the new holders of copyright in the underlying work, its decision turning largely on requirements superseded for all

(entering federal copyright ; 1978 or later

~~future~~ works) ~~by the 1976 Act~~.[30] (76 Act explan

The relevant statutory schemes thus create a palimpsest of chronological layers to which a copyright text must provide a useful map. This Professor Goldstein does quite well, providing a technical outline and alerting the reader to the fact patterns that implicate prior law. For this and a multitude of other reasons, the treatise will serve as an excellent guide to the perplexed.

Another challenge facing the writer on copyright arises from the ambiguities of copyright's normative and empirical underpinnings. As will be discussed below at more length, various theories may play a role in copyright. Professor Goldstein himself identifies at least four: "natural justice," "the economic argument," cultur~~al reasons~~, and an ~~"social~~ argument" (Vol II at 685-86.)* To ignore the normative possibilities in treating any particular provision of the copyright laws ~~is~~ would be unfortunate, yet it would be an immense burden to analyze fully the competing goals, to examine what their precise relationships should be, and to gather data and assess the available empirical evidence to determine how well the statute fulfilled these goals. Professor Goldstein has chosen a felicitous middle ground, focusing on the two major strains of argument. He indicates both that the dominant purpose of copyright is instrumental--to "serve the general public interest in an abounding national culture"--and that theories of natural rights have some place, albeit subordinate and ill-defined, in

"development of the national that copyright "makes for social cohesion"

* Quoting from Stephen Stewart, International Copyright and Neighboring Rights 3 (1983)

(Butterworths of NZ 1992)

the copyright scheme. (Vol II at 5; Volume I at 8-9; Volume II at 685-86) He then employs the instrumental model to analyze the nature of the choices Congress made when it enacted the various provisions of the Copyright Act. (See, for example, Vol I at 4-5; Vol I at 516-17; Vol II at 197.) He thus brings unity to the treatise's treatments of disparate topics, and, by pinpointing the hypotheses on which Congress's decisions seem to rest, clarifies for researchers the empirical and normative issues needing attention. He also analogizes to other areas of the law and their use of various norms, drawing for example, on the cost-benefit calculus apparent in certain nuisance law doctrine. (Vol II at 197 n 23)

When a leading authority pens a treatise, we have the opportunity to learn not only what that person thinks the state of the law <u>is</u>, but also what he thinks it should be. The concomitant danger is that the author might confuse prescription with description, might make errors of ascription (inadvertently attributing his own views to the courts or to Congress), or might mar an otherwise sound discussion by advocating only one side of the issue.

Professor Goldstein willingly shares with the reader his opinions on how the law should be, but there is no air of polemic here. His normative views are clearly labeled as such and ordinarily the reader can easily separate them from the treatise's description of what Congress or the courts have in fact done. Goldstein presents his positions without undue

diffidence, yet with a dispassion that reflects respect for the reader. The next two subsections explore Professor Goldstein's treatments of two topics on which he has clear views: derivative works and preemption.

=S31. Derivative works.

The newcomer to copyright typically expects that any work original or creative enough to be copyrighted could not also infringe another copyright. And indeed, the original copyright statute took the position that any substantial creative effort, even when it was applied to someone else's copyrighted work, could not infringe a copyright--a dramatization, bona fide abridgement, translation, or other creative adaptation could be both copyrightable and free of any control by the person who owned the copyright in the work being adapted.[31] Over time, however, this changed. The rule that creative adaptations could be copyrighted was retained[32] (with one exception, mentioned below), but the law now gives the underlying work's copyright owner the exclusive right to authorize or make derivative works,[33] subject to the public's generally applicable privileges[34] and some minor additional limitations.[35] The statute also provides that "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."[36] This means that a derivative work is ineligible for copyright if it pervasively uses copyrightable elements of another's copyrighted work without permission.[37]

One of the best-informed persons to analyze and comment on the history and policy tensions inherent in rights to derivative work is Professor Goldstein himself, and in a 1983 article he persuasively argued that pervasive but relatively minor infringements should not cause a derivative work to lose its copyright.[38] As Goldstein argued, even if the infringed work has a pervasive underlying presence in the new work, denying the second creator a copyright in what he has added removes incentives for creation while giving the first creator more protection than he needs[39] or deserves.[40]

Copyright law's harsh treatment of the derivative creator is not inevitable. Patent law makes the opposite and arguably preferable choice, entitling the inventor of an improvement who has proceeded without permission from the owner of the original patent to an "improvement" patent. Although the owner of the improvement patent cannot sell the improved invention without the agreement of the owner of the underlying invention, nor can the owner of the original invention use the improvement without the improver's consent.[41] This seems a more equitable division of revenue than under copyright law, where a person who proceeds without permission forfeits all copyright in her creation,[42] and yet, despite his belief that Congress should not have denied copyright to works that pervasively employ without permission the copyrighted aspects of a preexisting work, Professor Goldstein's treatment of § 103(a), the relevant statutory provision, not only makes the existing rule clear, but

even begins with a statement of the congressional rationale. (Vol I at 216-17; Vol II at 142-43).[43] Only then does Goldstein go on to state his own position, consigning much to a short footnote (Vol I at 216-17, 217 n 9) that focuses only on the problem of allowing a third party who has copied the derivative work to use that work's own infringement as a defense. In fact, one wishes that Goldstein had been willing to spin out his critical analysis a bit more and incorporate his more recent thoughts, or at least to cite his more developed treatment of the issue elsewhere.[44]

=S32. Preemption.

It should be admitted that Professor Goldstein is not always so retiring in presenting his views, particularly with regard to preemption (Vol II at 470-646), an area of longstanding interest to him.[45] The preemption question is an important one. A host of state rights are potentially available to protect intellectual products either directly or indirectly; these include rights arising under the doctrines of unfair competition, misappropriation, trade secrets, privacy, contract, and quasi-contract, as well as the right of publicity. Determining which of such nonfederal rights survive can be a complex and uncertain undertaking, particularly since the 1976 Copyright Act set forth a new section on preemption, § 301.

Section 301 of the 1976 Act preempts state rights that are within the "subject matter of copyright." In order to be within the "subject matter of copyright," a work must be, among other things, "fixed in a tangible medium of expression." Thus, a judge

even begins with a statement of the congressional rationale. (Vol I at 216-17; Vol II at 142-43);[43] Only then does Goldstein go on to state his own position, consigning much to a short footnote (Vol I at 216-17, 217 n 9) that focuses only on the problem of allowing a third party who has copied the derivative work to use that work's own infringement as a defense. In fact, one wishes that Goldstein had been willing to spin out his critical analysis a bit more and incorporate his more recent thoughts, or at least to cite his more developed treatment of the issue elsewhere.[44]

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will decide that § 301 defeats the assertion of a state law right[46] only if three tests are met: (1) the product sought to be protected is written down, filmed, tape recorded, or otherwise "fixed" under authority of its proprietor; (2) it is a work otherwise within the subject matter of copyright; and (3) the plaintiff asserts a right that is "equivalent to any of the exclusive rights within the general scope of copyright."[47] (Vol II at 473) The contours of § 301, and of intellectual property preemption generally, have not been definitively adjudicated.[48]

The treatise's discussion of preemption contains a fairly high proportion of normative commentary and controversial interpretation. To some extent this is unavoidable; given the large number of currently unanswered questions in the preemption area, interpretations of many of the cases and of portions of the statute itself will inevitably be controversial. Further, the shift in emphasis is not distracting to the reader. On the contrary, Professor Goldstein's handling of this difficult topic is remarkably clear. The treatise not only gives an overview of preemption in the abstract (Vol II at 470-503); it also offers the reader a substantive and fairly extensive description of the various state law rights that border ~~breach~~ copyright (a compilation quite valuable in itself), and follows each treatment of state law with an exploration of how preemption would or could apply to the right under discussion. (Vol II at 503-646) The tone remains dispassionate, and as a technical matter the treatise maintains a fairly clear line between description and prescription.

Nevertheless, a newcomer to copyright or a casual reader might well mistake some of the treatise's interpretations as stating the "black letter law" in an area where little is black letter certain.

Most notably, the neophyte might be confused by Professor Goldstein's statement that § 301 does not preempt state grants of monopoly in ideas.[49] The Copyright Act of 1976 specifically provides in § 102(b) that copyright does not protect ideas,[50] and the reasons for freeing ideas from ~~protection~~ are strong. (Vol I at 34-81) The treatise ~~concludes that~~ § 301 ~~imposes no restrictions on a state's~~ ability to grant such rights to ideas, ~~arguing~~ that ideas are not "within the subject matter of copyright" and that their use can therefore be restrained by state law insofar as § 301 is concerned.[51]

There is certainly case law and commentary supporting the treatise's approach, (Vol II at 488 n 61) ~~though the direction of the case law may shift~~ in light of a recent Supreme Court decision construing the effect of patent law on state intellectual property protection.[52] But there is also case law and commentary going the other way[53] that may be of ~~increased~~ interest, ~~given the Court's recent decision. Even~~ on its own terms, the opposing view that ideas are within the scope of copyright and therefore subject to § 301 preemption has ~~some~~ appeal. For example, it is hard to imagine how an idea, once expressed in words or otherwise given form, could fail to be part of a "work of authorship,"[54] More broadly, it can be argued that

§ 301 is "intended to distinguish" areas in which Congress drew a deliberate balance from those that Congress left "unattended."[55] Under this interpretation, the copying of all the elements that Congress "attended to" by listing as unprotectable in § 102(b) (such as ideas, processes, concepts, systems, discoveries, and perhaps by analogy, facts) must be governed solely by federal law.[56]

In addition to giving insufficient consideration to the merits of the opposing view, Professor Goldstein's approach here is arguably inconsistent with his explanations of copyright's general role in idea protection itself. The treatise suggests that making ideas incapable of ownership is part of an economic calculus that discriminates carefully between those elements of a work for which property-like protection will further social goals and those for which it will not. Under such a view, there seems to be ~~an explicit~~ congressional determination that ideas are elements of works "within the ~~general scope~~ subject matter of copyright" ~~and~~ that should not be ownable in order to further the system's overall goals of encouraging knowledge and cultural growth.[57] If so, state protection that upsets the calculus would seem to be a good candidate for preemption. (Vol II at 477)

The ends-focused model of copyright's scope might not drastically alter the results in preemption cases. The approach suggested would not automatically lead to the preemption of state law protection of ideas, since even a court's conclusion that ~~Congress~~ meant to place ideas were within the overall scope of copyright's subject matter would be only one of several hurdles

that a defendant must surmount before invoking § 301 to defeat a state right.[58] Conversely, the approach advocated by Professor Goldstein would not make all state protection for ideas permissible;as Goldstein notes, state protection for ideas might still be forbidden by the First Amendment (Vol II at 489) or preempted by the Supremacy Clause.[59] Each of these avenues, however, has difficulties of its own.[60]

Professor Goldstein is one of the commentators who have been eloquent and insightful on the importance of free access to ideas. (Vol I at 81-83; Vol II at 228) Given the uncertainties of using Supremacy Clause and First Amendment analyses as safe harbors against state protectionism, analysis of the preemption of state idea-protection under section 301 should take special care not to foreclose the issue, at least until the Supreme Court has spoken definitively.

Professor Goldstein's views on the preemption of ideas, and his views on the copyrightability of pervasively infringing derivative works, are treated differently by the treatise: they are prominent in one instance, more retiring in the other. But in both cases Professor Goldstein meets the challenge of presenting his views in a way that is clear and dispassionate.

=S2D. The Instrumental Model Applied

As mentioned above, another of the challenges facing the author on copyright is posed by the discipline's somewhat ambiguous normative structure; the treatise meets this challenge by employing throughout a normative instrumental model, called at various points "utilitarian" or "economic." (Vol I at 3-13) It

is based on the Constitution's Copyright and Patent Clause, which aims to "promote the Progress of Science and useful Arts."[61] Goldstein employs the instrumental model as a criterion to judge current copyright practice and predict future developments. Though the treatise's use of economics is likely to prove somewhat controversial given the ongoing debates over copyright's norms, it provides helpful guidance on a surprisingly wide range of topics, and ameliorates a treatise's natural tendency toward discontinuity by providing a consistent framework for the treatment of disparate topics. Also, despite the treatise's frequent recourse to economic concepts and terminology, Professor Goldstein does not view economics as a normative monolith superseding all other forms of analysis. Before addressing the normative issues on their own terms,[62] it may be helpful to review some examples of his use of economic language and analysis.

Professor Goldstein has long used economics in his work,[63] and its terminology and concepts obviously come naturally to him. But while ~~that~~ his summaries introducing new topics tend to be steeped in economic vocabulary, his discussion of policy is by no means limited to economic concepts. For example, in discussing why Congress specified that United States government works should not be copyrighted~~ed~~,[64] Professor Goldstein begins by suggesting that Congress preferred supporting these works "by taxes levied at progressive rates [rather] than by the regressive price mechanism of a private property system" ~~(under which the poor may~~

only issue as the best way to provide economic incentives given ... diminishing marginal utility of income

~~be kept from government~~ documents by their lower ability ~~to~~ pay)~~.~~ (Vol I at 14) It sounds at first as if Goldstein sees the ~~issues as exclusively economic~~, but he later discusses the additional issues inherent in the question of whether copyright should subsist in government works, such as the importance to our democratic polity of giving citizens access to, and the free ability to replicate, the significant dictates, decisions, and reports of their government.[65] (Vol I at 88 n 21, 88-89, 97) It thus gradually becomes clear that economics is not the sole normative model at work. Indeed, even Goldstein's introductory use of economic language (i.e., "regressive price mechanism") can be interpreted as an essentially noneconomic point: price structures that penalize the poor are to be avoided where goods such as access to political materials are at issue.[66]

Professor Goldstein shows the connections that can exist between economic and other policy arguments particularly smoothly in his discussion of the "idea/expression dichotomy," the doctrine in copyright law that copyright subsists not in ideas but only in the "particular form or collocation of words"[67] and other expressions of ideas.[68] Though this doctrine is probably most commonly understood in humanistic terms (of cultural value, First Amendment interests, and the like), it can also be understood economically, as Professor Goldstein demonstrates. He usefully distinguishes three kinds of ideas: ideas as marketing concepts, ideas as solutions, and ideas as fundamental building blocks. Of the latter he says:

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The reason for withholding copyright protection from creative building blocks lies in the very object of copyright law: to stimulate the production of the most abundant possible array of literary, musical and artistic expression. To give creators a monopoly over such fundamental elements would reduce their incentive to elaborate these elements into finished works. More important, to give one creator a monopoly over these basic elements would effectively stunt the efforts of other creators to elaborate on these elements in the production of their own works.[69] (Vol I at 78-79)

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Ties between humanistic and ~~economic~~ values are ~~thus~~ valuably intimated. ~~Professor Goldstein shows a sensitivity to the needs of~~ new creators in many other ~~respects~~ as, for example, in his discussion of derivative works. In light of his sensitivity to the costs ~~and to the protection of~~ future authors, ~~his~~ approval of the rule that subconscious copying triggers liability is surprising. (Vol II at 162) Imposing liability in such circumstances is an application of copyright's general strict liability approach, and can be ~~justified~~ on several grounds. Most obviously, allowing an "unconsciousness" excuse might encourage a deliberate copyist simply to lie about his state of mind. Of course, the attractiveness of this consideration is limited by one's confidence in juries' ability to judge

witnesses' truthfulness, and this is not the consideration to which Professor Goldstein points.

Goldstein favors the "subconscious copying" rule apparently because he believes that such copying could be avoided at fairly low cost, with just a bit more vigilance. (Vol II at 162) This seems an unrealistic expectation, however, at least where artists are concerned. Demanding that an artist maintain a detailed memory of his predecessors' works could significantly distort the creative process.[70] The social costs of this distortion need to be taken into account under any economic model.

In addition, the rule may operate unfairly. The person who accidentally and in good faith replicates something heard or seen earlier is surprised by the copyright owner's claim. Were the penalty merely a requirement that the new creator pay the prior creator some fee for use, a finding of liability might cause little if any harm. Under copyright law, however, the unconscious copyist is penalized much further. He has no copyright in what he has produced if the prior work was used "unlawfully"[72] and pervasively, and his aggrieved predecessor may obtain an injunction against the new project, blocking not only the ~~prior~~ elements but any newly-created ones that are intermixed, as well. Although the two parties may negotiate a license, this set of rules gives the first creator an extraordinarily powerful bargaining position, allowing him to command proceeds more fairly attributable to the new author's contributions,[73] or to stop the new project fully in its tracks,

regardless of how much effort, expense, and emotion the new artist has invested. Further, the second artist may in fact owe no debt, at least in a moral sense, to the person claiming infringement. It is possible that sometimes even an artist's subconscious forgets a composition encountered years earlier, and the similarity of form is merely coincidence. But the law at present cannot distinguish such cases.[74] ~~The law presumes~~ courts often infer a causal connection between the access years ago and the creation today with a logic that is practically, though ~~perhaps~~ not formally, irrefutable.[75]

One's opinion of the subconscious copying rule may depend on one's view of the creative process. Under what one might call an "influence" view of creativity, ~~it is~~ I find it hard to imagine that subconscious copying only occurs through carelessness, or that it can be avoided at minimal cost. Subconscious copying occurs constantly, and usually bears valuable fruit.

One such view is The theories of critic Harold Bloom, who suggest that all art is a creative misreading of one's predecessors, a Freudian rebellion against what came before;[76] under this ~~view~~ approach, all works are potentially derivative.[77] Terry Eagleton summarizes Bloom's view as follows:

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[A]ny particular poem can be read as an attempt to escape this ✓ 'anxiety of influence' by its systematic remoulding of a previous poem. The poet, locked in Oedipal rivalry with his castrating ✓✓ 'precursor', will seek to disarm that strength by entering it from

within, writing that strength by entering it from within, writing in a way which revises, displaces, and recasts the precursor poem; in this sense all poems can be read as rewritings of other poems.[78]

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With the past at the center of their work, many artists could not function if a catalogue of that past, and lawyer-like attention to whether the things borrowed are "idea" or "expression," become prerequisites for publication. As Benjamin Kaplan has suggested, the romantic notion of independent creativity is fairly new, but has had an unfortunately strong impact on copyright;[79] the classical approach to art understood and honored the role the past plays in the new.[80]

When the subconscious copying rule is linked with the ubiquity of communications media, a real threat to new artists may emerge. Writers seem to perceive it already. For example, a recent award-winning story depicts the supposed state of art midway in the twenty-first century, when virtually everything composable has been composed.[81] The author, Spider Robinson, argues strongly for a limited copyright term; he envisions composers' frustrations as they discover that most of their new compositions are uncopyrightable because computer searches have shown them to be based on music that, probability suggests, the composers have heard before.[82]

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Exaggerated as the particular story may be, its general point is sound: copyright exists for future authors and audiences

as much as for present authors and listeners. Only a heightened sensitivity to possible future dangers can protect persons not here to speak for themselves, and take account of the costs and benefits that current policies will bear for future generations.

Though Professor Goldstein favors the subconscious copying rule, that does not mean he is unaware of these dangers. Rather, his assent to the rule may bespeak his preference for other responses.[83] Professor Goldstein's approach to preserving the public domain appears to vary with the type of expression being considered. For example, he recognizes the limited vocabulary available for musical composition, and seems to advocate a more demanding "originality" standard for copyrighting music than other works. (Vol I at 137, 224-25) With respect to the idea/expression question, Professor Goldstein prefers to preserve the "building blocks of creation" in close cases by adjusting the infringement standard (i.e., judicially shrinking the reach of the author's exclusive rights); under this approach, the plaintiff would be required to prove something approaching exact replication. (Vol I at 79-80) However, in contexts where the new artist is claiming special rights because of the social worth of what she has made, Professor Goldstein expresses doubt about leaving the value choices to the judiciary, and seems to prefer a congressional response. (Vol II at 198) Reconsideration of the subconscious copying rule could add valuably to this repertoire.

=S1II. New versus Old Authors and the Problem of Suppression:

Looking Behind the Texts

Virtually all the issues canvassed above embody the tension inherent in any attempt to honor the interests of two generations of creators. For example, the essay has discussed the need for new adaptive artists to have a copyright in their own productions; the dangers that the "subconscious copying rule" poses to new creators, particularly in an age of ubiquitous media; and the importance of a vigorous preemption doctrine to preserve artists' rights to use their predecessors' ideas lest state intellectual property protection erode the freedom that Congress meant to confer by withholding ownership of ideas. The instant section examines that tension directly.

=S2A. On Keeping the Costs of Creation Low: Is There Shelter for the Necessary Freedom to Borrow?

The primary tool for accommodating the interests of new generations is the idea/expression dichotomy, which seeks to assure that the fundamental building blocks of creation can be used freely, with no need to seek out and bargain with the party who placed the idea in the stream of culture. But it is far from clear that courts today are using the doctrine to safeguard this necessary freedom with the requisite vigilance. The line between "ideas" and "expression" is, not surprisingly, a hazy one, and should a new artist happen across the line he will be guilty of creating an unauthorized derivative work.

An artist who takes only "ideas" and not "expression" may still not be safe. The Goldstein treatise's position on

preemption suggests that the author of the prior work may be able to maintain a state law cause of action. In discussing the applicability of the European doctrine of "moral rights" in this country, for example, the treatise points out that although American law lacks an explicit analogue to the Continental right of "integrity," an author may be able to obtain protection against "travesties" of his work under federal law if expression is used, and under state law even though only ideas are being used.[84] (Vol II at 635, 645.)

Yet, as Harold Bloom's ~~convincing~~ evocative model of the creative process suggests, ~~that~~ art sometimes requires the hostile use of predecessors' work.[85] The author of a new work is unlikely to obtain permission from a prior author if he wishes to criticize the prior work or use the prior author's material in a way that rejects or undercuts the meaning the predecessor meant to invest in her materials or symbols. It may be precisely the travesty that is most in the need of freedom.[86]

It is true that "creative misprision" (to use Bloom's phrase describing the habit of artists to misread their predecessors) can often proceed without infringing a prior work. But that is not always the case. ~~The goal of~~ For example, central to the post-modernist movement in art is ~~to~~ comment on existing culture, often ~~by~~ employing the specific icons and images others have popularized.[87] Whether the art at issue is a photo-collage showing the Statue of Liberty swimming for her freedom[88] or a retelling of Hamlet from the point of view of its minor characters,[89] ~~the~~ much art might not be

81A - see YALE L J ?

created if consent were required from the person whose work is being commented on. More generally, an artist or speaker sometimes needs to use the expressions, symbols, and characters that represent what he is attempting to rebut, integrate, or criticize in order to make his point clearly. In holding that the state may not criminally prosecute someone for burning a flag in political protest, even the Supreme Court has recognized that the hostile use of symbols originated by others can be essential to self-expression.[90]

We are social creatures, and there are many symbols less noble than the flag that have a power over our minds. As the Court observed, "Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind. Causes and nations . . . and . . . groups seek to knit the loyalty of their followings to a flag or banner, a color or design."[91] Advertisers and entertainment conglomerates also seek to knit loyalty through the use of symbols. To free one's self or one's neighbors from an unquestioning loyalty, or simply to retain cultural vitality, it is sometimes necessary to use a received symbol in an unexpected way, a way that the originators would not have wanted. As was observed when the Disney organization successfully restrained a counter-cultural comic parody of Mickey Mouse that implicitly mocked both Disney and the suburban lifestyle legitimated in the Disney canon:

$qa

Prodigious success and its responsibilities and failures draws

I am addressing only here, the threshold question of ~~relevance~~ whether some special consideration for hostile uses is appropriate. I do not ~~add~~ suggest that all hostile uses should automatically be permitted; the question of what ~~part~~ weight to give to the factors discussed here, and how they ~~should~~ must be applied accommodated ~~if recognized~~ must be implemented within © doctrine, is outside the scope of this ~~paper~~ essay.

parody. That's how a culture defends itself. Especially from institutions so large that they lose track of where they stop and the world begins so that they try to exercise their internal model of control on outside activities.[92]

$qt

How might these necessary freedoms be preserved? The recommendations briefly canvassed in the first parts of this review essay may not provide a sufficiently safe harbor for a hostile use that a copyright owner wants to suppress. Even if the idea/expression dichotomy is respected, and state control of ideas preempted, it is possible that a second creative person will take enough of the first copyrighted work to be viewed as infringing. Even a rejection of the judicial rule that imposes liability for "subconscious copying" would be irrelevant if the second artist used the prior work deliberately. And even if the statutory provision denying copyright to derivative works that are fully intermixed with prior works were repealed, the second author would still be unable to distribute what he has made without the permission of the first author.[93]

How would we go about discovering whether current law respects the value of these hostile uses, and whether it could legitimately give them a greater freedom than other uses from charges of infringement? If these hostile uses are valuable, might they be preserved under the current state of the law?

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idea/expression dichotomy,[95] and, possibly, the infringement, originality, or authorship standards. These several doctrines are equitable--not in the procedural sense but in Aristotle's, wherein equity is a means of correcting for the law's inevitable overinclusiveness.[96] But the purpose and justification of such flexible doctrines is usually that they allow the judge or other decisionmaker "to say what the legislator himself would have said had he been present, and would have put into his law if he had known."[97] Even equity, then, must be consistent with the existing legal regime, and we must identify the goals of that regime in order to determine whether giving a significant degree of freedom to hostile works is legitimate within it. Clearly that is a task beyond the scope of this review. Nevertheless, some useful observations about both methodology and substance can be proffered even in this brief compass.

=S2B. Identifying Relevant Principles and Policies

There are at least two possible referents when searching for antecedents consistent with this safe harbor : copyright itself, viewed as an isolated set of doctrines, or copyright within the context of the law as a whole. Let us begin with the copyright law, canvassing briefly some of the available principles and policies, and then examining what the Goldstein treatise has to say about the copyright statute's purposes. As already mentioned, copyright has one dominant purpose but many subsidiary ones, and it is not yet clear from either Congress or the courts how the

various policies should be ranked and weighted. The essay will explore this mix of purposes and ways we might resolve the problem this mixture poses.

=S31. Maximizing social welfare.

There are many normative goals by which a property system might be justified. One type of justification is instrumental and aggregative, with legal rules are dictated by a social welfare function aimed at maximizing some particular variable. In copyright, the three most salient candidates for maximization are dollars (economic value "as measured by . . . willingness to pay"),[98] utility, and the "progress of science."[99]

Each of these variables has its own definitional ambiguities and internal variations, but their major deficiencies and strengths are fairly clear and familiar. The advantage of economic inquiry is that dollars are readily measurable; the disadvantage is that its criterion of value reflects existing distributions of wealth. The strength of utilitarianism is that it treats people as equals regardless of wealth; yet utility is difficult or impossible to measure and to compare interpersonally. The "progress of science" is the constitutional explanation for copyright, but it too is difficult to measure, and poses an additional institutional difficulty: judges who have been admonished by years of copyright jurisprudence to beware the inexpertise of "persons trained only to the law" in evaluating cultural worth[100] would be required to determine whether protecting a given work, or freeing a given use from a copyright

owner's claim of protection, would better advance the progress of knowledge.

In seeking to maximize social welfare, moreover, each of these approaches seems to suffer from another potential deficiency--paying insufficient attention to individuals. Under an aggregative inquiry, the interests of a person who has done nothing morally culpable can be sacrificed in order to serve the "greater good" (however measured).[101]

=S32. Consent.

The argument from custom or consent[102] often finds its way into copyright commentary, but is not often analyzed or even made explicit. The core of the argument was stated by Harry Kalven, Jr.: "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[103] Along with unjust enrichment and improper incentives, the Supreme Court included this sentiment (in fact, this very phrase) in a decision approving an exclusive common law right in performance.[104] The problematic central notion in this approach appears to be that if most users are already getting what they need by paying for it, they will not be deprived if a right to payment is enforced.[105]

=S33. Natural rights.

The natural rights tradition (~~which is more often invoked than analyzed~~) contains two strands, ~~strands~~ that are commonly blended[106] but that in intellectual property law raise separate issues and play separate roles meriting individual treatment.[107]

One strand is restitutionary. It has to do with securing, for those who create works of value, payment for their "just deserts." It can be viewed in various multiple ways: as a form of corrective justice[108], holding that the person who creates value should be paid for it, just as (arguably) those who generate harm should be made to compensate their victims;[109] as an offshoot of Lockean labor theory;[110] as a notion of fairness; as a sort of strict liability for benefits; or as a variant of the law of unjust enrichment. The key notion in this branch of the so-called "natural rights" tradition is the claim to some monetary reward, not a claim to control.

The second "natural rights" strand has to do with an author's personal stake in what she has made. It too can be found in Locke,[111] though arguably only with some strain, but its most thorough articulation probably appears in the work of Hegel and his interpreters.[112] It suggests that "[w]e have the feeling of our personality being in some inexplicable way extended to encompass the objects we own."[113] If people experience such cathexis to ordinary items of property, then how much closer must be the connection of the author to his creative works?

* * *

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a willingness to pay for something does not always, or even often, indicate that the parties agree on who should own what. This is a valuable addition to the literature criticizing the view that property should be premised upon custom or consent.[114]

~~Second~~, one learns that an "instrumental" model, which views authors' rights simply as a tool for drawing from creators something that will benefit the public, is dominant in copyright. (Vol I at 5-8 & nn 5-8), that the appropriate criterion of public benefit is culture and education (Vol I at 4-5 n 1), ~~and that economics, utility, and the sheer variety of works also may play some role in achieving this public benefit.~~ ~~Third~~, one learns that the dominant instrumental model is not absolute (Vol I at 8-9; Vol II at 685-86): that the instrumental language of the Copyright and Patent Clause of the Constitution places only a "loose harness" on Congress (Vol II at 196); that considerations of "just" reward may have a proper if subordinate place in copyright (Vol I at 514-16 & n 9); and that the law even seeks to protect some of an author's personality interests, at least in some contexts (Vol I at 8-9 and at 515-16; Vol II at 249-250 & n 14), though such protection may not be appropriate in others. (Vol II at 191-92). ~~Fourth~~, and most important for the instant discussion, one learns by implication that there is no definitive ordering, no place in the case law or statute that will tell us where one of several legitimate policies is capable of extending or limiting the reach of another. Various observers have suggested the same, arguing for example that the Supreme Court

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beginning after the cite to nn 5-8 and
continuing through the bold faced type.

No determinate criterion of public benefit is specified; the yardstick of social desirability maybe impact on "culture and education" (Vol I at 3, 4-5 n.1), economic value as measured by willingness to pay (Vol II at 190), or the sheer variety of works (Vol I at 197); or social desirability may be a value judgment left to Congress (Vol I at 7).

has been less than consistent in deciding whether notions of "desert" play any proper role in copyright.[115]

Given this ambiguous mix of policies, with dominant but not exclusive, how should the equitable doctrines be construed? One might handle these cases by assessing the underlying policy concerns of each and deciding, according to some calculus, whether enforcing the author's prima facie rights of control or giving the hostile user the freedom to copy best serves the relevant goals. But, as noted above, determining the relevant calculus to accommodate the various goals is at this stage of copyright's development a difficult matter. This is not a sign of copyright's immaturity as a discipline; virtually all legal doctrines contain a mix of policies competing for strength.[116] There may well be no "plateau" at which all the relevant policies will come into equilibrium.[117]

Another way to handle the mix of policies is to minimize the conflict by identifying some dominant purpose. Thus, one might identify providing economic incentives as the dominant purpose of copyright, and recommend that users' privileges be granted whenever the copyright owner's motivations differ from that approved motive. That is the approach the Goldstein treatise takes on the suppression question (and is similar to the approach I have taken as well).[118] Professor Goldstein argues that protection need not be given to a copyright owner who seeks to pursue "non-copyright interests," (Vol II at 191-92) defined apparently as any interest other than an interest in monetarily

exploiting the work.

A third way of reconciling these diverse policies is to investigate whether there is any result on which all relevant policies can converge. It is to this possibility that I now turn.

=S2C. Safeguarding Hostile Uses from Suppression: A Search for Converging Policies

The Treatise suggests that the two major strains in copyright are the economic or instrumental perspective, and the authors' rights perspective. This dual perspective parallels the configuration in property and tort law as a whole, where quandaries such as the suppression problem are sometimes analyzed in terms of whether the individual holding an entitlement is a "steward" entrusted with the resource solely for the social good that is likely to result from ~~his~~ her productive use of it, or a "sovereign" to be left unregulated in managing the resource.[119] Despite their potential for conflict, the sovereignty and stewardship models often generate results that converge.[120] It may be that copyright's various normative strands can be similarly reconciled in regard to particular issues. I shall suggest that in regard to at least some suppression issues--notably, those involving authors who have already made their work part of the public debate or consciousness--it may be possible to reach some consensus among the competing policies and principles, thus rendering it unnecessary to choose one dominant strand on which to rely. But such an analysis requires that one

As the theorem has taught us, legal

The Coase Theorem teaches us that it is necessary to specify how

the Coase proof of Scott suggests that in a world of no Transb,

voyage some distance beyond the explicit words of the copyright statute.

=S31. The economics of suppression.

It may seem odd to contend that second-guessing an owner's decision about whether or not to license or sell a resource can be consistent with economics. In the suppression context, however, there are many well-recognized economic phenomena at work in ways that should diminish our confidence that the owner's decisions will in fact tend toward the "maximization of economic value" in any meaningful sense. Consider, for example, a historian who denies a hostile critic permission to quote fairly extensively from her book, or sets an extremely high price--say, $10,000--which she believes will be the amount lost in revenues if the critic's hostile review is published. Also assume that the review would be ineffective without the quotations. If the critic, who stands to make, say, $500 from the review, declines to purchase a license but publishes the quotations nevertheless, and the historian sues, the following reasons counsel that the courts not assume that because the historian's price was higher than the critic's offer it is "value maximizing" to enforce the copyright.

First, the critic's fee is unlikely to represent all the value that publication of the review will bring to the affected audience, in part because the market for such goods rarely if ever gives their sellers a price that captures the resulting surplus.[121] Thus, the buyer's likely maximum offer ($499) is

(new) fn p 37 — 124D

The discussion here has indicated why a ct shd not take a (C) owner's refusal to license a hostile use as conclusive on the question of economic value. Whether in a particular case permitting a hostile use will in fact yield net economic benefits is a separate question

likely to significantly understate the actual value of the use in her hands.

Second, the historian's minimum price of $10,000 is likely to significantly overstate the social value of the quotations remaining solely in the historian's hands, since much of that amount reflects mere pecuniary loss: if the review is published, many consumers of historical works will simply shift their purchases to other (perhaps better) historians, and there may be no net social loss at all.[122] There may even be a social benefit if an inferior history is ignored and a better one supported by the reading public.

Third, the historian's reputation and image are involved, and when such irreplaceable items are at stake "income" or "wealth" effects become dominant.[123] When goods as irreplaceable as life or reputation are on the table, persons are unlikely to sell what they own at any price; and in such cases where the effect of the initial grant of entitlements is so strong that it is likely to determine where the resource rests in the final analysis, the results of consensual bargains cannot be relied upon to yield any independent information about "value."

Of course, the above discussion is quite summary.[124] Nevertheless, it should suggest why the copyright owner's pursuit of a non-monetary interest could give an economically-oriented court reason to favor a defendant with greater than usual leniency.

=S32. Authors' rights and suppression.

n 124 A (old n.11 to expanded fn S 31

X Compare Ronald H. Coase, Notes on the Problem of Social Cost, in R.H. Coase, The Firm, The Market and the Law 157, 170-74 (Chicago 1988)

That notion in turn might be traced to any one of a number of arguments: a strict view of personal responsibility, perhaps, suggesting that every individual should keep the benefits she generates and pay for the harm she does; ~~or perhaps the unearned benefit he reaps;~~ a notion that the existing balance of goods among persons warrants ~~prima facie~~ ~~status~~ ~~should be~~ (as a plc matter) respected, so that any unjustified taking of a benefit or imposition of a harm causes an imbalance or an inequality that demands recompense. But these notions tend to be symmetrical; if they suggest that

An allegedly objectionable

The authors' rights approach has, as mentioned, two principle lines of argument, one resting on the appropriateness of rewarding valuable labor, the other on the perception that authors have a special personal ~~attachment~~ relationship to their works. While conceivably either of these strands could be employed to argue that authors should be free to suppress others' unfriendly use of their work, such an argument does not inevitably follow from the arguments' terms. To the contrary, attention to questions of proper reward ~~and~~ psychological cathexis or personal development may better indicate that the power to suppress should not be given to artists.

The restitutionary strain of argument rests on the notion that a person should retain the benefits he generates. ~~Conversely, it would seem to suggest that a person who causes harm should compensate his victims. Or, putting it somewhat differently~~ (insert from back p. 37), if "pay for the benefits you receive from others" is a relevant principle, so is "do no harm to others" or "pay for the harm you do." ~~There is a necessary symmetry here.~~[125] If so, the author's right is limited by the very consideration that supports it. ~~If so,~~ An author ~~should~~ not ~~be~~ at liberty to withdraw her work at will from the use of those whom it has affected.

~~This~~ A harm-based limitation on property rights is captured in Locke's theory by his proviso: one who labors in the common to draw forth water from the lake or pick apples from the field is entitled to that to which his labor is joined, as (arguably) is an artist who labors to draw ideas from the public domain, but only so long as "enough and as good" is left for others.[126] If that proviso is not

met--if giving exclusive dominion to the laborer will leave others worse off than they would have been in his absence--then the laborer is not entitled to property rights in what he has taken.

The structure of this argument gives primacy to the harm principle, as it should, since it can be argued that Locke's argument also derives from a harm principle. To see this, consider Locke's primary argument for property:[127] Locke first argues that each of us has a property in his body and the labor of his body. Second, he posits that when one appropriates things from the common--picking apples, drawing water from the river--one joins one's labor to the things so taken. Third, he ~~takes from the Bible the proposition that humans should do no harm to one another~~. ~~Fourth, he argues that~~ It would harm the laborer to take the apples or water from him because his labor was joined to these items of sustenance. Therefore, ~~Locke concludes,~~ one who labors to draw forth objects from the common plenitude "has a property" in the things so gathered, at least if there ~~was~~ "enough, and as good" left for others, because others are under an obligation not to harm him by taking the things from him.[128] In short, Locke's labor theory depends upon a "do no harm" rule, and acting upon the theory (with no additional justification) is problematic when doing so itself causes harm.

In many contexts, allowing a copyright owner to suppress the works he has dispatched into the culture would indeed cause harm. The copyright owner has injected something into the common

culture, and its audience may be unable to purge it from their memories once they have encountered it. Having changed the community's culture, the author may actively be committing a harm if he then withdraws the work from the community when its new artists seek to integrate, assess, and respond to its influence. Perhaps on balance the first artist's work is still more valuable than not; if so, perhaps, some payment is owed to that first artist even when a hostile or critical use is made. But even if Lockean theory will justify complete control and injunctive relief in some circumstances, it will not do so here: labor theory does not support a complete right of exclusion against those whom the property negatively affects.[129]

What of the "personality" theories? Clearly the artist who finds his work attacked will not be happy about it. And yet a regard for emotional attachments, or self-actualization, does not point solely in the direction of suppression and the artist's interests; audiences, too, develop attachments to the symbols surrounding them, and for audiences, as for artists, use of the symbols may be essential to self-expression and to making an impression on the world around them. X Cf Jeremy Waldron, The Right to Private Property, 318-81 (Clarendon Press, Oxford 1988) (suggesting 'everyone must have property')

=S33. Reference to the common law.

Yet all this is at a fairly high level of generality, and debatable. To what other sources might one look to determine what a lawmaker should decide when faced with a claimed right to suppress? The possibility is to look to decisionmakers in analogous contexts; this leads us to the common law, particularly that area known as substantive restitution or "unjust enrichment." This is the area

X I here mean to distinguish rest that itself provides the basis of a c of a, from restitution that serves simply as a remedy for the val of rts provided by other doctr

of the common law most concerned with copyright's central issue, the question whether (and when) the law should impose liability for benefits one person derives from another's efforts. Persons who feel it is illegitimate to be required to pay for copying should consider the restitution cases, in which persons who willfully take advantage of benefits made possible by others' efforts are sometimes required to pay for them.[130]

The restitution cases are, however, marked by a strong concern with preserving the defendant from an erosion of his autonomy, and with preserving the defendant from harm. Thus, in the intermediate cases, when the choice is between leaving a laborer unrewarded and causing a net harm to the defendant, frequently the laborer is left without recourse.[131] If the common law is any guide, then, authors who attempt to use copyright law to suppress works unfavorable to them should not be completely free to do so. Some concern for the users' autonomy and safety from harm--some concern with the audience's own moral rights--is necessary.

The common law might offer guidance to some of the other questions canvassed above as well. A particularly useful source of analogy might be torts, which in many ways functions as the converse of intellectual property.[132] As a mirror provides a great deal of information through its reversed images, it may be that the literature of tort law, the civil branch of the law of harms, could contain significant wisdom applicable to the jurisprudence of benefits.

First, both copyright and torts can be interpreted as

re your inquiry on autonomy & harm

130a. See George E. Palmer, 2 The Law of Restitution at 359 (Little, Brown 1978) ("long-standing judicial reluctance to encourage one person to intervene in the affairs of another by awarding restitution of benefits thereby conferred").

131. See Saul Levmore, Explaining Restitution, 71 Va L Rev 65, 77-78, 84 (law denies restitution where a nonbargained "benefit" may not in fact make recipient better off; even at a "less-than-market" price the unsolicited benefit "may be undesirable to a wealth-constrained" recipient); see generally Gordon... [remainder of old n.131 goes here]

serving non-instrumental ends. Whether in terms of morality, fairness, or "corrective justice," one can argue that an innocent victim injured by a harm-causer "deserves" to be made whole and that the defendant "ought" to pay. Similarly, it is often argued that a creative person "deserves" to be paid for what he has brought to the world, and that the user of another's work "ought" to give recompense for it. The question of what role should be played by a creator's claim to "fair return" is largely unresolved in copyright.[133] It is likely that there is some grain of truth in that much-invoked but little-analyzed notion, "the moral rights of an author," and only systematic analysis can separate that grain from the rhetoric of perpetual and all-encompassing claims that now cling to it. Perhaps the literature exploring notions of "desert" and "corrective justice" in torts, and in criminal law as well, could be of assistance here.

Second, and perhaps more important, both copyright and torts serve a particular incentive function: they seek to "internalize externalities." That is, both copyright and torts seek to bring decisions' effects to bear on persons with power to affect how things are done. In copyright, the primary person to be affected is the creator; he is encouraged to produce by being given a right to capture a portion of the benefits he creates.[134] In torts, the primary person to be affected is the tortfeasor; he is discouraged from taking unnecessary risks with others' persons and possessions by the specter of suit imposing liability for any harm caused. Thus, both doctrines aim at providing incentives ~~to~~

persons ~~in a position to~~ make decisions.[135] Conceivably the lessons of one could be useful for the other.

recognizing that the person best able to effectuate desirable actions is not always the defendant.

We might try, for example, viewing the creative user problem from the perspective of the tort doctrines ~~that~~ base exceptions to the defendant's liability on the plaintiff's contributory activity. For example, if a pedestrian is "contributorily" or "comparatively" negligent by running in front of a car, that behavior will eliminate or reduce any recovery that might be sought. The economic logic is familiar: when the pedestrian is better positioned than the driver to avoid an accident,[136] it is the pedestrian's behavior the law should seek to change; the way to change that behavior is to force pedestrians to bear some of their own costs if they choose to behave carelessly. The formal lesson of the logic is also familiar: in every transaction there are two parties, and deciding how to "internalize" costs between them is a choice that should depend on context rather on formal classifications such as plaintiff or defendant.[137] If all the harms that would not occur "but for" the defendant's driving were internalized to that driver, ~~no one else~~ who might become involved ~~would~~ might have an inadequate incentive to be careful.

The same point could be made, just as simply, about copyright. If all the benefits that could be traced to a first artist through a "but for" test were internalized to her, no one else would have an monetary incentive to build upon her work ~~be creative.~~ If a creative copyist is in a better position to contribute to the culture than

is the first artist, then perhaps the law should take care to direct positive incentives to such persons by, for example, giving them a copyright in their derivative works. It may be that tort tests of responsibility would remind us that "incentive" works both ways, and might even assist us in parsing where an "infringing derivative work" ends and a non-infringing work begins.

Copyright is less a field of law than a domain: while the bulk of American law regulates the behavior of persons in regard to tangible things and each other, copyright regulates the behavior of persons in regard to a particular species of intangible, the "work of authorship." Copyright like the rest of American jurisprudence has a law of property (Vol I at chapters 2-5), a law of tort (Vol I at chapter 6 and Vol II at chapters 7-10), a law of contract (Vol I at 405-36 and 480-511), a law of procedure and remedies (Vol II at chapters 11-14), a law of inheritance (Vol I at 450-57, 485-93), and even its own branches of criminal law (Vol II at 289-306) and international law (Vol II at chapter 16). It is only fitting that copyright can learn from what the rest of the law has to teach.

Copyright is on the verge of entering the mainstream. Work such as Professor Goldstein's is helping that happen. As others in the law learn copyright, and academics from other disciplines turn their attention to our field, copyright practitioners and scholars can do as Professor Goldstein has done, and be open to learning from other disciplines and from the rest of the law.

The isolation is almost over.

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1. For example, Chief Judge Oakes of the Second Circuit Court of Appeals attempted to use, in a concurring opinion urging [illegible], the First Amendment, precedent from nuisance law, and economic analysis to secure for the publisher of a critical biography the liberty to print quotations from the subject's letters and diaries. Oakes's colleagues agreed that the biography should not be enjoined, but only on the nonsubstantive ground of laches. The Second Circuit's opinion exhibits a lack of receptivity to the kind of eclectic scholarship and concern for writers' freedom that animated the

opinions of Judge Oakes and the lower court. New Era Publications, International, Aps v Henry Holt & Co., 695 F Supp 1493 (S D NY 1988), aff'd on other grounds, 873 F2d 576 (2d Cir petition for reh. denied, 884 F2d 659 (2d Cir 1989), cert. denied, 110 S.Ct. 1168 (1990) 1989). See also Pierre N. Leval, Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture, 36 J Copyright Society USA 167 (1989).

2. Benjamin Kaplan, An Unhurried View of Copyright (Columbia, Royall Professor emeritus at Harvard, Emer 1967). Justice Kaplan, served on the Supreme Judicial Court of Massachusetts.

3. Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv L Rev 281 (1970).

4. Melville B. Nimmer and David Nimmer, Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas (Matthew Bender, 1989) (4 vols) ("Nimmer on Copyright").

5. Paul Goldstein, Copyright: Principles, Law and Practice (Little, Brown, 1989). All parenthetical volume and page references in text and notes are to this treatise.

6. See HR 11947, 88th Cong, 2d Sess (July 20, 1964), in 110 Cong Rec 16256 (July 20, 1964); and S 3008, 88th Cong, 2d Sess (July 20, 1964), in 110 Cong Rec 16260-61 (July 20, 1964). Senator McClellan and Representative Cellar "introduced [the bill] pro forma by request of the Copyright Office." Benjamin Kaplan, Nimmer on Copyright, 78 Harv L Rev 1094, 1094 (1965).

7. See Kaplan, 78 Harv L Rev at 1095.

8. An Act for the General Revision of the Copyright Law, Pub L No 94-553, 90 Stat 2541 (1976), codified at 17 USC §§ 101 et seq (1988). All section number references in subsequent footnotes are to this Act.

9. §§ 302-304.

10. ~~§ 111.~~ See note 48 and accompanying text

11. Congress counterbalanced the decrease in renewal complexities, ~~however~~, with a "termination right" more complex than renewal had ever been. §§ 203, 304(c). Unlike renewal, however, a failure to exercise the termination right does not invalidate the copyright. Id.

12. Works created prior to the effective date of the 1976 Act can still enter the public domain for failure to comply with the requisite formalities. As a consequence, even today one cannot be sure of the copyright status of a work created or distributed in prior years without researching the details of its publication, renewal, notice affixations, and transfers, and analyzing the impact of those events under the then-relevant law. See text at notes 28-30 (discussing of the Goldstein treatise's coverage of still-applicable provisions of former law).

13. See Berne Convention Implementation Act of 1988, Pub L No 100-568, 102 Stat 2853 (1988); see also Jane C. Ginsburg and John M. Kernochan, One Hundred and Two Years Later: The U.S. Joins the Berne Convention, 13 Colum-VLA J L & Arts 1, 9-17 (1988).

Some formalities remain applicable to new works and new publication of existing works, but failure to comply with these formalities does not divest a proprietor of his or her copyright. See, for example, §§ 401(d) and 402(d). But see 406(c) (lack of copyright notice on copies publicly distributed prior to the Act's effective date can still divest copyright).

14. See, for example, U.S. Congress, Office of Technology Assessment, Intellectual Property Rights In an Age of Electronics and Information 9-11 (GPO, 1986).

15. I am indebted to participants in the University of Chicago Law and Economics workshop for bringing home to me, in the context of a discussion unrelated to this essay, the importance of this point.

16. Henry G. Henn, Nimmer on Copyright, 16 Stan L Rev 1146, 1146 (1964).

17. See, for example, Paul Goldstein, Publicity: The New Property, 8 Stanford Lawyer 9-10 (Winter 1982-83).

18. Henn, 16 Stan L Rev at 1148 (cited in note 16).

19. One of my personal favorites among the one-volume treatises is Marshall A. Leaffer, Understanding Copyright Law (Matthew Bender, 1st ed, 1989). Other useful treatments include William F. Patry, Latman's The Copyright Law (BNA, 6th ed 1986) (the respected descendant of Herbert A. Howell, The Copyright Law (BNA, 3d ed 1952)); and Neil Boorstyn, Copyright Law (Law Co-op, 1981 & Supp 1988). A copyright treatise by Professor Howard Abrams is scheduled to appear shortly, to be published by Clark Boardman.

20. Professor Goldstein is the Stella W. & Ira S. Lillick Professor at Stanford Law School. In addition to his many articles, Professor Goldstein's achievements include his copyright casebook, Copyright, Patent, Trademark, and Related

State Doctrines: Cases and Materials on Intellectual Property (Foundation, 3d ed 1990) (forthcoming June 1990); and his writings in the related area of tangible property law, see Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance (Foundation, 2d ed 1988); and Real Property (Foundation, 1984). Professor Goldstein was also the Chairman of the Advisory Panel to the 1986 OTA Report, Intellectual Property Rights in an Age of Electronics and Information (cited in note 14). He is also Marian B Faerstein

21. It will not be my task here to compare the Nimmer and Goldstein treatises. Even were I interested in such comparisons, it is still probably too early to assess the impact of Professor Nimmer's 1985 death on the future course of his treatise, now being edited by his son David. See Michael J. Lynch, Updating the Law of Copyright, 12 The Criv Sheet 13, an insert in 21 Am Assn of L Libr Newsl (March 1990).

22. See notes 29-30 and accompanying text.

23. See, for example, the six volumes of E. Fulton Brylawski and Abe Goldman, eds, Legislative History of the 1909 Copyright Act (Rothman & Co., 1976), or the seventeen volumes in George S. Grossman, ed, Omnibus Copyright Revision Legislative History (Wm. S. Hein & Co., 1976). A unique resource providing extensive legislative materials on the 1976 Act is Alan Latman and James F. Lightstone, eds, The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976 (Rothman & Co., 1981) (6 vols) Despite its complex indexing system, the Kaminstein volumes offer invaluable access to decades of congressional hearings, reports, and other material.

24. United States, National Commission on New Technological Uses of Copyrighted Works, Final Report (Library of Congress, 1979)("CONTU Report").

25. Latman and Lightstone, Kaminstein Legislative History Project (cited in note 23).

26. See Copyright Society of the USA, ed, Studies on Copyright (Rothman & Co., Arthur Fisher Memorial ed 1963) (two volume compilation).

27. (Cited in note ~~27.~~ 14; As noted above (note 20), Professor Goldstein chaired the project's Advisory Panel.

28. An excellent if brief bibliography of important secondary materials is available in Alan Latman, Robert A. Gorman, and Jane C. Ginsburg, Copyright for the Nineties: Cases and Materials (Michie, 3d ed 1989). See also J. Paul Lomio and Susan Kuklin, Selected Bibliography of Copyright Materials With Annotation, 4 Legal Ref Serv Q 39 (Spring 1984); CONTU Report at 135-141 (cited in note 24); and Henriette Mertz, Copyright Bibliography (US Copyright Office, 1950).

29. The 1976 Act makes clear in § 304 that works already subject to renewal at the time the new Act became effective would remain

subject to renewal requirements. If the author dies before renewing, the right to renew passes to statutorily-designated beneficiaries who will, if they renew, own the copyright for the duration of their renewed term. § 304(a). Renewal rights are alienable, so that an author could enforceably promise in advance both to renew and to convey the renewed copyright to an assignee. However, the author's agreement would not bind the new owners of the renewal copyright if the author died prior to renewal. See Stewart v Abend, ~~1990 US LEXIS 2184.~~ 58 LW 4511 (1990)

30. Id at ~~*25-26.~~ 4514

31. See Kaplan, An Unhurried View of Copyright at 9-12, 17-32 (cited in note 2).

32. The 1976 Act explicitly provides that derivative works are entitled to a copyright. §§ 102, 103. The copyright "extends only to the material contributed by the author of [the

derivative] work," and not, of course, to the "preexisting material." § 103.

33. § 106(2). Rights over specified derivative works had been gradually increased over the years, culminating in this general grant. See Kaplan, An Unhurried View of Copyright at 9-12, 17-32 (cited in note 2).

34. For example, the public always has the privilege to make fair use of a copyrighted work, § 107, and the right to use a copyrighted work's ideas and other unprotectable elements. § 102(b).

35. See, for example, §§ 203(b), 304(c)(6)(A) (certain uses of derivative works can continue after terminating the underlying grant).

36. § 103(a).

37. So, for example, an anthology containing one infringing poem might be copyrightable as to the arrangement and selection of the

other poems, but a translation of a copyrighted book would necessarily be so suffused with protectable elements unlawfully borrowed from the copied work (such as the original author's paragraph structure) that it could not sustain a copyright. Copyright Law Revision, HR Rep No 94-1476, 94th Cong, 2d Sess 57-58 (1976) (reprinted in Vol III at 114-15).

38. Derivative Rights and Derivative Works in Copyright, 30 J Copyright Society USA 209, 244 (1983).

39. Id.

40. See Wendy J. Gordon, ~~On Owning Information:~~ Intellectual Property and the Restitutionary Impulse (work in progress on file with the University of Chicago Law Review) (examining the ~~limits~~ of "~~natural right~~" claims to "deserve reward").

41. Peter D. Rosenberg, Patent Law Fundamentals § 1.03 at 1-10 n 35, § 16.02 at 16-14, 16-16 (Clark Boardman, 2d ed 1980).

42. One might seek to justify the copyright rule by the first

author's putative "moral right" to control the presentation of his work. Despite occasional flirtations, American law by and large has not adopted this European notion of droit moral; and it should not do so, at least not without substantial limitations. The notion, as interpreted abroad, seems to ignore the moral rights of audiences, see, for example, text at notes 82-83, and may pay insufficient respect to values Americans associate with the First Amendment.

42A. See Vol I at 217 n.9 (preservation of derivative work copyright as against a third party). The line between permitted "inspiration" (the borrowing of unprotected ideas and themes) and unlawful appropriation of copyrighted expression is a vague and wavering one; see discussion in note 68. If a poem inspires a play that subsequently is judged to make an infringing and pervasive use of the poem, a motion picture company that in turn copies the play in detail ~~is "inspired" by the play~~ would need only the poet's permission to make a movie of it. The playwright's contribution would be ignored.

43. The rule denying copyright to the infringing portions of

derivative works is usefully reiterated, as are other general principles, in factual contexts where they are likely to be implicated. See, for example, Goldstein's discussion of phonograph records (Vol I at 172) and computer databases (Vol I at 219 n 19). Beginners in copyright might, however, appreciate a mention of this derivative work rule in the introductory overview. At an early point in the treatise, Professor Goldstein discusses the availability of copyright for a deliberate but creative rewording of Keats's "Ode on a Grecian Urn," but neglects to mention that such a copyright would be available only because Keats's poem is in the public domain. Vol I at 63.

44. See note 38.

45. See, for example, Paul Goldstein, Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright, 24 UCLA L Rev 1107 (1977); Kewanee Oil Co. v. Bicron Corp.: Notes on a Closing Circle, 1974 Sup Ct Rev 81;

"Inconsistent Premises" and the "Acceptable Middle Ground:" A Comment on Goldstein v. California, 21 Bull Copyright Society USA 25 (1973); The Competitive Mandate: From Sears to Lear, 59 Cal L Rev 873 (1971); Federal System Ordering of the Copyright Interest, 69 Colum L Rev 49 (1969).

46. There may be other sources of invalidity as well. See notes 59-60.

47. § 301(b).

48. Congress enacted § 301 of the 1976 Act with two goals in mind. First, it displaced state "common law copyright" in unpublished writings with federal copyright protection, substituting a manageable unitary system for the difficult two-tier system (which primarily gave federal protection to published works and state protection to unpublished works). HR Rep No 94-176 at 129-30 (cited in note 37). Second, § 301 sought to draw a

clear line between federal and state protection. Id at 130. The first goal was accomplished; the second remains distant.

One reason the line between federal and state protection remains blurred is a last-minute amendment to § 301 that was accompanied by a thoroughly confused discussion on the floor of the Congress, which Professor Goldstein does a lovely job of explicating (Vol II at 484-85). Another reason is the shifting views of the Supreme Court. The Court's preemption position reached a high-water mark with the Sears and Compco decisions in 1964, which Professor Goldstein says indicated "that the Court also intended to preempt state protection of subject matter that falls outside the scope of protectable subject matter." (Vol II at 496) See Sears, Roebuck & Co. v Stiffel Co., 376 US 225 (1964); and Compco Corp v Day-Bright Lighting, Inc., 376 US 234 (1964). Since then, the Court's decisions have been so much more tolerant of state laws that Goldstein, among others, has speculated that Sears/Compco may be considered overruled. (Vol II

at 497) Only recently, however, the Court reaffirmed the core holding of those two early cases, making clear that the patent law's refusals of protection create "federal right[s] to 'copy and to use'" that are, like any federal law, supreme over state law. Bonito Boats, Inc. v Thunder Craft Boats, Inc., 489 US 141, 109 S Ct 971, 985 (1989) (state statute prohibiting the direct molding of unpatented boat hulls held preempted).

It is too early to tell if the Bonito Boats approach applies to copyright law as well. Much of the opinion is written as if applicable solely to patent law, yet the same constitutional clause (Art 8, § 8, cl 8) applies to both copyright and patent. See Wendy J. Gordon, An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory, 41 Stan L Rev 1343, 1449 n 461 (1989) (exploring differences between copyright and patent in the context of the constitutional copyright and patent clause). Further, the Court's approach (finding an enforceable "federal right to 'copy and to use'"

within the interstices of federal intellectual property law, 109 S Ct at 985) is potentially transferable to copyright. See Gordon, 41 Stan L Rev at 1399 n 251, 1403 n 266. Other patent preemption cases have been quite important to copyright doctrine (Vol II at 496-97), and Bonito Boats could revive the preemptive leanings of the Court's early pronouncements on the subject.

The treatise gives no extended treatment to the case, perhaps because the opinion issued so close to the treatise's publication date. Volume II refers to Bonito Boats only in footnotes. Vol II at 472 n 5, 495 n 3, and 497 n 16, 529 n.22, 591 n.4, 598 n.34.

49. When Professor Goldstein first introduces the subject, he notes that placing ideas "outside the subject matter of copyright" is a question of judgment (Vol II at 487-88) ("the thorniest interpretational problem"; the "soundest reading of the statute"), but subsequent treatments offer as uncontroverted the view that § 301 leaves states free to protect ideas, leaving only cross references to warn the unwary. Vol II at 495, 507.

("Preemption does not, however, extend to subject matter such as ideas and facts that fall outside the scope of copyrightable subject matter"; "[s]ubject to preemption under the Patent Act, states can also protect any 'idea, procedure, process, system, method of operation, concept, principle, or discovery' from which § 102(b) withholds copyright protection"). See also Vol II at 507, 512, 528, 624.

50. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery. . . ." § 102(b).

51. Under this view, a state grant of monetary or injunctive remedies against someone who uses another's ideas will be valid as part of a work of authorship
√ under § 301, even if the idea is written down and even if the state grant includes control over reproduction, distribution, or other "rights equivalent to copyright." Professor Goldstein notes, however, that preemption of state protection for ideas may

occur under the Supremacy Clause (Vol II at 489 n 65, 501-02, 529-30) and that the First Amendment may place additional limitations on a state's efforts to give property rights (or other dissemination-reducing rights) in ideas. Vol II at 489, 501-02. He also notes that the states themselves are often sensitive to the public interest in leaving ideas free of property-like protection. Vol II at 488.

52. Bonito Boats, Inc. v Thunder Craft Boats, Inc., 109 S Ct 971 (1989). As Professor Goldstein notes (Vol II at 502, 529), Supreme Court cases on preemption can help inform interpretations of § 301. Although Bonito Boats was decided after the enactment of § 301, it makes clear that the Court's earlier decisions favorable to preemption should not be ignored. See note 48. In addition, Bonito Boats is potentially applicable to preemption arguments not based on § 301. See notes 51 and 59 (Supremacy Clause basis for preemption).

53. ~~The classic article presenting the opposing point of view is~~ Ralph S. Brown, Jr., Unification: A Cheerful Requiem for Common-Law Copyright, 24 UCLA L Rev 1070, 1092-99 (1977). For cases, see Mitchell v Penton/Industrial Publishing Co., Inc., 486 F Supp 22, 24-26 (N D Ohio 1979) (action for misappropriation of facts preempted; unclear if court ~~used~~ relied on § 301 or Supremacy Clause independent analysis); ~~and Xerox Corp. v Apple Computer, Inc., 1990 US Dist LEXIS 4207 at *25-26 (N D Cal) (court finds plaintiff's state law claims in unfair competition and unjust enrichment preempted).~~ See also 3 Nimmer on Copyright § 16.04[C] at 16-25 n 42 (cited in note 4) (suggesting that ideas may be within the subject matter of copyright); and 1 Nimmer on Copyright § 1.01[B] at 1-25, 26 n 106.

54. To communicate an idea, one ordinarily writes a letter, makes an outline, prepares a report, or shows slides: all are "works of authorship" protectable (as to their expression but not their ideas) under federal copyright law. (An oral communication containing ideas is

53. See Howard B. Abrams, Copyright, Misappropriation and Preemption: Constitutional and Statutory Limits of State Law Protection, 1983 S Ct Rev 509, 569-66; Ralph S. Brown, Jr., Unification: A Cheerful Requiem for Common-Law Copyright, 24 UCLA L Rev 1070, 1092-99 (1977). For cases, see, e.g., Garrido v Burger King Corp., 558 S2d 79, 81-82 (Fla App 3rd D 1990) (claim for conversion and theft of advertising ideas contained in copyrightable materials held pre-empted; § 301 and § 102 explicitly considered); Walker v Time Life Films, 615 F Supp 430, 441 (SD NY 1985) (claim for misappropriation of, inter alia, "ideas and concepts" from a book held pre-empted under § 301), aff'd 784 F2d 44, 53 (2d Cir 1986), cert. denied 476 US 1159; Peckarsky v. ABC, 603 F Supp. 688, 695-96 (D DC 1984) (unfair competition and unfair trade practice claims based on use of facts and (by implication) ideas held pre-empted under § 301), also see Mitchell v Penton/Industrial Publishing Co., Inc., 486 F Supp 22, 24-26 (N D Ohio 1979) (action for misappropriation of facts preempted; unclear if court relied on § 301 or on independent Supremacy Clause analysis). See also 3 Nimmer on Copyright § 16.04[C] at 16-25 n 42 (cited in note 4) (suggesting that ideas may be within the subject matter of copyright); and 1 Nimmer on Copyright § 1.01[B] at 1-25, 26 n 106.

also potentially a "work of authorship" (Vol II at 504-07), but would escape preemption under § 301 because it is not fixed in a tangible medium of expression. State protection for oral ideas might be preempted under Supremacy Clause principles, however.)

~~The view that "ideas" are inextricably linked to works of authorship is different from that taken by the treatise (Vol II at 488), which seems to envisage that an idea can exist "separately."~~

Two partial exceptions to my view that ideas are almost inevitably part of "works of authorship" should be noted. Even a scientific idea, if it is described in a writing or picture, is part of a copyrightable "work of authorship," but it is probably more appropriate to speak of state protections for scientific ideas as preempted by patent law rather than copyright. Also, a scientific idea embodied ~~in~~ a three-dimensional machine or structure is probably not part of a "work of authorship" because the Act defines "pictorial, graphic and sculptural works" to exclude any "useful

article" that has only "mechanical" and "utilitarian" aspects. § 101.

55. See Ralph S. Brown and Robert C. Denicola, Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical and Artistic Works 490 (Foundation, 4th ed 1985).

56. Under this view, state grants of rights over ideas, processes and the like would be preempted ~~once~~ if those ~~ideas~~ intangibles were fixed in a tangible medium of ~~expressions~~ expression and ~~they~~ if state rights were "equivalent" to rights granted by the Copyright Act. Compare Brown and Denicola, Cases on Copyright at 490-92 (cited in note 55). Federal law, such as patent, would be available to protect such intellectual products where applicable.

57. The Nimmer treatise, for example, argues that when Congress denied copyright protection to ideas it was not excluding them from "the subject matter of copyright" but rather was stating "merely a limitation on what elements within such subject matter

may be considered protectible." 3 Nimmer on Copyright § 16.04[C] at 16-25 n 42 (cited in note 4). As the Goldstein treatise notes, works that "fail to meet" copyright's standards for protections but that fall within the general scope of copyright face potential preemption under § 301. (Vol II at 490)

58. See text at note 46. A state contract law, for example, might still survive preemption if it provided a "non-equivalent" form of protection for ideas (Vol II at 515, 525, 529-30)

59. Professor Goldstein suggests that the Supremacy Clause may have independent preemptive force; a state's protection of unfixed works, or ideas and facts contained in fixed works, could be preempted if it interfered with overall federal goals. (Vol II at 489 n 65, 501, 529-30) Professor Goldstein admits that this position is debatable, and that some courts might look solely to § 301 for preemption analysis. Vol II at 501, 530.

Even when taking up Supremacy Clause analysis independent of § 301, the treatise is more generous to state-granted rights than one would expect. Vol II at 512, 529-30. It focuses, for example, on whether the availability of state protection would "deter[] producers from developing their works into copyrightable form" (Vol II at 512); one would have thought, however, that the more appropriate inquiry would be a state law's conflict with the congressional calculus. See text at note 57.

60. As the treatise notes, it is plausible that § 301 provides the sole benchmark for preemption inquiry, in which case Supremacy Clause analysis would be unavailable. (Vol II at 501) Even assuming that this supplemental analysis is available, the appropriate standard for the Supremacy Clause inquiry is not clear. Vol II at 495-503, 512.

As for the First Amendment, Professor Goldstein notes that the Supreme Court has so far been reluctant to apply it to intellectual property rights. Vol II at 238-43; 616-18. However,

the Amendment's low profile in the area may be explained by the presence in copyright of doctrinal protections for free speech, such as the idea/expression dichotomy (see notes 67-69 and accompanying text) and the fair use doctrine. Vol II at 242. The fair use doctrine is a flexible privilege to use other's copyrighted material that defies easy summary. Described non-exhaustively in § 107, it provides safe harbor for uses that might otherwise be infringing.

Where such doctrines are absent, as they might be in state law, explicit use of the First Amendment becomes more likely. Under this view, state intellectual property law would gradually become subject to a set of constitutional privileges, not unlike state defamation law. See New York Times v Sullivan, 376 US 254 (1964); and Hustler Magazine, Inc. v Falwell, 485 US 46 (1988).

61. US Const, Art I, § 8, cl 8.

62. See Section IIB; also see Ralph S. Brown, Eligibility for

Copyright Protection: A Search for Principled Standards, 70 Minn L Rev 579 (1985).

63. See, for example, 30 J Copyright Society USA 209 (cited in note 38); and The Private Consumption of Public Goods: A Comment on Williams & Wilkins Co. v. United States, 21 Bull Copyright Society 204 (1974).

64. § 105.

65. Note, however, that this policy is imperfectly implemented. For example, Congress left the question of copyright on state and local governmental works to the judiciary, L. Ray Patterson and Craig Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations, 36 UCLA L Rev 719, 751-55 (1989), and the judiciary has not always fully protected this public interest. See id.

66. At one point Goldstein identifies works relevant to culture

and those relevant to political comment as two "special" sorts of goods. Vol II at 204-06.

67. International News Service v Associated Press, 248 US 215, 234 (1918).

68. Words are not the only mode of expression. Music and pictures, for example, can express ideas, too. A symphony transmits not only a particular collocation of notes, but also the idea of symphonic form. The former is protectible; the latter is not.

Similarly, a particular painting might embody an idea, such as that of superimposing several views of a figure on itself to convey motion as in Marcel Duchamp's "Nude Descending a Staircase". Copying the expression of the particular painting would be infringement, but copying the underlying idea--even if it originated with the artist copied--would not be.

A more current example, and one that illustrates the difficulties with the doctrine, can be found in the world of superheroes. Just as Superman can be described in words as "faster than a speeding bullet," "more powerful than a locomotive," and "able to leap tall buildings in a single bound", so he can be pictured in successive frames as outrunning a bullet, stopping a train in its tracks, and leaping over a pointy-tipped skyscraper; his imperviousness to firearms can be demonstrated by showing him stop bullets with his chest. For another comic-book artist to closely copy the details and ordering of these successive drawings would probably be infringement, though the second comic-book artist would probably be free to copy the ideas of an incalculably speedy superhero with the powers of flight and invulnerability, and to use these ideas in a differently-illustrated comic strip of his own. Yet in Detective Comics, Inc. v Bruns Publishing, Inc., 111 F2d 432 (2d Cir 1940), where "Wonderman" was held to infringe "Superman"

on the ground that the defendants had "used more than general types and ideas and have appropriated . . . pictorial and literary details . . . ," the court's injunction went so far as to prohibit defendant from portraying any of the feats of strength or powers. Id at 433.

Thus, the question of how much can be copied before "expression" is deemed to be taken is always hard to predict, and will be determined case by case. The way one structures or marshals ideas can itself be a form of expression, depending on the level of detail and other factors. One would imagine that the level of detail copied would have to be fairly high before a court would find infringement, but things are not always so. See Roth Greeting Cards v United Card Co., 429 F2d 1106 (9th Cir 1970). See also Vol I at 160; Vol II at 25-26, 72.

Also see

69. For additional useful discussions of the need to protect future authors' abilities to create, see Jessica Litman, The Public Domain, 39 Emory L J -- (forthcoming 1990); William M.

Landes and Richard A. Posner, An Economic Analysis of Copyright Law, 18 J Legal Stud 325, 332, 347-49 (1989); and David Lange, Recognizing the Public Domain, 44 L & Contemp Probs 147 (Autumn 1981). Unfortunately, the courts are often less eager to protect future authors than present ones.

70. See Litman, 39 Emory L J at -- (cited in note 69).

71. Goldstein's ~~reliance on~~ a cheapest cost avoider ~~rationale~~ seems too narrow even if an ~~economic~~ calculus is to be applied. It suggests that avoiding mistake is always preferable; yet it is sometimes more costly to avoid all mistakes than to allow some to be made. This is the now-hoary lesson of the Hand Formula. See United States v Carroll Towing Co., 159 F2d 169 (2d Cir 1947). Given Professor Goldstein's overall preference for solutions whose social benefit exceeds their social cost, a reconsideration of the "unconscious copying" question might be in order.

72. See the discussion in text at notes 36-37.

73. Professor Goldstein recognizes these remedial problems. Vol I at 7-8; Vol II at 248-49, 272-80. See also Goldstein, 30 J Copyright Society USA at 236-39 (cited in note 38).

74. See Litman, 39 Emory L J at -- (cited in note 69) (suggesting the impossibility of empirically distinguished between subconscious copying and coincidence). Professor Litman does not recommend abandoning the subconscious copying rule, however; rather, like Professor Goldstein, she focuses on other devices to preserve the public domain.

75. Goldstein discusses the functioning of the "access" and "substantial similarity" rules in copyright infringement. Vol II at 7-21.

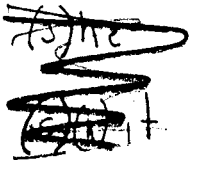
76. See Harold Bloom, The Anxiety of Influence: A Theory of Poetry (Oxford, 1973).

77. Technically speaking, a work is not derivative unless a substantial amount of protectable expression has been taken from

the prior work; if that expression has been taken without permission, the derivative work infringes. A work that takes only ideas, themes, or other nonprotectable elements from prior works is neither an infringement nor a derivative work. Vol I at 222. At issue here, however, is the chilling effect on artists, and artists are not usually copyright experts. Thus, the fact that a work could be a potential infringement is as important in practical terms as actual infringement.

78. Terry Eagleton, Literary Theory: An Introduction 183 (U Minn, 1983). restore feminist pt - a gin cites to fem cr - old n 96

79. "[T]he new literary criticism, I suggest, tended to justify strong protection of intellectual structures in some respect 'new,' to encourage a more suspicious search for appropriations even of the less obvious types, and to condemn these more roundly when found." Kaplan, An Unhurried View of Copyright at 24 (cited in note 2) (citations omitted).



80. Id at 22-25.

81. See Spider Robinson, Melancholy Elephants, in Isaac Asimov and Martin H. Greenberg, eds, The New Hugo Winners: Award-Winning Science Fiction Stories 99, 106-11 (Wynwood, 1989) (I am indebted to Jessica Litman, in 39 Emory L J ___ (cited in note 69) for directing me to the Spider Robinson story).

82. Robinson, Melancholy Elephants at 106-111. The story ~~sometimes seems to suppose~~ the story may erroneously be supposing that novelty (part of the standard for patentability) rather than originality is the relevant standard in copyright. This error does not undermine the theme's basic validity, as the categories of novelty and originality tend to overlap as a functional matter if three conditions obtain: (1) the "unconscious copying" rule; (2) the likelihood that a large proportion of everything composed or created in a given field has been encountered by virtually everyone in that field; and (3) the rule of § 103(a) that copyright protection does not extend to any

part of a work in which another's copyrighted work has been used unlawfully. (On the latter, see discussion in text at note 36-37.) Thus, if one has heard all the relevant compositions and composes a song that resembles throughout and in substantial part an existing composition, the new song would be using the prior song "unlawfully" and would not be entitled to copyright. Given the ubiquity of most songs, compositions will obtain copyrights only if they are unlike any copyrighted song that has been popular before. In this way, the explicit requirement of originality becomes in practice a requirement of novelty. Goldstein raises a related point. Vol I at 66-67. (I am indebted for this point to students in my 1988 Theoretical Foundations of Intellectual Property Law seminar.)

83. When and if such exhaustion of possibilities in fact approaches, rejecting the doctrine of subconscious copying is only one possibility. The term of copyright might also be shortened, the scope of protectible subject matter reduced, the "originality" and "authorship" prerequisites for copyright

stiffened, the variety of available remedies restricted, or the reach of the owners' exclusive rights curtailed.

84. The so-called "integrity" right is a protection against distortion, and thus a power of manipulation: it allows an author to say "This is my symbol, my character, my image: use it only as I want you to use it. If you think my use distorts a truth, you must find some way to address that problem without making direct use of my distortion."

85. While one might disagree with Bloom's view that "creative misreadings" of what has come before is essential to the creation of all new literature, it surely describes accurately an important part of many authors' aesthetic maturation.

86. Compare Tom Stoppard, Travesties 85-87 (Grove, 1975); see also George Orwell, 1984 32-33 (Signet Penguin, 1981) (indicating the importance of being able to utilize "documentary proof" to resist the state's power to redefine language and truth).

87. "The referent in post-Modern art is no longer 'nature,' but the closed system of fabricated signs that make up our environment." John Carlin, Culture Vultures: Artistic Appropriation and Intellectual Property Law, 13 Colum-VLA J L & Arts 103, 111 (1988). There is an art form known as "appropriation" that consists of making an audience see pre-existing art in a new light or take a different stance toward it. Sometimes it involves making substantial changes; sometimes it does not. See generally id. Carlin argues that "some arrangement needs to be developed whereby artists' traditional freedom to depict the environment in which they live and work is upheld" Id. at 140-41

88. As in Michael Langenstein's "Swimmer of Liberty," ~~discussed~~ pictured in Latman, Gorman & Ginsburg, Copyright for the Nineties at 159 (cited in note 28). (Though I speculate about the reasons for Ms. Liberty's dip.)

89. As in Tom Stoppard's Rosencrantz and Guildenstern are Dead (Grove Press, 1967).

90. See Texas v Johnson, 491 US __, 109 S Ct 2533, 2538-40 (1989); and United States v Eichman, 1990 US LEXIS 3087. But see

The San Francisco Arts & Athletics, Inc. v United States Olympic Committee, 483 US 522 (1987) (unauthorized use of the word "Olympics" to promote the Gay Olympics, a non-profit athletic event, violates the U.S. Olympic Committee's property right in the word).

I use the flag cases heuristically rather than doctrinally. As a matter of First Amendment doctrine, there are various grounds upon which the cases can be distinguished from intellectual property cases.

91. Texas v Johnson, 109 S Ct at 2539, quoting West Virginia Bd. of Ed. v Barnette, 319 US 624, 632 (1943).

92. Stewart Brand, Dan O'Neill Defies U.S. Supreme Court: A Really Truly Silly Moment in American Law, Coevolution Q 41 (Spring 1979).

93. The question of whether a derivative work can have a copyright is separate from the question of whether another party

also has a copyright-based legal interest in the derivative work. See § 106 (author's exclusive rights). The rights of several persons routinely co-exist in the same work or object. See, for example, Gordon, 41 Stan L Rev at 1361-65 (cited in note 48) (common law doctrines such as tort and property), and 1422-25 (conflicts among intangible and tangible property entitlements).

94. The statutory section on fair use in fact singles out "criticism and comment" as deserving of solicitude, § 107, and parody has long been considered an important exercise of fair use. See, for example, Sheldon N. Light, Parody, Burlesque and the Economic Rationale of Copyright, 4 Conn L Rev 615 (1979). But current fair use doctrine does not offer a determinative answer to the question.

95. I mean to include in this category the judicially-created doctrines that preserve freedom for ideas even when they are inextricably bound with expression; in particular, the doctrine

Continuation of Footnote 94

Fair use questions are decided on a case by case basis, New Era Publications Int'l, ApS, v Carol Publishing Group, 1990 US App LEXIS 8726, Docket Nos. 90-7181, 90-7193, slip op at 4060 (2d Cir, May 24, 1990), and a case involving suppression has yet to be considered by the Supreme Court. The Court's dicta is sparse and ambiguous. It seem to suggest that a refusal to license will not be second-guessed as a general matter, see Stewart v. Abend, 58 LW 4511, 4516 (1990) ("hoarding" of copyrights and "arbitrar[y]" refusals to license are both allowed to the copyright owner) but that if a plaintiff can prove that a refusal is motivated by suppression that may count as an "abuse" against which the fair use doctrine might be employed, see Harper & Row, publishers, Inc. v. Nation Enterprises, 471 US 539 at 559 (1985) (cautioning that the Court does not approve "abuse of the copyright owner's monopoly as an instrument to suppress facts"). Also see Zacchini v Scripps Howard Broadcasting Co., 433 US 562, 578 (1977) (suggesting that First Amendment might have been implicated if state intellectual property right had been utilized to suppress dissemination rather than simply to obtain payment).

A distaste for suppression has played a role in some lower court opinions. For example, in New Era v Carol, mentioned above, at issue was a hostile biographer's quotations from the published works of L. Ron Hubbard, the now deceased founder of

the Church of Scientology. The Court found fair use in part because of the critical nature of the defendant's book. Slip op. at 4062. However, an earlier second circuit opinion was willing to find copyright infringement of an unfavorable biography that quoted from Hubbard's unpublished work, New Era Publications In't, ApS v Henry Holt & Co., 873 F2d 576 (2nd Cir 1989), cert denied, 110 S Ct 1168 (1990), thus calling into question how much weight the possibility of suppression has or should have even if its relevance were conceded (and in that opinion little if any such concession was made; see id. at 873 F2d 584). Further, suppression motivated by a desire to preserve a living author's privacy may receive more approval than suppression to pursue other nonpecuniary interests. See Vol II at 191-92 n. 11.

The clearest copyright case enforcing a distaste for suppression was resolved on Establishment Clause principles. See United Christian Scientists v Christian Science Board of Directors, First Church of Christ, Scientist, 616 F Supp 476, 479-81 (D DC 1985) (private law extending the copyright term of Mary Baker Eddy's writings held void; the copyright extension had been sought and granted to ensure that only versions of Eddy's work approved by the Church hierocracy would be disseminated.)

(Vol I at 80)

of merger and the doctrine that the standard of infringement can be heightened for expression that permits only limited variation. See Continental Casualty Co. v Beardsley, 253 F2d 702, 706 (2d Cir 1958) ("the proper standard of infringement is one which will protect as far as possible the copyrighted language and yet allow free use of the thought beneath the language").

96. Aristotle writes, "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission . . .." Aristotle, 10 Ethics, in The Nicomachean Ethics 133, D. Ross trans, revised by J.L. Ackrill & J.O. Urmson (Oxford, 1984).

97. Id.

98. See generally Richard A. Posner, Economic Analysis of Law 9 (Little, Brown, 3d ed 1986).

99. See Brown, 70 Minn L Rev 579 (cited in note 62).

100. Bleistein v Donaldson Lithographing Co., 188 US 239, 251 (1903)(Holmes).

101. In practice, this may not lead to such extreme results. Mitchell Polinsky reminds us, for example, that persons whose interests are sacrificed in the pursuit of economic efficiency can be rewarded by transfer payments after the "larger pie" has been created. A. Mitchell Polinsky, An Introduction to Law and Economics 7-10, 119-127 (Little, Brown, 2d ed 1983). Even without transfer payments, utilitarianism would yield significant protection for individual interests. See, for example, Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165, (1967)(both the utilitarian and fairness approaches to the Fifth Amendment yield significant protections for existing property entitlements, with utility, surprisingly, protecting more entitlements than a pure fairness approach might).

102. Contractarianism is general enough to be manipulated to serve virtually any end, instrumental or deontological. I use the term "consensual" instead of "contractarian" to indicate actual, face-to-face agreements between people, rather than some hypothetical contract model a la Locke, Rawls, or Nozick.

103. Harry Kalven, Jr., Privacy in Tort Law--Were Warren and Brandeis Wrong?, 31 L & Contemp Probs 326, 331 (1966). See also Murray N. Rothbard, 2 Man, Economy and State: A Treatise on Economic Principles 652-60 (Van Nostrand, 1962).

104. Zacchini v Scripps-Howard Broadcasting Co., 433 US 562 (1977). Although this case was presented under a "right of publicity" rubric, a common law copyright in an unfixed performance was clearly at issue. Vol II at 601-05.

105. Contrariwise, some commentators use a consent argument to attack intellectual property, arguing that it is illegitimate because it imposes a nonconsensual limitation on at least some

persons' use of their physical property. Tom G. Palmer, Intellectual Property: A Non-Posnerian Law and Economics Approach, 12 Hamline L Rev 261 (1989).

106. See, for example, David Ladd, The Harm of the Concept of Harm in Copyright, 30 J Copyright Society USA 421 (1983).

107. For an interesting investigation of one form that the restitutionary and personality approaches might take, and comparisons between them, see Justin Hughes, The Philosophy of Intellectual Property, 77 Georgetown L J 287 (1988). See also, Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St L J 491 (forthcoming 1990); Gordon, 41 Stan L Rev 1446-69 (cited in note 48); Edwin C. Hettinger, Justifying Intellectual Property, 18 Phil & Pub Aff 31 (1989); and Wendy J. Gordon, Owning the Fruits of Creative Labor: Boundaries and Limits in Intellectual Property (draft manuscript; copy on file with the University of Chicago Law Review);

108. All of these issues are examined in more depth in Gordon, Intellectual Property and the Restitutionary Impulse (draft manuscript, cited in note 40).

109. Compare ~~Contrast~~ George Sher, Desert 69-90 (Princeton, 1987).

110. See John Locke, The Second Treatise of Government, ch 5 (Bobbs-Merrill, 1952); also see Gordon, Owning the Fruits of Creative Labor (draft m cited in note 46)

111. See, for example, Karl Olivecrona, Appropriation in the State of Nature: Locke on the Origin of Property, 35 J Hist Ideas 211 (1974); Karl Olivecrona, Locke's Theory of Appropriation, 24 Phil Q 220, 225 (1974).

112. See Hughes, 77 Georgetown L J at 330-66 (cited in note 107); and Margaret Jane Radin, Property and Personhood, 34 Stan L Rev 957 (1982).

113. Olivecrona, 35 J Hist Ideas at 215 (cited in note 111).

114. See generally Gordon, 41 Stan L Rev 1413-35 and the sources

cited therein (cited in note 48). See also Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum L Rev 810, 814-17 (1935).

115. See, for example, William W. Fisher III, Reconstructing the Fair Use Doctrine, 101 Harv L Rev 1659 (1988).

116. This may be considered Ronald Dworkin's life work: exploring how the common law proceeds in the face of principles bearing a shifting degree of weight. See Ronald Dworkin, Law's Empire (Harvard, 1986).

117. See, for example, Arthur A. Leff, Law And . . ., 87 Yale L J 989 (1978)(arguing that such mixes are inevitable).

118. See Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 Colum L Rev 1600, 1632-45 (1982).

119. In intellectual property law, the sovereignty model correlates roughly with the "authors' rights" perspective. The

stewardship model corresponds most closely with the economic perspective, and it also has echoes in the notion that copyright serves First Amendment values. See Vol II at 238-43 (First Amendment).

120. It is their convergence in the usual case that permits their continued coexistence as competing perspectives. For example, one way to serve the "social good" is, arguably, to respect individual owners' investments in their property; compare Michelman, 80 Harv L Rev 1165 (cited in note 101) (utility arguments support paying compensation to owners disadvantaged by government activity in a fairly wide range of instances). Similarly, a way to serve the economic health of a society is, arguably, to honor owners' decisions as to how their property should be used. This latter argument is, at its extreme, Adam Smith's "invisible hand" notion.

121. See Michael L. Katz, An Analysis of Cooperative Research and

Development, 4 Rand J Econ 527, 527 (1986) (in the absence of price discrimination, a firm that invests in research and development "will be unable to appropriate all of the surplus generated by the licensing of its R & D").

122. See Richard A. Posner, ~~Conventionalist Defenses of Law as an~~ The Problems of Jurisprudence (Harvard U. Press, forthcoming) Autonomous Discipline (September 21, 1987, unpublished manuscript, on file with the ~~University of Chicago Law Review~~) (using pecuniary effects to explain why landowners who create certain positive spillovers are not entitled to payment from those who benefited). 440-441 fix

123. Income effects are, roughly, the impact on one's preference brought about by a change in wealth, including the change brought about by being given, or being denied, an entitlement. See, for example, E.J. ~~III~~ Mishan, The Postwar Literature on Externalities: An Interpretive Essay, 9 Econ Lit 1, 18-21 (1971) ("income" or "welfare" effects illustrated arithmetically); see also Yen, Journal of Economic Literature

Restoring the Natural Law: Copyright as Labor and Possession, 51 Ohio St L J at 518-19 (cited in note 107) ("flip flop" of rights).

124. For further exploration, see Wendy J Gordon, The Right Not to Use: Nonuse and Suppression in Intellectual Property, (draft on file with the University of Chicago Law Review).

125. In fact, if there were any asymmetry, it would probably give a stronger right against harm than to recapture benefits. See ~~that the~~ Leumore, 71 Va L Rev 25 (Cited in n 131) (suggesting such asymmetry exists in the common law)

126. See Locke, Second Treatise ch 5 at 9 27 ~~17~~ (cited in note 110). The "en" is common to the provision of the 'sufficient' clause

See id.

127. I give here my interpretation of Locke's "labor-joining" argument. Locke's Second Treatise also contains other arguments, ~~an~~ arguments, e.g., regarding the beneficial results of property ownership; whether ~~this~~ the utilitarian argument should be viewed as an independently sufficient justification for property has, of course, been debated.

128. See Locke, Second Treatise ch 5. The proviso that "enough,

130a. See George E. Palmer, 2 The Law of Restitution at 359 (Little, Brown 1978) ("long-standing judicial reluctance to encourage one person to intervene in the affairs of another by awarding restitution of benefits thereby conferred").

131. See Saul Levmore, Explaining Restitution, 71 Va L Rev 65, 77-78, 84 (law denies restitution where a nonbargained "benefit" may not in fact make recipient better off; even at a "less-than-market" price the unsolicited benefit "may be undesirable to a wealth-constrained" recipient); see generally Gordon... [remainder of old n.131 goes here]

and as good" be left for others constitutes an additional "do no harm" principle. See also Lawrence C. Becker, Property Rights: Philosophic Foundations (Routledge & Kegan Paul, 1977). Similarly, Locke's argument regarding waste suggests he saw nothing wrongful in taking property from someone to whom it had no use value. If so, Locke would seem to view a non-harmful taking as non-wrongful, at least in the state of nature.

129. For a fuller development of this theme, see Gordon, Owning the Fruits of Creative Labor (draft manuscript, cited in note 107).

130. See Gordon, 41 Stan L Rev at 1454-65 (cited in note 48) (comparing the exceptions to the "intermeddler" rule with copyright).

130A insert to 131 } see separately typed material

131. See generally Gordon, Intellectual Property and the Restitutionary Impulse (draft manuscript, cited in note 40).

132. Another caveat regarding nomenclature is in order here.

Any violation of a duty gives rise to a right; when property rights are violated, the resulting cause of action is typically classified as a tort. Copyright is no exception; copyright infringement is classified as a tort. See William F. Patry, Latman's The Copyright Law at 266 (cited in note 19). It would therefore be circular to refer to "tort law" as a source of insight for copyright if one meant only the branch of torts that effectuates owners' rights to exclude. But of course tort law does more than protect a property owner's right to exclude. It also mediates non-property relations, as in the law of negligence, and, through the law of nuisance, it helps define the hazier boundaries of a property owner's entitlements. In these latter areas tort cases tend to serve as a locus for substantive policy discussion about what rights should be granted. It is to this discussion and consequent experimentation that I refer when I suggest looking to "tort law" for informative analogies to some of our intellectual property questions.

133. See, for example, Vol I at 4-9; Vol II at 685-86. See also Fisher, 101 Harv L Rev 1659 (cited in note 115).

134. Persons with the potential to create valuable works have authorship rights over the use others make of their products; the benefits the authors create are brought home via license or royalty fees, and productive behavior is encouraged.

135. Copyright provides positive incentives to persons with control over potentially creative resources, and torts provides negative incentives to persons with control over mechanisms with destructive potential.

136. See generally Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (Yale, 1970) ("cheapest cost avoider").

137. See Ronald Coase, The Problem of Social Cost, 3 J L & Econ 1 (1960).