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Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story

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EXCUSE AND JUSTIFICATION IN THE LAW OF FAIR USE: TRANSACTION COSTS HAVE ALWAYS BEEN *PART* OF THE STORY

by WENDY J. GORDON*

INTRODUCTION

In American copyright law, the doctrine of "fair use" has long been problematic. Every plausible litmus test that might simplify the "fair use" inquiry has proven inadequate,[1] and copyright commentators have long

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[1] Fair use is a judicially-created doctrine from the nineteenth century that permits some uses of copyrighted material despite the lack of the copyright holder's consent. The doctrine was given statutory recognition in the Copyright Act of 1976. *See* 17 U.S.C. § 107 (2000) (listing factors to "include" in consideration of fair use). *See also id.* § 101 (indicating that, "The terms 'including' and 'such as' are illustrative and not limitative.").

A court will deem a defendant's copying or other use of the plaintiff's work "fair" when, by and large, the use is non-commercial, involves a quantitatively small amount of copying, serves the public interest, and causes little or no harm to the owner of the copyright. *See id.* § 107. Yet there are cases that give the lie to each of these factors standing alone: Cases where "fair use" was found potentially available for a use that is commercial, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994); for a use that copies 100% of the copyrighted work, *Williams & Wilkins Co. v. United States*, 203 sought an algorithm or heuristic to lend predictability and conceptual coherence to the doctrine. Twenty years ago, I published in this *Journal* an article entitled *Fair Use as Market Failure*, which suggested that the key to understanding the protean forms of "fair use" could best be found in the notion of market failure.[2] That 1982 article has been often misapplied, by both courts and commentators. I am pleased to publish in the Fiftieth Anniversary issue of this *Journal* a clarification of my position on market failure and fair use.

Most importantly, I want to make explicit that markets do not "fail" merely when transaction costs are so high that a potential seller and buyer fail to meet.[3] The point of "market failure" as a category is not to cata-

Ct. Cl. 74, 89-90 (1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam); for a use of trivial aesthetic or public importance, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 440 (1983) (copying of, inter alia, television entertainment programs); and for a use that harmfully diminishes the demand for the copyrighted work, *cf.* Fisher v. Dees, 794 F.2d 432, 437-38 (9th Cir. 1986) (for fair use purposes, only substitutional harm is relevant; other kinds of harm do not weigh against fair use). Similarly, when the Supreme Court put great stress on the unpublished nature of a plaintiff's work, *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985), Congress fairly quickly passed an amendment to the fair use statute to clarify that the unpublished status of a work should not be determinative. *See* the last sentence of 17 U.S.C. § 107 (2000).

2 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 (1982) [hereinafter *Fair Use as Market Failure*], *reprinted in* 1 THE ECONOMICS OF INTELLECTUAL PROPERTY 377-434 (Ruth Towse & Rudi W. Holzhauer eds., 2002), *and in* 30 J. COPYR. SOC'Y 253-326 (1983).

3 The typical misunderstanding has been to interpret me as arguing that "the impossibility of arriving at bargains [is] the essential justification for the doctrine of fair use." David Lindsay, The Future of the Fair Dealing Defense to Copyright Infringement 62, Research Paper No 12, University of Melbourne Centre for Media, Communications and Information Technology Law, Nov. 2000); *accord* Robert P. Merges, *The End of Friction? Property Rights and Contract In The "Newtonian" World Of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 130-31(1997). To the contrary, of course, the impossibility of arriving at bargains is only one of the types of market failure I explored in *Fair Use as Market Failure.* Other types of market failure can arise, inter alia, in the presence of nonmonetizable interests, anti-dissemination motives, and positive externalities generated by users. *See id.* at 1630-35.

Some courts and commentators understand and apply the original analysis well. Lydia Pallas Loren is one. But as she suggests, many courts as well as some scholars have taken the erroneously narrow view of the market failure defense. Lydia Pallas Loren, *Redefining the Market Failure Approach To Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1, 26-27 (1997). I applaud most of the discussion in the Loren article as helping to avert further misunderstanding, and hope that the instant essay will help clarify further.

logue individual buyers' and sellers' private frustrations. Rather, the concept of "market failure" provides tools for economists and other observers to assess when privately motivated deals can or cannot be relied upon to suit public ends.

Thus, in the literature of law and economics, the term "market failure" refers to the failure of the Invisible Hand that Adam Smith hoped could reconcile private motives and public goals. It is the Invisible Hand that makes us comfortable relying on markets to allocate our resources, comfortable assuming that a property owner's decisions deserve deference, comfortable that a private person's choices will be socially beneficial even though no government official oversees what occurs. It is the Invisible Hand that in large part justifies the usual legal rule making someone's intentional use of another person's property *prima facie* actionable — actionable without needing a judge to decide whether or not the unconsented use is socially undesirable. When we see a palsy in the Invisible Hand, however, we need to reconsider that deference.

Since "market failure" refers to a market's failure to serve social goals, such a failure can happen even when participants are bargaining face-to-face. For example, consider a potential licensee of a copyrighted work, call her Alice, who wishes to adapt an existing book in a controversial way. Assume her adaptation will provide crucial ideas to public discourse, but that Alice's book itself is not likely to become a best-seller. The revenue she would collect from her book would represent only a small portion of the social benefits her adaptation would create. (The benefits someone generates but cannot capture are termed "positive externalities.") Consider another potential licensee, call him Ben, who has in mind a conventional blockbuster adaptation, a page-turner that will provide little in the way of new ideas but heaps in the way of money. When going to banks for loans to finance their projects, Alice is likely find that Ben can raise more money than she can. When promising payments to the copyright owner, Alice is likely to find that Ben can promise more than she can. If Ben can "internalize" the benefits his adaptation would generate more completely than Alice can, he can and likely will outbid Alice — even if Alice's adaptation could serve social needs. A market exchange has occurred, in that a license has been granted (by the copyright owner to Ben). However, the copyright license has been allocated to the wrong party. This, too, is "market failure." Thus, "market failure" as a category extends well beyond the case of high transaction costs between owner and user.

I here suggest that fair use cases can be usefully separated into two categories. Each category marks a set of reasons to think that private markets will fail to meet social goals. I dub the two sets of reasons "market malfunction" and "inherent limitation." Both can be thought of as forms of "market failure" writ large.

Briefly, the category of "market malfunction" identifies instances where economic norms appropriately govern, but which display imperfect market conditions (such as significant externalities). This is the category most law and economics scholars mean by "market failure." By comparison, the category of "inherent limitation" refers to circumstances where even under perfect market conditions we cannot rely on markets to function as socially satisfactory institutions for the distribution of resources. These are the many instances where market norms themselves fail to provide fully suitable criteria for resolving a dispute, instances where we do not want money to determine what happens.

It is often said that babies should not be treated as commodities, nor should adult bodies. There may be occasions when works of authorship, too, involve values that should not be subject solely to monetary forces. As will appear below, policies regarding commodification can help us distinguish when a court should treat a given copyright interaction as appropriately governed by market norms, and when instead the court should treat such norms as fully or partly inadequate.

The distinction between "malfunction" and "inherent limitation" can be illuminated by drawing on the distinction between "excuse" and "justification." That distinction, so far best developed in the context of criminal law, is capable of more general application.

"Excuse" connotes "if only" — *if only* some discrete fact were different, we could apply the law as written. In instances of "market malfunction" we are in the world of "if only": we would *prefer* the market to govern if only the market could function well, but when it fails to do so (because of, e.g., transaction costs), a court may *excuse* a participant from adhering to the usual market rules. Therefore, the "market malfunction" category corresponds, in a loose but useful way, to the legal concept of "excuse." It is based on the nonappearance of conditions that the governing model views as normal,[4] and is thus a conditional defense.

By contrast, a defense of "inherent limitation" would not be conditional in this way. If market norms are inherently inadequate in the particular context, then even were the market to function perfectly, a court might approve a departure from market procedures as *justified* under

[4] Admittedly, the market is never fully "perfect." What counts as market malfunction is a matter of degree. This too bears a good analogy to the criminal law treatment of "excuse." The overall criminal law model assumes persons are rational actors who respond to incentives such as fear of imprisonment, even though all people are sometimes irrational and sometimes immune from incentives. It is only when the divergence from the normal grows great enough that someone is declared "insane," that he may be excused for criminal acts he performs.

these other norms. Thus, I suggest that this second category of market failure is analogous to the established concept of "justification." When we come up against the market's inherent limitations, we don't yearn toward what the market could do "if only" some fact were changed. We turn to other norms.

(Note the distinction parallels criminal law only in part. Criminal law parses "excuse" as pertaining largely to state of mind, and "justification" largely to a defendant's act. The way I use the terms, the core of the distinction is seen more generally: "Excuse" is a matter of factual divergence from the standard; "justification" is a matter of norms; and acts can be justified *or* excused.)

Third, I point out that in all tort cases — and copyright infringement is no exception — excuse and justification can apply at any of three levels: to the defendant's *behavior*, to the defendant's failure to obtain the plaintiffs *permission*, and/or to the defendant's failure to *compensate*. (This, too, is different from criminal law.) I show how the single "fair use" inquiry in fact contains all three inquiries.

Fourth, I suggest that courts should and do treat cases where a lack of permission and compensation are excused (market malfunction) differently from cases where absence of permission and compensation are justified (market limitation). The difference in treatment is summarized at the end of this Introduction.

Finally, I argue that significant societal dangers lurk in responding to defendants' claims of fair use with judicially created compulsory licenses. This latter option — denying the plaintiff an injunction but making the defendant pay — may look like a wonderful compromise that satisfies both free speech and incentive concerns, but data from psychology and behavioral law and economics suggests that it has costs of its own.

My earlier work, linking fair use generally to notions of market failure, is consistent with making the proffered distinction between excused and justified fair uses.[5] Where I diverge from my earlier writing, however, is in my current belief that not all reasons for distrusting markets should be given the same treatment.

[5] As mentioned, in *Fair Use as Market Failure*, *supra* note 2, I presented "nonmonetizable interests" as a form of market failure. *Id.* at 1630. As discussed below, the presence of nonmonetizable interests can constitute a "justification" for fair use. In *Fair Use as Market Failure*, I argued that transaction costs high enough to impede bargaining constituted another form of market failure. *Id.* at 1628. As discussed below, the presence of high transaction costs between owner and user can constitute an "excuse" for a court providing fair use treatment. Thus, the use of the "excuse" and "justification" categories refines but does not contradict my earlier definition of the market failures that can trigger fair use treatment.

Most notably, in my earlier work I had argued that fair use should generally be denied if recognizing the defense would cause substantial injury to the copyright owner.[6] The presence of substantial injury should defeat a claim of fair use, I argued, and I applied this recommendation to all cases where market deference was inappropriate, even situations involving nonmonetizable interests (an "inherent limitation" kind of market failure). I now recognize that treatment as overbroad.[7] Substantial injury to the plaintiff is a factor that should be treated differently by the category of market malfunction ("excuse"), and by the category of inherent limitation ("justification").

I will here argue as follows:

1. A case of "justification" can occur when we would not object if others emulated a defendant's having no permission and/or her having paid no compensation.[8] For free speech purposes, for example, it appears actively undesirable to require an iconoclast to obtain the permission of the entity she is ridiculing. We would want iconoclasts like her to speak[9] without obtaining permission from their targets.[10] If so, the iconoclast's failure to ask permission is justified.[11]

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6 *Fair Use as Market Failure*, *supra* note 2, at 1618-27 and *passim*.

7 One of the important influences stimulating me to rethink this issue was Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 330-31 (1996). I thank Neil Netanel for the excellent and helpful criticism.

8 Heidi M. Hurd, *Propter Honoris Respectum: Justification and Excuse, Wrongdoing and Culpability*, 74 NOTRE DAME L. REV. 1551, 1555 (1999) ("A . . . well-known test of when actions are justified holds that an action is justified if and only if we are willing to recommend that others emulate it in similar circumstances. In contrast, an action is eligible only for an excuse when we wish that the actor had acted differently and hope that others do not emulate the actor's unfortunate conduct in the future.").

9 I am following the convention that uses "speech" to embrace all acts of communication. Nevertheless, for those who identify "speech" with "talking," please note that quoting from copyrighted works in one's private talk does not require permission under copyright law, no matter how extensive the quotation may be. That is because "private performance" is outside a copyright owner's control. By contrast, giving a public talk is a "public performance" which is governed by § 106 of the Copyright Act. 17 U.S.C. § 106(4) (2000).

10 Should the law require the iconoclast to obtain the permission of the person whose oeuvre she is attacking, such a requirement would likely block the critique altogether, or blunt its point and effectiveness. The target's dislike of being attacked is not a technical problem that can be easily *cured* by tweaking institutions or technology.

11 Issues can arise on the borderline between excuse and justification, as will appear below. For one example, consider policies of redistribution. One scholar arguing that redistribution should be a relevant fair use policy is Robert Merges, *supra* note 2, at 133-36. Conceivably this could give rise to

2. For fair use, a potential "excuse" arises when something occurs that we do *not* want to have emulated — a behavior, lack of permission, or lack of compensation — but which we allow without imposing liability because of the particular facts of that case. A paradigmatic example is presented when high transaction costs between owner and possible licensee are so large that they swamp any possibility of bargaining.[12] The social good that could be furthered by the blocked transaction, coupled with the incapacity of the participants to use the market, can "excuse" the defendant from going forward without asking permission.[13] But if transaction costs were lower, we would want the defendant's use to occur only if voluntarily licensed by the copyright owner.
3. In cases of "excuse," fair use should and does disappear if, because of institutional or technological change, the excusing circumstances disappear. By contrast, in cases of "justification" a change in circumstances would not change the availability of the fair use defense.[14]
4. In cases of "excuse," it is defensible to deny fair use treatment if it would do significant harm to the plaintiff's interests and to the incentives of similarly situated copyright owners. In cases of "justification," however, harm to the owner should be given much more limited importance.[15]

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an "excuse," in the sense that correcting the maldistribution might eliminate the fair use. Alternatively, this could be conceptualized as a case of justification, where the market's monetary measure will be unable to accomplish social ends.

12 The importance of transaction costs depends on their size *relative to* the benefits to be reaped from a transaction. A potential license will likely be blocked whenever the copyright owner and putative copier face transaction costs that are higher than any net gains that could result from a consummated transaction. *See Fair Use as Market Failure*, *supra* note 2, at 1627-30.

13 This is how I interpret the court's decision in *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74 (1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam). *See Fair Use as Market Failure*, *supra* note 2.

14 The only thing that would change the availability of the defense in cases of justification is a change in *norms.*

15 Please note that point (3), regarding change in circumstance, is true of all "excuses" by definition. An excuse is a defense based on special circumstances, which is applicable only when the circumstances are present. The next factor discussed — point (4), substantial injury to the copyright owner — is not definitional in the same way, and applies to many but not all cases of excuse.

Presenting a full development would be beyond the scope of this summary. The article's purpose is to show the connections between fair use, "justification," and commodification.

The instant essay will explain the relevant concepts, explore the logical connections between them, and provide some examples. In addition, it will use concepts of both excuse and justification to explore a problem area that straddles the distinction: attempts by copyright owners to use intellectual property law as a tool of private censorship.

I begin by offering a partial conceptual map of excuse and justification.

I. EXCUSE AND JUSTIFICATION

In common lawyer's parlance, an act or omission is said to be "justified" if we would not object to its being emulated.[16] An act or omission is said to be "excused" if we would not want it to be emulated, but we have reasons *other than* the merits of the act or omission itself to relieve the defendant of liability. Thus, one might say that "justifying" an act or omission goes to the merits of the defendant's choice, while giving the defendant an "excuse" does not go to the merits.[17] Usually, an "excuse" arises because of some kind of institutional lack of fit between the circumstances and what the applicable law seeks to accomplish.

To illustrate, consider self-defense in the ordinary common law of crime. If someone in using reasonable force to repel a violent attack unavoidably breaks her attacker's arm, the attacker will not be able to sue the arm-breaker successfully for battery, nor will the arm-breaker be criminally liable. Her acts will not give rise to liability because it is desirable for innocent parties to defend themselves. The use of reasonable force is proper, and what the arm-breaker has done is *justified.* Even if it is not the best thing that she could have done (we may have preferred her to run

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[16] *See* Hurd, *supra* note 8. Or, as stated in the classic treatment by H.L.A. Hart: "In the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes." H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 13 (1968) (footnote omitted).

[17] For this useful simplification, I am indebted to Tamar Frankel. It allows me to sidestep the fascinating question of whether there is some definable essence, other than "not on the merits," that motivates excuses in civil tort law. As will appear below, I argue that most "excuses" in the tort of copyright are linked to deviations from what would be needed for the neoclassical Invisible Hand to operate. But as this intuition has a great deal of openness, a sidestep is useful.

In criminal law, it is often argued that "justification" goes to the defendant's *act*, while "excuse" goes to the defendant's culpability as a person. *See* Hart, *supra* note 16, at 13-14 ("psychological state of the agent"); *cf.* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 577-78, 734, and chapter 10 (1978) (excuse as lack of "accountability" or attribution). In my schema, the acts of refusing to pay, or of refusing to seek compensation, can be excused as well as justified.

away), the action is morally acceptable. We would not object to its being emulated by persons similarly situated.

By contrast, consider an arm-breaker who was delusional in thinking she was being attacked. In a criminal trial, she might escape conviction for battery, but not because her actions were justified. Rather, the delusional arm-breaker might be found "not guilty by reason of insanity." Such a verdict reflects an *excuse.* We do not want her action emulated. Rather, the criminal law merely chooses not to impose a criminal sanction because of particular circumstances that cause a lack of fit between the defendant's state of mind, on the one hand, and, on the other, the purposes and functioning of criminal law and its sanctions. A different result might well be reached by a judge applying the civil law of torts,[18] with its different purposes and function.

If one evaluates the purposes and function of copyright, what do we find? Copyright sets up a market system in which, it is hoped, copyright owners, publishers, new creators and consumers will enter into transactions which will both disseminate the creative works and provide incentives for their creation.[19] Ownership is given to the class of persons — creators — from whose hands a market will most easily evolve and which will result in a desirable degree of internalization.[20] It is hoped that the

18 Many states whose criminal law might excuse the delusional defendant would nevertheless impose civil (tort) liability on her.

19 This standard language of "incentive and dissemination" is sometimes misinterpreted. Copyright is granted as a monopoly to subsidize creativity and *not* as a monopoly to subsidize physical production or physical dissemination. This was true historically as well. The publishers who benefited under the first copyright statute, the Statute of Anne, were those who had *paid* authors for an exclusive right to copy. Statute of Anne, 8 Anne, ch. 19. (1710). Thus, although publisher pressure may have helped that first copyright act come into being, the publishers were not subsidized *as* publishers, but rather as persons who had supported the authorial enterprise.

Had the publishers not paid for copyrights, their mere physical costs of printing and distribution would not have supported a claim for governmental aid. Normal competition applies to those physical processes. Copyright does not aim to make the physical act of dissemination more profitable than other physical processes. Copyright merely aims to encourage the creation of works — and the fixed costs of creation having been met, authors can then license the newly made works, providing access to the public.

20 Even if it is decided that the law should adopt a rule of deference to property owners, it still remains necessary to specify who is the owner. Who will *receive* an ab initio right to use the resource, as compared with the non-owning people who must *purchase* a privilege to use the resource? From a moral perspective, we might want authors and inventors to have initial ownership in their intangibles if they *deserve* ownership. Debate would then center on the proper nature and bases of desert. It would be in part empirical (who does what?), but mostly normative (what significance should be given to what is done?). From a neoclassical economic perspective, however, owner-

result will maximize social welfare as well as the welfare of the participants. (Of the many ways to measure welfare, most legal scholars follow Judge Posner's classic approach, and seek to "maximize value as measured by willingness to pay."[21]) Market transactions are thought a desirable way to pursue such maximization because, inter alia, decentralized market actors such as buyers and sellers have incentives to reveal some of their preferences, and need less data than a centralized entity would need in order to operate effectively. Second-guessing individual owners has high dangers of inaccuracy, as well as being administratively expensive.[22] Thus, enforcing a market system is one of the best ways of being sure that efficiency will be achieved, assuming of course that transaction costs are low and other conditions of perfect competition are adequately met. Thus, in cases where economic value is at stake, we ordinarily *want* a potential user to seek permission from the copyright owner and pay a price they negotiate. A copyist who fails to obtain consent and to pay is considered an infringer.

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ship is placed not where it is morally deserved, but instead where benefits and costs can best be internalized. Debate then would center on how the dynamics of human behavior would be affected by different starting points. For example, if authors and inventors are given initial ownership rights, what is likely to follow? Or if the public is given rights to copy, what is likely to follow?

For economic purposes, ownership should be allocated according to whatever starting point is most likely to internalize benefits in a way that will give adequate incentives to produce socially-valuable products without causing excessive deadweight loss and administrative burdens. This involves essentially empirical inquiry, but some armchair inferences can be drawn from general patterns of human behavior. Thus, I have argued elsewhere that intellectual property markets and consequent internalization evolve most easily when, inter alia, copiers have an incentive to identify themselves. If so, giving ownership to the author or inventor indeed makes more economic sense than privileging all copiers. Conversely, I have argued that in most instances giving the public an entitlement to copy would be a cumbersome starting point, causing immense problems of coordination from which to reach a socially desirable level of production. If so, a starting point that presumptively gives ownership to authors and inventors, rather than to the public, appears preferable. Wendy J. Gordon, *Of Harm and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992).

21 The instant article takes as its target model the classic Posnerian approach of "maximizing wealth as measured by willingness to pay." For an approach less used by lawyers but more similar to that used by academic economists, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001). As Kaplow and Shavell point out, Judge Posner has himself amended his stance. *Id.* at 996 n.68.

22 This section is obviously indebted to the analysis in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Sometimes, however, the goals of the law cannot be achieved through the market. If so, market logic suggests this is a good occasion for a defense: a doctrine or rule that permits the defendant to act without obtaining permission or paying compensation.[23] The market perspective can be used not only to identify the occasion when a defense may be needed to achieve social goals, but can also help classify the possible defenses into excuses and justifications, as follows:

A. Excuse

Sometimes the law's goal is economic, but a market malfunction is present in the sense that the current conditions diverge strongly from those needed for perfect competition. For example, high transaction costs may make it impractical for plaintiff and defendant to deal with each other. In such a case, allowing the defendant to proceed with his copying may produce a higher level of value than enforcing the copyright by enjoining the use. In such a case a court might allow a defendant fair use.[24]

However, allowing free use in such cases is distinctly a second-best solution. Recall that a criminal court might excuse an insane defendant, but *want* him to have acted differently. Similarly, a copyright court in the presence of high transaction costs might *excuse* the defendant, but if the transaction-cost problem were eliminated, would *want* the defendant to proceed through the market. This notion of "we would prefer otherwise" is near the essence of excuse.

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23 A system of private law that puts the maximization of economic value above the maintenance of market "forms" will find either an excuse or a justification — or a prima facie limitation on owners' rights — in all those situations where markets cannot be relied on to function as socially satisfactory institutions for the distribution of resources. This statement is a virtual tautology. After all, a system that aims at value maximization by using markets will have to find some means to transfer resources *other than* through owners' voluntary consent when that economic goal is unreachable through markets.

Despite the tautology, the "market failure" language is useful: the economic paradigm provides a checklist and a structure for inquiry. It helps us identify many of the occasions on which the usual market-based system, where the owner's will is law, will not reliably maximize social value. Note, incidentally, that the instant argument must alter if markets are desired *for their own sake* because, e.g., they contribute to an owner's autonomy. The instant analysis will assume that markets are desired because of their ability to contribute to value-maximization. For an exploration of alternative norms, see Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L. REV. 579 (1985). *See also*, *e.g.*, Netanel, *supra* note 7 (copyright should serve the norm of encouraging democratic civil society).

24 *See Fair Use as Market Failure*, *supra* note 2.

B. *Justification*

Sometimes, by contrast, going outside the market is a first-best solution. In particular, where non-economic values are at stake, we might feel very uneasy trusting that market transactions could achieve the desired goals. In such a case, a judge might well decide that a defendant could be *justified* in proceeding without consent or compensation: that even if market conditions were perfect, it would be normatively appropriate to proceed outside the market's ordinary process of consent and payment.

For example, we might *want* a biographer to be able to quote from his subject's letters without obtaining the subject's consent. Similarly, we might *want* someone who is exposing the foibles of another's work to be able to quote from it without paying that other author compensation for the decrease in consumer demand that might follow. There can even be cases of copyright self-defense, where someone photocopies an attack that another wrote in order to refute it.[25] Under many views of fairness, we would not *want* the photocopier to pay his attacker or be subject to the attacker's veto power.

In such a case, because the inherent limitations of the market prevent it from implementing desired values, justification may appear. In these cases, the lack of permission or compensation may indeed be something we would want emulated.

II. *THREE TIERS OF INQUIRY*

I argue that potentially tortious acts contain at least three components that must be assessed in terms of both excuse and justification. These components are (1) the defendant's ultimate *behavior* in the world, that is, the defendant's use of the affected party's resource, (2) the defendant not having asked the affected party for her *consent*, and (3) the defendant not paying *compensation* to the affected party. Excuse and justification can go to any one level of inquiry, or all three. In order to make best use of the distinction between excuse and justification, we need to examine *what* is being excused or justified.

Although it is not generally stated in precisely this fashion,[26] all torts embody these three different levels of possible limitation. The tort of copyright infringement is no different. Consider the following examples, drawn both from common law and copyright, which illustrate the three

[25] *Cf.* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148 (9th Cir. 1986), discussed *infra* at notes 69-73 and accompanying text.

[26] The classic treatment is Calabresi & Melamed, *supra* note 22. They distinguish between rules that protect a right-holder's veto (a "property rule") and rules that give him only a right to be compensated (a "liability rule"). *Id.* at 1092. They also discuss how the law might decide where to place an entitlement in the first instance. *Id.* at 1096-106.

tiers of inquiry. Note that the answers to any of the three-tier inquiries can be expressed either in terms of defenses, or in terms of limitations on the plaintiff's initial right of action.

A. *Behavior*

Is the defendant's *behavior* desirable and/or excused? Learned Hand's negligence calculus reflects this kind of inquiry. If it is economically more efficient to neglect a precaution than to take it, negligence law imposes no liability on the defendant who fails to take the precaution. The privilege of self-defense also reflects this inquiry: it is desirable for persons to preserve themselves from attack. In copyright law, the desirability of the defendant's behavior — the use she makes of the plaintiff's copyrighted work — also plays an obvious role.[27] One illustration is the classic *Time v. Geis* case where an author was permitted fair use of copyrighted films showing the Kennedy assassination. The defendant had copied the films to illustrate a publicly valuable argument contesting the conclusions of the Warren Commission, and the court in granting fair use stressed the value of the defendant's behavior.[28]

B. *Lack of Permission*

If the defendant has not sought the property owner's *permission*, is that lack of deference to the plaintiff's property interest socially desirable and/or excused? Again negligence law and self-defense provide useful illustrations. When an injury is unintentional, as in negligence law, no blame

[27] Fair use is an area that breaks or bends the usual copyright rules. For example, in the ordinary case, judicial diffidence is the rule, set down by Holmes: judges are supposedly ill equipped to evaluate art. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903). Some courts take this as an indicator they should not inquire into the social value of the works before them. In fair use, however, the social value of the defendant's use is often key.

Similarly, in fair use cases the usual rule that "creativity is no defense" is turned on its head. In the ordinary case where the defendant has published a work that transforms plaintiff's work without plaintiff's permission, the defendant's creativity is no defense: his creativity merely makes his product an infringing "derivative work." Further, as Learned Hand said, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate." Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 565 (1985) (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936)). Yet creativity and the extent of transformation are often key in fair use cases.

[28] Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 145-46 (S.D.N.Y. 1968) (finding "a public interest in having the fullest information available on the murder of President Kennedy"). As will appear below, however, virtually all uses of intangibles are justified. The harder questions are whether a lack of compensation and/or permission can be excused or justified.

attaches for failing to obtain advance permission from the injured party. That person's identity was not knowable in advance. In order to state a prima facie case in negligence, therefore, plaintiff must show something more than he suffered an unconsented injury.[29] As for self-defense, if we focus on the person who initiated the attack, we think the attacker through his aggression against another has (within reason) forfeited his ordinary right to be consulted about what happens to his body. In copyright's fair use doctrine, too, a copyright owner can forfeit his normative right to be consulted. This was intimated by the Supreme Court in *Acuff-Rose*: since a copyright owner will not ordinarily license someone to lampoon him, a parodist may be justified in not seeking the owner's permission.[30]

C. *Lack of Compensation*

When the defendant has taken, used, invaded or injured something belonging to the property owner, is it justifiable or excusable that he not pay *compensation* for it? In the famous case of *Vincent v. Lake Erie*, a boat owner acted desirably in keeping his ship tied to the dock during a roaring storm, but the court nevertheless made him pay for damage done to the dock.[31] The view of the law of Nuisance expressed in the Second Restatement reflects a similar approach: a failure to pay can make otherwise reasonable behavior "unreasonable."[32] This contrasts with the more traditional tort approach, under which rightful behavior brought no need

[29] My "permission" category follows Calabresi & Melamed fairly closely. *See* their *Property Rules*, *supra* note 22, at 1106-09.

[30] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); *see also infra* at text accompanying notes 100-114 (endowment effect and pricelessness).

[31] Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

	Potentially Justified	Potentially Excused	Defendant loses
No permission	X		
No compensation	No	No	X
Behavior	X		

[32] *See* RESTATEMENT 2D OF TORTS § 826(b) (1979) ("An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.") (The official comment on clause (b) is somewhat clearer: "It may sometimes be reasonable to operate an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.")

Dividing the desirability of *payment* from the desirability of *behavior* and from the desirability of *asking permission* is most familiar from the "takings" area of Constitutional law. Under the Fifth Amendment, sometimes government must pay those whom it has adversely affected, even when the effect was a by-product of socially beneficial action and even when the government permissibly failed to obtain the affected citizen's permission.

to pay, and wrongful behavior could trigger both monetary and injunctive relief.

As for copyright, its core tradition too unites injunctive and monetary relief. In the typical case where infringement is found, both remedies are available, and in the typical case where fair use is found, both remedies are denied. Nevertheless, for copyright also, the question of copyright owner's consent is sometimes separated from questions of compensation. This is seen most explicitly in the many compulsory licenses set up by copyright legislation.[33]

In the judicially formed doctrine of fair use, too, the Supreme Court has suggested that sometimes an injunction should be denied (suggesting that the permission of the copyright owner need not be sought), but payment should nevertheless be made.[34] Thus, a use may be socially desirable, and it may be unnecessary to obtain the owner's consent, but payment may nevertheless be ordered.

There are many applications of the notion that a defendant might appropriately receive a gain that he may sometimes nevertheless be required to pay for. *See, e.g.*, Jules Coleman, *Corrective Justice and Wrongful Gain, II*, J. LEGAL STUD. 421, 427 (1982). *See also* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 187 (1992) [hereinafter *On Owning Information*].

33 For example, the statute provides that any band can make a "cover" version of a song that has already been recorded simply by paying a statutory fee to the copyright owner. The composer who objects is powerless; he has no right to stop the making of a "cover" version that conforms to the provisions of the statute. *See* 17 U.S.C. § 115(a) (2000).

Incidentally, the compulsory license gives a privilege to *make* cover records, not to perform publicly. To *perform* a "cover," therefore, requires permission which, in practice, is sought by the venue and not the performers. It can be sought from the copyright owner, or (as occurs more often) a license can be obtained through BMI, ASCAP or other collective rights association that serves as the owner's representative.

34 *Acuff-Rose*, 510 U.S. at 592 n.10. To represent this graphically, here is the situation for a parody that is found to be a "fair use" before *Acuff-Rose*:

	Potentially Justified	Potentially Excused	Defendant loses
No permission	X		
No compensation	X		
Behavior	X		

Compare this with how such a parody could be treated after *Acuff-Rose* if the hint in the footnote 10 is taken up by later courts:

	Potentially Justified	Potentially Excused	Defendant loses
No permission	X		
No compensation			X
Behavior	X		

In such instances, one might say that the only wrong would be a defendant's failure to compensate the plaintiff. Judge Keeton's term, "conditional fault," is useful to refer to such cases. As he pointed out, sometimes "[i]t is the moral sense of the community that one should not engage in [a particular] type of conduct, because of risk or certainty of losses to others, without making reasonable provision for compensation of losses."[35] My contention is that conditional fault, like other kinds of grounds for defendant liability, can be justified or excused.

Summary: For a market to serve as a socially acceptable mode of allocating resources, ideally (a) the available institutions and technology must provide the conditions for perfect competition, such as perfect knowledge and an absence of transaction costs;[36] and (b) society must want to distribute the resource in accord with efficiency criteria. Among academics, the dominant convention saves the term "market failure" for (a) the technical lack of perfect-market conditions. However, our pluralistic legal culture demands that we admit that markets can also fail when (b) the criteria that perfect markets maximize are simply not the criteria of most importance. Therefore it makes sense to use the term "market failure" broadly, whenever we have grounds to believe that bad results will follow from adhering to the rule of owner deference.[37]

One can develop rules about the likely failure of rules,[38] and as intimated there are at least two categories of occasions when an owner guided by self-interest is not likely to act in a way that society can tolerate. The simplest and most familiar category might be called, as mentioned above,

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[35] Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L REV. 401, 427-28 (1959). Please note that nothing in Judge Keeton's analysis (or in the instant article) suggests that because *some* harmful actions are permissible when compensation is paid, *all* harmful actions are permissible when compensation is paid. To the contrary, much of the literature on commodification and commensurability seeks to identify the actions whose permissibility should not be conditioned on compensation and, further, to identify the actions that can be *made wrongful* by introducing monetary compensation where it does not belong.

[36] These are the assumptions that economists following Adam Smith have posited as necessary for the attainment of perfect competition and achieving consistency between public and private interest. Notable among these assumptions are perfect knowledge, and the absence of transaction costs. *See Fair Use as Market Failure, supra* note 2, for a brief summary. One of the best books examining the limits of the market model is Michael J. Trebilcock, *The Limits of the Freedom of Contract* (Harvard University Press 1993).

[37] This broad use was employed in *Fair Use as Market Failure*; *see* note 2 *supra*.

[38] This can occur in ethics too; situations of duress provide one such category. For example, the usual rule that prohibits lying may be a bad rule for a bank teller to follow when answering a robber's questions about how to shut off a police-warning system.

market malfunction. This is when the facts of the real-world market at issue significantly fail to correspond with the factual assumptions behind the perfect market model.[39] We are in the domain of market malfunction if we feel that if only the deviation from the set of perfect market assumptions could be "fixed," the market would be a satisfactory method of making the needed decision.

By contrast, the presence of nonmonetizable interests and other nonmonetary issues point up the inherent limitations of the market model. We can be in the domain of market limitation even if there is no technical problem to "fix" — if we would feel uncomfortable using the market to govern how the resource is used even if all the conditions of perfect competition were present and satisfied. I define cases of "justification" as cases of market limitation. There the market simply is the wrong place to look for answers.

Other kinds of excuse and justification may exist, as we will see when we come to assessing the tier I call "behavior." But from the perspective of the market, permission and compensation have particular roles: to help align private and public action. If the market cannot accomplish that task, either because of a lack of normative fit or a problem of technical market conditions, then a defendant might appropriately prevail despite a lack of permission and compensation.

IV. MARKET LIMITATIONS AND THE VOCABULARY OF COMMODIFICATION

A definitional note regarding the connection between "market limitation" and "commodification" is in order. To say that economic norms are inapplicable to a given relation will often lead to the conclusion that the relation should not be commodified — which can involve denying a putative "owner" any right to sue in the given context.[40] This link between market limitation and commodification should hardly be controversial.

[39] In instances of market malfunction, facts fail to correspond to perfect-market facts. The decision-maker will face an initial normative inquiry — namely, whether a market norm should govern — but if she finds the market norm applicable, she will focus most of her efforts on the subsequent question of what empirical facts are presented by the given situation. In the case of market limitation, by contrast, the decision-maker sees the perfect-market norm as itself inadequate. She will focus much of her effort on identifying and clarifying alternative norms and deciding which one(s) should govern the presented situation.

[40] There are many aspects to making something a commodity: the right to sell is one aspect that is often discussed, and another is the right to sue to exclude others. A decision against commodification can affect one or many such characteristics.

Yet it may strike some readers that "things" rather than "contextual relations" are the appropriate focus of the commodification debate.

Admittedly, for reasons of academic path-dependence, debates over commodification often center on asking what "things" should or should not be commodified, as if resources could be permanently placed in one category (say, "property" or "commodity") or another (say, "personal" or "not tradable on a market"). However, as Margaret Jane Radin has pointed out, most resources are susceptible to varying categories,[41] with the result depending largely on the relation between persons, or between persons and the resource. I share Radin's relational perspective.[42]

When *most* of the relations regarding a thing are best handled outside the market, we are likely to place that "thing" in the category of things that cannot be owned. But that is only a presumptive categorization. It can be reversed. For example, consider the way that copyright protection extends to works of expression but does not extend to an author's ideas.[43] Just as "fair use" allows an exception to the usual presumption that works of expressive authorship *can* be exclusively owned, the presence of certain relations can undo the usual presumption that ideas *cannot* be owned.

It may be useful to explore this last example. In copyright, as I just suggested, people who create ideas have no property right to exclude others from using them, even if the ideas are embedded in a copyrightable work of expression. The reasons for so denying commodity status to ideas has both to do with economics (e.g., "ideas" are best exploited in diverse ways by non-centralized actors),[44] and with non-economic notions of personality, autonomy and fairness (e.g., "ideas" become part of their recipients, and people who receive ideas should not be required to refrain from using parts of themselves[45]). But although ideas are usually non-commodi-

[41] Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 18 (1987); Margaret Jane Radin, *Justice and the Market Domain*, *in* MARKETS AND JUSTICE: NOMOS XXXI 165 (John W. Chapman & J. Roland Pennock eds., 1989).

[42] Persons adhering to a "thing" view of commodification might be said to have a "subject matter" perspective on the topic. Persons open to a "relational" view might be said to believe that "scope of rights" also matters for commodification. Since in most of intellectual property, subject matter and scope of rights always trade off against each other, *cf.*, Robert A. Gorman, *Copyright Protection for the Collection And Representation of Facts*, 76 HARV. L. REV. 1569, 1602 (1963), for intellectual property scholars a view of commodification that goes beyond "thingness" is practically inevitable.

[43] 17 U.S.C. § 102(b) (2000).

[44] *Compare* Edmund Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977) (patents are justifiable for those products whose exploitation is best managed by centralized decision-making).

[45] *See* Wendy Gordon & Sam Postbrief, *On Commodifving Intangibles*, 10 YALE J.L. & HUMAN. 135 (review essay, 1998).

fied, in some circumstances they can be bought and sold: namely, in negotiated two-party transactions between equals.[46] Thus, a screenwriter can "sell" his client an idea, and the two can agree in an enforceable contract that the client will not share the idea with others.[47] This is the law of "ideas" on which Hollywood operates.[48] Such two-party transactions are the "relational" exception to the rule that ideas are not commodities.[49]

Conversely, there can be relational exceptions to the presumption that certain things are usually commodities. In copyright, works of authorial expression are usually commodified.[50] Fair use is one of the doctrines that can negate this usual presumption that works of expression should be bought and sold.

Thus, we have a trio of labels — market limitation, cases of possible justification, and non-commodified relations — that all make the same point: that there are many occasions on which a society cannot afford to rely on private ownership for its decision-making.

A related definitional note regarding "commodification" may also be helpful. When an item is a commodity, it means (among other things) that an owner can divest herself of ownership, and that an owner can stop other people from using the thing. In both instances — the owner's power to sell or give away the thing, and the owner's right to sue other people who injure or use the thing — we are concerned with someone losing access to the resource. To use Professor Radin's language of "human flourishing": in the case of the power to sell or give, we are concerned lest someone divest herself of something that is crucial to her *own* human flourishing. In the case of limitations on rights to sue, we are concerned

[46] The enforceability of shrink-wrap contracts raises a quite different set of issues.

[47] Similarly, in patent law there can be no ownership in ideas that are obvious, and in copyright there can be no ownership in non-creative lists. Nevertheless, the courts will routinely enforce contracts regarding non-patentable ideas, and lists of names, so long as the contracts are genuinely negotiated between equal parties. Moreover, such contracts can be backed up by trade secret law. *See* Kewanee Oil v. Bicron, 416 U.S. 470, 482-83 (1974).

[48] *See*, *e.g.*, Buchwald v. Paramount Pictures, 13 U.S.P.Q.2d 1497 (Cal. App. Dep't Super. Ct. 1990). Not officially published (Cal. Rules of Court, Rules 976, 977).

[49] In turn, blackmail law is the relational exception to the rule that allows negotiated contracts over information to be enforced. In blackmail the purported contractual relation involves the infliction of unjustifiable harm and is socially wasteful in a particularly obvious and dangerous way. *See* Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741 (1993).

[50] 17 U.S.C. § 102(a) (2000): "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression."

lest someone divest others of something that is crucial to *their* human flourishing.

The policies can be much the same.[51] Nevertheless, it should be noted that for "fair use," we are addressing only one part of the commodification conundrum: whether an owner should have a right to exclude *others* from the resource. Whether an owner should have a power to exclude *herself* from the resource — the issue of inalienability — is a separate question.

V. EXAMPLES OF JUSTIFYING AND EXCUSING

This distinction between justification and excuse now must be applied to the three-tier inquiry. As will appear, in copyright law the distinction has more "cutting edge" in regard to lack of compensation and permission than it does to behavior.

A. Behavior

In the analysis that follows, the term "behavior" is defined as the use that the defendant makes of the plaintiff's product. For example, in *Time v. Geis* the behavior was copying the Zapruder films in order to illustrate an argument about the Kennedy assassination. In *The Wind Done Gone* case, recently in the courts,[52] the behavior is a young novelist's borrowing of characters and plot structures from *Gone With the Wind* in order to criticize and parody Margaret Mitchell's famous work of popular fiction. In *Williams & Wilkins*, the behavior was a federal library photocopying medical articles for the use of researchers. In the case of a software pirate who mass-produces and sells copies of copyrighted computer programs, the behavior is the production and distribution of these additional copies. Whether it is justifiable or excusable for a behavior to occur can be separated from the question of whether it should have occurred only if the defendant had the copyright owner's permission (issue B, below), and from the question of whether the defendant should pay for the use (issue C, below).

Thus, for example, it may be very desirable that copies of the software be made and distributed (issue A), but if this could and should proceed only through the copyright owner's voluntary licensing (issue B), then fair

[51] For example: for reasons of both economics and human flourishing, sometimes society is unwilling to allow someone to divest herself of liberty to use her own ideas. For similar reasons, society might be unwilling to give owners rights to prohibit *others* from using ideas. *See* Gordon & Postbrief, *supra* note 45.

[52] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (Suntrust I) and Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001) (per curiam) (Suntrust II), reversing Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357 (N.D. Ga. 2001). The case was later settled.

use should be denied and the defendant enjoined. Alternatively, should it be decided that the copies should be made and distributed (issue A), and that the owner's voluntary licensing is unlikely to function appropriately (issue B), a court may yet decide that the defendant should pay compensation (issue C).

For tangibles, the desirability of the defendant's behavior — isolated from questions of compensation — can be a matter of much dispute. This is true from the perspective either of market economics or of other norms. For tangibles, sometimes market failure can cause a lack of permission to be excused or justified, but the undesirability of the behavior itself can lead the court to find in favor of the plaintiff on the basis of an all-things-considered decision.[53] To put it another way, behavior is undesirable if we can say "even if the plaintiff was compensated, and even if the plaintiff gave permission, this behavior should not occur." With tangibles, therefore, much investigation is necessary to assess whether a behavior is value-maximizing or otherwise desirable.

For intangibles, by contrast, it is fairly hard to imagine a use that is *not* desirable so long as concerns regarding compensation are satisfied. Defendant's use usually does not interfere with plaintiff's ability to use the intangible. Because copyright like patent deals with inexhaustible public goods, we can light each other's candles without diminishing the light from our own.[54]

Admittedly, some speech can be undesirable on the merits. Consider, for example, hate speech. This is not desirable behavior. Nevertheless, it is unlikely to trigger legal sanction because of the First Amendment.

Interestingly, such treatment can be seen either through the lens of justification or excuse. Because of the First Amendment, judges are not likely to assess the merits of a defendant's *message* in deciding whether his copying is infringing or "fair." Rather, because of the free speech concerns, the defendant's behavior is likely to be assessed at a higher level of

[53] Whether or not compensation is paid to the injured party, a value-maximizer does not want wasteful acts to occur. Similarly, under other norms there are behaviors that cannot be made acceptable by having the gaining party pay the injured party.

[54] "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me." Graham v. John Deere Co., 383 U.S. 1, 9 n.2 (1966) (quoting 6 WRITINGS OF THOMAS JEFFERSON 180-81 (Washington ed. 1903)).

Admittedly, one can imagine a contrary case: for example, if a software pirate creates 3,000,000 copies while the copyright owner has already created 3,000,000 copies, there will be wasted production costs if only 4,000,000 people desire a copy of the software at or above marginal cost. But although such a case can be imagined, copying that is undesirable in itself is empirically likely to be rare.

generality: say, his participating in public debate.[55] Viewed with such generality, the behavior is justifiable. Alternatively, focusing on the defendant's message itself, we might say that quoting from a copyrighted work as part of socially destructive speech is "excused" by the institutional considerations mandated by the First Amendment. Hate speech is not something we want to be emulated, but it is something to which our legal sanctions are not well suited.

Whether under the rubric of excuse, or of justification, then, for copyright most of the difficult issues arise not with behavior, but with permission and compensation. This is the reason why it is particularly important for understanding intellectual property to divide the defense inquiry into three parts. Too often we think of defenses in terms of the rightfulness or wrongfulness of behavior. For copyright, the behavior of copying is almost always rightful, or at least institutionally excused. The hard issues arise in relation to *how* the copying should be done: pursuant to voluntary licensing under the market system, subject to an obligation to compensate the copyright owner, or freely. As to those issues, it can be helpful to identify if the market is functioning and whether market norms are applicable.

B. *Lack of Permission*

Assuming the goal of copyright is to achieve maximum social benefit, there is no reason to require a potential user of a work to ask the copyright owner's permission unless there is some way to believe the owner's self-interest is aligned with society's. When this is not the case — when, for example, social and private costs markedly diverge, or the interests involved are not monetizable — seeking permission should not be required.

As for justification, the commodification literature provides abundant examples of resources that justifiably should not be owned in the sense that they should not be subject to sale. Where the public interest cannot be

[55] It is our institutional commitment to the First Amendment that allows such speech to be disseminated, rather than the merits of what is said. Sometimes the law responds to harmful speech. For example, when someone quotes a target out of context in order to lie about him, the law of libel may respond, depending, inter alia, on whether the target was a public figure and whether the plaintiff spoke with reckless disregard of the truth.

Note that elsewhere in this essay I recommend that judges allow themselves at least to admit when harm is caused by a work of authorship, and to allow speech in responses that mitigates harm. *See* the discussion *infra* accompanying footnotes 68-74 and accompanying text. One might debate whether that recommendation, and the case law on which it is based, is inconsistent with the supposed neutrality of the "marketplace of ideas" notion, and how the recommendation fits with alternative conceptions of the First Amendment.

evaluated in monetary terms, it makes no sense to treat owner self-interest as if it were likely to generate socially desirable outcomes.

When by contrast there is a technical failure of market functioning (typically, the presence of significant transaction costs), I would say the defendant who has not obtained permission is potentially "excused." He may be acting rightfully in not obtaining permission — or wrongly — but it is an empirical economist who can tell us if requiring permission would maximize value.

There are also cases on the borderline between excuse and justification. For example, sometimes we cannot trust the owner's judgment because there simply is no stable answer to "where is the highest valued use in monetary terms." Cases of unstable value could, on the one hand, be classified with cases of justification, since in the end a non-monetary metric will be needed. On the other hand, perhaps these should be classified as cases of excuse, since many such cases can still be fruitfully addressed through a quasi-economic consequentialist calculation. This issue will be discussed below, under the heading of "pricelessness."

C. *Lack of Compensation*

In the domain of market malfunction and "excuse," the desirability of compensation is by definition measured by economic effect. Here we can usefully borrow from Frank Michelman's classic treatment of the analogous question of whether governmentally inflicted injuries should be compensated.[56] He suggests there are at least two primary reasons why a value-maximizing economist might favor requiring the government to pay compensation for acts that, while facially desirable from a societal point of view, inflict injury on private parties.

First, paying compensation keeps the harm-causer honest. If the defendant (the government) has to pay, it will not use the plaintiff's resource without being sure that the behavior contemplated will in fact generate enough benefit to outweigh the costs.

Second, paying compensation averts the "demoralization costs" that can occur if the citizenry feels itself vulnerable to losing its investments at the whim of others. Professor Michelman suggests that the citizenry might work less hard in general if people thought their efforts might come to naught because of uncompensated governmental injury.

For copyright, we do not have to worry much about the first consideration. Given the inexhaustibility of intangible public goods, it will usually happen that copying and other uses of copyrighted works will in fact generate more benefits than costs. But the second consideration, what Profes-

[56] Frank L. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

sor Michelman called "demoralization costs," has great importance in the copyright area — though in copyright, demoralization costs go by their more familiar name, "incentive effects."

In cases of excuse, where wealth maximization provides the appropriate norm, the incentive effects are likely to be crucial to the analysis. The legislature has presumptively decided what desirable incentive effects should be. If a grant of fair use substantially impairs those incentives, then a court might logically refuse to grant fair use treatment, or premise fair use on an obligation to compensate.

What of justification? If something we value is degraded by being priced, a judge may think it inadvisable to order compensation. Yet, ordering compensation may not be the same as selling.[57] Therefore, even in these cases, compensation might be a good idea if we made sure that any orders to pay were limited to cases where a defendant *reaped enough monetary benefit to pay and still find it profitable to make the use.*[58] Then plaintiff would be paid, and the defendant would be able to speak, and the realm of public discourse would still profit from defendant's work. However, as I suggest in the final section of this essay,[59] there can be significant problems even with such limited orders to compensate.

The chart on the next page may be a helpful summary of the discussion.

57 *See* the discussion *in* MARGARET JANE RADIN, CONTESTED COMMODITIES 184-205 (1996).

58 If a defendant merely has to disgorge a *monetary* benefit, he or she is unlikely to be harmed. As scholars of restitution law have observed, one cannot always sell what one has received (services and goods may have been consumed; the markets may be distant; etc.) and no one can afford to pay for everything he or she might desire. Giving someone a service or a good and then requiring payment for it may make that person worse off than he or she would have been without the service or the product. Should a court require the defendant to pay for something non-monetary that he or she has gained, the defendant could indeed be harmed. Restitution law has long taken these considerations into account in an attempt to protect defendants from being made worse off after a restitution suit than they would have been had they never received a benefit from the plaintiff. *See* Gordon, *On Owning Information*, *supra* note 32 at text accompanying note 226 and following. The suggestion to utilize this approach for fair use purposes was made by Megan Richardson.

59 *See* Sections XI "Caveat" and Conclusion *infra.*

Summary of Analysis

	Potential justification: "inherent limitation" on market use	**Potential excuse — "malfunction" in market**	**Neither excuse nor justification applies: Defendant loses**
No permission	The market norm is not what should govern OR money is not a good measure of welfare in this context.	The market norm and monetary criterion are appropriately applied but the market is not working.[60]	Either the market norm and monetary measures are appropriate and the market is working, OR some other consideration[61] leads a court to favor honoring the owner's property right.
No compensation	Even if payment could be practicably made, it would be normatively wrong to make the defendant pay.	Market breakdown makes it difficult for defendant to pay.[62]	Either the market norm is appropriate and the market is functioning, or for some other reason (e.g., fairness) compensation is a good idea
Behavior	The defendant's behavior is desirable.[63] Still need to assess if permission or compensation is required.	Undesirable behavior might be excused for reasons other than its merits.[64]	Some behavior should be stopped[65] regardless of whether the harmed person consents or receives compensation.[66]

60 Example: the defendant may be excused for not obtaining the plaintiff's permission if there is such a short period of time between the defendant realizing she will need to use the plaintiffs copyrighted work and the time when the use must be implemented, that she is unable to send a permission request capable of being acted on in a timely fashion.

61 One example of such other consideration is autonomy. Another is Neil Netanel's "robust civil sphere." Netanel, *supra* note 7. Another might be Milton Friedman's notion that private property promotes political freedom.

62 An example might be when the cost of contacting the owner is larger than the value of the use. As another example, consider a critic who generates significant positive externalities when he quotes from the copyrighted work.

63 If defendant's behavior is desirable, one still needs to look at issues of compensation and permission to know whether plaintiff or defendant should prevail. Note: In copyright, this paper suggests, a defendant's behavior is likely to be desirable.

64 As a possible example of speech that may be undesirable but excused by First Amendment and institutional considerations, consider a neo-Nazi who quotes from others' copyrighted works as part of a campaign of hate.

65 The "undesirable behavior" could be stopped either by letting plaintiff win a civil suit against defendant, or by the government bringing a criminal or regulatory action, or by private self-help. The defendant's act might be cabined in many different ways.

66 This is linked to issues of inalienability.

VI. THE JUSTIFICATION OF SELF-DEFENSE AND ITS POTENTIAL ROLE REGARDING PARODY

One of the most interesting questions in "fair use" has to do with whether copyright owners should be empowered to enjoin persons who copy from their work in order to criticize, parody, or otherwise lampoon them. From a "justification" perspective, the answer seems clear: no such injunction should be allowed. A paradigm instance of when we do *not* want a speaker to obtain a copyright owner's permission is when the speaker's use will be critical of the copyrighted work. If truth is a merit good that should be available without regard to payment, then a judge should not even order compensation.[67]

Further, many critical and parodic uses are essentially acts of self-defense, where someone who has been affected by an iconic work seeks to undo its negative effect on him or her.[68] This is the case with Alice Randall, author of *The Wind Done Gone.* Randall's novel seeks to undermine and parody Margaret Mitchell's *Gone With the Wind* through use of Mitchell's own characters. Randall in a recent interview made clear that *Gone With the Wind* had injured her, and many other African-Americans. Randall said she would rather have been "born blind" if blindness would have enabled her to avoid reading Mitchell's novel,[69] so great was the emotional harm she felt.

As a privilege allows one to respond to a threat of physical harm in the law of battery, self-help is also potentially justifiable in the law of copyright. This has been recognized in fair use case law under the label of "rebuttal." As the Ninth Circuit observed in a case where Jerry Falwell as part of a fund-raising effort sent his supporters photocopies of a *Hustler* magazine attack on him:

> [A]n individual in rebutting a copyrighted work containing derogatory information about himself may copy such parts of the work as are necessary to permit understandable comment. Falwell did not use more than was reasonably necessary to make

67 *See* the discussion of Posner, *infra* at note 125.

68 I do not propose that one harm "justifies" the victim committing a responsive harm. I am *not* talking about revenge. Rather, I am talking about reducing the harmful effects caused by the copyright owner's work.

In the emotional realm, we acknowledge that merely speaking a trauma can help undo its effect. (*See*, *e.g.*, the work of psychologist Alice Miller, *For Your Own Good* (1984)). This is true in the cultural realm as well. Giving voice can be curative.

69 *See* The Connection Web site for July 16, 2001 with guest Alice Randall talking about her book, *The Wind Done Gone* (Houghton Mifflin Company 2001), which criticizes *Gone With the Wind* by means of writing a new novel that uses some of Mitchell's characters: *available at* http://archives.theconnection.org/archive/2001/07/0716b.shtml.

> an understandable comment when he copied the entire parody from the magazine . . . . [T]he public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness.[70]

Thus, although the First Amendment barred Falwell from suing *Hustler* for the emotional damage the attack caused him,[71] the First Amendment did not bar the court from giving Falwell a "self-help privilege" of self-defense assertable under the label of fair use.[72]

That the judge's self-defense argument puts us in the realm of inherent market limitation rather than market malfunction is patent. Nothing in the judge's discussion of the dispute between *Hustler* and Falwell's Moral Majority attempts to balance the harms and benefits.

To embrace self-defense within fairness does not mean the justification inquiry requires a judge to wander without guidance. Several articulable normative structures can give content to a notion of "fairness" that is sensitive to self-defense. One such structure is Lockean natural rights.

Locke suggested that property rights could arise from labor providing that the laborer left "enough, and as good" in the common for others.[73] Building on that Lockean proviso, I have argued that works of authorship that do harm (such as the *Hustler* attack and the racist portions of *Gone With the Wind*) should not have the aid of the law in doing so. That is, a copyright owner whose work has harmed someone has no natural right to prevent the harmed party from quoting or copying the injurious work in an attempt to undo its effects.[74] Such quotation or copying is justified.

It might be argued that behavior cannot be "justified" by reference to harms caused by speech, since the First Amendment requires all of us to bear most speech harms without legal recourse. But the case law seems to draw a dividing line between rights to sue (which the First Amendment

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70 Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153 (9th Cir. 1986).

71 *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988). (When *Hustler* made fun of Falwell in a lampoon that was both disgusting and untrue, the Supreme Court ruled that the First Amendment barred his suit for intentional infliction of emotional distress.)

72 It might be argued that a personal attack (as by *Hustler* against Falwell) generates a self-defense privilege that is not available when a group is attacked. By contrast, I think the two cases sufficiently analogous — and the problem of cultural marginalization of minority groups sufficiently serious — that the *Falwell* case could be treated as suitable precedent for the privilege of group self-defense.

73 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698) (corrected by Locke) (bk. II, § 27).

74 Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533-609 (1993) [hereinafter *A Property Right in Self-Expression*].

can bar), and rights to self-help: While the First Amendment precluded Falwell from bringing suit for intentional infliction of emotional distress to recompense the injury he felt *Hustler* had caused him, the court under "fair use" gave Falwell a privilege to use self-help, and to quote or copy the injurious work in an attempt to undo its effect.[75] Lockean natural rights would come to the same result.[76]

VII. PRICELESSNESS AND PRIVATE CENSORSHIP

The above discussion suggests that some critics and parodists can use self-defense as an argument for fair use. Such an argument lies in the realm of justification. What I want to explore now is the possibility that even economic norms can lead to a substantial privilege for critics. That is, I aim to prove that for critical speech, a speaker who has not sought the owner's consent or who proceeds against an owner's consent has a potential excuse as well as a justification.[77] In instances of private censorship, free speech is not the only value that dictates a defendant victory. Economics, too, can lead to the same result. It will be useful to examine this example in some detail, borrowing both from the economics literature and the literature on commodification.[78]

In the most recent "fair use" case before the Supreme Court, the opinion indicated that fair use could be justified in part as a response to situations in which copyright owners are unlikely to give permission at virtually any price.[79] Other cases have taken the same position.[80] This position, advanced in a case involving a song parody, might strike the reader as

[75] Although unable to sue *Hustler* for damages, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), Falwell was held entitled under the fair use doctrine to photocopy the *Hustler* lampoon for purposes of raising money to defend himself. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153 (9th Cir. 1986).

[76] Gordon, *A Property Right in Self-Expression*, *supra* note 74.

[77] *See also* the discussion of Richard Posner's position, *infra* notes 81 and 125.

[78] The material on pricelessness and endowment effect borrows from my prior work, particularly Wendy J. Gordon, *On the Economics of Copyright, Restitution, and "Fair Use": Systemic Versus Case-By-Case Responses to Market Failure*, 8 J.L. & INFO. SCI. 7 (1997) (Australia); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009 (1990) (review essay).

[79] *See* Campbell v. Acuff-Rose, Inc., 510 U.S. 569 (1994). In assessing the plaintiffs claim that the parody would impair their potential market, the Court responded: "[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market." *Id.* at 592.

[80] The Ninth Circuit Court of Appeals made a similar point in *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) ("The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought."). For other cases involving similar anti-dissemination motives on the part of

inconsistent with the usual economic assumption that one must take preferences as a given. If one takes this notion seriously — it is sometimes known as the assumption of "consumer Sovereignty" — then it seems the Court should have accorded as much respect to the copyright owner's desire not to be parodied as to any other value. After all, in theory, an unwillingness to sell or license merely indicates that the potential buyer/licensee is not the highest-valued user. So it may seem wrongheaded of the Supreme Court to suggest that it may be appropriate to give a parodist — a disappointed licensee — the liberty to copy for free on the ground that the owner would not sell him a license. Is the Court under-valuing the owner's preferences? Not necessarily; there are several explanations of the Court's approach that are consistent with the traditional economic deference to individual preferences.[81]

When a copyright owner refuses to let someone adapt her work for purposes of parodying it, or refuses to give an ideological opponent permission to quote lengthy passages, or insists on suing anyone who quotes passages of her memoirs that reflect unfavorably on her, she is using her copyright as a tool of suppression.[82] The question of whether authors should be entitled to refuse permission to those users of whom they disapprove is a complex one. For example, there can be practical problems in distinguishing improperly motivated suppression from a refusal to license motivated by a desire to maximize financial return.[83] More important than

copyright proprietors, *see* Gordon, *Fair Use as Market Failure*, *supra* note 2, and Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 78, at 1632-33.

81 Judge Posner admits, "it may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work." Richard A. Posner, *When Is Parody Fair Use*, 21 J. LEGAL STUD. 67, 73 (1992). He also treats "reluctan[ce] to license" as a factor that should favor fair use. *Id.* at 71. However, he is not clear as to what methodology he uses to reach that conclusion. His stated reason for his conclusion — that we should encourage the production of truth, *id.* at 75 — suggests that he is using a mixture of economic and noneconomic norms. *See* note 125 *infra.*

82 Similar instances also appear in the corporate realm. For example, when a newspaper expanded its TV coverage it told its readership about the extended service in an advertisement that pictured a copyrighted *TV Guide* cover for purposes of comparison. *TV Guide* then sued for copyright infringement. Presumably the suit was motivated by something other than a desire for license fees. The comparative advertising was held to be a fair use. *See* Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980).

83 For example, it can be difficult to distinguish suppression from an attempt to direct the work into the most valuable derivative work markets. *See, e.g.*, 1 PAUL GOLDSTEIN, COPYRIGHT 571-73 (1989) (rights over derivative works can affect the direction of investment and the type of works produced).

Similarly, in regard to unpublished works, it can be difficult to distinguish cases of suppression from cases of economically motivated refusals to lithe practical problems may be a conceptual one. If the proper way to look at these problems were economic, then, as mentioned, the principles of consumer sovereignty would seem to dictate that governmental decision-makers should not question why someone refuses to sell or license.[84] Economics "assum[es] that man is a rational maximizer of his ends in life,"[85] and a desire to suppress would seem to be as rational an end as a desire for fame or fast cars.

Additionally, Ronald Coase has persuasively emphasized the importance of transaction costs by showing that, in their absence, the ultimate allocation of a resource will be efficient regardless of how entitlements are initially assigned.[86] So long as the parties can meet face to face, as a copyright owner and potential parodist or critic could often do, why should there be any need for the judiciary to do anything but enforce whatever property right is before it?

Whether suppression would or would not be economically desirable will depend in most cases on empirical analysis of the particular fact pattern.[87] But some general observations can indicate preliminarily why,

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cense. An author accused of suppression may be simply trying to keep the work out of the public eye temporarily until it reaches its mature form and can be published.

Even if some practical means existed to distinguish all dissembling "suppressors" from those copyright owners who are genuinely motivated by financial return, some cases will present instances of truly mixed motives. For example, the owner of copyright in an out-of-print collection of letters might sue a biographer who extensively quotes the letters, not only out of a dislike for the biographer's message or perceived inaccuracies, but also out of a desire to preserve the reprint market for the letters. *See* Meeropol v. Nizer, 417 F. Supp. 1201, 1208 (S.D.N.Y. 1976), *rev'd and remanded*, 520 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

84 The discussion that follows draws in part on Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 78, at 1042-43.

85 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (5th ed. 1998).

86 *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Efficiency will occur in the absence of factors such as transaction costs, wealth or endowment effects, and strategic behavior. *See id.* (transaction costs). *See also*, *e.g.*, Donald Regan, *The Problem of Social Cost Revisited*, 15 J. LAW & ECON. 427 (1972) (strategic behavior). *Compare* Ronald H. Coase, *Notes on the Problem of Social Cost*, *in* THE FIRM, THE MARKET AND THE LAW 157 (1988).

87 Even if one interprets copyright's economic goal as being solely the use of incentives to "promote knowledge," so that satisfying the copyright owner's personal tastes would not count as an independent value, the empirical answer to suppression questions would not be easy: in a given case enforcing any particular type of suppression would both keep some knowledge secret, and yield long-term incentives that could aid knowledge in the long run (because authors who can suppress have a copyright worth more than authors who cannot). *Cf.* Michelman, *Property, Utility & Fairness*, *supra* note

when copyright owners seek to use the copyright law to enforce attempts at suppression, neither consumer sovereignty nor the Coase Theorem suggest that judges give the owners automatic deference.[88]

At least four reasons suggest that the market cannot always be relied upon to mediate attempts at suppression and that it might be economically desirable to refuse authors an entitlement to suppress.[89] The four reasons are: the "suppression triangle"; pecuniary effects; managerial discretion; and what I call "pricelessness." In addition, of course, it is possible that economics is not the right way to view this matter at all. The four reasons are interrelated, and to explicate them let me begin with the "suppression triangle."

A. *Suppression Triangle*

I use the term "Suppression Triangle"[90] to point to the fact that in cases involving the suppression of information or other intellectual products,[91] at least three parties are affected: (1) the person who seeks or threatens to make the contested use (for example, the potential parodist), (2) the copyright owner who wants to keep the material from being copied or adapted (the potential suppressor), and (3) the person or persons who would want to see the material (the potential recipients). This is the triangle of affected interests. Yet in the suppression transaction typically only two parties are present: the potential user (such as a parodist); and the copyright owner. Whether an attempt to suppress is likely to be value-maximizing will depend, inter alia, on how well the interest of the omitted third party, the class of potential recipients, is represented by the two immediate participants.

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56 (the effects of demoralization on productivity). Which of the two potential effects on knowledge would be greater (the loss from enforcing suppression or the gain from long-term incentives) cannot be determined *a priori.*

88 For a fuller discussion of this issue, see Wendy J. Gordon, The Right Not to Use (unpublished manuscript).

89 Additional reasons might include, e.g., the potential nonmonetizability of First Amendment values. *See Fair Use as Market Failure*, *supra* note 2, at 1631-32.

90 I base this theory in part on the work of James Lindgren in the blackmail area. *See* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984) (discussing the three-party structure involved). For an economic analysis of blackmail stressing other aspects of blackmail activity, see Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 673-74 (1988).

I am indebted to Warren Schwartz for suggesting the potential relevance of the blackmail literature to this problem.

91 Data can implicate different issues than can, e.g., literary expression. For purposes of this very general discussion, however, I shall group all together under the rubric "information."

Theoretically, the more valuable the parody or other use is to the public, the more the public should be willing to pay for it, and the more the parodist should be willing and able to bid for permission. Thus, the notion of the Invisible Hand[92] expects that any market participant will be in a position to reflect the interests of affected third parties (that is, the public audience). Nevertheless, the Invisible Hand often falters, and the possibility of misallocation remains.

Consider a hypothetical novelist or moviemaker who wants to keep the world from knowing what a hostile critic or parodist has to say about his work. Assume also that the critic or parodist wants to quote from the work or use its imagery, and that use of the quotation or imagery is somehow essential to the comprehensibility or believability of the criticism or parody.[93] If the law required the critic or parodist to purchase licenses to quote or paraphrase, how sure could we be that the "highest-valued" use would ensue?

For purposes of mathematical example, assume that the critic or parodist stands to earn at most a $1,000 profit from even the best-written product. Assume that the novelist or film-maker would lose $50,000 if the criticism or parody were published. Since the copyright owner would charge at least $50,000 for a license to criticize or ridicule his work, and the critic or parodist stands to gain only $1,000 from publishing, it may look like the copyright owner holds the "highest valued" use when compared with the parodist or critic. But that may be an illusion resulting from the fact that the third party (in the owner/user/public triangle) is not being counted as part of the deal.

The publishing of the review or parody might benefit the public (who would thus be warned off from, say, a much-hyped romance novel that does not really excite anyone who reads past page five). Perhaps the public gains something like that same $50,000, or perhaps even more. On these hypothesized facts, requiring the publisher to seek a license from someone who would not sell it is a bad idea, and giving the publisher (the critic or parodist) free use is a good idea. Both are consistent with eco-

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[92] Adam Smith argued that people pursuing their self-interest will come to results that are in accord with social need, as if guided by an "invisible hand." ADAM SMITH, AN INQUIRY INTO THE WEALTH OF NATIONS 423 (Modern Library 1937).

[93] There is another factor that may be at work here as well: the idea/expression dichotomy. Since under current law copyright owners cannot prevent others from using their ideas, it could be argued that little suppression of note could occur. For simplicity's sake, therefore, assume that in the following examples whatever the defendant has taken from the first artist's work could be considered copyrightable expression rather than simply "idea" and that the use of the copyrighted expression is somehow essential to the effectiveness of the planned derivative work.

nomic measures of value. If the critic had been able to capture the full value that the review gave to the audience, then the novelist's $50,000 minimum asking price would have been met.

A parodist may similarly be unable to capture the full value that the work holds for the audience. This can occur for many reasons.[94] There may be significant positive externalities and surplus in the market for parodies, for example. There also may be other complications in the markets for reviews and parodies, such as pecuniary losses that diverge from societal economic losses.

B. *Pecuniary Losses*

Much of the loss that can come from a critical review will often be merely pecuniary, reflecting not a net loss to society but rather a shifting of revenues from one novelist to another and possibly better one.[95] Say, for example, that after a negative review of the copyright owner's book, audiences turn to a better novelist's book. It begins to sell well and generates more than $50,000 in royalties that would not otherwise have been earned. It is as if the triangle now were a geometric figure with four points (the criticized novelist, the critic, the public, and the better novelist). If one could add to the $1,000 the reviewer could offer for a "license to criticize" the $50,000 that the better novelist would reap, plus the amount that consumers gain from avoiding a bad book, the total value generated by the review would be enough to outweigh the initial copyright owner's pecuniary loss. Since this hypothetical additur is highly unlikely to happen,[96] mere pecuniary losses may take on an importance they should not have and they might prevent socially desirable licensing.

C. *Managerial Discretion*

Another possible complication has to do not with the potential buyer's inability to raise the appropriate amount of capital, but with the potential licensor's potential inability to know even a good deal when it

94 As economist Michael L. Katz writes of the similar problem in the research and development area: In the absence of perfect discrimination, the firm conducting the R & D will be unable to appropriate all of the surplus generated by the licensing of its R & D, and the firm will sell its R & D results at prices that lead to inefficiently low levels of utilization by other firms. Michael L. Katz, *An Analysis of Cooperative Research and Development*, 4 RAND J. ECON. 527, 527 (1986).

95 *See* Richard A. Posner, Conventionalist Defenses of Law as an Autonomous Discipline 17 (Sept. 21, 1987) (unpublished manuscript using pecuniary effects to explain why landowners who create certain positive spillovers are not entitled to payment from those who benefited).

96 Journalistic ethics would undoubtedly forbid reviewers of a given book to accept subsidies from the authors of competing books.

comes along. This complication can be termed managerial discretion,[97] by which I mean to embrace all those agency problems that may make managers in complex corporations sometimes arrive at decisions that are less value-maximizing than they could be. I would include here, for example, personal risk aversion, bureaucratic structure, group dynamics, and laziness.[98] Thus, the officials of a company that owns a given copyright may refuse to license simply because the requested license is in an unfamiliar field and their particular bureaucratic structure penalizes unlucky risk takers more than it rewards lucky ones. When critical, parodic, or otherwise controversial licenses would be at issue, the human desire to "play it safe" might prevent value-maximizing transfers from occurring.[99] Managerial discretion is just one of many agency problems that can prevent the parties from dealing with each other like the unitary participants in the classic Coasian transaction.

D. *Pricelessness*

All of the above are reasons why socially desirable "licenses to be critical" are not likely to be granted if left solely to the devices of copyright owners.[100] One additional and probably most important factor remains to be discussed: the difference between the minimum price a person would accept to sell something, and the maximum amount that same person would pay if she wished to purchase the thing.[101]

The concept here basically refers to the fact that giving someone an entitlement makes that person richer, and this may change how the holder monetarily values both the entitlement and other resources, and this in

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97 There is a fairly extensive literature on the controversial question of whether managerial discretion exists and if so what impact it has and what should be done about it. I draw on it here only to make the most general point: that agency problems will often prevent value-maximizing choices from occurring.

98 In an individual, a taste for risk or laziness might be a legitimate part of her personal utility curve, but a manager is supposed to maximize the utility of the corporation.

99 *But see* Jennifer Arlen, Matthew Spitzer & Eric Talley, *Endowment Effects Within Corporate Agency Relationships*, 31 J. LEGAL STUD. 1 (2002) (Experimental evidence suggests that corporate agents may be *less* likely than ordinary persons to exhibit differences between willingness to pay and willingness to accept).

100 Of course, such licenses might be granted; I offer here only an abstract analysis that would need to be empirically verified.

101 I follow Mishan here. He used the term "welfare effects" to examine the allocative impact brought about by a change in wealth, including the change brought about by being given, or being denied, an entitlement. Mishan argued that one reason for this impact can be ability to pay. E.J. Mishan, *The Postwar Literature on Externalities: An Interpretive Essay*, 9 J. ECON. LIT. 1, 18-19 (1971).

turn may affect how entitlements are eventually allocated once bargaining between that person and other persons is completed.[102] Variations in buy and sell valuations do not retard resources from moving to hands where, given a particular entitlement starting-point, the resources have their highest monetary value. But the location of that highest value may depend crucially on starting point. Admittedly, these variations do not often make a difference; in instances where fungible commodities are sold in markets populated by many buyers and sellers, "buy" and "sell" valuations probably tend to converge. But, when the variations do have an impact, they have the potential of rendering the meaning of "highest-valued" use indeterminate in the sense that the location of the highest-valued use is not independent of the law. In such cases, everything can depend on the legal assignment of entitlements that form the transaction's starting point.

For example, you are unlikely to sell a privilege to inflict significant pain on yourself, no matter how much money another person offers for the privilege. Assuming you begin with such a right, you would not sell it to a sadist or a foe. By refusing to sell, you appear to be the highest-valued "user" of your body, and its continuance in a harm-free state seems to be the highest-valued "use" for your body as a resource. But consider what would happen if the entitlement were switched. If the law gave the sadist or foe liberty to inflict pain on you, he might refuse your monetary offers in preference to pursuing his pleasures. At that point the sadist or foe would appear to be the highest-valued user — and the highest-valued use of your body would appear to be serving as a pin-cushion.[103] The apparent location of "highest value" has switched.

When things like pain and bodily integrity are at stake, therefore, the notion of highest-valued use is dependent on legal starting points. It would be circular to make the search for the highest-valued use the basis for assigning initial entitlements to such things. As Edwin Baker has pointed out, if we tried to assign a right in such things "to the party who would buy it from the other party if the party had the right," we could locate no such

[102] For an excellent numerical example, see *id.* at 18-21. It is well recognized that a divergence often exists between the price that a potential buyer would be willing to pay for a resource he does not own, and the price that the same person would demand before he would sell that same resource if the law had initially awarded its ownership to him. What is less clear is what terminology, explanations, and characterizations are best employed for discussing the phenomenon. For a valuable discussion, see Elizabeth Hoffman & Matthew Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993).

[103] *See* Mishan, *supra* note 101, at 18-19; Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 78, at 1042-43; *see also* Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 491, 518-19 (1990) ("flip-flop" of rights).

party. The answer is indeterminate: "neither party would buy because neither party would sell."[104]

Professor Coase showed that in a world without transaction costs, welfare effects or strategic behavior, resources will be traded to their highest-valued uses, so that, as between any two users of a resource, if A can use the resource more productively than B, A will end up with it.[105] Therefore, many scholars argue, in a real world full of transaction costs that can impede bargaining, it often makes sense to "mimic the market"[106] and assign legal rights to the highest-valued user in the first instance. This is a core insight of law and economics. Yet the law and economics argument largely depends on there being a stable highest-valued user. The injunction to "seek efficiency by mimicking the perfect market" only makes normative sense if the perfect market allocation is stable. If the allocation of rights significantly affects the monetary valuation that parties place on a resource, then there may be no stable economic reality for the law to seek to mimic.

There is at least one salient class of goods that lack this stability. These are the precious, personal, irreplaceable, crucial goods one thinks of as "priceless." Examples are many: the Dead Sea Scrolls; family heirlooms; one's children, health, reputation and peace of mind. The monetary value a person places on one of these goods may well depend on whether the person has a legal entitlement to it (whether she "owns" it) or whether she must purchase it.

Some of the change in monetary valuation may stem from differing psychological attitudes people have to things that are "theirs" versus things they have to purchase. Even with items as trivial as coffee mugs this endowment effect can be seen. (In experiments, college students were found to value mugs differently depending on whether the student's status was as an "owner" of the mug or as a "possible purchaser"[107]) But for many goods, like the coffee mugs, the effect is likely to be minor enough not to affect the identification of highest-valued use.[108]

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[104] C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUBLIC AFF. 3, 12 (1975). This is perhaps the first legal article to discuss the relevance of such effects for the law.

[105] *See* Coase, *The Problem of Social Cost*, *supra* note 86.

[106] Assigning the legal right to the person who would purchase it saves society the costs of transfer, and ensures that the resource finds its way to the highest-valued user. However, there are many reasons to decline to mimic the market in this way. For example, a low-valuing user may nevertheless be morally entitled to payment for the resource, or incentive concerns may dictate giving the low-value user compensation for a resource he may hold.

[107] For further exploration, and for citation to relevant literature, see J.J. Rachlinsky & F. Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541 (1998); Hoffman & Spitzer, *supra* note 102.

[108] *See* Coase, *Notes on the Problem of Social Cost*, *supra* note 86, at 157, 170-74.

The case is far different for things we think of as priceless. For them, adding to whatever endowment effect may exist, is the simple but immensely powerful constraint of a person's purchasing power, his or her ability to pay. For things of great value, ability to pay can interact with ownership status to yield obvious shifts in what appears to be the highest valued use.[109]

Consider health, for example. It is plausible that most people would be unwilling to sell their organs at any price, so that Jane Smith might turn down an offer of $5,000,000 from Billionaire X for one of her kidneys. Similarly, if Jane Smith has kidney failure and one of her dying relatives wills her a healthy kidney, she might well be unwilling to take the billionaire's $5,000,000 in exchange for her entitlement to it. If so, Jane Smith looks like the kidney's "highest-valued user." But should she have no entitlement to the kidney from the recently-deceased person (perhaps because the relevant jurisdiction does not recognize such bequests as enforceable), Jane Smith's own budget and health insurance will place a limit on how much she can spend pursuing the transplant. It is highly unlikely she will be able to outbid Billionaire X for the kidney. If so, Billionaire X will appear to be the "highest-valued user." One can draw from such a pattern no reliable information about whether the resource has its highest value in the hands of the billionaire or Jane Smith. This phenomenon might be called the "pricelessness effect."

The pricelessness effect is related to the phenomenon already mentioned: since assigning an entitlement to someone makes that person wealthier, it can affect the valuation the person puts on resources. For example, often "accept" and "offer" prices differ from each other. Many people hedge the Coase Theorem by noting it does not apply when significant effects of this kind are present. But usually such effects are so minor that they do not impair the reliability of using a market mimicry approach to model efficiency.[110]

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109 "[W]herever the welfare involved is substantial," Mishan points out, ability to pay may account for potent shifts in perceived value, "The maximum sum he will pay for something valuable is obviously related to, indeed limited by, a person's total resources, while the minimum sum he will accept for parting with it is subject to no such constraint." *See, e.g.*, Mishan, *supra* note 101, at 18-19.

110 *See* Coase, *Notes on the Problem of Social Cost*, *supra* note 85, at 170-74 (discussing arguments re the presumed effect of changes in legal position on the distribution of wealth and on the allocation of resources).

Professor Coase argues that the impact of these effects can be overstated because, among other things, if the legal rules are known in advance, the prices of applicable resources will likely alter in a way that minimizes such effects; in addition, he suggests, contractual provision for contingencies may be available to mitigate some changes in legal rules. *See id.* at 157. *See also id.* at 170-74. Neither of these devices is likely to eliminate the effect — here

The "pricelessness effect" deserves having its own name precisely because the subcategory of effects it denotes is likely to be significant. The "pricelessness effect" comes into play when the entitlement at issue pertains to a good that (1) an individual or group values very highly, and (2) which is virtually irreplaceable, and (3) when it is the allocation of that very good[111] which is at issue. As to such items, the initial placement of the entitlement is likely to have a sharp effect on the price and allocation of the resource, even in the absence of transaction costs.

In cases of parody or criticism, both areas where "fair use" treatment tends to be awarded to defendants, reputation may be at issue. To many, reputation is priceless in the sense we have been discussing. For example, a novelist who fears that a journalist will use extensive quotations from her book to bolster a hostile review will be most unlikely to sell the journalist a license to copy those quotations — regardless of the price offered. But that does not mean the author's preference is the "highest-valued use" in any meaningful sense, since that same author may be unable to buy silence if the law gives the journalist a "fair use" liberty right to publish. A similar analysis can be made of parody: since most people intensely dislike being ridiculed, the legal right may determine where the highest-valued use lies.[112] In such cases, the market is useless as a guide, and formal deference to owners' market powers is inappropriate.

For example, assume A is a novelist, a copyright owner who has an entitlement not to license and who is otherwise financially comfortable; she has perhaps $4,000 in the bank, a two-year old car and a prospect of steady royalties. She may be tempted by B's offer of, say, $10,000 for a license to use her work, but she can afford to say no without altering her lifestyle. If B's project is an ordinary commercial project and A will not be sacrificing more than $10,000 from foregoing alternative uses of the work, she will probably license. (It might also happen that B's project would not require an exclusive license and would not otherwise interfere with A's other licensing opportunities. If so, granting B permission to go forward would have no opportunity cost at all for A. She would be even more likely to license such a use.) However, if B's project is hostile toward A's work as a whole, A may well refuse the license, either to protect her long-

called "pricelessness" — in the context of authorial suppression of embarrassing criticism, however.

111 That is, while I predict that the law's assignment of rights in organs or free speech is likely to have a distinct effect on the allocation of kidneys or speech, it is a more complex question whether the law's assignment of rights in organs will have much of an effect on the allocation of *other* resources.

112 These points are also explored in Gordon, *Toward a Jurisprudence of Benefits*, *supra* note 78, at 1042-43; *see also Fair Use as Market Failure*, *supra* note 2, at 1632-36 (anti-dissemination motives).

term economic interest (which may be a mere pecuniary loss, remember), her aesthetic reputation, or her feelings.

If however the law gave novelist A no entitlement to prevent B's use, then she would have to persuade B not to publish (*cf.* "paying for silence," as in blackmail). The most A could offer B to persuade B not to make the critical use planned is the amount in her bank account, plus whatever she could sell her car for, plus whatever she could borrow on the strength of her expected royalty stream. The total may well be less than $10,000, and B will probably demand a price in excess of $10,000. Give A the entitlement and the highest-valued use of the contested expression is in her hands; give B the entitlement and the highest-valued use is in that licensee's hands. The locus of the "highest-valued use" has shifted as a result of where the law places its entitlement. In such cases, looking to the results of consensual transactions will not give us any information about who "should" have the right.

Another way to put the point is this:[113] Economics is sometimes used as a normative guide for good social policy. When it is used in this fashion, its primary claim to legitimacy stems from the links between economics and utilitarianism[114] The more that income distribution restricts the expression of individuals' preferences, the shakier the link between economics and utility becomes. This linkage has the potential for completely breaking down in cases of "pricelessness." Though in such cases the parties' preferences may remain constant, both in their objects and in their intensity, a shift in who owns the entitlement may effectively disable one of those parties from effectuating that preference. Thus, a legal regime that is committed (even in part) to utilitarian consequentialism would be unwise to rely upon a money-bound market model for normative guidance in cases of pricelessness.

In sum, refusing to allow a copyright owner to suppress a hostile use of the copyrighted work, in a case where the "pricelessness effect" is likely to make a determinative difference, does not necessarily contravene economic principles. In such an instance, it is appropriate for even an economically oriented court to refuse to defer to the copyright owner, and instead make an independent weighing of how enforcing the copyright in the given instance would affect welfare, and any other relevant consequentialist or nonconsequentialist policies.

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113 I am indebted here to Alan Feld.

114 This belief is rather controversial. *See, e.g.*, such classic sources on the debate as the *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) and RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 48-115 (1981) for further discussion of the question of whether utilitarianism and economics are truly linked in this way.

VIII. RECONSIDERING THE "SUBSTANTIAL INJURY" HURDLE TO FAIR USE

In *Fair Use as Market Failure*, I argued that fair use was and should be granted only if a three-part test were satisfied: that (1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner's incentives would not be substantially impaired by allowing the user to proceed.[115] This current article is consistent with the first two prongs, but I would like to reconsider the third prong, the substantial injury hurdle, under which substantial injury to the plaintiffs incentives should ordinarily bar fair use.

As Neil Netanel has pointed out, the third prong of the test effectively forces all inquiries to be subordinated to the economic.[116] Yet there are instances where noneconomic values will be more important — a possibility for which the substantial injury hurdle leaves no scope. Since the whole point of singling out "justifications" is to help us see the occasions on which judges give fair use because economic value is not the proper metric, the excuse/justification distinction helped me understand that substantial injury to the plaintiff need not preclude fair use in all cases. In cases of "justification," we sometimes tolerate such injury in pursuit of other goals.

IX. WHAT HAPPENS TO FAIR USE WHEN TRANSACTION COSTS DECREASE

In cases where fair use is premised on high transaction costs between owner and user, as arguably occurred in the *Williams & Wilkins* and perhaps even in the *Universal City Studios* cases,[117] the precedent is vulnera-

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[115] Gordon, *Fair Use as Market Failure*, supra note 2.

[116] Netanel, *supra* note 7, at 330-31. (Thanks to Tom McNulty for this formulation of Netanel's point.)

[117] The following chart depicts the results in *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74 (1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam) and *Sony Corp. of America v. Universal City Studios, Inc.*, 463 U.S. 417 (1983):

	Potentially Justified	Potentially Excused	Defendant loses
No permission		W&W or SONY	
No compensation		W&W or SONY	
Behavior	W&W or SONY		

The next chart depicts *Williams & Wilkins* and *Universal Studios v Sony* as they could have been decided if the court had decided to "make a market" by imposing a monetary-only remedy:

ble to shifts in the institutional and transactional landscape: If changes occur that lower the transaction costs (whether through collecting societies, technological devices, or otherwise), the increased ease in transacting should and does result in a lessened availability of the fair use defense.[118] This is appropriate, as I recognized in my original piece.[119] If fair use was granted because market conditions made it hard to consult the owner, but a market remained *desirable*, then there is every reason to return to relying on the market when owner and user are put in a position where they *can* consult. Relying on the market means fully enforcing the copyright.

In short, in many cases of "excuse" it will be possible for the facts to alter in a way that eliminates the desirability of fair use treatment. But the same is not true of cases of justification, for it is hard to see any factual change that could transform a decision governed by non-economic norms into something the market could adequately handle.[120]

	Potentially Justified	Potentially Excused	Defendant loses
No permission		W&W or SONY	
No compensation			W&W or SONY
Behavior	W&W or SONY		

[118] *See, e.g.*, three cases in which the availability of potential licensing helped persuade the courts against fair use: Am. Geophysical Union v. Texaco, 60 F.3d 913, 923 (2d Cir. 1994); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir, 1996); Encyclopaedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1173-78 (W.D.N.Y. 1982). A graph for them would look as follows:

Texaco and *Princeton Documents* and *Britannica*:

	Potentially Justified	Potentially Excused	Defendant loses
No permission			X
No compensation		X	
Behavior	X		

The *Britannica* case is discussed in *Fair Use as Market Failure*, *supra* note 2, at 1629. For commentaries on how cases like *Texaco* may affect my *Market Failure* analysis, see, e.g., Edmund W. Kitch, *Can the Internet Shrink Fair Use?*, 78 NEB. L. REV. 880 (1999); Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. Rev. 557 (1998); Loren, *Redefining The Market Failure Approach To Fair Use In An Era Of Copyright Permission Systems*, *supra* note 2; Merges, *The End of Friction?*, *supra* note 2.

[119] *Fair Use as Market Failure*, *supra* note 2, at 1629 & note 159 and 1645-57.

[120] *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). He argues that to maintain some equality, it is necessary that some goods (e.g., political office) remain unavailable for purchase by money. By contrast, the instant article stresses *relations* rather than *things*.

Although market malfunctions can be curable, it is important to avoid exaggerating the extent to which even "excuse" cases will disappear. Consider the promise that the Internet and collecting societies may offer for lowering transaction costs. Much argument has centered on whether transaction costs will in fact grow low enough to allow markets to form between copyright owners and at-home occasional users, and what the impact will be on fair use.[121] But for all the debate, it must be stressed most cases of fair use are premised on factors *other than* transaction-cost barriers that keep copyright owner and potential licensee apart, and some of these other factors can be relevant to home copying. For example, a judicial and legislative unwillingness to impose copyright liability on individual at-home users has other, converging explanations, such as the desire to preserve privacy[122] and maintain a feeling of community.[123] These concerns will not disappear in the face of a reduction in transaction costs. Thus, many cases of excuse contain facts that are inextricably intertwined with non-economic normative judgments.

The latter point can be seen by considering the "external benefit" generated by a historian, critic or scholar who reproduces someone's words or images. In analyzing the case, we can move back and forth between the market and non-market normative realms. Let us focus on a scholar like the defendant in *Time v. Geis* who needs to copy some copyrighted text or image to convey his point. One way to look at the scholar's quandary is through the lens of justification: that he is furthering public debate in a way that is not monetizable. However, one could also see his position through the lens of excuse — that even if the benefits the scholar generates are capable of being put into monetary terms, the scholar's pocketbook is unlikely to reflect much of that benefit. Those benefits will remain *external* to him, so he will be unlikely to offer a license fee high enough to reflect the social benefit at issue. Conceivably the scholar's book could earn a million-dollar advance, which would "cure" the externality problem. But in reality, scholarly books rarely ever internalize much of the social benefit they generate, so that this kind of fair use is likely to be durable despite factual changes. The benefit given to the public by the historian, critic or scholar is unlikely ever to be reflected in his or her

As Margaret Jane Radin has pointed out, see *Justice and the Market Domain*, *supra* note 40, most of our life involves a mix of market and nonmarket relations, even in connection with the same objects.

121 *See, e.g.*, Bell, *supra* note 117; Kitch, *supra* note 118; Loren, *supra* note 2.

122 *See, e.g.*, Jessica Litman, *Reforming Information Law In Copyright's Image*, 22 U. DAYTON L. REV. 587 (1997) (discussing privacy concerns).

123 Maintaining gift relationships can be particularly important to maintaining *artistic* community and vibrancy. *See* LEWIS HYDE, THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY 47, 272-82 (1983).

pocket.[124] And even if the historian, critic or scholar who quotes from a copyrighted work *did* capture a significant amount of the benefit she generates, a normative economist might still suggest exempting her from having to obtain permission from her target: Judge Posner has suggested that, "The social product is diminished if persons are able to exact compensation from truthful critics of their failings, for such a right reduces the incentive to produce truth."[125] One might add that the availability of receiving compensation from critics could also decrease the ordinary disincentives to produce flawed work.

For all these reasons, even market malfunction is not always curable. Many externalities will be unaffected by technological and institutional change. Further, many "excuse" cases are intertwined with issues of justification.

X. A POSSIBLE DANGER OF MY APPROACH

In copyright law, judges have developed a complex, largely unarticulated network of defenses under the rubric of "fair use."[126] This article suggests that, paralleling the common law distinction, some fair use cases

124 *See Fair Use as Market Failure*, *supra* note 2, at 1607, 1630-31 ("In cases of externalities, then, the potential user may wish to produce socially meritorious new works by using some of the copyright owner's material, yet be unable to purchase permission because the market structure prevents him from being able to capitalize on the benefits to be realized." *Id.* at 1631). *See also* Loren, *supra* note 2.

125 Richard A. Posner, *When Is Parody Fair Use*, 21 J. LEGAL STUD. 67, 74 (1992). In the quoted passage, Judge Posner seems to be mixing norms. He seems to view truth as something whose value is absolute, rather than as something whose value is dependent on market preferences, but then he seems to use a purely economic model for its production. This is intriguing. Real-world policymakers do indeed regularly choose "goods" by means of nonmarket criteria, and then turn to pragmatic tools, including the economic, in order to secure the production of the good.

Possibly Judge Posner is responding to the fact that "perfect information" (truth) is one of the pre-conditions for a perfect market. James Boyle has suggested that markets for information cannot be well addressed through a neoclassical lens since that lens presupposes an abundant supply of information whose scarcity is in fact something that needs to be remedied. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996). While I do not share Boyle's pessimism about the uselessness of economics here — after all, no system can be validated by terms entirely within itself — he is right to emphasize that for a market, information has the dual role of precondition and product.

126 In copyright law, a defendant is liable if her work is "substantially similar" to, and copied from, the plaintiffs copyrighted work. A finding that "substantial similarity" is lacking constitutes another place where doctrine hides a complex network of defenses and limitations.

involve "excuse" and some involve "justification." Because changes in circumstances are relevant to "excuse" in a way they are not to "justification," the distinction between the categories is particularly important for areas of law like copyright that involve rapid technological and institutional change. Some recent confusion may result from conflating cases of excuse and justification together.[127]

My analysis is not impaired by the fact that courts do not explicitly distinguish between justified and excused fair uses. What the common law judges accomplished over several centuries, copyright judges have had to develop over a much shorter time. It is no wonder that the separately delineated defenses of the common law are collapsed together in the copyright area, where the time to elaborate and distinguish the defenses has been so condensed.

The main problem with the analysis that I offer is that it leaves a myriad of decision points open for judges to resolve. Look at all the decisions that are open, and must be made by someone:

Someone (probably a judge, but "fair use" is usually considered a mixed question of law and fact) has to decide whether a defendant's use implicates only monetary values. Even if it is decided that the use implements solely monetary values, the Someone then has to decide whether or not the market can implement those values. If it is decided that the market suffices to achieve value maximization, then the plaintiff's right is enforced. If market norms are applicable but the particular market cannot be relied on, then the Someone has to decide whether the defendant's behavior is socially desirable on an economic metric, and, employing the same metric, whether it is appropriate that the plaintiff's consent was not sought and whether the defendant should pay compensation.

Conversely, the Someone may decide that the defendant's use does not implicate only monetary values. If so, then that Someone needs to address the values that are involved, and do so in relation to the three questions of behavior, permission and compensation.

The analysis makes clear — perhaps too clear — how many normative decisions the law of "fair use" requires. But the current doctrinal formulations for fair use involve no fewer normative choices — the choices are merely better hidden.

I do not think that requiring explicit normative choice means leading judges into a realm of pure judicial legislation. Rather, it leads them into a

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127 Thus, persons who believe that a decrease in transaction costs can eliminate fair use treatment may be seeing everything in terms of a narrowly-defined "excuse" type market malfunction, and ignoring the possibilities of justified fair use.

field of subtle cues that a judge can employ to navigate.[128] Nevertheless, it can be objected that such openness leaves the law too vulnerable to particular judges' idiosyncrasies. I know of no better preventative than to try to classify and define the choices involved, and the taxonomy of this article is intended as a contribution to that end.

Lawyers have known, at least since the Legal Realists and probably since law began, that the neutrality of the law is only partial, and that normative choice influences virtually all hard decisions. Is it more useful to explicitly name and organize those value choices, or is it better to promote law's perceived legitimacy by hiding them? That is, alas, an open question of its own. I suggest that much good can come from exposing the pluralism of our norms, even if that means the populace then loses its illusion that the law operates like a machine. Any narrower inquiry could impose great harm on nonmarket values, particularly free speech, and that would impose an even greater cost.

XI. CAVEAT: THOUGHTS ON THE ISSUE OF FULL FAIR USE VERSUS COMPENSATION

When a judge faces a fair use inquiry, she knows after *Acuff-Rose*[129] that she has several options in regard to remedy. She can refuse an injunction (because she finds the defendant's use socially desirable and finds the neglect of the owner's veto power excusable or justifiable), but she is nevertheless free to give the plaintiff a reasonable royalty or other compensation. This is equivalent to the judge "making a market": the judge can decrease transaction costs by creating new points of contact between the parties. It can also be seen as a judicially imposed compulsory license.

Traditionally, judges in fair use cases faced a binary choice: either find fair use and give the plaintiff no remedy at all, or find infringement and give the plaintiff both injunctive and monetary relief. Now that their discretion is explicitly enlarged, should judges in fair use cases routinely give compensation to the plaintiff? Should they ever do so? A "compensation-only" or "liability rule" approach has the virtue of apparent compromise: it appears to encourage dissemination and discourse, while simultaneously preserving incentives.

The liability-rule approach is so attractive, that we may ask whether all copyright cases should be open to this route. In doing so, we must be wary of a likely corollary: if injunctions disappear in favor of monetary rewards, the scope of copyright is likely to expand. Congress has already been remarkably generous to the "copyright industries" (entertainment,

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128 *See, e.g.*, Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 810-11 (2000).

129 *See supra* note 34 and accompanying text.

media, and so on) at the expense of the public domain.[130] The demise of injunctions would let industry lobbyists more easily argue in favor of even greater copyright extensions. If so, much that is currently free will come to bear a price tag. Is this bad?

Of the many lessons the commodification literature has to teach copyright lawyers and theorists, let me single out two strands relevant to this issue. First, Titmuss in his classic and controversial work, *The Gift Relationship*,[131] suggested that for some products, *quality degrades* when they are commodified. His focus was on the market for human blood.

His research suggested that switching from a donor system to a sale system degraded the quality of the blood available for transfusions. People who sell blood are both likely to have questionable health histories (drug use corresponds with poverty) and a reason to lie about that health history. By contrast, people who donate blood are more likely to be healthy, and have fewer motives to lie.

Second, Titmuss and others have shown that over-commodification can have deleterious *systemic effects.* Thus, if a large proportion of blood begins to come from monetary purchase, the sheen of donative merit that now attaches to voluntary blood donation may diminish. Anything having to do with transfers of blood may begin to acquire an unsavory reputation, and voluntary donations may slow.

For a more dramatic example of deleterious systemic effect, consider the following, drawn in part from a hefty science-fiction literature on commodification. If human organs could be freely bought and sold, persons might imperil their health in the efforts to help their families economically; people might make irreversible choices they come to regret because they may be unable to predict the way their preferences might be affected by selling parts of themselves; murders might increase as organ-flappers went into the chop-shop business. Even the state might increase the scope of crimes deemed worthy of capital punishment.[132]

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130 *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 870-79 (1987); Pamela Samuelson, *The Copyright Grab*, Wired, Jan. 4, 1996, at 134.

131 Richard M. Titmuss, The Gift Relationship: From Human Blood to Social Policy (1972). Whether or not Titmuss was correct as an empirical matter, the question of product quality is well raised by him.

132 In the future society of one science fiction story, a series of traffic violations was enough cause to sentence the violator to death, making his body available to the governmental organ banks. Larry Niven, *The Jigsaw Man*, *in* Dangerous Visions 218-29 (Harlan Ellison ed., 1983). Consider also the recent revelations concerning China's use of executed prisoners. Craig G. Smith, *On Death Row, China's Source of Transplants*, N.Y. Times, Oct. 18, 2001, at A1. (Thanks to David Koh for bringing this material to my attention.)

Given the great attraction that the "no injunction/money only" remedy holds for copyright, we should consider some of its dangers. What kind of quality degradation or deleterious systemic effects could eventuate if liability-rule judgments of "compensation only" drastically increased? Let us look at an extreme: assume that fair use as free use disappears, that copyright expands, and that most of the public's current rights to "copy and to use"[133] have become conditional on payment.

Theresa Amabile and other social psychologists have determined that in some contexts, external motivation in the form of rewards can decrease the quality of creative work. Emphasizing monetary relief could conceivably have this effect. Injunctive relief is a "natural" outgrowth of an author's creating a work; with creation comes an instinct for control. If instead an author could only expect money, her perception of her task — and the quality of what she produces — could degrade.[134]

What of systemic effects? Imagine that technology increased to such an extent that all uses we made of each other's works would automatically trigger a change in our bank balances, and that copyright law had evolved to require payment on all such occasions. If I quote you — even a quote that would have been fair use to a prior generation — a nickel or a dollar flows from my account to yours. If I quote from a book written long ago — even a book that would have been in the public domain had there been no series of laws extending the copyright term — a nickel or dollar flows from my account to the account of the authors' heirs. This is quite different from what happens today. But if in fact I have experienced monetary benefit in the amount of that nickel or dollar, would it not be safe to make me pay? After all, in such a case requiring payment will not impose a net harm. Yet even if the recipient is ordered to pay only a portion of the monetary benefit he or she has earned, some danger remains.

My space here is obviously too short to explore all the difficulties that might result with a regime where we pay for all the monetary benefits we receive from others. One salient danger is that a requirement of ubiquitous payment may erode everyone's sense of indebtedness to the commu-

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[133] The phrase is Justice O'Connor's. *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 165 (1989).

[134] Admittedly, the experiments of Amabile and her colleague are too limited to allow firm conclusions, particularly regarding adult artists. TERESA M. AMABILE ET AL., CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY 171-77 (1996). Further, my argument applies to works that are owned by their creators. For the large numbers of works written in work for hire contexts, monetization has to some extent already occurred.

Nevertheless, it is clear that a right to *control* can have effects different from a right to be *paid*, even outside the realm of creativity. *See* Rachlinsky & Jourden, *supra* note 107.

nity. In the literature on what motivates political morality,[135] the perception of reciprocity is key.[136] One reason we pay taxes without a policeman breathing down our shirts is that we see benefits the government gives us, and gives to others who in turn may benefit us. Our legal system would fall apart if we only paid taxes, and obeyed other laws, when a policeman looks over our shoulder. A pervasive system where we pay for each bit of what we use could give us the illusion that we are not net recipients. (I say "illusion," for only the labor and insights of generations has protected us from lives nasty, brutish and short. There is no way we can pay *everyone* we owe.) From this illusion that we have paid for everything we have, could come an unwillingness to give back to the community and an unwillingness to obey its laws.

CONCLUSION

On some occasions a market's malfunctions or limitations will make it an unreliable institution for furthering social goals. A court should accordingly avoid awarding an automatic and absolute deference to an owner's market strength in such cases. Rather, the court must directly examine the merits: Should the behavior (copying, adaptation, or other use of the copyrighted work) go forward? Should the defendant have asked plaintiff for permission? Should the defendant have paid? The court may decide that the copyist's decision to proceed without compensation or permission was justified or excused (and award fair use treatment), or the court may decide the defendant's decisions were unjustified and not excused (and impose liability). Fair use is at bottom a procedural device: it sorts through the bulk of cases to find the few where a detailed and equitable inquiry is likely to be advisable.

Thus, it should be stressed that the presence of market malfunction or inherent limitation does not compel a court to conclude that the defendant's use is privileged. Rather, the presence of these danger signals merely tells the legal system it should substitute a detailed inquiry for its usual automatic deference to a property owner's will.

On some occasions, the market's inherent limitations make it untrustworthy; perhaps non-economic norms are important to the particular dispute, or perhaps non-monetizable interests are at stake, or perhaps there is a danger that market interactions will erode social goodwill and the productivity it enables. On such occasions, we might say the market is inherently limited and that departures from it are potentially "justified."

On other occasions, economic norms are the only goals at issue and the market mode of exchange appropriate, so that the market is a pre-

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[135] The phrase is Goodin's. *See* ROBERT E. GOODIN, MOTIVATING POLITICAL MORALITY (1992).

[136] Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333 (2001).

sumptively useful way to proceed. Even then, however, the presumption can be defeated: Sometimes the market cannot be relied upon to direct a resource to its highest valued use because the conditions for perfect competition are absent. This is market malfunction. In such cases, a copyist may be "excused" for not having sought a copyright owner's permission.

In both cases, it may still happen that a judge will decide that the copyist should be considered an infringer. The point is that the decision should be based on something more than a mere failure to obtain the copyright owner's consent.

Loosely, one can associate market malfunctions such as high transaction costs with "excuse," and inherent market limitations — where other, non-market norms should govern — with notions of "justification." The existence of the two categories emphasizes the multiplicity of ways in which markets can fail to do the tasks the law assigns them. Markets can be unreliable modes of achieving social goals even when a potential buyer and seller are face-to-face, and even where no transaction costs arise between them.

In cases where markets are unreliable devices for achieving social goals, a court may sometimes deny an injunction (to allow a socially valuable use to go forward), yet nevertheless order compensation. As is fairly well acknowledged in the literature, there are both strengths and weaknesses in such judicial equivalents to compulsory licensing. However, I have suggested additional possible dangers in this otherwise-tempting approach.

In particular, a judge who awards a money-only remedy may succumb to the illusion that her monetary award will have no adverse consequences for Free Speech and democratic interchange. If so, with the decline in injunctive relief we are likely to see an expansion in the scope of copyright. For example, judges may be more likely to characterize small takings as infringements, and more likely to characterize contested territory as owned "expression" rather than free "idea." The dunning of the public that might result could, in time, change the citizen's relationship to her cultural heritage and to her society as a whole. This is not only true of audiences. Creators who stand to collect the fees may come to feel that society values their artistic stake only in cash terms, which could erode the artists' own sense of dignity and intrinsic purpose. New generations of creators, who often need to quote from their predecessors' work, might find their relations to the artistic canon shifting in unproductive ways. A bureaucratic assessment of even a penny-per-pound could dampen the complex set of spontaneous emotions (such as gratitude) that often stimulates the best of new growth.

In short, with the demise of the injunction we are likely to see an expansion in other aspects of copyright. As a result we may drift into a cash-and-carry mode of social interaction that could be destructive of creativity, community and respect for law.