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### Harmless Use: Gleaning from Fields of Copyrighted Works

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#### Recommended Citation

Wendy J. Gordon, *Harmless Use: Gleaning from Fields of Copyrighted Works*, in 77 *Fordham Law Review* 2411 (2009).

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**KEYNOTE ADDRESS**

**HARMLESS USE:  
GLEANING FROM FIELDS OF COPYRIGHTED  
WORKS**

INTRODUCTION

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FEATURED LECTURER\*

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PROFESSOR KATYAL: Hello, everyone. I want to thank all of you for coming today and for spending time with us today and tomorrow. I want specifically to acknowledge the incredible work that our conference organizers have done. Katherine Strandburg, Brett Frischmann, and Jay Kesan have done such a wonderful job in putting together this incredibly groundbreaking program, with so many interesting and wonderful papers and participants.

Today I actually have the distinct honor of introducing someone who, quite literally, needs no introduction. We have all read, cited, admired, and have been enriched by the person that I am about to introduce to you.

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\*\* Wendy J. Gordon is the Philip S. Beck Professor of Law, Boston University School of Law. During the period of revising the speech for publication, she served as the Bacon-Kilkenny Distinguished Visiting Professor of Law at Fordham University School of Law.

I owe great thanks to the participants at the Fordham conference. Many of the points they raised in questions and comments have been incorporated into the essay you see before you. I also apologize to those in the audience who wouldn't describe themselves as I described the group; I probably overstated the unanimity within the audience.

I particularly want to thank Marc Poirier, Gregg Macey, Jeannie Fromer, Andrew Kull, and James Grimmelman for stimulating discussion and providing helpful suggestions.

All of you know that Wendy Gordon is one of the most cited women in intellectual property today. All of you also know that her work has brought us consistently to a new level of thinking in terms of blending the insights of philosophy, economics, and political theory into rethinking some of the foundational presumptions that explain the design and the enforcement of intellectual property. Her article, *Fair Use as Market Failure*,<sup>1</sup> which was on the *Sony*<sup>2</sup> decision in the U.S. Supreme Court, ranks as one of the most cited articles in intellectual property history. She has been cited in three Supreme Court opinions,<sup>3</sup> and I am sure she has influenced dozens more in the process.<sup>4</sup>

You also probably know that Wendy Gordon holds a distinguished chair at Boston University. She has also served as a Fulbright Scholar, a fellow at Oxford, St. John's College, a resident at the Rockefeller Foundation, and has received a New Jersey Governor's Fellowship in the Humanities. In the spring, we are delighted to have her with us here at Fordham.

We know most of these incredible qualities and accomplishments, but perhaps one thing that we particularly want to draw attention to is something that so many of us in the room have benefited from.

As most of you know, the law of intellectual property is a relatively new field. It is populated by some extremely successful men and women who occupy very influential positions in the scholarly literature and also in the judiciary. But one of the reasons why intellectual property as a discipline is so special is because of the hard work that our world of senior scholars and so many people in this room, like Pam Samuelson, Rochelle Dreyfuss, Jonathan Zittrain, Graeme Dinwoodie, Joel Reidenberg, Keith Aoki, Jay Kesan, Mike Madison—and there are so many others—have done in making sure that younger generations of scholars get mentored and supported and looked after as they develop.

So while you may know Wendy Gordon's incredible accomplishments, I want to draw your attention to some of the reasons why the world of intellectual property—and particularly because of her—is such a special and such a supportive field. She has been referred to by Pam Samuelson as a pioneer in the field of intellectual property in many ways, including by bringing important insights from other disciplines to bear on fundamental issues in copyright law. She draws not just from economics, but also from philosophy, art, literature, and psychology.

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1. 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).

2. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984).

3. *N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483, 497 (2001); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559, 566 n.9 (1985); *Sony*, 464 U.S. at 478.

4. Wendy has been included in many "top citations" lists. For example, James Lindgren and Donald Seltzer ranked Wendy as number five nationally on the list of "The Most Prolific Law Professors in the 10 and 20 Most-Cited Law Reviews (Volumes Beginning in 1988–1992) (Mean Pages)." James Lindgren & Daniel Seltzer, *The Most Prolific Law Professors and Faculties*, 17 CHI.-KENT L. REV. 781, 800 tbl.9 (1996).

“What exuberance,” Pam says, “she also brings to our field. It makes copyright law that much more fun to have her with us.”

Her dean, Maureen O’Rourke, has said of Wendy, “It has been a wonderful gift to be on the same faculty with Wendy Gordon,” and notes that Wendy is not only generous with her time, but has also served as a terrific mentor for junior faculty, both in the intellectual property field and outside.

Feminist law professor and intellectual property maven Ann Bartow says, “In addition to being brilliant and funny, Wendy is also a truth teller. She does not tell social lies to stroke egos. She says exactly what she thinks, and that’s a great attribute in a person.” Bartow explains, “She’s never mean, but she’s always direct and forthright. For that reason, when she gives you a compliment, it really means something special.”

If you have seen Wendy interact with her students or other scholars, or if you have seen her run down the hall after someone insisting that they wear a hat on a rainy day (which actually happened to me), you know precisely what I’m talking about. You know how warm, how special, and how generous she can be with others.

So I wanted to introduce Wendy not just by talking about her accomplishments, which we all know, but by emphasizing how much her time and generosity to others, on its own and by simply serving as an example, has really transformed the way that intellectual property scholars relate to one another.

As Stacey Dogan from Northeastern explained to me,

When I first met Wendy, I knew her only by her fearsome reputation as a copyright superstar. The first couple of times I saw her at workshops, I sort of cowered. Her comments seemed so intellectual and philosophical and robust and intimidating. In fact, I don’t even think I dared to speak to her for several months after joining the Boston area intellectual property community. But one day just out of the blue, she invited me to lunch. I was surprised and delighted to find her warm, disarming, and eager to talk to me about my just-budding scholarly agenda. Since then, I have had countless lunches with Wendy, working through her ideas and mine, shooting most of them down, but honing, developing, and strengthening many others.

I just want to end with an observation: what makes intellectual property law such a special field is precisely people like Wendy, people who spend time with junior folks working through intellectual property ideas and helping to develop them. Jessica Silbey from Suffolk reminds us that,

Wendy thoroughly engages with your work and she responds with a deep structural critique and genuine enthusiasm, both signs of respect. For a junior scholar like myself, the attention Wendy provides is humbling. And because she knows no status in her comments or attention, anyone can be the beneficiary of it. In this way, she is a true intellectual, but she is also a model citizen.

I want to draw attention to this aspect of Wendy's work because, in the eyes of myself and so many others here, that is what makes her special, and it is what makes intellectual property law as a field so special—that she knows no status in her comments or attention, as Jessica says, and that is what makes not just a true intellectual, but also a model citizen for us to follow.

Let's all give a warm welcome to the charming, humble, and inestimably generous Wendy Gordon, and thank her for sharing her views with us.

PROFESSOR GORDON: That was actually the kindest, nicest introduction anyone has given for me in my entire life. Thank you so much, Sonia.

I also want to thank Bill Treanor and Joel Reidenberg as our hosts, and to thank Kathy Strandburg, Brett Frischmann, and Jay Kesan for putting this excellent conference together. I also thank this morning's panelists for what I have already learned today, and I look forward to the rest of the conference.

## **HARMLESS USE: GLEANNING FROM FIELDS OF COPYRIGHTED WORKS**

I will first provide a brief comment about what I think brings us all together. Second, I will talk about a particular project—something that has preoccupied me ever since I entered the field—namely, the distinction between what I will call, for sake of abbreviation, harmful use and harmless use.

### **I. OUR COMMUNITY**

Now to my first task. One of the interests that unify many of the scholars in this room is a curiosity about noncommercial models such as cooperative sharing and peer-to-peer creativity. Motivating this curiosity might be a yearning for a different kind of society, perhaps one that is less commercial, more focused on dialogues, both democratic and personal, and a mode of life that emphasizes the process and product of work rather than its monetary payoff.

We all know from the work of psychologists like Teresa Amabile<sup>5</sup> and education experts like Alfie Kohn,<sup>6</sup> as well as from our own experience,

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5. See, e.g., TERESA M. AMABILE, CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY 149–52, 157–60 (1996) (finding that individuals promised a reward for drawing produced more drawings than students not so motivated, but that the “reward” group’s drawings were of lesser quality than the artwork produced spontaneously by the control group).

6. See, e.g., ALFIE KOHN, PUNISHED BY REWARDS?: THE TROUBLE WITH GOLD STARS, INCENTIVE PLANS, A’S, PRAISE, AND OTHER BRIBES (1993).

that unprodded work is often the best work. External motivators, whether sticks or carrots, can get in the way.

Sticks are probably the most destructive—think back to the quality of work you produced for a parent who threatened to ground you unless you finished your school project. But even carrots—promises of reward—can be destructive. If an individual is keeping his or her eye on a monetary goal or getting an A or getting ahead, instead of on the intrinsic interest of the work itself, very often he or she will do work *less good* than what he or she produces on those occasions when the work itself is the focus of attention.<sup>7</sup> To what extent can the law help make the work *itself* the focus of creative people's attention, without denying them the recompense that the authors both need in order to keep creating, and deserve? It is that dilemma, I think, that many of us are trying to reconcile—we are seeking a sort of life and law that de-emphasizes the commercial yet still provides some of the benefits the commercial structure gives.

We are all exploring alternatives, and our paths are many. Some see these new patterns in IP scholarship as reaching critical momentum when Jessica Litman issued her invitation to see the public domain as more than a default category<sup>8</sup> and to see the legislative version of copyright as a product of less-than-reasoned decision making.<sup>9</sup> Those are my particular landmarks. Others might attribute the takeoff point to Pam Samuelson, particularly the conference on copyright and computers at Columbia that she was key in organizing,<sup>10</sup> or maybe Becky Eisenberg's<sup>11</sup> work on sharing in science, or Larry Lessig's unparalleled ability to bring copyright issues to a popular audience,<sup>12</sup> or Yochai Benkler's work on networks,<sup>13</sup> or Lewis Hyde's book on how gift relationships foster creativity.<sup>14</sup>

Whomever we nominate as our person who marked the shift—half the people in this room come to mind as candidates; and one prime candidate for the role of triggering the shift is not even a person, it is the Internet—we come to a place where we look toward a similar set of goals but from a thousand different angles.

We may resemble the group of blind men in the old joke, each of whom touches part of an elephant and experiences something quite unlike what the others report perceiving. But although individually we might not be able to

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7. See generally AMABILE, *supra* note 5; KOHN, *supra* note 6.

8. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1012–22 (1990).

9. See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

10. Symposium, *Toward a Third Intellectual Property Paradigm*, 94 COLUM. L. REV. 2307 (1994).

11. Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 YALE L.J. 177 (1987).

12. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004), available at <http://www.free-culture.cc/freeculture.pdf>.

13. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

14. LEWIS HYDE, *THE GIFT: IMAGINATION AND THE EROTIC LIFE OF PROPERTY* (3d ed. 1983).

get a full mental picture of the elephant, together in pooling our observations we might figure out what is what. That is what the community of scholars hopes to do in all cases—join together in a common inquiry—but does particularly well and particularly eagerly in our field.

So many of the current projects, including the commons project by the tri-wizard<sup>15</sup> team of Kathy, Brett, and Mike,<sup>16</sup> explicitly say that they are looking for contributions, trying to build models, and drawing people together to compare what works and what does not work.<sup>17</sup>

In addition to this active seeking of cooperation, another noteworthy development is the way in which new institutions to assist the public in dealing with copyright are being formed. I guess it probably began with Richard Stallman, the programmer famous for writing the GNU Emacs text editor, which provides the winged feet of the GNU/LINUX system.<sup>18</sup> He founded the free software movement and created “copyleft”—a mode of using copyright to enforce liberty of access—and instantiated it in the General Public License (GPL).<sup>19</sup> Since then, we have seen “Creative Commons” begin and grow. We witnessed Larry Lessig’s noble if futile effort to challenge copyright’s most recent durational extension.<sup>20</sup> There is a wonderful new set of standards for fair use for documentary filmmakers that Peter Jaszi and Pat Aufderheide put together,<sup>21</sup> which is inspiring others as well.<sup>22</sup> We see follow-on efforts by people all over the country.<sup>23</sup>

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15. Hogwarts and its “Tri-Wizard Tournament” are probably trademarks, but my use is lawful. (Yes, this is a wise-guy footnote.) For an interesting take on the real legal issues involved in employing trademarked terms in nonsales contexts, see Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 98 TRADEMARK REP. 1345, 1349 (2008) (arguing that trademark owners should not be able to use the Lanham Act to restrain nontrademark use of their terms and symbols).

16. See, e.g., Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment* (Univ. of Pittsburgh Legal Studies Research Paper Series, Working Paper No. 2008-26, 2008), available at <http://ssrn.com/abstract=1265793>.

17. See *id.* at 1–2.

18. See, e.g., Posting of Paul McNamara to Network World, <http://www.networkworld.com/community/node/25360> (Feb. 25, 2008, 07:56 EST) (discussing Richard Stallman’s role as the creator of the GNU Emacs text editor).

19. The General Public License (GPL) uses copyright to enforce openness; thus, its nickname is “copyleft.” Roughly speaking it works like this: programmers who make their work available under the GPL retain their copyrights, but give anyone permission to copy, sell, and adapt their programs—so long as the persons doing so *also* (1) make available their (human-readable) source code instead of merely distributing impossible-to-decipher (machine-readable) object code; and (2) employ copyleft in their resulting product by including in them the GPL set of permissions and requirements. See generally GNU Project, The General Public License, <http://www.gnu.org/licenses/gpl.html> (last visited Mar. 23, 2009).

20. See *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003) (noting that Lawrence Lessig argued on behalf of the petitioners).

21. E.g., ASS’N OF INDEP. VIDEO & FILMMAKERS ET AL., CTR. FOR SOC. MEDIA, DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE (2005), available at <http://centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf>; see also PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 30–

In other words, some in the community are trying now not only to help lawyers, judges, and legislators think through how to do their work, but are also trying to directly assist ordinary people in how they do their daily business. And that is a very exciting new dimension for legal scholarship generally.

Enough panegyric. I promised that in this speech I would also try to provide our community with an extra analytic tool. As you will recall, my offering is to suggest why it would be valuable to put more focus on the harmless use of copyrighted works.

## II. HARMFUL AND HARMLESS USES

There are differences between, on the one hand, interactions that cause substantial harm to the plaintiff, and, on the other hand, harmless interactions that trigger disputes only because the parties disagree about how to allocate shares in the benefit they have mutually generated. These differences deserve greater attention.

In his talk this morning, James Grimmelmann suggested that there may be an opposition between the ethic of sharing and the ethic of trade.<sup>24</sup> I am not so sure. Both ethics involve reciprocity;<sup>25</sup> after all, one never knows when he or she will be the stranger in need rather than the owner who shares. In copyright this is particularly true. As many observers have noted, a kind of reciprocity is inherent in the authorial role: authors are continually both creators of original work and users of material others have created.<sup>26</sup> Nevertheless, if James is correct that there is a conflict between the ethic of trade and the ethic of sharing, that conflict is softest when the

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32 (2004), available at [http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES\\_Report.pdf](http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf).

22. See, e.g., Berkman Center for Internet and Society at Harvard University, Freedom to Teach: An Educational Fair Use Project, <http://cyber.law.harvard.edu/research/freetomoteach#> (last visited Mar. 23, 2009).

23. And, of course, the professorial contribution is only a small part of a larger movement that includes advocacy groups, such as the Electronic Frontier Foundation (EFF), and many forms of community action.

24. James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 *FORDHAM L. REV.* 2005 (2009). See generally Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gifts*, 46 *UCLA L. REV.* 815 (1999) (arguing that the institution of contract is more egalitarian than the institution of gift).

25. The authors who have written on reciprocity are legion. One wonderful place to begin is with philosopher and polymath Lawrence Becker's book *Reciprocity*. LAWRENCE C. BECKER, *RECIPROCITY* (1986). For a recent exploration of reciprocity's limits, see Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 *COLUM. L. REV.* (forthcoming April 2009), available at <http://ssrn.com/abstract=1304283>. On the behavioral literature regarding reciprocity, see sources collected *id.* at 64 n.136.

26. See, e.g., Litman, *supra* note 8, at 966. This duality of position is also recognized by economists such as William Landes and Richard Posner, who point out that increases in copyright protection today benefit a current generation of creators but add to the costs of creation that will be faced by the next generation. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11, 69 (2003).



thing we ask the owner to share is something he wasn't using anyway,<sup>27</sup> or something that, if used by a stranger, would cause the owner no substantial harm. The latter is my focus.

### A. Gleaning

You may know the old saying that condemns the person who "reap[s] where he has not sown."<sup>28</sup> Taken literally, the phrase is a condemnation of

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27. It is often believed that a copyright or patent owner's rights to exclude remain strong even if the owner refuses to use or license the intangible. (I call this the question of whether proprietors have a "right not to use" their writings and inventions.) But the most cited case for the "right not to use" in copyright—*Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932)—was a tax case focusing on other issues, namely, whether a copyright is an "instrumentalit[y] of the federal government" and hence immune from state taxation. *Id.* at 126–28. I see the U.S. Supreme Court's statement about the copyright owner's freedom not to use in *Doyal* as essentially dicta, or, at most, directed at the owner's freedom not to use even in the face of a federal government demand. The *Doyal* decision does not address whether an owner's decision not to use her property should affect the rights of private parties to glean.

The Supreme Court has made clear that, at least in some contexts, a refusal to use or license will increase the defendant's liberty under the fair use doctrine; this is true particularly in markets (such as the "market" for criticism and parody) that the copyright owner does not want to exploit. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). Some older cases also indicate that the public had some rights to share in unused intellectual products. *See, e.g., Vitamin Technologists, Inc. v. Wisc. Alumni Research Found.*, 146 F.2d 941, 945–46 (9th Cir. 1945) (dicta) (patentee's refusal to license vitamin-enriching process for oleomargarine, "the butter of the poor," might justify denying injunction against patent infringement).

Admittedly, sometimes an owner's nonuse of her property lacks this effect. Thus, commentators and courts often cite *Special Equipment Co. v. Coe*, 324 U.S. 370, 378–79 (1945), which stated that a patentee is free not to use, and to suppress, his or her patent. Yet that statement in *Coe* was mere dicta; the *Coe* Court also noted that, "The record establishes no intention by petitioner not to use his invention." *Id.* at 380.

Nonuse by an owner sometimes even works to constrict a defendant's liberty of use. Thus, in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), the Court weighed the unused (unpublished) nature of the plaintiff's work heavily against the defendant's fair use claim. Note, however, that in *Harper & Row* the plaintiff had plans to publish the work almost immediately, so that the decision was about the copyright owner's control of "timing" his use, not about judicial reactions to nonuse. Further, when a slim majority of Supreme Court Justices strongly deferred to the unpublished nature of a work in *Harper & Row*, Congress rebuffed them by revising § 107 to state that the unpublished nature of a work did not itself negate the public's ability to make fair use of it. 17 U.S.C. § 107 (2006).

Some may wonder how the Supreme Court can square, on the one hand, the *Acuff-Rose* opinion's seeming disdain for an owner's desire not to award licenses to parodists, with, on the other hand, standard judicial deference to owners' "customary" commercial decisions to refuse licenses based on ordinary marketing and timing criteria. For an example of the latter, see not only *Harper & Row*, 471 U.S. 539, but also more recent cases such as *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 (1998) (distinguishing usual and customary markets from "fair use markets"). I proffer what E. J. Mishan called "welfare effects" as one criterion for distinguishing between, on the one hand, cases where the courts are willing to defer to an owner's decision not to use, and, on the other hand, the cases where the courts are unwilling to give weight to markets the owner leaves unused. See the discussion of pricelessness and welfare effects in Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 182–87 (2003); E. J. Mishan, *The Postwar Literature on Externalities: An Interpretive Essay*, 9 J. ECON. LIT. 1, 18–19 (1971).

ever keeping a windfall or a beneficial spillover or perhaps even an inheritance. So interpreted, following the phrase's advice would be insane; in a civilized nation full of physical, technological, and cultural infrastructure, we reap from birth what others have sown. Nevertheless, the broad condemnation of "reaping without sowing" seems to find its way into a substantial amount of judicial decisions and public debate. To help people remember why the seeming command, "do not reap where you haven't sown," should not and cannot be taken to broadly condemn free riding, let me take two examples from the past. One is the Biblical practice of gleaning. Gleaning served the community in both of the ways that concerned James Grimmelmann in his discussion this morning.<sup>29</sup> Gleaning honored the trading ethic by allowing a farmer his primary harvest, and honored the sharing ethic by endowing the poor with an entitlement to food.

Although the agricultural metaphor<sup>30</sup> of reap/sow is sometimes thought to have a biblical origin, the Five Books of Moses do not condemn the substantially harmless reaping of another's harvest. To the contrary: if a Jew owned a field, at harvest time he or she was commanded to leave some grain standing in the corners for the people who were poor, and the latter were supposed to come and glean. Biblically, then, part of the property owner's obligation was to sow without reaping every product of the field; conversely, to reap without sowing is a right of both the stranger and the community.<sup>31</sup>

Seventeen years ago, I argued for limits on IP rights<sup>32</sup> based in part on a gleaning argument. I wrote, "The remote beneficiary who makes an unexpected and creative use of the work arguably does not reap the plaintiff's harvest. At most, she gleans in a neglected corner of the field, and by gleaning Ruth met Boaz."<sup>33</sup>

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28. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 2 (1967); Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918); *see also* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1067 (2005) (quoting KAPLAN, *supra*, at 2).

29. Grimmelmann, *supra* note 24.

30. I am not sure who first called it "the agricultural metaphor"; it was probably Ben Kaplan.

31. Joseph Singer translates the applicable Torah passage this way:

When you reap the harvest of your land, you shall not reap all the way to the edges of your field, or gather the gleanings of your harvest. You shall not pick your vineyard bare, or gather the fallen fruit of your vineyard; you shall leave them for the poor and the stranger: I am the Lord your God.

JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP*, at frontispiece (2000) (translating *Leviticus* 19:9); *see also id.* at 38–62 (discussing the practice of gleaning and other property-sharing institutions in Judaism, Christianity, and Islam).

32. Most people see "IP rights" and think "intellectual property rights." However, I think "intellectual property" is a term that perniciously misdescribes our field. I therefore use "IP" to stand for "intangible products."

33. Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 191–92 (1992) [hereinafter Gordon, *Restitutionary Impulse*].

I thought that “Ruth met Boaz” was the capper to the argument. But it turned out no one knew who they were. So let me tell you. Ruth was a poor woman who gleaned in a field owned by Boaz. The two married and became the grandparents of King David. From King David’s line supposedly sprang Joseph, husband of Mary; it is sometimes argued that Mary was also a descendant.<sup>34</sup> As two important traditions, Jewish and Christian, both ascribe great importance to the lineage of Ruth and Boaz, the meeting of those two people during gleaning provides a wonderful image to underscore the fecundity that can flow from allowing some reaping without sowing.

So the Bible rejects a rule that would forbid all “reaping without sowing.” Industries engaged in anticopying public campaigns might preach to potential copyists the commandment that “Thou Shalt Not Steal,” but the Bible makes clear that reaping without sowing need not constitute theft.

### B. *A Different Perspective on INS v. AP*

Let me now essay a differently angled attack. I want to look at the most famous American application of the agricultural metaphor: the Supreme Court’s majority opinion in *International News Service v. Associated Press* (*INS*).<sup>35</sup> In that 1918 case, the Supreme Court of the United States enjoined one news service (that had been barred from the European theater of war) from copying the other news service’s published news.<sup>36</sup> I will try to show how that case is all about harm.

In most of the cases where the “reap without sowing” command has been recognized, like *INS*, the situation isn’t simply one where the defendant has benefited without paying. Rather, the benefit is taken at the expense of the plaintiff.<sup>37</sup> For the reaping to be condemned, it usually must be harmful,

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34. See, e.g., John Gill’s Exposition of the Entire Bible, [http://www.freegrace.net/gill/Luke/Luke\\_3.htm](http://www.freegrace.net/gill/Luke/Luke_3.htm) (last visited Mar. 10, 2009) (commenting on *Luke* 3:23: “Which was the son of Eli; meaning, not that Joseph was the son of Eli; for he was the son of Jacob, according to [*Matthew*] 1:16, but Jesus was the son of Eli; and which must be understood, and carried through the whole genealogy . . . though it is true indeed that Joseph was the son of Eli, having married his daughter; Mary was the daughter of Eli . . .”). Wikipedia explains John Gill’s position this way: “Gill (theologian), for example, claimed that Matthew’s gospel gives Jesus’ legal lineage through Joseph while Luke gives Jesus’ biological lineage through Mary.” Wikipedia.org, *Genealogy of Jesus*, [http://en.wikipedia.org/wiki/Ancestors\\_of\\_Christ](http://en.wikipedia.org/wiki/Ancestors_of_Christ) (last visited Mar. 20, 2009).

35. 248 U.S. 215 (1918).

36. *Id.* at 245.

37. This may have been true even in *Board of Trade of Chicago v. Dow Jones & Co.*, 456 N.E.2d 84, 92–93 (Ill. 1983). In that case, the Supreme Court of Illinois used the state law of misappropriation to enjoin the offerors of a futures contract from pegging their “index price” (of stock market performance) to the Dow Jones average. The court’s decision was shocking, in part because it ignored federal preemption, but also because the use planned by the defendant was apparently both productive and harmless. Yet the judicial urge to avoid harm probably paid a role: I suspect that the result was dictated by the court’s fear that if the defendant prevailed, the aura of “gambling” sometimes attributed to commodities trading would stick to Dow Jones, publisher of the *Wall Street Journal*, and harm the reputation of that conservative entity.

usually not only to the plaintiff, but to the society as a whole. This was clearly recognized in the *Motorola* case, where the Second Circuit said that it would save a hot-news misappropriation claim from preemption only when the defendant's actions were so harmful that they threatened to leave the public without the service.<sup>38</sup>

To illustrate how important the harm element is to these cases that purport to be about reaping and sowing, then, I would like to talk about an aspect of the *INS* case that I have taught to my classes for years, but have seen no hint of in print until fairly recently, in Douglas Baird's wonderful recounting of the litigation's background.<sup>39</sup> First, though, the more familiar story.

Many of us have noticed that, in *INS*, the majority opinion says that the law should stop *INS* from copying AP's news because *INS* was doing its copying "precisely at the point where profit [was] to be reaped."<sup>40</sup> If the copyist was allowed to continue and expand its practice of copying without remuneration, the company that had the only front-line access to war news could have collapsed, leaving the copyist without anyone to copy and unable to engage in war reportage itself because of European rules that uniquely constrained it; and the public would have been left without first-hand reportage of World War I.<sup>41</sup> Thus, the *INS* story mimics a prisoner's dilemma in many ways; if both parties fail to cooperate with each other, they both suffer.<sup>42</sup>

But this argument was far from watertight, of course. As with all prisoner's dilemmas, disaster is not inevitable. Among other possibilities, had the Court denied AP the relief it sought against *INS*, the two news-

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38. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). The court listed three elements:

We therefore find the extra elements—those in addition to the elements of copyright infringement—that allow a "hot-news" claim to survive preemption are:

(i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff.

*Id.* at 853 (dicta).

*National Basketball Association v. Motorola, Inc.*'s dicta might conceivably be interpreted as allowing a hot-news claim where only the first two elements are present. The interpretation of *International News Service v. Associated Press (INS)*, 248 U.S. 215, urged *infra*, an interpretation that focuses on the two news services' relations with their customers rather than with each other, will, I think, make clearer why that third element is crucial to the "hot-news" precedent. Of course, the preemption issue raises additional complications; it is possible that the court was incorrect, and that the federal law might preempt even a state claim that contained all three elements.

39. Douglas G. Baird, *The Story of INS v. AP*, in *INTELLECTUAL PROPERTY STORIES: PROPERTY, NATURAL MONOPOLY, AND THE UNEASY LEGACY OF A CONCOCTED CONTROVERSY* 9, 9–35 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

40. *INS*, 248 U.S. at 240.

41. See, e.g., Gordon, *Restitutionary Impulse*, *supra* note 33, at 266–73 (discussing misuses of the *INS* case).

42. *Id.* at 267–68.

gathering entities could have entered into a “gentlemen’s agreement”<sup>43</sup> about what was acceptable practice, using their prospect of iterated transactions as a way to keep each other disciplined.

Yet a defendant’s victory in *INS* would have threatened a harm beyond what was identified in this now-standard story, however—a harm that would have been much more obvious, immediate, and, I think, irremediable. This would have been the harm to each organization’s internal structure.<sup>44</sup> I suggest that we expand our attention from the biparty relationship between AP and INS, to the multilevel relationship each entity had to its respective members and customers, the local newspapers.<sup>45</sup>

If you publish the *New Haven Register* or the *Hartford Courant*, you probably can’t afford your own international or even nonlocal reporters. So you pay money to a news service like the AP. The news service gathers the money from you and other similarly situated newspapers, hires international and national correspondents,<sup>46</sup> and makes the resulting news stories available to you.

But how likely are you, local newspaper publisher, to pay fees to a news service if you know you can copy their news for free? That is an important question, because if *INS* had gone the other way, that is, had the Court denied AP the relief against copying that it sought, most lawyers of the day would probably assume that newspapers *could* copy news freely. (Admittedly, copyright law could still make the small newspapers rewrite the news stories so as to avoid taking *expression*, but, if the dissent had prevailed in *INS*, any newspaper would be free to copy all the *facts* it wished to.)<sup>47</sup> In such a context, the hometown newspaper would just drop

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43. However, Douglas Baird shows that the two news organizations were not situated on an equal playing field. See Baird, *supra* note 39, at 24–25. AP was much more powerful; among other things it had exclusive cartel arrangements with foreign governments to obtain news. *Id.* at 25. Nevertheless, some kind of agreement might have been forthcoming (*pace* antitrust, of course), particularly since, as Baird points out, “the most important member of AP,” *id.* at 26, and the owner of INS, *id.* at 29, was the same person: William Randolph Hearst.

44. Baird suggests that there was no real dispute between INS and AP to be resolved—whether by agreement or litigation. *Id.* at 35. The effective head of AP, Kent Cooper, “understood that the victory had little to do with INS and everything to do with his vision of AP’s future.” *Id.* at 30. By this, I think Baird is referring to the possibility I mention in text immediately below, namely, that without a rule against copying news, AP newspapers might have defected, and future customers (such as radio stations, *id.* at 31) might not have signed on.

45. Baird does a wonderful job of providing such background. See generally *id.* My version is much simplified.

46. Although AP’s initial strength lay in its technical infrastructure—“leasing the telegraph lines and hiring telegraph operators,” *id.* at 13—and not in gathering news, by the time of the litigation, it had begun serious news-gathering efforts. *Id.* at 19.

47. In the litigated case, INS apparently asserted no copyright in the news. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 232–33 (1918). In 1918, rigid legal formalities made it awkward and difficult to obtain copyright for works such as newspapers. Baird, *supra* note 39, at 12. Even if INS had claimed copyright in its news stories, copyright does not extend to facts. *INS*, 248 U.S. at 234.

its news-service membership or subscription. That would be particularly true of the West Coast papers, which, because of the earth's rotation, would even get pre-daybreak access to the news printed in East Coast morning papers.

The Court might reasonably have thought that if it refused to enjoin the defendant's copying, no entity could collect enough fees from the small newspapers to afford to send out national and overseas correspondents. This could drastically impair the knowledge base upon which democracy rests. If the Court had such a prospect in mind, it might well have thought it proper to stop that kind of copying.<sup>48</sup>

So, in *INS*, for all of its dicta about refraining from "reap[ing] where [you] ha[ve] not sown,"<sup>49</sup> the more applicable rule seems to be, you can't "reap" if using the product of others' intelligence and effort is going to be so harmful to them as to make it impossible to get an important product to the public.<sup>50</sup> Thus, if you look at the granddaddy of the "reap without sowing" cases, it is not about prohibiting somebody like Ruth from taking some grain she did not plant; it is about prohibiting a whole crowd from taking the entire field of grain.

### C. Exploring a Provisional Rule

So far we seem to have a provisional rule—still untested, since this is just a thought experiment<sup>51</sup>—but the rule looks like this: the law should not permit suit for "reaping without sowing" except where the reaping causes substantial harm to the plaintiff and the public. In my thought experiment, I would extend this rule to both common-law causes of action such as right of publicity and misappropriation (to the extent, if any, these state rights survive preemption) and to copyright itself.

This would mean drastically fewer lawsuits. That may not be a bad thing. After all, back in the early morning of law and economics, Judge Guido Calabresi and A. Douglas Melamed suggested that, all things being

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The public domain status of facts under copyright law is even clearer today than it was in the very early twentieth century; prior to *Feist v. Rural*, 499 U.S. 340 (1991), and the enactment of 17 U.S.C. § 102(b), courts occasionally stretched to "protect" laboriously gathered facts under copyright in one way or another. (Truth be told, even today, some copyright courts come close to protecting bare facts.)

48. Justice Louis Brandeis's dissenting opinion made clear that, whether or not the prohibition of copying facts was wise, such a ruling should have been left to the legislature, which, in detailed provisions or administrative regulations, could have protected the free speech and antitrust issues so raised. *INS*, 248 U.S. at 264–67 (Brandeis, J., dissenting). A simple injunction in favor of AP could have left many newspaper readers without news of the war. As it happens, however, Baird argues, the injunction made little difference to the behavior of *INS*. Baird, *supra* note 39, at 30.

49. *INS*, 248 U.S. at 239.

50. See *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

51. I am far from having resolved all relevant issues, especially regarding remedial questions. For example, in this essay, I suggest that profitable commercial adapters of copyrighted work must pay; should *non*-profitable adapters be free of any obligations? For one earlier take on the topic, see Gordon, *Restitutionary Impulse*, *supra* note 33, at 258–66.

equal, the cheapest thing to do with injuries is to let them lie where they fall.<sup>52</sup> Of course, they knew that not all things are equal—often letting injuries lie where they fall means long-term social loss because injurers will have no incentive to avoid careless behavior. Nevertheless, that starting observation of theirs may have identified one reason plaintiffs have the burden of proof; in cases of deadlock, the damage remains with the defendant, where it already lies.

The economic insight known as “moral hazard”<sup>53</sup> has even more importance than does avoidance of administrative costs. Since in any interaction both parties play a role (as Saul Levmore says, it “takes two to tort”<sup>54</sup>), by leaving losses on defendants, people in defendants’ position will have incentives to take more care in the future.

A similar set of observations might be made, in converse,<sup>55</sup> about copyright.

52. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 n.43 (1972).

53. “Moral hazard” points out that people who are fully assured of reimbursement in case of loss will be more careless than if they expected to bear part or all of the potential losses themselves.

54. Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 822 (1982) (citing R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

55. Let me make clear some of the ways in which negligence law mirrors copyright and vice versa. Any mirror produces data points that are identical but *reversed*; it is therefore sometimes difficult to keep the relationships between mirrored structures in mind. Here are the major mirrored structures:

- Negligence law is primarily concerned with internalizing *harms*, while copyright is primarily concerned with internalizing *benefits*.
- Negligence law seeks to *decrease* socially *destructive* behavior, while copyright seeks to *increase* socially *productive* behavior.
- Most of negligence law aims its primary incentives toward *defendants* and those upon whose behavior the defendants have some influence (such as careless employees). Conversely, copyright aims most of its incentives toward *plaintiffs* and those over whose behavior the plaintiffs have some influence (such as creative employees, or authors to whom publishers as copyright assignees pay royalties).
  - Thus, the rules of negligence law are crafted for the primary purpose of decreasing the careless or otherwise undesirable behavior of defendants (or their employees).
  - Conversely, copyright law is crafted for the primary purpose of increasing the socially desirable production of creative works by plaintiffs (or their creative employees and assignors)
- Both copyright and negligence law have some concern with the incentives of the other party as well.
  - For tort law, this concern primarily embodies itself in *defenses*. For copyright law, this concern primarily embodies itself in *limitations to the plaintiff's rights*.
    - Thus, the tort doctrines of *assumption of risk* and *contributory or comparative negligence* seek to minimize the so-called “moral hazard” that plaintiffs will take inadequate precautions to avoid injury; these tort doctrines, therefore, leave harm on some plaintiffs to encourage other people in plaintiff’s position to take appropriate precautions.

The cheapest thing to do, administratively, is to allow beneficial spillovers to lie where they happen to fall. And when people in the recipient (defendant) position are doing no harm, and are capable of creating new works and benefits of their own, maybe leaving gains on recipients will encourage people in defendants' position to build productively on what they have received.

Just as moral hazard tells us that defendants who are fully immunized from harm might be careless, the converse is also true: defendants who are fully excluded from spillover benefits may be unproductive. And given that intangibles are often best exploited by decentralized, spontaneous outpourings of effort,<sup>56</sup> particularly in the copyright arena,<sup>57</sup> assuring some return and thus incentives to downstream users is particularly important.<sup>58</sup>

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- As for copyright, the converse encouragement for defendants can be found in many doctrines that limit the plaintiff's rights, such as the "*idea/expression dichotomy*," the limitation of the right to control performance to only "*public*" performance, overall *durational limits*, plus a host of specific exceptions such as the first sale doctrine. All these consistently leave some benefits with defendants to encourage them to build on predecessor works.
  - The policy concern with the incentives of the "other party" sometimes switches locus without substantially changing its effect. Foreseeability is a good if controversial example.
    - The tort of negligence puts a burden on the *plaintiff* to prove that the harm done *was foreseeable* to a reasonable person in the *defendant's* position.
    - Copyright in the "fair use doctrine" encourages *defendants* to show that their use causes no significant harm to markets that the *plaintiff* *expected* to exploit. That is, the defendant might try to show that if his use has any negative impact, it affects only markets *unforeseeable* to plaintiffs.

On the latter point, see Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007), who argues that foreseeability has played a strong historic role in fair use that needs to be reasserted more strongly today; also see Wendy J. Gordon, *Foreseeability and the Harm/Benefit Distinction*, 122 HARV. L. REV. F. [hereinafter Gordon, *Harm/Benefit Distinction*] (forthcoming 2009) (arguing that foreseeability does play a role in fair use, and explaining why negligence law is a more apt model for copyright infringement than is trespass-to-land); also see Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1117655> (arguing that copyright law be revised to require proof of foreseeability as an element of plaintiff's case).

On the general question of tort/copyright parallels, see generally Wendy J. Gordon, *Copyright as Tort Law's Mirror Image: "Harms," "Benefits," and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003).

56. There is a substantial literature arguing the opposite, of course. See, e.g., Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977) (the most famous and probably first enunciation of the "prospect theory" favoring centralization of control). But the argument for centralization is probably stronger for patent than for copyright. See Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 LOY. L.A. L. REV. 159, 170 n.38 (2002) ("[T]he centralization argument [of the prospect theory] has little force when applied to copyright, a field whose merit is diversity



Thus, the “permissible gleaning” rule has many purposes. Among other things, the rule aims to avoid interfering with the defendant’s own creative processes, to preserve the defendant’s incentives to build on what came before, to help the owner execute a moral duty to allow gleaning, and to do all this without losing basic authorial rewards. Since the “gleaning” rule does not forbid suit where harm is done, it preserves the basic incentives and expectations of those who are potential plaintiffs.

Yet I remain concerned that this gleaning rule may not provide enough for the creative class; it might underincentivize plaintiffs in a random way. To correct this, I suggest limiting the permissible-gleaning rule. Among other things,<sup>59</sup> I would allow a plaintiff to sue for license fees for a substantially harmless use when the defendant is making a use-yielding profit<sup>60</sup> sufficient to leave both parties with benefits, so long as asking advance permission for use would not interfere with the defendant’s creative process. Under this approach, if a large-scale enterprise, like a movie, made extensive use of a copyrighted work without permission, it would be suable for a share of its profits, even if the work on which the movie was based lost no sales as a result of its adaptation into movie form. This limitation on the “go and glean” rule is explored further *infra* Part II.F.

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rather than centralization.”). For helpful discussion, see Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007).

57. Paul Goldstein in his treatise argues the primary purpose of copyright is to induce great *variety* in works. See PAUL GOLDSTEIN, 1 GOLDSTEIN ON COPYRIGHT § 1.14 (3rd ed. 2006).

58. As a corollary, I would argue that 17 U.S.C. § 103 should be revised to allow copyright in any creative derivative work, regardless of whether the author of the derivative work employed the prior work lawfully. (This change would make copyright follow the current pattern in patent law.) Under copyright’s current § 103(a), any creativity that is “intermixed” with unlawful use loses its copyright, so that, for example, the author of an unauthorized translation would not only be subject to an infringement suit, but the copyright owner of the translated book could publish the new translation and owe nothing to the translator. This impairs the translator’s incentives. Note that even if § 103 were revised as I suggest, the first author still has leverage to obtain his own payments: the author of the creative derivative work could not do much with the work—could not publish it, publicly perform it, etc.—unless he had fair use, or had the consent of the person owning copyright in the work upon which the derivative was built. My change would give the derivative’s author more bargaining leverage than he has under current law.

Admittedly, the authors of unlawfully made derivative works have some bargaining power now, not only because the preparation of the work might be sheltered by the fair use doctrine (*cf.* patent’s experimental use exception), but also because the statute deprives the derivative author of copyright only in that “*part of the work in which such material has been used unlawfully.*” 17 U.S.C. § 103(a) (2006) (emphasis added). Yet some judges have gone so far as to hint (contrary to legislative history and statutory language) that any unlawful use taints the whole derivative work so that even separable portions of the latter cannot bear their own copyright. *Pickett v. Prince*, 207 F.3d 402, 408 (7th Cir. 2000). It would be better to amend § 103(a) to follow the patent model and allow even the unauthorized maker of a derivative work her copyright. Then, if the derivative work is valuable, both the author of the derivative work and the author of the work on which it is based can profit.

59. In addition, as will appear below, I would allow suit over a substantially harmless use for the purpose of trying title.

60. As per my caveat *supra* note 51, I retain doubts about how to handle the unprofitable commercial defendant.

#### D. Defining Harm, Benefit, and Other Terms of the Provisional Rule

Before getting into those details, however, let me address some definitional issues. Because in a speech one lacks time to fully explore what construals of “harm” and “benefit” might prove most productive for discussion, let me stipulate some simple starting points.

Negative divergence from a baseline is “harm,” and positive divergence from a baseline is “benefit.” As a baseline, I would use the welfare of the party in a world where the other person’s action had not occurred. This is a variant of the standard but-for test. For example: I am “benefited” when I enjoy reading a book another person has written because “but for” the action of the author, I would not have the book to read. (*How much* I am benefited may vary with what my other recreational or reading options might have been.) I cause “harm” if I make a thousand copies of the book and give or sell them to people who otherwise would have purchased copies from the author’s designated publisher; the author is “harmed” because “but for” my actions, the author would have had income from these other customers.

I also need to specify what metric of welfare to use. Following John Stuart Mill, I would not count setbacks to moralizing interests<sup>61</sup> as a kind of “harm.” But I would count severe insults to dignity as harm,<sup>62</sup> and would

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61. JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859) [hereinafter MILL, ON LIBERTY]; see also JOEL FEINBERG, HARM TO OTHERS 14–27 (1984) [hereinafter FEINBERG, HARM TO OTHERS] distinguishing “harm to others” and “offense to others” from paternalistic and other interests). Regarding moralizing motives such as a disapproval of drinking, sexuality, or eating pork, “Neither the intensity of the distress nor the number of people who share it seem to affect [Mill’s] conclusion that it is illegitimate for the majority to impose its values on the rest of society.” C. L. TEN, *Mill’s Defence of Liberty*, in J. S. MILL, ON LIBERTY IN FOCUS 212, 214 (John Gray & G. W. Smith eds., 1991). John Stuart Mill “reject[s] . . . these forms of distress as a proper basis for social interference with the liberty of individuals.” *Id.* at 214. For analysis of the possible distinction between harm and offense, and a probing definitional discussion of “harm,” see FEINBERG, HARM TO OTHERS, *supra*; JOEL FEINBERG, OFFENSE TO OTHERS (1985).

Feinberg’s discussion of “benefits” is much less satisfying than his discussion of harm. See JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW 311–17 (1990). Among other things, he begins with *transfer payments* as a type of “benefit.” *Id.* at 312. By contrast, the primary economic issue for private law is not the disposition of fixed monetary amounts, but rather how to encourage A and B to deploy their resources in a way that *increases* the social total. Feinberg indirectly touches on the latter issue in his discussion of collective goods, see *id.* at 316–17, but the matter lies far from his focus.

62. I would have to see an extreme dignitary harm before recommending a legal response. The United States would be wrong, I believe, to adopt the European “moral rights” approach that puts the authors’ dignitary interests on a pedestal that can impinge on free speech rights. We have already gone too far in adopting 17 U.S.C. § 106A. *But see* Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006) (arguing for an interestingly circumscribed set of moral rights).

It is hard for me to imagine what might be a severe enough dignitary harm to warrant legal restraint in the copyright arena, where First Amendment free speech doctrine privileges most expressions of opinion or emotion that give rise to dignitary and emotional harm. See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). But I have learned that my

count economic injury as “harm.” I would even count Schumpeterian creative destruction as “harm”<sup>63</sup>—remembering always that harms can be outweighed by benefits. (My thought experiment today explores the possibility that harmless uses should be free of liability; it at no point suggests that all harmful uses should be liable.<sup>64</sup>) Most importantly, I want to emphasize the importance of the Millian guideline that we should be wary of enacting laws that inhibit harmless behavior.<sup>65</sup>

E. *Does the Common Law or Lockean Philosophy Pose a Challenge to a Rule that Allows Gleaning of Copyrighted Work?*

In addition to setting out these definitional starting points, I want to admit a difficulty with the provenance of the gleaning rule: in ordinary tangible property, the common law prohibits even harmless trespasses. The difficulty is not fatal to my project. After all, as I have argued elsewhere,

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imagination is limited in this regard. Notably, I would have thought that only entries in and around the home could cause severe enough dignitary damage to warrant more than nominal monetary relief for a physically harmless trespass—until reality taught me differently. Thus, in *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 166 (Wis. 1997), punitive damages were upheld (appropriately in my view) for a physically harmless trespass not to a home, but to a *field*. The defendant crossed the plaintiff’s land in a manner that belittled both the elderly landowner and the rule of law.

63. Creative destruction is *ex hypothesi* socially beneficial, as far as we can judge from the economist who coined the phrase. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81–86 (5th ed. 2008). Joseph Schumpeter argues that ordinary competition between similar competitors with slightly differentiated products is not the source of much consumer benefit. Rather, monopoly and oligopoly are undercut by the emergence of “the new commodity, the new technology, the new source of supply, the new type of organization” that “strikes [at] . . . the existing firms[.] . . . foundations and their very lives.” *Id.* at 84. This process, which Schumpeter calls “creative destruction,” “expands output and brings down prices.” *Id.* at 85.

For an extension of the Schumpeterian position to copyright, see generally, for example, Ariel Katz, Substitution and Schumpeterian Effects over the Lifecycle of Copyrighted Works (Aug. 5, 2008), available at <http://ssrn.com/abstract=1205679>. For an extension of creative destruction to issues of cultural cross-fertilization, see TYLER COWEN, CREATIVE DESTRUCTION (2002).

64. Mill took a similar position: he did not argue that all harmful acts should be controlled, only that the social control should be restricted to prohibiting acts that are harmful to persons other than the actor.

65. MILL, ON LIBERTY, *supra* note 61, at 73–91. Mill argued that that “the *only* purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” *Id.* at 9. Joel Feinberg points out that Mill also seemed to contemplate preventing offense to others as an additional rightful basis for coercion. FEINBERG, HARM TO OTHERS, *supra* note 61, at 14 (citing MILL, *supra* note 61, at 9). The Millian concern has special resonance in the free speech arena, which is copyright’s home turf. See generally Christina Bohannon, *Copyright Harm and the First Amendment* (Univ. of Iowa, Legal Studies Research Paper No. 09-15, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1367624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1367624).

In past work, I overstated the irrelevance of Mill to copyright. See Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1385–86 & n.194 (1989). Note, however, that I still stop short of fully embracing Mill’s harm principle. *Inter alia*, I believe that some harmless uses should give rise to liability (as in the case of the profitable movie hypothesized in text).

conditional schemes of liability (such as negligence and restitution) are better models for the regulation of intangibles than is the real-property tort of trespass to land.<sup>66</sup> Yet even if one does follow common-law rules of trespass, we find analogies that favor changing copyright law to allow most harmless use.

But first, let us look at the challenge the trespass tort seems to pose to my provisional gleaning rule. Under my provisional rule, copyright owners in most contexts would be under a duty to allow gleaning.<sup>67</sup> In the common-law system, however, only in cases of emergency is a landowner obligated to share her property with others. For John Locke, a philosopher often cited as providing a normative basis for private property, the obligation to share one's property was similarly quite narrow: in the state of nature, strangers were entitled to share in our property only when they were in dire need and we had more than enough,<sup>68</sup> or where our property would rot without their using it.<sup>69</sup> This is somewhat surprising for Locke,<sup>70</sup> especially given his

66. See, e.g., Gordon, *Harm/Benefit Distinction*, *supra* note 55 (negligence as a model); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1544–49 (1993) [hereinafter Gordon, *Self-Expression*] (property rights conditional on satisfying the Lockean proviso); Gordon, *Restitutionary Impulse*, *supra* note 33, *passim* (restitution as a guide for rewriting the common law governing misappropriation of intangibles).

67. Note that I assume not only a lack of legal right to exclude in the landowner, but also a claim of right to enter in the public. This follows the Biblical injunction, which not only would deprive a landowner of legal rights to stop gleaning, but would also prohibit him from erecting fences or using other modes of self-help to exclude gleaners. See *supra* note 31 and accompanying text.

68. In the *First Treatise on Government*, John Locke writes,

But we know God hath not left one man so to the mercy of another, that he may starve him if he please . . . he has given his needy brother a right to the surplusage of his goods . . . so charity gives every man a title to so much out of another's plenty as will keep him from extreme want, where he has no means to subsist otherwise . . .

JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 29–30 (bk. I, § 42) (2003); see also *id.* at 102 (bk. II, § 6).

69. Thus Locke writes that one can “acquire a propriety” in wild fruits or beasts, but if they perished, in his possession, without their due use; if the fruits rotted, or the venison putrefied, before he could spend it; he offended against the common law of nature, and was liable to be punished; he invaded his neighbour's share, for he had no right, farther than his use . . .

*Id.* at 116 (bk. II, § 37); see also *id.* (bk. II, § 38) (“The same measures governed the possession of land too . . . [I]f . . . the fruit of his planting perished without gathering[,] . . . this part of the earth . . . might be the possession of any other.”).

70. It is somewhat surprising that Locke did not see natural law as requiring landowners to share when sharing is largely harmless. Perhaps it was his focus on tangible property, or the influence of the common law of his time, that led him in this direction. It would have been more in keeping with his overall theory to have permitted a larger degree of sharing than he did: For Locke, the general duty of persons to refrain from taking the fruit of others' labor, which is the sign of property, derived from the moral imperative to avoid causing harm. See Gordon, *Self-Expression*, *supra* note 66, at 1544–49 (describing “[t]he [h]arm-based [s]tructure of Locke's [a]rgument for [p]roperty”). For the Locke of the *Two Treatises*, therefore, one would imagine that a property invasion would become wrongful only when it causes substantial harm. Thus, it is surprising that Locke gives strangers a

religious orientation. Nevertheless, Locke does not impose on property owners a general obligation to allow strangers to glean.

As for the common law, its miserly approach to sharing might be explainable by the tangible nature of its ordinary subject matter. I do not speak merely of the fact that some tangible property can only be shared by being destroyed. (When I share my apple with you, I lose the part you bite off.) Tangible property has a special set of emotional connections as well. To invade a physical home is to invade privacy and security. By contrast, as has often been noted, copying a document miles from its author need cause the author no distress at all. Therefore the landowner might be entitled to exclude physically harmless trespasses for reasons much less applicable to intangibles.

As for Locke's reluctance to embrace a broad doctrine of sharing, perhaps an explanation lies in the fact that, for Locke, property came into being only if it satisfied a stringent moral test, namely, Locke's proviso that the appropriation had to leave "enough, and as good" for others.<sup>71</sup> Maybe the owners of such specially justified property claims are rightfully subject to fewer obligations than are real-life owners, whether of Biblical fields or today's copyrights.

That is not a question whose merits I reach today, but let's play with it. What if it were true, that fulfilling the proviso by leaving "enough, and as good" for others, entitles a property owner to exclude everyone, except for the narrow exceptions of dire need and rotting food?

Then it would be worthwhile to determine which of today's owners satisfy the Lockean proviso. Exploring that intriguing question will indirectly lead us to one of my major qualifications on the "go and glean" rule.

#### F. *Modifying the "Go and Glean" Rule*

One way to understand Locke's proviso that the appropriator leave "enough, and as good," is that it imposes a precondition to property. Before a property claim can be the rightful sort that other persons have duties to respect, "enough and as good" must be left. And one way to read "enough and as good" is as requiring that the property claimant do no harm by this

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liberty to use our property only in case of great need, or on the occasion of our allowing our property to rot.

71. LOCKE, *supra* note 68, at 112 (bk. II, § 27) ("For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.").

There is immense debate about the proviso, including whether Locke meant it as a true precondition to the just acquisition of property, or whether the proviso simply indicated an area particularly free of doubt for Locke; what "enough, and as good" should be measured against; and so on. For my own views, see generally Gordon, *Restitutionary Impulse*, *supra* note 33. For a particularly intriguing survey of alternatives that emphasizes the many possibilities in the word "harm," see generally John Arthur, *Resource Acquisition and Harm*, 17 CANADIAN J. PHIL. 337 (1987).

appropriation.<sup>72</sup> Therefore, I argue that before a property claim can be recognized as valid against a particular person, the property owner must show that his claim causes no harm to that other person.<sup>73</sup> As part of the thought experiment, then, let us assume that today's copyright owners can limit their duties to share only in cases of dire exigency and can refuse to allow gleaning—if and only if their property claim itself does no harm to the user they are suing.

When might that occur? How could a defendant's paying money to a copyright claimant do no harm to the defendant? One answer is, when the defendant has made a commercial use that can give the property claimant an appropriate share, and still leave the defendant as well off as he would have been "but for" the lawsuit and "but for" the plaintiff's creativity. For the defendant to be as well off after losing a lawsuit as he would have been "but for" his exposure to plaintiff's work of authorship, the law would need to ensure that the defendant would retain an appropriate profit after paying the plaintiff, and that the need for the defendant to anticipate the need to make such payment would not interfere with the creative enterprise. In such a case, the proviso is met.<sup>74</sup>

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72. See Gordon, *Self-Expression*, *supra* note 66, at 1563–64 (explaining the role of "no harm done" in Locke's response to Sir Robert Filmer); see also LOCKE, *supra* note 68, at 114 (bk. II, § 33) ("Nor was this appropriation . . . any prejudice to any other man, since there was still enough, and as good left . . . [F]or he that leaves as much as another can make use of, does as good as take nothing at all.").

73. Gordon, *Self-Expression*, *supra* note 66, at 1570 ("Individualized and Nonfungible Nature of the Proviso's Protection").

74. In other words: in such a case, awarding relief to the plaintiff will do no harm to the defendant. See Gordon, *Restitutionary Impulse*, *supra* note 33, at 205–11, 224–25 (avoiding harm to the defendant); see also Gordon, *Self-Expression*, *supra* note 66, at 1560–72 (avoiding harm to defendants' entitlement to cultural heritage).

In some instances, a showing of a profitable bureaucratic or commercial use might also satisfy the "harm to plaintiff" requirement: when a standard profit-making opportunity exists, then "but for" the particular defendant, the plaintiff would have had another, similar user to whom to license. This possibility raises issues regarding the appropriate baseline, but is intriguing, and is indirectly suggested by Bohannon, *supra* note 55, especially at 989 (exploring a two-part test for "harm" in copyright that bears several analogies to this essay's approach).

Note that my example of the defendant who can pay a monetary judgment yet remain whole contemplates a defendant who has not been affirmatively harmed by exposure to the copyrighted work. When however the work has harmed the defendant, the defendant might have a full defense under the self-defense privilege that is honored by some fair use cases. See, e.g., *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150, 1153 (9th Cir. 1986) (minister who was ridiculed in a copyrighted mock advertisement distributed thousands of copies of the advertisement to his supporters in an effort to raise money). The U.S. Court of Appeals for the Ninth Circuit ruled that "the public interest in allowing an individual to defend himself against such derogatory personal attacks serves to rebut the presumption of unfairness." *Id.* at 1153. This self-defense privilege has its parallel in the Lockean proviso that property only arises where "enough, and as good" is left for others.

An example of how a work can cause harm can be seen in the litigation involving Alice Randall, author of *The Wind Done Gone*. That novel, an Afro-centric critical sequel to *Gone with the Wind* that was, for a while, banned from store shelves for copyright infringement. Randall stated that she would rather have been "born blind" than have read *Gone with the Wind*. Such an author's position in life has been negatively affected by the

These conditions are likely to be met when an entity uses copyrighted work without consent as part of deliberate large-scale commercial enterprise. Therefore, I suggest that such an enterprise—even if harmless—should be subject to a “duty not to glean without permission” so long as relief is structured to leave the defendant as well off as he would have been had he never used the plaintiff’s work.

This is not so different from the common law after all. Harmless trespasses give rise to significant monetary recovery only in cases of significant commercial use.<sup>75</sup>

To recap: if the defendant is making a deliberate use, particularly one that involves much forethought and organization,<sup>76</sup> there may be a good case for allowing the copyright owner to sue even for harmless use of her work. After such a lawsuit, if damages are allocated appropriately, both parties should be left benefited—better off than they would have been had the other’s actions not occurred.<sup>77</sup>

Some proprietarians might argue that the courts should allow plaintiffs to collect license fees and have an injunction in any case where the defendant

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predecessor work. To forbid Randall the tools necessary to deal fully with the change can make her worse off than if she had never encountered the work at all. Wendy J. Gordon, *Render Copyright unto Caesar: Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 82 (2004) [hereinafter Gordon, *Render Copyright unto Caesar*]; see *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga.), *rev’d*, 268 F.3d 1257 (11th Cir.), and 252 F.3d 1165 (11th Cir. 2001) (enjoining production, display, distribution, advertising, sale, or offer for sale of the book *The Wind Done Gone*).

Note that I am not arguing that a harmed audience member has a legal right to redress; such an asserted private right would probably fall to First Amendment scrutiny. See, e.g., *Hustler Magazine v. Falwell*, 458 U.S. 46, 53, 55–56 (1998) (First Amendment bars recognizing a claim of intentional infliction of emotional distress by a minister who was ridiculed in *Hustler* magazine). I am instead arguing for a self-help privilege, a liberty to use in self-defense or self-explanation. This distinction is well established, at least in private law. In the libel literature, for example, one reason for denying public figures strong *legal* rights in defamation is their ability to use publicity to explain themselves. The First Amendment does not limit the latter.

75. *Edwards v. Lee’s Adm’r*, 96 S.W.2d 1028, 1032 (Ky. 1936) (defendant created a tourist attraction conducting tours to a cave that lay partly under plaintiff’s land; the suit resulted in giving plaintiff a share of the trespasser’s net profits proportional to the physical characteristics and size of the cave being commercially exploited); *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 239 (Va. 1946) (awarding the market value of the excess use of an existing right-of-way as an approximation of the money saved by a trespassing railway).

76. For more spontaneous and less bureaucratic creators, the mere need to obtain permissions can poison the creative effort. See Gordon, *Render Copyright unto Caesar*, *supra* note 74, at 90 (suggesting a special privilege for “context[s] where the use is not ordinarily accompanied by pre-use negotiation or licensing”).

77. This no-harm result might follow even if the plaintiff is awarded an injunction. But injunctions have dangers, such as giving a plaintiff “hold-out powers” that he or she can use to squeeze the defendant. See, e.g., *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 395–97 (2006) (Kennedy, J., concurring); *Special Equip. Co. v. Coe*, 324 U.S. 370, 380–84 (1945) (Douglas, J., dissenting).

Note that in those cases where the defendant’s efforts produce something the copyright owner disapproves of on ideological, religious, or dignitary grounds (e.g., a parody of the plaintiff’s work), the fair use doctrine would continue to be available to shelter the defendant, *vel non*, from liability.

reaps any benefits at all, so as to facilitate bargaining between the parties. But, in the artistic context, where so much depends on “following one’s nose” and spontaneity,<sup>78</sup> and where the boundaries of prior creators’ claims are so indistinct,<sup>79</sup> bargaining can be destructive. This is a kind of market failure insufficiently recognized. Enforcing the plaintiff’s rights too strongly may not result in bargaining, but in stalemate.<sup>80</sup>

The common law may provide a helpful rebuttal to the proprietarians. I know of no case where a harmless trespass for purposes of enjoyment resulted in a substantial monetary judgment against the trespassers. Yet in copyright, the statutory damage provision enables record companies to collect thousands of dollars from teenagers involved in music copying even where no harm is proved. If the teenagers were entering land or using personality for harmless enjoyment, as Andrew Kull has commented orally, “it is virtually inconceivable that restitution law would have this effect.” In trespass cases not involving significant commercial profit, only nominal monetary payments are ordinarily recoverable.<sup>81</sup>

One might wonder, why are trespass-to-land suits for harmless noncommercial entry ever brought? One purpose of the common law allowing suits for such harmless entries is to provide a convenient way to try title disputes (“that strip of land is mine,” “no, it’s mine”). I see such nominal-damage suits not as determining that harmless entries are “wrongful” but as an administrative convenience.<sup>82</sup> I would allow title-determination suits for copyright as well, but limit recovery to nominal damages. The only copyright owners who would bring suits against this kind of (largely profitless, noncommercial) harmless use would be people who want clear titles against the possibility of some future harm occurring at the defendant’s hands.

### III. INTERIM CONCLUSION

One usually imagines that because real property is scarce, its legal rules should be stricter against defendants than would be the rules governing inexhaustible intangible property.<sup>83</sup> If a harmless noncommercial entry to land gives rise to no substantial recovery in restitution, then *a fortiori*, a

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78. See Gordon, *Render Copyright unto Caesar*, *supra* note 74, at 83.

79. See, e.g., Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1273449>.

80. Cf. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998) (exploring one set of reasons why “rights to exclude” strangers from using creations and discoveries might retard the innovation).

81. Although this phenomenon is observable (as a positive matter) and not stated as a “rule” by any of the Restatements of Restitution, I believe it a principled statement of (normative) law as well.

82. I think I read this proposition in something by Justice Oliver Wendell Holmes, but cannot locate the source.

83. Of course, the supplies leading to the *creation* of intangibles are not inexhaustible. That is one reason why I assume that many harmful erosions of copyright should remain actionable.



harmless noncommercial use of copyrighted works should give rise to no monetary recovery either.<sup>84</sup> Similarly, if the law of negligence provides copyright a better model than does trespass-to-land, we need to remember that negligence law generally *forbids* suits for carelessness that has caused no harm.

In conclusion, let me sum up how my notion of owners' obligations to share might impact copyright's treatment of harmless use. My thought experiment suggests that copyright law should give more honor to harmless uses—uses that produce results that are Pareto superior to nonuse. A rule we should explore would thus look like the following: a copyright owner cannot sue for substantially harmless uses except in two instances: (1) the copyright owner should be able to obtain a monetary award and an injunction<sup>85</sup> where (a) the defendant makes a deliberate commercial use of the authored work in a context where the defendant is making licensing and other bureaucratic arrangements prior to production, and (b) the defendant makes enough profit to remain whole after paying the plaintiff; or (2) the copyright owner can obtain a nominal monetary award for purposes of determining questions of title ownership and title, even against a harmless use. Further, suits even for harmful copying would be potentially defeasible (as to any remedy, or as to injunction alone) by a showing of dire public need.<sup>86</sup>

In other words, I am one of those scholars distressed by copyright's strict and largely nonconditional trespass-like approach to liability.<sup>87</sup> I suggest

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84. There are other places where the law of real property is more generous to the public than is copyright. Thus, for example, many states would give the public liberties to cross over privately owned land if necessary to reach publicly owned resources such as beaches. By contrast, the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C. and at 28 U.S.C. § 4001), incorporated into American copyright law, gives the public no liberty to decrypt a digital-management-device even for the purpose of reaching publicly owned resources; if public-domain materials are mixed with privately owned copyrighted works behind a digital gate, the public has no general privilege to reach them. Similarly, although the fair use doctrine of old-fashioned copyright law would allow a member of the public to reverse engineer a copyrighted computer-program work in order to reach public domain material within it, the DMCA has no general privilege of fair use. Thus, if reverse engineering required decrypting a technological protection measure, American law would not permit it (unless the Copyright Office issued a special ruling.) It is ironic when real property law is more generous to non-owners than is the law of intangibles. For more on this issue, see Wendy J. Gordon, Keynote Address: *Fair Use: Threat or Threatened?*, 55 CASE W. RES. L. REV. 903 (2005).

85. My remedial suggestions are the most tentative part of this essay. I have a healthy suspicion of how injunctions can be abused, and the danger they pose to free speech, yet I fear that monetary-only remedies can erode authors' intrinsic motivations. Cf. Kwall, *supra* note 62, at 2006–07.

86. See *supra* note 68 and accompanying text for a discussion of the common-law doctrines of “private necessity” and “public necessity,” and Locke’s notion of charity.

87. See, e.g., Balganes, *supra* note 55, at 1 (proposing, instead, “a test of ‘foreseeable copying’ to limit copyright’s grant of exclusivity to situations where a copier’s use was reasonably foreseeable to the creator at the time of creation”); Bohannon, *supra* note 55, at 974–76, 983–85 (criticizing the use of trespass-to-land models in copyright); Cristopher M. Newman, *Infringement as Nuisance* (George Mason Univ. Law & Econ. Research Paper No. 09-17, 2009), available at <http://ssrn.com/abstract=1354110>. Another model of conditional

that a new step be added to the copyright owner's burden: she must prove either that she has been harmed, or that she is suing simply to clarify title, or that the defendant's use is not the kind that would be substantively impaired by a requirement of seeking prior permission. The last element could be demonstrated, for example, by a showing that the defendant is a commercial enterprise that made profitable use of the plaintiff's work and was engaged in making licensing and other bureaucratic arrangements prior to and during the production process. If copyright were limited in these ways, that might be a first step that might help our community to see more clearly the next steps that must be taken to adapt current copyright to humanitarian and democratic goals.

I offer this as a tentative, interim conclusion. Given the cooperative nature of the copyright community, I look forward to learning what comes next.

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rather than strict liability is restitution. For an exploration of restitution as a model for regulating the copying of intangibles see Gordon, *Restitutionary Impulse*, *supra* note 33.