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**Article**

**The Moral Psychology of Copyright Infringement**

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## INTRODUCTION

Copyright's origin story, rooted in the Constitution,<sup>1</sup> appears to be a simple and elegant matter of economics. Granting authors exclusive rights in their works of authorship protects them from literary piracy and allows them to extract value from their mental labors. This legal protection, in turn, motivates authors to produce the kind of creative and informative works that make the world a more interesting and enlightened place.<sup>2</sup> James Madison neatly summed up this happy tale of symbiosis by noting that with copyright, "[t]he public good fully coincides . . . with the claims of individuals."<sup>3</sup> There's only one problem with this appealing story: it's not true. The past decade has seen a flood of legal scholarship devoted to undermining the foundations of copyright's central incentivist narrative. This work has challenged the assumption that money plays much of a role at all in motivating artistic production, suggesting instead that the desire for subcultural status or the intrinsic enjoyment of the creative process are stronger drivers of creative production.<sup>4</sup> Other research has shown that factors foreign to U.S. law, like the desire for attribution, play a persistent role in authors' incentives.<sup>5</sup> And evidence from a broad array of social science fields has suggested that monetary incentives do little to improve, and may actually worsen, creative

1. U.S. CONST. art. I, § 8, cl. 8.

2. Countless sources echo this origin story. For just one, see CRAIG JOYCE ET AL., *COPYRIGHT LAW* 54–56 (9th ed. 2013).

3. THE FEDERALIST NO. 43 (James Madison).

4. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 522–36 (2009).

5. See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1759–89 (2012).

production, suggesting that copyright law's origin story has it exactly backward.<sup>6</sup>

These and many other critiques do an admirable job of showing the flaws in copyright law's basic assumptions about what leads people to create, but the motivation to create amounts to only one half of this narrative. Exclusive rights are not only a carrot meant to tempt authors into creating new works, but also a stick that allows authors to protect their works with credible threats of litigation. In copyright's standard story, owners would sue for infringement only when necessary to preserve the income stream that flows from their works, causing infringement litigation to work in concert with copyright's idealized incentivist structure.<sup>7</sup> But anecdotal evidence indicates that owners of literary property frequently perceive themselves to be wronged for reasons unrelated to financial harm. Instead, their objections to unauthorized use invoke a variety of non-pecuniary considerations. For example, Dilbert creator Scott Adams conceded that although the unauthorized use of his comic strips probably helped promote his brand and enhance his viewership, he still regarded it as wrong and as a profoundly personal violation.<sup>8</sup> Fashion houses typically express outrage at the perceived wrongfulness of having their work copied,<sup>9</sup> despite a growing body of evidence that knock-off designs actually provide an economic benefit, rather than a detriment, to designers.<sup>10</sup> And when the devout Christian sculptor Frederick Hart sued Warner Brothers for using a likeness of his religious sculpture in the orgy scene of the film *The Devil's Advocate*, he explained his motivation not in terms of the studio's failure to pay for the rights to use his work, but be-

6. See Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 640–47 (2012).

7. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

8. Scott Adams, *Is Copyright Violation Stealing?*, DILBERT BLOG (Apr. 7, 2007), [http://dilbertblog.typepad.com/the\\_dilbert\\_blog/2007/04/is\\_copyright\\_vi.html](http://dilbertblog.typepad.com/the_dilbert_blog/2007/04/is_copyright_vi.html).

9. See generally KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012) (recounting stories of fashion designers, such as Foley + Corinna, whose anger over unauthorized copies of their clothing led them to lobby for federal legislation to stop the practice).

10. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1732–35 (2006) (arguing that unauthorized copies of fashion designs help the copied designers by burnishing their brands while not harming them because knockoffs are purchased by consumers in different markets).

cause he felt deeply offended at the inclusion of his Christian-themed sculpture in a prurient context.<sup>11</sup>

Just as copyright's *ex ante* incentives story does not mesh with authors' actual motivations to create, copyright's *ex post* infringement story does not mesh with owners' actual motivations to file suit. Yet while the secondary literature is replete with accounts exploring the former issue, it is mostly silent as to the latter.<sup>12</sup> In this Article, we seek to remedy this lacuna in copyright scholarship, critiquing the dominant economic account of infringement litigation by exposing the complex psychological causes that lead owners to sue over unauthorized use of their works. This account is important for two related reasons. First, it provides the missing counterpart to the critique of copyright's authorial incentive story. Scholars have focused these critiques on the mismatch between economic incentives and future creative production. Our analysis of the psychology of infringement litigation shows that copyright's market-oriented approach is flawed for a separate, unappreciated reason: owners' *ex post* reasons for suing are also at odds with the kind of predominantly monetary motivations that copyright law is meant to assume. And second, exposing the complex moral psychology of infringement reveals that owners are often motivated to litigate in ways that undermine, rather than further, copyright's goals of optimizing creative production. This insight carries important normative implications, for it is only when law takes account of the full range of owners' motivations for filing suit—financial and nonfinancial alike—that it can craft a copyright regime that effectively promotes creative and intellectual progress.

The many critiques of copyright's economic-incentivist model typically debunk that model by looking to the psychology of creation and creativity.<sup>13</sup> Here, too, we critique the infringement aspect of this model by looking to the psychology of trans-

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11. Gustav Niebuhr, *Warner Brothers Sued Over Use of Sculpture in "Devil's Advocate,"* DESERET NEWS (Dec. 7, 1997), <http://www.deseretnews.com/article/599449/Warner-Brothers-sued-over-use-of-sculpture-in-Devils-Advocate.html>.

12. There is some interesting work about other aspects of infringement litigation, such as what drives lay perceptions of substantial similarity. See Shyamkrishna Balganesch et al., *Judging Similarity*, 100 IOWA L. REV. 267 (2014).

13. See generally, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007); Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010).

gression. Our analysis seeks to locate the foundational motivations that lead owners to feel wronged by unauthorized users. To that end, we deploy recent research in moral psychology, a field that examines why people perceive certain conduct as right or wrong. A particular school of thought within moral psychology, moral foundations theory (MFT), provides a systematic framework for understanding and explaining the psychology of infringement.<sup>14</sup> This theory illuminates the plural, innate reactions that inevitably characterize owners' reactions to copyright infringement—and that range far beyond concern for financial gain or loss. The moralized anger or hurt that people express in reaction to unauthorized use of their creative works have their roots in intuitive concerns about issues such as non-pecuniary harm, broken reciprocity, anti-Americanism, threats to social order, and a sense of disgust and sacrilege.<sup>15</sup>

This Article presents a novel view of the complex moral psychology of infringement. It does so both to complement extant critiques of copyright's incentivist story and to provide a realistic account of owners' motivations for infringement on which a more effective copyright regime may be built. We elaborate these claims as follows. Part I highlights the contrast between the robust critiques of copyright's theory of creation and the paucity of attention to its theory of litigation, and illustrates the social costs produced by increasingly common infringement suits animated by nonfinancial concerns. Part II develops a psychology of infringement, rooted in MFT, that illuminates the plural motivations—including, but ranging far beyond, pecuniary harm—that underlie owners' decisions to sue (or threats to do so). Part III elaborates the implications of our analysis. We first show how our claims forge a middle path that mediates between the traditionally opposed copyright paradigms of market-focused utilitarianism and moral rights. Second, we identify a series of policy levers that lawmakers could employ to reform copyright law in a way that is both mindful of the realities of owners' moral psychology and still true to copyright's goals of optimizing creative production. Finally, the Conclusion reflects on possibilities for future work framed by

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14. For a summary of MFT's claims and the empirical evidence supporting it, see Jesse Graham et al., *Mapping the Moral Domain*, 101 *J. PERSONALITY & SOC. PSYCHOL.* 366 (2011).

15. See Jesse Graham et al., *Moral Foundations Theory: The Pragmatic Validity of Moral Pluralism*, in 47 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 55, 61–71 (Patricia Devine & Ashby Plant eds., 2013) (discussing the various moral foundations that animate our notions of right and wrong).

our analysis, such as empirical research that would further shed light on copyright owners' subjective experience of infringement.

## I. COPYRIGHT CONSEQUENTIALISM AND HUMAN BEHAVIOR

Courts and scholars generally agree that U.S. copyright law is and should be based on consequentialist principles of optimizing creative production by granting certain rights to authors of original works. These rights help protect authors' incentives to create works, and their infringement can result in steep monetary damages and injunctive relief. On this view, copyright law is about regulating markets for creativity.<sup>16</sup> Accordingly, other considerations, including so-called "moral" rights, have no place.

Copyright law's market-oriented consequentialism, however, presents an impoverished view of authors' true motivations with respect both to creating new works and to protecting them via infringement lawsuits. The reasons that authors create and the reasons that they object to uses of their works extend far beyond pecuniary considerations. Much work has noted that copyright fails to account for the full range of authors' creative incentives, but none has yet systematically explored the correlative point that copyright's theory of why owners sue (or threaten to sue) over unauthorized use is similarly narrow and flawed. In this Part, we begin to fill in this gap in the literature, explaining copyright's market-based consequentialism and how this leads law to craft a one-note economic vision of why owners object to unauthorized use of their works.

### A. INCENTIVES AND INFRINGEMENT

#### 1. The Economics of Copyright Law

Creative works like songs, movies, and books present a tricky economic problem—they are incredibly costly to make, but once they have been made they can be very cheaply copied and distributed. In order to recoup the costs of producing new works, authors may try to price copies of their works above the

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16. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 4 (2003) ("Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.").

marginal cost of producing each copy. But others, who have not invested in creating the works, can simply copy them and sell them for less. Eventually, if markets are efficient, the cost of a copy of the work will be driven down to the marginal cost of producing and distributing it. At this point, however, authors are unable to recoup the costs of their creative investments and, instead of creating new works, may choose to do something else with their lives; there is no incentive to continue singing, filming, and writing.<sup>17</sup>

Copyright law solves this public goods problem by giving authors exclusive rights to copy, distribute, perform, display, and remake their works.<sup>18</sup> These rights allow authors to charge prices for copies that exceed the marginal costs of production, thereby allowing them an opportunity to recoup their initial investments.<sup>19</sup> Moreover, if others violate these rights, authors can sue to enjoin further infringement<sup>20</sup> and to recover substantial damage awards representing the profits they have lost or disgorging the profits the infringers have gained.<sup>21</sup> The law prevents others from producing works or copies that risk substituting for the original author's work.<sup>22</sup> Copyright law preserves authors' ability to make money from their creations and, thus, the public is better off because people can now hear, see, and read these new works.

17. For a review of this approach, see *id.* at 37–70.

18. 17 U.S.C. § 106 (2012).

19. Of course, not all authors will recoup their investments if the public decides it does not want to consume the work at any price. See WINTER'S TALE, (Warner Bros. Ent. 2014); John Clyde, *5 Biggest Box Office Flops of 2014, So Far*, KSL.COM (May 5, 2014, 2:04 PM), <http://www.ksl.com/?sid=29768532&nid=1205&title=5biggestboxofficeflopsof2014sofar> (explaining that *Winter's Tale* cost \$60 million to make yet produced worldwide gross earnings of merely \$27 million). And by “see” in the citation, we do not, in fact, suggest that you see *Winter's Tale*.

20. 17 U.S.C. § 502(a) (“Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”).

21. *Id.* § 504(a) (“Except as otherwise provided by this title, an infringer of copyright is liable for either—(1) the copyright owner's actual damages and any additional profits of the infringer, . . . or (2) statutory damages . . .”).

22. Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1679 (2012) (“By deterring such copying, copyright law in turn preserves creators' incentives to produce more creative expression. The law treats copying as a wrong in this view only because of the law's commitment to inducing creativity by deterring copying.”).

In solving this problem, however, copyright law creates other problems. First, because authors can charge supra-marginal prices for copies of their works, some people will not get to enjoy them.<sup>23</sup> A consumer might have been willing to pay the marginal cost of producing and distributing copies of a movie, but she might not be willing to pay the supra-marginal rate charged by the author. This missed opportunity, known as a deadweight loss, is one of the costs of the copyright system.<sup>24</sup> Second, because copyright law gives authors the exclusive rights to remake and adapt their works, it increases the costs of secondary creativity.<sup>25</sup> If a new creator has an idea for how to improve or adapt a protected work, she must first engage in costly negotiations with the original author.<sup>26</sup> The costs of negotiating and the original author's ability to unilaterally prevent many adaptations of her work mean that some new works will never get created.<sup>27</sup> The limitations on subsequent creators are another cost of the copyright system.

For these reasons, copyright law does not assign authors the most robust set of rights possible; instead, it works a tradeoff between the incentives given to authors and access to creative works preserved for the public.<sup>28</sup> Copyrighted works eventually enter the public domain, at which point they can be freely copied, used, and adapted by others.<sup>29</sup> Moreover, not all uses of a work constitute copyright infringement,<sup>30</sup> and other

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23. LANDES & POSNER, *supra* note 16, at 22 (“[IP] rights reduce the demand for intellectual property by inserting a wedge between price and marginal cost, creating deadweight loss that must be balanced against the disincentive effects of denying the creator of such property a remedy against copiers.”).

24. *Id.*

25. *Id.* at 58 (“By discouraging copying, [copyright law] discourages the historically very important form of artistic creativity that consists of taking existing work and improving it.”).

26. *Id.* at 60.

27. See Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 46 (2011).

28. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (“Copyright protection . . . has never accorded the copyright owner complete control over all possible uses of his work.”).

29. For newly created works, copyright subsists for the life of the author plus seventy years or for ninety-five years from the date of publication, depending on the type of work. 17 U.S.C. § 302 (2012); see Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (introducing the notion of the public domain as an object of social and cultural concern).

30. See, e.g., *Vincent v. City Colls. Of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007) (“[Plaintiff] appears to believe that a copyright entitles the author to determine how a work is used and thus to prevent the book’s adoption as a



uses of a work are exempted from the authors' exclusive rights under the fair use doctrine.<sup>31</sup> This doctrine ensures that some valuable uses of a work, including for criticism, parody, or educational purposes, are not solely under the author's control. Through these and other doctrines, copyright law attempts to balance creative incentives and public access.<sup>32</sup> Rights are granted solely for the purpose of incentivizing creative production,<sup>33</sup> but, given the costs these rights generate, they must be limited to that purpose only. As a matter of economic theory, any copyright protection that exceeds the minimum necessary to encourage creativity is costly to social welfare.

The rules related to infringement litigation—the focus of this Article—are meant to exemplify this balance between market-based incentives and public access. The rights granted by copyright law seek primarily to prevent unauthorized copying that substitutes for the market of the author's work.<sup>34</sup> When there is no reason to think that the defendant's copy will substitute for the author's work, there is no threat to the author's creative incentives, and thus, no need for copyright protection. Copyright law's focus on monetary creative incentives is most evident in its remedial doctrines. The law's damages provisions entitle plaintiffs to relief for financial losses that have been caused by the infringement, but plaintiffs are not allowed to recover for non-pecuniary losses, including emotional harm.<sup>35</sup> Successful plaintiffs may recover for both their actual damages and any profits made by defendants that are attributable to the

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teaching text. Not at all.”).

31. 17 U.S.C. § 107.

32. LANDES & POSNER, *supra* note 16, at 11.

33. When we refer to “creative production,” this includes behaviors associated with producing the work as well as those associated with distributing it. See *Eldred v. Ashcroft*, 537 U.S. 186, 188 (2003) (noting that copyright protection might be granted to “encourage copyright holders to invest in the restoration and public distribution of their works”).

34. Judge Posner explains copyright's focus on substitutionary copying in *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (“[C]opying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work . . . is not fair use.”).

35. 17 U.S.C. § 504(b). The limitation of damages to financial losses, unfair gains, and statutory damages appears to apply to violations of the Visual Artists Rights Act, 17 U.S.C. § 106A, as well. See 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:46, at 16-92 (2015).

infringement.<sup>36</sup> These amounts reflect the value of sales of the work by plaintiffs or defendants.<sup>37</sup> Alternatively, plaintiffs may elect to recover “statutory damages” instead of proving actual damages.<sup>38</sup> Nonetheless, statutory damages are still generally intended to serve as a means of protecting the markets of copyrighted works because actual damages are hard to measure and infringement is difficult to deter;<sup>39</sup> they are not meant to allow recovery of non-pecuniary losses.<sup>40</sup> Similarly, injunctive relief made available by copyright law is intended to prevent irreparable monetary harm caused by the possibility of further infringement.<sup>41</sup>

This focus on pecuniary incentives is also explicit in the fair use analysis. Each of the four statutory fair use factors explores, to varying degrees, the extent to which the defendant’s conduct poses a risk to the author’s incentives.<sup>42</sup> The first fac-

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36. *Pfanenstiel Architects, Inc. v. Chouteau Petroleum Co.*, 978 F.2d 430, 432 (8th Cir. 1992) (“The Copyright Act allows recovery of actual damages, in addition to the infringer’s profits, in recognition that some types of infringement inflict more harm to the copyright owner than the benefit reaped by the infringer, for example, where the infringer’s minimal use forecloses a broader market or where the copyright owner’s provable profit margin is greater than the infringer’s.” (citations omitted)); *see also* *Eagle Servs. Corp. v. H2O Indus. Servs., Inc.*, 532 F.3d 620, 624 (7th Cir. 2008).

37. 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 14.02[A][1], at 14-14 to -17 (2015).

38. 17 U.S.C. § 504I(1).

39. H. COMM. ON THE JUDICIARY, 87TH CONG., *COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 102-03* (Comm. Print 1961) (listing four reasons for statutory damages); *see also* Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 304-05 (2014) (discussing the role of statutory damages as a multiplier that compensates for under-enforcement of IP rights).

40. *See* 6 PATRY, *supra* note 35, § 22:174, at 22-451. This is not to suggest that statutory damages and injunctive relief were exclusively meant to solve economic problems in copyright law. These two doctrines can also be understood as protecting authors’ moral interests in their works above and beyond any dollar losses that they may suffer.

41. 17 U.S.C. § 502(a) (“Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”); *see* 6 PATRY, *supra* note 35, § 22:74, at 22-233 to -237.

42. The four factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to

tor's emphasis on the nature of the defendant's use distinguishes between commercial activities that are likely to adversely affect the market for the author's work and non-commercial activities that are less likely to do so. The first factor also differentiates "productive" or "transformative" uses of the author's work from uses that will substitute for its market value.<sup>43</sup> Even more explicitly, the fourth factor addresses "the effect of the use upon the potential market for or value of the copyrighted work."<sup>44</sup> The Supreme Court has called this factor "undoubtedly the single most important element of fair use."<sup>45</sup> When the defendant's work causes "harm arising from [its] ability . . . to act as a substitute for plaintiff's work in the marketplace" it will weigh strongly against a finding of fair use.<sup>46</sup> The second and third factors, which address, respectively, the nature of the plaintiff's work and the amount that was copied, also help determine whether the defendant's behavior is a threat to market-based creative incentives.<sup>47</sup> The fair use doc-

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the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. Although the fourth factor is explicitly concerned with market harm, each of the other factors reflects a concern with markets and incentives. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1604-05 (1982).

43. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). In *Campbell*, for example, the Court stressed that fair use tolerates transformative uses because they are less likely to be market substitutes for the owner's work. 510 U.S. at 591 ("[W]hen . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.").

44. 17 U.S.C. § 107.

45. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (footnote omitted). Whether this is still the case has been doubted. See 4 PATRY, *supra* note 35, § 10:149, at 10-503.

46. 4 PATRY, *supra* note 35, § 10:150, at 10-510.

47. The second factor's analysis of the nature of the plaintiff's work often involves attention to the reasons for its creation and its status as published or unpublished. See *Harper & Row*, 471 U.S. at 553 ("The right of first publication implicates a threshold decision by the author whether and in what form to release his work."); *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) (distinguishing between informational and creative works). In considering the amount and substantiality of the portion used in the defendant's work, the third factor assumes that smaller or less important uses are less likely to have substitutive effects on the plaintiff's market. *Harper & Row*, 471

trine is meant to absolve users of copyrighted works of infringement liability when their behavior is unlikely to harm authors' financial motivations for creating and distributing new works.

Under the standard view, copyright law exists to solve an economic problem about creative incentives and public access. Contemporary copyright's infringement doctrines reflect this concern about optimizing market-based incentives. In particular, copyright law's remedial and fair use doctrines stress the importance of market harm as the primary, and perhaps even sole, feature of the wrongfulness of unauthorized use. Where market harm, and thus harm to creative incentives, does not exist, copyright law should not curtail behavior.<sup>48</sup>

## 2. Markets, Motives, and Morals

The preceding subsection described copyright law's basic normative consequentialist structure and the doctrines it employs to achieve it. That structure arises from foundational assumptions about people's behavior and motivation. The governing assumption of copyright law is that people are rational maximizers of their own welfare, measured primarily in monetary terms.<sup>49</sup> People act—to create new works, to copy or consume those works, and to litigate over them—when the monetary benefits they receive exceed the activity's monetary costs.

As Samuel Johnson said, “[n]o man but a blockhead ever wrote, except for money,”<sup>50</sup> and U.S. copyright law generally concurs that financial incentives are essential for creativity. In 1954, the Supreme Court explained, “[t]he economic philosophy

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U.S. at 565 (“[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.”).

48. There are some instances where the Copyright Act does appear animated by concerns separate and apart from incentivizing authors to create. The Visual Artists Rights Act (VARA), 17 U.S.C. § 106A, provisions enabling terminations of transfer, *id.* § 203, and various exceptions in favor of the blind, *id.* § 121, seem motivated by moral rights or fairness considerations. As explained in Part I.A, though, the dominant theme in the Copyright Act appears to be its concern for optimizing creative production by extending economic monopolies to authors. And even if this were not the case, our claims in Part III would remain the same, since we regard this as a worthy normative aspiration.

49. See Buccafusco & Sprigman, *supra* note 27, at 45.

50. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (quoting Samuel Johnson).

behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”<sup>51</sup> More recently, the Court, riffing on Adam Smith, declared that “copyright law serves public ends by providing individuals with an incentive to pursue private ones.”<sup>52</sup> Leading theories of copyright law also subscribe to the notion that financial incentives are the dominant motivators of authors’ behavior.<sup>53</sup> People will not create new works nor sue to protect them, according to this theory, unless it makes economic sense to do so.<sup>54</sup>

In the standard view of how infringement works, copyright law pairs a consequentialist, pecuniary, and market-oriented goal with a rationalist, pecuniary, and market-oriented account of human behavior. Copyright law is seen as an administrative system for regulating the behavior of rational, welfare-maximizing people. Accordingly, “moral” concerns about fairness, justice, and “rights” are generally considered irrelevant at best and harmful at worst to copyright law’s aims and doctrines. It is a familiar, even uncontroversial, notion among judges and scholars that American copyright law is not driven by so-called “moral”—i.e., non-pecuniary—considerations.<sup>55</sup> Wil-

51. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

52. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18; ADAM SMITH, AN INQUIRY INTO AND CAUSES OF THE WEALTH OF NATIONS 70 (Roy H. Campbell & Andrew S. Skinner eds., Liberty Fund 1981) (1776) (“It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our necessities but of their advantages.”).

53. According to Landes and Posner, “[s]ince the decision whether to create the work must be made before the demand for copies is known, it will be a ‘go’ only if the difference between expected revenue and the cost of making copies equals or exceeds the cost of expression.” LANDES & POSNER, *supra* note 16, at 39; *see also* RONALD A. CASS & KEITH N. HILTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS (2013) (applying an economic framework to the analysis of intellectual property laws).

54. Julie Cohen explains, “[p]ractitioners of economic analysis treat creative motivation as both internal and exogenous—a preexisting preference that matters only to the extent that it is presumptively enhanced by the possibility of an economic reward.” JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 65 (2012).

55. *E.g.*, Cassandra Spangler, *The Integrity Right of an MP3: How the Introduction of Moral Rights into U.S. Law Can Help Combat Illegal Peer-to-Peer Music File Sharing*, 39 SETON HALL L. REV. 1299, 1321 (2009) (“[C]opyright is inherently amoral.” (internal quotation marks omitted) (cita-

liam Patry, for example, observed that “[t]here is no reason to keep pretending that the Copyright Wars involve morality or principle—they don’t and never have.”<sup>56</sup> Judges echo this consensus. In the earliest U.S. Supreme Court copyright case, *Wheaton v. Peters*, the Court held that copyright was solely a product of statutory law, not natural right. This holding explicitly rejected the plaintiff’s position that copyright was “established in . . . abstract morality.”<sup>57</sup> The Court has explained that “[t]he primary objective of copyright is not to reward the labor of authors, but to ‘promote the Progress of Science and the useful Arts.’”<sup>58</sup> Federal courts have generally concurred in this conclusion, typically citing copyright’s market-based underpinnings as a basis for rejecting any other human motivations in the infringement calculus. As the Second Circuit recently held, “copyright laws are not matters of strong moral principle but rather represent economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole.”<sup>59</sup>

Some scholars object to the status quo account of U.S. copyright law, including its infringement provisions, and have argued that the law should also reflect other, non-consequentialist concerns such as authorial dignity and autonomy. Yet, even these authors acknowledge the dominantly economic basis of domestic copyright law.<sup>60</sup> Further, the instances

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tion omitted)); Patti Waldmeir, *There Is No Nobility in Music Theft*, FIN. TIMES (London), Sept. 29, 2003, at 14 (“[C]opyright law is not a commandment of God or nature, like the prohibition against murder, or the theft of an ox or an ass or a wife.”).

56. WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 189 (2009).

57. 33 U.S. 591, 672 (1834) (Thompson, J., dissenting).

58. *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8).

59. *Sarl Louis Feraud Int’l v. Viewfinder, Inc.*, 489 F.3d 474, 480 n.3 (2d Cir. 2007) (internal quotation marks omitted); see also *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law . . . does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”).

60. See ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2 (2011) (“Current convention has it that IP law seeks to maximize the net social benefit of the practices it regulates.”); MADHAVI SUNDER, FROM GOODS TO THE GOOD LIFE 11 (2012) (“Intellectual property scholars today focus on a single goal: efficiency.”); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006) (“Copyright’s provision of economic incentives is consistent with its underlying utilitarian philosophy.”).

where U.S. copyright law and scholarship do seem to take account of moral considerations are often used to provide evidence that the rest of the law is amoral. The most conspicuous black-letter-law example is the Visual Artists Rights Act (VARA).<sup>61</sup> This statute incorporates into the U.S. Code some of the integrity and attribution rights enjoyed by authors in foreign “moral rights” regimes,<sup>62</sup> though its substantive scope is narrow, and litigants have rarely invoked it. With its reverence for concepts that spring from the natural rights justifications for copyright, VARA is depicted as an island of morality in U.S. copyright law’s amoral sea. Interestingly, despite its natural rights justifications, violations of VARA are subject to the same market-based remedies as traditional copyright infringement.<sup>63</sup> Whether from those who approve or disapprove, the consensus is clear: American copyright law is concerned with the financial motivations of authors, and that means it operates outside the moral domain.<sup>64</sup>

#### B. RECONCEIVING COPYRIGHT ACTORS

For copyright law to best achieve its consequentialist aims, of course, its descriptive account of human motivation should be accurate. Copyright law attempts to manipulate people’s be-

61. 17 U.S.C. § 106A (2012).

62. See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945, 945–47 (1990). For an example of an artist’s successful assertion of a VARA claim, see *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999) (holding that a city’s destruction of an artist’s public mural as part of urban renewal project violated VARA).

63. See 5 PATRY, *supra* note 35, § 16:46, at 16-92. Another example of a plausibly non-consequentialist doctrine in copyright law are rules allowing authors to terminate transfers of their works after a certain period of time. 17 U.S.C. § 203. These rules, which seek to give authors with poor bargaining power “another bite at the apple,” make little sense from a consequentialist perspective and are best understood as enacting a distributional preference for authors over publishers and producers. See Guy A. Rub, *Stronger Than Kryptonite: Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 51–64, (2013).

64. See sources cited *supra* notes 59–60; see also Sheldon W. Halpern, *Copyright Law in the Digital Age: Malum In Se and Malum Prohibitum*, 4 MARQ. INTELL. PROP. L. REV. 1, 10–11 (2000) (premising a lecture on the notion that copyright is malum prohibitum, not malum in se); Spangler, *supra* note 55 (“Americans see copyright as a money issue and not a moral issue”). See generally Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States*, 28 BULL. COPYRIGHT SOC’Y U.S.A. 1 (1980) (characterizing U.S. copyright generally as “amoral”).

havior through positive and negative incentives, so, for it to succeed, it must understand how people respond to those incentives.<sup>65</sup> In recent years, however, the rationalist, market-oriented view of human behavior that undergirds copyright policy has been deeply undermined by empirical research from the social sciences. Humans, a group that includes copyright authors, have been consistently shown to be much more complicated than the standard view suggests.<sup>66</sup> Rather than rationally computing costs and benefits and acting accordingly, people are influenced by a wide range of motivations and often act in ways that are clearly against their economic interests.<sup>67</sup>

In the context of copyright law, a number of legal scholars have recently addressed the growing scientific literature on the role of incentives for promoting creativity.<sup>68</sup> Contrary to Johnson's dictum, people write, paint, and make movies for a host of reasons that have little to do with market compensation. Moreover, some empirical research suggests that receiving monetary payments for creativity can hinder rather than improve creative performance.<sup>69</sup>

Much of the recent literature in this area has focused on qualitative empirical studies of creators' stated motivations.<sup>70</sup>

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65. Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 262 (2013).

66. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2012) (cataloging the many heuristics and biases that affect judgment and decision-making).

67. See Buccafusco & Sprigman, *supra* note 27, at 36–39; Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 23–25 (2010); Christopher Jon Sprigman, Christopher Buccafusco & Zachary Burns, *What's a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389, 1405–20 (2013).

68. See, e.g., Fromer, *supra* note 5 (discussing the utility of expressive incentives in intellectual property); cf. Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, *Experimental Tests of Intellectual Property Laws' Creativity Thresholds*, 92 TEX. L. REV. 1921 (2014) (reporting results of experiments to determine the effects of incentives on creativity in the IP context).

69. Teresa M. Amabile, *Effects of External Evaluation on Artistic Creativity*, 37 J. PERSONALITY & SOC. PSYCHOL. 221, 222 (1979) (finding that subjects acting with reward expectation are judged to produce significantly less creative work than those acting without reward expectation). For a discussion of this literature, see generally Buccafusco, Burns, Fromer & Sprigman, *supra* note 68.

70. See generally MIHALY CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION (1996) (describing the "flow theory" for the creative process).



In these studies, market-based incentives often play a limited role, at best, in people's descriptions of why they create. According to Julie Cohen, "[c]reative people are much more apt to describe what they do as the product of desire, compulsion, or addiction, and to understand particular results as heavily influenced by cultural, intellectual, and emotional serendipity."<sup>71</sup> Similarly, Rebecca Tushnet documents the role of "play" and the desire for cultural engagement in motivating creators.<sup>72</sup> In a recently published empirical study, Jessica Silbey interviewed dozens of creators about the role that IP laws play in their lives and work.<sup>73</sup> Rather than following the accepted incentives story, their accounts of the creative process are "temporal, emergent, multiple, and moral."<sup>74</sup> Silbey notes that the "diverse narrative explanations undermine the one-dimensional IP incentive story and belie the categorical principles of a legal approach that masks more complex realities."<sup>75</sup>

Further challenging the received wisdom of copyright's incentives story is the large and rapidly expanding body of research on intellectual property law's "negative spaces"—areas of creative production that lack or do not use formal legal protection but still demonstrate substantial creativity.<sup>76</sup> In fields like open source software,<sup>77</sup> graffiti art,<sup>78</sup> and fan fiction,<sup>79</sup> the lack of legal protection means that creators see little or no monetary return from their creativity. Nonetheless, these areas exhibit substantial creativity and growth, suggesting that creators are motivated by other market and non-market desires.

71. Julie E. Cohen, *Copyright As Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143. Cohen goes on to propose that copyright should instead be used to "enable the provision of capital and organization so that creative work may be exploited," so that it "creates a foundation for predictability in the organization of cultural production, something particularly important in capital-intensive industries like film production." *Id.*

72. Tushnet, *supra* note 4, at 527.

73. JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015).

74. *Id.* at 16.

75. *Id.*

76. See generally RAUSTIALA & SPRIGMAN, *supra* note 9 (summarizing much of this research).

77. Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 372–73 (2002).

78. Al Roundtree, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959, 961 (2013).

79. Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction As Fair Use*, 95 CALIF. L. REV. 597, 612 (2007); Tushnet, *supra* note 4, at 531.

They experience internal satisfaction from the act of creating,<sup>80</sup> they value the social aspects of being part of a creative community, and they desire having a strong reputation within that community.

In many contexts perhaps, the pecuniary monetary incentives protected by copyright law are doing little to increase creative production, and they may be harming it. Since copyright protection is costly, for the reasons discussed above, it should be reduced or even eliminated if it is not producing substantial incentive effects.<sup>81</sup> According to this research, state interference in the market for creativity is an evil when it cannot be shown to be a good.<sup>82</sup> Other scholars have suggested ways that copyright law could be restructured to take into account authors' heterogeneous motivations.<sup>83</sup> For example, Jeanne Fromer has proposed offering "expressive incentives," including default attribution rights that "convey solicitude for and effectuate [authors'] personhood and labor interests, thereby maximizing the

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80. Jürgen Bitzer et al., *Intrinsic Motivation in Open Source Software Development*, 35 J. COMP. ECON. 160, 167 (2007) (finding that "the fun of programming is a major motivational driver" for open source software programmers); Karim R. Lakhani & Robert G. Wolf, *Why Hackers Do What They Do: Understanding Motivation and Effort in Free/Open Source Software Projects*, in PERSPECTIVES ON FREE AND OPEN SOURCE SOFTWARE 3 (J. Feller et al. eds., 2005) ("We find . . . that enjoyment-based intrinsic motivation—namely, how creative a person feels when working on the project—is the strongest and most persuasive driver.").

81. Johnson, *supra* note 6, at 625; Diane Leenheer Zimmerman, *Copyrights As Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 43 (2011). Some of the literature on IP's negative spaces has suggested that the informal norms that operate in the absence of formal IP protection may be over-protective relative to copyright law. For example, informal norms systems might prevent some kinds of conduct that would otherwise be tolerated by formal copyright law, including copying ideas and parody. See Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1823 (2008) ("[C]omedians' norm system does not merely exceed the scope of copyright law but extends also to the type of appropriation typically dealt with under the heading of plagiarism . . .").

82. To paraphrase OLIVER WENDELL HOLMES, JR., THE COMMON LAW 96 (1881).

83. Cohen, *supra* note 71; Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation To Shape Copyright Protection*, 69 LA. L. REV. 1, 4 (2008) (arguing for thinner copyright protection for works that did not require copyright incentives in order to be created and distributed); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2008 (2011) (describing the difference between internal and external motivation).

creative incentive for the benefit of society.”<sup>84</sup> Under this proposal, copyright law’s normative consequentialism is maintained, but it attempts to achieve that goal through a more nuanced and accurate understanding of authors’ behavior.

### C. TOWARDS A BEHAVIORALLY REALISTIC PICTURE OF COPYRIGHT LITIGATION

The research discussed above highlights stark divergences between copyright law’s assumptions about authors’ creative incentives and the social scientific account of creative motivation. If copyright law’s incentives regime is doing a poor job of encouraging creativity, then the tradeoffs at the system’s foundation will fail. Perhaps more important to fully understanding owners’ incentives, however, is what happens after copyrights are granted—an issue scholars have yet to fully explore. The law allows authors to sue for unauthorized use of their works in order to prevent harm to certain markets. By preventing others from copying a work in ways that will substitute for sales of the author’s work, authors’ incentives to create are preserved. Copyright law assumes that authors will only object to uses of their works that threaten these sorts of market substitution harms.<sup>85</sup> This Article proves that assumption wrong.

Just as people create for a variety of different reasons, they also object to people using their creations for many reasons. Some objections to copyright infringement are based on reasons that flow directly from the law’s concern about substitutionary copying. For example, when the manufacturer of the popular “Beanie Babies” stuffed animals sued a competitor who was making very similar toys, the plaintiff was clearly concerned that consumers would purchase the defendant’s product instead of its own.<sup>86</sup> Similarly, the concerns of the recording and motion picture industries about online file sharing primarily arise from anxieties that consumers will not purchase content when it is freely available, thereby undermining revenues and harming creative incentives. But, as the examples in the Intro-

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84. Fromer, *supra* note 5, at 1764. *But see* Sprigman, Buccafusco & Burns, *supra* note 67, at 1426–31 (relying on empirical data to argue that offering default attribution rights could impair licensing of works and produce market inefficiencies).

85. The fair use and remedial doctrines discussed above are intended to isolate market-based harms as the only compensable aspects of copyright infringement. Since owners cannot recover for non-market injuries, they presumably lack the incentive to bring suit.

86. *See Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167 (7th Cir. 1997).

duction indicate, many authors object to copyright infringement not because it harms the market for their works, but instead because they believe that the use is unfair, immoral, or obscene. And infringement suits—and even threats of infringement suits—that are rooted in motivations unrelated to preserving owners’ financial interests in their works tend to undermine copyright’s goal of optimizing creative production.

This hypothetical has real-world analogues. The Church of Scientology has frequently sued for copyright infringement when its ex-members have published its materials online to express their concern over its practices,<sup>87</sup> as have other churches.<sup>88</sup> And other examples of infringement litigation motivated by non-market harm abound. Some such lawsuits have targeted uses of copyrighted works that the owners considered demeaning or “tarnishing” of the original. Frederick Hart’s lawsuit against Warner Brothers for including obscene variations on his sculptures in a film scene clearly derived from his sense that the unauthorized use offended his Christian sensibilities.<sup>89</sup> Relatedly, a group of Hollywood directors concerned about the artistic integrity of their works used copyright law to enjoin (and, eventually, put out of business) a company that created family-friendly versions of films<sup>90</sup>—even though doing so intro-

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87. *E.g.*, *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (describing a lawsuit against an operator of an online network for storing users’ files that contained material critical of Scientology). The Church of Scientology also frequently threatens infringement lawsuits as a way of combating critical uses of its materials, which amounts to an even more cost-effective way to leverage its copyrights to suppress dissent. *E.g.*, Nick Denton, *Church of Scientology Claims Copyright Infringement*, GAWKER (Jan. 16, 2008), <http://gawker.com/5002319/church-of-scientology-claims-copyright-infringement> (noting numerous threats of suit against publisher of a biography of Tom Cruise that exposed many of Scientology’s secrets, as well as media outlets that reported on the work).

88. The Mormon Church has also sued ex-members who have published its internal documents in critical contexts. One couple faced such an infringement suit that it resolved in an undisclosed settlement when the Church’s suit survived a motion to dismiss. *See Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999); *see also* Ben Fulton, *The Tanners’ Uneasy Settlement*, SALT LAKE CITY WKLY. (Dec. 7, 2000), [http://web.archive.org/web/20010215144156/http://www.avenews.com/editorial/no/cw/city/city\\_2\\_001207.cfm](http://web.archive.org/web/20010215144156/http://www.avenews.com/editorial/no/cw/city/city_2_001207.cfm) (discussing this case and concluding that for the Mormon Church, “[c]opyright litigation is becoming one of the most effective ways of silencing critics”).

89. *See infra* notes 165–66 and accompanying text (discussing this case).

90. *Clean Flicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006).

duced the directors' works to new and lucrative markets.<sup>91</sup> A celebrity couple angered by paparazzi taking photos of their secret nuptials recently acquired the rights to the offending images and successfully shut down publication of them.<sup>92</sup> J.D. Salinger leveraged his exclusive rights to suppress a sequel to *Catcher in the Rye* that posed a negligible threat to the value of the original.<sup>93</sup> Copyright infringement suits rooted in non-pecuniary motivations continue to proliferate<sup>94</sup>: they include a pro-choice group suing a pro-life group for its criticism of the former's videos;<sup>95</sup> Michael Savage suing the Council on American-Islamic Relations to facilitate his anti-Muslim rants;<sup>96</sup> a widow suing a documentarian whose film painted an unflattering portrait of her deceased husband;<sup>97</sup> and songwriters Don Henley and Jackson Browne suing politicians whose views they dislike for using their works at campaign rallies.<sup>98</sup>

Although copyright law's normative structure is organized around harms to creative incentives, copyright law doctrine does little to police plaintiffs' plural motivations for bringing infringement suits. Copyright infringement is generally believed to be a strict liability offense.<sup>99</sup> If the defendant has infringed one of the plaintiff's exclusive rights, she will be *prima facie* li-

91. See David Fagundes, *Market Harm, Market Help and Fair Use*, 17 STAN. TECH. L. REV. 359, 366 (2014) (discussing the financial upsides of *Clean Flicks* for film copyright owners).

92. See *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012).

93. *Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010) (noting the district court's finding that "*60 Years Later* is unlikely to impact the sales of *Catcher* itself").

94. For an argument that such uses of copyright are increasing as owners seek to use their exclusive rights as a form of censorship, see John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245 (2015).

95. *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012).

96. *Savage v. Council on Am.-Islamic Relations, Inc.*, 87 U.S.P.Q.2d (BNA) 1730 (N.D. Cal. July 25, 2008).

97. *Hofheinz v. AMC Prods., Inc.*, No. CV-00-5827 (CPS), 2003 U.S. Dist. LEXIS 16940 (E.D.N.Y. Apr. 21, 2003).

98. *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010) (granting summary judgment on copyright infringement claim for unauthorized use of musical works in campaign ads for Republican Senate candidate Chuck DeVore); *Browne v. McCain*, 611 F. Supp. 2d 1073 (C.D. Cal. 2009) (denying motion to dismiss copyright infringement claims for unlicensed use of musical work in pro-McCain television ad).

99. See, e.g., David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 152 (2009) ("Direct copyright infringement remains a strict liability offense . . .").

able.<sup>100</sup> More important, copyright plaintiffs are not required to show that they have suffered harm.<sup>101</sup> Unlike many torts and property causes of action, copyright infringement will result in liability even if the plaintiff does not present evidence of harm.<sup>102</sup> For example, if a defendant publicly displays the plaintiff's copyrighted painting, proof of the unauthorized display establishes prima facie liability without a showing that the plaintiff suffered any kind of injury, financial or otherwise.<sup>103</sup>

Fair use may provide some solace for defendants who find themselves sued for infringement despite the pecuniarily harmless character of their use. But courts are far from universally sympathetic to the defense, even when owners' suits clearly seek to vindicate only noneconomic interests.<sup>104</sup> And even when users successfully invoke this defense, they invariably have to expend enormous time and litigation costs to do so. Green Day, for example, recently prevailed on a fair use defense in a lawsuit filed by an artist who felt that their unlicensed use of his work in a concert backdrop "tarnished" his image.<sup>105</sup> Pursuing this issue through appeal to the Ninth Circuit is possible, though costly, for internationally famous bands; for the average

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100. Christina Bohannon & Herbert Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 973 (2010) ("A copyright holder can enjoin or demand royalties for virtually any copying, regardless of whether that copying was of a kind likely to harm the copyright holder's incentives to innovate.").

101. See 17 U.S.C. § 501(a) (2012) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . .").

102. Christina Bohannon, *Copyright Harm and Injunctions*, 30 CARDOZO ARTS & ENT. L.J. 11, 14 (2012) ("Copyright plaintiffs are not required to prove that allegedly infringing uses of copyrighted material cause any meaningful harm to them or their incentives to produce creative works. The copyright plaintiff must merely prove copying, and sometimes very little copying will suffice.").

103. Furthermore, prima facie liability will exist even if there is reason to believe that the defendant's behavior *helped* the copyright owner. See Fagundes, *supra* note 91, at 363–64.

104. *E.g.*, *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1164 (9th Cir. 2012) (rejecting the fair use defense despite works' total lack of monetary value); *Salinger v. Colting*, 607 F.3d 68, 74 (2d Cir. 2010); see also Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1099 (2010) ("Although harm to the market for the copyrighted work is one statutory factor that courts consider in fair use, it is not a strict requirement. By emphasizing other factors in the fair use test, a court may easily reject fair use even when evidence of harm is absent or merely speculative. Moreover, what constitutes legally cognizable harm in copyright law is not well defined.").

105. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

person, it is likely impossible.<sup>106</sup> Finally, since judges retain discretion to award or deny attorney's fees and costs in copyright infringement suits, even defendants whose economically harmless uses are totally absolved of liability may find themselves bearing the substantial costs of their vindication.<sup>107</sup>

Even the mere threat of infringement litigation that derives from owners' non-monetary interests can effectively suppress unauthorized use in a manner inconsistent with copyright's aim of optimizing creative production. Users often lack the money to fund a legal defense of their conduct, and the uncertainty of copyright law usually makes it a wiser decision simply to cease a given use rather than risk the hammer of massive statutory damages and outsized attorneys' fees.<sup>108</sup> To take just one example, the Dysfunctional Family Circus (DFC) was a delightfully ribald parody of the wholesome Family Circus cartoon.<sup>109</sup> It exemplified the kind of non-substitutive, non-commercial parody that epitomizes fair use. But when creator Bil Keane got wind of the often-prurient nature of the online parody, he engaged his publisher's lawyers, and the mere threat of costly litigation soon rendered the impecunious DFC defunct.<sup>110</sup> And an owner's reputation for litigious behavior can lead to socially costly self-censorship. For example, the justified reputation of the Martin Luther King, Jr. estate to police use of King's speeches in contexts that are not flattering to King and his family has prevented numerous artists from engaging with

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106. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 940–41 (2007).

107. Michael Savage has twice sued the Council on American-Islamic Relations (CAIR) for copyright infringement simply because CAIR has substantially quoted Savage's words to argue that they represent dangerous hate speech. But while CAIR prevailed in these suits, the court denied their motion to have Savage bear their court costs and attorney's fees, despite the judge's concession that Savage's copyright claim was "never strong and was litigated anemically." *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-06076 SI, 2009 U.S. Dist. LEXIS 4926, at \*1–3 (N.D. Cal. Jan. 26, 2009) (denying CAIR's request for fees).

108. See Gibson, *supra* note 106, at 890.

109. For just one classic example, see *DFC #311*, DYSFUNCTIONAL FAMILY CIRCUS, <http://dfc.furr.org/archive/311.html> (last visited Apr. 19, 2016).

110. See Horselover Fat, *DFC: The Elegy*, ZOMPIST, <http://www.zompist.com/dfcdead.html> (last visited Apr. 19, 2016) (relating the story of the copyright threats that brought down the DFC). This is not always how these stories end. Jim Davis embraced the existential parody of his *Garfield* comic, *Garfield Without Garfield*, and teamed up with the latter's creator to produce a successful book. See Michael Marotta, *Garfield Minus Garfield Equals Book Deal*, BOS. HERALD, Aug. 5, 2008, at 38.

King's work. When *Selma*, a biopic about King's life, was released in 2014, King's speeches were rewritten and paraphrased even though quotations would almost certainly have qualified as fair use.<sup>111</sup> In both of these cases, the public lost access to a richer creative milieu, though the copyright owners' conduct did nothing to enhance or protect their creative incentives.

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Copyright's focus on pecuniary incentives has come under fire from numerous scholars who have illustrated the breadth of reasons that lead authors to create. But this critique gets to the flaws of only part of copyright's incentives story. Law seeks to optimize creative production not only with the carrot of exclusive rights for future works of authorship, but also with the stick of heavy sanctions for unauthorized use of those works. Part I begins a critical conversation about the second half of the incentives story. It has shown that just as copyright law assumes that authors are encouraged to create primarily in response to financial rewards, it also relies on the central proposition that authors sue primarily to remedy harm to their monopolies over works of authorship. But if this assumption proves false, it would raise concerns serious enough to undermine copyright's aims of optimizing creative production. The existence of numerous infringement lawsuits spurred by non-pecuniary motivations, discussed throughout this Part, raises a strong inference that plural motivations underlie owners' decisions to seek infringement remedies. Part II seeks to explore, and fully theorize, those motivations.

## II. THE MORAL FOUNDATIONS OF COPYRIGHT INFRINGEMENT

Part I introduced the idea that copyright law is rooted in a monetary, market-oriented vision of why owners sue that fails to describe the range of motivations underlying infringement actions. But what explains this puzzling slippage between copyright's presumptions about infringement and why owners actually file infringement suits? This Part answers that question

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111. See Jonathan Band, *How Copyright Forced a Filmmaker To Rewrite Martin Luther King's Historic Words*, TECHDIRT (Dec. 30, 2014), <https://www.techdirt.com/articles/20141229/13390429545/how-copyright-forced-filmmaker-to-rewrite-martin-luther-king.shtml>.



in two ways. First, it reflects on the scholarship that has noted different kinds of copyright infringement matters (both threats of suit and filed cases) motivated by non-monetary considerations, observing that none of them explain—or even explore—the foundational motivations underlying these different matters. Second, this Part looks to recent work in moral psychology to provide such a unified account. Cognitive science has shown that morality is a fundamental part of how people experience transgressions, including copyright infringement. These innate moral intuitions explain why owners inevitably object to infringement not only when it causes economic loss, but also when it engages ethical considerations like violated purity and betrayed loyalty, reciprocal fairness and subversion of authority. This map of copyright’s moral domain enables us to consider how to construct authorial incentives in ways that account for owners’ moral intuitions about infringement.<sup>112</sup>

#### A. LOCATING MORALITY WITHIN THE COPYRIGHT SKEIN

We are not the first to recognize that owners frequently file copyright suits for motives unrelated to monetary loss. Numerous commentators have observed this fact, typically in order to highlight the social problems that arise when owners leverage copyright law for purposes unrelated to protecting their creative incentives. John Tehranian, for example, has detailed the capacity of copyright law to suppress political dissent or any other expression with which owners disagree, rendering copyright an engine of censorship rather than an incentive for creative production.<sup>113</sup> Christina Bohannon has written about this issue from a more theoretical perspective, noting numerous infringement lawsuits where owners appear to experience no pecuniary loss, and seeking to solve this problem by developing “a theory of [pecuniary] harm that can give effect to its constitutional purpose.”<sup>114</sup> In a different vein, Amy Adler has argued

112. This account is largely limited to individual owners’ intuitions about copyright infringement. Corporate owners likely tend to be driven more by pecuniary cost-benefit considerations than by moral psychology. We are grateful to Neil Netanel for raising this distinction.

113. Tehranian, *supra* note 94, at 250 (“[C]opyright law has become the weapon *par excellence* of the 21st-century censor.”); see also Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (discussing the effects of copyright infringement litigation on free speech).

114. Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 969 (2007).

that laws enabling artists to vindicate the integrity of their works via moral rights protections tend to suppress the kinds of critical conversations that are the lifeblood of creative progress, citing numerous instances of filed suits that have had this effect.<sup>115</sup> And Jeanne Fromer has shown that despite U.S. copyright law's absence of attribution rights, authors still possess a powerful desire to be associated with their works,<sup>116</sup> which has likely led to attempts to seek attribution via other doctrinal means.<sup>117</sup>

These accounts all seek to describe the same phenomenon: Overreaching owners suing or threatening to sue users for reasons unrelated to their monetary interests in their works of authorship, thereby undermining copyright law's aim of optimizing creative production. While all of this work identifies the existence of such suits and the social costs they exact, none of it addresses the mechanism that underlies these overreaching assertions of owners' rights.<sup>118</sup> Because these projects are concerned with the social problem of excessive copyright lawsuits, they typically stop short of examining why owners file those suits. Some of this scholarship conjectures about these motivations but invariably fails to situate them in the context of any theoretical framework that can provide evidentiary support for their explanatory assertions or help predict more generally why infringement lawsuits happen in the absence of pecuniary incentives.<sup>119</sup>

Prevailing scholarship, in sum, lacks a coherent and systematic account of why copyright owners file or threaten in-

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115. See Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 279–94 (2009).

116. See Fromer, *supra* note 5, at 1764–81.

117. Cf., e.g., *Gilliam v. Am. Broad. Co., Inc.*, 538 F.2d 14, 17 (2d Cir. 1976) (holding that ABC's editing of three Monty Python programs "impaired the integrity of the original work," entitling Monty Python to a preliminary injunction restraining ABC from broadcasting them).

118. Fromer does provide an account for authors' incentives that is rooted in non-pecuniary motivations, such as the desire to be publicly recognized for one's work. See Fromer, *supra* note 5, at 1767–70. But this is an explanation of why authors create works, not why owners sue for their infringement, which merely highlights the same asymmetry we discuss in the Introduction. See *supra* text accompanying notes 7–12 (observing that the secondary literature brims with accounts of why authors create but is puzzlingly bereft of accounts of why they sue).

119. See, e.g., Tehranian, *supra* note 94, at 281 (asserting, plausibly but without evidentiary support, that in many copyright suits, "rightsholders are acting, at least partially, on non-economic dignity or privacy interests that courts have deemed [whether rightfully or wrongfully] legitimate").

fringement suits. This Article seeks to locate just such an explanation, one that can not only make sense of past and present infringement controversies, but that can also provide an ongoing framework for law's remedies for infringement. Because this is ultimately a question about motivation to seek redress, it requires that we look to research about what causes people to feel that they have been wronged. We thus locate our account in moral psychology, the field that examines people's intuitions about right and wrong as a phenomenon of the mind, not just as a matter of analytical philosophy. In particular, we turn to an emergent variant of moral psychology, moral foundations theory (MFT), that seeks to identify the particular intuitions that drive our moral reasoning.<sup>120</sup> MFT suggests that there are at least six different moral foundations that may be activated when people perceive certain patterns in the social world, and that these patterns in turn guide their instinctive judgments of right and wrong.<sup>121</sup> The six foundations identified by MFT research are:

- care/harm (concern that people and objects of value are cared for, and not harmed);
- fairness/cheating (concern that people behave in concert with reciprocity norms such as tit-for-tat and the Golden Rule);
- sanctity/degradation (concern that people seek to remain pure and avoid sullyng sacred things);

120. A major premise of moral foundations theory is that our beliefs about morality are primarily a product of intuition rather than reason. Jonathan Haidt & Craig Joseph, *Intuitive Ethics: How Innately Prepared Intuitions Generate Culturally Variable Virtues*, DAEDALUS, Fall 2004, at 55, 56.

121. Initial work suggested only five moral foundations, hence the reference to five such foundations in this article: Spassena P. Koleva et al., *Tracing the Threads: How Five Moral Concerns (Especially Purity) Help Explain Culture War Attitudes*, 46 J. RES. PERSONALITY 184 (2012).

Later work has reconfigured the moral foundations slightly to reveal a total of six. See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 181–84 (2012) (making the case for a sixth moral foundation looking to liberty and oppression). MFT's leading scholars have emphasized that their claim is that there are at least six moral foundations, and that there may be more. See Graham et al., *supra* note 15, at 104 ("MFT has never claimed to offer an exclusive list of moral foundations."). Other possibilities—called "candidate foundations"—remain under consideration. *Id.* at 104–07 (discussing candidate foundations such as efficiency/waste and ownership/theft). MFT is not, of course, without its critics, some of whom argue that all moral instincts derive from concerns about harm. *E.g.*, Kurt Gray et al., *Mind Perception Is the Essence of Morality*, 23 PSYCHOL. INQUIRY 101, 118 (2012).

- authority/subversion (concern that people defer to legitimate authority figures and socially recognized hierarchies);
- loyalty/disloyalty (concern that people remain loyal to relevant in-groups like nations or families); and
- liberty/oppression (concern that people remain free from being forced to do things by overbearing authorities).<sup>122</sup>

These six moral foundations operate like ethical taste buds.<sup>123</sup> Just as different people may especially like sweet flavors or be particularly disgusted by bitter ones, so may different people be especially morally compelled by acts of loyalty or be particularly offended by impurity. Different people will feature different degrees of sensitivity to different moral foundations,<sup>124</sup> so that what seems right to one person may seem glaringly wrong to another.<sup>125</sup> Of course, multiple moral foundations may undergird intuitions that a behavior is wrong, so that it may be difficult to specify which particular foundations are doing the moral work, especially since we may not be aware of what moral intuitions are driving our attitudes.<sup>126</sup> Finally,

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122. Graham et al., *supra* note 14, at 368–79 (testing the validity of the foundations using the Moral Foundations Questionnaire (MFQ) and concluding that “the MFQ is clearing a high bar in providing unique predictive validity for outcomes relevant for moral and political psychology”). We define and explain each of these moral foundations more extensively in *infra* Part B.

123. See Haidt, *supra* note 121, at 115 (referring to moral foundations as “moral taste receptors”).

124. Importantly, people tend to feature arrays of any or all of the six moral foundations, not just one to the exclusion of the other five. Some people’s moral sensibility may be largely driven by care/harm, while others’ may feature authority/subversion, loyalty/disloyalty and purity/degradation, for example. This different sensitivity to different moral foundations among groups may help to explain, for example, the wide (and increasing) gulf between liberals and conservatives in American politics. See Graham et al., *supra* note 14.

125. Peter H. Ditto & Spassena P. Koleva, *Moral Empathy Gaps and the American Culture War*, 3 EMOTION REV. 331, 332 (2011) (“When people exasperated from a heated political argument exclaim that their opponents ‘just don’t get it,’ moral intuitions are almost always the ineffable ‘it’ the opponents don’t ‘get.’”). For instance, one recent study found that the sanctity/degradation moral foundation predicted disapproval for gay marriage more than any other foundation, suggesting that opposition to gay marriage is most prominent among people who consider homosexuality impure and/or gay unions a degradation of the institution of marriage. See Koleva et al., *supra* note 121, at 188 (“[T]he debate about same-sex relationships and marriage evokes concerns about [various foundations], yet both are by far best predicted by Purity.”).

126. See Koleva et al., *supra* note 121, at 188 (pointing out that MFT research indicates that “attitudes on moral and political issues may have intui-

while MFT assumes that people's moral intuitions and their sensitivities to different foundations are organized in advance of experiences of the world, those intuitions may still be shaped to some extent by the cultures and environments in which people are raised.<sup>127</sup>

Our account of why copyright owners seek remedies for infringement derives from the insight of MFT research that people's responses to transgression—such as the unauthorized use of their works of authorship—are inevitably and richly moral.<sup>128</sup> This assertion flows naturally from a mountain of psychological evidence about human motivation, but it lies at odds with the collective opinion of copyright scholarship,<sup>129</sup> which casually regards copyright infringement as a mere economic injury with narrow moral valence.<sup>130</sup> One advantage of looking at copyright through the lens of MFT is that it corrects this misapprehension and places the idea of morality in its proper place in copyright analysis. Importantly, though, we do not claim that law should provide remedies that reflexively track any moral outrage an owner experiences. Rather, as Part III explores in more detail, we argue that because owners inevitably possess morally charged reactions to infringement, copyright law must recognize this reality in order to achieve its consequentialist aims.

MFT bears other advantages as a theoretical framework for mapping out the domain of owners' psychological reactions to copyright infringement. For one thing, as its name suggests,

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tive bases of which we are not aware").

127. Intuitions are like a "first draft" of our morality, which will inevitably be revised by our life experience. GARY MARCUS, *THE BIRTH OF THE MIND* 34, 40 (2004). So for example, people who grow up in strongly religious communities are likely to be more sensitive to violations of authority and purity than are people who grow up in secular communities, regardless of their innate moral intuitions.

128. A number of recent studies have indeed shown that copyright-relevant behavior is bound up with moral instincts for adults and even for children. See, e.g., Kristina R. Olson & Alex Shaw, "No Fair, Copycat!": What Children's Response to Plagiarism Tells Us About Their Understanding of Ideas, 14 *DEV. SCI.* 431 (2011); Alex Shaw et al., *Children Apply Principles of Physical Ownership to Ideas*, 36 *COGNITIVE SCI.* 1383 (2012).

129. There is a vocal minority of scholars who stress an alternative, moral-rights vision of copyright. See, e.g., Kwall, *supra* note 60; see also sources cited *infra* notes 206–07. This approach better captures the plurality of owners' instincts about infringement—such as the dignitary harm inflicted by unauthorized use—but is more concerned about articulating a series of authorial entitlements and thus lacks the kind of psychological account of intuitive reactions to infringement that we supply here.

130. See *supra* Part I.A (citing scholarship and judicial opinions stating that copyright is a merely economic issue with no moral valence).

MFT is a theory about moral *foundations*. It seeks to identify the ultimate roots of our ethical intuitions, including the moral outrage that owners often express when their works are used without authorization. MFT thus makes sense of the full range of moral intuitions at play in copyright infringement and illustrates the poverty of law's current assumption that owners will sue only when their copyright monopoly is threatened. In addition, MFT provides an evidence-based way of explaining why and when owners are likely to bring infringement suits. While current scholarship assays plausible guesses about the motivations underlying objections to unauthorized use, MFT supplies a framework rooted in empirical analysis and social science that can answer this question more rigorously. Finally, MFT provides a systematic account of ethical instincts, including owners' intuitions that infringement of their works is wrongful. While researchers in the field have stopped short of asserting that the list of fundamental moral intuitions is exhaustive, the theory does depend on the premise that there are a finite and identifiable number of such bases. MFT thus allows us to make sense of owners' moral intuitions in a way that enables systematic, rather than ad hoc, understanding of them retrospectively. Thus, it also permits us to develop rules and remedies that take those intuitions into account. With this understanding of the relationship between copyright and morality in mind, we now turn to a detailed account of how MFT makes sense of the fundamental intuitions animating copyright infringement.

#### B. MAPPING COPYRIGHT INFRINGEMENT'S MORAL DOMAIN

With the tools MFT provides, we can begin the systematic study of moral intuitions about copyright infringement. A number of clarifications are in order before we proceed to that analysis. First, we are not claiming that each of the moral foundations is equally responsible for people's moral intuitions about copyright. The care/harm and fairness/cheating foundations unquestionably do a lot of the moral heavy lifting, at least in the U.S. Nonetheless, the other moral foundations arise regularly and often seem to determine why people have moral objections to uses of their works that cause no monetary harm. Second, our approach to understanding how different moral foundations affect people's judgments about copyright issues centers on what those owners affected by infringement write and say. This includes the writings of judges and legislators, but necessarily also encompasses what owners, users, and the

public say about unauthorized use. In order to study the role of moral foundations in shaping people's judgments, we often focus on the metaphors that people use to talk about copyright. Metaphors are an especially rich source of evidence about moral intuitions because they reveal subconscious or intuitive relationships between abstract concepts and moral judgments.<sup>131</sup> Indeed, some neuropsychological research suggests that people cannot organize their thinking about complex issues, such as morality, without resort to the kind of categories and patterns that metaphors facilitate.<sup>132</sup> With these qualifications in mind, we now take up our analysis of copyright law's moral foundations.

### 1. The Care/Harm Foundation

A major driver of many people's moral intuitions is concern that people be cared for, and, conversely, that they not be harmed. This foundation features centrally in moral intuitions about copyright. Indeed, the straight "utilitarian bargain" story is often interpreted as a narrative about harm, and in particular about preventing pecuniary harm to authors who will be undercompensated in the absence of exclusive rights.<sup>133</sup> This kind of moral appeal shows up most consistently in the testimony and public statements of content industry representatives who are seeking support for stronger laws against unauthorized use of creative works. As one industry representative put it, "[o]nline piracy harms the artists, both the famous and struggling, who create content."<sup>134</sup> The Recording Industry Association of America (RIAA) has described infringement as

131. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCH. REV. 814, 835 (2001) ("Metaphors have entailments, and much of moral argument and persuasion involves trying to get the other person to apply the right metaphor.").

132. HOWARD MARGOLIS, PATTERNS, THINKING, AND COGNITION: A THEORY OF JUDGMENT 1 (1987).

133. For one such expression of the "utilitarian bargain," see Dave Fagundes & Jonathan S. Masur, *Costly Intellectual Property*, 65 VAND. L. REV. 677, 678–79 (2012).

134. DANIEL CASTRO, THE INFO. TECH. & INNOVATION FOUND., BETTER ENFORCEMENT OF ONLINE COPYRIGHT WOULD HELP, NOT HURT, CONSUMERS 2 (2010). It bears noting that even the title of Castro's article frames infringement in terms of harm and care. The Software & Information Industry Alliance similarly framed infringement in terms of deprivation to artists. "When someone infringes a copyright, the copyright holder is effectively deprived of income . . ." *The Content Infringement Problem*, SIAA IP PROTECTION, <http://www.siaa.net/Divisions/IP-Protection-Services/About/The-Content-Infringement-Problem> (last visited Apr. 19, 2016).

“devastating” creators.<sup>135</sup> The standard argument that artists suffer from unauthorized use finds a particularly pathos-inducing corollary in content industry representatives’ invocation of harm to the “little guy” who serves a humble role in the entertainment world (sound engineer assistant, boom mic operator), and who may lose his job if infringement drives recording companies or film studios out of business.<sup>136</sup> These appeals also stress the harm to the consuming public that will accrue if infringement proliferates. “Piracy,” one industry source warns, “ultimately also hurts law-abiding consumers who must . . . compensate for the costs of piracy.”<sup>137</sup> This strategy represents an especially effective invocation of the care/harm narrative because it makes listeners not just concerned that others will be hurt, but that they themselves will suffer.

The relative sobriety of these appeals pales in comparison to the more dramatic attempts to inflame public sentiment about infringement using threats of dire harm. The most infamous is Jack Valenti’s 1982 congressional testimony in which he asserted that “the VCR [i]s to the American film producer and the American public as the Boston strangler is to the woman at home alone.”<sup>138</sup> Valenti’s analogy accessed the care/harm moral foundation in the most visceral possible way, associating the VCR with the specter of a violent criminal threatening to sexually assault and murder a vulnerable victim. Content industry representatives continue to use language designed to trigger moral intuitions against harm. The most frequently in-

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135. Peter Feuilherade, *Online Piracy “Devastates” Music*, BBC NEWS (Mar. 4, 2004, 13:15 GMT), <http://news.bbc.co.uk/2/hi/technology/3532891.stm>.

136. Chris Dodd, *Copyright—A Leading Force for Jobs, Innovation, and Growth*, HUFFINGTON POST (Nov. 19, 2013, 11:21 AM ET), [http://www.huffingtonpost.com/chris-dodd/copyright--a-leading-forc\\_b\\_4302882.html](http://www.huffingtonpost.com/chris-dodd/copyright--a-leading-forc_b_4302882.html) (updated Jan. 25, 2014) (“And these are not just the famous people whose names and faces so many of us know, but the men and women sweating behind the scenes every day developing the latest software, building sets for films and TV shows, operating the lights and cameras, recording and producing the music we listen to, or publishing the latest books we love to read. These people provide the foundation of a healthy creative industry and they all depend on copyright for their livelihoods.”).

137. CASTRO, *supra* note 134. Another industry organization warned that infringement is “hurting the economic growth of this country.” *The Content Infringement Problem*, *supra* note 134.

138. *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488 and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982) [hereinafter *Hearings on Home Recording*] (statement of Jack Valenti, President, Motion Picture Association of America, Inc.).



voked metaphor is that infringement will not only harm, but will “kill” the entertainment industry as we know it.<sup>139</sup> The lobbying group Morality in Media even intimated that widespread infringement “facilitate[s] crimes against children.”<sup>140</sup> Industry appeals to children in this regard are particularly telling, because they are direct moral appeals unmediated by any sense of obligation to defer to the straight “utilitarian bargain” story. A suggested lesson plan for elementary school children designed to inculcate copyright values, for example, explained that copyright infringement is wrong because “real people like J.K. Rowling . . . are hurt when copies are made without the permission of the copyright owner.”<sup>141</sup>

That copyright infringement touches on the care/harm moral foundation is not that surprising. The justification for the copyright monopoly rests on the assumption that infringement inflicts monetary harm on authors. But this one angle does not exhaust the variety of ways unauthorized copying implicates this moral foundation.<sup>142</sup> Artists whose work is copied without permission most often speak not in pecuniary terms but rather of a dignitary harm inflicted by the experience of having their work wrested from them and used—especially when modified—without their permission. Artist Chris Cooper, for example, explained that having his work copied made him feel like “somebody broke into your house and stole your ste-

139. Examples abound. One computer developer stated that “piracy . . . killed a lot of great independent developers.” Tim Ingham, *Epic: Piracy Has Killed Our Enthusiasm for PC*, COMPUTERANDVIDEOGAMES.COM (May 18, 2010, 11:46 AM), <https://web.archive.org/web/20120424022401/http://www.computerandvideogames.com/247057/epic-piracy-has-killed-our-enthusiasm-for-pc>. And content industry lobbyists warned even before the advent of digital media that “home taping is killing music.” Ian Peel, *Thought Home Taping Was Dead? Think Again...*, GUARDIAN (June 17, 2008, 9:30 EDT) <http://www.theguardian.com/music/2008/jun/17/popandrock>.

140. Brief of Kids First Coal. et al. as Amici Curiae Supporting Petitioner at 1, *Metro-Goldwyn-Mayer, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), <http://www.copyright.gov/docs/mgm/kidsfirst.pdf>.

141. COPYRIGHT SOC’Y OF THE U.S.A., “HOW HARRY POTTER WAS BORN”: A RAGS TO RICHES COPYRIGHT STORY, DISCUSSION POINTS & QUIZ 3 (2006), [http://www.richfield.k12.wi.us/UserFiles/Servers/Server\\_5626897/File/Richfield%20school%20district/Cirillo/Computer/Middle\\_JK\\_Rowling\\_Story\\_and\\_Quiz.pdf](http://www.richfield.k12.wi.us/UserFiles/Servers/Server_5626897/File/Richfield%20school%20district/Cirillo/Computer/Middle_JK_Rowling_Story_and_Quiz.pdf).

142. Though artists do, frequently, articulate their moral indignation about infringement in terms of concerns that they will be financially harmed by it. Wil Wheaton stated, “As an actor and writer, I have a personal stake in making sure that [c]opyright law is enforced. If I can’t own the works I create, then I can’t feed my family.” Wil Wheaton, *August 22, 2002*, WIL WHEATON DOT NET (Aug. 22, 2002), <http://www.wilwheaton.net/mt/archives/001096.php>.

reo.”<sup>143</sup> This reaction locates the harm of infringement as a demoralizing act of violation, not as a mere dollar cost. Indeed, many artists reject the argument that unauthorized use can help them by creating free PR,<sup>144</sup> suggesting that the suffering felt by artists when their work is copied is more dignitary than economic.

## 2. The Fairness/Cheating Foundation

A second major basis for beliefs that something is morally wrong is that it triggers the fairness/cheating foundation, offending basic principles of reciprocity—hence the equation of this foundation with “the law of karma.”<sup>145</sup> Perhaps the best indication of the presence of the fairness/cheating foundation in moral controversies about copyright is the frequency with which copyright infringement is equated with theft. As a legal matter, copyright violations are not the same as theft (or stealing). The Copyright Act refers to violations of an owner’s exclusive rights as infringement,<sup>146</sup> while theft refers to the act of taking someone’s physical chattel property intentionally and without permission.<sup>147</sup> Nevertheless, owners express their moral outrage about unauthorized use by equating it with theft (or stealing, or sometimes also trespass) so frequently that the infringement/stealing elision has become a standard moral appeal in content industry rhetoric.<sup>148</sup> And on the other side of the

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143. Brian Doherty, *An Artist on Getting Ripped Off*, REASON (July 2013), <http://www.reason.com/archives/2013/05/28/an-artist-on-getting-ripped-off> (documenting an interview with artist Chris “Coop” Cooper).

144. Upon settling with clothing designer Jeremy Scott for his unauthorized use of skateboard designs for Santa Cruz Skateboards and NHS, Inc. by Jim Phillips, NHS issued a statement indicating that they “do not believe in the idea that any publicity is good publicity. There was a lot of interest in this issue, but we do not need this type of PR to help grow our brands. It was actually quite damaging to us.” See Zahra Jamshed, *Jeremy Scott and Santa Cruz Skateboards Reach Settlement over Plagiarism Claims*, HYPEBEAST (Sept. 4, 2013), <http://www.hypebeast.com/2013/9/jeremy-scott-and-santa-cruz-skateboards-reach-settlement-over-plagiarism-claims>.

145. HADT, *supra* note 121, at 206. Other familiar moral bromides capture the essence of this moral foundation: “Do unto others as you would have them do unto you”; “do not reap where others have sown.”

146. 17 U.S.C. § 106 (2012). And the Supreme Court has held that copyrighted works were not covered by a federal statute that criminalized the interstate transportation of property. *Dowling v. United States*, 473 U.S. 207 (1985).

147. *E.g.*, CAL. PENAL CODE §§ 484–85 (West 2016) (enumerating the elements of theft under California state law).

148. *E.g.*, Alex Ben Block, *MPAA Chief Chris Dodd “Hurt,” Defends His Piracy Strategy, Slams Obama and Google (Q&A)*, HOLLYWOOD REPORTER (Jan.

coin, copyright skeptics often take pains to distinguish infringement from theft in order to avoid the moral opprobrium that the former may entail.<sup>149</sup> Indeed, one district court ordered the plaintiffs in a copyright infringement suit to avoid using the term “thieves” (or “pirates”) at trial because “such derogatory terms would add nothing to the Plaintiffs’ case, but would serve to improperly inflame the jury.”<sup>150</sup>

As we have explained above, the metaphors speakers use to express their moral indignation help to illuminate the moral foundations that animate their intuitive reaction that something is wrong. The moral meaning of the theft metaphor is multivalent, but it can certainly serve as an expression of (or an appeal to) the fairness/cheating foundation. A major reason that theft metaphors have such power is that they articulate a basic violation of the principle of reciprocity: thieves take from people without compensating them. Sean Combs, for example, connected the idea of infringement-as-theft to the imbalance that is generated when one reaps where another has sown<sup>151</sup>: “When you make an illegal copy, you’re stealing from the artist. It’s that simple. Every single day we’re out here pouring our hearts and souls into making music for everyone to enjoy. What if you didn’t get paid for your job? Put yourself in our shoes!”<sup>152</sup> Singer-songwriters also invoked the theft metaphor in a way

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19, 2012), <http://www.hollywoodreporter.com/thr-esq/chris-dodd-mpaa-piracy-obama-google-283289> (quoting the MPAA president as highlighting the moral wrongfulness of copyright infringement by saying “[s]tealing is wrong”); see also Brief of the Recording Indus. Ass’n of Am. Amicus Curiae Supporting Appellants at 7, *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015) (No. 03-16106), <https://www.eff.org/files/2013/10/17/riaamicusbrief.pdf> (lamenting “widespread theft of intellectual property”).

149. Mike Masnick, *Why It’s Important Not To Call Copyright Infringement Theft*, TECHDIRT (Sept. 14, 2010, 8:47 AM), <https://www.techdirt.com/articles/20100913/22513210998.shtml>.

150. *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-204277-CIV (S.D. Fla. Sept. 20, 2013) (omnibus order).

151. According to the eighteenth-century British decision *Millar v. Taylor*, it is “not agreeable to natural justice, that a person should reap the beneficial pecuniary produce of another man’s work.” Patricia Loughlan, *Pirates, Parasites, Reapers, Sowers, Fruits, Foxes . . . The Metaphors of Intellectual Property*, 28 SYDNEY L. REV. 211, 220 (2006) (emphasis omitted) (quoting *Millar v. Taylor* (1769) 98 Eng. Rep. 201 (K.B.)).

152. *What the Artists and Songwriters Have To Say*, MUSIC UNITED, [https://web.archive.org/web/20140406222035/http://www.musicunited.org/3\\_artists.aspx](https://web.archive.org/web/20140406222035/http://www.musicunited.org/3_artists.aspx) (last visited Apr. 19, 2016). Examples like this one show how pecuniary and non-pecuniary harms can be mixed. Combs seems to be arguing both that he has lost money and that it is unfair for others to take from him without contributing anything of their own.

designed to appeal to the notion of tit-for-tat that is central to the cheating/fairness foundation, saying that if you are going to infringe copyright, “[y]ou might as well walk into a record store, put the CDs in your pocket, and walk out without paying for them.”<sup>153</sup>

The presence of the fairness/cheating foundation in authors’ responses to infringement extends even beyond invocations of the theft metaphor. Artists’ frequent expressions of moral opposition to unauthorized use of their works sound frequently, perhaps even primarily, in terms of the simple formal injustice of people taking from them without providing any recompense. Author Lloyd Shepherd articulated his sense of infringement’s immorality in terms of his concern that others were profiting from his creation (“[s]omebody, somewhere is making money from my own labour”), thereby invoking the core fairness/cheating idea that it is wrong to reap where others have sown.<sup>154</sup> And novelist J.K. Rowling’s expression of moral approval of the copyright infringement judgment she won against the author of *The Harry Potter Lexicon* in 2008 similarly relied on the law of karma. “The proposed book took an enormous amount of my work and added virtually no original commentary of its own.”<sup>155</sup> What was really wrong was not the unauthorized taking itself, Rowling suggested, but rather the notion that the author of *Lexicon* sought to profit from her work without providing any commensurate effort of his own.<sup>156</sup> Rowl-

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153. *Who Really Cares About Illegal Downloading?*, MUSIC UNITED, <http://tech-insider.org/internet/research/acrobat/020926.pdf> (last visited Apr. 19, 2016) (quoting Mark Knopfler of Dire Straits).

154. Lloyd Shepherd, *Lloyd Shepherd: My Parley with Ebook Pirates*, GUARDIAN (Mar. 16, 2012, 6:30 EDT), <http://www.theguardian.com/books/2012/mar/16/lloyd-shepherd-ebook-pirates-mobilism>.

155. Shawn Adler, “*Harry Potter*” Author J.K. Rowling Wins Copyright-Infringement Lawsuit, MTV NEWS (Sept. 8, 2008), <http://www.mtv.com/news/1594367/harry-potter-author-jk-rowling-wins-copyright-infringement-lawsuit>.

156. It bears noting that not all authors express similar concern for reciprocity when faced with music infringement. See *Artists Give Newsbeat Their Views on Music Piracy*, BBC NEWSBEAT (Oct. 15, 2013), <http://www.bbc.co.uk/newsbeat/24524871> (“Before there was the Internet, there was people selling mix tapes and CDs with your music on it—they sell it, they benefit from it. I get promotion out of it, which is a good thing for me, because people like my song and put on a stage show.”).

This is perfectly consistent with—and even illustrative of—the basic principles of MFT. The theory indicates that different people tend to favor different moral foundations, just as different people think different flavors make food taste good or bad. See Ditto & Koleva, *supra* note 125 (observing that people feature different innate moral responses to similar phenomena). So the artists who appear unconcerned by unauthorized use may simply not have the

ing does not seem to be arguing that the *Lexicon* harmed her motivation to create her novels; instead, she is upset that if anyone *deserves* to make money off of them, it is her and her alone.

### 3. The Sanctity/Degradation Foundation

The third moral foundation identified by MFT research is sanctity/degradation. Some people's moral matrix features concern that people, things, or ideas they regard as sacred not be treated in a manner they regard as disrespectful or defiling.<sup>157</sup> At first glance, the sanctity/degradation foundation, rooted in notions of physical disgust, may seem worlds apart from American copyright, with its antiseptic economic rationale. But concern for sacredness and defilement are commonplace in copyright disputes.<sup>158</sup> Consider, for example, the extent to which judges' moral disapprobation of copyright cases involving obscene unauthorized uses appears to dictate those cases' outcomes. In *MCA, Inc. v. Wilson*, for example, the Second Circuit considered whether the defendant's obscene parody ("The Cunilingus Champion of Company C") infringed the copyright of a classic American ballad ("Boogie Woogie Bugle Boy of Company B").<sup>159</sup> The court denied the defendant's fair use defense in an opinion that seemed driven primarily by moral revulsion at the parody's debasement of a beloved musical standard.<sup>160</sup> Numerous other federal courts have denied fair use defenses and found copyright infringement where the defendant's unauthorized use is obscene and the plaintiff's work is a wholesome and mainstream one, such as a Disney character<sup>161</sup> or the Dallas Cowboys logo.<sup>162</sup>

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same concern for fairness and cheating as those artists who object to the practice more strongly.

157. See HAIDT, *supra* note 121, at 170–77 (discussing the sanctity/degradation foundation generally).

158. See Christopher Buccafusco, Paul J. Heald & Wen Bu, *Testing Tarnishment in Trademark and Copyright Law: The Effect of Pornographic Versions of Protected Marks and Works*, 91 WASH. L. REV. (forthcoming 2016) (manuscript at 1–2, 6–10) (noting that concerns about inappropriate uses of copyrighted works figure in owner's objections to fair use claims and their arguments in favor of extending copyright term extension).

159. 677 F.2d 180 (2d Cir. 1981).

160. *Id.* at 185 ("[A] commercial composer can[not] plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society.").

161. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 752–54 (9th Cir.

Respect for sanctity and concern about degradation also animate authors' and owners' objections to unauthorized use. Content industry representatives, for example, often attempt to connect copyright infringement with sexual impurity—and in particular, pedophilia—in order to generate moral indignation.<sup>163</sup> Authors, as well, express their moral opposition to infringement in terms of sexual violation, with one plaintiff referring to her work being copied as the equivalent of “literary rape.”<sup>164</sup> The sanctity/degradation foundation likely also accounts for the moral outrage of devoutly religious sculptor Frederick Hart, who sued Warner Brothers for using a version of his work *Ex Nihilo* in an orgy scene of the movie *Devil's Advocate*.<sup>165</sup> Hart framed the motivation for his lawsuit not in terms of lost royalties or even loss of authorial control, but rather because he was “deeply disturbed that 13 years of work to create a sculpture of the profound mystery and beauty of God's creation would be so debased and perversely distorted.”<sup>166</sup>

And even those who are not religious may have their sanctity/degradation foundation activated by infringement. Describing his legal battles to prevent the use of James Joyce's work by scholars, Stephen Joyce, the author's grandson, proclaimed, “I am not only protecting and preserving the purity of my grandfather's work but also what remains of the much abused privacy of the Joyce family.”<sup>167</sup> Many musicians have objected to legal

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1978); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397, 1398 (S.D.N.Y. 1975).

162. *Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205–06 (2d Cir. 1979).

163. *E.g.*, Kurt Nimmo, *Edgar Bronfman's Declaration of War Against the Internet*, NIMMO.FREESERVERS.COM (May 27, 2000), <http://www.nimmo.freeservers.com/bronfman.html> (quoting Bronfman as saying that he will “[track] down those who ignore right from wrong . . . hackers and spies, pirates and pedophiles”).

164. *Starobin v. King*, 137 F. Supp. 2d 93, 96 (N.D.N.Y. 2001) (quoting author Christina Starobin). Author Lewis Perdue, who accused Dan Brown of infringing his work, said of Brown's conduct that “I felt violated, like somebody had broken into my head.” *Author Brown “Did Not Plagiarise,”* BBC NEWS (Aug. 6, 2005, 10:20 GMT), <http://news.bbc.co.uk/2/hi/entertainment/4126710.stm>.

165. *See* Niebuhr, *supra* note 11.

166. *Id.* The data reported by Buccafusco, Heald & Bu, *supra* note 158, suggest that inappropriate uses of works has little negative effect on the value that consumers attach to the works and that such uses may even enhance consumer value.

167. D.T. Max, *The Injustice Collector: Is James Joyce's Grandson Suppressing Scholarship?*, NEW YORKER (June 19, 2006), <http://www.newyorker.com/magazine/2006/06/19/the-injustice-collector>.

uses<sup>168</sup> of their songs by politicians with whom they disagreed on the grounds that such a use “perverted” or “tarnished” the song or the artist.<sup>169</sup> In addition, numerous rock, gothic, and heavy metal bands like Rage Against the Machine and Skinny Puppy (whom one might not initially assume to be hypersensitive to sanctity/degradation concerns) have sued the U.S. government for playing their musical works without permission as part of the interrogation of detainees at Guantanamo Bay.<sup>170</sup> The bands’ actual objections sound less in terms of concern for unpaid royalties, and more in terms of their sense that their music has been soiled by connection with “torture.”<sup>171</sup> Indeed, Skinny Puppy sought \$666,000 in damages to symbolize “the evilness of the [U.S. government’s] deed.”<sup>172</sup> Sanctity concerns also drive moral considerations about creativity outside the context of formal copyright law. Tattoo artists have explained their deference to their community’s informal norm that original designs not be copied without permission in terms of the “sacredness” of such designs that would be violated by unauthorized copying.<sup>173</sup>

168. Many of these uses are legal even though the songwriters have not given permission because the venue playing the song has licensed the copyrights from the music publisher and owner of the sound recording.

169. The Foo Fighters objected to John McCain’s use of their song “My Hero,” claiming, “[t]o have it appropriated without our knowledge and used in a manner that perverts the original sentiment of the lyric just tarnishes the song.” Nick Neyland, *Foo Fighters Slam John McCain for Unauthorized Use of “My Hero,”* PREFIX (Oct. 8, 2008, 11:42 AM), <http://www.prefixmag.com/news/foo-fighters-slam-john-mccain-for-unauthorized-use/22200>.

170. See John Tehranian, *Guantanamo’s Greatest Hits: The Semiotics of Sound and the Protection of Performer Rights Under the Lanham Act*, 16 VAND. J. ENT. & TECH. L. 11, 18–43 (2013).

171. Rage Against the Machine explained, “[a]s artists and as human beings, it sickens us to know that the U.S. government has been using our music to torment detainees. We are especially appalled by the discovery that there is very little that we, as artists, can do to stop the military and the CIA from turning our music into a weapon.” Tom Morello et al., *Band Irate at the Use of Music for Torture*, DENVER POST, Aug. 24, 2008, at 1D.

172. “*They Are Using Our Music To Inflict Damage*”: Canadian Techno Band Skinny Puppy Sue US for Using Their Music in Torture of Guantanamo Prisoners, DAILY MAIL (Feb. 8, 2014), <http://www.dailymail.co.uk/news/article-2554625/They-using-music-inflict-damage-Canadian-techno-band-Skinny-Puppy-sue-US-using-music-torture-Guantanamo-prisoners.html>.

173. Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 555 (2013).

#### 4. The Loyalty/Betrayal Foundation

Another driver of moral intuition is a sense of whether conduct represents loyalty to or betrayal of a relevant in-group. Some public issues that are strongly associated with in-group symbols, such as flag burning, appear clearly to engage the loyalty/betrayal foundation. Initially, infringement may not seem to raise any such concerns, at least insofar as it is usually cast merely as an economic wrong that complicates copyright's aim of maximizing creative production. Upon closer examination, though, copyright's nexus with this moral foundation emerges in unexpected ways. Content industry lobbyists, for example, have invoked appeals designed to trigger the loyalty/betrayal foundation in seeking more expansive copyright laws. Jack Valenti's 1982 congressional testimony about the VCR is most (in)famous for his "Boston Strangler" comment, but Valenti even more prominently pointed out that the Sony-made VCR was a Japanese product. This enabled a classic in-group narrative of the private home recording issue, allowing Valenti to portray the VCR as a "flank assault" on the uniquely American domestic film industry:

The U.S. film [industry] . . . is the single one American-made product that the Japanese, skilled beyond all comparison in their conquest of world trade, are unable to duplicate or to displace or to compete with or to clone. . . . It is a piece of sardonic irony that . . . while the Japanese are unable to duplicate the American films by a flank assault, they can destroy it by this video cassette recorder.<sup>174</sup>

Valenti's attempt to inflame in-group passions, and thereby access the loyalty/betrayal foundation, could not have been clearer. The VCR was a tool of the tricky and aggressive Japanese who were seeking to undermine the U.S. film industry and the American economy. Advocating home recording, as Valenti framed it, was an act of unpatriotic betrayal. And this is far from the only time that pro-copyright lobbyists have appealed to in-group loyalty against outsider threats. Supporters of the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) defended them by invoking the danger posed to domestic crea-

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174. *Hearings on Home Recording*, *supra* note 138, at 4–5. This is only part of Valenti's rhetoric about the "Japanese threat" posed by the VCR. He stressed that "100 percent of these machines are made in Japan and 85 percent of all of the blank tapes are made in Japan," warned of the "\$5.3 billion trade deficit with Japan on electronic equipment," and even referred to Sony's American-born representative, Mr. Ferris, as "[o]ne of the Japanese lobbyists." *Id.* at 6, 8.



tive industries from dangerous “rogue foreign sites.”<sup>175</sup> And the U.S. Trade Representative’s *Notorious Market* reports highlight infringement by listing foreign websites and physical markets that purportedly threaten U.S. copyright interests.<sup>176</sup> These concerns may be valid, but the reports’ focus on dangerous foreign sites to the exclusion of domestic ones resonates with the loyalty/betrayal moral foundation by casting them as outsider threats to our shared national in-group.<sup>177</sup>

Perhaps even more than the “theft” metaphor, the metaphor of copyright infringement as “piracy” is often used by copyright owners to portray unauthorized use as morally wrongful.<sup>178</sup> Although “piracy” shares some of the same connotations as “theft,” it also imports a sense of “foreignness” to those engaged in it. Whether the metaphor calls to mind swarthy, (homo)sexualized Barbary Coast villains or modern gun-toting Somalis, it triggers an intuition that “we” are being attacked by a band of lawless, violent outsiders.<sup>179</sup> Piracy metaphors arose early in copyright debates and in ways that signaled foreignness and disloyalty.<sup>180</sup> In the nineteenth century, publishers and authors compared America’s unwillingness to protect the copyrights of international authors to Barbary Coast pirates’ refusal to abide by the law.<sup>181</sup> And similar echoes continued throughout the twentieth century. In a 1995 address to a House committee, Jack Valenti declared,

175. Block, *supra* note 148 (quoting MPAA President and former U.S. Senator Chris Dodd).

176. See, e.g., OFFICE OF U.S. TRADE REPRESENTATIVE, OUT OF CYCLE REVIEW OF NOTORIOUS MARKETS (Dec. 20, 2011), <https://ustr.gov/sites/default/files/uploads/gsp/speeches/reports/2011/Notorious%20Markets%20List%20FINAL.pdf>.

177. Many of the purportedly “notorious” sites are actually quite pedestrian. The Report lists the Russian site VKontakte as permitting “users to provide access to allegedly infringing materials,” *id.*, but the same could easily be said of many mainstream domestic sites such as YouTube.

178. See generally ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES (2009) (tracing the elaborate history of the concepts of piracy and intellectual property).

179. See Loughlan, *supra* note 151, at 219–20.

180. JOHNS, *supra* note 178, at 1–15.

181. The publisher Henry Hold argued to the U.S. Senate, “[i]t is time that the United States should cease to be the Barbary Coast of literature, and that the people of the United States should cease to be the buccaneers of books.” S. REP. NO. 50-622, at 2 (1888), quoted in Catherine Seville, *Nineteenth-Century Anglo-US Copyright Relations: The Language of Piracy Versus the Moral High Ground*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 19, 41 (Lionel Bently et al. eds., 2010).

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[e]ach year pirates and thieves the world over try to plunder the greenhouse of intellectual property. And each year those of us in the creative community spend millions of dollars to stand guard against this thievery, to punish violators, to move swiftly against those who are responsible, to make it risky and expensive for pirates to ply their trade.<sup>182</sup>

Increasingly, at the turn of the twentieth century, fears about piracy often explicitly mention the threat from China, Russia, and the rest of the developing world to American prosperity.<sup>183</sup> Marybeth Peters, the former Register of Copyrights, explicitly distinguished the relatively banal piracy in the U.S. from the especially pernicious international piracy coming from China and Russia:

To be sure, piracy anywhere is serious and cause for concern. . . . But all too often, what we see abroad bears no resemblance to college students downloading their favorite songs and movies.

Much of the foreign piracy about which we are speaking today is done by for-profit, criminal syndicates. Factories throughout China, Southeast Asia, Russia, and elsewhere are churning out millions of copies of copyrighted works, sometimes before they are even released by the rights holders. These operations are almost certainly involved in other criminal activities. Several industry reports in recent years suggest that dueling pirate operations have carried out mob-style “hits” against their criminal competitors. And, although the information is sketchy at best, there have been a series of rumored ties between pirating operations and terrorist organizations.<sup>184</sup>

Piracy abroad is figured as more dangerous than domestic piracy, in part due to its unwillingness to respect American values regarding individual rights.<sup>185</sup>

Patriotism may be the most common way that the loyalty/betrayal moral foundation arises in the copyright setting, but it is far from the only one. Authors may interpret unauthorized copying as an in-group violation insofar as it represents a betrayal of another artist. Installation artist Colette Maison

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182. *NII Copyright Protection Act of 1995: Hearings on H.R. 2441 Before the Subcomm. on Courts & Intellectual Prop.*, 104th Cong. 23 (1996), <https://archive.org/details/niicopyrightprot02unit> (statement of Jack Valenti, President and CEO, Motion Picture Association of America, Inc.).

183. According to Tom Doctoroff, “China is the total flip-side of the U.S. Piracy goes back to the China world view that individual rights don’t matter.” Kenneth Rapoza, *In China, Why Piracy Is Here To Stay*, FORBES (July 22, 2012, 9:47 PM), <http://www.forbes.com/sites/kenrapoza/2012/07/22/in-china-why-piracy-is-here-to-stay>.

184. *Piracy of Intellectual Property: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 109th Cong. 85–86 (2005) (statement of Marybeth Peters, Register of Copyrights).

185. See Rapoza, *supra* note 183.

Lumiere, for instance, claimed that Lady Gaga had copied her installation designs without permission to make Gaga's 2011 holiday window displays at Barney's. Maison Lumiere cast Gaga's unauthorized use as a betrayal of art-world norms and also suggested that the art world itself had betrayed her by not supporting her infringement allegations.<sup>186</sup>

Beyond the context of formal copyright law, members of groups that deploy informal IP norms couch their moral opposition to violation of those norms in terms of loyalty and betrayal. Roller derby skaters, for example, tend to follow strict, centralized rules to assure the uniqueness of the pseudonyms under which they compete. Complying with these rules when first choosing a name represents an act of loyalty, insofar as it represents deference to an established group norm.<sup>187</sup> And skaters regard the breaching of these norms as wrong for many reasons, but among them is the notion that not following those rules is a betrayal of the close-knit in-group that is the roller derby world itself.<sup>188</sup> Along similar lines, influential writing teacher Gordon Lish sued *Harper's Magazine* for copyright infringement when it published the syllabus he had given to his students under a condition of confidentiality. Though Lish experienced no monetary harm from the publication of the syllabus, he was apparently motivated to litigate over a sense of besmirched loyalty, having admonished students that "to violate the confidentiality of the class is to dishonor yourself irreparably."<sup>189</sup>

##### 5. The Authority/Subversion Foundation

The fifth moral foundation reflects the extent to which our sense of right and wrong is animated by concern for social order and deference to legitimate authority. Two different phenome-

186. See Jenni Avins, *Artist Feels Ripped Off by Lady Gaga's Windows at Barney's*, N.Y. MAG. (Jan. 4, 2012), <http://nymag.com/thecut/2012/01/artist-feels-ripped-off-by-lady-gaga.html> (including a video of Maison Lumiere in which she complains of betrayal both by Gaga as a fellow artist, and by the art world for not coming to the aid of one of its own).

187. See David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1128 (showing that beginner skaters comply with roller derby's name-uniqueness rules partly to indicate that they are good cooperators).

188. See *id.* at 1111 & n.86 (noting that name copying is wrong because it violates the derby world's "don't be a douchebag rule" by putting an individual's selfish desires above the good of the community as a whole).

189. *Lish v. Harper's Magazine Found.*, 807 F. Supp. 1090, 1094 (S.D.N.Y. 1992).

na may trigger this foundation. The first group consists of “anything that is construed as an act of obedience, disobedience, respect, disrespect, submission, or rebellion, with regard to authorities perceived to be legitimate.”<sup>190</sup> The second kind of behavior that may trigger this foundation is conduct that seems to subvert the traditions, institutions, or values that create stable social order.<sup>191</sup> The extent to which authority/subversion drives the moral instincts of players in copyright controversies emerges most clearly in the metaphors they use to critique unauthorized use. The leading metaphor exposing concern for subversion of stabilizing social order is theft. One valence of the moral attraction of invoking these metaphors for unauthorized copying is that they trigger the fairness/cheating moral foundation, as discussed above. But the efficacy of the theft metaphor as a moral appeal also lies in its resonance with concern for respecting authority. The notion that theft is wrong is ancient, and certainly much more widely shared and deeply felt than the relatively recent and substantively complex notion that copyright infringement is illegal. To equate unauthorized copying with theft, then, raises concern that more than just a formal legal violation has occurred. Rather, it suggests that the infringing conduct threatens the stability of the social order itself by eroding respect for long-accepted boundaries of private physical space.

In a speech by Jack Valenti on the subject, aptly titled *Don't Be a Scene Stealer*, he capped a long moral equation of infringement and theft by warning that the impact of tolerating theft was decay of the social order. “Everything we do must be rooted in some kind of a code,” warned Valenti, “[o]therwise we are anarchists.”<sup>192</sup> But the clearest invocation of the authority/subversion foundation in the context of the theft metaphor is courts’ (and other sources’) reference to the Biblical proscription “thou shalt not steal” to admonish infringers.<sup>193</sup> This refer-

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190. Haidt, *supra* note 121, at 144.

191. *Id.*

192. Jack Valenti, *Speech: “Don't Be a Scene Stealer,”* 11 COMMLAW CONCEPTUS 307, 310 (2003).

193. *Grand Upright Music, Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (“‘Thou shalt not steal’ has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.”).

ence to the Old Testament frames a technical violation of the U.S. Code into both an affront to God Himself and a threat to social order reflected in a longstanding consensus that we should respect one another's property.

Similarly, the infringement as "piracy" metaphor likely triggers the authority/subversion foundation in addition to the loyalty foundation discussed above. The moral power of the piracy metaphor derives from its suggestion of social disruption, lawlessness, and moral subversion. Pirates symbolize the ultimate threat to the social order—they follow no nation's law, respect no central authority, and create a constant threat to both commerce and tourism at sea.<sup>194</sup> Equating unauthorized copying with piracy, then, resonates strongly along the authority/subversion foundation. The piracy metaphor can either express a speaker's concern that infringers represent threats to established social order and/or trigger moral outrage in listeners who have strong concern that sources of such order be respected. Content industries in particular deploy the piracy metaphor to describe the destabilization of the regnant hierarchy that gives them a leading role in the delivery of creative content, warning that such a breakdown of order will in turn redound to the detriment of consumers located lower down this hierarchy.<sup>195</sup>

A less common, but still telling, metaphor that exposes the frequency with which unauthorized copying resonates along the authority/subversion foundation is the parent/child metaphor. The salience of parenthood as a source of stability and legitimate authority is obvious, and for that reason it shows up as a

194. This was certainly true as a historical matter. *See generally* MARCUS REDIKER, *VILLAINS OF ALL NATIONS: ATLANTIC PIRATES IN THE GOLDEN AGE* (2004). It remains true today, especially as a resurgence of Somali piracy threatens trade and tourism off the Gulf of Aden. *See* Adam Nagourney & Jeffrey Gettleman, *Pirates Brutally End Yachting Dream*, N.Y. TIMES (Feb. 22, 2011), <http://www.nytimes.com/2011/02/23/world/africa/23pirates.html> (describing a "modern-day piracy epidemic" in the waters off the northeastern corner of Africa).

195. *Piracy Prevention and the Broadcast Flag: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the H. Comm on the Judiciary*, 108th Cong. 5 (2003), <http://www.gpo.gov/fdsys/pkg/CHRG-108hhrg85490/pdf/CHRG-108hhrg85490.pdf> (excerpt of letter from John S. Orlando, Senior Vice President of External Relations, National Association of Broadcasters) ("The information age has . . . vastly expanded the dangers of digital piracy. The Internet allows pirated content to be made instantly available to millions of people. . . . In light of these perils, content creators have made clear they will withhold compelling digital content from over-the-air transmission.").

central theme in MFT literature's discussion of the authority/subversion foundation.<sup>196</sup> This helps make sense of the frequency and longevity with which authors have invoked the metaphor that their works are like their children.<sup>197</sup> Cartoonist Gary Larson observed, "[t]hese cartoons are my 'children' of sorts, and like a parent, I'm concerned where they go at night without telling me. And, seeing them on someone's website is like getting a call at 2:00a.m. that goes, 'Uh, Dad, you're not going to like this much but guess where I am.'"<sup>198</sup> Framing the author/work relationship in terms of the parent/child expresses the immorality of unauthorized use by triggering the authority/subversion foundation. It portrays infringement as a deeply destabilizing act that threatens a core locus of social stability—the nuclear family. If the claim of parental authority establishes the author's unique right to determine how his children are "raised"—that is, developed, distributed, and matured<sup>199</sup>—then unauthorized use is the home-wrecker that destroys this family. Frankie Sullivan, the guitarist and songwriter for the band Survivor, objected to Newt Gingrich's use of the song "Eye of the Tiger" on precisely these grounds: "My motives have nothing to do with politics," he said. "It's one of my babies, and I'm just exercising the laws of this great country."<sup>200</sup> He continued, "[m]y legacy, my life, has been 'Eye of the Tiger.'"<sup>201</sup>

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Part I identified an unappreciated problem in copyright law: It assumes that owners will sue only to redress monetary

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196. See HAITT, *supra* note 121, at 144.

197. The metaphor of parent/child to represent the author/work relationship goes back at least to the Renaissance in the West. Mark Rose, *Copyright and Its Metaphors*, 50 UCLA L. REV. 1, 5 (2002) (quoting Daniel Defoe saying that "[a] Book is . . . the Child of his Inventions, the Brat of his Brain").

198. PATRY, *supra* note 56, at 69–71 (quoting Larson).

199. The title of a recent article by Jane Ginsburg, a proponent of moral rights, is telling: Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS & ENT. L.J. 73 (2012).

200. James C. McKinley, Jr., *G.O.P. Candidates Are Told, Don't Use the Verses, It's Not Your Song*, N.Y. TIMES (Feb. 3, 2012), <http://www.nytimes.com/2012/02/04/arts/music/romney-and-gingrich-pull-songs-after-complaints.html>.

201. Allison Horton, *Former Survivor Member Sues Newt Gingrich for Using "Eye of the Tiger,"* CHI. SUN-TIMES (Jan. 30, 2012), <http://web.archive.org/web/20140415154014/http://www.suntimes.com/news/nation/10332797-418/former-survivor-member-sues-newt-gingrich-for-using-eye-of-tiger.html>.

losses, but owners actually sue for a variety of reasons, including under circumstances that appear unrelated to that concern. Some literature has acknowledged the social problems generated by this mismatch, but no writing has yet sought to provide a systematic map of the moral intuitions that infringement triggers in owners. Part II did just this, analyzing copyright as a moral-psychological phenomenon. In particular, it used recent research in moral foundations theory to illuminate the plural ethical intuitions triggered by unauthorized use, which include familiar concerns about pecuniary harm but also encompass motivations as diverse as disgust and betrayed loyalty. This map of copyright's moral domain frames our final inquiry: Having understood the plural ethical intuitions caused by infringement, how should we modify copyright law's remedial scheme to take account of these instincts while also staying true to the constitutional aspiration to maximize creative production? We tackle this problem in Part III.

### III. TOWARD BEHAVIORAL REALISM IN COPYRIGHT INFRINGEMENT

The previous Part showed that, contrary to the assumptions implicit in copyright law, owners seek remedies for infringement not only when they experience harm to their creative monopolies, but also due to a range of other perceived transgressions rooted in notions of purity, fairness, authority, and loyalty. Moreover, MFT shows that these plural motivations are the products of innate moral intuitions. Thus far, then, our goal in this Article has been to show the flaws in law's assumptions about owners' subjective experience of infringement and to show what the actual map of that moral domain looks like. This Part develops two implications of these claims. The first reflects on the descriptive implications of our argument for copyright theory, charting a middle path between copyright scholarship's dominant poles of consequentialism and moral rights. We show that the fuller picture of owners' moral responses to unauthorized use is not inconsistent with, and can actually be usefully integrated with, the aim of optimizing creative production. Second, we suggest ways that this middle approach might translate into doctrine by outlining several different policy levers that copyright law might use to incorporate a behaviorally realistic vision of owners' moral intuitions about infringement with the law's aim of optimizing creative production.

## A. MOTIVATIONS AND MORALITY IN COPYRIGHT INFRINGEMENT LITIGATION

The received wisdom about U.S. copyright law focuses on markets and financial incentives. According to this view, “moral” (i.e., non-monetary) concerns have no place in copyright law discourse. A competing body of scholarship, however, argues that since authors experience unauthorized use as a moral transgression, copyright law should protect these integrity and dignity interests. Our goal is to chart a middle path that incorporates a richer understanding of authors’ motivations into a more refined copyright consequentialism. This includes understanding how copyright’s infringement doctrines could reflect the full set of motivations that people have to create and litigate.

As we explained in Part I, the standard story about copyright law focuses exclusively on providing and protecting market-based incentives to create.<sup>202</sup> The law assumes that authors are motivated to create for financial reasons and that threats to their financial returns provide the only reasons for filing infringement lawsuits.<sup>203</sup> Copyright doctrines reflect these concerns. According to the standard story, so-called “moral” considerations, which include anything not directed at market incentives and substitutionary copying, should play no role in copyright law.<sup>204</sup> Even worse, the argument runs, were such considerations allowed to creep insidiously into copyright, they would upset the law’s carefully calibrated consequentialist structure.<sup>205</sup>

In opposition to the consequentialist camp is a group of scholars who view certain unauthorized uses of works as creating meaningful moral (i.e., non-consequentialist) harms that copyright law should prevent and remedy.<sup>206</sup> Grounded in the

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202. See *supra* Part I.A.1.

203. See Bohannon & Hovenkamp, *supra* note 100, at 922 (“[M]arket failure is the starting point for IP laws, and it is market failure that gives rise to the need for legal entitlements.”).

204. See PATRY, *supra* note 56.

205. See Adler, *supra* note 115, at 265 (“This essay seeks to undermine the foundations of moral rights scholarship, law, and theory. My argument is that moral rights laws endanger art in the name of protecting it.”).

206. Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001); Roberta Rosenthal Kwall, “Author-Stories”: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine, 75 S. CAL. L. REV. 1 (2001); Kwall, *supra* note 60, at 1986; Susan P. Liemer, *Understanding Artists’ Moral Rights: A*



natural rights theories of Locke and Hegel, these scholars conceive of acts of intellectual creation as establishing moral bonds between authors and their works.<sup>207</sup> When others copy, tarnish, or degrade their works, authors suffer legitimate injury entirely separate from any concerns about incentives and access.<sup>208</sup> So, too, do authors suffer when they fail to receive attribution for their efforts.<sup>209</sup> Scholars in this group support the expansion of copyright doctrine to remedy non-consequentialist harms.<sup>210</sup>

Our approach differs from both the standard account and the moral rights account, and it offers a third option between these two poles. We are committed to copyright law's consequentialist goal of optimizing creative production by balancing incentives to create with access to the public and future creators.<sup>211</sup> We differ from the standard account, however, in our descriptive understanding of authors' motivations to create and to sue for infringement. Where the standard account looks solely to pecuniary issues as motivations for infringement lawsuits and ignores any unrelated concerns, our view depicts authors as subject to more heterogeneous motives—including the kinds of issues that animate the moral rights framework. In presenting a richer, more realistic portrait of copyright authors, our approach can better achieve the law's goals.

As Part II showed, copyright authors object to unauthorized use of their works for a wide variety of reasons, often having little to do with creative incentives or market-based harms.

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*Primer*, 7 B.U. PUB. INT. L.J. 41, 41–42, 44 (1998).

207. See MERGES, *supra* note 60, at 13 (referring to the first-order principles of IP law as “(1) Lockean appropriation, (2) Kantian (liberal) individualism, and (3) Rawlsian attention to the distributive effects of property”); see also Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

208. Adler explains:

Indeed, moral rights advocates sometimes speak of art works as if they were living things: “To mistreat the work is to mistreat the artist.” It is as if the work has a magical connection to its maker; hurting the piece will hurt the artist as if you were sticking pins in a voodoo doll. Because of this emphasis on the artist's (and indeed, the art's) personhood, moral rights are said to have a “spiritual, non-economic and personal nature.”

Adler, *supra* note 115, at 269 (internal citations omitted).

209. Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985 (2002) (arguing that U.S. copyright law should adopt attribution rights because of the moral linkage between an author and her work).

210. See *id.*

211. A full-throated defense of this consequentialism is beyond the scope of this paper.

On our view, however, the existence of these concerns is not, *prima facie*, a reason for the law to respond to them. As in most cases, a descriptive “is” does not produce a moral “ought.”<sup>212</sup> For example, simply because opposition to gay marriage appears to be rooted in the moral foundation of purity<sup>213</sup> does not mean that society should roll back all the advances made on the marriage equality front. By the same token, simply because some or even many people intuit that copyright should be concerned with authority or purity, for example, does not require that the legal system must formally adopt rules that are consistent with those intuitions.<sup>214</sup> Legal systems do not exist merely to track people’s intuitions about appropriate conduct; they also exist to mold intuitions and behaviors.<sup>215</sup> Even though people exhibit non-consequentialist responses to copyright infringement, this does not mean that U.S. copyright law should come unmoored from its consequentialist foundations.<sup>216</sup>

The approach to copyright morality that we have described preserves copyright law’s normative base but alters its descriptive superstructure. It does not require U.S. copyright law to come unmoored from its central consequentialist aspirations to incorporate a more nuanced understanding of people’s moral reactions to unauthorized use.<sup>217</sup> In order to make laws that optimize creative production and promote cooperation and social

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212. DAVID HUME, A TREATISE ON HUMAN NATURE 335 (NuVision Publications 2007) (1737); Rachel Cohon, *Hume’s Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/fall2010/entries/hume-moral> (last updated Aug. 27, 2010).

213. See Ditto & Koleva, *supra* note 125.

214. For a valuable discussion of the relationship between variation in people’s moral foundations and normative morality, see JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM 336–41 (2013).

215. Indeed, sometimes law operates on the assumption that people’s moral instincts are essentially bad and that the purpose of regulation is to counter them. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–62 (1897) (explaining how bad men care little about the moral grounding of the law but instead about predictions of which behaviors will lead to punishment).

216. For a discussion of recent literature on the relationship between moral intuitions and legal rules, see Mark Kelman, *Moral Realism and the Heuristics Debate*, 5 J. LEGAL ANALYSIS 339 (2013).

217. We do not offer a full-throated defense of U.S. copyright’s consequentialism in this Article. Surprisingly few such defenses actually exist. See LANDES & POSNER, *supra* note 16. Sunder presents a “complex consequentialist approach that seeks to expand the purpose of this law beyond incentives and efficiency to promoting the broad range of values we hold dear in the twenty-first century.” SUNDER, *supra* note 60, at 15.

welfare, copyright systems need to be able to comprehend and account for people's responses to unauthorized use—even when those responses are not grounded in concerns about incentives and market harm. As we described in Part I, when authors sue to prevent uses of their works that are unrelated to protecting incentives, they cause substantial harms to public access, cultural exchange, and free speech.<sup>218</sup> The analysis in Part II is a first step towards systematic understanding and prediction of authors' behavior, and it promises to improve the substantive law of copyright itself.

Here, we offer a behaviorally realistic<sup>219</sup> version of copyright consequentialism.<sup>220</sup> As in the standard story, our approach adopts the same fundamental balancing framework of protecting authors' motivations to create while preserving access to works for the public and future creators. It differs, however, in both its descriptive account of authors' motivations and its normative response to them. A behaviorally realistic vision of copyright law appreciates that creativity emerges from a diverse, complex, and sometimes contradictory set of motives, desires, reasons, and emotions.<sup>221</sup> Some creators are motivated to write songs or computer code primarily as a way to make a liv-

218. See *supra* Part I.C.

219. See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 831 (2008) (“We are in the midst of a flowering of large-scale quantitative studies of facts and outcome, with numerous published results. The relevant studies have produced a New Legal Realism—an effort to understand the sources of judicial decisions on the basis of testable hypotheses and large data sets.”); see also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063 (2006); Brian Leiter, *Legal Realisms, Old and New*, 47 VAL. U. L. REV. 949, 954 (2013) (noting that the various legal realisms share a skepticism that legal doctrine constrains judicial behavior).

220. An impressive body of research employing moral psychology methods is emerging for other areas of substantive law. As yet, criminal law leads the way. See, e.g., Kenworthy Bilz & Janice Nadler, *Law, Psychology & Morality*, in 50 PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL JUDGMENT AND DECISION MAKING 101 (D. Medin et al. eds., 2009); Donald Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531 (2010); Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1 (2008); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007). Other important research is being done in contract law. See, e.g., Zev Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67 (2012); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

221. See Cohen, *supra* note 71.

ing by selling copies for a profit. Other creators produce new works even though doing so is obviously a bad financial decision. Instead, they are motivated by a desire to be heard or to belong to a community or simply because they cannot help it.<sup>222</sup> Most creators, of course, are moved by multiple reasons.<sup>223</sup> Similarly, copyright authors object to unauthorized uses of their works for various and multiple reasons. A singer may sue a woman for using one of his songs in the background of her silly YouTube video because he believes that her failure to license the work results in lost revenue that affects his desire to create<sup>224</sup> and because he thinks that the video violates his authorial claim to uses of his work.<sup>225</sup> Copyright law can function best only when it has a full picture of all of these motives.

In our view, copyright law should continue to police the role of non-incentive-based objections to unauthorized use. In fact, we believe that it should police these objections more strongly. Nonetheless, to successfully optimize creative production, copyright law should connect its doctrinal and remedial structures with the richer, more realistic picture of creative incentives discussed above.<sup>226</sup> When authors object to unauthorized uses of their works that are entirely divorced from their reasons for creating them, copyright law should turn them away. Ex post anxieties about uses that tarnish or degrade a work or that upset the author's sense of fairness should not be remedied by copyright law. In the next section, we discuss various policy levers for further accomplishing this goal.

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222. See Bitzer et al., *supra* note 80 (finding that “the fun of programming is a major motivational driver” for open source software programmers); Lakhani & Wolf, *supra* note 80 (“We find . . . that enjoyment-based intrinsic motivation—namely, how creative a person feels when working on the project—is the strongest and most pervasive driver.”).

223. SILBEY, *supra* note 73, at 27–28 (discussing the diversity of motivations that innovators mention).

224. See *Lenz v. Universal Music Corp*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (deciding whether copyright owner had to consider fair use of Prince's song prior to issuing a DMCA takedown notice for a video depicting children dancing to the song).

225. Mike Blake, *Prince To Sue YouTube, eBay over Music Use*, REUTERS (Sept. 13, 2007), <http://www.reuters.com/article/us-prince-youtube-idUSL1364328420070914> (“U.S. pop star Prince plans to sue YouTube and other major Web sites for unauthorized use of his music in a bid to ‘reclaim his art on the Internet.’”).

226. Cf. Fromer, *supra* note 5, at 1761–64, 1781–88 (drawing a connection between monetary and non-monetary concerns of authors by looking to social norms and the expressive dimension of law).

But not all of the objections canvassed in Part II of this Article can be characterized in that way. Although we have focused on authors' concerns about uses that are unrelated to market-based incentives, market-based incentives are not the only ones that should matter to copyright law. If the nature of an author's objection to unauthorized use of her work suggests that such a use undermines her desire to create new works, this is a harm relevant to her incentives to create—what we will call an “incentive-based” or “incentive-relevant” harm.<sup>227</sup> For example, many authors are driven to create in order to receive public recognition for their efforts.<sup>228</sup> They may value recognition entirely apart from any financial benefit that it conveys.<sup>229</sup> Accordingly, if others repeatedly use their works without attributing them to their authors (a practice that copyright law generally allows), those authors may be less willing to create in the future.<sup>230</sup> Moreover, aggrieved authors might often file suits against uses that are technically copyright infringement but whose only objectionable aspects flow from failure to provide attribution.<sup>231</sup> The failure to provide a default attribution right, although it does not directly affect substitutionary copying and market-based harm, may have a negative effect on ex ante incentives to create and on downstream access to works.<sup>232</sup> Copyright law must understand the nature of these concerns in order to perfect its incentives-access balance.

To be clear, just because certain behaviors cause incentive-relevant harms, copyright does not need to make them illegal. Copyright law's balance is a delicate one, and expanding protection to cover these behaviors could have an unacceptable

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227. Jeanne Fromer and Mark Lemley have articulated a related, but distinct, argument that copyright infringement should require both technical similarity and market substitution. Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1299–301 (2014) (elaborating on this claim).

228. See Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 76–101 (describing contemporary attribution norms in various professions); Fromer, *supra* note 5, at 1764–71.

229. See Sprigman, Buccafusco & Burns, *supra* note 67, at 1401 (distinguishing between different reasons authors might value attribution).

230. See Fromer, *supra* note 5, at 1790–98 (proposing that IP law consider using “expressive incentives” like attribution).

231. It is possible that a photographer might sue a website that posts her photos online without attribution not because the website is costing her licensing fees but only because she believes that the unattributed use is unfair or disrespectful of her “parental” relationship with her creations. *Id.* at 1791.

232. See Sprigman, Buccafusco & Burns, *supra* note 67, at 1427.

impact on further creative development and on free speech. Just as copyright law does not currently provide a remedy for every behavior that impacts creative incentives,<sup>233</sup> it need not do so under a behaviorally realistic version either. Copyright law should, however, make these tradeoffs between incentives and access, speech, and downstream creativity explicitly and with a full view of authors' plural motives both to create works and to file suit.

#### B. POLICY LEVERS FOR PRODUCING BEHAVIORALLY REALISTIC COPYRIGHT DOCTRINE

We have repeatedly emphasized the need for copyright law to carefully balance creative incentives with access for downstream users and creators, and we have argued that the current system's failure to account for the full range of authors' motivations leads to inefficiencies. Given the novelty of this contribution and the challenge of striking such a balance, however, we do not here offer a silver-bullet solution for solving this problem. In copyright law, as in other areas of the law, policymakers have a range of substantive and procedural doctrines at hand that may produce a desired outcome.<sup>234</sup> Each of these doctrines, however, may have different and difficult to predict costs associated with achieving those results.<sup>235</sup> So rather than advocating change via a single reform, this Article proposes a series of possible strategies to achieve copyright's consequentialist aims.<sup>236</sup>

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233. For example, the first sale doctrine limits the copyright owner's rights to control of only the first sale of a copy even though allowing owners to recoup investments from downstream sales would further add to their financial incentives to create. See 17 U.S.C. § 109(a) (2012) ("Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.").

234. See Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1638 (2003) (discussing ten different policy levers that can be used to shape patent law).

235. *Id.* at 1577 ("Technology is anything but uniform, . . . and it displays highly diverse characteristics across different sectors.").

236. It is also worth noting the possibility that, as some readers have suggested, this Article's critique of owners' incentives to litigate combined with the preexisting literature critiquing authors' incentives to create poses a more foundational problem for copyright law than legislative modifications can fix. While this is a plausible concern—and something for the drafters of the possibly forthcoming new Copyright Act to keep in mind—we take the moderate optimist's position that the reforms suggested in this Section can at least do no

## 1. Substantive Doctrinal Reform

Our principal concern about copyright owners' litigation behavior involves those lawsuits that are motivated not by concerns about undermining *ex ante* creative incentives but rather by *ex post* objections to conduct that owners deem wrongful or hurtful.<sup>237</sup> Litigation, or the mere threat of it, against these latter unauthorized uses of copyrighted works is costly to the public without generating any valuable incentive effect. In order to eliminate such socially costly litigation, copyright doctrine might be altered to better police plaintiffs' motivations for bringing suit in two ways.

a. *The Prima Facie Infringement Case*

As a first doctrinal policy lever, Congress could change the substantive standard for infringement. For example, the Copyright Act could be amended to require that plaintiffs establish incentive-relevant harm as part of their *prima facie* case.<sup>238</sup> As noted above,<sup>239</sup> copyright law does not currently require plaintiffs to establish that the defendant's actions caused them any harm, financial or otherwise.<sup>240</sup> Rather, it deems any violation of plaintiffs' rights to presumptively cause harm.<sup>241</sup> This rule differs from most tort and property causes of action.<sup>242</sup> For example, if Alice negligently strikes Bill with her car, he can only successfully sue Alice if he can show that he actually suffered some compensable harm.<sup>243</sup> In copyright law, however, if the defendant displayed the plaintiff's painting on a set in its televi-

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harm, and remain well worth considering.

237. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984); *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007).

238. Christina Bohannon and Herbert Hovenkamp have made similar arguments recently. See Bohannon & Hovenkamp, *supra* note 100, at 985 ("IP law should recognize harm only for uses that are likely to interfere with IP holders' *ex ante* decisions to create or distribute their works . . .").

239. See *supra* Part I.B.

240. Bohannon, *supra* note 102.

241. *Id.* at 13–15.

242. Libel is an exception where harm is presumed based on the defendant's conduct. Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 120, 127 (1934) ("[T]he plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured. From the fact of the publication of the defamatory matter by the defendant, damage to the plaintiff is said to be 'presumed' . . .").

243. See RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* 146 (10th ed. 2012) (listing the elements of a negligence cause of action). The same is true for trespass to chattels. See *RESTATEMENT (SECOND) OF TORTS* § 218 cmt. e (AM. LAW INST. 1965).

sion program without the plaintiff's permission, the plaintiff can meet her prima facie burden without establishing that the defendant's behavior caused her any monetary loss or other detriment (and even if the unauthorized use may have actually benefited her). If plaintiffs were required to show that they suffered a cognizable incentive-based harm, many of the lawsuits and threats of lawsuits that most concern us might disappear.

By incentive-relevant harm we refer to a demonstrable injury to creative incentives, including the incentives to create, distribute, and maintain works of authorship.<sup>244</sup> What counts as incentive-relevant harm, however, will require further elaboration, and we seek here only to highlight and sketch rough contours of this policy lever. At a minimum, we assume that the asserted detriment must affect an interest that was reasonably foreseeable to the copyright holder.<sup>245</sup> Harms to unforeseeable interests obviously do not affect authors' incentives.<sup>246</sup> As noted above, however, authors' creative incentives can be damaged in a number of ways.<sup>247</sup> Because authors create for a variety of different reasons, unauthorized uses of their works that undermine those reasons—whether financial, emotional, or spiritual—can curtail an author's willingness to make new works or distribute existing ones. Traditionally, the harm associated with copyright infringement has been characterized solely according to market-based losses associated with substitutionary copying. But the law could also embrace harms to other non-financial motivations, as well. For example, a plaintiff could be allowed to satisfy the harm element of copyright infringement by showing that the defendant's conduct weakened his desire to

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244. See *Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003) (noting that Congress "rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works").

245. See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1603 (2009) (proposing a test of "foreseeable copying" to limit copyright's grant of exclusivity to situations where a copier's use was reasonably foreseeable at the time of creation).

246. *Id.* at 1574 ("If the law (in other contexts) readily presumes that actors can only ever factor foreseeable consequences into their decisionmaking process, then logically speaking, copyright law should see little need to give creators an entitlement to unforeseeable ones. Copyright thus needs to internalize the idea that incentives have limits and develop a mechanism by which to eliminate unincited gains from a creator's entitlement, especially when including them in the entitlement is likely to produce more costs than benefits.").

247. See *supra* Part I.A.



create more works in the future because it tarnished the bond that he feels with his art.<sup>248</sup>

Creating an expansive account of copyright harm would be consistent with a more behaviorally realistic account of human motivation, but it might also prove problematic to implement for a variety of reasons. Whereas a market-based focus has the benefit of resting on relatively demonstrable proof of financial loss, proving that other, more emotional or internal motivations were harmed may well prove challenging.<sup>249</sup> Plaintiffs may not be able to produce the necessary evidence, and courts may not possess the requisite institutional competence to evaluate these claims. And perhaps more concerning still, if it is too difficult to prove harm to intrinsic motivation, courts may simply take the plaintiff's word for it, turning a substantive element into a legal fiction.<sup>250</sup> If so, an effort to constrain litigation might, in fact, make it easier and more lucrative by broadening the recognized protectable interests. In order to counteract this concern, the inclusion of infringement-based harm in the prima facie case for copyright infringement could be operationalized in the form of a pleading requirement. The Federal Rules of Civil Procedure could be amended to require owners to "state with particularity" the harm they have experienced to their creative incentives in their complaint, just as the FRCP requires of fraud plaintiffs.<sup>251</sup> While this would by no means solve the problem of incentive-irrelevant infringement litigation, it would provide a small hurdle and some moral suasion reminding plaintiffs of the reasons the infringement action exists in the first place.<sup>252</sup>

248. The plaintiff might also be allowed to prove that if he had known that the defendant would use his work in such a way, he would have been less inclined to produce it in the first place. Bohannon, *supra* note 102, at 24 (referencing J.K. Rowling's testimony, in *Warner Bros. Entm't. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008), about the harm of a competing work's potential publication on her own desire to create) ("[T]here are times when an author claims that an unauthorized use of her copyrighted work hurts her incentives to continue in her own creative endeavors, not because the use actually hurts sales of her own work, but because it causes psychic injury that deprives her of the motivation to continue working.").

249. They might also be subject to fabrication. *Id.* at 25.

250. In early common law practice, plaintiffs could only gain access to the royal courts if the defendant acted with force and arms against the king's peace. Accordingly, clever plaintiffs simply included these allegations in all pleadings, and courts did not question them. See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 61 (1969).

251. See FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

252. There is some evidence that the heightened pleading requirement for

In requiring plaintiffs to establish incentive-relevant harm as part of their prima facie cases, copyright law can tailor the requirement to best balance the competing interests at stake. Since we seek here merely to note the availability of this policy lever, we stop short of stating with specificity what the ideal scope of such a harm requirement would be.<sup>253</sup> Importantly, though, the incorporation of a harm element is not necessarily at odds with copyright law's allowance of statutory damages in lieu of proof of actual damages.<sup>254</sup> As explained above, copyright law permits a victorious plaintiff to elect statutory damages in part out of a concern that proving actual losses will be difficult.<sup>255</sup> But proving the *amount* of actual losses is different from proving that *some* loss or harm did occur. Uncertainty regarding the degree to which the defendant's conduct affected the plaintiff does not imply that there must be similar uncertainty about whether it was likely to cause an effect or not. Accordingly, adding a harm element does not necessarily entail eliminating statutory damages.<sup>256</sup>

*b. Affirmative Defenses*

Another promising doctrinal policy lever operates after, rather than as part of, the prima facie case for infringement: affirmative defenses that absolve defendants of infringement liability. There is, of course, the fair use defense, which currently operates as copyright's most promising means for cutting down on infringement suits motivated by copyright-irrelevant harm. Fair use's fourth factor requires judges to consider "the effect of the use upon the potential market for or value of the

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fraud deters frivolous lawsuits, at least in some specialized settings. *Cf.* Valerie Lee Litwin, *Pleading Constructive Fraud in Securities Litigation—Avoiding Dismissal for Failure To Plead Fraud with Particularity*, 33 EMORY L.J. 517 (1984).

253. Some of the necessary information might be available but other data might not exist. Relevant data would include the volume and costs of copyright litigation, including the amount that it would be affected by changes in the substantive law. It would also be valuable to be able to estimate the impact the change would have on downstream users and creators who would be free from costly litigation.

254. 17 U.S.C. § 504(c) (2012) ("[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action . . .").

255. 6 PATRY, *supra* note 35, § 22:153, at 22-415 to -416 ("Statutory damages have been believed to be particularly valuable where such relief is difficult to prove." (citations omitted)).

256. Neither, of course, does it entail retaining them.

copyrighted work”<sup>257</sup> as part of the overall fair use balancing test. Courts have interpreted this factor to invite consideration of “market harm,”<sup>258</sup> such that where an unauthorized use negatively impacts any market that is “actual, customary, or likely to emerge,” that weighs against fair use and in favor of infringement liability.<sup>259</sup> And while courts have focused more recently on the transformativeness of unauthorized uses rather than their market impact on owners’ works,<sup>260</sup> uses that inflict even negligible or theoretical harms to the market for the plaintiff’s work may still lose on fair use claims, especially at early stages of litigation.<sup>261</sup> And given the massive statutory damages that prevailing plaintiffs in copyright litigation may recover, the mere risk of such an adverse outcome, even if unlikely, may well be enough to deter fair uses.<sup>262</sup>

Fair use’s fourth factor thus helps countenance infringement suits that pose no threat to owners’ creative incentives. This tendency is exacerbated by courts’ liberal understanding of market harm, which extends even to markets that may theoretically exist, so that any plaintiff who can produce a plausible argument about market harm stands a good chance of overcoming a fair use defense.<sup>263</sup> Courts could address this concern by

257. 17 U.S.C. § 107(4).

258. See Fagundes, *supra* note 91, at 361–77 (discussing courts’ elision of “effect . . . on the market” with “market harm”).

259. See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (holding that any “impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets” weighs against a finding of fair use).

260. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (citing empirical evidence showing that, since 2005, the transformative use first-factor analysis tends to predominate in fair use analyses, and that the market harm fourth-factor analysis is becoming relatively less important).

261. E.g., *Monge v. Maya Publ’ns, Inc.*, 688 F.3d 1164, 1180–83 (9th Cir. 2012) (denying fair use defense for unauthorized use of private wedding photographs that owners had no intention of assigning or licensing); *Salinger v. Colting*, 641 F. Supp. 2d 250, 267–68 (S.D.N.Y. 2009) (denying defendant’s fair use defense, despite concluding that the unauthorized use had no adverse effects on sales of plaintiff’s work and only a theoretical negative impact on possible licensing opportunities for that work).

262. See Gibson, *supra* note 106 (discussing how even low risks of massive statutory damages tends to chill unauthorized uses that are likely fair). Moreover, even where defendants win on their fair use defense, courts still may not shift attorneys’ fees to the plaintiff, saddling defendants with massive attorneys’ fees and court costs. E.g., *Savage v. Council on Am.-Islamic Relations, Inc.*, 87 U.S.P.Q.2d (BNA) 1730 (N.D. Cal. July 25, 2008).

263. For example, in *Monge v. Maya Publications, Inc.*, the Ninth Circuit

changing evidentiary standards for plaintiffs' arguments that they have experienced market harm. Presently, courts are highly deferential to owners' assertions that they have suffered financial harm, and they do not sufficiently limit the scope of harms to those related to creative incentives.<sup>264</sup> Limiting this deference would help to limit infringement suits only to those that are motivated by appropriate considerations. While it makes sense to deny fair use in cases where plaintiffs rely on evidence that the defendant's use has inflicted harm on their primary market, e.g., by reducing sales of copies of their work, courts could apply a heightened standard where owners' claims invoke more abstract concerns about detriments to future or secondary markets. A plaintiff's well-substantiated assertion that the defendant's unauthorized use competed with a pending licensing negotiation would meet such a standard,<sup>265</sup> but a merely plausible claim about potential harm to future secondary markets would not.<sup>266</sup>

Modifying the fair use defense bears promise for weeding out the kinds of infringement lawsuits that are more likely to harm than to further copyright's goal of optimizing creative production. Yet this approach too has its drawbacks. Merely reminding judges that the fair use defense is meant to work a certain way does not guarantee that they will follow suit. Courts have displayed a stubborn tendency to bend the fair use defense to their will, regardless of statutory admonitions.<sup>267</sup> And attempting to filter out non-incentive-related suits as part of an affirmative defense, rather than as part of the *prima facie* infringement case, may not do as much to aid the cause of de-

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resoundingly held that the plaintiffs' market for their copyrighted photos was harmed by the defendants' unauthorized publication of them. 688 F.3d at 1180–83. While this argument has surface plausibility, it ignores the crucial fact that the plaintiffs purchased the copyrights in the photographs in order to suppress those images and had no intention of selling them for any price, so the market the court found to be harmed was purely imaginary.

264. See Bohannon, *supra* note 114.

265. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560–69 (1985).

266. Cf. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 144–46 (2d Cir. 1998) (finding market harm where a plaintiff merely asserted that they could have entered the market for the defendant's derivative book, despite lack of evidentiary support that they actually planned to do so).

267. E.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 555 (2008) (discussing that despite section 107's requirement that courts consider all four factors, factors two and three have effectively become formalities with no impact on outcomes).

defendants whose uses are monetarily innocuous. Plaintiffs bear the burden of proving the substantive case for any cause of action they assert, and copyright infringement is no exception. But defendants, of course, bear the burden of proof with respect to affirmative defenses.<sup>268</sup> And while fair use's status as an affirmative defense is contested, as a practical matter, courts have expressed reluctance to resolve this issue at earlier stages in litigation.<sup>269</sup> Addressing the problem of suits motivated by copyright-irrelevant harm at this procedural stage, then, would likely require defendants to bear more litigation costs than if it were folded into the *prima facie* case and were more readily resolvable via motions to dismiss.

Market harm is, of course, simply one factor in the fair use balancing test, so even a more searching judicial review might lead to cases where fair use is denied because the other factors predominate.<sup>270</sup> A more direct policy lever for combating the proliferation of non-incentive-related copyright suits would be to create an affirmative defense that focuses exclusively on whether an unauthorized use inflicts incentive-based harm. For instance, just as the Copyright Act provides a safe harbor for innocent infringers,<sup>271</sup> it could also include a harmless use defense. Such a provision could state that in the case of infringement that does not inflict incentive-relevant harm, courts have discretion to reduce damages to a nominal amount per act of infringement. This failsafe would obviate the biggest threat in the copyright infringement arsenal—statutory damages—and would be available in cases only where actual damages (either plaintiff's losses or infringer's profits) would be zero or negligible. The possibility of litigating a costly infringement suit, only

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268. 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 16.3.2, at 16:21 (3d ed. 2005 & Supp. 2016).

269. *E.g.*, *Katz v. Chevaldina*, 900 F. Supp. 2d 1314, 1316 (S.D. Fla. 2012) (holding that as a “general rule, . . . fair use defenses are not ripe for determination before the summary judgment stage”); *Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009) (declining to adjudicate a fair use issue presented in a motion to dismiss, and noting that “courts rarely analyze fair use on a 12(b)(6) motion”).

270. The cases dealing with unpublished works could provide an example. *See supra* text accompanying note 47.

271. 17 U.S.C. § 504(c)(2) (2012) (“In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.”).

to recover such nominal damages, would likely deter most owners who seek only to vindicate non-incentive related interests.

This approach bears certain advantages over merely recalibrating the fourth fair use factor. The fair use defense requires judges to evaluate a variety of considerations of which market effects are merely one,<sup>272</sup> so that concerns about incentive-relevant harm may be swamped by transformative use or the amount of the work appropriated by the plaintiff. But creating a freestanding harmless-use defense would raise the same concerns discussed above with respect to the evidentiary and practical challenges associated with specifying incentive-based harm. And, as with reconfiguring fair use's fourth factor, framing the harmless-use inquiry as an affirmative defense would tilt matters slightly in favor of plaintiffs, by placing the burden of proof on defendants.

Changes to the prima facie case elements or to affirmative defenses could help solve the problem that animates this Article—the threat of infringement lawsuits that are motivated by copyright-irrelevant harm. These policy levers are, in effect, two sides of the same coin and, thus, mutually exclusive. Either incentive-relevant harm could enter the picture as a matter of the plaintiff's prima facie case, or it could wait to arrive with the defendant's affirmative defense. Which one is preferable, if either is, depends on a variety of issues, including which side should bear the burden of proof and whether this issue should be litigable at summary judgment.<sup>273</sup> We anticipate that changes to the prima facie case elements would have the larger effect because proving lack of market harm will be difficult for defendants<sup>274</sup> and because waiting until trial to litigate lack of harm will exacerbate possible wealth differences between richer plaintiffs and poorer defendants.<sup>275</sup>

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272. *Id.* § 106 (stating that “the factors to be considered [in a fair use defense] shall include” all four listed statutory considerations (emphasis added)).

273. See *supra* note 269 and accompanying text.

274. Cf. Douglas Walton, *Nonfallacious Arguments from Ignorance*, 29 AM. PHIL. Q. 381, 385 (1992) (discussing the philosophical debate about proving a negative).

275. It is unclear whether the Goliath suing David trope is accurate in copyright litigation. See Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 1992 (2014) (noting the relatively similar distributions of large firms, small firms, and individuals on both sides of copyright disputes).

## 2. Copyright Remedies

In addition to manipulating copyright law's substantive doctrine, Congress might also attempt to adjust the law's remedial options to more efficiently balance creative incentives and public access. Here we suggest three possibilities that are worth considering.

First, copyright law could reduce its reliance on property rule-based injunctive relief in favor of greater emphasis on liability rule-based damages that are matched to incentive-relevant harms.<sup>276</sup> The threat of an injunction could prevent socially valuable, but technically infringing, uses of a work from ever existing. Normally, we might expect that these sorts of uses would simply be licensed by the copyright holder so that everyone benefits. But because we are discussing situations in which the nature of the owner's objection may be based on concerns about unflattering and undesired uses of the work, licensing will be impossible.<sup>277</sup> If these are still not to be treated as fair uses (and, thus, free uses) copyright law could eliminate injunctive relief and limit the plaintiff's recovery to a figure consistent with the amount of incentive-based harm.<sup>278</sup> In some cases, at least, the public will still have access to the infringing work and authors will receive some compensation for their losses.

Second, copyright law could tailor its remedies to the nature of the incentive-relevant harm that the author has suffered. In particular, when the nature of the harm comes from diminished creative incentives associated with the failure to provide attribution to the author, courts could impose injunctive relief mandating that all subsequent copies of a work include appropriate attribution.<sup>279</sup> Ideally, this could occur in lieu of both injunctive relief that would prevent any copies of a new work from being produced and substantial damages.

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276. For the classic statement of property rules and liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

277. See Gordon, *supra* note 42.

278. Although the Supreme Court's recent holding in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), that injunctive relief should not be automatic in patent cases was predicted to produce a similar diminution in copyright cases, the existing empirical evidence suggests that this has not yet happened. See Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215 (2012).

279. Courts' equitable authority is given by 17 U.S.C. § 502(a) (2012).

Imagine a situation in which a photographer objects to the use of her photo in a book because the book does not attribute the photo to her. The photographer did not agree to the reproduction of the photo, so the use technically constitutes copyright infringement. She does not object to the use of the photo in general or to the loss of the licensing revenue, but only because she feels upset about the lack of attribution. Having her works connected with her persona is a major reason why she enjoys photography in the first place. Instead of completely enjoining publication of the book or granting the photographer substantial damages that might discourage the publisher from continuing to print it (both of which could happen under current law), the judge could offer injunctive relief mandating that all existing and future copies of the book include adequate attribution.<sup>280</sup>

This solution recognizes the roles that attribution and personal expression play in creative motivation, but it does so in a more efficient way than other attempts to legally recognize “expressive incentives.”<sup>281</sup> Rather than provide attribution as part of the default complement of legal rights that all copyright authors receive, our proposal tailors the use of attribution to situations in which attribution likely played a role in motivating creativity. Legal rights are expensive to provide and expensive to contract over, and attribution is no exception.<sup>282</sup> Many authors who would be given attribution rights in a default scheme would not necessarily value them or would value them for reasons unrelated to creative incentives.<sup>283</sup> Contracting over copyrighted works would become more expensive, and the initial distribution of the rights would likely be sticky.<sup>284</sup> With our suggestion, however, attribution is only provided when appropriate—when it was part of why the author created the work in the first place.

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280. It is possible that the parties will negotiate to a similar solution in the absence of a formal legal remedy. But the existence of the formal legal remedy might be valuable for a couple of reasons. It could give legal support to an option that the parties would not have considered or valued highly otherwise. More importantly, it could buoy the defendant’s bargaining power in a way that will increase the likelihood that the book will remain in print and accessible to the public.

281. Fromer, *supra* note 5.

282. See Sprigman, Buccafusco & Burns, *supra* note 67.

283. For example, they might value them intrinsically for non-consequentialist reasons.

284. See Sprigman, Buccafusco & Burns, *supra* note 67.



Third, modifying the availability of attorneys' fees may also be a promising policy lever for ameliorating the problem of lawsuits that do not seek to vindicate incentive-relevant harms. Statutory damages are typically held out as the major weapon owners have to strike back at infringers,<sup>285</sup> but attorneys' fees can be even more powerful. The cost of bringing a copyright infringement case to trial averages around \$600,000.<sup>286</sup> And while courts have discretion to award or deny fee awards,<sup>287</sup> they typically issue them as a matter of course to prevailing plaintiffs in copyright cases—even when the actual amount recovered is relatively small.<sup>288</sup> Fees thus pose an unappreciated part of the reason that suits unmotivated by incentive-based harm are so threatening: even if actual damages are small, and even if a court grants only a small statutory damages remedy, the attorney's fees alone (or even their threat) can be financially crippling.

Here, along the lines of above suggestions, law could consider linking awards of attorneys' fees to the presence of incentive-based harm. Awarding fees to prevailing plaintiffs who are meaningfully seeking to preserve their financial interests makes sense. Owners should not have to bear six-figure costs merely to vindicate exclusive rights in their works of authorship, and the threat of attorneys' fees is a powerful deterrent against unauthorized use. But where owners are seeking only to vindicate some sense of moral injustice, the promise of attorneys' fees may actually undermine copyright's goal of optimizing creative production. Users whose conduct inflicts no cost on an owner's copyright incentives may still knuckle under to a threat of suit if they may have to bear all the costs of the litigation should the owner successfully show a technical though costless infringement. One simple solution would be to require owners to show the presence of an incentive-relevant harm as a prerequisite for recovering attorneys' fees. This would serve as

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285. See generally Pam Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

286. See AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 25 (2007).

287. 17 U.S.C. § 505 (2012).

288. See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 869 F. Supp. 521, 523–24 (E.D. Mich. 1994) (awarding plaintiff \$326,318.52 in attorney's fees and costs on a statutory damages award of \$30,000); *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359 (S.D.N.Y. 1991) (awarding plaintiff \$116,729 in attorney's fees on a damages award of \$10,001).

a major caution to owners motivated entirely by moral outrage unrelated to their pecuniary incentives. Yet it comes with the same caveats that we have noted with the above policy levers. Figuring out how to prove incentive-relevant harm raises difficult evidentiary issues, and risks becoming no more than a formality. But putting such a hurdle in the way of recovering attorneys' fees would at least complicate matters for copyright owners motivated by concerns unrelated to ex ante creative incentives, and it would weed out at least some counterproductive infringement litigation.

### 3. External Doctrinal Checks

The foregoing policy levers focused on changing the Copyright Act itself in ways designed to minimize the social harm arising out of inappropriate litigation. Here, we consider a pair of policy levers that look to other sources of law either as limitations on owners' rights to sue for infringement or as models for how to deter owners from filing such suits.

#### a. *Constitutional Limitations*

One external doctrinal check on infringement suits that are not motivated by incentive-relevant harm is the Constitution itself. Scholars primarily cite two constitutional provisions that may provide a check on excessively broad or overzealously enforced copyrights. The First Amendment's speech protections are implicated by infringement suits in that every enforcement of an owner's copyright effectively shuts down some act of expression<sup>289</sup>—albeit typically an unlawful one. And the Progress Clause giving rise to Congress's ability to create intellectual property law limits that legislative power to that which “promote[s] the progress of science and the useful arts.”<sup>290</sup> These two provisions each seek to support copyright's ultimate purpose of optimizing creative production, though in different ways. The First Amendment's checks on overly broad copyright make sure that owners' rights do not undermine the American

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289. See Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 2 (2000) (“When one speaker wishes to use another's words, or even words that, taken as a whole, are ‘substantially similar’ to someone else's words, the government may tell her that she cannot. If she has printed books with those words in them, her books may be seized and destroyed by U.S. marshals, or she may be enjoined from trying to sell them.”).

290. U.S. CONST. art. I, § 8, cl. 8.

principle of freedom of expression, while the Progress Clause requires Congress to prioritize the public's interest in access to works of authorship (not owners' desire to profit from them) when it creates intellectual property rights.

Numerous scholars have argued that these constitutional principles should give rise to doctrines constraining copyright law, and some courts have applied variants of these theories to dismiss infringement claims when raised by defendants in infringement litigation.<sup>291</sup> Here, too, constitutional theories could help address the social costs of infringement suits generated dominantly by owners' inflamed moral passions. In particular, defendants could raise such constitutional claims as affirmative defenses, plausibly arguing that infringement litigation not motivated by incentive-based harm offends both the First Amendment's Speech Clause and Article I's Progress Clause for different but related reasons. As we have explained, angry owners increasingly file suit not because of concern for their creative incentives, but because they seek to use copyright as a tool of censorship to silence expression that offends their ethical intuitions.<sup>292</sup> In such cases, copyright's incentive-protecting function is negligible, but its capacity to harm speech is at its zenith.<sup>293</sup> Such cases warrant applying the First Amendment to preclude owners from suppressing free expression by pursuing such litigation. The use of copyright to strike back at unauthorized uses that owners find immoral—either because it offends their religious beliefs or simply because they find the use personally embarrassing—also lies in clear tension with the Progress Clause's twin admonitions that the public, not owners, are the primary beneficiaries of copyright law, and that copy-

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291. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001) (holding that First Amendment speech concerns warranted skepticism about owner's copyright infringement suit against defendant's parody of its work). While the *Suntrust* court did not explicitly frame its decision in terms of the Progress Clause, it did stress that copyright was designed to "promote learning," an aim that was undermined by the plaintiff's lawsuit. *Id.* at 1261.

292. See, e.g., *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012) (describing lawsuit filed by a pro-choice group against a pro-life group for its criticism of the former's videos); *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010) (granting summary judgment on copyright infringement claim for unauthorized use of musical works owned by left-leaning musician Don Henley in campaign ads for Republican Senate candidate Chuck DeVore).

293. See *Tehrani*, *supra* note 94 (cataloguing the speech-related harms of the increasing trend toward using copyright as a tool of political and personal censorship).

right serve as a means of promoting cultural progress. Of course, these constitutional doctrines are typically invoked as constraints on legislation. But Congress does not have the power to pass copyright law that simply protects private owners' ethical sensibilities at the expense of enriching the public. This allows legislative constraints to be recast as affirmative defenses: Defendants could argue that courts should regard infringement suits that seek to remedy copyright-irrelevant harm as lying outside the constitutionally valid scope of the Copyright Act's remedial provisions.<sup>294</sup> If accepted, this would result in the judicial recognition of one of the changes to the prima facie case or defenses discussed above.

Using a constitutional affirmative defense as a policy lever in this context bears promise. One distinct advantage of this approach as compared to doctrinal reform is that it does not require legislative action, obviating the practical difficulties associated with getting a gridlocked Congress to do anything, and instead allowing individual litigants to selectively deploy Speech or Progress Clause arguments against copyright-irrelevant lawsuits. That said, this policy lever is also subject to a number of limitations, even beyond the concerns raised above about articulating a stable notion of incentive-relevant harm. Probably the most serious concern is the challenge of translating constitutional theories into a coherent and enforceable doctrine. While many articles have been written about different ways that both the First Amendment and the Progress Clause could cabin excessive copyright litigation,<sup>295</sup> courts have been loath to actually apply these theories. The First Amendment has only occasionally been invoked to block expression-suppressive litigation,<sup>296</sup> and courts have consistently rejected

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294. Put another way, courts could conclude that those provisions are unconstitutional as applied to infringement suits that seek remedies for copyright-irrelevant harm.

295. *E.g.*, Netanel, *supra* note 113, at 1; David Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537 (2010); Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 337 (2002); Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1 (2013); Tushnet, *supra* note 289.

296. *E.g.*, *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) (invalidating removal of works from the public domain under the Uruguay Round Amendments Act on a First Amendment theory), *rev'd sub nom.* *Golan v. Holder*, 132 S. Ct. 873 (2012) (which sort of proves the point); *Suntrust Bank*, 268 F.3d at 1259 (reversing and remanding district court's finding of infringement liability

Progress Clause challenges in light of the wide deference owed by the judicial branch to Congress's legislative decisionmaking.<sup>297</sup> Using this policy lever in infringement lawsuits inspired by copyright-irrelevant harm would require a much more liberal approach toward constitutional doctrines than courts have previously displayed in this setting. Even a handful of victories for defendants on such theories, though, could give pause to owners otherwise inclined to file suit for copyright-irrelevant harm and provide one more tool for better assuring that infringement litigation furthers copyright's constitutional aspirations.

*b. Statutory Penalties*

Section 512(f) of the Digital Millennium Copyright Act (DMCA) provides a promising model for an additional policy lever that might ameliorate the problem of infringement suits unrelated to incentive-based harm. Wrongfully sued defendants could be allowed recourse to damages associated with having to defend suits not motivated by incentive-relevant harm. The DMCA allocates to copyright owners the ability to issue takedown letters to Internet service providers hosting unauthorized uses of their works, but it also seeks to balance the risk that owners may abuse this prerogative with a provision allowing users to sue owners for the damages incurred by bad-faith takedown notices.<sup>298</sup> This provision has been invoked in several high-profile cases, such as when Prince issued a takedown notice regarding a home video of a baby dancing to "Let's Go Crazy,"<sup>299</sup> and when Diebold issued a takedown notice regarding leaked internal emails that cast the company in a negative light.<sup>300</sup> In both of these instances, courts found that

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on a First Amendment theory).

297. *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (rejecting a Progress Clause challenge to the Copyright Term Extension Act).

298. 17 U.S.C. § 512(f) (2012) ("Any person who knowingly materially misrepresents under this section—(1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.").

299. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

300. *Online Policy Grp. v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

the uses lay so clearly within the fair use defense that the owners' assertions that they were infringing amounted to misrepresentations and warranted damages under section 512(f).

As we have explored in detail, infringement suits motivated by copyright-irrelevant harm similarly exact outsized social costs both to users, who are threatened with individual liability, and to the public, who may lose access to works that it would otherwise be able to consume and enjoy. Copyright law could also include such a remedial section, modeled on section 512(f) of DMCA, that promises to make defendants whole for infringement lawsuits in which they prevail, if a court finds that the owner's suit was unrelated to incentive-relevant harm.<sup>301</sup> This would provide a more robust remedy than the Copyright Act currently provides to victorious defendants. Current law merely permits courts discretion to award costs and attorneys' fees to prevailing parties (plaintiffs or defendants),<sup>302</sup> and so judges remain free to decline to engage in such cost-shifting—which they often do.<sup>303</sup> A section 512(f)-style option for victorious copyright defendants, by contrast, would be mandatory and would include all costs inflicted on the defendant by the owner's bogus suit—including, but not limited to, attorneys' fees and court costs.<sup>304</sup> This greater scope would allow courts to take account of the full measure of social costs incurred by infringement lawsuits unrelated to incentive-based harm, including not only the direct litigation costs borne by defendants, but also other costs to the defendant—and, depending on statutory

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301. The closest existing such doctrine is the common-law notion of copyright misuse, which allows defendants to shield themselves to liability from infringement suits that are rooted in owners' attempts to wrongly expand their copyright monopolies. This doctrine has been used with success very rarely, though, such as where the owner's conduct was found to be anticompetitive, *see Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990), or to suppress valid literary criticism, *see Schloss v. Sweeney*, 515 F. Supp. 2d 1068, 1081 (N.D. Cal. 2007). Yet this doctrine only enables defendants to enjoin the plaintiff's enforcement of the copyright during the period of misuse; it does not permit retrospective compensation of damages flowing from that misuse. *Schloss*, 515 F. Supp. 2d at 1079.

302. 17 U.S.C. § 505.

303. A court recently declined to order a plaintiff to pay a defendant's costs and fees in a copyright infringement case where the court found that the plaintiff's failed infringement claim was "never strong and litigated anemically." *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-06076 SI, 2009 U.S. Dist. LEXIS 4926, at \*1–3 (N.D. Cal. Jan. 26, 2009).

304. *Cf.* 17 U.S.C. § 512(f) (stating that parties who issue takedown notices based on false infringement claims "shall be liable for *any damages* . . . incurred by the alleged infringer" (emphasis added)).

phrasing, even the public<sup>305</sup>—so that the damage wrought by these suits is fully compensated. The threat of such broad liability for pursuing losing infringement claims unrelated to incentive-based harm could be a potent deterrent to owners otherwise inclined to file suit for unauthorized use rooted solely in such concerns.<sup>306</sup>

Some of the downsides of this policy lever have already been indicated in other contexts. To the extent that parsing “incentive-relevant harm” creates interpretive challenges for judges, that problem would apply with similar force here. It is also worth noting that while several high-profile cases have illustrated the promise of DMCA section 512(f), such cases are relatively few, leading some scholars to express concern that defendants lack the time, resources, and risk tolerance to seek the remedies this section makes available.<sup>307</sup> Such objections would similarly apply in the context of our hypothetical remedial cause of action for copyright defendants, who also tend to be impecunious and risk-averse. One way to ameliorate this latter concern would be to make recovery of such damages available on a *qui tam* basis, so that members of the public could act as private attorneys general, recovering the statutory penalties—on behalf of both wrongly accused infringement defendants and the public more generally—made available by a copyright analogue of DMCA section 512(f).<sup>308</sup>

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305. Accounting for the broadly distributed access-related costs inflicted on the public by overzealous infringement suits would be a challenging endeavor indeed. One possibility for avoiding this valuation morass would be to include a flat-fee damages amount accounting for public costs as an automatic part of defendants’ recoveries.

306. See Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 746 (2011) (“If appropriately interpreted, the [DMCA section 512(f)] misrepresentation claim holds great promise for protecting both copyright owners and lawful users of copyrighted works.”).

307. *Id.* at 751 (noting these concerns and adding that courts’ restrictive interpretations of DMCA section 512(f) have further limited its availability).

308. Such actions are most familiar in the context of the federal False Claims Act, 31 U.S.C. §§ 3729–33 (2012), which allows private citizens to bring suit against government contractors for violations of federal regulations. The rationale for *qui tam* actions in the FCA setting is actually quite analogous to the rationale for developing a remedial cause of action for overreaching copyright infringement suits. FCA *qui tam* actions are premised on the notion that fraud in government contracting ultimately harms not just state entities, but also the public. Similarly, here, seeking remedies against owners who overextend their copyright monopolies helps not only defendants who suffer the expense of defending these suits, but also the public, which bears the cost of lost access and chilled expression that such lawsuits may engender.

#### 4. Administrative Options

A final policy lever that could be integrated with some or all of these doctrinal reforms operates at the administrative level. Copyright's administrative body is the Copyright Office,<sup>309</sup> which occasionally issues clarifying regulations and circulars but primarily engages in the ministerial task of processing registrations and recordations of works of authorship. Some scholars have suggested that the Office could take a more active role in administering copyright law, such as by adjudicating certain kinds of infringement disputes as a less costly, more efficient alternative to full-scale litigation.<sup>310</sup> This administrative strategy holds promise for remedying the concerns raised by this Article as well. In the foregoing discussion of various policy levers, a common thread has been the need to identify some notion of incentive-relevant harm as a threshold issue for limiting the scope of infringement liability by various means. Yet in each of these cases, courts would have to resolve this conceptually difficult issue, raising the kinds of uncertainty concerns that may still deter financially harmless use.<sup>311</sup>

Consider, then, the possibility of enabling the Copyright Office to issue advice letters that opine on whether a given instance of unauthorized use does or does not engage incentive-based harm. Such letters could issue from adjudicators with expertise in copyright litigation and would simply render a preliminary, advisory opinion on that issue based on the parties' limited submissions that would not be dispositive in subsequent litigation.<sup>312</sup> Receiving an unfavorable letter would not preclude an owner's going forward with an infringement suit,

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309. The Copyright Office is an Article I entity, located within the legislative branch of the federal government. *See* 2 U.S.C. § 136 (2012); 17 U.S.C. § 701.

310. *See, e.g.*, Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1122–28 (2007) (outlining a proposal to have the Copyright Office create three-member boards to resolve fair use issues separately from federal litigation); Fagundes, *supra* note 99, at 182–88 (suggesting that the Copyright Office issue advisory letters when asked to opine on specific instances of unauthorized or highly similar use).

311. *See* Gibson, *supra* note 106 (observing that even very low risks of liability or litigation costs may deter unauthorized users, who are often impecunious compared to copyright owners).

312. Indeed, giving an Article I administrative agency authority to determine the outcome of federal litigation would likely violate the separation of powers principle. *United States v. Sparks*, 687 F. Supp. 1145 (E.D. Mich. 1988) (holding that exercise of power by one branch that is constitutionally allocated to another violates separation of powers).



but it would make owners think twice if it forced them to confront the possibility that they might recover no or limited remedies after suit. There are a variety of models for how such advice letters would interact with copyright litigation. Law could require owners to seek such letters as a mandatory prerequisite to filing infringement suits,<sup>313</sup> or it could make them optional and available to either party.<sup>314</sup> The former option would add a hurdle that would be daunting for owners if they received a ruling that the infringement at issue did not entail incentive-relevant harm. The latter option would prove useful to potential defendants in cases that involved no such harm, giving them a powerful means of deterring suit—especially if a showing of such harm was a prerequisite to recovery of certain remedies or even to the prima facie infringement case itself, as we have suggested above. And the practice of issuing advice letters would be useful also because it would create a body of advisory precedent to which future owners and users could turn in assessing whether the Copyright Office (or courts) is likely to regard their dispute as involving copyright-based harm.

Adding a layer of administrative procedure to copyright litigation may prove a cheap and efficient way to resolve many pending infringement suits that do not involve incentive-relevant harm, fending off such matters before they reach full-blown (and much more costly) federal litigation. Administrative adjudication would also bring specialized expertise, which may ameliorate the difficulties courts would inevitably face when specifying the notion of incentive-based harm. That said, the objections to such an approach are several, and worth noting. Agencies are subject to capture by industry,<sup>315</sup> which could lead to the issuance of advice letters becoming a formality that inevitably favored owners. Owners might also object that even purely advisory letters unduly interfere with their right to vindicate infringement matters in federal court, either on due pro-

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313. The EEOC uses a similar practice, requiring plaintiffs seeking to file discrimination lawsuits against federal employers to engage in mandatory mediation, and then receive a “right to sue” letter that entitles them to move forward with their lawsuit if the mediation does not resolve it. See 42 U.S.C. § 2000e-5(f)(1) (2012).

314. This approach is similar to the SEC’s use of no-action letters, *No Action Letters*, U.S. SECS. & EXCHANGE COMM’N, <http://www.sec.gov/answers/noaction.htm> (last visited Apr. 19, 2016) (describing this practice), and the IRS practice of issuing letter rulings, Rev. Proc. 2007-1, 2007-1 I.R.B. 1 (outlining the IRS private letter ruling process).

315. For the classic account of regulatory capture, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

cess<sup>316</sup> or separation of powers grounds.<sup>317</sup> And adding a new administrative adjudicative process is not cheap, so that employing this strategy may force the Copyright Office to further ration its notoriously limited resources in ways that would exact other social costs.<sup>318</sup> But the strategy we have sketched here is but one of a number of possibilities for leveraging the authority and expertise of the Copyright Office in the service of better accounting for the moral psychology of infringement.<sup>319</sup>

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This Part has taken on the challenge of incorporating the innate moral responses owners exhibit when their works are infringed with copyright's central aspiration of optimizing creative production. Part of this project is conceptual. Part III.A sought to chart a middle path between the two classic copyright paradigms of monetary instrumentalism and moral rights. Our counterintuitive suggestion is that only by taking account of the realities of moral psychology can copyright truly achieve its consequentialist ends. But this theory needs to translate into practice if our insights are going to have practical bite. To that end, we offer the suggestions of Part III.B as policy levers that

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316. Especially in the case of mandatory advice letters, copyright owners may argue that the hardships imposed on them by having to advert to administrative process create an undue burden on their due process prerogative to have their ownership interests evaluated by federal courts. *See Matthews v. Eldridge*, 424 U.S. 319, 332–35 (1976) (discussing the three-part balancing test that governs this issue).

317. The separation of powers argument would call into question the propriety of having a legislative agency resolve issues that are the constitutional province of Article III courts. *See Sparks*, 687 F. Supp. at 1145. Michael Carroll has carefully considered and convincingly dismissed these constitutional objections in the context of his proposal to have fair use issues resolved administratively. *See Carroll, supra* note 310, at 1133–35.

318. It could, for example, make even slower the Office's processing of copyright registration applications, which has slowed to a crawl due to budget cuts. *See Lyndsey Layton, © 2009? Wishful Thinking, Perhaps, as Backlog Mounts*, WASH. POST, May 19, 2009, at A1 (observing backlog of about two years for registration applicants). Issuing these letters would not, of course, come without a cost to litigants, and it is possible that the fees associated with the letters would substantially offset the costs to the Office.

319. To take just one other quick example, the Copyright Office could issue a circular seeking to define the notion of incentive-relevant harm, much as it frequently issues circulars seeking to resolve hard definitional issues arising out of the Copyright Act. *E.g.*, U.S. COPYRIGHT OFFICE, CIRCULAR NO. 9, WORK MADE FOR HIRE (2012) (defining "work made for hire" in light of statutory definition and court decisions).

might make copyright law better adapted to owners' moral psychology. We present these options not to demonstrate that any particular one is clearly right and should be adopted by Congress and the courts, but simply as promising examples of the kinds of strategies that are available to address the problem of infringement litigation that derives from concerns unrelated to harm relevant to copyright incentives.

### CONCLUSION

Contrary to copyright law's standard narrative, authors' motivations are complex. But so too is the effort involved in crafting appropriate copyright policy. This Article's descriptive claims about the heterogeneity of owners' litigation motives will be, we hope, widely admitted upon review of the evidence we present. And we expect that others will also agree that the mismatch between copyright's standard story and the behaviorally realistic portrait that we offer can create a series of problems for the law's attempts to optimize creative production. Figuring out which of the series of policy levers we mention will best solve those problems is, of course, a much more difficult enterprise.

One thing we suspect all readers will agree with is the need for further empirical study in this area. It would be valuable to know precisely what sorts of activities trigger owners' moral foundations and how widely distributed those responses are. For instance, do most copyright owners object to prurient uses of their works, or is this a concern that is mostly felt by a subset of them? Moreover, to what extent, if any, does a sense of moral outrage over unauthorized use—prurient or otherwise—affect those authors' willingness to keep creating new works? In addition, we would like to know how malleable these moral intuitions are. To what extent are they based on the contours of current social norms or copyright doctrine, and to what extent are they more or less hard-wired aspects of how humans relate to their creations?

Answering these and related questions should rank high on the list of copyright scholars' priorities for the coming years. With the promise of a new copyright act around the corner,<sup>320</sup> now is the time to flesh out a behaviorally realistic picture of copyright authorship and litigation.

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320. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) (speech by current U.S. Register of Copyrights on the need to review and revise current copyright law).