

# The Judge's Order and the Rising Phoenix: The Role Public Interests Should Play in Limiting Author Copyrights in Derivative-Work Markets

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*ABSTRACT: By discussing the recent case Warner Bros. Entertainment v. RDR Books (“the Harry Potter case”), this Note focuses on the current copyright-law paradigm, which employs two seemingly contradictory tools—copyright protection and fair use—to serve the public interest by providing the widest possible dissemination of information. First, copyright protection promotes the public interest by granting authors lifetime monopolies over their works, which incentivizes creativity. Second, fair use promotes the public interest by curtailing these monopolies to allow new innovative uses of the original work. In this case, the U.S. District Court for the Southern District of New York ruled that a Harry Potter Lexicon did not constitute fair use of the Harry Potter books. Current copyright and fair-use statutes supported, and arguably required, this decision. However, this Note questions whether the current copyright-law paradigm actually achieves the policy objective sought, i.e., to benefit the public interest. This Note discusses whether the current copyright framework achieves the utilitarian objective of copyright law in light of the issues presented in the Harry Potter case and the historical and present tensions existing between copyright protection and fair use. The question this Note considers is: By extending copyright protections to exclude works like Vander Ark’s Lexicon from the marketplace, does the law extend copyright protection beyond its purpose of serving the public interest? After weighing the costs and benefits, it becomes apparent that the public interest would be better served by further limiting copyright protections in derivative-work markets. This would allow for more innovation, more participation, and more consumer options in the marketplace—all of which would benefit the public.*

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## I. INTRODUCTION

On September 8, 2008, the U.S. District Court for the Southern District of New York ruled that defendant Steven Vander Ark's ("Vander Ark") published Lexicon—describing the creatures, characters, objects, events, and places that existed in plaintiff J.K. Rowling's ("Rowling") Harry Potter novels—violated copyright law and was not fair use. This decision confronted the tension between copyright, which strives to protect individual property interests in order to promote progress in the arts, and fair use, which strives to protect the rights of the public to build upon preexisting works and recast them in a new light.<sup>1</sup> A key factor to the court's decision that Vander Ark's Lexicon did not constitute fair use was the fact that Vander Ark's use was for commercial gain, and therefore, would interfere with a preexisting market for derivative works written or licensed by Rowling.<sup>2</sup>

The case of Rowling versus Vander Ark was David-and-Goliath-like in proportion. CNN noted the two authors' disparate positions: "Rowling is a billionaire and Vander Ark is a mere muggle: a librarian. . . . [T]he expected salary for a typical librarian in the United States [i]s \$53,861. But Rowling says it is not about the money, it's about control."<sup>3</sup> That is precisely what this Note will explore: the dynamics of control within copyright law and the rationales and justifications for the current legal paradigm.<sup>4</sup> Today,

1. Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513, 539–40 (S.D.N.Y. 2008). Vander Ark has since published a version of the Lexicon. STEVE VANDER ARK, THE LEXICON (2009). However, this does not change the questions the Harry Potter case raised, including whether the law rightly gave Rowling the power to sue and stop publication of Vander Ark's initial version. See Warner Bros. Entm't, 575 F. Supp. 2d at 553 (enjoining the publication of Vander Ark's initial version of the Lexicon).

2. Warner Bros. Entm't, 575 F. Supp. 2d at 552–53.

3. Sunny Hostin, *Harry Potter Case Brings the Law into Internet Age*, CNN, Apr. 24, 2008, <http://www.cnn.com/2008/CRIME/04/22/sunny.potter/index.html#cnntext>.

4. Thomas Kuhn defines a "paradigm" as an ensemble of theories, philosophical premises, and moral values that at a particular time and place fix a society's normal practices and intellectual inquiries. F. Willem Grosheide, *Paradigms in Copyright Law*, in OF AUTHORS AND ORIGINS 203, 209 (Brad Sherman & Alain Strowel eds., 1994). Paul Goldstein summarizes the current copyright-law paradigm; he states:

The overarching object of copyright law in the United States is to encourage the widest possible production and dissemination of literary and artistic works. The Copyright Act seeks to achieve this object through a scheme of carefully balanced property rights that give authors and their publishers sufficient inducements to produce and disseminate original creative works and, at the same time, allow others to draw on these works in their own creative and educational activities. Copyright law presupposes that, absent subsidy, authors and publishers will invest sufficient resources in producing and publishing original works only if they are promised property rights that will enable them to control and profit from their works' dissemination in the marketplace. But copyright law also recognizes that all creative efforts necessarily build on the creative efforts that precede them. If

copyright law determines what is considered fair use and what violates copyright protections. The law weighs the public interests to determine who has access to the cultural marketplace and who is denied participation. The law determined in the case of Rowling versus Vander Ark that an author who has sold more than 140 million copies of Harry Potter novels in the United States alone has the legal right to stop an unknown author from selling 10,000 copies of a published Lexicon because it might harm her marketplace interest.<sup>5</sup> Taking a step back, one must ask, is this what the framers intended when they gave Congress the authority “[t]o promote the Progress of Science and useful Arts”?<sup>6</sup> At what public cost are we promoting individual-author property interests? At what point must creative monopolies give way to broader cultural participation? Indeed, it is not just about the money; it is about access, participation, and an inherent sense of fairness and proportionality.<sup>7</sup>

Vander Ark’s print Lexicon was a culmination of his Lexicon website. Since 1999, Vander Ark collected and organized information from the Harry Potter books into an online Lexicon for fans to use.<sup>8</sup> Rowling, her publishers, and Warner Brothers Entertainment<sup>9</sup> all used Vander Ark’s website and praised him for his creation. Rowling spoke highly of Vander Ark’s online Lexicon: “This is such a great site that I have been known to sneak into an internet café while out writing and check a fact rather than go into a bookshop and buy a copy of Harry Potter.”<sup>10</sup> In July 2005, Vander Ark

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copyright law is to promote the national culture and learning, it must allow subsequent creators to draw on copyrighted works for their inspiration and education.

PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 1:14 (1989).

5. See Hostin, *supra* note 3 (noting that Vander Ark’s publisher intended to print an initial run of 10,000 copies of the Lexicon); Dan Slater & Jeffrey A. Trachtenberg, *Judge Halts ‘Potter Lexicon’ for Copyright Violations*, WALL ST. J., Sept. 9, 2008, at B11, available at <http://online.wsj.com/article/SB122089489410910619.html> (referring to Rowling as “one of the most successful authors in the world, with more than 140 million copies of Harry Potter novels in the U.S. alone”).

6. U.S. CONST. art. I, § 8, cl. 8.

7. Professor Tim Wu of Columbia University Law School observes that Vander Ark is “an author in his own right” and argues that Vander Ark and others like him “may not be authors like Rowling, who are going to become millionaires. But I think, however humble [] they are[,] they deserve a little respect, and that’s where I think the law needs to go.” Hostin, *supra* note 3.

8. Warner Bros. Entm’t v. RDR Books, 575 F. Supp. 2d 513, 520 (S.D.N.Y. 2008) (describing how Vander Ark created “descriptive lists of spells, characters, creatures, and magical items from *Harry Potter* with hyperlinks to cross-referenced entries” and “developed an A-to-Z index to each list to allow users to search for entries alphabetically”).

9. Warner Brothers has a property interest in Rowling’s Harry Potter series because it has exclusive film rights to the entire seven-book series. *Id.* at 518.

10. *Id.* at 521 (quoting Transcript of Record at 118:2–119:2, Warner Bros. Entm’t v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (No. 07 Civ. 9667 (RPP))).

received a note from a senior editor at Scholastic, the American publisher of the Harry Potter series, thanking him:

“[F]or the wonderful resource [his] site provides for fans, students, and indeed editors & copyeditors of the Harry Potter series,” who “referred to the Lexicon countless times during the editing of [the sixth book in the series], whether to verify a fact, check a timeline, or get a chapter & book reference for a particular event.”<sup>11</sup>

In September 2006, when Warner Brothers invited Vander Ark to the set of *The Order of the Phoenix*, the film's producer “told Vander Ark that Warner Brothers used [his] Lexicon website almost every day” while filming.<sup>12</sup> Finally, in July 2007, while visiting Electronic Arts' studios, the licensed producer of the Harry Potter video games, Vander Ark “observed printed pages from the Lexicon covering the walls of the studio.”<sup>13</sup>

The fact that no one brought a copyright suit against Vander Ark's online Lexicon indicates that Rowling, her publishers, Warner Brothers, and Warner Brothers' video-game licensees considered the online Lexicon to be a fair use of her novels. It further indicates that they were not threatened by the online Lexicon and were more than happy to use the website as a resource for capitalizing on the Harry Potter market. Why then, did Rowling file suit when Vander Ark decided to publish the fruits of his online labor in a print-version Lexicon? The answer is that Rowling herself planned to write an encyclopedia to the Harry Potter series.<sup>14</sup> She also feared that Vander Ark's Lexicon might be a substitute in the marketplace for her two companion books to the Harry Potter series.<sup>15</sup> The court held Vander Ark's Lexicon was not a fair use of the Harry Potter series because even though Vander Ark's published Lexicon would not compete with the already-published Harry Potter novels, it would compete in the market for Rowling's companion books, her proposed encyclopedia, and her rights to license future derivative works.<sup>16</sup> While weighing the fourth factor for the fair-use test (“the effect of the use upon the potential market for or value of the copyrighted work”<sup>17</sup>), the court reasoned that Vander Ark's Lexicon would “impair the market for derivative works that Rowling is entitled [to] or likely to license.”<sup>18</sup>

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11. *Id.* (alterations in original) (quoting Def. Exhibit 502 ¶ 39, Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (No. 07 Civ. 9667 (RPP))).

12. *Id.*

13. *Warner Bros. Entm't*, 575 F. Supp. 2d at 521.

14. *Id.* at 519.

15. *Id.* Rowling's two companion books, *Quidditch Through the Ages* (2001) and *Fantastic Beasts & Where to Find Them* (2001), “have earned more than \$30 million to date.” *Id.*

16. *Id.* at 551.

17. 17 U.S.C. § 107(4) (2006).

18. *Warner Bros. Entm't*, 575 F. Supp. 2d at 551.

Initially, it seems fair that Rowling should have the sole right to publish future works, such as an encyclopedia, that rely almost exclusively on her original Harry Potter novels as a source. As the court observed, even though Vander Ark's use of Rowling's fictional facts and quotations in his *Lexicon* was only a fraction of the seven-book series, this "copied expression [was] entirely the product of the copyright-holder's imagination and creation."<sup>19</sup> When considering the publication of Vander Ark's *Lexicon* in light of Rowling's proposed encyclopedia, the law clearly favors and protects Rowling's right to develop subsequent works based on her novels over Vander Ark's right to enter the cultural marketplace.<sup>20</sup> However, it is important to question at what point this current copyright-law paradigm overshadows the public's interest in allowing new authors to recognize a consumer demand and capitalize on that demand.<sup>21</sup> The facts clearly

19. *Id.* at 535.

20. For a summary and discussion of the Harry Potter case see *infra* Part II.C.

21. In the Harry Potter case, the court recognized that though "the *Lexicon* in its current state, is not a fair use of the *Harry Potter* works, reference works that share the *Lexicon*'s purpose of aiding readers of literature generally should be encouraged rather than stifled." *Warner Bros. Entm't*, 575 F. Supp. 2d at 533. The court also observed the inherent tension in copyright law: "At stake in this case are the incentive to create original works which copyright protection fosters and the freedom to produce secondary works which monopoly protection of copyright stifles—both interests benefit the public." *Id.* at 540; see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) (discussing this inherent tension and the utilitarian nature of the copyright legal paradigm). For a discussion concerning the current copyright-law paradigm's application in the internet era, see LAWRENCE LESSIG, *FREE CULTURE* xiv (2004), which argues that extending current intellectual property laws to the Internet could limit our tradition of a free culture, or "a culture that supports and protects creators and innovators," as distinguished from a "permission culture," in which creators only get to create with permission from the creators of the past. Lessig analogizes that, just as property law had to change with the advent of the airplane, intellectual property must change with the advent of Internet technologies:

[P]roperty law originally granted property owners the right to control their property from the ground to the heavens. The airplane came along. The scope of property rights quickly changed. There was no fuss, no constitutional challenge. It made no sense anymore to grant that much control, given the emergence of that new technology.

... Congress has given authors an exclusive right to "their writings" plus any derivative writings (made by others) that are sufficiently close to the author's original work.

... The courts have expanded [this control] slowly through judicial interpretation ever since.

....

I think it's time to recognize that there are airplanes in this field and the expansiveness of these rights . . . no longer make sense. More precisely, they don't make sense for the period of time that a copyright runs.

indicate that Vander Ark's Lexicon was a valuable resource in the course of creating, editing, and producing profitable books, movies, and videogames.<sup>22</sup> Vander Ark even made a modest profit from his online Lexicon by posting various advertisements on his site.<sup>23</sup> Rowling did not bring a copyright suit for this online use. But, what if Vander Ark had charged site users to use his online Lexicon? What if his profit was substantial and not modest? Would Vander Ark's online Lexicon be protected under the fair use doctrine? Given the recent decision in the Harry Potter case, it seems that the fair use doctrine would not protect Vander Ark's online Lexicon (if Rowling perceived it to be as profitable and as competitive as his published Lexicon).

This Note will address the costs and benefits of the current copyright-law paradigm. This paradigm protects primary authors' property interests by creating disincentives for secondary authors to recognize a public demand for a derivative work in the cultural marketplace and to capitalize on that demand. Part II introduces the current paradigm as reflected in the development of copyrights and the doctrine of fair use. It also uses the Harry Potter case to illustrate the conflicting interests that threaten to undermine the purpose of copyright law. Part III sets forth the interests copyright protection serves, specifically the author's property interest and recognition interest in his or her creations. Part IV discusses the interests served by fair use. Part V weighs the costs and benefits of these competing interests and concludes that in order to create a more efficient copyright-law paradigm, Congress needs to expand fair-use protections to counter the expansiveness of current copyright protections or it needs to redefine the scope and method in which society will protect authors' rights in their works—either with a tort-liability remedy or an antitrust definition of marketplace harm.

## II. BACKGROUND

### A. THE HISTORY AND DEVELOPMENT OF COPYRIGHT LAW

The theory of copyright law stems from an historical legal paradigm that seeks to encourage artistic invention by allowing authors to make an exclusive profit on the fruits of their labor, while simultaneously disallowing

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*Id.* at 294; see also BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 56 (1967) ("So inured have we become to the extension of the monopoly to a large range of so-called derivative works, that we no longer sense the oddity of accepting such an enlargement of copyright.").

22. *Warner Bros. Entm't*, 575 F. Supp. 2d at 521.

23. At trial, Vander Ark testified that "his Web site was hardly a gold mine, having earned about \$6,500 from advertising from 2000 to 2007, though he estimated that it had been visited by 1.5 million to 2 million readers a month." Anemona Hartocollis, *Sued by Harry Potter's Creator, Lexicographer Breaks Down on the Stand*, N.Y. TIMES, Apr. 16, 2008, at B1, available at <http://www.nytimes.com/2008/04/16/nyregion/16potter.html>.

creative monopolies by restricting copyright protection to a limited period of years.<sup>24</sup>

American copyright law is rooted in English copyright law, specifically the Statute of Queen Anne, which was enacted in 1710 and is generally cited as the first modern copyright law.<sup>25</sup> This Statute granted copyright protection to existing book titles for twenty-one years and offered new book titles protection for fourteen years with the possibility of renewal.<sup>26</sup> After Parliament enacted this Statute, however, it was still unclear whether copyright was based on statutory or natural-law rights.<sup>27</sup> In *Donaldson v. Beckett*, decided in 1774, the House of Lords decided definitively that though an author had a natural right to copyright at common law, the Statute of Queen Anne replaced this natural right with a statutory right.<sup>28</sup> Since *Donaldson*, only statutes protect copyrights in both the English and American legal traditions.<sup>29</sup>

After the Revolutionary War, twelve of the thirteen original states passed copyright laws with the dual purposes of promoting authors' property rights and preventing monopolies.<sup>30</sup> At the Constitutional Convention, it became

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24. Ronald Bettig challenges the philosophies underlying the historic and current copyright-law paradigm. RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 25 (1996). Bettig observes that the underlying assumption in our Anglo-American culture's copyright law is that "human beings require economic reward to be intellectually or artistically creative." *Id.* However, Bettig notes that despite the fact that "throughout most of human history there existed no concept of intellectual property rights. . . . humans still produced technological and cultural artifacts." *Id.*; see also Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 *LAW & CONTEMP. PROBS.* 135, 174 (2007) (noting fans that create secondary works are often motivated by community-based incentives, including fame and recognition, rather than monetary incentives).

25. BETTIG, *supra* note 24, at 23; see Bruce W. Bugbee, *European Origins*, in *FOUNDATIONS OF INTELLECTUAL PROPERTY* 269, 269–70 (Robert P. Merges & Jane C. Ginsburg eds., 2004) (arguing that though the Statute of Anne is generally regarded as the earliest copyright legislation, there is evidence placing the origin of state protection of intellectual property in Renaissance Italy, where the Venetian government sought to promote its printing trade by issuing a series of *privilegii* (or privileges) relating to books and printing, as early as 1469); Paul Goldstein, *The History of an Idea*, in *FOUNDATIONS OF INTELLECTUAL PROPERTY* 277, 281 (Robert P. Merges & Jane C. Ginsburg eds., 2004) (arguing that though early English copyright law shaped American copyright law, American copyright law was distinct because it was writers that led the drive for copyright in the United States, not the booksellers who wanted a monopoly over certain titles). See generally MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993) (detailing the historical development of copyright law and the philosophies and economic interests driving its development).

26. BETTIG, *supra* note 24, at 23.

27. *Id.*

28. *Id.*

29. *Id.* In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), the U.S. Supreme Court followed the Anglo-precedent of *Donaldson* and held copyright was a statutory right created by Congress and rejected the idea that authors retained a perpetual, natural right in their copyrighted works. *Id.* at 28.

30. BETTIG, *supra* note 24, at 25. Many of the states' copyright acts sought to promote intellectual industry with copyright protection. For example:

clear to many, including James Madison and George Washington, that there needed to be uniformity in the laws concerning literary property and that the new nation required a national copyright law.<sup>31</sup> A constitutional clause to empower Congress to enact a national copyright law was proposed and passed unanimously in 1787.<sup>32</sup> As a result, the Constitution vests Congress with the authority “[t]o promote the Progress of Science and useful Arts.”<sup>33</sup> In 1790, Congress passed the first federal copyright law, granting U.S. authors “the sole right and liberty of printing, reprinting, publishing and vending” their works for a limited statutory term.<sup>34</sup> Historically, American courts did not recognize copyright protection in derivative works under the statute.<sup>35</sup>

Today, there are two important statutes that grant authors copyright protection. Title 17, § 102(a) of the United States Code grants copyright protection to “original works of authorship”<sup>36</sup> and § 106(2) gives the copyright owner the exclusive right to “prepare derivative works based upon the copyrighted work.”<sup>37</sup> A derivative work is a “work based upon one or more preexisting works, such as a . . . fictionalization” and a “work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.”<sup>38</sup> The Supreme Court has held that “[t]o qualify for copyright protection [under either provision], a work must be original to the author,” meaning, “the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”<sup>39</sup>

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Connecticut’s 1783 “Act for the Encouragement of Literature and Genius” mandated “that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind.” Similarly, the Massachusetts copyright act passed in 1783 determined that in order to encourage “learned and ingenious persons in the various arts and sciences[”] . . . there “must exist legal security of the fruits of their study and industry to themselves.”

*Id.*

31. Goldstein, *supra* note 25, at 281.

32. *Id.*

33. U.S. CONST. art. I, § 8, cl. 8.

34. BETTIG, *supra* note 24, at 27.

35. *See* Stowe v. Thomas, 23 F. Cas. 201, 206 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that a translation of Harriet Beecher Stowe’s *Uncle Tom’s Cabin* into German after Stowe had already translated and copyrighted a German edition of her book did not violate Stowe’s copyrights).

36. 17 U.S.C. § 102(a) (2006).

37. *Id.* § 106(2).

38. *Id.* § 101.

39. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

Rowling's Harry Potter books qualified for and were given copyright protection.<sup>40</sup> As a result, § 106(2) gives Rowling the exclusive right to prepare and to authorize any derivative works based on Harry Potter.<sup>41</sup> Even though the current law grants Rowling exclusive copyright protection over her original work and all derivative works, this Note asks whether disallowing secondary works such as Vander Ark's Lexicon protects Rowling's marketplace interest to the extent necessary to justify the public costs of that exclusion.

There are many justifications for copyright protection and just as many criticisms for the current paradigm.<sup>42</sup> Most critics and proponents agree, however, that copyright law must walk a fine line between promoting and stifling creative enterprise.<sup>43</sup> Thus, the law has tried to strike a balance between these two conflicting interests by creating and developing fair use, which allows "borrowing from others" in order to foster creativity.<sup>44</sup>

### B. THE DEVELOPMENT OF FAIR USE

Historically, fair use was a judge-made, common-law limit on statutory copyright protections.<sup>45</sup> Today, fair use is a codified statutory right. Title 17,

40. Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513, 518 (S.D.N.Y. 2008).

41. 17 U.S.C. § 106(2) (2006).

42. See Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, in FOUNDATIONS OF INTELLECTUAL PROPERTY 303, 303–05 (Robert P. Merges & Jane C. Ginsburg eds., 2004) (arguing that there are three approaches that justify copyright protection: the "exaltation of authorship" approach, the constitutional approach, and the economic approach). The "exaltation of authorship approach" justifies copyright protection because of the sacrifice writers and artists put into their creations. *Id.* at 303. Brown asserts that proponents of this approach think existing copyright protections should be expanded to offer creators even more property rights. *Id.* at 304. The constitutional approach (or the utilitarian approach) focuses on copyright as a way of motivating creative activity of authors, while simultaneously limiting extreme enforcement of copyright measures so that the general public can access creations without fear of liability. *Id.* Under the economic approach, "intellectual productions are a form of public good" and copyright laws create an economic incentive for intellectual production. *Id.* at 305. However, copyright laws allow authors to demand payment for their work and exclude others from copying their work, which causes a mini-monopoly and diminishes consumption of these cultural goods. *Id.* Brown observes that the hard part for an economist to decide is "just how much legitimization of exclusive rights in intellectual property is needed to induce the optimal flow of writings and inventions." *Id.*

43. See Paul Goldstein, *Copyright*, in FOUNDATIONS OF INTELLECTUAL PROPERTY 301, 303 (Robert P. Merges & Jane C. Ginsburg eds., 2004) ("[Copyright law] . . . must not judge authors' efforts by too exacting a standard; and it must not impose too severe a prohibition against authors' borrowing from others.").

44. See Leval, *supra* note 21, at 1110 ("Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.").

45. *Id.* at 1127. Leval notes that "[n]ot long after the creation of the copyright by the Statute of Anne . . . , courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as 'fair abridgment,' later 'fair use,' would not infringe the author's rights." *Id.* at 1105. *But see* Anupam Chander & Madhavi Sunder, *Everyone's a Superhero*:

§ 107 provides that “fair use of a copyrighted work . . . is not an infringement of copyright.”<sup>46</sup> The statute provides four factors the court must weigh to determine “whether the use made of a work in any particular case is a fair use,” including: “(1) the purpose and character of the use,” i.e., whether the use is commercial; “(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>47</sup> Courts weigh these factors to determine if the contested use is a fair use.<sup>48</sup>

### 1. Justification for Fair Use

Generally, fair use is justified in terms of promoting the public good. Copyright protection without the “wobble room” of fair use would stifle creative development because secondary authors would have little incentive to capitalize on old ideas with new uses. Stifling this kind of creative development prevents the public from enjoying new and interesting creations.<sup>49</sup> Fair use also protects First Amendment values, including free speech and freedom of the press.<sup>50</sup>

A good example of this justification for fair use is *Suntrust Bank v. Houghton Mifflin Co.* (hereinafter “*The Wind Done Gone* case”).<sup>51</sup> The issue in this case was whether Alice Randall’s *The Wind Done Gone*, a novel that

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*A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 600 (2007) (“[W]e defend fair use against efforts to narrowly interpret it as merely a response to transactions’ cost-induced market failure, an explanation that leads ultimately to its evisceration as technologies reduce transaction costs.”); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1337, 1150 (1990) (arguing that fair use’s justification, while rooted in utilitarian theory, can be justified by other social values, including general considerations of fairness). Justifying fair use because of “transactions’ cost-induced market failure” entrenches fair use in the utilitarian theory. See *supra* note 44 and accompanying text (describing how fair use benefits the public).

46. 17 U.S.C. § 107 (2006).

47. *Id.*

48. Leval notes that:

The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.

Leval, *supra* note 21, at 1110–11.

49. See GOLDSTEIN, *supra* note 4, § 1:14 (“If copyright law is to promote the national culture and learning, it must allow subsequent creators to draw on copyrighted works for their inspiration and education.”).

50. See *Eldred v. Ashcroft*, 537 U.S. 186, 190–91 (2003) (explaining that “copyright law contains built-in First Amendment accommodations” because “the fair use defense allows the public to use [copyrighted] expression . . . in certain circumstances” (internal quotation marks omitted)).

51. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

parodied Margaret Mitchell's classic *Gone with the Wind*, violated copyright law or was protected by the fair use doctrine.<sup>52</sup> After weighing the fair-use factors, the Eleventh Circuit ruled that Randall's novel was a fair use of the original work.<sup>53</sup> Even though Randall's novel was set in a fictional world created by Mitchell and used many of Mitchell's characters, it was narrated from a slave-girl's perspective with the "literary goal . . . to explode the romantic, idealized portrait of the antebellum South during and after the Civil War."<sup>54</sup>

The court found Randall's novel transformed the original work<sup>55</sup> and held Randall's work was protected by the fair use doctrine.<sup>56</sup> The fair-use justification that stringent copyright enforcement stifles creative development finds strong footing in cases like *The Wind Done Gone* case because allowing fair use in this instance promotes the public good. Fair use allowed *The Wind Done Gone*, an innovative parody of an old work, access to the cultural marketplace. Extending fair-use protection to works like *The Wind Done Gone* encourages creative production of similar parodies. New authors know they have a successful defense to potential copyright suits and that they will be able to make an economic profit from capitalizing on old ideas with new uses.<sup>57</sup> Fair use fosters this kind of creative development and ensures that the public will enjoy new and interesting uses of old works.

## 2. Fair Use Case Law

Like *The Wind Done Gone* case, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that a parodic rap song entitled *Big Fat Hairy Woman* constituted fair use of Roy Orbison's song, *Oh, Pretty Woman*.<sup>58</sup> The Court reasoned that the song was transformative, i.e., it altered the original song with "new expression [and] meaning."<sup>59</sup>

However, in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, the Second Circuit held that a trivia game based exclusively on the television

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52. *Id.* at 1268.

53. *Id.* at 1276.

54. *Id.* at 1270.

55. *Id.* at 1270–71, 1276. The Eleventh Circuit noted that "[w]hile 'transformative use is not absolutely necessary for a finding of fair use, . . . the more transformative the new work, the less will be the significance of other factors.'" *Id.* at 1271 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)); *see infra* notes 58–59 and accompanying text (summarizing the *Campbell* holding).

56. *Suntrust Bank*, 268 F.3d at 1276.

57. Oftentimes, when the court finds a copyright violation, it will order an injunction to stop publication and distribution of the contested work. *See Warner Bros. Entm't v. RDR Books*, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008) (enjoining Vander Ark from publishing his encyclopedia of Harry Potter characters). This injunctive relief prevents the author of the new work from making any profit on potential sales.

58. *Campbell*, 510 U.S. at 569.

59. *Id.* at 579.

show *Seinfeld* was not protected by the fair use doctrine because “[u]nlike parody, criticism, scholarship, news reporting, or other transformative uses,” the game substituted “for a derivative market that a television program copyright owner such as Castle Rock ‘would in general develop or license others to develop.’”<sup>60</sup> The court noted that the unauthorized use had “little, if any, transformative purpose,” and thus that “the first fair use factor weigh[ed] against [the] defendants.”<sup>61</sup>

The facts of the Harry Potter case fall between *Campbell* and *Castle Rock*. While the court found Vander Ark’s use transformative (like *Campbell*), the court still held that it was not a fair use because it would interfere with a derivative-work market (like *Castle Rock*). Therefore, even if a use is transformative, a court will not necessarily find the use to be fair if it interferes with the copyright-holder’s derivative-work market.<sup>62</sup>

### C. COPYRIGHT AND FAIR USE IN THE HARRY POTTER CASE

The manner in which the District Court for the Southern District of New York applied the fair use doctrine is central to the outcome of the Harry Potter case and is also central to this Note’s analysis of the current copyright-law paradigm. A brief synopsis of the court’s rulings will be helpful to understand the comparison of interests served by both copyright protection and fair use discussed in Parts III and IV.

In determining the purpose and character of the use, the court ruled that even though the Lexicon’s use of Rowling’s Harry Potter series is commercial in nature,<sup>63</sup> “[t]o the extent that [Vander Ark’s paper Lexicon] seeks to provide a useful reference guide to the *Harry Potter* novels that benefits the public, the use is fair, and its commercial nature only weighs slightly against a finding of fair use.”<sup>64</sup> In determining the nature of the copyrighted works, the court found that because Rowling’s work was creative, fictional, and “wholly original,” the second factor favored Rowling.<sup>65</sup> In determining the amount and substantiality of the use, the

60. *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (quoting *Campbell*, 510 U.S. at 592).

61. *Id.* at 143.

62. A derivative-work market is the market in which derivative works are sold. Derivative works are “work[s] based upon one or more preexisting [and copyrighted] works.” 17 U.S.C. § 101 (2006). For example, the derivative-work market in which Vander Ark was trying to publish his Lexicon was “the market for reference guides to the *Harry Potter* works.” *Warner Bros. Entm’t v. RDR Books*, 575 F. Supp. 2d 513, 550 (S.D.N.Y. 2008).

63. *Warner Bros. Entm’t*, 575 F. Supp. 2d at 544–45.

64. *Id.* at 545.

65. *Id.* at 549. The court noted that the second factor “must favor a creative and fictional work, no matter how successful.” *Id.* (citing *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993)).

court found the quantity and quality of the portions that Vander Ark copied from Rowling's novels weighed more "heavily against a finding of fair use."<sup>66</sup>

In determining market harm, the court concluded that while there was "no plausible basis to conclude that publication of the Lexicon would impair sales of the *Harry Potter* novels," publication could harm sales of Rowling's two companion books,<sup>67</sup> thus tipping the fourth factor in favor of Rowling.<sup>68</sup> The court also added that the market-harm factor favored Rowling "if publication of the Lexicon would impair the market for derivative works that Rowling is entitled [to] or likely to license."<sup>69</sup>

After weighing the factors (three in favor of Rowling and one that did "not completely weigh in favor of" Vander Ark) the court ruled the balance "tipped against a finding of fair use."<sup>70</sup> The court justified its decision as striking a balance between the dual goals of copyright law: protecting the property rights of the copyright-holder and allowing secondary authors "freedom of expression."<sup>71</sup> The court concluded that secondary works, such as reference guides to works of literature, "should generally be encouraged by copyright law as they provide a benefit [to] readers and students."<sup>72</sup> However, the court tempered this assertion by noting that secondary authors should not be permitted to "plunder" the works of copyright-holders without paying the customary price, lest copyright-holders lose incentive to create new works based on their prior works, which will also benefit the public interest.<sup>73</sup>

### III. INTERESTS SERVED BY COPYRIGHT PROTECTIONS

Copyright laws seek to encourage artistic invention by allowing creators to make an exclusive profit on the fruits of their labor.<sup>74</sup> This protection serves the public interest because it creates incentives for the best and brightest minds in our society to create works from which society benefits.<sup>75</sup>

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66. *Id.* at 548–49.

67. These books, *Quidditch Through the Ages* (2001) and *Fantastic Beasts & Where to Find Them* (2001), "[b]oth appear in the *Harry Potter* series as textbooks that the students at Hogwarts use in their studies." *Id.* at 519.

68. *Warner Bros. Entm't*, 575 F. Supp. 2d at 550–51. The idea that the unknown Vander Ark could harm Rowling's market for the *Harry Potter* companion books is debatable considering Ms. Rowling's overwhelming success.

69. *Id.* at 551.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Warner Bros. Entm't*, 575 F. Supp. 2d at 551. "Customary price" in this instance likely refers to a licensing fee.

74. See *supra* Part II.A (discussing the purpose, history, and development of copyright law).

75. See Leval, *supra* note 21, at 1107–10 (discussing the utilitarian justification for copyright law); see also PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 141 (rev. ed., Stanford Univ. Press 2003) (1994) (explaining how economic

Under this rationale, it is necessary to serve the author's interest in order to serve the public interest.<sup>76</sup> Therefore, it is necessary to examine how authorial interests are served by copyright protection and what incentives copyright protections create for authors. These interests include the author's property interests in his or her works as well as the author's interest in social recognition as the owner of his or her works.

#### A. AUTHOR PROPERTY INTERESTS

While there are certainly economic incentives for authors to have property interests in their works, there is another incentive that is commonly alluded to, but rarely explored: the incentive of being able to maintain an artistic relationship to the property itself. Obviously, when authors put their sweat, energy, time, and emotion into creating a work, they have an intense attachment to their creation. They would like to continue this relationship by managing when and how this work is presented to society at large and to what extent derivative works may make use of their work. Generally, the law conceptualizes this attachment through basic property principles. Locke's justification for ownership was that by putting one's labor into a piece of property, one claimed ownership of it.<sup>77</sup> Locke's theory is one of

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analysis expounded upon utilitarian theory to understand and create a "balanced system of incentives" for copyright). Goldstein notes that after the "so-called law and economics movement" in the 1970s, legal scholars began applying "welfare economics" to the copyright system, which measures "the desirability of a particular legal rule against the criterion of consumer welfare." *Id.*

76. Leval, *supra* note 21, at 1109.

77. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184–202 (Classics of Liberty Library, photo reprint 1992) (3d ed. 1698). Locke's property rationale was based on the idea that an individual had a property claim on all that his personal labor produced:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes of the State that Nature hath provided, and lift it in, he hath mixed his Labour with it, and joyned to it something that is his own, and thereby makes it his Property.

*Id.* at 185; see also Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523–24 (1990) [hereinafter Yen, *Restoring the Natural Law*] (explaining that Locke's natural law of property was premised on the idea that "[s]ince people owned their bodies . . . they also owned the labor of their bodies, and by extension, the fruits of that labor. Thus, a person who mixed her labor with an unowned object became morally entitled to property in that object." (footnote omitted)).

Both Edward Young in *Conjectures on Original Composition* (London, 1759) and William Enfield in *Observations on Literary Property* (London, 1774) argued for the extension of property rights to intellectual property in Lockean terms by comparing the mind to a piece of real property. Mark Rose, *The Author as Proprietor: Donaldson v. Beckett and the Genealogy of Modern Authorship*, in OF AUTHORS AND ORIGINS 23, 38 (Brad Sherman & Alain Strowel eds., 1994). Enfield argued that just as one who works the land should keep the bounty produced, an intellectual who works his or her mind should keep the bounty of such ideas produced:

production. By plowing the soil, planting the seed, and producing a crop, a farmer laid claim to and “owned” a property interest in the fruits of his labor.

Margaret Davies refines Locke’s legal concept of ownership by observing that while ownership has traditionally been justified by the act of dominating a piece of property and making it bear bounty, it is actually the individual’s sense of being connected to the property through the process of labor that makes the individual feel entitled to the property.<sup>78</sup> Thus, the process of creation forges an author’s connection with the property and causes an author to view intellectual property as a part of him or herself.<sup>79</sup> It is this blurring between self and property that allows the author to rationalize his or her sense of entitlement to complete and long-term control of the property so long as he or she lives.<sup>80</sup> As Davies writes, “The tantalising thought here is that [ownership of property] does not have to be understood as a natural condition or a reflection of our individual efforts at appropriation, but rather may be regarded as a . . . process [of] connecting the self in perpetuity to the [property].”<sup>81</sup> American copyright law, though not perpetual, does give copyright protection for the life of the author plus seventy years after his or her death.<sup>82</sup> In essence, society says to the author, we give you complete and lifetime control of your work so long as you share it with the public.

#### B. SOCIAL RECOGNITION REINFORCED BY PROPERTY INTERESTS

This idea of connection to the property not only affects an author’s sense of entitlement to the property, but is recognized by society as entitling

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In this various world, different men are born to different fortunes: one inherits a portion of land; he cultivates it with care, it produces him corn and fruits and wool; another possesses a fruitful mind, teeming with ideas of every kind; he bestows his labour in cultivating *that*; the produce is reason, sentiment, philosophy. It seems but equitable, that a fair exchange should be made of these goods; and that one man should live by the labour of his brain, as well as another by the sweat of his brow.

*Id.* (citation omitted).

78. MARGARET DAVIES, PROPERTY: MEANINGS, HISTORIES, THEORIES 109 (2007).

79. Davies refers to this merging of self and property as “an ambivalence in the having/being distinction in property.” *Id.* She also notes that ownership is justified by the “self-referential nature of the individual which provides the connection between the person and the (private) property. It is because the person is regarded as committed essentially to their own identity” that these connections to the property may arise. *Id.* at 110; *see also* Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 923–24 (1999) (“[I]ntellectual property can be a means to protect the personality interest . . . of individual creators. A person may view her intellectual creations as a statement or manifestation of her spirit, creativity, and identity.”).

80. DAVIES, *supra* note 78, at 109.

81. *Id.*

82. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT 8 (7th ed. 2006).

the creator to the fruits of his or her labor. Society admires creativity and ingenuity. To many people, it seems only fair that someone who comes up with an innovative idea<sup>83</sup> should receive credit for that idea. Historically, this understanding of entitlement to societal recognition has coincided with an economic component. Society gives authors fame and social recognition for their work and the economic profit from that work.<sup>84</sup>

Society respects and admires our Twains, Fitzgeralds, and Frosts and wants to foster their creative energies. Extending copyright protection so that these types of individuals can reap the benefits of their own work makes sense not only because these individuals have a property interest in their work forged by the process of creation, but because it seems unjust to allow someone else, wholly uninvolved in the creative process, to be enriched by an author's work. In general, our legal system reflects this deep-seated understanding of author rights.<sup>85</sup>

Thus, the current copyright-law paradigm seeks to provide incentives and protections to authors to foster the production of creative works, which serve the public interest. However, the public interest is also served by protecting access to those works. Fair use seeks to promote access of both the general public and of new authors, who create new works using prior, existing works.

83. "Innovation" is the "creation of the first copy of a good/process/idea that did not exist before." Michele Boldrin & David K. Levine, *Intellectual Property and the Efficient Allocation of Social Surplus from Innovations*, in PROPERTY RIGHTS DYNAMICS: A LAW AND ECONOMICS PERSPECTIVE 93, 110 (Donatella Porrini & Giovanni Battista Ramello eds., 2007).

84. See *id.* at 110 (discussing the basic intuition underlying creator and inventor monopoly privileges in current intellectual property legislation); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 264 (2004) ("Giving credit where it is due . . . is instinctively appropriate because it furthers the interests both of authors and of their public.").

85. See Brown, *supra* note 42, at 303 (arguing that one justification for copyright protection is the "exaltation of authorship approach," which is premised on the idea that the sacrifice writers and artists put into their creations entitles them to stringent copyright protection). The Supreme Court has given credence to the "exaltation of authorship approach." In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Court recognized that under both common and statutory law, the author's right to control the first public distribution of his or her work implicates the author's "personal interest in creative control." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985). But see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 487-88 (discussing the "work for hire doctrine," in which work done by the author while under the employment of another becomes the employer's property). Jaszi observes that by allowing the work-for-hire model to qualify for copyright protection "American law . . . put a reverse-twist on individualistic 'authorship,'" and thus, pressed the "Romantic conception of originality . . . into the service of commerce." *Id.* at 487.

## IV. INTERESTS SERVED BY FAIR USE

Fair use serves the public interest by limiting artistic monopolies and fostering innovation.<sup>86</sup> Fair use limits copyright-holders' rights in certain instances and creates a safe haven for other people to use, expound upon, criticize, and transform the copyrighted work into their own expression.<sup>87</sup> Allowing others fair use of copyrighted ideas serves the public interest because it protects everyone's right to expression, response, and participation in the marketplace of ideas. Fair use is an important check on copyright protection because it allows freer access to the creative commons, limits creative monopolies, and counters marketplace inefficiencies.

## A. ENCOURAGING ACCESS TO THE CREATIVE COMMONS

Fair use allows freer access to the creative commons because it allows new authors to borrow good ideas and transform them into new artistic pieces. Justifications for further expanding fair use have found strong footing in the postmodern movement. Rosemary Coombe argues that postmodern theories of interpretation have called into serious question traditional assumptions that a text has one meaning and that its author has the ability to control how that text is received by the public.<sup>88</sup> These new interpretations challenge traditional assumptions about authorial control and counterpart justifications for legally protecting copyright-holders'

86. Leval, *supra* note 21, at 1109. As Netanel observes:

The United States Supreme Court has stated repeatedly that the limited "monopoly privileges" vested in authors by the Copyright Act are designed to advance the public welfare by providing economic incentives for creative effort, while at the same time making the fruits of such effort available to as many people, and as cheaply, as possible.

Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 365 (1993). In addition, Leval notes:

The Supreme Court has often and consistently summarized the [utilitarian] objectives of copyright law. The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations [, but it] is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.

Leval, *supra* note 21, at 1107. Leval also recognizes that the utilitarian goal of copyright is "achieved by permitting authors to reap the rewards of their creative efforts." *Id.*

87. Professor Abraham Drassinower argues that "we should think of copyright less as a 'balance' between authors and users than as a 'dialogue' between authors and users." Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991, 992 (2009). Drassinower also argued that once the author creates a work of expression, "the law of copyright demands that the author submit to every other person's equal right" to expression. *Id.* at 1003. Drassinower describes fair use as the "right to respond to the author's [original] communication." *Id.* at 1005.

88. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 248–52 (1998).

control in light of others' rights to access and their own interpretations.<sup>89</sup> Coombe also notes that, with the advent of the postmodern public sphere, traditional authorial privileges "can no longer be assumed."<sup>90</sup> Coombe argues that, while the idea that the "author intentionally conveys his own inner thoughts to others" still holds credence, the belief that "such texts maintain the integrity of authorial intention in all social contexts is a historically specific convention that requires massive misrecognition—and a significant legal architecture."<sup>91</sup> She explains that authorial integrity, as perceived in Romantic terms, is unrealistic because in the postmodern era we recognize "[a]ll writings are at risk of being carried away by others, transcending their agencies of origin."<sup>92</sup>

When discussing justifications for limiting authors' exclusive rights to their work, Professor Alfred Yen argues that we must recognize "that authorship is not a lonely endeavor in which a single person creates an entire work from her imagination alone."<sup>93</sup> He observes that works of authorship are an amalgamation of "the author's personality, the society in which she lives, and the works of other authors," and that this "reliance on borrowed material has powerful implications for the strength of the author's

89. *Id.*

90. *Id.* at 250–51.

91. *Id.* at 251.

92. *Id.*; see also Chander & Sunder, *supra* note 45, at 600 (defending against the "foremost cultural critique of fair use—that reinterpretation (or 'recoding') of the text destabilizes cultural foundations"); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 293–95 (1992) (exploring and summarizing the recent scholarship of Michele Foucault, Benjamin Kaplan, Martha Woodmansee, Mark Rose, and Carla Hesse, which reevaluates past assumptions about the role of "author" and shifts the interpretive paradigm).

93. Yen, *Restoring the Natural Law*, *supra* note 77, at 554. Yen observes:

Although it is certainly true that authors are extremely gifted and industrious, the popular vision of authors as people who create new things from nothing is simply false. No author has lived an entire life on a proverbial desert island . . . [because] authors live and work as members of an artistic community and a broader society whose creations, values and experiences form an integral part of the author's creative vision. Authorship is . . . the conscious and unconscious intake, digestion and transformation of input gained from the author's experience within a broader society.

*Id.*; see also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990) ("To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined."). Arguably, even though Rowling's Harry Potter novels are innovative, it is no surprise that much of the diction within her novels and many of her etymological references come from past creators. See Hartocollis, *supra* note 23 (describing how Vander Ark deciphered "the richness of Ms. Rowling's nomenclature and references using secondary sources like 'Bulfinch's Mythology,' 'A Field Guide to the Little People,' 'Haunted Britain' and etymological dictionaries").

claim of complete control over her work.”<sup>94</sup> Access to the creative commons is essential for speaking to other readers and writers in a mutually accessible and understood cultural language; it is also essential for fostering the creation of new works, most of which build upon pre-existing stories, character-traits, and plot-lines.

### B. LIMITING MONOPOLY

Fair use serves an important public interest by limiting creative monopolies. Even though the authorship justification<sup>95</sup> resonates with society, economic monopolists originally crafted these arguments<sup>96</sup> and continue to expound them to further their goal of continual and exclusive profits from another’s copyrighted work. Coombe observes that “the Romantic image of the individuated author as creative genius, autonomously creating works characterized as embodiments of personal originality” provides “ideological support for the legal institution of copyright fictions that denie[s] and obscure[s] market forces.”<sup>97</sup>

Similarly, Professor Peter Jaszi observes that the authorship justification is “strategically invoked, suppressed, or revised to mediate the inherent and repetitive manifestations of the tension between access and ownership.”<sup>98</sup> He insightfully recognizes that the authorship justification for extending copyright “has remained what it was in eighteenth-century England—a stalking horse for economic interests that were (as a tactical matter) better concealed than revealed.”<sup>99</sup>

Historically, the authorship justification protected eighteenth-century booksellers’ interests in copyrights.<sup>100</sup> Today, these “concealed” interests are the interests that huge corporations have in the exclusive publication or

94. Yen, *Restoring the Natural Law*, *supra* note 77, at 554–55. For an example of how “borrowed materials” can contribute to new works see *The Eyre Affair*, in which a book-travelling agent reads herself into *Jane Eyre* and saves the book’s plot from being changed by a villain. JASPER FFORDE, *THE EYRE AFFAIR* (Penguin Books 2001).

95. The “authorship justification” is premised on the idea that copyright protection is justified because when an author works hard, he or she should reap the benefits of that work. See Brown, *supra* note 42, at 303 (arguing the “exaltation of authorship approach” justifies copyright protection because of the sacrifice writers and artists put into their creations); *supra* Part III.B (discussing how society generally believes that authors’ innovations and ingenuity entitle them to property rights in their creations).

96. The Statute of Anne, hailed as the first copyright act in the Anglo-American legal tradition, was passed at the behest of the Stationers’ Company, a group of London’s leading publishers. GORMAN & GINSBURG, *supra* note 82, at 1–2. The Stationers’ Company petitioned Parliament to pass “a law to protect its alleged [copy]rights [. . .] against pirate printers.” *Id.* at 1.

97. COOMBE, *supra* note 88, at 255.

98. Jaszi, *supra* note 85, at 500.

99. *Id.*

100. See *id.* (discussing the historical function of authorship).

filming rights in an author's work.<sup>101</sup> As demonstrated by the Harry Potter case, companies like Scholastic and Warner Brothers have a very real self interest in using the author as a front-man to garner public support and curtail secondary use of a work in which they also have a copyright interest.<sup>102</sup>

Professor Laura Heymann argues that the current copyright-law paradigm is too narrow in the sense that it does not account for the multiplicity of authors in the marketplace and the different types of incentives that drive these authors.<sup>103</sup> She argues the copyright framework should strive for a more individualized evaluation of who the author is and why he or she creates, in order to determine which interests to protect.<sup>104</sup> For example, a corporate author that finds, produces, and markets the work of a creative writer has an interest in recouping those costs; therefore, there is a stronger copyright case against a person who infringes on that marketplace interest than on someone who uses the original expression in a way that is not detrimental to the interest that the corporate author seeks to protect with copyright law.<sup>105</sup> For example, in the Harry Potter case, Warner Brothers Entertainment was a corporate author that had an interest in recouping the costs of contracting with Rowling and producing, marketing, and publicizing the Harry Potter movies. Under the individualized standard

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101. See ROSE, *supra* note 25, at 3 (“[C]opyright—the practice of securing marketable rights in texts that are treated as commodities—is a specifically modern institution, [and] the creature of the printing press . . .”). For a similar observation concerning modern special-interest groups, see Bettig’s discussion of how industries pursue their own interests by presenting empirical studies and social-science expert opinions to Congress. BETTIG, *supra* note 24, at 173–74. Bettig notes: “[T]he boundaries between legislative and judicial realms have become increasingly blurred as legal scholars are called in to serve as ‘hired guns’ for those wishing to influence policymaking.” *Id.* Jessica Litman also observes the inherent conflict of interest in allowing those who stand to benefit or lose from copyright law to influence what those laws will be:

Copyright law is horribly complicated. Sometime around the turn of the century, we in the United States reached the collective judgment that copyright was too complicated for mere mortals (or indeed for mere senators) to appreciate, and we settled on an approach whereby we assembled all of the copyright experts—that is, the entities whose businesses involved printing, reprinting, publishing and vending—and assigned them the task of sorting out the relationships among them. So, whenever we need a major revision of the copyright law, it has become traditional to assemble all of the current stakeholders in informal negotiations and present whatever they agree on to Congress.

Jessica Litman, *Copyright Non-Compliance (Or Why We Can't "Just Say Yes" to Licensing)*, in FOUNDATIONS OF INTELLECTUAL PROPERTY 425, 427 (Robert P. Merges & Jane C. Ginsburg eds., 2004).

102. Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513, 518 (S.D.N.Y. 2008).

103. Laura A. Heymann, *A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product*, 34 J. CORP. L. 1009, 1020–21 (2009).

104. *Id.* at 1023–24.

105. *Id.* at 1025.

proposed by Heymann, Warner Brothers would hypothetically have a stronger case against Paramount Pictures for producing a derivative work of the Harry Potter series than against Vander Ark for the same transgression because Paramount's use would interfere with the interest that Warner Brothers sought to protect under copyright law: recouping the costs of licensing, producing, and marketing the Harry Potter films. However, such a system would still allow creative and economic monopolies because Rowling would have a strong case against Vander Ark for unauthorized use.

### C. COUNTERING MARKETPLACE INEFFICIENCIES

Fair use also benefits the public because it works to correct the inherent market inefficiencies that copyright law creates.<sup>106</sup> Copyright law gives authors complete control over their works. Because of this control, in many instances authors may disallow secondary uses of their copyrighted works. The current copyright-law paradigm is premised on the assumption that if a new and different author believes that his or her use of the copyrighted work will be profitable, he or she can contract with the copyright-holder, or the copyright-holder, to pay for the use of that work.<sup>107</sup> This idea is premised on two assumptions: (1) that the new author will have the financial backing to buy rights from the copyright-holder, and (2) that the copyright-holder will sell those rights so long as the price is equal to or more than the economic value of the portion of control he or she must give up over her work.<sup>108</sup> However, this utility-maximization model often fails because new authors often do not have the financial backing to pay for the use and copyright-holders hold out from selling these use-rights for noneconomic reasons.

The first inefficiency of copyright law is that new authors usually lack the financial clout to pay a copyright-holder for the use of their copyrighted work. Professors Anupam Chander and Madhavi Sunder argue that under the current copyright-law paradigm "uses of copyrighted works lie hostage to the ability of the transformers to pay."<sup>109</sup> Chander and Sunder make an

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106. See Tom W. Bell, *Fair Use vs. Fared Use? The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 583 (1998) (explaining fair use as a solution to the inherent market failures that copyright law creates). See generally LESSIG, *supra* note 21 (describing the social benefits of allowing a free culture, which fosters innovation, instead of the current permission culture in which time, money, and creative energies are wasted by obtaining permission from past creators).

107. See Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 80 n.5 (1991) [hereinafter Yen, *When Authors Won't Sell*] (explaining efficiency theories in copyright).

108. The second assumption is premised on the idea that "the owner of the resource will either exploit that resource himself, or will sell it to someone else who will." Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1632 (1982).

109. Chander & Sunder, *supra* note 45, at 600.

important point. Even with the backing of his publisher RDR Books, it is unlikely that an unknown author like Vander Ark can offer enough money to buy the rights to print his Harry Potter Lexicon from Rowling.

The second inefficiency of copyright law is that copyright-holders often hold out from selling rights in their works, even if the price offered for the new use is economically sound. Many copyright-holders refuse to license their work to new uses because of the sentimental attachment they have formed to their work.<sup>110</sup> Copyright-holders might find the proposed use offensive or may think the use would sully the reputation of the original work. For example, the Mitchell estate stated it would only sell rights to a sequel to *Gone with the Wind* to an author who pledged “under no circumstances [to] write anything about miscegenation.”<sup>111</sup> Though this artistic limitation may have maintained the integrity of Margaret Mitchell’s original work, it would have stifled Alice Randall’s artistic expression within her own novel, in which miscegenation was central to the plot.<sup>112</sup> It is absurd to think Mitchell’s estate would condone and license use for a work such as *The Wind Done Gone*, even if offered an economically reasonable licensing fee.

Historically, society protects and respects a property owner’s right to refuse to sell because respecting the owner’s right to hold out from selling generally promotes efficiency.<sup>113</sup> However, real property differs from intellectual property because it is immovable and can only be put to one use at a time. For example, a farm cannot also be a golf course; an airport cannot also be a public park; a shopping mall cannot also be a housing development. Real-property owners determine how their property will be used, and that decision precludes other possible uses.

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110. Professor Alfred Yen argues that “future attempts to construct efficiency explanations for copyright doctrine are likely to fail whenever authors value their copyright rights for non-monetary reasons.” Yen, *When Authors Won’t Sell*, *supra* note 107, at 107. For a general discussion of the pros and cons of optional licensing agreements see Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1575 (2005). Stendell recognizes that optional licensing could allow authors to share in the profit but still allow broader access to secondary authors. *Id.* She writes: “[I]f copyright owners could act to fulfill the needs of consumers, through some form of voluntary system, then they could reap the benefits of that use rather than losing profits when consumers act to fill the needs on their own.” *Id.* However, she notes that the downfall of such a voluntary system would be that authors who are reluctant to cede creative control could still refuse to license their work to secondary authors. *Id.*

111. Chander & Sunder, *supra* note 45, at 623 n.155 (quoting *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (Marcus, J., concurring)).

112. *The Wind Done Gone* is narrated from the perspective of Scarlett’s half-sister, the child of “Planter,” Scarlett’s father, and “Mammy.” ALICE RANDALL, *THE WIND DONE GONE* 1–5 (2001).

113. Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, in FOUNDATIONS OF INTELLECTUAL PROPERTY 379, 379 (Robert P. Merges & Jane C. Ginsburg eds., 2004).

Market forces generally ensure the land will be put to its most efficient use. For example, a real-property owner in Iowa will not sell valuable farmland to a buyer who wants to build a golf course because (1) the farmer would get a higher bid from someone who wanted to use the property to farm, and (2) it is unlikely that a bank would lend a buyer the capital to buy the land if he or she intended to use the land for a golf course and this was deemed an economically unsound venture. Thus, market forces will likely ensure that the land is used as a farm. Either the owner will use the nutrient-rich land to farm, or the owner will sell it to someone else who will put the land to this use.

Thus, in real-property scenarios, hold-outs generally promote efficiency. However, this model often creates inefficiencies in the intellectual-property realm.<sup>114</sup> Similar to real-property transactions, the copyright system attempts to create “utility maximization . . . by encouraging the production of valuable intellectual works.”<sup>115</sup> The threshold for utility maximization in the two systems is different though because while “[a] piece of land can’t serve both as your living room and Trump Towers, . . . a piece of intellectual property suffers from no limitation.”<sup>116</sup> In short, intellectual property may be used by multiple people in multiple ways at the exact same time. In this respect, intellectual property is distinct from real property.<sup>117</sup>

For these reasons, Judge Kozinski and his then-clerk, Christopher Newman, conclude that by allowing copyright owners to hold out from other uses, the current copyright-law paradigm creates inefficiencies.<sup>118</sup> They argue that owners should not have the right to exclude others from using their copyrighted work. Instead, they propose a copyright-law paradigm rooted in tort rather than property law.<sup>119</sup> Under this proposed paradigm, people could use copyrighted works freely without first obtaining the author’s permission, but if they made a profit on that work, they would have to pay the copyright-holder for that use.<sup>120</sup> In a useful hypothetical, Kozinski and Newman observe that even though “Rowling might find it disturbing” that someone would use her character to write an “unauthorized Harry Potter sequel,” her identity as the creator of Harry Potter is still intact and “her reputation [would be] unharmed.”<sup>121</sup> They further note: “[Rowling] is

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114. *Id.* (questioning whether this model holds true for copyrights).

115. *Id.*

116. *Id.*

117. *Id.*

118. Kozinski & Newman, *supra* note 113, at 379, 379 n.\*.

119. *Id.* at 380.

120. *Id.*

121. *Id.* at 379–80; *see also* Chander & Sunder, *supra* note 45, at 600 n.16 (stating that Sunder views “intellectual property as the fulcrum linking recognition and redistribution”); Ginsburg, *supra* note 84, at 306–07 (“[W]hether one sees copyright as a [property] right conferring on the author the ownership of the fruits of her labor, or as an economic incentive

still just as able to do all the things with her character that she could before, and will be able to continue earning the appreciation of the people who like what she does."<sup>122</sup> They conclude that though Rowling should not be able to stop others from using her character, she should be compensated with a share of the profits of this unauthorized sequel under a liability remedy.<sup>123</sup>

In discussing the potential of the tort-liability remedy, Kozinski and Newman observe:

The simple fact is that owners of intellectual property tend to be control freaks, and regard anyone who would erode this control as an enemy. "It's my creation," they will say. "What right do others have to tamper with it?" To this I say: It's your creation if you keep it secret. Once you release it to the rest of us, it enters our minds and becomes ours as well . . . So long as their right to a share in the profits of derivative uses is enforced, I suspect that copyright holders would actually be better off in a system in which everyone was allowed to exploit the work. When set free to do so, people will find ways to extract value from intellectual properties that original authors, too fearful of sullyng their creations, would never dream of.<sup>124</sup>

This conclusion invokes Rosemary Coombe's idea of postmodern-interpretation theories challenging traditional authorship-control justifications ("Once you release it to the rest of us, it enters our minds and becomes ours as well.").<sup>125</sup> It recognizes the utilitarian model will be inefficient so long as authors value their copyrights for nonmonetary reasons ("The simple fact is that owners of intellectual property tend to be control freaks . . . 'It's my creation,' they will say.").<sup>126</sup> It also invokes Lawrence

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scheme to promote the production of works of authorship . . . giving credit where it is due is fully compatible with both . . . these goals.").

122. Kozinski & Newman, *supra* note 113, at 380.

123. *Id.*

124. *Id.*; see Yen, *When Authors Won't Sell*, *supra* note 107, at 92 (arguing that the case for fair use is stronger when the secondary use is parody because "society gains a unique benefit" from "parodies that criticize literary and social conventions").

*The Wind Done Gone* case exemplifies Kozinski's point that "[w]hen set free to do so," people like Randall "will find ways to extract value from intellectual properties that original authors," or in this case, Mitchell's estate, "too fearful of sullyng their creations, would never dream of." Kozinski & Newman, *supra* note 113, at 380. Not that Randall's artistic work "sullied" Mitchell's creation. Randall's novel did, however, challenge certain romanticizations of the South, which Mitchell's estate, and likely Mitchell herself, would have been reluctant to demythify. See Chander & Sunder, *supra* note 45, at 615 (discussing how Mitchell's estate would never condone a work such as *The Wind Done Gone*).

125. See *supra* notes 88–89 and accompanying text (challenging traditional assumptions about and justifications for legally protecting authorial control to the exclusion of others in light of postmodern theories of interpretation).

126. See *supra* text accompanying note 108 (arguing fair-use restrictions are inefficient so long as authors restrict others' uses for nonmonetary reasons); see also Gordon, *supra* note 108,

Lessig's argument that requiring permission from the copyright-holder smothers the creative process and the possibility of allowing new creations to enter the cultural marketplace ("When set free to do so, people will find ways to extract value from intellectual properties that original authors . . . would never dream of.").<sup>127</sup> The use-now, pay-later model has the potential to cure current inefficiencies of the copyright system. These inefficiencies include: (1) the inability of a secondary author to pay upfront for the use of the work, and (2) the ability of the author and copyright-holder to say no to the proposed use. As discussed above, fair use sometimes fails to counter these inefficiencies.

Another recent proposition for copyright reform is rooted in antitrust law. Professor Sara Stadler argues that though courts consider market harm<sup>128</sup> under the fair-use test they do not have a clear statutory definition for what constitutes market harm.<sup>129</sup> She proposes that "market harm should be defined using antitrust law."<sup>130</sup> In antitrust law, products that do not compete are not considered to be part of the same market.<sup>131</sup> Stadler also predicates competition on the idea of whether the secondary work is a substitute or complement to the original copyrighted work.<sup>132</sup> Under this copyright framework, an author's derivative-work market<sup>133</sup> would only be protected to the extent that the secondary use is a substitute for the copyrighted work. Because Vander Ark's *Lexicon* was not a substitute of Rowling's *Harry Potter* series, it would be allowed under this proposed policy.<sup>134</sup>

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at 1632 ("[Parody] uses share a type of market failure that helps to explain their fair use treatment and that is particularly important in a field where advancement of knowledge is the ultimate goal."). Gordon observes that "[t]he case law has tended to grant fair use treatment where copyright owners seemed to be using their property right not for economic gain but to control the flow of information." *Id.*; see also *supra* Part III.A (discussing how authors feel connected to their creative product through the process of creation, and how this connection creates in them a sense of entitlement to perpetual ownership).

127. See LESSIG, *supra* note 21, at 84 (arguing that in order to foster creative enterprise, past creators' property rights must give way to the extent that they stifle creative development). Lessig's example of how property owners' air rights had to give way with the invention of the airplane is a particularly striking example of this. *Id.* at 1–2.

128. Courts must consider "the effect of the use upon the potential market for or value of the copyrighted work" in order to determine whether the use is fair. 17 U.S.C. § 107(4) (2006).

129. Sara K. Stadler, *Relevant Markets for Copyrighted Works*, 34 J. CORP. L. 1059, 1061–62 (2009) (describing "how copyright law might look if courts defined copyrights as rights in markets, using antitrust [law] to draw the boundaries of these entitlements"). Market harm is the fourth factor courts consider in order to determine whether a use of the copyrighted work is a fair use. See *supra* notes 47–48.

130. Stadler, *supra* note 129, at 1076.

131. *Id.*

132. *Id.*

133. See *supra* note 62 (defining "derivative-work market").

134. Stadler, *supra* note 129, at 1075 (concluding that the *Harry Potter Lexicon* was "complementary, not substitutive" of the original *Harry Potter* books).

## V. WEIGHING THE COSTS AND BENEFITS

Out of these three options, Congress should amend the copyright laws and enact a tort-like remedy for unauthorized use of copyrighted material.<sup>135</sup>

The current system of fair use offers some leeway to secondary uses. However, as the Harry Potter case demonstrates, fair use is an imperfect escape mechanism for the current, over-restrictive copyright laws. Also, because of the uncertain decisional outcomes under the fair-use factors, many publishers refuse to publish a work because they fear copyright-infringement liability, even if the proposed use is fair. On the other hand, an antitrust-definition of marketplace harm may go too far and offer too little protection for copyright-holders. Even though it seems just for Vander Ark to be able to publish his *Lexicon*, it seems unfair for him to use so much of Rowling's original material and not pay her anything for the use.<sup>136</sup>

The tort-like remedy seems like the fairest option to both copyright-holders and new authors. This remedy would encourage dissemination of the original work while also fostering new uses of the work, which promotes the utilitarian values of copyright law.<sup>137</sup> In this system, the copyright-holder would still have the burden to prove unauthorized use of the copyrighted work.<sup>138</sup> However, unlike in a fair-use case, after unauthorized use is established, the judicial inquiry would stop. If the court found unauthorized use of the copyrighted work, then it would award the copyright-holder a fixed percentage of all profits minus the publishing expenses. Under this fixed-compensatory system, a copyright-holder would not have an injunctive remedy, i.e., she or he would not be able to enjoin any use of the copyrighted work. But, she or he would be compensated for any use in

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135. The personal-property tort upon which this remedy might be based is trespass to chattels, in which a defendant "uses or intermeddles with [the owner's] chattels without permission." THOMAS C. GALLIGAN, JR. ET AL., *TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS* 103–04 (4th ed. 2007). To be actionable, "the defendant's interference must . . . have caused some injury to the chattel or to the plaintiff's rights in it." *Intel Corp. v. Hamidi*, 71 P.3d 296, 302 (Cal. 2003). The other personal-property tort is conversion, in which a defendant intentionally exercises "dominion or control over a chattel which so seriously interferes" with the owner's right "to control it" that the defendant may "justly be required to pay . . . the full value of the chattel." GALLIGAN ET AL., *supra*, at 110 (emphasis added) (citation omitted). Conversion, unlike trespass to chattels, would thwart the utilitarian objectives of copyright law because it would deter *all* use of the copyrighted work.

136. See *supra* Part III.B (discussing how society generally believes that authors' innovations and ingenuity entitle them to the economic profits derived from their work).

137. See *supra* note 86 (discussing the utilitarian goal of copyright law: to foster dissemination of creative and intellectual works to the general public).

138. See GORMAN & GINSBURG, *supra* note 82, at 5 (guarding against monopoly, the 1790 Congress shifted the burden of proof to the copyright-holder); *Warner Bros. Entm't v. RDR Books*, 575 F. Supp. 2d 513, 533 (S.D.N.Y. 2008) ("[T]he plaintiff must establish actual copying by either direct or indirect evidence; then, the plaintiff must establish that the copying amounts to an improper or unlawful appropriation.").

which a profit was realized. Free-access proponents might oppose such a system on the grounds that it would curtail secondary uses, restrict free speech, and innovation, and is premised on the assumption that copyright-holders deserve to be paid for any profitable use. These are valid concerns, and legislative compromises could be made by shortening the duration of copyright protection from the life of the author, plus seventy years to a more reasonable term. In regards to free-speech concerns, copyright-holders generally do not sue others for unauthorized use unless the use is profitable, competitive, or offensive. Many unauthorized uses would have more protection under the fixed-compensatory system than under the current fair use doctrine since there would be a safe harbor for *any* use that was not profitable. Under the fixed-compensatory system, copyright-holders could only sue for their share of the profits but could not enjoin others from their proposed use.

## VI. CONCLUSION

Vander Ark spent years developing his Lexicon website, just as Rowling spent years writing her Harry Potter novels. Both should have protection under the law for their efforts and be allowed to profit from the fruits of their labor. Three changes could increase such protection: (1) broadening the scope of the fair use doctrine, (2) creating a liability paradigm with a use-now, pay-later model that would ensure a primary author is properly reimbursed when a secondary author uses his or her original copyrighted work and profits from that use, or (3) narrowly defining market harm using antitrust law. No matter the course, the current copyright-law paradigm should be examined with scrutiny. Denying Vander Ark access to the cultural marketplace not only creates disincentives for broader participation, but it also denies the public the benefit and choice of such diverse works as Vander Ark's Lexicon.