**Aligning Incentives with Reality: Using Motivation for Creation to Shape the Scope of Copyright Protection**

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In June 2006 the Vatican forcefully asserted its copyright in all papal texts, sending a bill for past royalties to one publishing house and indicating that "prior agreement" with the Vatican would be necessary for newspapers to publish excerpts from officially released papal documents.[2] If the Vatican were to assert its copyright against a publisher or a newspaper in U.S. courts, how would its claim be treated? Presumably the creation and distribution of papal texts are motivated by considerations other than monetary reward. Thus, it is safe to assume that the Pope and the Vatican do not need the incentive created by copyright law in order to create or distribute papal writings. Should this affect the eligibility for or the scope of copyright protection? Papal texts are not the only category of works where the incentive of the copyright is not the primary motivating force for the creation and dissemination of the work. If the driving motivation for the creation of certain works is unrelated to copyright protection, should that play a role in determining the existence of copyright protection or the scope of copyright rights that the law provides such works?

As surveyed in Part IV, current U.S. copyright law, while based on a utilitarian theory, does not consider creative motivation in determining protection afforded to copyright owners. Indeed, when looking solely at U.S. copyright law, it appears that the U.S. adheres completely to the notion that "no man but a blockhead ever wrote, except for money."[3] This article argues in Part I that while the grant of copyright protection without reference to motivational factors may be appropriate, the law should take motivation into account in determining how robust the copyright protection afforded should be. Part IV

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[2] Richard Owen,*Vatican 'Cashes In' By Putting Price On The Pope's Copyright*, The Times January 23, 2006.

[3] 3 Boswell's Life of Johnson 19 (G. Hill ed. 1934). Samuel Johnson's famous quote has been included in several important copyright decisions in the United States: See e.g. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994); Castle Rock Ent. Inc,v. Carol Pub. Group, Inc., 150 F.3d 132, (2d Cir. 1998). I offer no comment on this quote when considered in the context of papal writings.

describes two ways courts should shape the scope of copyright protection works whose creation and distribution are not primarily motivated by the marketable rights created by copyright law. First, courts should consider motivation in non-exact reproduction cases when determining how similar an alleged infringing work needs to be to violate the copyright owner's rights. Second, to fulfill the purpose of fair use as the "breathing space within the confines of copyright",[4] courts should explicitly evaluate the effect that allowing the defendant's use would have on the motivational incentives that the copyright system is designed to provide. This inquiry should not examine the motivations of the particular creator of the copyrighted work at issue, instead the court should explore the motivations for creators of the type of work at issue. If the court determines that the motivations would not be significantly undermined by permitting the use at issue, that finding should weigh heavily in favor of a finding of fair use.

The approach argued for in this article will result in less robust, or "thin",[5] copyright protection for those types of works that do not require the incentive of the copyright to be created and distributed. As explained in Part I, this approach is entirely consistent with the utilitarian underpinnings of U.S. copyright law. If copyright law is designed to guard against underproduction of intangibles assets that, without the legal rights afforded by copyright, would be a public good,[6] then it should not be problematic to provide less protection for those types of works that appear to not risk underproduction absent legal protection. Providing less protection to certain categories of works, however, may do harm to an authors' rights view of copyright law. This harm could be counterbalanced by a stronger right of attribution than is currently provided to authors of creative works under U.S. copyright law.[7]

It is time to take into account the social cost of uniform levels of protection in copyright law. All works are not created equal: different types of works are motivated by different considerations. In addition to papal and other religious texts, examples of types of works created and distributed without the primary motivation being the marketable right provided by copyright law include: email and other personal communications, model legal codes, standard portrait photography,

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[4] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[5] Courts and commentators often refer to "thin" copyright protection for those works that, while eligiable for copyright protection, have less creativity. Cites.

[6] Cohen et al COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6-8 (2d Aspen 2006).

[7] As discussed more below, providing a stronger right of attribution may be more in-line with the desires of creators whose motivations for creating new works are non-monetary. For a general discussion of the significant effects that an author's name can have see, Laura A. Heymann, *The Birth of Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 Notre Dame L. Rev. 1377 (2005).

amateur/home photography, architectural works, advertising artwork and advertising copy, scholarly articles,[8] and legal pleading documents.[9] While the protection afforded by copyright law may be important to varying degrees for these types of works, robust copyright for these types of works is not necessary for their creation and may be only marginally necessary for their distribution. Therefore, there is no reason why society should endure the cost of uniformly robust copyright protection for these types of works.

After surveying the normative reasons for candidly using motivation for creation as a basis for distinguishing different levels of protection, this article discuss the costs associated with copyright protection for works whose creation is primarily motivated by non-monetary considerations. This article argues that the law should provide copyright protection for these works, but that protection should be appropriately calibrated to be "thin." While statutory changes could accomplish such recaliberation, and they are discussed below, industry capture of the legislative process in the field of copyright law is well documented and thus legislative change is unlikely. A more realistic approach is for courts to interpret the current statute and provide appropriately "thin" protection through incorporation of a motivation inquiry into the substantial similarity analysis and into the second factor of the fair use analysis.

## I. Why Motivation is an Appropriate Consideration in Determining Scope of Copyright Protection.

Should courts explicitly consider motivation for creation in determining the scope of copyright protection? The answer to this normative question depends on what one believes to be the purpose of copyright law. Generally, justifications for copyright protection fall into three broad categories: Utilitarian, Natural Rights, and Author's Rights. The utilitarian justification is based on a belief that without the protection afforded by copyright law creative works would be under-produced.[10] The natural rights justification holds that providing a legal means of protection for the products of a man's creativity is the morally right course of action.[11] A Hegalian based author's rights view of

[8] See e.g., Jessica Litman, *The Economics of Open Access law Publishing*, 10 Lewis & Clark L. Rev. 779 (2006).

[9] This list is not meant to be exhaustive. There certainly are other types of works that may fit the criteria. The types of works identified here will be used to illustrate the points asserted throughout this article.

[10] Cohen et al COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6-8 (2d Aspen 2006).

[11] Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1544-45 (1993).

copyright posits that providing protection of the creations of the mind helps individuals become fully self-realized.[12] Continental European copyright laws stem from an author's rights' conception that there is a bond between creator and the intangible work created. [13]

In the United States the justification for copyright protection is dominantly utilitarian.[14] The law grants protection for copyrighted works in order to achieve a goal – the advancement of knowledge and learning.[15] It is believed that without the marketable right of the copyright there would be insufficient incentives for the creation and distribution of creative works.[16]

The intangible asset that the law identifies as the copyrighted work can be thought of as a "public good" in the economic use of that phrase. Characterized by non-rivalous consumption and non-excludability, without legal protection it is feared that, like all public goods, copyrighted works will be under-produced.[17] The grant of exclusive rights to creators of copyrighted works is designed to correct for potentially sub-optimal production by providing a marketable right to those creators. This marketable right creates an incentive for production. As a marketable right, the magnitude of the incentive is, in theory, perfectly calibrated by the invisible hand of the market. The more "in demand" a work or type of work is, the greater the potential reward and thus the greater the incentive will be to create and distribute those types of works. The creators' and distributors' rewards are linked to the market for the works themselves, with greater profits made possible by copyright protection.

The utilitarian theory posits that without the legal protections afforded by the copyright, creative individuals and entities would not have the same level of incentive to create and distribute new works. Without legal protections, popular works would be copied by

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[12] Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 972 (1982). See also Gordon, supra n. 11.

[13] Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tul. L. Rev. 991, 992 (1990); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533 (1993)

[14] *Cf.* Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L.J. 517 (1990)

[15] This purpose behind copyright law is expressly stated in the Constitution. Art. I, sec. 8, cl. 8. Exclusive rights granted to authors are meant to promote progress in "science." *Id.* At the time of the framing of the Constitution, "Science" connoted broadly "knowledge and learning." Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 11 n.13 (1966)(noting that the most authoritative dictionary at the time listed "knowledge" as the first definition of "science")

[16] Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343 (1989).

[17] Cohen et al supra n. 9 at 6-7.

competitors and the price driven down to the marginal cost of each unit. The original creator and distributor might not be able to recoup expenses incurred in the creation of the work and, at a minimum, would not be able to obtain as much profit in the face of direct competition.[18] Preventing copying through copyright law allows for higher profits for copyright owners, thereby creating the incentive to invest in the creation and dissemination of new works. As the Supreme Court recently stated, "(C)opyright law serves public ends by providing individuals with an incentive to pursue private ones."[19]

When considering the effects of the marketable right created by copyright, it is important to remember that knowledge is advanced not only by new works being created, but by being shared with other as well.[20] Thus, when discussing the incentives created by copyright, it is important to consider also the incentives necessary to achieve dissemination.[21] When start-up costs for dissemination are costly or the risk of recouping sufficient returns high, copyright protection eliminates direct competition, allowing distributors to charge higher prices. However, the distributors of items identified at the outset of this article also have other motivations for distribution, beyond pure profit. The cost of dissemination is real, although in a digital world that cost may be significantly reduced.[22] Because of this real cost, under-dissemination may remain a concern even for works whose creators are in no way motivated by monetary reward, thus arguing for some level of copyright protection, but a fully robust copyright may not be necessary.

Pausing at this juncture to consider some of the categories of works identified at the outset of this article may help to provide some insight into the effect of providing copyright protection for these types of works. It would seem that the Vatican has sufficient incentive to both create and distribute papal texts without regard for the rights afforded by copyright protection. The Vatican seeks to provide guidance to those of

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[18] *Cf* Breyer, *The Uneasy Case For Copyright: A Study Of Copyright In Books, Photocopies, And Computer Programs*, 84 Harvard L. Rev. 281 (1970). Professor (now Justice) Breyer argues in this article that there are other means for publishers to recoup investment, including lead-time advantage and brand loyalty.

[19] Eldred v. Ashcroft, 123 S.Ct. 769, 785 n.18 (2003).

[20] Both initial disclosure to others and public distribution facilitate the advancement of knowledge. First publication can be an important right for all copyright owners and is protected through the reproduction right. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

[21] The complicated dynamics between authors and publishers, or creators and disseminators more broadly, remains part of the copyright world that cannot be ignored. *See* Maureen O'Rourke, *A Brief History Of Author-Publisher Relations And The Outlook For The 21st Century*, 50 J. Copyright Soc'y U.S.A. 425 (2003)

[22] Raymond Ku, *The Creative Destruction Of Copyright: Napster And The New Economics Of Digital Technology*, 69 U. Chi. L. Rev. 263 (2002).

the Catholic faith on a wide array of matters. That guidance comes in the form of written communications authored by the Pope and other church officials and distributed through the Vatican to churches and believers worldwide. Copyright protection for these works permits the Vatican to recoup the cost of creating and producing copies of the works, and, to the extent copyright protection allows the Vatican profits beyond the marginal cost of production of those copies, helps offset the operational cost of the Vatican itself.[23] Copyright law therefore can be viewed as providing a subsidy to the Catholic Church.[24]

The creation of email messages and personal communications also appears to be sufficiently motivated by incentives unrelated to those provided by the copyright protection. The distribution of these items, at least to one recipient, does not require the incentive of the Copyright Act; they are created for the purpose of being shared in this manner. It is also unlikely that affording copyright protection to these works provides an incentive for the sender to further distribute them. The protection of copyright for these correspondences may instead decrease their subsequent distribution by the recipients.

The production of model legal codes appears to be motivated by concerns for legal reform, or by the concerns of members of the organization proposing the model laws.[25] Model codes offer a way to create industry standards with legal enforceability. Copyright protection is not the primary motivation for the creation of model codes. Copyright protection permits these organizations to charge a price for copies of the model code that is greater than the marginal cost of production, greater than they would be able to charge in a market with direct competitors selling the same work. To the extent that copyright law provides protection for model codes, that protection permits these organizations to earn profits that help offset the costs of creating those codes.[26] It is unlikely that the potential for supra-competitive pricing leads to the creation of model codes.

Portrait photography, like those available in shopping malls across the country or hired by contract for events such as weddings, would be created even without the protection that the photographer[27]

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[23] See nn __-__ *infra.* and accompanying text.

[24] For a discussion of copyright as a form of authors' welfare, *see,*Tom Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights,* 69 Brooklyn L. Rev. 229 (2003)

[25] For example, building contractors associations are a main proponent of model building codes.

[26] But see *Veeck* (creator of model code seeking to prevent competitor from publishing copies of the code).

[27] In many situations of portrait photography today the photographer is employed by a corporation and is taking the photographs within the scope of her employment. In these

obtains under copyright law. The photographers are paid to create these images by clients who are not initially affected by copyright protection for these works. Yet copyright protection for these types of works can interfere with legitimate uses by the consumer.[28] It is possible that the existence of copyright protection for these images helps keep the initial price for the creation of these images lower. If a photographer factors in the profits that are possible from the marketable copyright rights in the photographs, she may charge less to the client, figuring to make additional profits through the copyright.[29] It is, however, unlikely that photographers engage in this type of discounting. One proof of this would be wedding photographers who charge a lower rate if the photographer retains the copyright and a higher rate if the copyright is assigned as part of the contractual arrangements. This does not appear to be standard practice in the industry.[30]

Amateur and home photography also is not motivated by the monetary incentive provided by copyright protection. People take pictures to capture memories and be able to document both life's milestones and trivialities. Copyright protection has nothing to do with providing an incentive for the creation of these types of photographs. In the age of the internet, mass public distribution of these images also does not appear to be motivated by financial gain. Photographic images on sites such as flickr abound.[31]

As these examples illustrate, if providing copyright protection is meant to address the potential sub-optimal production and distribution of creative works, calibrating protection based on the primary motivation

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situations, the author of the work would be the corporation. See 17 U.S.C. §101 (definition of "work made for hire").

[28] Just try taking one studio produced portrait photograph to a copy store to include as one of over 20 home photographs in a personalized calendar as a gift for the grandparents. Stores routinely refuse to reproduce such images. *See* Copyright and Your Photographic Products, Fred Meyer Brochure (on file with author).

[29] Additionally, privacy concerns and rights of publicity claims may restrict the ability of the photographer, as creator of these works, from authorizing further distribution.

[30] Wedding photojournalist association. Industry practice may be different for different types of professional portrait photography. As any parent of a teenager can convey, the industry practice surrounding "senior pictures" varies widely. One recent example relayed to me involved payment of over $150 for an initial set of approximately 10 photographic proofs. Prints from those proofs were extremely expensive when ordered through the photographer. No assignment of copyright could be obtained. When asked what type of prints the parent was going to order, the response was that the parent planned to scan the proofs and make their own prints at home. This anecdote may, in fact, indicate that copyright protection in the digital age is meaningless for the photographer, thus explaining the high price for the initial proofs. If that is the case then robust copyright protection is unnecessary as these works will be created regardless of the level of copyright protection.

[31] See http://www.flickr.com.

for creation and distribution seems reasonable. It is appropriate to afford less protection to creators of works who do not need the incentive copyright protection is designed to provide because under-production is not a threat. Some protection is likely necessary to offset the cost of distribution, but the level of protection necessary is not likely to be as great as with other categories of works. Using primary motivation for creation and distribution to shape the scope of copyright protection is justified through this straightforward account of the utilitarian purpose of copyright.

A market based approach to copyright law have assumes that all individuals are motivated by monetary reward.[32] The effect of this underlying assumption on the scope of copyright protection afforded should be reexamined. This plea for reexamination comes at a time when those in the field of economics are calling for more consideration of the rational actor assumptions[33] and at a time when social science research and literature is gaining greater prominence as an influencing force in the design of incentives created by legal rules.[34] Given the costs of copyright protection, as described in the next section, copyright law should factor in the full range of motivations for creation and distribution of creative works.

## II. The Costs of Copyright Protection

Investigating the costs of copyright protection and the wealth distribution effects it causes, strengthens the conclusion that motivation should explicitly be considered when determining the strength of copyright protection granted to different types of works. Providing legal rights for creators of works of authorship involves a cost to society. Scholars have begun to explore the cost of uniform protection for intangible assets that derive from different technologies, different creators, and operate in different markets.[35] More tailored rights that take into account these difference could reduce the cost to society

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[32] See Boswell's Life of Johnson supra n. 3 and accompanying text.

[33] Louis Uchitelle *Encouraging More Reality In Economics* NYTimes January 6, 2007.

[34] Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 Davis L. Rev. 1151 (2007).

[35] *See e.g.*, Michael W. Carroll, *One For All: The Problem Of Uniformity Cost In Intellectual Property Law*, 55 Am. U. L. Rev. 845 (2006). Professor Carroll argues that "perfectly tailored rights that promise innovators only the expected value required to induce socially desirable innovation would be theoretically optimal if intellectual property rights were the only policy tool available to promote innovation". *Id.* At 848 (footnoted omitted). *See also* Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 Sup. Ct. Econ. Rev. 1 (2004); Dan L. Burk & Mark A. Lemley, *Biotechnology's Uncertainty Principle*, 54 Case W. Res. L. Rev. 691, 695-706 (2004).

without sacrificing the underlying goal of copyright protection: promoting the advancement of knowledge and learning. Several problems contribute to why copyright law does not contain such tailoring.[36] The resulting uniformity of protection translates into unnecessary costs to society. The costs created by copyright protection include the increased cost of "inputs" to the creative process as well as the opportunity cost of the investment in the creation of new works. These costs should be minimized through less robust copyright protection in cases where the copyright incentive is less necessary to achieve creation and distribution. The proposals in this article are an attempt to define a way towards more tailoring under the current copyright regime.

Additionally, the wealth distribution effect of copyright protection shifts resources from consumers and users of copyrighted works to copyright owners and should not be ignored in evaluating the success of a copyright system.[37] If the goal is to promote knowledge and learning for all citizens, the wealth distribution effects caused by copyright protection may create an impediment to achieving that goal. In cases where the wealth re-distribution is unnecessary, the strength of copyright protection should be weakened.

### A. The Costs Of Copyright Protection: Wealth Transfers

A fundamental result of granting copyright protection is that consumers pay more for creative works. As explained above, the exclusive rights facilitate copyright owners receiving a price for their work that is above the price that would otherwise result in a competitive market. This can be viewed as a cost the public pays as a result of copyright protection, but in reality it is merely a wealth transfer from consumers to distributors and creators of copyrighted works.[38]

A further cost that the existence of the exclusive rights granted by copyright law imposes is born by the creators of new works and ultimately by consumers of those new works. If one of the inputs to a new work is protectable elements of a pre-existing copyrighted work, authorization to use those elements is necessary in order to make the use

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[36] Professor Carroll identifies some reasons as "uncertainty about innovation, information asymmetries between policymakers and innovators, administrative costs of tailoring, and the political economy of intellectual property policymaking." Carroll, *supra* n.35 at __.

[37] *See* Glynn Lunney, *The Death Of Copyright: Digital Technology, Private Copying, And The Digital*, 87 Virginia L. Rev. 813, 900-902 (2001).

[38] *See* Tom Bell, *Authors' Welfare: Copyright As A Statutory Mechanism For Redistributing Rights* 69 Brooklyn L. Rev. 229 (2003).

lawful.[39] The need to obtain permission from the copyright owner of the pre-existing work creates costs and can create hold-up problems, raising the cost of creation for the new work, both of which ultimately increases the cost for consumers of new works. Again, however, this can be viewed as a mere wealth transfer from consumer to copyright owner. In the end, Congress has made the choice that the transfer of wealth afforded by the copyright law promotes the end goal of the regime: promoting knowledge and learning. In the United States, we approve of this wealth transfer as a means to "get what we want" – the creation and distribution of creative works.[40]

Some brush aside wealth transfers, confident that, absent market failures, the market will sort things out and marketable items will be transferred to the entity that places the most value on that item. Wealth distribution effects, however, may have a significant effect on achieving the underlying goal of copyright.[41]

> [A] regime that couples creativity and money also affects the distribution of creative opportunities. Some creators want the monetary incentive that copyright provides; others do not. Some creators can bear the expenses that copyright imposes; others cannot. . . . Should we understand the copyright regime as a subsidy that makes their creativity possible? Or as a tax that makes it unaffordable? How should we think about these possibilities in light of enduring values about the distribution of expressive opportunities?[42]

In light of the goals of copyright law, we should be disturbed by unequal distribution of expressive opportunities. Distributing opportunities to create expressive works, even those that embody elements of pre-existing works, contributes to the expansion of knowledge and learning for all.[43] While this distribution effect is present for all copyrighted works, it would be good policy to minimize it when the works involved

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[39] The required authorization may be obtained from the copyright owner or may be found in the Copyright Act itself in sections such as those providing fair use rights, 17 U.S.C. §107, mechanical copying rights, 17 U.S.C. §115, or other statutory limitations, §§107-123.

[40] Lunney *supra* n. __ at 900-903 questions the wisdom of pointing to the growth in the copyright industries in recent years as evidence of increased creative output. Instead, that growth may be the result of the bold extension of additional rights to copyright owners, which has allowed copyright owners to capture more consumer surplus without adding new works into the marketplace.

[41] Molly Van Houweling, *Distributive Values in Copyright* 83 Texas L. Rev. 1535 (2005).

[42] Van Houweling *supra* n. __ at 1537-38.

[43] *Id.* 1548.

do not require robust copyright protection to insure their creation and distribution.

### B. The Costs Of Copyright Protection: Opportunity Costs

Still another cost of copyright protection, unassociated with wealth transfers, should be considered: opportunity costs. The types of works identified at the outset of this article would be created even in the absence of copyright protection as they are not primarily motivated by the monetary reward system made possible by copyright protection.[44] If the market feedback mechanism is not motivating the creators of these types of works, yet copyright protection allows for greater profits for copyright owners, arguably production of these types of works may be greater than socially optimal. In other words, creators may be spending more time creating works that the market does not demand. The other non-creative activities foregone might produce greater social welfare. These opportunity costs should be considered in evaluating the success of any copyright regime[45] or in evaluating the appropriate scope of protection to afford to different types of works.

If there are identifiable types of works for which it is unnecessary to facilitate the wealth transfers and bear the cost of robust copyright protection, where underproduction is not threatened, thinner protection is appropriate for those works. Consider the example of religious texts. Is it necessary to endure the costs associated with robust copyright when the benefits of creation and distribution would have been achieved anyway? A strong marketable right facilitating supra-competitive pricing and control of future creative expression is not necessary for the public to enjoy the benefits that accompany the creation of those texts. Consider also the example of model legal codes. Model codes have been held to be protected by copyright. Once enacted, while the model code may retain protection, the enacted version is no longer subject to

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[44] In several of the examples, there are other monetary rewards, just not ones created by copyright law. Legal pleadings, for example, are created by lawyers who are reaping monetary rewards for their work. Those monetary rewards, however, are not created as a result of copyright protection.

[45] Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, *49 Vand. L. Rev.* 483, 487-88, 589-99 (1996). Of course, it may be the case that if a creator is not motivated by monetary concerns in the initial creation of a work, he may, nonetheless, become motivated once the market feedback mechanism kicks in. If the market is "telling" the author to create more of that type of work, then the proxy of the market, at least, is indicating that the socially optimal quantity of that type of work has not yet been reached. Alternatively, a creator not motivated by monetary concerns may remain unmotivated by any feedback from the market, in which case even the existence of copyright protection is irrelevant as an influencing factor.

copyright protection.[46] Model codes are often drafted by industry organizations seeking to achieve the benefits associated with favorable legal codes as well as the benefits that can accompany standardized legal codes. The marketable right created by copyright is not the primary motivation for the creation of these codes.[47] The industry has sufficient incentive to create and distribute these works without a robust copyright right.

## III. Why Complete Elimination of Copyright Protection for Differently Motivated Creations is Inappropriate.

The costs identified in the previous section could be a basis to argue for the elimination of copyright protection for types of works which do not require the incentive of the copyright for creation and distribution. There are at least three reasons to resist eliminating copyright protection for these types of differently motivated works. First, as identified above and discussed in more detail below, while copyright protection may not be needed to motivate the creation of these types of works, it may be necessary to create appropriate levels of incentive for distribution. Second, the cost of error counsels in favor of some, more limited, protection for these types of works.[48] Finally, while the primary basis for copyright protection in the United States is utilitarian, there are distinct strains of natural rights justifications, the unfairness of eliminating protection completely would make calls for reform sufficiently unpalatable so as to be ineffective. Additionally, elimination of protection for these types of works would violate international treaty obligations.[49]

If copyright protection were eliminated for the differently motivated works, creators of works will be treated differently, raising issues of fairness in the distribution of entitlements under the Copyright Act.[50] However, many creators of the types of works targeted by this

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[46] Veeck v. Southern Building Code Congress Int'l, 293 F.3d 791, 794-95 (5th Cir. 2002) (en banc), cert. denied, 539 U.S. 969 (2003).

[47] To the extent that some groups may enter the model code business in order to profit from sales of the works, those may not be the groups society would be most interested in having draft model legislation. While there are also problems with industry groups writing the codes that govern the players in that industry, affording model codes less robust copyright protection would likely not significantly reduce industry group incentive to create such codes.

[48] *See* Dennis S. Karjala, *The Relative Roles of Patent and Copyright in the Protection of Computer Programs*, 17 J. Marshall J. Computer & Info. L. 41, 53 (1998) (arguing that some protection is necessary for computer software, but not "thick" protection).

[49] Berne and Trips.

[50] *See* Bell *supra* n. __ at __ (comparing the distribution of entitlements provided by the Copyright Act to those provided by welfare benefits).

proposal seem concerned with a different type of entitlement – credit or being identified as the author of the work when that work reappears in a different context. The behavior of millions of creators of certain types of works is illustrative. The proliferation of web sites such as flickr and youtube where home photographers post photographs and home videos by the millions, often with dedications to the public domain or under creative commons licenses, demonstrates that these creators are largely unconcerned with the monetary rewards permitted by copyright. It seems these works have been created and are being efficiently distributed without influence by copyright. These creators, however, often desire to be credited as the creator of their work.[51] Taking fairness into account for these differently motivated works may translate into granting a strong right of attribution for these copyright owners, while providing a less robust set of marketable rights.[52]

The proposal offered by this article would result in different copyright owners being treated differently. Under a natural rights or author's rights justification for copyright law, motivation should play no role in determining the scope of the protection. The only relevant determination is whether the creator is an author and therefore is deserving of certain rights in the works she creates. Yet the requirements for protection in the United States lead to some creators being denied protection for their works. For example clothing designers[53] and creators of works that may require painstaking attention to detail but which do not involve authorial judgment,[54] are, nonetheless, not granted copyrights in their creations. Because not all creations are protected by copyright, unfairness already exists in the law. Choices have been made concerning what to protect based on the underlying goals of the statute. Providing less protection for differently motivated works would be a similar choice, although some copyright protection would be provided.

For copyright infringement of the types of works not motivated by copyright in the first place, an infringement action is often not about monetary rewards or marketable rights. Sometimes creators attempt to

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[51] The experience with Creative Commons licenses was that 97-98% of creators selected the licenses that required authorial attribution. See Lydia Pallas Loren, *Building A Reliable Semicommons Of Creative Works: Enforcement Of Creative Commons Licenses And Limited Abandonment Of Copyright* 14 George Mason L. Rev. 271, n.98 (2007).

[52] *See* Catherin Fisk, *Credit Where its Due: The Law and Norms of Attribution,* 95 Geo. L.J. 49 (2006).

[53] Cite.

[54] Hearn v. Meyer, 664 F. Supp. 1987 (S.D.N.Y. 1987) (rejecting copyright protection for reproduction of public domain art prints completed using an exacting and time-consuming process)

use copyright to prevent circulation of damaging information,[55] to prevent unflattering biographies,[56] or to protect privacy interests. Alternatively, the copyright owners may assert that the real reason they require control is to prevent consumers from being confused by "unofficial" versions of the work.[57] In these instances, allowing robust copyright protection for these types of works would mean protecting values that the Copyright Act is not meant to promote. Indeed, for the most part, courts reject attempts to use copyright to censor unflattering biographies[58] or damaging information.[59] And concerns about confusing the public as to the "official" versions of a text are far better addressed by trademark law.[60] While the opinions rejecting copyright claims that fundamentally are attempting to protect a different interest do not seem to weigh creators' motivation in their infringement analysis, motivational considerations may be influencing the courts. Instead of allowing it to continue to discretely influence infringement determinations, considering motivation explicitly should be encouraged.

Considerations of a creator's motivation for creation or a distributor's motivations for distribution would, however, be a change from the current law.

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[55] *See* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

[56] See e.g., Wright v. Warner Books, Inc. 953 F.2d 731 (2d Cir. 1991) (permitting use of unpublished letters in an unflattering biography); Carol Pub'g Group. 904 F.2d 152 (2d Cir. 1990) (permitting use of unpublished journal entries and letters in scholarly biography).

[57] This concern was identified by the Vatican in its pronouncement on its copyright policy. See supra n.__.

[58] See e.g., Wright v. Warner Books, Inc. 953 F.2d 731 (2d Cir. 1991) (permitting use of unpublished letters in an unflattering biography); Carol Pub'g Group. 904 F.2d 152 (2d Cir. 1990) (permitting use of unpublished journal entries and letters in scholarly biography).

[59] *See* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

[60] *See* Laura A. Heymann, *The Birth of Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 Notre Dame L. Rev. 1377 (2005).

## IV. The Irrelevancy of Motivation Under Current Copyright Doctrine

### A. Eligibility for Protection

Under U.S. copyright law, the motivation for the creation of a particular work or even category of work is not relevant to a determination of whether a particular work is eligible for copyright protection. All that matters under U.S. copyright law is whether the work is fixed and whether it is original.[61] Thus, works created by accident,[62] without thought, or with no consideration of the material rewards that might result[63] obtain copyright protection so long as they are fixed and original. Clearly papal texts are eligible for copyright protection,[64] as are email and other personal communication,[65] model legal codes, [66] and amateur photography.

The determination at the outset to not inquire into motivation for creation leads to a range of items being copyrighted that many might find counter-intuitive. For example, the vast majority of personal correspondence is sufficiently fixed and original to garner copyright protection. In the United States, and indeed in almost all countries, copyright protection is afforded to works even without registration for protection and without notice of the author's claim to copyright protection.[67] Thus a simple email to one's friend is copyrighted upon creation regardless of the message's lack of a copyright notice (the simple "c" within a circle) and regardless of a failure to register the message for protection with the copyright office.[68]

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[61] 17 U.S.C. §102.

[62] "A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations." Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

[63] Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968) (acknowledging copyright protection for the Zapruder film, a home movie of the presidential motorcade during which JFK was shot).

[64] One might be tempted to consider that papal texts are actually the work of god and therefore not protected. Cite. However, the Vatican does not assert that the words of the pope are the words of god, thus the pope is the "author" of the works he creates.

[65] See supra n. __.

[66] Model Legal Codes are a category of works identified as potentially not needing the incentive of robust copyright to assure their creation and distribution. The copyrightability of model legal codes is not in doubt, however, once adopted into law, the enacted version, for public policy reasons, is not eligible for protection. Veeck.

[67] Indeed, international treaty obligations require that no formalities be imposed in order to obtain copyright protection. Berne.

[68] Registration is not required, although certain benefits do flow from registration. 17 U.S.C. §412.

The choice to not filter works based on motivation at this stage is likely to be an efficient one. U.S. copyright law does not make a distinction based on categories of works, let alone creative motivation within those categories. Instead, in the United States, the law awards copyright protection to all fixed, original works.[69] Trying to establish *ex ante* which types of works do not require the incentive of the copyright could lead to problems of both under-inclusion and over-inclusion. If Congress identified in the statute categories of works that would not be protected on the assumption that the incentive of copyright protection was unnecessary to motivate creation, it is possible that as society changed Congressional assumptions would no longer be correct. Alternatively if Congress adopted a requirement for copyright protection that examined the motivation of the creator, making protection unavailable for those works that were created not for monetary gain, a host of affidavits would be filed in copyright litigation attesting to the subjective motivations of the author of the work at issue.

Providing copyright protection for works whose creation is not motivated primarily by the monetary incentive created by copyright can serve an important purpose of encouraging distribution of that work. The strongest means of assuring distribution of creative works is to require distribution as a condition of obtaining copyright protection. While in the first copyright acts of this country publication was required to obtain protection, that has not been the case for almost a century.[70] Even though distribution is not required for protection, the existence of copyright protection facilitates distribution by providing assurances that once the work is released to the public the copyright owner will be able to control some unauthorized uses of the work.[71] Thus, it is appropriate to provide copyright protection for works where, although the protection

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[69] "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . " 17 U.S.C. §102. The U.S. Constitution permits Congress to award copyright protection to all "writings" of an "author". Art. I. §8 cl. 8. While the 1909 Copyright Act used those words to identify the works eligible for protection, the 1976 Act utilizes words that do not risk a constitutional collision when a court determines that a work does not qualify for protection.

[70] The 1909 Copyright Act eliminated publication as a requirement for protection, permitting unpublished works to obtain protection through registration. Registration as a requirement for protection of unpublished works was eliminated by the 1976 Copyright Act.

[71] The digital world has largely altered the landscape and therefore the calculations that copyright owners must make concerning the ease of replication once a work has been first published. The duplication and distribution made possible by the internet counter-balances the protections afforded to copyright owners when considering how little unauthorized reproduction can be controlled. In the end, however, all that may be necessary is "some assurance that copying will be limited." Trotter Hardy, *Property (and Copyright) in Cyberspace*, Univ. Chicago Legal Forum. 217, 222 (1996).

is not needed to incentivize creation, it is needed to create an incentive for distribution.

### B. Scope of Rights Protected by Copyright Law

All copyrighted works are given the same basic rights under copyright law, specified in section 106 of the Copyright Act, including the fundamental rights to reproduce the work in copies, to distribute copies of the work, and to make derivative works based on the copyrighted work. [72] Certain categories of copyrighted works are also granted the right to publicly perform the work.[73] The same is true for the right to publicly display the copyrighted work: only certain categories of works are granted this right. For all of the rights granted, however, the motivation for the creation of the work does not play a role in determining what rights a copyright owner obtains. While all copyright owners are granted the same set of basic rights, the scope of the protections afforded all copyrighted work are significantly shaped by two fundamental aspects of copyright law: the substantial similarity inquiry and the statutory limitations on the rights of copyright owners, including the important fair use defense.[74]

First, except in the case of an exact reproduction, the scope of the right to control reproductions and the right to control the creation of derivative works is determined by what constitutes a "substantially similar" copy in an infringement analysis. This type of case is often referred to as a case of "non-literal infringement." Substantial similarity enters the analysis when the allegation is one of a violation of the right provided in section 106(1), the right to control reproductions in copies, and also when the allegation is one of a violation of the right provided in section 106(2) the right to prepare derivative works based on the work. If a defendant is accused of non-literal infringement or of creating a derivative work, a court will need to inquire whether the defendant's work is substantially similar to the plaintiff's work.[75] Without the required degree of similarity, no infringement will be found.

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[72] 17 U.S.C. §106.

[73] *Id.* Only certain categories of works are granted a right to publicly perform a work, while other categories of works are granted a right to publicly display a work. See §106(4) & (5). Sound recording copyright owners are granted a more limited public performance right: the right "to publicly perform the copyright work by means of a digital audio transmission." §106(6).

[74] 17 U.S.C. §107.

[75] The degree of similarity is relevant at two points in the infringement inquiry. First, because independent creation is an absolute defense to infringement, to infringe a defendant must be found to have copied from the plaintiff's work. Unless the defendant admits copying, copying is typically demonstrated by showing access to the plaintiff's work and "substantial similarity". Additionally, the degree of similarity is

Courts routinely require greater similarity for different types of works. For example, when a work is considered to be more factual in nature, courts require greater similarity in order to hold the defendant liable for infringement.[76] Computer software, due to its functional nature, also requires a greater degree of similarity for non-literal infringement to be found.[77] On the other hand, when the work is considered more creative, less similarity is needed for a court to find the similarity sufficiently "substantial" and thus infringing.[78] These varying degrees of similarity are sometimes referred to "thin" and "thick" copyright protection.[79] Courts have not based the "thickness" of copyright protection on the motivation of the creator of the work at issue or on the class of works to which that work belongs.[80] As explored in more detail in part IV, in the case of papal decrees and other types of works where motivation is not significantly influenced by copyright, the motivation for the creation should be relevant to a determination of the degree of similarity required in order to infringe.

The second manner in which the scope of copyright protection is varied based on the type of work at issue involves the statutory limitations on copyright owners' rights. All of the rights granted to copyright owners are expressly subject to many statutory limitations, [81] codified in section 107-123 of the Copyright Act,[82] including the important limitation of fair use. In the United States the fair use analysis is currently structured around the four factors set out in section 107 of the Copyright Act. Courts have not interpreted any of the four factors as requiring an inquiry into the motivations that led to the creation and/or distribution of the allegedly infringed work. While the Supreme Court has indicated that all four factors must be considered and no presumptions should be employed,[83] it has become clear in the case law that often the first and fourth factors dominate the analysis, with the third

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then also used in determining whether the defendant has improperly appropriated the protectable elements of the plaintiff's copyrighted work. *See, e.g.,* Three Boys Music Corp. v. Michael Bolton, 212 F.3d 477 (9th Cir. 2000).

[76] cite

[77] Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992)

[78] *See e.g.* Boisson v. Baninan Ltd., 273 F.3d 262 (2d Cir. 2001).

[79] *See e.g.* Feist Pub., Inc. v. Rural Tele. Serv. Co., 499 U.S. 340; 349 (1991); Fleener v. Trinity Broadcasting Network, 203 F.Supp.2d 1142, 1149 (C.D.Cal. 2001).

[80] See e.g. Bellsouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc., 999 F.2d 1436 (11th Cir. 1993) (en banc), cert. denied, 510 U.S. 1101 (1994).

[81] §106 states that the rights granted to copyright owners are "subject to sections 107-123 . . . . ."

[82] *Id.*

[83] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

and second factors trailing in significance, in that order.[84] Additionally courts tend to analyze the second and third factors in relation to the first and fourth factors.[85] Generally courts focus more on the defendant's activities without much inquiry into the actions of the plaintiff copyright owner or the class of copyright owners for that particular type of work.[86]

The first factor involves examining "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[87] As this factor focuses solely on the defendant's use, this factor does not involve any inquiry into the motivation for the creation of the plaintiff's work or the type of work allegedly infringed. Instead, under the first factor courts primarily focus on whether the defendant's use is "transformative" and the extent of commercial motivation on the defendant's part. Whether a use is transformative or, in the words of one court, "substitutive,"[88] weighs significantly in the balance of the fair use determination.

The other factor which heavily influences the fair use determination is the fourth factor: "the effect of the use upon the potential market for or value of the copyrighted work."[89] Courts sometimes identify this factor as "the most important factor" or at least "primus inter pares",[90] despite Supreme Court admonitions against elevating one factor above others.[91] When defendant's use has a substitutive effect in the market, supplanting demand for the plaintiff's original copyrighted work, courts rarely hold the defendant's use to be a fair one. Even if the effect is on the licensing market for the work, courts weigh that against a finding of fair use.[92]

The Supreme Court has indicated that the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," should be evaluated in relation to the type of use that the defendant has engaged in (the first factor).[93] Viewed through the lens of the first factor, the Supreme Court has found copying

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[84] Lydia Pallas Loren, *Redefining The Market Failure Approach To Fair Use In An Era Of Copyright Permission Systems*, 5 J. Intell. Prop. L. 1, 27-28 (1997).
[85] *Id.*
[86] Michael Madison, *A Pattern-Oriented Approach to Fair Use*, 45 Wm. & Mary L. Rev. 1525 (2004).
[87] 17 U.S.C. § 107(1).
[88] Cite.
[89] 17 U.S.C.§ 107(4).
[90] Princeton Univ. Press, 99 F.3d at 1385. *See also* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1077 (1997) (noting the tendency of the courts to focus primarily on market harm "to the exclusion of all else").
[91] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[92] Texaco; Princeton University Press
[93] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

of an entire work to be fair[94] and also copying of only a small fraction of a work to be infringement.[95] This factor involves both a qualitative and a quantitative consideration.[96] In the end, this factor focuses on the use made by the defendant and is unrelated to the motivations of the creator of the work.

The second factor, a relatively moribund factor, dictates exploration of the "nature of the copyrighted work." Many courts have erred in their interpretation of this factor, determining that the second factor weighed in favor of the copyright owner because the work was clearly copyrightable.[97] If the work was not copyrightable, there would not be prima facie infringement and thus there would be no need for an analysis of fair use. Courts that have appropriately considered this second factor have essentially determined that there is a range of copyrightable works. Works that are closer to the "core" of copyright protection, such as highly creative works of visual art, fictional literary works, and musical works, are given more protection by courts because the second factor will be seen as weighing against a finding of fair use.[98] Works more factual in nature or more functional are given less protection by the second factor weighing in favor of fair use. Other aspects of the "nature of the copyrighted work" that courts have considered include whether the work has been published,[99] and if the work is out of print.[100] As explored more fully in part V, this second factor invites inquiry in the nature of the copyrighted work and should include consideration of what motivates the creation and distribution of that type of work.

### C. Possible Statutory Amendments to Reduce Protection

Statutory amendments to reduce the level of protection afforded the types of works identified in this article could take the form of specific limitations on the rights granted to copyright owners. Section 107 is but one statutory section out of 17 separate sections that place limits on the rights of copyright owners. Some of those limits are targeted at specific types of works, such as: nondramatic musical works,[101] sound recordings,[102] useful articles,[103] computer programs,[104]

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[94] Sony
[95] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).
[96] Campbell.
[97] Cites.
[98] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[99] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).
[100] Joseph P. Liu, *Copyright and Time: A Proposal*, 101 Mich. L. Rev. 409 (2002) (urging courts to consider duration issues in this factor as well).
[101] 17 U.S.C. §§110(6), (7) & (8); 115, 116.

and architectural works.[105] Consistent with the arguments put forth in this article, certain types of work not requiring robust protection could be identified and defined in the statute and an appropriate a statutory limitation could be enacted.

One possible limitation would be to eliminate or significantly limit the right to control derivative works. The Copyright Act contains precedent for such a limitation. When protection for sound recordings was added to the Copyright Act in 1971,[106] a limitation was adopted that prevented "sound-alike" works from constituting infringement of the sound recording copyright.[107] A limitation on the derivative work right for differently motivated works would reduce the wealth distribution effects and reduce the cost of "inputs" for future creative works.

The likelihood of statutory change of the magnitude suggested here is, however, extremely low. The problems of industry capture of the legislative process in the field of copyright law are discussed at length in other articles.[108] As described by one scholar, copyright lawmaking has been a one-way rachet: [109] Great and greater protections have been afforded to copyright owners, with very little limitations placed on those new protections, let alone limitations on already existing protection. For purposes of this article, the current state of copyright law-making is taken as a given. Recognizing the slim reality of legislative change, there are, nonetheless, provisions in the current statute that courts can and should interpret to achieve some more modest reductions in the strength of protection for works where incurring the cost of robust protection is unnecessary.

## V. Considering Motivation Within the Current Copyright Framework

As developed in Parts I and II, it is appropriate to consider the motivational drive for the creation and distribution of copyrighted works when establishing the level of copyright protection to afford any

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[102] 17 U.S.C. §114.
[103] 17 U.S.C. §113. "Useful article" is a term of art in the Copyright Act, defined in Section 101. 17 U.S.C. §101.
[104] 17 U.S.C. §117.
[105] 17 U.S.C. §120.
[106] Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (effective Feb. 15, 1972).
[107] 17 U.S.C. §114(b). This limitation was significantly influenced by the dynamics of the music industry and the powerful lobby forces behind the different positions at stake. *See* Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case Western L. Rev. (2003).
[108] Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 879 (1987).
[109] Jessica Litman, DIGITAL COPYRIGHT 80 (1st ed. 2001).

particular work. Part IV demonstrated that current copyright doctrine does not expressly consider motivation in this way and identified two places in copyright doctrine where such consideration would be possible: the substantial similarity analysis and the second factor of the fair use inquiry. This section provides more detail on how such considerations could be implemented by courts.

Before addressing the two means by which judicial interpretation of the Copyright Act could reduce the strength of protection for certain types of works, it is important to establish how a court would determine whether a particular copyrighted work falls into the category of a work that should be afforded the type of "thin" protection. Courts already employ a notion of reduced protection for factual works, engaging in line drawing about the type of work at issue, thus the task to be undertaken is not unfamiliar to judges. The key will be to define what constitute a non-monetarily motivated creation.

When considering motivations, it is important that courts not look at the motivation of a particular author of a particular work, but rather consider typical motivations that lead to the creation and distribution of the type of work into which the plaintiff's work fits. Four reasons counsel against using a subjective inquiry. First, the subjective inquiry is not likely to lead to the desired result, as many examples of highly creative works find their origin in nonmonetary motivations. Using subjective motivation of a particular author could therefore result in abuse within the industry as publishers seek to take advantage of highly talented individuals and dedicated artists who love their craft and will often attest that they are "not in it for the money." Second, if the subjective motivations of the individual plaintiff were at issue, the temptation would be great for plaintiffs to simply aver to monetary considerations being significant in their motivations.

More fundamental, however, is that courts should be cognizant of the effect their decisions will have on future creators and distributors. Thus, the better inquiry is the general motivation for creators and distributors of the type of work at issue. If the type of work at issue is one for which creators and distributors, in general, are significantly motivated by factors beyond the marketable right afforded by copyright, reducing the scope of protection should not interfere with the level of creations and distribution.

Finally, a more objective inquiry into the motivations for a particular category of work would allow potential users of the work, *ex ante*, some ability to judge how robust the copyright protection for a type of work is likely to be. If a subjective inquiry into motivation were necessary, most users would not be able to judge whether a particular creator's motivation will affect the scope of protection for a particular work.

Courts should therefore ask, and litigators should be prepared to answer: is the copyrighted work of a type that would be created and sufficiently distributed in the absence of strong copyright protection? This is not an inquiry into whether the work would be created and distributed if no copyright protection were available, rather it is an inquiry into whether weak copyright protection is sufficient protection. In considering the categories of works identified above, each would meet that test. The creators of those types of works engage in the creation either for non-monetary reasons, or for monetary reasons that are not related to the marketable rights provided by copyright protection. Additionally, each of those types of works would have been distributed even with weaker protection. As discussed above, it is important that courts consider not only the motivation for creation but the effect that weaker copyright protection may have on the economic dynamics of distribution.

The objective inquiry may result in some creative individuals choosing to no longer create new works. These are the individuals for whom a subjective inquiry would have dictated strong protection: they need the heightened incentive in order to invest time and energy in the creation and distribution of their work. However, by using an objective inquiry we are, by definition, selecting types of works were the majority of creators of those works will continue creating even with weaker copyright protection.

As courts developed this inquiry, categories would emerge and industries would adapt to the revised levels of protection. If employed properly, the end result would be a reduction in the social cost of providing the copyright incentive for the creation and dissemination of creative works.

### A. Degree of Similarity Affected by Motivation for Creation

While courts have not explicitly embraced an inquiry into the motivation for the creation of a particular type of work as relevant to determining the scope of copyright protection, it is both appropriate and possible to do so under current copyright doctrine. First, in determining the magnitude of similarity necessary to meet the similarity requirement in an infringement analysis, the type of work being infringed is typically considered. In doing so, courts often consider the level of creativity evidenced in the plaintiff's work. For example, to infringe compilations of factual elements, courts have required near identity in the defendant's work.[110]

[110] Feist; Schroeder v. William Morrow 7 Co., 566 f.2d 3 (7th Cir. 1977).

Courts should expand their inquiry and consider the primary motivation for the creation and distribution of the type of work at issue as relevant to the degree of similarity required in order to infringe a particular work. Similarity in this context is used to determine improper appropriation. If the defendant's work is not sufficiently similar to the plaintiff's, no improper appropriation has occurred and there is no infringement of plaintiff's copyright. The degree of similarity required is decided on the facts of the case, often using both quantitative and qualitative measures. Using a formulation proposed by Nimmer, courts have identified two different types of similarity: "fragmented literal similarity" and "non-fragmented comprehensive similarity."[111] In both of these types of infringement inquiries, consideration of the motivations of creators of the type of work at issue would be appropriate. When creators and distributors of a particular type of work are not primarily motivated by the marketable right granted by copyright, greater similarity should be required in order to find infringement.

Consider as an example a case that is used in many copyright and intellectual property casebooks: *Steinberg v. Columbia Pictures Industries, Inc.*[112] In that case the plaintiff, Saul Steinberg, sued for infringement of a work that had been commissioned for use on the cover of *The New Yorker* magazine. The work, often referred to as a New Yorker's view of the world, could be classified as advertising copy.[113] The motivation for the creation of the image was the commission payment by *The New Yorker*. Even with weaker copyright protection, magazines like *The New Yorker* would still have sufficient incentive to purchase attractive cover artwork, and to use that artwork by publicly distributing its magazines. Their business is selling magazines and more attractive covers presumably help achieve that goal. The defendants in that case had created a poster, a portion of which emulated Steinberg's

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[111] Nimmer of Copyright 13.03[A] (2005); Walker v. Time Life Films, Inc., 784 F.2d 44 (2d Cir. 1986). Marshall Leaffer has proposed a different terminology: "verbatim similarity" and "pattern similarity". Leaffer, Understanding Copyrigh Law 412-14 and n.27.

[112] 663 F. Supp. 706 (S.D.N.Y. 1987). For example, this case is used in Cohen et al, supra n. __ at 336; Gorman and Ginsberg, COPYRIGHT: CASES AND MATERIALS 572 (7th Ed. 2006); Merges, Menell and Lemley, INTELLECTUAL PROPERTY IN THE NEW TECHNOLCIGAL AGE 474 (4th Ed. 2006).

[113] Some may take issue with this classification arguing that magazine covers are often produced by artists and are highly creative. Even though highly creative, the bulk of the compensation expected by artists for these covers comes from the commissioning entity – the magazine – to whom all copyright rights are assigned. The artist does not profit from the copyright except to the extent that copyright affects the willingness of the magazine publisher to pay for the commission and the amount it is willing to pay. Further, it is unlikely that the commissioning entity factors the various potential licensing opportunities for derivative works of its covers into the price it is willing to pay for the commission.

work and the remainder of which consisted of images of the actors in a movie that the poster was designed to advertise.[114] The court determined that the image in the poster was sufficiently similar to the plaintiff's work, despite significant differences and major portions of the poster that contained other images. While a portion of defendants' work clearly emulated Stienberg's work, if the court had taken into consideration the motivational influences as outlined in this article, it would have been more appropriate to find no infringement. The defendant's work was not overwhelmingly similar to the copyrighted image. Weaker copyright protection for this type of work would not reduce significantly the amount of these types of works created and distributed.

### B. Incorporating Creative Motivation into the Second Fair Use Factor

Fair use is designed to allow for ex post ordering of copyright rights by courts. It would be entirely consistent with the fair use analysis for courts to consider motivation for the creation and dissemination of the type of work at issue when analyzing the second fair use factor. While the wording of section 107 invites courts to consider factors outside of the four listed in that section,[115] the second factor, the "the nature of the copyrighted work"[116] invites consideration of the motivations behind creation and distribution of a particular type of work.[117]

The analysis of the second factor has been relatively inconsequential in most court opinions. The nature of the copyrighted work might be significant if the work was unpublished[118] or if the court finds that the work lies far from the "core of copyright protection", such

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[114] For another example of a magazine cover being used as a basis for a movie poster advertisement, see, Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998).

[115] Section 107 states: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . ." The use of the word "include" to introduce the four factors draws upon the definitions provided in the Copyright Act which provides that "The terms 'including' and 'such as' are illustrative and not limitative." 17 U.S.C. § 101. Some courts have expressly consider factors outside of the four listed in the statute. Cites.

[116] 17 U.S.C. 107(2).

[117] Reconciling such an approach with international treaty obligations is also possible using a robust interpretation of "fair remuneration" in the permitted exceptions test of both the Berne Convention and the TRIPS Agreement. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization , Annex 1C, Legal Instruments--Results of the Uruguay Round vol. 31, 33 I.L.M. 81 [the TRIPS Agreement]. See Okediji *Towards an International Fair Use Doctrine*, 39 Colum. J. Transnat'l L. 75 (2000).

[118] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Faulkner v. National Geographic, 294 F. Supp. 2d 523 (S.D.N.Y 2003).

as a heavily factual work or a compilation of factual or public domain information.[119] Allowing courts to explicitly consider the motivational dimensions of a type of work would permit courts to tailor the costs of protection to the level of robustness necessary to motivate creation and distribution of a particular type of work.[120] The other four factors should also be considered, so as to prevent the second fair use factor from becoming a proxy for denying copyright protection altogether.

Using this proposed consideration in the fair use analysis would mean that if a newspaper quoted substantial portions of a recent papal decree, the second fair use factor would weigh in favor of a finding of fair use. A court would inquire into the nature of papal decrees and other documents from churches designed to provide guidance to church members. The creation and dissemination of such documents, a court would likely conclude, are motivated not by the market-based incentives that copyright law creates, but by other considerations. That conclusion should influence the result in a fair use analysis, weighing in favor of fair use and thus creating a less robust scope of protection for that type of work.

## Conclusion

Current U.S. copyright law provides relatively uniform protection for copyrighted works. This uniformity of protection imposes costs on society when such costs are not necessary to motivate creation and dissemination of certain types of works. The law should take into account the primary creative motivation for types of creative works in determining the scope of protection to afford. The scope of protection can be varied through determinations of how similar an alleged infringing work needs to be to violate the copyright owner's rights and through consideration of the second fair use factor. If a court determines that reducing the scope of protection would not significantly undermine the motivations for creation and dissemination of the type of work at issue, that finding should weigh heavily in the degree of similarity required for non-literal infringement and in analyzing whether defendant's use is a fair use.

[119] Cites. Cf. Campbell (concluding the work at issue lies in the core of copyright protection, but that such conclusion is not helpful in a case involving parody).
[120] See, Carroll supra n.__, at __ (suggesting such tailoring to ameliorate the cost of uniform copyright protection).