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Debunking Blackstonian Copyright

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Copyright's Paradox
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INTRODUCTION

More than two decades ago, in attempting to make sense of the structural dissonance between copyright and free expression, the U.S. Supreme Court famously declared that copyright was intended to be "the engine of free expression."[1] Ironically, this characterization was at the time intended as little more than a rhetorical device. In that very case, the Court proceeded immediately thereafter to analyze copyright as a "marketable" property right and conclude that absent a showing of market failure, neither fair use nor the First Amendment would preclude a finding of infringement.[2] Instead of injecting a new set of values into copyright analysis, the "engine of free expression" metaphor served to effectively downplay the extent to which the value frameworks underlying the two systems could ever come into conflict with each other. Indeed, later opinions too have used it precisely to this end.[3]

Despite its origins, Neil Netanel has long believed that there may yet be some merit in the Court's characterization.[4] In his view, copyright is a state mechanism directed at enhancing the "democratic character of civil society."[5] By providing creators with an incentive to produce creative expression, supporting expressive activity via the market, and setting limits to private control of creative expression, copyright contributes directly to the development of a vibrant civil society.[6] Netanel's "democratic paradigm" stands in contrast to both the market-based and minimalist accounts of copyright and attempts to take seriously copyright's ability to be an engine of free expression.[7]

1. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

2. *Id.* at 559.

3. The most recent instance is the Court's decision in *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), through which the Court effectively immunized copyright legislation from First Amendment scrutiny, relying on this observation from its earlier holding in *Harper & Row*. A notable exception is the Tenth Circuit's decision in *Golan v. Gonzales*, 501 F.3d 1179, 1188 (10th Cir. 2007).

4. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 341 (1996) [hereinafter Netanel, *Democratic Civil Society*] (setting up a theory that gives effect to the statement). Netanel does seem deeply skeptical of the simplistic invocation of the metaphor nonetheless. *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 27 (2001) [hereinafter Netanel, *First Amendment Skein*] (cautioning against the "talismanic invocation" of the metaphor).

5. Netanel, *Democratic Civil Society*, *supra* note 4, at 288.

6. *Id.* at 347-63.

7. *Id.* at 288-89.

For the last several decades, however, the analysis of copyright law has come to be dominated by the traditional law and economics account of the institution.[8] In this account, copyright exists to provide creators with an incentive to produce creative expression and to ensure that the expression so produced is efficiently allocated through the market.[9] Copyright thus provides creators with a property right in their creative expression, and given the centrality of strong property rights to the efficient functioning of the market, stronger copyright is thought to be efficiency enhancing. Netanel's prior work directly targeted this economic account of copyright, which he termed the "neoclassicist approach," by emphasizing that copyright as an institution was "in, but not of, the market."[10]

In his new book, *Copyright's Paradox*, Netanel further develops his democracy-enhancing approach to copyright law, attempting to remake copyright in the "First Amendment's image."[11] This time though, his target is not the nuanced economic account, but rather the systematic use of property rhetoric and propertarian ideas to understand and justify copyright's major expansions—the trend toward what he characterizes pejoratively as "proprietary copyright" or "Blackstonian copyright."[12]

Across different areas of the law, the idea of property has time and again proven to be immensely powerful in furthering a particular conception of an issue and thereby influencing change along a desired dimension.[13] William Blackstone's legendary characterization of the right to property as a "sole and despotic dominion"[14] has proven to be particularly useful in this process, by helping to conjure up images of an owner's absolute and unconditional right to

8. *See, e.g.*, Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter Gordon, *Fair Use*]; Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) [hereinafter Gordon, *Inquiry*]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

9. *E.g.*, Gordon, *Fair Use*, *supra* note 8, at 1604 ("[T]he copyright system creates private property in creative works so that the market can simultaneously provide economic incentives for authors and disseminate authored works . . . .").

10. Netanel, *Democratic Civil Society*, *supra* note 4, at 306, 364.

11. NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 195 (2008).

12. *Id.* at 7. Netanel uses these terms interchangeably throughout the book. *See, e.g.*, *id.* at 151, 153. In this Review, I will use the term "Blackstonian copyright" to avoid confusion.

13. *See generally* Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998).

14. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

exclude others from a resource.[15] Scholars have long debated the extent to which Blackstone himself believed in this version of property, with most concluding that he intended it as little more than a functional metaphor.[16] Yet, it has had significant influence over time, with the absolutism inherent in it having lent itself perfectly to a noninstrumental view of ownership and, in the process, to a vision of property rights and ownership as universally necessary ends in themselves, commonly characterized as "property essentialism."[17]

Copyright law is no exception. Since its entitlement bundle consists of a set of exclusive use privileges protected by a coextensive right to exclude (much like tangible property), copyright is commonly characterized as a form of property.[18] But unlike tangible property, where an owner's exclusive use privileges are presumptively infinite, copyright limits a creator's exclusive privileges to those connected to the work, in turn representative of its underlying purpose. The perfunctory invocation of property rhetoric often glosses over this nuance. Yet, once copyright is characterized as a form of property, the noninstrumentalism of ownership is considered an end in itself, allowing for the scope of its exclusive privileges and exclusionary right to be extended with little regard for its underlying purpose. In *Copyright's Paradox*, Netanel rightly identifies this essentialism as central to copyright's recent expansionist trend.[19]

Copyright's Paradox does an exemplary job of setting up the copyright/free expression tension in the context of the democratic paradigm. Netanel systematically lays out recent instances of copyright expansion where the conflict has been most apparent and traces them to uses and modalities of property thinking that are often well concealed within doctrine. Building on the idea of copyright as a democracy-enhancing mechanism, the book makes a convincing argument that copyright can continue to serve as an engine of free expression notwithstanding the emergence of the Internet and with it new technologies of distribution that allow for expressive content to be shared, transformed, and copied with ease.[20]

15. *See* Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67 (1985).

16. *See, e.g.*, Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998) ("[P]roperty as exclusive dominion is at most a cartoon or trope . . . .").

17. *See* Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 734 (1998) (characterizing Blackstone as the "patron saint" of property essentialism).

18. For a particularly vocal defense of the idea, see Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005).

19. NETANEL, *supra* note 11, at 6.

20. *Id.* at 81-108.

Having (1) elaborated on his vision for copyright (the democratic paradigm), (2) described the main impediment to its realization (copyright's expansion and its conflict with free speech), and (3) identified the principal source of the problem (the proprietary vision of copyright), Netanel then proceeds to lay out a remedial "blueprint" to allow for copyright to be recast in the "First Amendment's image."[21] It is here that his proposals seem surprisingly unambitious and perhaps more importantly, do not offer an alternative to the source of the problem: the propertarian vision.

Copyright expansionism has certainly gone too far, and property rhetoric has no doubt played a major role in this. Yet, Netanel's proposals seem to do little to minimize the influence of property essentialism within copyright. They focus principally on moving copyright away from its reliance on exclusionary remedies to systems for remunerating creators without altering its underlying entitlement structure in any way. With property ideas being as well entrenched in all of copyright thinking as Netanel tells us they are, what copyright needs, if indeed it is to serve its purpose as an engine of free expression, is a viable structural alternative to propertarian thinking. A large part of the reason why the essentialist rhetoric has continued to dominate is precisely because its critics are hard-pressed to offer such an alternative.

An alternative to property essentialism in copyright law need not require accepting a "minimalist" approach, or indeed seeking to "overly truncate[]" copyright.[22] But it would entail a structural recognition that the copyright grant differs significantly from that of other tangible and intangible property rights. Copyright differs from other forms of exclusive rights (including patents and trademarks) in that the existence of a creator's entitlement and its scope are only ever determined judicially and correlatively—that is, in reference to a defendant's actions. The absence of an administrative agency overseeing a formal grant process means that it falls entirely to courts to both delineate and enforce a creator's entitlement during an infringement action. Copyright law thus closely resembles the common law process of adjudication, where the existence and violation of an entitlement are determined purposively, by reference to an underlying policy or objective; circumstantially, in the context of the parties before the court; and additionally, ex post. Taking these attributes seriously and understanding copyright to be a strongly conditional common law entitlement wherein courts balance a host of competing interests before making a finding, I argue in Part IV, is likely to move copyright away

21. *See id.* at 12.

22. Netanel, *Democratic Civil Society*, *supra* note 4, at 339.

from its reliance on property as a structural ideal, allowing it to realize its role as an engine of free expression unimpeded by property essentialism.

Part I begins by examining Netanel's real target in *Copyright's Paradox*: Blackstonian copyright. Section I.A starts by setting out the application of Blackstonian rhetoric to property and copyright. Section I.B analyzes Netanel's claims that the use of Blackstonian rhetoric in copyright is responsible for copyright's recent expansions by looking to the modalities by which property thinking operates. Part II then lays out Netanel's democratic paradigm for copyright law and analyzes his argument that copyright can and does function as an engine of free expression, even in the wake of the Internet and digital distribution. The strength of Netanel's theory, this Part argues, lies in its repostulation of values traditionally considered ends in themselves as mechanisms contributing toward an exogenous end—free expression. The next Part analyzes the ways in which Netanel sees copyright as burdening free speech, looking specifically in Section III.A to the ways in which Blackstonian property essentialism has contributed to that process. Section III.B then evaluates his proposals to alleviate those burdens to conclude that they fail to adequately address the very cause of the problem that he ably identifies. Part IV outlines an alternative vision for copyright: a common law based structural understanding of the institution; one that would effectively minimize reliance on property essentialist rhetoric and ideas to explain its entitlement structure.

I. BLACKSTONE, PROPERTY, AND COPYRIGHT

What motivates much of Netanel's analysis and argument in *Copyright's Paradox* is the recognition that over the last decade or so, copyright has expanded significantly, to the extent that it today imposes an "unacceptable burden" on the values of free speech.[23] Netanel's project in the book is therefore to set out the problems that this expansion poses for free speech and to prescribe a solution connected to the democracy-enhancing features that he identifies for copyright. All the same, he also makes unambiguously clear what he believes is the "primary" and "immediate" cause for the expansion.[24] He makes the cause a theme that runs through his entire analysis and in opposition to which he sets up his solutions.

What, then, is this cause? The target he identifies is the increasing reliance on property essentialist rhetoric in copyright analysis. Copyright, he notes, is increasingly viewed as a form of conventional property, worthy of protection

23. NETANEL, *supra* note 11, at 5.

24. *Id.* at 6.

independent of any underlying reasons for which it was brought into existence. He associates this version of property talk with Blackstone's now infamous observation that the right of property consisted in the "sole and despotic dominion which one man claims and exercises . . . in total exclusion of the right of any other individual in the universe."[25] As Netanel observes early in the book,

> Property rhetoric, whether invoked reflexively or strategically, has tended to support a vision of copyright as a foundational entitlement, a broad "sole and despotic dominion" over each and every possible use of a work rather than a limited government grant narrowly tailored to serve a public purpose. . . . And courts brand as "theft" any unauthorized use of a copyright holder's work . . . .[26]

What exactly is this rhetoric, and why has it proven to be particularly impactful in different areas including copyright law, giving rise to what Netanel describes as "Blackstonian copyright"? How has it contributed to copyright's recent expansion? In this Part, I attempt to answer these questions.

A. The Sole and Despotic Dominion in Perspective: Property Essentialism

By most accounts, when Blackstone defined property as the sole and despotic dominion of its owners, he was far from advocating a form of property absolutism. As legal historians have pointed out, Blackstone's own description of property doctrine of the time did not reflect this definition.[27] Yet ironically, the Blackstonian idea of property is commonly associated with his definition, rather than his actual description of the subject.

Blackstone's definition though has proven over the years to be particularly powerful as a metaphor or trope.[28] Quite apart from its imagery of property as an absolute entitlement—allowing for a limitless exercise of the right to exclude—it has also permeated contemporary legal analysis by lending itself to a version of property rhetoric that values property's right to exclude

25. 2 BLACKSTONE, *supra* note 14, at *2; *see* NETANEL, *supra* note 11, at 7.

26. NETANEL, *supra* note 11, at 7.

27. *See, e.g.*, Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 30-32 (1996); Burns, *supra* note 15, at 81-82; David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 105 (2009). Netanel notes this irony as well in his discussion of the Blackstonian idea of property. *See* NETANEL, *supra* note 11, at 220 n.11.

28. *See* Rose, *supra* note 16, at 601-02.

independent of its underlying rationale. The idea of property as despotic dominion that is often associated with Blackstone's definition then denotes two somewhat interconnected elements. The first is the idea that property has no limits: absolutism. The second is the idea that once an entitlement is designated as a form of property, its owner is allowed to exercise the exclusionary privilege/right that is central to it, regardless of any underlying reason: essentialism. It is indeed the latter that has proven to be particularly impactful in the copyright context.

Noted property theorist Jim Harris refers to this idea as the "irreducibility of ownership."[29] Ownership over a resource—that is, having a property right in it—is often thought to give its owner an open-ended set of ownership privileges, all or any of which may be exercised with little regard for an underlying principle or purpose. An owner may thus decide to use his resource in a way that is clearly inefficient, wasteful, or indeed completely inexplicable.[30] Yet in each of these situations, the fact that the resource and the reasons for action are characterized as "the owner's" is all that matters. Once the law designates something as property, the law's reasons for the designation cease to matter. Property thereafter exists for its own sake. No further inquiry into the reasons for the owner's privileges or ownership is merited.[31] The despotism that Blackstone alludes to connects perfectly with this idea.

Central to the essentialist claim is therefore a belief that the reasons underlying a property right are irrelevant. And to be sure, in the context of tangible property, they usually are irrelevant. Thus, an owner's decision to paint his house purple, or to scribble on the hood of his car, is not commonly analyzed beyond ascertaining that the decision was indeed the owner's.[32] To the extent that the question whether someone is actually an owner is made an issue, it usually revolves around issues of procedure—whether he acquired title appropriately—rather than purpose—why this person should be the owner.

In her seminal work analyzing the various rhetorical strategies that employ Blackstone's metaphor, Carol Rose characterizes the idea of the sole and despotic dominion as the "Exclusivity Axiom" and notes that it is "powerfully suggestive" because it delegates the decision of whether to exclude someone

29. J.W. HARRIS, PROPERTY AND JUSTICE 64 (1996).

30. *Cf.* Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781 (2005) (noting courts' hostility toward recognizing and enforcing an owners' unfettered right to destroy his or her property).

31. *See* HARRIS, *supra* note 29, at 65 ("If he may use, abuse, exploit, or transmit in these and countless other less eccentric ways, it is because he is owner.").

32. *Id.*

from a resource to a property owner.[33] As she notes, "This decisionmaking authority is what makes property a central libertarian value: The property owner has a small domain of complete mastery, complete self-direction, and complete protection from the whims of others."[34] Very importantly though, she also notes that one of the characteristic features of the Exclusivity Axiom involves its masking the underlying distribution of entitlements and the reasons (or indeed the complete absence of reasons) for the distribution.[35] The metaphor of despotism thus aptly emphasizes the "indifference" of exclusion toward the underlying distribution, its legitimacy, and its reasons.[36]

While Blackstone never used the sole and despotic dominion idea directly in his discussion of copyright, he clearly seems to have believed that authors were entitled to property rights in their creations—rights that were indifferent to any underlying purpose.[37] In addition, he does seem to have believed in some variant of the essentialist logic applying to copyright. He thus observes, in his description of copyright,

> When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property.[38]

Regardless of whether Blackstone actually believed in an absolutist conception of property, his understanding of copyright has clear essentialist overtones. His somewhat abbreviated discussion of the subject seems to hint at copyright being a form of common law property, consisting of an open-ended set of exclusionary privileges to be treated largely analogously to ordinary tangible property.[39] Once copyright is classified in this conception as a form of

33. Rose, *supra* note 16, at 604; *see also* Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31, 57 (1996) (describing the influence of the metaphor on the Court's takings jurisprudence).

34. Rose, *supra* note 16, at 604.

35. *Id.* at 605.

36. *Id.* ("[I]t is the axiom's very indifference toward specific distributions that triggers the Ownership Anxiety.").

37. *See* NETANEL, *supra* note 11, at 7; Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 782-83 (2000).

38. 2 BLACKSTONE, *supra* note 14, at *405-06.

39. To be sure, Blackstone's discussion draws a distinction between common law copyright and statutory copyright, with the latter being recognized to be of finite duration. *See id.* at *407.

property, it is thought to give its holder, the owner, a set of privileges exercisable completely independent of both the nature of the underlying subject matter of the right and the purpose that motivated its conferral to begin with.

The term "Blackstonian copyright" is thus a reference not just to Blackstone's own views on copyright—no doubt limited by the system and conceptions of it that existed at the time—but to the idea of *property essentialism* that is at the core of copyright. While often confused with the idea of property absolutism that is commonly associated with Blackstone's definition, copyright remains somewhat distinct. Now to be sure, very often property absolutism and essentialism are mutually reinforcing; that is, the ownership interest is deemed absolute because it is agnostic to any underlying purpose. Yet the ideas remain analytically distinct. And it is precisely this characteristic that is at the heart of copyright's recent expansions.[40]

B. Blackstonian Copyright and Copyright's Ungainly Expansion

How, exactly, then does the idea of property essentialism that is at the heart of Blackstonian copyright relate to copyright's expansion in recent times? In describing the link between propertarian thinking and copyright expansion, Netanel makes an interesting observation. He notes that copyright's recent expansion in duration and scope is at once both a consequence of and a cause for the view that copyright is just like any other property right.[41] He characterizes this a "vicious cycle."[42]

This causal reflexivity that Netanel identifies, is particularly intriguing because it reveals how property is in some ways a self-reinforcing idea. On the

Yet Blackstone believed that the source of the rights—individual authorship—remained the same in both and consequently that copyright derived its source outside of any statutory grant, much like tangible property. This latter position was reflected most aptly in his arguments that the creation of statutory copyright did not abrogate analogous protection under the common law. *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 89-91 (1993); *see also* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 231 (discussing how "statutory amendments gradually added new entitlements to copyright protection" that were not protected by existing statutes or common law).

40. To be sure, Netanel's arguments do not rely on the essentialism/absolutism distinction, and it seems that at times his conception of Blackstonian copyright entails both. Yet I believe that in the copyright context absolutism originates in an essentialist view of property and is therefore incomplete as a causal basis for the expansion.

41. NETANEL, *supra* note 11, at 55.

42. *Id.*

one hand, property ideas contribute to doctrinal expansion through their essentialism. Yet on the other hand, when copyright law expands independently and comes to closely resemble traditional property, it tends to be equated with other forms of property. When this happens, the expansion symbolically contributes to a propertarian vision of copyright.

Even accepting this causal reflexivity, why indeed is it that propertarian thinking is the "primary" and indeed "immediate" cause for copyright's recent expansions? The answer, one suspects, derives from the way in which property ideas and metaphors effectively mask the tradeoff between conflicting institutional objectives by presenting themselves as nonideological and therefore noncontestable realities.[43] As a consequence, even when other causal factors are at play in copyright's expansion, property rhetoric, of the essentialist variety, enters the picture to give the argument an air of legitimacy. This is certainly true of the other causes that Netanel identifies in the book and elsewhere.[44] Thus, entertainment industry rent seeking is routinely couched as a demand for "protection against theft." And courts, no less, have fallen prey to this approach, not just in their rhetoric but also as part of their doctrinal analysis.[45] Just as an owner of a tangible resource is thought to have an open-ended set of use privileges associated with the resource, a copyright holder is deemed entitled to control any market for uses of the work through the grant or denial of a license. The causal primacy and immediacy of the propertarian vision therefore derive from its ubiquity in all areas of the copyright system.

Additionally, on a theoretical level, property essentialist rhetoric forces copyright law and policy to elide the centrality of the incentives-access tradeoff, a defining feature of intellectual property analysis since the seminal work of Nobel Prize-winning economist Kenneth Arrow in the 1960s.[46] Since the subject matter of protection in copyright (and all of intellectual property) is a nonrival, nonexcludable public good, resource exclusivity—the incentive for creativity—is imposed artificially through legal rules that attempt to mimic the functioning of tangible property systems. All the same, this exclusivity comes at a cost, represented by the static and dynamic inefficiencies associated with

43. For more on this phenomenon in structuring legal arguments see Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 150 (1999).

44. *See, e.g.*, NETANEL, *supra* note 11, at 7; Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* 6 NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillan ed., 2007).

45. *See infra* text accompanying notes 56-60.

46. *See* Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609 (Nat'l Bureau of Econ. Research ed., 1962).

monopoly control over an otherwise nonexcludable resource. Consequently, all of intellectual property, including copyright, revolves around identifying the point at which this balance is optimized—that is, the monopoly costs associated with the artificial exclusivity are outweighed by its incentivizing benefits.[47] While tangible property rights also come with their own set of inefficiencies, by all accounts the costs associated with intellectual property rights far outweigh those attributable to tangible property rights.[48] And as a direct result, calibrating the scope and extent of the grant of exclusivity to account for these significantly higher costs remains a core concern in the intellectual property context, in a way that it just is not in the tangible world. The power of essentialist rhetoric therefore lies in its giving short shrift to the importance of this tradeoff. When the law does not care if I deny you permission to walk across my front yard on your way to work, why should it now when I deny you permission to use parts of my song in a documentary? They are both mine and since my ownership interest in the land is presumptively agnostic to the inefficiencies of requiring you to walk around my front yard, my ownership in the song should be too.

To be sure though, it is not always clear when property ideas are a cause and when they are a consequence. In some situations the presence of exogenous influences and reasons certainly hints at the propertarian analogy being a consequence rather than a cause. Take copyright's expansion in duration that Netanel describes.[49] With the term of protection now extending to the life of the author plus seventy years,[50] the duration is certainly "functionally perpetual."[51] Yet the property analogy here comes in at the back end, rather than at the front; it does not directly drive the expansion. Copyright's term extension was at each juncture, justified independently as deriving from copyright's system of providing creators with an incentive to create and distribute.[52] Property essentialism seems to have been neither the direct nor the immediate contributor to the expansion along this dimension. All the same, a seemingly never-ending term certainly contributes to a vision of

47. For a general overview of the idea in the copyright context, see Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996).

48. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 21 (2003) (noting that intellectual property rights tend to be more costly in several ways than other rights in physical property).

49. NETANEL, *supra* note 11, at 57-58.

50. *See* 17 U.S.C. § 302 (2000).

51. NETANEL, *supra* note 11, at 58.

52. The most recent iteration of this argument was endorsed by the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). *See* NETANEL, *supra* note 11.

copyright as just any other form of property and by symbolizing this, gives rise to a set of norms that countenance this vision.[53]

This is in contrast to the other major substantive expansion that Netanel identifies: copyright's expansion in scope.[54] Copyright's modern tests for infringement seemingly exclude very little. Tests such as "total concept and feel" or "substantial similarity" allow copyright's entitlement bundle to reach beyond what it was traditionally meant to cover—creative expression.[55] The vagueness of copyright's internal doctrinal limits, including the idea/expression dichotomy and fair use has further contributed to this. The influence of essentialist rhetoric on copyright, however, is best seen in what Netanel describes as the property-centered approach to fair use.[56]

Of the four factors that courts employ as part of the fair use analysis, the last requires them to look to the effect of the defendant's use on "the potential market for or value of the copyrighted work."[57] In interpreting this requirement, though, courts have counterintuitively defined the "potential market" to include a market for licensed uses of the work.[58] In this broad understanding, just about any use to which the work is put is likely to have a negative impact on the market for the work, with the result that fair use is often denied.[59] This rather amorphous definition of the "market" for the protected work originates directly in essentialist thinking. Recall that essentialism emphasizes the indifference of the property entitlement toward the reasons that underlie it. A property owner is deemed to have an exclusive

53. The most well known of these norms is often described as the "clearance culture"—a phenomenon whereby users of a work protected by copyright automatically presume that their use falls within the copyright holder's bundle of exclusive rights and focus on obtaining a license from the holder for the use. This in turn fuels holders' and indeed courts' conception of the copyright bundle as all-encompassing. For an excellent study of this phenomenon, see James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887-906 (2007). For more on the clearance culture phenomenon, see Peter Jaszi & Patricia Aufderheide, *Untold Stories: Collaborative Research on Documentary Filmmakers' Free Speech and Fair Use*, 46 CINEMA J. 133 (2007).

54. NETANEL, *supra* note 11, at 58.

55. *Id.* at 60.

56. *Id.* at 64.

57. 17 U.S.C. § 107(4) (2000).

58. For a discussion of this phenomenon, see 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][5], at 13-202.2 (2008); Gibson, *supra* note 53, at 895-98; Mark A. Lemley, *Should a Licensing Market Require Licensing?*, LAW & CONTEMP. PROBS., Spring 2007, at 185, 190; and Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 903-04 (2007).

59. NETANEL, *supra* note 11, at 64.

right to do whatever he or she wants to a resource simply by virtue of owning it, regardless of whether the right and the actions connect to the reasons for the ownership. In similar fashion, once an original work of expression is created and it is found to be the subject matter of copyright protection, the essentialist view considers the creator to be vested with exclusive rights over all possible uses to which the work may be put, however, again ignoring the purpose for which the entitlement exists. The idea of a market for licensed uses does precisely this.

The third major form of copyright expansion that Netanel discusses represents in many ways the crystallization of the Blackstonian conception of copyright—the emergence of "paracopyright."[60] The emergence of digital encryption and other technological control measures coupled with the enactment of the Digital Millennium Copyright Act (DMCA) now allow copyright owners to effectively regulate access to expression. With the law imposing liability for the circumvention of such measures, and indeed the very manufacture and distribution of technologies capable of such circumvention, copyright owners are equipped with both a legal and a technological mechanism to control all access to their expression.[61] Unlike even traditional copyright, the system of liability here is not even subject to limited exceptions akin to the fair use doctrine.

Largely analogous to this process, Netanel notes, is the use of one-click licenses that make access to expression conditional upon an acceptance of terms and conditions that impose property-like exclusionary restrictions on uses of the expression.[62] These licenses effectively make every person accessing the expression a party to a contract with its creator, thereby subjecting him or her to its underlying terms, which courts and contract law remain perfectly willing to enforce.[63] The process then effectively blurs the well-known distinction between property and contract that the law has always adhered to, and converts contractual restrictions into property-like ones.[64]

60. *Id.* at 66. For a discussion of how this crystallizes the propertization of copyright, see Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281 (2003).

61. *See* 17 U.S.C. § 1201.

62. *See* NETANEL, *supra* note 11, at 70.

63. For an elaborate overview of how this effectively expands copyright's scope and restricts the applicability of its limits, see David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999).

64. *See generally* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) (elaborating on why the legal system uses property and contract as two distinct modalities for allocating rights).

The primary impetus for these developments, however, was not propertarian thinking, but rather the easy availability and diffusion of technological mechanisms that enabled them as a functional matter.[65] Digital locks now enabled nonexcludable expression to be converted into a partially excludable commodity;[66] clickwrap enabled the imposition of additional exclusionary restrictions on uses. Yet once this happened, the propertarian (that is, essentialist) vision of copyright effectively coalesced with this functional reality, giving it legal significance. If copyright owners could as a technological matter exercise near-complete control over their expression—something that sits rather well with the idea of them owning their expression—the law too should facilitate such ownership, or so the argument goes.

What is perhaps most interesting about these three forms of copyright expansion is the different roles that propertarian thinking played in each process. In one, relating to its scope, its influence on the law was direct and causal. Yet in the other two, it played a less direct but nonetheless equally important role. In the context of duration, its impact one might say was largely structural. Propertarian thinking here emerged as a consequence of nonproprietary, yet ill-conceived, structural changes that made copyright resemble tangible property structurally, thereby symbolically reinforcing the essentialist rhetoric. To be sure, term extensions certainly do have functional significance, yet their principal impact, at least in their more recent iterations, is structural.[67] This is in contrast to copyright's expansions in the area of paracopyright, where the law reinforced the propertarian vision functionally, by legitimizing and indeed encouraging a practice that originated in essentialist logic. Thus, through a mix of causal, structural, and functional influences, property thinking has certainly remained central to almost all of copyright's recent expansions.

Indeed the final two instances of expansion that Netanel describes each reveal a convergence of these modalities. The first relates to noncommercial personal uses, which were until recently exempt from copyright infringement,

65. *See* Picker, *supra* note 60, at 282-83.

66. *See* Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2065-66 (2000).

67. This perhaps explains why the constitutional challenge to copyright's most recent extension, contained in the Copyright Term Extension Act, was brought as a facial challenge rather than as an as-applied one in *Eldred v. Ashcroft*, 537 U.S. 186, 186 (2003). This also may have been the reason why the Court was not ready to invalidate the extension, absent a showing of functional harm resulting from the extension. *See* LAWRENCE LESSIG, FREE CULTURE 229-30 (2004).

either de jure or de facto.[68] Here, the expansion of infringement to cover any use to which the expression is put (a causal influence), and the reality that copyright owners can indeed regulate such uses as a practical matter (a functional influence) are combining to result in a large number of users today coming to recognize all forms of private copying to be a form of infringement (symbolic reinforcement). The second is the stifling of new media through the rampant use of exclusionary remedies such as injunctions.[69] With the copyright holder's entitlement being viewed as a full-blown property right, it has indeed become customary for courts to recognize permanent injunctive relief to be not just the default, but rather the *only* remedy upon a finding of infringement. Rarely ever do courts award damages in lieu of an injunction. Here, the influence of essentialist thinking is rather direct and causal. Since copyright holders own their expression, they should be allowed to give effect to the right to exclude that is central to the idea of property by excluding infringing uses altogether, and courts readily accede.[70]

Netanel thus makes a compelling argument that propertarian thinking has contributed to copyright's recent expansions in more ways than one. Often this influence is direct and strategic; yet in recent times it has become indirect and reflexive, thereby avoiding genuine scrutiny.

II. THE CONTINUING RELEVANCE OF THE DEMOCRATIC PARADIGM

Central to *Copyright's Paradox* is Netanel's argument that the "engine of free expression" metaphor continues to remain a functional ideal for copyright law and policy even in the digital era, with the advent of new technologies of distribution. In recognition of the innumerable sociotechnological changes that have occurred over the last decade or so, Netanel offers a significantly qualified account of the democratic paradigm in contrast to his earlier work.[71] All the same, he builds on its core ideas.

In his account, Netanel identifies three principal functions for copyright, each of which he claims plays a role in underwriting our system of free expression—the production function, the structural function, and the

68. NETANEL, *supra* note 11, at 72-75.

69. *Id.* at 75-78.

70. For more on this phenomenon, specifically on how exclusionary remedies contribute to a propertarian conception of a right, see Shyamkrishna Balganesh, *Demystifying the* Right *To Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 616, 628-29, 638-49 (2008).

71. *See* Netanel, *Democratic Civil Society*, *supra* note 4, at 341-64.

expressive function.[72] Very importantly, though, his claims are not purely descriptive. He notes that each of the three functions ought to be used additionally as "metrics" against which copyright's role in promoting free speech should be measured.[73] They thus form focal points for his entire theory. As he notes, "They are also useful metrics for measuring the extent to which copyright actually furthers [the promotion of free speech]. They are tools for asking whether today's copyright law, given its current configuration and the market and technological universe in which it operates, still serves as a vital 'engine of free expression.'"[74]

This raises an important question. Is each of the functions identified for copyright a goal toward which the copyright system ought to independently aspire, or is each a goal because it in turn contributes to the system of free expression? If the former, the theory then needs to additionally tell us why these goals are independently desirable—a selection issue—and their contribution to the free speech system becomes a descriptive "extra" rather than a normative necessity. But if the latter, they cease to be viable independent measures. Netanel's answer seems to be a mix of both. On the face of it, Netanel's arguments appear to convert what are traditionally presumed to be copyright's independently desirable ends into mechanisms directed at an exogenous structural end. At the same time though, he injects the mechanisms with independent normative content, by arguing that they can function as metrics in the analysis. He thus seems to suggest that the functions he identifies should be read as both means and ends in the analysis. I use this parameter to run through each of them.

A. Beyond Incentives: The Production Function

Copyright's "production function," according to Netanel, derives from its ability to act as an incentive for the creation and distribution of creative expression.[75] Through the grant of an exclusive right, copyright attempts to solve the public goods problems of nonexcludability and nonrivalry associated with original expression, inducing creators to produce and disseminate expressive content.[76] In *Copyright's Paradox*, however, Netanel offers a major qualification to his original position. He concedes that as a consequence of the

72. NETANEL, *supra* note 11, at 81.

73. *Id.* at 82.

74. *Id.* at 81-82.

75. *Id.* at 84.

76. *Id.* at 84-85.

Internet and the emergence of numerous new technologies of decentralized distribution, creative expression today often is produced and distributed without any reliance on copyright's incentive structure. Individuals generate and share content for a variety of motives independent of copyright and, additionally, can tap into extraneous revenue streams.[77]

Having made this concession, Netanel argues that copyright nonetheless serves as an important incentive for works of authorship that involve a significant amount of time and resources to create, such as motion pictures, television programs, and the like. The production function in this variation is an argument about copyright's "*incremental* free speech benefits," related to its ability to induce creative expression beyond what would be produced independently – that is, without such protection.[78]

The "incremental benefits" variant of the argument, as should be apparent, also builds on copyright's theory of incentives.[79] All the same, it attempts to do more than merely validate the idea of incentives. What it seems to do, however, is to convert the idea of a creative inducement, long thought to be an end in itself, into a mechanism directed at a new goal: furthering the system of free expression. Consequently, the production function is additionally dependent on whether the expression so produced has "independent First Amendment value."[80] Only if this additional condition is satisfied, argues Netanel, is the production function served. It is here that Netanel's analysis might have provided a little more insight into his thinking.

What are these independent First Amendment values? To Netanel, the idea of First Amendment values extends beyond First Amendment doctrine as interpreted and applied by judges. It covers what he identifies as "free speech principles," a set of values and ideals that contribute to the widest

77. *Id.* at 86-88.

78. *Id.* at 88.

79. For an overview of copyright's theory of incentives, see Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129 (2004).

80. NETANEL, *supra* note 11, at 88. As Netanel notes, "[W]e must posit that (1) the copyright incentive generates the creation and dissemination of original expression over and above the rich array of speech that would be available even without copyright, and (2) this additional, copyright-incented expression has independent First Amendment value." *Id.* It is worth mentioning that Netanel's original formulation of the production function in his prior work contained no such limit. *See* Netanel, *Democratic Civil Society*, *supra* note 4, at 350 ("It bears emphasizing that the constitutive role of copyrightable creative expression in a democratic civil society is limited neither to works of authorship that explicitly address matters of political or social importance nor to those that present ideas in a rationally apprehensible manner.").

dissemination of information from diverse sources.[81] It values the negative liberty of the First Amendment but is more empowering than that, and emphasizes both expressive autonomy and expressive diversity as valuable ends.[82]

What Netanel does not tell us, though, is how and when expression dependent on copyright's incentive structure furthers these values. To begin with, it is not clear how or why the fact that the incentive produces *some* expression does not by itself have such value, given how widely the idea seems to be understood. But this clearly is not all that is needed to satisfy the "independent" value argument, since that would make the condition seem superfluous. Netanel thus seems to envision some category of works that copyright manages to incentivize, but which do not independently satisfy a set of free speech principles.[83]

It would have helped then to have examples of expressive works that fit the incentive theory, but fail the production function. This is particularly so given that Netanel rightly notes the emergence of works that are produced quite independent of copyright's incentive structure. If this trend indeed continues, as some optimistically predict it will,[84] the category of expressive works produced through copyright's incentive structure—that is, "sustained works of authorship"[85]—will continue to become narrower and narrower, making Netanel's twofold test for the production function even more important, and perhaps unduly exclusionary.

B. Not Just Allocative Efficiency: The Structural Function

Quite apart from providing creators with an incentive to produce and disseminate creative expression, copyright is thought to support a market-

81. NETANEL, *supra* note 11, at 35.

82. *Id.* at 35-42.

83. It is not clear either that Netanel favors a subjective content-based evaluation of works to measure their contribution to the free speech system as a condition to their protection via copyright. His detailing of categories covered seems wide enough to exclude such content-based classification. *Id.* at 88-89.

84. *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 106 (2006); Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L.J. 369, 371, 375 (2002).

85. This is a term Netanel borrows from Jane Ginsburg to describe works of authorship that involve the investment of significant time and resources. *See* NETANEL, *supra* note 11, at 88; Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1499 (1995).

based sector of creators and thereby underwrite an "expressive sector with roots outside the state."[86] It thus allows for creative expression to be disseminated via the market, minimizing the influence of both government and elite forces. Copyright's structural function, as Netanel details it, is a complex and nuanced argument.

Providing a brief structural history of the creative sector in the seventeenth century, Netanel notes how creative pursuits were intricately tied to the patronage system—dependent on the church, a monarchy, or an elite aristocracy for support. It was only in the eighteenth century that a market for such literary and artistic creativity began to emerge. Yet, even then the market was controlled by the government through licenses, which functioned as a system of censorship. Consequently, when conceptualizing copyright, the Framers were acutely aware of the perils of both the patronage and the government-controlled systems of support for creativity. To them, the copyright system was meant to maintain authors' "fiscal independence" and result in a "national market" for their works.[87]

Moving to the present, Netanel argues that this structural ideal still has merit in today's world. Yet, he concedes that in light of recent technological developments, its impact is "more modest" and "incremental," just as he does in the context of the production function.[88] Notwithstanding the emergence of new distribution technologies such as peer communication and their role in disseminating news and information, traditional media such as news channels and newspapers, he argues, continue to possess significant value in a democracy—in acting as a powerful check on the government, in ensuring the authenticity and reliability of information, and in framing issues for public debate.[89]

Netanel ties his argument for the structural function, in its incremental formulation, to an important distributive value: expressive diversity.[90] He lays particular emphasis on the value of a "*plurality*" of media and models of discourse.[91] It thus entails both an ideologically diverse output and a dispersal of "communicative power," whereby the generators of diverse output are endowed with the power to have their opinions heard.[92] Yet what is interesting

86. NETANEL, *supra* note 11, at 89.

87. *Id.* at 89-92.

88. *Id.* at 93.

89. *Id.* at 94-99.

90. For a fuller discussion of Netanel's conception of expressive diversity, see *id.* at 38-42.

91. *Id.* at 95.

92. *Id.* at 39-40.

about the structural function is Netanel's argument that copyright represents a reliance on the market to attain these distributive ends, a claim that has a distinctive libertarian undertone.

While the structural function is a claim about copyright being a democratic allocative mechanism whereby creators can invest in expressive works independent of both government and elite support, it differs from the frequent claim about the simple allocative efficiency of a market for creative works. It is an argument about creators who would otherwise not have found an outlet for their work being able now to use the market to finance their investment of time and resources into the creative process.[93] The structural argument, as Netanel describes it, makes absolutely no claim about the market being the most efficient allocative mechanism. Rather, it claims the market is a nondiscriminatory outlet for certain kinds of creative expression.[94]

This distinction seems to be particularly important in light of Netanel's argument that copyright's structural function contributes toward the free speech principle of expressive diversity. In numerous contexts, economists have posited that market-based pricing represents the most efficient way of ensuring greater diversity and variety in output.[95] Netanel, on the other hand, does not seem to be arguing that the creation of a market for expressive works is indeed the most efficient way of ensuring expressive diversity. His argument is that it represents an additional outlet for expressive works, and that any additional expression, regardless of content and mode, is diversity enhancing.[96] Thus understood, the fact that copyright structurally contributes to expressive diversity becomes a descriptive extra rather than an independent basis on which the validity of the argument rests.

93. For more on this argument, see Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1540-42 (2005).

94. This distinction was reflected most aptly in his prior work, where he notes that the activities promoted by copyright comprise a system "in, but not of, the market" and that allocative efficiency is "a secondary consideration." Netanel, *Democratic Civil Society*, *supra* note 4, at 364.

95. Most recently, Christopher Yoo has made this argument in the context of the network neutrality debate. *See* Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 62 (2005) (arguing for a market-based system of "network diversity" to allow the heterogeneity of demands to coexist and be satisfied); *see also* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006) (advocating a "network diversity" approach to broadband policy instead of other alternatives).

96. NETANEL, *supra* note 11, at 93-94.

C. *Symbolic Reinforcement: The Expressive Function*

In identifying a third free speech enhancing function for copyright law—the expressive function—Netanel breaks with his past work, which centered around the production and structural functions. Central to the idea of copyright's expressive function is the notion that law plays a role in symbolically reinforcing certain values, independent of its ability to regulate behavior linked to those values.[97] In different areas, scholars have long observed that laws and legal rules are often directed at "making statements" of a certain kind to mould a set of beliefs and understandings.[98] Netanel builds on this body of work to argue that copyright law too contains a deep symbolism, one related to "our understanding of authorship and of the place of individual expression within our cultural and political matrix."[99] This, he notes, has three aspects to it. The first is its underscoring the importance of fresh ideas and contributions to public discourse, by valuing the development of distinctive expression. The second is its reinforcing the importance of individual expression to public deliberation in civil society, a republican understanding. The third is its connection to the ideal of progress and the diffusion of knowledge within society.[100]

Yet actions can change the social meaning and symbolism associated with a law, and as Netanel notes, copyright is no exception. He thus notes that its "new meaning" differs from its old, and for copyright to serve its true expressive function, it needs to be recalibrated back to its original understanding.[101]

While the idea of copyright's expressive function is both novel and insightful, it clearly is not the most compelling of the free expression enhancing roles that Netanel identifies for copyright. This is so for two somewhat related reasons.

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97. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996). For examples of other work on the expressive function, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); and Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998). *See also* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (critically evaluating various expressive theories of law).

98. Sunstein, *supra* note 97, at 2024.

99. NETANEL, *supra* note 11, at 105.

100. *Id.* at 105-06.

101. *Id.* at 107.

First, as some scholars have noted, the expressive function of a law is often hard to dissociate from its consequences.[102] When a law directed at generating a certain norm via its expressive function in effect produces one with negative consequences, its independent expressive value merits closer scrutiny. Thus, while copyright may have been intended to make a statement about society's commitment to autonomous expression, its role in public discourse and indeed its contribution to the diffusion of knowledge in society, the fact that today copyright has assumed "new meaning," under which it is viewed as a hindrance to each of those values, should make us question our reliance on its expressive function as an independent reason for the law.[103] The obvious response is that this new meaning is a result of modern developments and has no connection to the expressive function as communicated by the Framers originally.

This leads to the second reason, which relates to the potential weakness of copyright's expressive function and the resultant conflation of means and ends. In situations where the communication of a law's expressive value is not clear and effective, the statement it often sends tends to confuse its intended goal with the means it employs to achieve that end. Take the case of a law that renders illegal a certain type of activity in the interests of an ideal such as "fairness" or "morality," with the contours of that ideal remaining indeterminate. In such a situation, it is normal to expect individuals over time to understand the law's communication to be no more than that "the activity in question is illegal." When this happens, the illegality of the activity assumes a life of its own and can evolve in a direction completely opposite to the intended idea of "fairness." Indeed, one might argue that this is precisely what has become of copyright.[104] Copyright's exclusive rights framework was meant to

102. *See* Sunstein, *supra* note 97, at 2045-48. The two examples Sunstein provides are instructive. The first involves a law directed at reducing pollution by introducing a system of emissions trading. Here, an expressivist critic would object that the law has an adverse effect on social norms—that it effectively encourages polluting behavior by failing to stigmatize it. If the criticism were shown to be true, Sunstein argues, it might favor rejecting the law altogether. *Id.* at 2045-46. The second involves minimum wage laws. One might favor such laws as expressing society's valuation of human labor at some predetermined level below which the wage is akin to an attack on the dignity of the laborer. Yet, if it can be shown that such laws actually contribute to greater unemployment among the classes of laborers they were intended to protect, Sunstein argues, the expressive account should not blind itself to consequences. *Id.* at 2046-47.

103. Netanel seems to concede that individuals view modern copyright along these lines. NETANEL, *supra* note 11, at 106 ("[I]t seems that copyright is increasingly perceived as a hindrance, if not a forbidding obstacle, to individual moral agency, contributions to public discourse, and self-expression.").

104. *See id.* at 107.

express the law's commitment toward a set of civic republican ideals and the value of autonomous expression within that setting. Yet the weakness of this expressive function resulted in the exclusive rights framework assuming an independent existence, with the result that copyright today conveys a completely different statement of its intended values. Even if copyright did express a commitment to a set of ideals, the fact that it has effectively "stray[ed] from that expressive meaning"[105] may represent a weakness in its expressive structure, which in turn might give us reason to reconsider whether the expressive function is worth holding on to at all.

Copyright may certainly have served an expressive function historically. As a descriptive argument then, the expressive function does seem plausible. Yet it is not nearly as convincing as a normative argument. Unlike the production and structural functions, which clearly have some applicability in today's world, even if only incrementally,[106] Netanel's argument about copyright's expressive function seems unduly idealized.

III. MINIMIZING THE BURDENS OF BLACKSTONIAN COPYRIGHT

Copyright can and does continue to underwrite the system of free expression. All the same, as Netanel notes early on, some tension between copyright and free speech is inevitable, a price to be paid for the overall speech-enhancing effects of the copyright system.[107] He thus proceeds to set out the different ways in which copyright "burdens" free speech. In acknowledging that some of these free speech burdens are tolerable, Netanel's analysis seems to focus on those more recent burdens that are entirely the result of copyright's recent Blackstonian expansions.[108]

The analysis does an impressive job of setting out the various forms in which the conflict between free speech and Blackstonian essentialism has played itself out in recent times. Yet, when it moves to describing ways in which this conflict can be minimized, it begins to move away from its sustained focus on the impact of Blackstonian thinking. If Blackstonian essentialism is indeed at the heart of copyright's recent expansions and thereby responsible for the myriad "intolerable"[109] burdens that copyright currently imposes on free

105. *Id.* at 106.

106. Interestingly, Netanel offers no similar qualification to the expressive function argument along similar lines.

107. NETANEL, *supra* note 11, at viii.

108. *See id.* at 109.

109. *Id.*

speech, should the aim not be to exorcise copyright of its essentialist influences? Netanel's proposals, while certainly meaningful as an incremental reform package, are in this respect, seemingly inadequate.

A. Blackstonian Copyright Versus Free Speech

As a historical matter, copyright has always suppressed some amount of speech by preventing, at the very minimum, the verbatim copying of protected expression. But Blackstonian copyright does more than just that. It actively contributes to a set of norms that cumulatively discourage certain kinds of speech even when it is not readily apparent that copyright's exclusionary mechanisms would extend to them. What Netanel describes as copyright's "censorial speech burden[s]" thus focuses on the norms of deterrence and self-censorship to which a proprietary vision of copyright have given rise.[110] Given copyright's expansion and the prevalent view that copyright's entitlement package extends to every possible use to which an expressive work may be put, users who rely on such expression for their own expression and indeed intermediaries on whom they depend, routinely limit their own expressive output whenever they are led to believe that their actions would constitute infringement. The uncertainty of copyright's reach is thus an overdeterrent rather than underdeterrent.[111]

The censorial burden to which Blackstonian copyright gives rise is largely a product of the way in which the institution of property normally operates. Central to all of property is the idea that once a resource is privately owned, it gives its owner a right to exclude all others from the resource—a right that is to be understood by its imposing a duty on others to stay away from the resource or risk legal liability in the form of an action for trespass.[112] It is this duty, which I describe elsewhere as the "norm of inviolability" that is responsible for individuals not walking across each other's front yards, grabbing each other's belongings in a subway train and the like.[113] Self-exclusion from an identifiably owned resource thus defines the very way in which property as a social institution functions. It should thus come as no surprise then that the overdeterrence and self-censorship that Netanel describes are indeed distinctively propertarian influences.

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110. *Id.* at 111.

111. *Id.* at 113-16.

112. *See generally* Balganesh, *supra* note 70 (arguing that the right to exclude derives from a norm of inviolability that originates in social morality).

113. *Id.* at 619-27.

Netanel's next argument, though, that copyright often makes it prohibitively expensive for speakers to express themselves, does not connect as directly to property thinking.[114] As Netanel reminds us, free speech does not mean costless speech, akin to the common mnemonic used by the free software movement "free as in freedom."[115] Consequently, the fact that speakers often have to pay something is not necessarily problematic. The argument he attempts to develop, however, is that they should not have to pay a prohibitive price, which would effectively deter and stifle their expression.[116] While his argument does not tell us how and when to determine when a price is prohibitive other than through its ex post effects, it eventually concludes that current copyright owners do indeed routinely charge "supracompetitive prices" that are in turn prohibitive. To reach that conclusion, Netanel goes through several steps.

Netanel begins by arguing that copyright, unlike other laws, is a form of speech regulation.[117] Since copyright ownership bears on what he describes as speech distribution—that is, it encourages and promotes speech of a certain kind—it is thus directed at the very regulation of speech and expression in society.[118] Copyright is thus principally a distributive mechanism, which "necessarily implicates fundamental normative questions about free speech policy regarding the desired balance between commercial and noncommercial expression and between wealthy and poor speakers."[119] In this conception, determining whether a cost is prohibitive is a context-specific inquiry involving a host of variables extrinsic to copyright.

After what point then does the cost of copyright-protected expression become prohibitive? Netanel equates this with the "competitive price" for expression, which he argues is the average price required to recover the creator's first-copy costs, plus any marginal costs.[120] He also notes that

114. NETANEL, *supra* note 11, at 116-17.

115. NIVA ELKIN-KOREN & ELI M. SALZBERGER, LAW, ECONOMICS AND CYBERSPACE: THE EFFECTS OF CYBERSPACE ON THE ECONOMIC ANALYSIS OF LAW 64 (2004); *see also* SAM WILLIAMS, FREE AS IN FREEDOM: RICHARD STALLMAN'S CRUSADE FOR FREE SOFTWARE (2002) (describing this mnemonic as being central to the entire movement).

116. NETANEL, *supra* note 11, at 116 ("Prohibitive license fees in fact are often (but not always) properly understood as an intolerable speech burden.").

117. *Id.* at 117. Netanel has made a more elaborate version of this argument previously, characterizing copyright as a form of content-neutral speech regulation. *See* Netanel, *First Amendment Skein*, *supra* note 4, at 47-48.

118. NETANEL, *supra* note 11, at 118-19.

119. *Id.* at 120.

120. *Id.* at 122, 125.

calculating this price additionally has to factor in the risk of failed efforts that creators take with every additional creative investment and that once creators' entire portfolios (of failed and successful creations) are to be examined, the metric has to move from competitive pricing to competitive profits and their sources.[121] Having made this move away from an objective measure, Netanel then tells us that it is impossible to ascertain the competitive price for a work without making "value judgments" about speech and expression: issues of free speech policy that are incapable of a priori determination.[122]

Why then do we still believe that copyright imposes a prohibitive cost burden on speech? In short, the burden comes from (1) the ability of copyright holders to charge supracompetitive prices as determined by the structure of the market, coupled with (2) their apparent unwillingness to minimize their own risks, and (3) their actual profits being in excess of that needed to stay in business. Here, Netanel's arguments move back and forth between the theoretical, the empirical, and the anecdotal. The market structure argument in turn derives from the reality that the market for copyright protected goods remains highly concentrated and the fact that several expressive works under protection are important enough ("iconic") such that they are significantly less substitutable than other goods in general.[123] This appears to be a largely descriptive claim. On industry risks and profits, however, Netanel's claims seem to rely more on anecdote and speculation. He thus notes that while copyright industries do face great risks with their investments, they have the means to "lessen and manage" such risks and sets out a few strategies that are well known in the industry.[124] Similarly, on industry profits, he argues that copyright industries' profit levels have been well above those of others. Particularly interesting here is his use of copyright industries' rent-dissipating activities such as excessive spending on marketing, on celebrity authors and actors, and on government lobbying, to conclude that such behavior correlates positively with earning rents.[125]

Having gone through these several steps, Netanel then offers a conclusion that is far more qualified and cautious than that suggested by the original argument about copyright's prohibitive costs. He thus concedes that the analysis does not yield a yardstick to determine whether a price burden is "intolerable" and therefore prohibitive, but that it instead suggests delimiting

121. *Id.* at 125-27.

122. *Id.* at 128.

123. *Id.* at 131-35.

124. *Id.* at 136.

125. *Id.* at 138-39.

copyright "so that, on the margins, relatively more oppositional and nonmarket creative appropriation is permitted."[126]

While this conclusion may seem disappointing to some, it is vividly representative of the problems associated with economic claims about the copyright system, given the absence of a universally accepted baseline. The fact that Netanel takes us through these several steps to finally conclude that his argument "follows from a straight free speech policy trade-off" also points to the obvious incommensurability of several variables that are key to Netanel's broader theory.[127] Indeed, this incommensurability—the fact that these variables cannot be meaningfully compared along a uniform metric[128]—has long plagued copyright and free speech analysis, and is a reality perhaps worth acknowledging early on in the discussion so as to avoid having the reader believe that the answer can be derived empirically.

The last of the three burdens Netanel identifies—the distributive burden—develops his theory of speech distribution even further. In essence, the argument here is that since copyright tends to promote certain kinds of speech—namely, those that go through the market—entities best positioned to use the market tend to be favored by the system. This translates into greater concentration in media markets, where large conglomerates overwhelmingly control most copyrighted expression. These conglomerates in turn, argues Netanel, generally disfavor reformulations and transformative uses of their content and tend to view such uses as potential sources of revenue.[129] While this represents a "static" phenomenon, the distributive burden also has a "dynamic" aspect to it, which involves media conglomerates deriving a competitive advantage in the overall expressive market and their use of copyright as a barrier against new entrants.[130] Scholars have long documented the use of copyright by industry incumbents to foreclose competition from new

126. *Id.* at 140-41.

127. *Id.* at 141.

128. For more on the idea of incommensurability in legal analysis, see Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U. PA. L. REV. 1419, 1421 (1998), which adopts a similar definition of the idea to Sunstein; and Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994). As Sunstein explains, "Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized." *Id.* (emphasis omitted).

129. NETANEL, *supra* note 11, at 144-46.

130. *Id.* at 147-53.

technologies of distribution.[131] In the past, however, either Congress or the courts routinely recognized this, and developed solutions to minimize such control.[132] The modern vision of Blackstonian copyright by contrast, Netanel argues, actively encourages copyright's use as an entry barrier, and given that courts and legislators have themselves actively contributed to this vision, they are unlikely to see this as problematic.

In some ways, the distributive burden, at least in its static dimension, seems to be an inevitable consequence of copyright's structural function. The structural function, one might recollect, entails the free expression system using the market to support a set of creators who would otherwise have to depend on either the government or elites for support.[133] It thus relies on the market to produce a democratic outcome: a multiplicity of speakers, or expressive diversity. While market and democratic ideals often reinforce each other, they can be in conflict too.[134] The distributive burden is one area where this is most apparent. Vertically integrated media conglomerates that are best positioned to use the market tend to dominate and exercise greater control. As with any competitive market, here too are clear winners and losers. Blackstonian copyright certainly allows the dominant participants to further entrench their position. All the same, one suspects that it is not the only reason for the burden, which is largely a consequence of the inevitable market/democracy tradeoff.

B. Trimming Away Copyright's Blackstonian Influence

In *Copyright's Paradox*, Netanel makes a convincing argument that a Blackstonian vision of copyright is indeed a major reason for copyright's recent expansions and that these expansions exacerbate the structural tension between copyright and free speech. Yet when he moves to describing his proposals to check this expansionist trend and alleviate the structural tension, his focus shifts away from minimizing the influence of Blackstonian essentialism to scaling copyright back. In his view, the "shared goal of copyright and the First Amendment is best furthered by charting a middle ground between

131. For some prominent work expounding on this idea, see Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423 (2002); and Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004).

132. *See* Wu, *supra* note 131, at 280, 297-324.

133. *See supra* text accompanying notes 86-89.

134. For more on this conflict, see ROBERT A. DAHL, ON DEMOCRACY 173-79 (1998); and Owen M. Fiss, *Capitalism and Democracy*, 13 MICH. J. INT'L L. 908 (1992).

Blackstonian copyright and no copyright."[135] While his proposals are independently meaningful, they remain directed at minimizing the *consequences* of property essentialism—that is, Blackstonian thinking—rather than at minimizing its very *causes*. Thus, while they are likely to remedy the effects of Blackstonian copyright, they do little to move copyright thinking itself away from Blackstonianism.

Structurally, Netanel offers two sets of reform proposals. The first applies First Amendment doctrine directly to copyright in order to limit its scope, while the second set uses the more general set of free expression values to recast copyright in the "First Amendment's image."[136] The discussion of his first set here focuses on two of his boldest claims—one relating to the First Amendment as a check on copyright's distributive role, and the other on its interface with fair use.

In *Eldred v. Ashcroft*,[137] the Supreme Court rejected a First Amendment challenge to Congress's attempt to extend copyright's term retroactively by twenty years. While the Court rejected almost all of the petitioners' arguments, Netanel argues that among other things, the Court might have examined the extension as a "rent-distribution statute," which operates at the expense of the public.[138] Since the extension's direct beneficiaries were media industry incumbents, it was, in his analysis, a "doling out [of] speech entitlements to well-heeled organized interests at the expense of the speech of the citizenry," which should have triggered heightened scrutiny under the First Amendment.[139]

There is of course little doubt that the extension at issue in *Eldred* was a product of special interest group lobbying.[140] But has not this been historically true of all copyright lawmaking, as Netanel himself acknowledges previously? In Netanel's analysis, all of copyright impacts speech distribution in some way, given that it ultimately works to the advantage of those best positioned to use market forces for their expression.[141] Consequently, every instance of copyright legislation, barring those introducing limitations and exceptions to its grant of exclusivity, inevitably will have distributive consequences that can be characterized as rent seeking. Netanel's model thus would place the burden on

135. NETANEL, *supra* note 11, at 168.

136. *Id.* at 169-72, 195-96.

137. 537 U.S. 186, 218-21 (2003).

138. NETANEL, *supra* note 11, at 182.

139. *Id.* at 182-83.

140. *See* LESSIG, *supra* note 67, at 218.

141. *See* NETANEL, *supra* note 11, at 118-19.

Congress in each instance to demonstrate that the legislation serves a substantial government purpose and was narrowly tailored to minimize its impact on speech.

In effect, then, this speech distribution argument would subject all copyright legislation to intermediate scrutiny since it derives largely from the structural reality that copyright will always impact someone's speech. In *Eldred*, the speech distributive effect was certainly most obvious, but in Netanel's understanding, all of copyright law inevitably will have some distributive impact.[142] Does this imply that the First Amendment requires heightened scrutiny of all copyright law, including the law currently in existence?[143] Indeed, in *Eldred*, one of the concerns motivating the Court appeared to be its belief that the petitioners' arguments required them to review all copyright legislation that had been passed by Congress. Netanel does not seem to suggest that, which makes his argument here somewhat unclear. It might have helped if Netanel had connected this argument more directly to his analysis of copyright's distributive burden and in the process proposed tentative limits to its wider application.

In addition to holding that any alteration to copyright's "traditional contours" would invite closer First Amendment scrutiny, the Court in *Eldred v. Ashcroft* also observed independently that copyright's internal safeguards could be construed to "accommodate First Amendment concerns."[144] Netanel uses this observation to argue that the First Amendment should be brought to bear directly on the fair use analysis.[145] I agree with Netanel that the fair use doctrine should be interpreted and applied as an application of the First Amendment. But why then should not all of copyright be interpreted and applied as instantiating a broader policy purpose, including perhaps the ones that Netanel identifies? If courts can and should give effect to copyright's underlying free speech values via the fair use doctrine, why should not they do so more broadly in their approach to copyright in general?[146] I revisit this issue

142. *Id.* at 182.

143. In recent work, others have suggested a strong position along these lines, deriving from an absolutist view of the First Amendment. *See, e.g.*, DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT (2008).

144. 537 U.S. 186, 221 & n.24 (2003).

145. NETANEL, *supra* note 11, at 191.

146. Indeed, the footnote that Netanel relies on as authority for this approach seems to make it clear that the accommodation can extend beyond the fair use inquiry to a declaratory action as well—that is, to the very question of whether something is covered by copyright's entitlement. *See Eldred*, 537 U.S. at 221 n.24.

in Part IV. It suffices to say here that Netanel's approach to fair use is thus a welcome, albeit limited, attempt to have courts reconceptualize copyright doctrine in terms of its underlying purpose and away from Blackstonian rhetoric.

Netanel's approach to fair use would now have courts interpret the transformative use exception more broadly, to exempt reformulations and creative appropriations whenever the defendant adds value in furtherance of "creative, critical, communicative, or informational objectives."[147] Secondly, it would have the burden of proof shift back to the plaintiff, once a colorable claim of fair use is made out.[148] This, Netanel argues, will minimize the self-censorship and overdeterrent effects of the current copyright system. Lastly, in situations where the plaintiff eventually succeeds, but the defendant's claim of fair use is "colorable," it would award only damages rather than injunctive relief.[149] What Netanel does not tell us through all of this, though, is when a fair use claim is truly *colorable.* A colorable claim is normally understood as one that "is legitimate and that may reasonably be asserted, given the facts presented and the current law," or "a reasonable and logical extension or modification of the current law."[150] In this broad understanding, then, virtually any assertion of the fair use doctrine would be colorable.[151] The idea of a colorable fair use claim is usually traced back to the Court's decision in *Campbell*, where it cautioned against the automatic grant of injunctive relief in situations where a "reasonable contention[] of fair use" is made by the defendant.[152] While later courts occasionally have relied on the idea of a colorable fair use defense,[153] their failure to accord it any additional meaning makes relying on it as a possible limit somewhat unhelpful.

147. NETANEL, *supra* note 11, at 191.

148. *Id.* at 192.

149. *Id.*

150. BLACK'S LAW DICTIONARY 264 (8th ed. 2004).

151. For an empirical analysis of how frequently the fair use analysis is invoked in copyright litigation, see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 623 (2008) (observing that in a significant number of copyright cases, courts are called upon to determine whether the defendant's actions constitute fair use).

152. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1993).

153. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1265 (11th Cir. 2001); Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998); Religious Tech. Ctr. v. Netcom On-line Commc'n Servs., Inc., 907 F. Supp. 1361, 1374 (N.D. Cal. 1995).

While Netanel seems willing to have courts interpret fair use to accommodate the First Amendment, he at the same time seems concerned with giving courts too much to do, which perhaps hints at why he seems to disfavor having courts tinker around with more than just fair use. He appears sympathetic to Judge Posner's reluctance to have courts introduce First Amendment concerns into the copyright calculus,[154] noting that his approach does not "add[] a layer of fact-specific, case-by-case First Amendment analysis" and requires courts to "peel back copyright's recent expansion, not fundamentally modify traditional copyright doctrine."[155] This last concession sits somewhat uneasily with the colorable fair use approach he advocates, which clearly seems to require a fact-specific analysis. Additionally, if copyright is to accommodate its underlying purposes, including those that derive from the First Amendment, it necessarily requires courts to introduce new variables into the current equation. While this may make the process somewhat more complex than the current one, it remains perfectly consistent with the rather unique role of courts in the overall copyright schema.

Netanel's second set of proposals by contrast set out to remake copyright to facilitate its functioning as an engine of free expression. Here, while Netanel attempts to minimize copyright's propertarian influence, his focus is mostly on the issue of remedies.[156] In a host of areas, Netanel proposes replacing copyright's traditional property rule protection with liability rules, through either a judicially or statutorily imposed compulsory licensing mechanism. In each of these areas, the royalty determination would derive not from a market bargain metric, but rather from the idea of a "fair return" to the creator. Thus, in relation to the adaptation right, he proposes limiting a defendant's liability in making a derivative to a "judicially determined compulsory license" equal to the amount of profits attributable to the underlying work.[157] Similarly, in relation to noncommercial uses such as file sharing, he proposes charging

154. *See In re* Aimster, 334 F.3d 643, 656 (7th Cir. 2003).

155. NETANEL, *supra* note 11, at 193.

156. Netanel does propose two additional changes independent of the liability-rule-related ones. First, he argues that anticircumvention measures that block privileged uses should be prohibited, or that the law should allow individuals to circumvent protection measures in order to engage in such uses. *Id.* at 213-15. Second, he proposes giving authors limited moral rights protection in the nature of a right of attribution, which would require uses of original expression to indicate the speaker's identity. *Id.* at 215-17. Since neither of these changes impact the Blackstonian vision of copyright that the book targets, I do not focus on them here.

157. *Id.* at 198.

providers whose profits depend on such uses a statutorily determined fee, a "noncommercial use levy", set as a percentage of their gross revenue.[158]

Property rights and property rules do often go together.[159] Exclusionary remedies such as injunctions are thought to give effect to an owner's right to exclude, in turn central to property. Yet property and the right to exclude mean more than just an entitlement to exclusionary relief.[160] As discussed before, property essentialism, the principal contributor to copyright's recent expansions, derives largely from the mere characterization of an identifiable resource as someone's property and of someone's rights over it as "property rights." Eliminating property rules in favor of liability rules weakens the way in which a property right is enforced by the legal system but is likely to have little impact on the characterization of the right as a property right—the very characterization from which essentialism begins to influence the direction of the law. The case of trespass to chattels aptly illustrates this point. The common law of trespass to chattels today does not enable the owner of a chattel to sue another for a mere physical interference with the chattel unless the interference does actual harm to the chattel, in which case the law allows the owner to recover damages from the wrongdoer.[161] The law thus clearly prefers ex post liability rule protection to property rule protection here. Yet, this does little to influence the law's (and indeed the layperson's) conception of chattels as property that can be owned, just like any other. Just as people avoid trespassing over others' land, they avoid coming into contact with others' movable property. The norms that the institution of property revolves around then can be largely indifferent to the remedies available to an owner for property infractions.

Property rule protection is thus a consequence of a right being identified as a property right, rather than a cause for it.[162] Hence, property rule protection in

158. *Id.* at 208. Netanel advocates a similar position for digital archives. *See id.* at 211. For an elaboration of this idea, see Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 35 (2003).

159. For a detailed discussion of this phenomenon, see Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

160. This point was reaffirmed most recently by the Supreme Court in its decision involving injunctive relief in patent cases. *See* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) ("[T]he creation of a right is distinct from the provision of remedies for violations of that right.").

161. *See* RESTATEMENT (SECOND) OF TORTS § 218 (1965). For more on this feature of trespass to chattels, see Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69 (2005).

162. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 381 (2001). *But see* Richard A. Epstein, *A Clear View of* The

the form of injunctive relief can be obtained for rights that are not necessarily considered property rights in the essentialist sense.[163] Liability rules are therefore unlikely to move copyright doctrine away from its reliance on Blackstonian thinking altogether on their own. Indeed, one suspects that focusing entirely on the remedial implications of the right might exacerbate the use of propertarian logic at the nonremedial level, through the use of self-help measures and perhaps by effectively widening the scope of copyright's exclusive rights bundle, with the essentialist logic there remaining untouched.

Moving copyright away from its reliance on property rules and toward a system of liability rules is undoubtedly a move in the right direction. The concern is not that this shift is misdirected, but rather that it does not follow from a vision of copyright that requires it. By glossing over the propertarian influences in copyright's substantive elements and looking exclusively to their impact at the remedial level, Netanel's proposals leave unanswered the broader question of why copyright should rely on liability rules, if its substantive structure seeks to mimic tangible property. In other words, if copyright is an ownership interest like any other—a premise left unaltered—the introduction of liability rule protection for certain elements seems to flow from reasons largely exogenous to copyright and its purpose. But this clearly is not the case, since Netanel's proposals all seem to originate in copyright's underlying purpose and in his attempt to "remake" it to serve that purpose.

What Netanel's proposals thus need, before moving to the issue of remedies, is a conception of copyright that offers an alternative to the Blackstonian vision that his prior analysis describes. For copyright to be seen as a "limited federal grant designed to further a particular public purpose,"[164] we need a theory that describes its structure and functioning in distinctively non-Blackstonian terms. Such a theory would have to make sense of copyright's structure as a bundle of exclusive rights but take seriously its instrumental origins and goals. Indeed the Blackstonian conception, as noted earlier, takes root in copyright's promise of "exclusivity." Consequently, until we disaggregate copyright's structure in non-Blackstonian terms, such that its

Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2091 (1997) (equating property rights and property rules).

163. This connection seems to have originated in the ancient rule that equitable relief, such as an injunction, was available only for rights that the common law characterized as "property rights." With time, the scope of what constituted a property right came to expand significantly and the distinction between property and personal rights soon collapsed altogether. For more on this, see Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

164. NETANEL, *supra* note 11, at 6.

reliance on liability rules seems to flow directly from its structure, function, and purpose, the mere move to remuneration mechanisms will remain largely piecemeal and incomplete. In the next Part, I offer what I believe might be just such an alternative, non-Blackstonian conception of copyright and its reliance on exclusivity—and postulate that if this conception is taken seriously, Netanel's blueprint might be well positioned to move copyright away from essentialist thinking in the short and long term.

Two important caveats need to be made. First, it might well be that Netanel's proposals implicitly, but nonetheless consciously, reject offering such an alternative conception. My attempt is not to argue that Netanel's blueprint in *Copyright's Paradox* necessarily requires such a conception, but rather that it is likely to seem more cogent and meaningful when viewed through the lenses of the alternative conception. Second, it bears emphasizing that the alternative conception that I argue is needed is not directed at simplistically rejecting property metaphors or the use of "property" to describe copyright. It only rejects the Blackstonian version of property essentialism that ignores the institution's purpose and origins once brought into existence. To the extent that the ideas of property and ownership cease to be autonomous conceptions in and of themselves and can be viewed as instrumentally driven, my normative account remains perfectly compatible with them.

IV. COPYRIGHT AS A COMMON LAW ENTITLEMENT

How then should we understand the institution of copyright, in order to move it away from its reliance on Blackstonian essentialism? For some time now, scholars have debated whether copyright is indeed a form of property.[165] My objective here is not to add to this debate, for I believe that much inevitably depends on how one characterizes the institution of property to begin with. Rather, I hope to show that copyright can be understood as a strongly *conditional* ownership interest in creative expression; where the existence and scope of the interest can only ever be understood contextually and purposively, and thus by a court. In this respect, it closely resembles the way in which entitlements are created and enforced by common law courts in other contexts. Placing sufficient reliance on the conditional nature of its entitlement structure is thus likely to dilute the influence of property essentialism within copyright

165. For some representative literature documenting this debate, see Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990); Gordon, *Inquiry*, *supra* note 8, at 1354-88; Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993 (2006); and Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (book review).

law. What this in turn needs, however, is for courts to reconceptualize their roles in the copyright system and recognize that adjudicating copyright infringement claims entails more than just interpreting a statutory enactment. In this Part, I outline the direction this might take.

A. Common Law Adjudication

Before proceeding to establish how copyright can be conceived of as a process of common law decisionmaking, this Section sets out what I believe are three central and interdependent features of the common law process that are most relevant to understanding copyright law's structure.[166]

I should offer one important preliminary point, though, before moving forward. Even though common law adjudication may have originated in a world with few statutory enactments, the idea of common law adjudication as it exists today clearly contemplates the existence of statutes. This is especially so in the federal context, where statutory law has long remained the dominant source of legal rules. My discussion thus focuses on the common law method as it interacts with, and indeed often originates in, statutory directives, given the realities of copyright's modern landscape. Common law adjudication of this kind is seen most conspicuously in the context of statutes that are understood to be "common law statutes."[167] Common law statutes are those in which Congress does little more than declare an important public policy in "sweeping, general terms," leaving it to courts to "mold the contours of that policy," in the process fashioning and refashioning rules as circumstances demand.[168] Central, then, to much of modern common law adjudication as it operates in a world dominated by statutes is the identification of a statute as a common law statute, by its apparent delegation of lawmaking power to courts. While some have argued that such a delegation to courts presents obvious constitutional problems under the nondelegation doctrine, common law

166. For some pioneering work outlining the features of common law decisionmaking, see ALAN BRUDNER, THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE (1995); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988); and KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

167. For some pessimism about this characterization, see William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1392 (1988), which suggests that most statutes may be called "common law statutes, to the extent that they have gaps and ambiguities which Congress fully expects the judiciary to fill."

168. *Id.* at 1377.

adjudication under statutory regimes nonetheless continues to remain a reality of today's legal landscape.[169]

1. The Role of Courts

The process of common law decisionmaking, or the common law method as some refer to it, is characterized by the central role of courts in the overall lawmaking process. Courts see themselves as doing more than just applying and enforcing laws enacted by legislatures. They actively create new rules in the process of applying and interpreting existing rules.[170] Now the distinction between interpreting an existing rule and molding it into a new one is, of course, often less than obvious. Yet it is seen most clearly when courts find themselves at complete liberty to develop rules that have no independent basis in the text of a statute, and later to adapt, reformulate, and indeed abrogate these rules as circumstances demand. In addition, these court-made rules are often justified by reference to moral, economic, social, or political values that courts see as qualifications to, or as deriving from, statutory texts.[171]

Theorists of the common law often make a distinction between interstitial and independent common law. The former involves courts filling gaps in statutory provisions to suit the circumstances of the case before them, in the recognition that there remain things that a legislature could not have contemplated. In the latter, by contrast, courts function as active participants in the lawmaking process, as "partners with other law-making institutions" in the legal system.[172] Melvin Eisenberg refers to this as the distinction between the "by-product" and "enrichment" models of the common law and notes that the latter is clearly more representative of what American common law courts routinely do.[173] In this latter conception of the common law, courts take the broadly worded statutory language and its underlying policy or purpose as beginning points for their analysis, and then develop a set of rules that they mold and adapt over time as circumstances necessitate.[174] In so doing, they

169. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 461 (2008).

170. *See* Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 455 (1989) (book review).

171. *Id.* at 456.

172. *Id.* at 457.

173. EISENBERG, *supra* note 166, at 6-7.

174. William Eskridge, for instance, refers to this process as "dynamic statutory interpretation." William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481 (1987).

thus explicitly enter the world of policymaking, ordinarily thought to be vested in the legislative branch. The Sherman Antitrust Act is perhaps the best-known example in which this process has occurred repeatedly over the course of the last century. Thus the primary feature of the common law method is the primacy of courts in lawmaking and policymaking in a given area.

2. Bipolarity/Correlativity

An overwhelmingly large portion of common law adjudication involves disputes between two private parties – referred to as private law. Bipolarity remains an important feature of private law and in turn refers to the reality that the adjudicative process connects two parties, the plaintiff and the defendant, solely through the idea of liability.[175] One party thus alleges an interference with a right, or a breach of a duty, by the other and the court affirms those rights or duties and awards a remedy for their infraction or breach.[176] In addition, in a bipolar structure the reasons why the law recognizes the plaintiff's right and the defendant's duty remain the same and derive from the same source. In other words, the plaintiff's right is made up entirely of the defendant's duty or a breach of the same. This idea in turn is referred to as "correlativity," and originates in the idea of corrective justice.[177] Correlativity is best seen in tort law. A victim's right in a negligence action, for instance, derives entirely from the defendant's duty of care and the breach of it, both of which in turn originate in the principle of corrective justice.

Bipolarity and correlativity thus require connecting one party's entitlement to another's actions through the purpose for which the law recognizes the entitlement.[178] They thus emphasize the reality that independent of a

175. This is also referred to by some as the common law's "bilateral" structure. In this discussion, I use the ideas of bipolarity, bilateralness, and correlativity to derive from a common source. *See* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 294 (2007) ("[T]he common law is committed to a particular kind of bilateral structure . . . [which] explains why plaintiffs are awarded judgments only against the particular defendants who harmed them, rather than against society as a whole, and why defendants are ordered to pay damages only to the plaintiffs they harmed, rather than to a general social pool."). For a discussion of the idea in the context of tort law, see PETER CANE, THE ANATOMY OF TORT LAW 11-12 (1997); and ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1 (1995).

176. WEINRIB, *supra* note 175, at 10.

177. *Id.* at 117.

178. *Id.*

defendant, there is no entitlement, or, as one scholar puts it, there is "no concept of negligence 'in the air.'"[179]

Additionally, and perhaps more importantly, correlativity also emphasizes that the remedy that the law chooses to give effect to this connection between the plaintiff's right and the defendant's duty, itself originates in the reasons for the liability. Thus, where the basis of the liability is the principle of corrective justice, courts need to allow this to inform their choice of remedy.[180]

3. Incrementalism

The third feature of the common law process derives from the second. Since courts can only make law in the limited context of the dispute before them, the process through which they create, modify, expand, and occasionally abrogate rules happens gradually.[181] Given that courts apply any rule that they develop to the parties before them, the extent to which they can and are willing to make radical deviations from existent rules is necessarily limited. This is not to imply that courts are unaware that their decisions will have implications for future disputes in a common law context. It only means that the common law system is premised on the belief that in determining the "best" result in the case at hand, courts will also lay down a rule that is independently socially desirable.[182]

Just as bipolarity is often a strategic reason for a common law delegation, so, too, is the incrementalism inherent in the process—especially in situations where a context-specific narrow entitlement is preferable to a broad, uniform one that is likely to be either underextensive or overextensive.[183] Uniform entitlements, much like bright-line rules, are undesirable in a host of areas, and

179. CANE, *supra* note 175, at 12.

180. *See* Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1 (2000).

181. *See* Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) ("It is the merit of the common law [process] that it decides the case first and determines the principle afterwards.").

182. *See* EISENBERG, *supra* note 166, at 4-7; Schauer, *supra* note 170, at 458 (noting how this is often taken for granted). More recently, however, Frederick Schauer argued that this twin process is intrinsically problematic, since judges are driven by cognitive biases that result in their compromising one for the other. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

183. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1124 (1987) (noting how diversity may be preferable to uniformity in a variety of situations where a common law statute is employed).

the common law method, analogous to a standards-based process allows courts to expand or contract a rule as circumstances demand.

The interplay of these three features—courts as principal lawmakers, the bipolarity and correlativity of the adjudicative process, and the incremental development of rules—characterizes much of common law adjudication. They each have implications for the way in which we might understand copyright's structural and functional attributes.

B. Making Sense of Copyright's Structure

Copyright law involves a form of common law adjudication. Its distinctive structural features internalize attributes of the common law identified above. Two of them deserve special attention.

1. The Copyright Act as a Common Law Statute

Common law statutes, as mentioned previously, are characterized by their delegation of both the lawmaking and law-enforcing functions to courts. The legislature specifies a broadly worded policy directive in the actual statute, which courts are then meant to develop correlatively and incrementally. Common law statutes in the modern context entail a little more complexity beyond this generic description.

In the context of intellectual property statutes, some scholars draw a further distinction within the category of common law statutes between those that adopt common law rules previously developed by courts and those that attempt to create a new policy but leave it to courts to shape and develop contextually.[184] The former category, instead of attempting to say something new, merely attempts to endorse a set of rules developed by courts.[185] The Copyright Act, in this understanding, represents a delegation to courts, but involves a mix of these two purposes.[186] Some of its provisions, such as the fair use doctrine or the idea/expression dichotomy, merely codify rules developed

184. *See* Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 196-97 (2004) [hereinafter Leval, *Trademark*]; *see also* Pierre N. Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1062 (2002) (arguing that courts should do more than just interpret the text of the copyright statute narrowly); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 100-01 (2004) (noting how the 1976 Copyright Act "recognized the role that courts had been playing in tailoring the scope of the property entitlement in a common-law-like manner").

185. *See* Leval, *Trademark*, *supra* note 184, at 196-97.

186. *See* WILLIAM F. PATRY, PATRY ON COPYRIGHT § 2:8, at 2-14 (2008).

independently by courts in the past. Others represent Congress's attempt to set out new policy, but delegate its working to courts.[187] The Copyright Act is thus structured largely as a common law enactment.

Theory apart, courts play a major role in developing the rules of the copyright system and occasionally generate altogether new rules. They have created new exceptions and limitations to copyright's entitlement,[188] and expanded copyright's liability structure,[189] without any textual basis. This phenomenon, which has continued into the digital age, can only be understood as a direct recognition that the copyright statute represents a common law delegation to courts. The delegation may not be as direct as in the antitrust context in which courts have explicitly recognized it,[190] given that Congress has over the years attempted to make changes to the statute and introduced complex regulatory mechanisms to deal with specific situations.[191] All the same, the bulk of copyright law's core today is judge made. Indeed, several rules that courts routinely apply during the copyright adjudicatory process find no mention at all in the text of the statute, yet without them the process would look very different.[192]

2. *Copyright as a Bipolar Entitlement*

Unlike its cousins, trademark and patent law, copyright law is characterized by the absence of an administrative agency overseeing a formal grant-making process. In the patent context, for example, the United States Patent and Trademark Office (USPTO) scrutinizes an inventor's application for a patent and once satisfied that the invention meets a set of requirements, makes a formal grant which specifies with a high level of detail the precise boundaries of the patentee's grant.[193] The patent thus functions in much the same way as a land title deed, with the land and its boundaries surveyed and described in great detail. So it is with trademarks. Consequently, when courts are called

187. *Id.*

188. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (laying down the defense of "substantial non infringing use[]" to copyright infringement).

189. *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 912 (2005) (introducing contributory liability for inducing copyright infringement).

190. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20-21 (1997).

191. *See* PATRY, *supra* note 186, § 2:8, at 2-14; Liu, *supra* note 184, at 105-29.

192. The most prominent of these is the test of "substantial similarity." 4 NIMMER & NIMMER, *supra* note 58, § 13.01[B], at 13-8.

193. *See* 35 U.S.C. §§ 101-103, 131, 151, 154 (2000).

upon to enforce the entitlement, they tend to place much reliance on the fact that an administrative agency independently scrutinized the plaintiff's eligibility for the entitlement.[194] Hence, courts at best share the function of scrutinizing a claimant's basis for the entitlement with the agency making the grant.

Copyright law operates very differently.[195] When a work is created, its creator obtains a set of exclusive rights in relation to the work. Yet, given the absence of a formal grant specifying the boundaries of the entitlement, at this stage the entitlement is only ever understood in general, sweeping terms. When this entitlement is sought to be enforced against a defendant, courts are called upon to validate and delineate the entitlement for the first time.[196] All the same, given the centrality of copying, they can only ever do so by reference to the defendant's actions and never in the abstract.[197] Courts thus define the entitlement by reference to the plaintiff's contribution and the defendant's actions. The copyright statute does little more than give a creator a right to commence an action for copying in much the same way as the law of negligence gives a victim the ability to initiate an action for injury sustained.[198] In both situations, the defendant's actions are crucial to understanding the plaintiff's right, without which it only ever exists in theory.

A bipolar entitlement, as noted earlier, is characterized by its reliance on a defendant's actions to define the scope and content of the entitlement contextually. The reasons for the plaintiff's right are also the reasons why the defendant's actions are deemed a wrong. This characteristic also explains why bipolar entitlements differ from constitutive ones such as real property ownership.[199] Since the boundaries of the entitlement are only determined by

194. In the patent law context, courts are obligated to presume that the patent was validly granted by the USPTO. *See* Doug Lichtman & Mark A. Lemley, *Rethinking Patent Law's Presumption of Validity*, 60 STAN. L. REV. 45, 47 (2007).

195. *See* Maureen A. O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177, 1180, 1184-87 (2000) (noting the existence of several differences between the two systems). Indeed, in the literature, copyright law's features have resulted in it being viewed as an altogether independent paradigm, in opposition to that of patent law. *See* J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994).

196. *See* Liu, *supra* note 184, at 100-01.

197. *See* Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1169 (7th Cir. 1997) ("The Copyright Act forbids only copying."); *see also* O'Rourke, *supra* note 195, at 1186 (noting the centrality of copying to copyright law).

198. *Cf.* Picker, *supra* note 60, at 283 (noting the similarity between copyright and tort law in this respect).

199. *Cf.* CANE, *supra* note 175, at 12 (discussing social security benefits).

reference to their infraction, their ability to influence individual behavior is necessarily more limited than it is for ownership interests with well-defined boundaries. Thus, when the USPTO issues a patent, its boundaries being specified in its claims, the patent serves as notice to inventors to avoid using the subject matter covered by the invention, deriving from the norm of inviolability, related to the right to exclude.[200] An issued patent thus serves as a property right, a fact borne out in the property-patent analogy contained in the express language of the Patent Act.[201] With bipolar entitlements, the original entitlement is described in broad, general terms, making their ability to influence exclusionary behavior minimal. It is precisely this attribute of copyright law that Justice Holmes was describing when he noted that it was an "extraordinary right" that operates "*in vacuo*," restraining the "spontaneity of men" where none otherwise existed.[202]

Thus, when copyright law grants a creator the "exclusive right to make copies" of the work, this means little more than that if and when someone else copies the work, the creator can commence an action claiming an interference with the exclusive right. Yet, until someone actually uses the work in a way that is understood to constitute "copying," the entitlement remains abstract.[203]

Copyright is thus a bipolar entitlement through which the plaintiff's right correlates directly to the defendant's actions, with both originating in the same underlying reason. In other words, the reason why a defendant is liable for copyright infringement is also the reason why the plaintiff or the creator has a copyright in the work.

C. What Should Courts Do?

The previous discussion logically leads us to the question of what turns on thinking of copyright law as a form of common law adjudication and its entitlement structure as bipolar in nature. At its simplest, it obviously entails

200. *See* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1795-96 (2007).

201. *See* 35 U.S.C. § 261 (2000).

202. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908).

203. It is worth noting that the mere transferability of a bipolar entitlement has little bearing on its bipolarity and correlativity, as with copyright. *See* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 712-17 (2005) (describing how alienability is perfectly compatible with tort law's correlativity). For a broader argument, see Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 396-400 (1989), which describes how open-ended alienability of tort claims might result in efficient insurance and optimal deterrence.

courts recognizing that they have a far greater role to play in the overall system than is usually identified. Courts interpreting and applying the Copyright Act's directives in the context of an individual dispute need to understand that their decisions derive from more than just the text of the statute and that giving effect to the Act's underlying purpose is as much their prerogative as it is Congress's.[204] Copyright adjudication is both rulemaking and rule enforcing, in a contextual setting. In situations where courts conclude that a literal application of the statute would produce outcomes inconsistent with its purpose, they should develop mechanisms and devices to rationalize the process. While they have done so occasionally in the past,[205] the failure to articulate their role within the system in clearer terms has undoubtedly resulted in a degree of restraint that has fueled the essentialist conception of copyright.

Two important practical consequences flow from the previous discussion of copyright as common law—both of which should enable courts to take a more active role in giving effect to copyright's underlying purpose.

1. The Instrumentalism of Copyright's Correlativity

Copyright is a bipolar entitlement where the plaintiff's right is defined and driven by the defendant's actions. Correlativity, the normative component of bipolarity, additionally emphasizes that the reasons underlying the plaintiff's right also specify the defendant's duty.[206] Much therefore depends on identifying these "reasons" and allowing them to inform both the liability structure and the remedial choice thereafter.

In its traditional formulation, the theories of bipolarity and correlativity are premised on the idea that private law's internal structure provides sufficient justification for liability.[207] In other words, the private law system in question is deemed an autonomous entity with an inner intelligibility reflective of its purpose. Thus, the law's use of formal concepts such as "duty of care" and the

204. This is obviously very different from their power to review Congress's interpretation of copyright's purpose, as contained in the Constitution. In *Eldred v. Ashcroft*, the Court made clear that it possessed no such power and would indeed defer to Congress's interpretation of its constitutional powers in this regard. *See* 537 U.S. 186 (2003).

205. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (developing a "transformative use" exception to copyright infringement); Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (reading a requirement of creativity into copyright law's doctrine of originality); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (using the First Amendment to deny a preliminary injunction).

206. *See* WEINRIB, *supra* note 175, at 120.

207. *Id.* at 3-14.

like appropriately give effect to the law's reason or purpose in corrective justice that informs the tort law system. This conception thus forbids connecting liability to instrumental goals on which the regime is premised, in the belief that the regime's internal devices are independently sufficient.[208]

This autonomous conception of correlativity, however, fails to account for situations in which the liability regime's internal devices themselves bear no connection to corrective justice. Thus the autonomous conception is hard-placed to account for the persistence of various forms of strict liability torts in the common law, and indeed other situations where liability is imposed on individuals absent actual wrongdoing by them, such as vicarious liability.[209] By forbidding any reference to the law's instrumental goals, it forces the analysis to look within the contours of the law's formal concepts for a justification. In addition, the autonomous conception often deploys the idea of property as an independently meaningful justification for liability.[210] Yet by forbidding any inquiry into the reasons for characterizing any given interest as a property right, the autonomous conception effectively contributes to a vision of essentialism. Hanoch Dagan describes this phenomenon and notes that correlative entitlements often run the risk of blinding themselves to the social values central to a law by relying on property as an autonomous idea, which it is not.[211] What Dagan describes in many ways represents precisely the mechanism by which Blackstonian essentialism has managed to entrench itself in copyright law.

More importantly, the autonomous conception refuses to acknowledge that private law is, in the end, a form of coercion that like other uses of state authority needs to be justified as a mechanism of social control. Private law mechanisms enable individuals to invoke the state's monopoly over legitimate force, without any reference to the broader policy or social reasons for the same.[212] Yet, the very decision to allow such recourse to state coercion

208. *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261 (1996) (reviewing ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995)).

209. *See* WEINRIB, *supra* note 175, at 171; Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1754 (1996) (noting the failure of corrective justice theories to account for vicarious liability).

210. *See, e.g.*, Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1, 6-7 (2000).

211. Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. 809, 811-18 (2008); *see* Dagan, *supra* note 43, at 144-47.

212. For an elaboration on the relationship between private law and the state, see Symposium, *Beyond the State: Rethinking Private Law*, 56 AM. J. COMP. L. 527 (2008). *See also* Dagan, *supra*

inevitably derives from a prior commitment to a set of core values. While these values may be exogenous to corrective justice, they remain far from irrelevant. An action is deemed "wrongful" and an enrichment "unjust" because they represent deviations from a state of affairs informed by these values. They may have little impact on the structure of the specific private law apparatus in question, but all the same they form the backdrop against which private law comes to exist.[213]

Correlativity, though, is capable of being understood within a broader context. An institution can have exogenous goals and purposes, and corrective justice may be one mechanism it employs to realize them.[214] These goals then form the context for the institution, within which the bipolar structure is understood. This is of particular significance to an institution's reliance on property, for it draws attention to the fact that the ideas of property and ownership derive their justification independent of the bipolar/correlative structure, and instead from the broader social setting of which the institution is a part. Dagan emphasizes this point when he notes that any account of private law has to make sense of the bipolar structure by reference to both the law's internal devices and the underlying social value ("instrumentalism") on which they are premised.[215] In this conception, correlativity is thus partly autonomous and party instrumental.

Understood in this vein, courts should conceptualize the institution of copyright law in both autonomous and instrumental terms. Its autonomous nature derives from the reality that at base, copyright is a correlatively structured action for misappropriation. Liability turns on the defendant's having copied or appropriated the plaintiff's content, with such appropriation having both a factual and normative dimension that manifests itself doctrinally

note 211, at 813 (observing that since private law is a coercive mechanism, it needs to also be a justificatory practice).

213. To Dagan, this foundation is principally distributive. *See* Dagan, *supra* note 43, at 139, 147-54. To others this is to be found in the idea of morality. *See* Stephen A. Smith, Book Review, 112 LAW. Q. REV. 363, 365 (1996) (observing how any attempt to justify private law must involve questions of morality).

214. For instance, Jules Coleman, a leading proponent of corrective justice in tort law, readily admits that the institution has a set of goals and purposes independent of the bilateral relationship between the parties. He thus notes that tort law is a mixture of "markets and morals." *See* JULES L. COLEMAN, RISKS AND WRONGS 75 (1992); *see also* Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 917, 917 (1992) (describing how Coleman's theory accommodates tort law's exogenous institutional goals).

215. Dagan, *supra* note 211, at 818-19.

during the infringement inquiry. The defendant's appropriation thus forms the focal point of the inquiry.[216]

All the same, focusing entirely on the defendant's act of appropriation does not tell us why a particular defendant's appropriation is the basis of liability in a specific case. In other words, why should a defendant's copying be rendered actionable? Indeed, there is a reason why copyright law differs from the tort of misappropriation, which focuses exclusively on a defendant's act of copying, to the exclusion of the content of such copying.[217] Here, relying on property essentialism obscures the search for a normative baseline to which copyright's bipolar structure attempts to restore the parties.[218] So, too, would a perfunctory reference to the bare source of the directive—that is, the statute. The answer to the "why" question must instead be understood to derive from the institution's overall purpose, from the fact that copyright is premised on providing creators with a market-based incentive for their creative expression and that an unauthorized appropriation interferes with that purpose. The focus on appropriation or copying tells us at what harm or interference the law is directed, but absent a reference to copyright's underlying purpose, the baseline distribution to ascertain the harm becomes indeterminate. Copyright thus originates in an openly instrumental conception of corrective justice.[219]

Distilled to basic terms, a court constructing a plaintiff's copyright entitlement in the context of a dispute should therefore ask—taking the correlative nature of the entitlement seriously—(1) whether the defendant's actions interfered with one or more of the plaintiff's exclusive rights, as understood by the formal terms of the law, and (2) whether the defendant's liability connects to the law's exogenous reasons for the plaintiff's entitlement. A court might choose to do this last step in one of several ways. It might develop an independent device to give effect to the law's instrumentalism contextually (for example, "foreseeable copying"[220]), or it might simply read the law's instrumentalism into its extant formal devices, such as fair use.[221]

216. 2 NIMMER & NIMMER, *supra* note 58, § 8.01[A], at 8-15.

217. *See* Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 622 (2003).

218. *See* Dagan, *supra* note 211, at 814-15 ("[R]eliance on the concept of property only obscures the distributive and expressive implications of this choice . . . .").

219. *See* Jules L. Coleman, *Intellectual Property and Corrective Justice*, 78 VA. L. REV. 283, 284 (1992) (noting that pure corrective justice theory does little to explain the functioning of intellectual property without an independent normative account).

220. Elsewhere, I argue in great detail what this entails and how it might give effect to copyright's instrumental purpose. *See* Balganesh, *supra* note 79.

221. *See* Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007) (developing a theory of "copyright harm" through the fair use doctrine).

Alternatively, it might indeed choose to do little more than recognize that the law's correlative structure operates in furtherance of other social values, even if they don't inform the bipolar nature of the legal inquiry.[222] In all of these options, though, copyright's purpose would come to inform its contextualized decisionmaking.

2. *Copyright as a Conditional Entitlement: The Model of Governance*

While emphasizing the bipolar and correlative nature of the copyright entitlement would allow courts to construct copyright's entitlement structure by reference to its justificatory reasons, it does not quite provide them with a mechanism to balance the competing purposes that are often at play in copyright. This is likely to be particularly crucial given that copyright, as Netanel points out, is both an engine for, and a burden on, free speech.

Recognizing an entitlement in a class of individuals may on the face of things seem like an absolute grant, where the only question is whether an individual before the court falls within the identified class. Yet the common law has long recognized entitlements, the very existence of which are conditioned upon a balancing of competing interests. Unlike situations in which a competing interest is made an exception to an entitlement granted, in these situations it becomes meaningless to speak of an entitlement until the balancing exercise is carried out. Nuisance law is paradigmatic of this approach.

Under the common law of nuisance, courts regularly examine the defendant's activity and attempt to balance the harms and benefits associated with it against the plaintiff's use and enjoyment of a resource.[223] The balancing that occurs is an integral part of the entitlement-delineation process rather than a subsequent relaxation of the entitlement once granted.

Henry Smith identifies this approach to entitlement delineation as the "governance strategy" and notes that it entails a granular inquiry into the

222. Weinrib, otherwise an advocate for an autonomous conception of correlativity, also admits that this option is indeed practicable and does little to erode the fundamental precepts of corrective justice, as long as it does not interfere with the bipolar structure of liability. *See* Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621 (2002) (arguing that a tort law system premised on corrective justice can affirm deterrence as an institutional goal).

223. *See* RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (1979); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 623 (5th ed. 1984); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 63 (7th ed. 2007).

specific uses to which a resource may be put.[224] He contrasts this with the "exclusion strategy" where the entitlement is defined in simple "on/off" terms, delegating to resource owners the power to make the cost-benefit analysis themselves, in the enforcement of their entitlement.[225] The exclusion strategy thus corresponds roughly to the idea of essentialism detailed previously in that it entails a very high level of deference to the owner's decision. The governance strategy on the other hand usually sets out a broadly defined, vague entitlement that courts then give content to contextually. Instead of deferring to the entitlement holder, however, courts undertake a balancing exercise themselves. The governance strategy thus entails higher costs at the ex post stage, but these costs are offset by the benefits associated with having avoided an overbroad entitlement ex ante. Governance thus focuses on "rights in activities," while exclusion focuses on "rights to things."[226]

Copyright law in many ways adopts what seems to be a distinctively governance-based approach to entitlement delineation.[227] The point is not just descriptive, but rather normative. Copyright does adopt a governance-based approach, in light of its institutional objectives, and this should be taken further, again to adhere more strongly to those objectives. Given copyright's common law structure and its competing purposes, a governance-based approach is a necessity. As a practical matter, courts adjudicating copyright claims should see themselves as balancing a set of competing interests contextually and weigh them in light of copyright's institutional purpose. In situations in which recognizing the entitlement would result in an aggregate negative effect on free speech, courts should see themselves empowered to factor that into the entitlement-delineation process. It bears emphasizing that what they should be doing is factoring it into the very structure and purpose of the entitlement, rather than as an exception to the entitlement once created. This would thus condition the entitlement on there being a positive free speech effect—understood in terms of copyright's free speech functions. It might thus entail having the plaintiff establish that copyright's production function extends to restricting the defendant's actions and that the costs imposed on the defendant's speech are offset by the benefits of production.

224. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004) [hereinafter Smith, *Law of Nuisance*]; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002) [hereinafter Smith, *Exclusion Versus Governance*].

225. Smith, *Law of Nuisance*, *supra* note 224, at 973-74.

226. *Id.* at 971.

227. Smith, *supra* note 200, at 1807.

One might thus posit a free speech calculus of sorts (analogous to the utilitarian tradeoff undertaken in nuisance cases[228]) where copyright's ability to further free speech, through its production function, represents its positive externality, and the burdens it imposes, a negative externality. When this tradeoff is positive—that is, the incremental benefits of copyright's incentive framework outweigh its costs—liability should be found, and when negative it should be denied. This approach would differ from the one suggested and rejected by Judge Posner in that the calculus would operate at the substantive level rather than the remedial one; it would also differ from those coalescing free speech and fair use in that the free speech concerns would be part of the entitlement's very purpose rather than just as an exception. In this conception of copyright, the First Amendment would be seen as according individuals not only a negative liberty but also an independent cause of action directed at furthering free speech values.

As with any balancing exercise, this process will inevitably involve incommensurables, such as those that derive from the nature of the speech in question and additionally the circumstances of the parties, both of which point very clearly in favor of courts undertaking this inquiry contextually.[229]

* * *

To sum up, understanding copyright as a bipolar, common law entitlement presents us with an alternative to the Blackstonian vision of copyright as an unconditional ownership entitlement premised on the right to exclude. Focusing attention on the deep instrumentalism that is at the heart of its structure serves to move it away from the institution of property and toward being identified as a system of ex post liability. Copyright differs from other forms of rights traditionally characterized as "intellectual property rights" and

228. *See* RESTATEMENT (SECOND) OF TORTS § 826 & cmt. e (1979) (describing in detail the social utility-harm balancing test as used by courts in determining liability for nuisance). Additionally, the factors that courts use to undertake this balancing test seem to be relatively well established. *See id.* § 827 (setting out the factors courts use on the harm side of the calculus); *id.* § 828 (setting out the factors on the utility side). The calculus clearly incorporates elements of social value, the effects of which are likely to be seen only in the long term, similar to those involved in the tradeoff between copyright and free speech. *See id.* § 828 cmt. f ("There is no universal, fixed scale by which courts can measure the amount of social value that a particular purpose or objective has.").

229. For a more general discussion of the idea of balancing in the law, see George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658 (1995).

this difference is more than just coincidental.[230] It represents in many ways a structural alternative to the use of a property metaphor, one that should be seen as having significant functional implications.

D. Circling Back to Netanel's Blueprint

Reconceptualizing copyright as a common law entitlement, characterized by its correlative and conditional nature, presents a viable alternative to Blackstonian essentialism. By emphasizing that its entitlement structure needs to be understood by reference to its underlying purpose, the common law model is likely to force courts to rely less on property as an autonomous concept to do the justificatory work for them. Additionally, the view of copyright just presented connects perfectly with Netanel's blueprint by offering a bridge between the reasons he identifies for copyright's recent expansion and the direction he seems to believe copyright should take.

As noted earlier, the central feature of his proposals retain their reliance on the use of liability rules that are either judicially or statutorily created, in lieu of property rule protection.[231] Copyright, in the correlative common law conception, represents an instrumental application of corrective justice. Correlativity requires that a court's choice of remedy be driven by the need to correct the normative imbalance created by the defendant's actions.[232] The remedy thus has to derive from the reasons for the entitlement to begin with and attempt to track its operation to offset the defendant's wrong. If copyright's purpose then lies in providing creators with an incentive to use the market as a revenue source for their creative expression, an infringement represents a market failure. The failure thus lies in its interference with a creator's ability to earn revenue and not, very importantly, with a creator's despotism.[233] This connects up directly with an award of damages rather than extraordinary relief.

Just as there exists a logical continuity between the institution of property and property rules, liability rules flow directly from an entitlement structure

230. Mark Lemley has made a similar argument in relation to trade secret law, specifically comparing its ex post liability structure to that of copyright law. *See* Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 326 n.50 (2008).

231. *See supra* text accompanying notes 156-158.

232. *See* Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 293 (1994).

233. *See id.* at 296-97.

that is principally correlative.[234] Correlativity thus exhibits a clear preference for liability rules in the areas of tort, contract, and unjust enrichment.[235] The reason for this also connects to another important attribute of the process discussed earlier: the need to fine-tune the entitlement and the remedy, both of which become especially difficult in situations that employ broad exclusionary remedies.[236] It thus explains why governance strategies correspond strongly with liability rule protection.[237]

Adopting this framework therefore leads us to where Netanel seems to want copyright to head, except that it additionally gives us a reason for it. Thinking of copyright as a conditional common law entitlement addresses the causes of copyright's problematic expansions rather than its consequences, at which Netanel's proposals are aimed. It thus offers a normative account of why copyright should not be headed in the direction it is, given its structural and functional attributes. In this way it forms a complement to Netanel's focus on liability rules.[238]

CONCLUSION

Copyright's Paradox is fundamentally a story about a problem that is in many ways at the very heart of the copyright system—property essentialism—and Netanel tells it in a way that is at once both deeply respectful of the institution and cognizant of its structural inadequacies. This is precisely what sets it apart from other recent work in the area, which often begin with normative priors that detract from the analytical objectivity that a project of

234. An overly simplistic characterization of the argument I have just been making would be to say that my alternative to proprietary copyright is one that derives from tort law. And, tort law, as is well known, is characterized and indeed defined by its reliance on liability rules. *See* Guido Calabresi, *Toward a Unified Theory of Torts*, 1 J. TORT L. 1, 1 (2007) ("[W]hat characterizes tort law is the liability rule.").

235. *See* Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55 (2003); Weinrib, *supra* note 180.

236. For a detailed argument along these lines, see Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783 (2007), argues that the inability of courts to tailor property rule protection to the circumstances of the case before them militates in favor of liability rules.

237. *See* Smith, *supra* note 159, at 1753.

238. One important point of difference is worth noting here. What is not clear from Netanel's analysis is why in some instances he prefers the liability rule system to come from Congress and not the courts. If part of the reason for the liability rule—that is, governance—system lies in its adaptability to individual circumstances, having Congress set it up does not seem to flow logically. Here, his proposals thus part company with my normative framework.

this nature demands. As a descriptive project, the book builds on Netanel's prior work and offers a novel way of thinking about copyright's purpose—a purpose that emphasizes the interconnectedness of copyright and the goals of democracy as contained in the First Amendment and elsewhere in the Constitution. Netanel makes an original and creative argument that copyright is in the end about speech, a reality that is ignored by courts, legislators, and scholars alike in their focus on its internal doctrines and seemingly autonomous nature. The book does an excellent job of taking the reader through the nuances of the copyright-free speech nexus. Netanel's brevity and use of examples that resonate with the institution's public perception are additionally laudable features. For these reasons alone, *Copyright's Paradox* should be on the list of required reading for anyone concerned with the inner workings of the copyright system, and those interested in issues of institutional or regulatory design as they relate to public policy goals.

My principal concern with the book lies in its goals as a normative project. A strong normative argument involves four analytically distinct stages: locating a problem, detailing its effects, identifying its cause, and finally offering a solution that is directed at the problem through its cause and consequences. *Copyright's Paradox* no doubt tries to do all of the above. The problem it focuses on is copyright's expansion, the cause for which is the increasingly proprietary or Blackstonian vision of copyright, and the consequence of which is an increased burden on speech. Nonetheless, the book's solutions seem to focus entirely on remedying the consequences of the expansion and tend to ignore its cause. Netanel makes clear throughout the book that he does not favor the Blackstonian vision, but what he fails to do is explain his vision of a non-Blackstonian copyright. He no doubt hints at it in several places, when he describes copyright as a "limited federal grant,"[239] but he does not tell us much beyond that. His proposals focus principally on the issue of remedies, attempting to convert copyright into a remunerative mechanism for authors and no more. But why indeed is copyright a simple remunerative mechanism as opposed to a full-blown property right, and are the two necessarily incompatible? In the world of intangible rights, we clearly seem to be moving toward recognition that property rules are no longer the unambiguously preferred option. If property's right to exclude can accommodate liability rules, does this mean that copyright is indeed a form of property, deriving from the Blackstonian conception? If not, what remains the normative basis beyond the social costs of copyright's expansion that gets us to liability rules?

239. *See supra* text accompanying note 164.

The institution of property operates on a set of norms that extend well beyond judicial remedies. And these norms seem to have entered the world of copyright as well, as epitomized most distinctively in the "clearance culture" and "self-censorship" that Netanel describes. What thus is not clear is how the move to liability rules is likely to address the nonremedial implications of Blackstonian copyright on its own.

Netanel may indeed believe that liability rule regimes embody an internal intelligibility that obviates the need for an exogenous normative account of their use. In other words, liability rules themselves present an alternative to the Blackstonian account. And it may well be then that our point of disagreement revolves around this narrow point. As I argue, liability rules flow directly from the ideal of corrective justice, and unless copyright as an institution can be reconceptualized along those lines, they do not independently offer us an alternative to Blackstonianism. Copyright can be understood as a correlative common law entitlement, embodying an instrumental vision of corrective justice, and I have attempted to outline the structural and functional implications of having courts view copyright along these lines. Perhaps more importantly though, I believe that this view of copyright can get us to where Netanel seems to want copyright to develop—a system of remuneration for creativity.

Copyright's Paradox makes an enduring contribution to the literature, which is both topical today and will undoubtedly continue to remain so in the years to come. As should be apparent from the previous discussion, I agree with the broad premise of Netanel's project and to the extent that I differ, my reasons derive from the need to accord it independent normative significance. Doing so, I hope, will wean copyright law away from its misplaced reliance on property rhetoric, and in the process focus attention more directly on the interdependent social, political, and economic purposes that it is meant to serve.