

# THE SKEWED STRUCTURE OF COPYRIGHT LAW

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## INTRODUCTION

Copyright is a peculiar form of incentive, at once both a carrot and a stick. Its purpose is to induce authors to pursue creativity that they might otherwise forego. Yet its value depends on its ability to induce would-be copyists to forego copying that they might otherwise pursue. It rewards one group by warding off the other.

This reward-and-punishment pairing gives rise to a familiar tradeoff in copyright theory. Working properly, copyright should facilitate creativity.<sup>1</sup> From the perspective of the copyright owner, the marginal dollop of control offers greater incentives to invest in creating. But from the perspective of everyone else, the marginal dollop of being controlled places greater burdens on cumulative creativity, suppressing follow-on material that would have been produced but for copyright constraints. As traditionally conceived, this “incentives/access” tradeoff pits the benefit of greater creativity upstream against the cost of reduced creativity downstream.<sup>2</sup> Ostensibly the upstream effect is a pure benefit and the downstream effect a pure cost, and the optimal copyright policy would seek to maximize the difference when one is subtracted from the other.

While there is plenty of disagreement over the magnitude of these costs and benefits, there is at least broad agreement over what the costs and benefits are.

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1. As Ruth Towse has observed, “Creativity is invoked in nearly every statement supporting the case for copyright law.” Ruth Towse, *Copyright and Creativity: An Application of Cultural Economics*, 3 REV. ECON. RES. ON COPYRIGHT ISSUES 83, 87 (2006). For a few examples, see *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating that the “ultimate aim” of copyright law is “to stimulate artistic creativity for the general public good”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (“The Copyright Act was intended to promote creativity, thereby benefitting the artist and the public alike.”); *Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 240 (2d Cir. 1983) (“It is a fundamental objective of the copyright law to foster creativity.”); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151 (2007) (“Creativity is universally agreed to be a good that copyright law should seek to promote . . .”).
2. See, e.g., WILLIAM M. LANDES & RICHARD R. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11, 22–24, 66–67 (2003); Glynn S. Lunney, Jr., *Reexamining Copyright’s Incentives–Access Paradigm*, 49 VAND. L. REV. 483, 492–98 (1996). Although this Article focuses on adaptation, the “access” side of the tradeoff also encompasses consumption of exact copies, which are similarly more expensive when protected by copyright. See *id.* at 497–98.

Whether you think that the current amount of copyright protection is too small, too big, or just right, the debate tends to imagine a social-welfare scale in which the size of the carrot is on one side and the size of the corresponding stick on the other. If the balance needs to be adjusted, it must be because we have either too little carrot upstream or too much stick downstream.

This two-variable model is elegant. But it's also incomplete. Amidst all the talk of the social cost of *being controlled*, seldom discussed is the social cost of *being able to control*. To speak of such an upstream cost may sound strange. After all, getting greater rights is supposed to help facilitate an author's creative production. In the worst case, perhaps, it might do nothing—but surely it could never hurt.

My goal in this paper, however, is to suggest that sometimes indeed it does. Under certain circumstances, an increase in copyright protection can impede creativity not by decreasing authorial resources but instead, perversely, by increasing them. My claim, in other words, is not the usual refrain that there are places where we have too much stick (though in certain respects that proposition is probably true, too).<sup>3</sup> It's that there are places where we have too much carrot.

The culprit is the skewed structure of the various rights in the copyright bundle. Not every right is equally valuable. Forces spanning from judicial interpretation to technological change to basic consumer preferences can render some rights better than others at generating revenue through exclusivity. As a result, at any given moment in history, the strength of copyright's incentive effect may be unevenly distributed across the range of activities that copyright covers. The value of the copyright bundle tilts toward the highest-value rights.

That asymmetry can influence the qualitative trajectory of creative production. All things being equal, projects that can exploit high-value rights make more attractive investments than projects that cannot. As is commonly recognized, the overall amount of copyright protection may affect the sheer number of works that will be made. The skewness of that protection, meanwhile, affects the *kinds* of works that will be made. Prior work has noted that the presence or absence of copyright protection can bias the direction of creative investment toward products whose value is easiest to appropriate.<sup>4</sup> But the impact runs even deeper than the binary question of pro-

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3. See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1402–03 (2015) (arguing that copyright's long term and steep statutory damages harm downstream creators without providing offsetting benefits).

4. See, e.g., Kate Darling, *IP Without IP? A Study of the Online Adult Entertainment Industry*, 17 STAN. TECH. L. REV. 709, 714 (2014) (finding that, due to enforcement difficulties, the adult entertainment industry has shifted away from selling access to fixed content and is “increasingly moving into convenience and experience goods, which are inherently difficult to pirate”); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 332 (1989) (“[I]t is

tection or no protection. Even when an artform is unquestionably protected by copyright, that protection can still select for certain kinds of works if it draws more revenue from certain exclusive rights than it does from others.

That phenomenon is happening today. In recent years, copyright protection for narrative works has become skewed toward the derivative work right, which allows owners to control sequels, spinoffs, and other adaptations of protected material.<sup>5</sup> I have elsewhere argued that this right's constraints on downstream creators has a surprising upside, stimulating unanticipated creative choices by limiting access to the most familiar solutions.<sup>6</sup> Unfortunately, the upstream incentives generated by that right have an equally surprising downside that has yet to be seriously scrutinized.

Before copyright law even enters the picture, firms already have a preexisting incentive to favor derivative works, which arrive thematically prepackaged with a proven track record and built-in audience familiarity. And once copyright is thrown into the mix, the ability to exclude others from producing derivative works amplifies that incentive by biasing creative production at the margin toward works that will generate further derivatives. It shifts rational firms toward tentpole franchises and away from works that are marketable only as standalone products. That shift can drive a wedge between the overall range of works that would maximize private returns on investment and the one that would generate the highest social value.

None of this, to be clear, is to say that derivative works are categorically worse than originals. On the contrary, a given derivative work can benefit society just as much or more than the underlying work from which it derives.<sup>7</sup> Nevertheless, a legal regime that systematically skews creative firms toward derivative works is puzzling and likely wrong. Consumers have heterogeneous preferences, and the current copyright ecosystem seems to be satisfying some (say, those that prefer comic-book action movies) but abandoning others (say, those that prefer midbudget character-driven dramas).<sup>8</sup> Moreover, to the extent we're serious about wanting to encourage creativity

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easy to note particular distortions that a copyright law corrects. Without copyright protection, . . . [t]here would be increased incentives to create faddish, ephemeral, and otherwise transitory works because the gains from being first in the market for such works would be likely to exceed the losses from absence of copyright protection.”).

5. See 17 U.S.C. §§ 101, 106(2) (granting the copyright owner the exclusive right to prepare “a work based upon one or more preexisting works”).
6. See generally Fishman, *supra* note 3.
7. See *THE EMPIRE STRIKES BACK* (Twentieth-Century Fox 1980). In fact, see it twice.
8. See, e.g., Jason Bailey, *How the Death of Mid-Budget Cinema Left a Generation of Iconic Filmmakers MIA*, FLAVORWIRE (Dec. 9, 2014), <http://flavorwire.com/492985/how-the-death-of-mid-budget->

(rather than just audience preference satisfaction, which isn't always the same thing), the legal rights that the copyright system grants ought to nurture an economic climate that doesn't always select against divergent thinking.

I grant that when it comes to expressive works, there is probably such a thing as too much novelty and too little sameness.<sup>9</sup> Identifying the precise optimality point for any class of works is a herculean task both in terms of normative theorizing and empirical data-gathering. I don't purport to complete that task here. But it's at least reasonable to conclude that we've fallen on the wrong side of the curve when Hollywood—often put forward as copyright's poster-child industry for strong protection, much like the drug industry is for patents—is routinely criticized for producing ever-more sequels at the expense of original works.<sup>10</sup> Whether you're happy with the state of film offerings today or not, it's important to recognize copyright's role in shaping the conditions that provoke those criticisms. Often critics' assumption is that the film industry has either become too risk-averse or has simply forgotten how to come up with an original story.<sup>11</sup> My argument is that such assumptions are too simplistic. There's likely a deeper reason baked into the underlying mix of benefits that the copyright system grants to owners. We get so many sequels in part because that's the outcome that copyright rewards most.

This counterintuitive effect has escaped serious study, likely because it operates entirely independently of the experience of downstream creators, the usual focus of copyright minimalism. But optimizing the conditions for creative production is a messy business. The skewness of copyright entitlements is especially messy because it requires calibration of not only the *overall* level of protection but also of the *relative*

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cinema-left-a-generation-of-iconic-filmmakers-mia; Janet Nguyen, *The Economics of a Blockbuster*, MARKETPLACE (Feb. 15, 2016, 11:42 AM), <http://www.marketplace.org/2016/01/22/world/blockbusters-superhero-movies>; Ellen Seidler, *Box Office Profits NOT Proof Piracy Doesn't Hurt*, VOX INDIE (April 19, 2016), <http://voxindie.org/hollywood-profits-not-proof-piracy-doesnt-hurt/>.

9. See Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1479–83 (2010) (arguing that most consumers of artistic works desire some novelty but not a lot of it).
10. See, e.g., Cecilia Kang, *Hollywood's Addiction to Franchises is Reaching New Extremes*, WASH. POST., Jan. 16, 2015.
11. See, e.g., Mark Harris, *The Day the Movies Died*, GQ (Feb. 10, 2011 2:00 AM), <http://www.gq.com/story/the-day-the-movies-died-mark-harris> (lamenting the “bland assembly-line ethos” underlying “Hollywood's collective inattention/indifference to the basic virtues of story development” and the “decades-long marginalization of the very notion of creative ambition by the studios”); Amanda Ann Klein & R. Barton Palmer, *Spinoff City: Why Hollywood Is Built on Unoriginal Ideas*, THE ATLANTIC (Mar. 20, 2016), <http://www.theatlantic.com/entertainment/archive/2016/03/cycles-sequels-spinoffs-remakes-and-reboots/474411/> (describing the “generalized sense that commercial cinema is losing its ability to come up with new ideas and, in its drive for profits, is finally scraping the bottom of the story-property barrel”).

level of protection between different exclusive rights. Costs and benefits are lurking in corners that many neglect to check. Before copyright policymakers can understand our current system's effect on cultural production, they need to account for all of them.

### I. THE EVOLVING VIEW OF COPYRIGHT'S CARROTS & STICKS

The classical economic account of copyright law is premised on financing authorship. Authors (or the intermediary firms through which they work) won't invest in creating the next song, book, or film without a reasonable prospect of being able to recoup that investment in the marketplace. Because informational goods could be reproduced promiscuously by those who can forego the author's fixed development costs, a rational author wouldn't incur those costs in the first place without some constraint on copying. Copyright provides that constraint, allowing authors to charge enough for copies to make the initial investment worthwhile.

The constraints within the copyright bundle take various forms, each listed in § 106 of the Copyright Act.<sup>12</sup> Among them are the exclusive rights to reproduce the work,<sup>13</sup> to publicly perform the work,<sup>14</sup> and, most importantly here, to prepare derivative works.<sup>15</sup> A derivative work is broadly defined as “a work based upon one or more preexisting works.”<sup>16</sup> This right extends the owner's control from exploitation of an initial work to exploitation of adaptations such as sequels and cinematizations.<sup>17</sup>

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12. 17 U.S.C. § 106.

13. *Id.* § 106(1).

14. *Id.* § 106(4).

15. *Id.* § 106(2).

16. *Id.* § 101.

17. *See id.*; MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (2016) (“Subsequent works in a series (or sequels) are derivative works . . .”). Much of this ground is also covered by copyright's reproduction right, which courts have interpreted to cover similarities so general that they're necessarily found in a derivative work. *See, e.g.*, *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112, 117 (2d Cir. 2003), *abrogated on other grounds by* *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (noting that the same “substantial similarity” test applies whether the defendant's product is analyzed as a reproduced work or a derivative work); *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (stating that the derivative work standard examines whether the accused work “*would be considered an infringing work if the material which it has derived from a prior work had been taken without the consent of a copyright proprietor of such prior work*” (quoting *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976) (emphasis added)) (internal quotation mark omitted)). While this doctrinal redundancy may be puzzling, *see, e.g.*, Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 50 (2002), it is tangential to my argument here. What

According to several commentators, this extension encourages authors to pursue various socially-desirable projects that in its absence would carry a higher private cost and that, at the margin, some authors would refuse.<sup>18</sup> The simplest argument, endorsed by the Supreme Court, is that control over derivatives facilitates production of originals that might otherwise not be produced.<sup>19</sup> While not every author invests in creating a work with derivative markets in mind, many do.<sup>20</sup> If an author depends on, say, movie-rights revenue to finance development of a novel, then no movie rights means no novel to begin with.

Beyond this additional revenue stream, the right to control derivative works also guards against potential distortions in publication timing.<sup>21</sup> If anyone could make a derivative work without permission, the original author might try to compete with them in ways that shortchange audiences. Authors might, for example, delay publication of initial works until they had also created all possible adaptations of it. Or they might rush to churn out those adaptations as soon as the market revealed some demand for them, sacrificing quality in the race to become the first mover. The derivative work right thus gives authors some cushion to “take their time,”<sup>22</sup> cashing out for audiences in the form of better works hitting the market as soon as they are ready.

But there’s another side of the ledger. Authorship is inherently cumulative, with

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matters is only that the works will be found infringing. As a result, I refer to “derivative works” regardless of whether the works would also be protected as reproductions.

18. The strength of these effects is contestable. Some have argued that the benefits outlined in this paragraph are overstated, perhaps grossly so. See Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345 (2008).
19. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994) (“[T]he licensing of derivatives is an important economic incentive to the creation of originals.”); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1910–11 (1990) (“Potential derivative works exploitations are often taken into account in the decision whether to make the initial investment in a work’s creation. . . . A broad scope of protection, thus, may favor the broader production of works . . . .”); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y U.S.A. 209, 216 (1983) (arguing that copyright’s derivative work right “enables prospective copyright owners to proportion their investment in a work’s expression to the returns expected not only from the market in which the copyrighted work is first published, but from other, derivative markets as well”).
20. See Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505, 1528–30 (2013).
21. *Id.* at 1530–31; see also Randal C. Picker, *Fair Use vs. Fair Access*, 31 COLUM. J.L. & ARTS 603, 613–14 (2008); LANDES & POSNER, *supra* note 2, at 110.
22. Michael Abramowicz, *A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 320 (2005).

today's output becoming tomorrow's input.<sup>23</sup> This cyclicity means that increasing copyright protection can impede authorship with one hand while trying to help it with the other.<sup>24</sup> Whether a marginal change in copyright protection would ultimately help or hurt authors thus depends on how it affects the ex ante behavior of the parties on each side of the "v." in a hypothetical lawsuit.

Consequentialist copyright theories have long modeled those effects in a two-variable framework, commonly dubbed the "incentives/access" tradeoff.<sup>25</sup> Upstream, where authors are considering whether to invest in a particular project, more copyright means more ability to appropriate a successful work's value later on. The upstream investment is more likely to be made. All things being equal, usually that's seen as a good thing. But downstream, where second comers are considering whether to adapt elements of an already-existing work into new material, more copyright means more legal restrictions and licensing hoops to jump through. The downstream investment is less likely to be made. All things being equal, usually that's seen as a bad thing.

But because all things are never equal, the welfare calculus gets very complicated very fast. Even if copyright's incentives are meant to facilitate production, it's hardly self evident just what ought to be produced. In its crudest form, the incentives theory measures success quantitatively, trying to maximize the sheer number of works created and disseminated.<sup>26</sup> The logic is simple enough: more money for authors yields

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23. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of rehearing en banc) ("Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."); LANDES & POSNER, *supra* note 2, at 66–68 (noting that because "[c]reating a new expressive work typically involves borrowing or building on material from a prior body of works," *id.* at 66–67, less copyright protection means lower costs of expression).

24. See LANDES & POSNER, *supra* note 2, at 69 ("[C]opyright holders might well find it in their self interest, ex ante, to limit the scope and duration of copyright protection. To the extent that a later author is free to borrow material from an earlier one, the later author's cost of expression is reduced; and from an ex ante viewpoint every author is both an earlier author from whom a later author might want to borrow material and the later author himself:").

25. See *supra* note 2.

26. See, e.g., Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644, 1644 (2011) ("On this account, the more, the merrier—the more copyrighted works, the merrier, and the more access, the merrier—and the interesting problems in copyright law are those in which these goals are in tension."); Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 75 (2014) ("Most utilitarians understand social welfare to be maximized—in the context of copyright law—by the creation of ever more artistic works."); Laura A. Heymann, *Overlapping Intellectual Property Doctrines: Election of Rights Versus Selection of Remedies*, 17 STAN. TECH. L. REV. 239, 246 (2013) ("[C]opyright law's theory is that the more works that are encouraged, the more likely it is that

more authorial works. These days, however, many think that copyright policy should do more than just aim to stockpile works indiscriminately. It should instead aspire to a more qualitative maximand.<sup>27</sup> How to specify that quality is a persistent philosophical conundrum within the field.<sup>28</sup> Nevertheless, many courts and commentators have coalesced around the proposition that at least a big part of the answer is promoting creativity.<sup>29</sup>

In trying to work through what that proposition means, intellectual property scholars have often adopted psychologists' leading definition of creativity. That definition sees creativity as a process that generates a product or idea that satisfies two criteria: originality and appropriateness.<sup>30</sup> The first criterion demands some divergence from a given corpus of prior exemplars, while the second demands some level of value as measured by a given audience. Thus, rehashing an existing answer to a problem might be appropriate, but it wouldn't be original. Developing an entirely unprecedented but also nonsensical and unhelpful answer might be original, but it wouldn't be appropriate. To say that copyright should promote creativity means that it should

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we will end up with something worthwhile.”); Raymond Shih Ray Ku, et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1671 (2009) (summarizing the standard theory as “[t]he greater the protection, the greater the reward; the greater the reward, the greater the incentive to create new works; and the greater the incentive to create new works, the greater the number of new works created”).

27. See, e.g., Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 37 (2004) (“The importance of incentives to produce new works is less significant when the number of existing works and the chance that a new work will be largely redundant are greater.”); Fromer, *supra* note 26, at 83 (observing that “some smaller subset that is of sufficient quality, however ‘quality’ is defined, could be preferable” to a limitless abundance of works); Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505, 1507 (2009) (arguing that copyright’s originality threshold for protection should be raised in order to induce production of more creative works).
28. See, e.g., Jessica Silbey et al., Afterword, *Conferring About the Conference*, 52 HOUS. L. REV. 679, 681 (comments of Aaron Perzanowski) (“Copyright’s goals remain rather amorphous. We expect the copyright system to result in more creativity, to produce stuff. But beyond that, copyright policy has avoided considerations of what kind of stuff, produced by whom, and for whom.”); Rebecca Tushnet, *Fair Use’s Unfinished Business*, 15 CHI.-KENT J. INTELL. PROP. 399, 404–05 (2016) (“[C]opyright tries to maximize something else [more specific than overall utility], but what exactly that is—authorship, expression, or economically incentivized expression—remains less than perfectly defined.”).
29. See *supra* note 1.
30. See, e.g., Christopher Buccafusco, et al., *Experimental Tests of Intellectual Property Laws’ Creativity Thresholds*, 91 TEX. L. REV. 1921, 1932 (2014); Fishman, *supra* note 3, at 1341; Fromer, *supra* note 9, at 1484–85; Gregory N. Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 U.C. DAVIS L. REV. 283, 334–35 (2010); Andres Sawicki, *Risky IP*, 48 LOYOLA CHI. L.J. \_\_ (forthcoming 2016).



promote works checking both boxes.<sup>31</sup>

Just as it has when the goal is quantity, the two-variable incentives/access model has also been pressed into service when the goal is quality. But the rationale behind the upstream-incentives side of the tradeoff is necessarily more subtle than simply “more resources, more works.” There’s not a direct link, after all, between greater appropriability and greater creativity. The strength of copyright protection for a given work doesn’t generally track the creativity of that work.<sup>32</sup> A prosaic work that squeaks past copyright’s rather minimal originality requirement<sup>33</sup> will receive the same basket of exclusive rights as would a groundbreaking work. What then is the mechanism through which more resources for investment could plausibly yield works of higher originality?

One common answer is risk. Markets for cultural works are beset with high uncertainty.<sup>34</sup> Even sophisticated firms cannot reliably cull the hits from the flops ahead of time. Part of the cost of doing business is thus weathering the inevitable flops, a cost typically subsidized by revenues from the hits. In that environment, striving for creativity is an especially precarious strategy. Creativity depends on charting out on novel paths, and so necessarily inflates the baseline risk that is already inherent in the marketplace.<sup>35</sup> Of course, diverging farther from past successes might produce an even greater success, but it also diminishes the project’s expected value by raising the

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31. There are other ways of conceptualizing creativity that focus more on the creator’s sense of fulfillment than on the quality of the end products that may result. *See, e.g.*, Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 537 (2009) (“[C]reativity is a positive virtue, not just because of its results but because of how the process of making meaning contributes to human flourishing.”). While I agree that any consequentialist theory of copyright ought to take such benefits into account in the final welfare calculus, they are not my focus here.
32. Parchomvosky & Stein, *supra* note 27, at 1506 (“Protection is granted indiscriminately to all expressive works, whether highly or only minimally original.”).
33. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (concluding that copyright’s originality standard requires “only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity”).
34. *See, e.g.*, LANDES & POSNER, *supra* note 2, at 233 (discussing the market for pop music records, where “[w]hich [records] will be hits and which flops is not knowable in advance”); Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 391 (2013) (observing that because “commercial outcomes in creative markets are extremely skewed and unpredictable,” those markets are characterized by a high degree of risk).
35. *See* MARK A. RUNCO, *CREATIVITY* 299 (2d ed. 2014) (“[C]reative ideas are sometimes risky. . . . There is . . . a risk involved in considering or sharing ideas, and the more original the idea, the larger the risk.”); Jennifer S. Mueller, et al., *The Bias Against Creativity: Why People Desire But Reject Creative Ideas*, 23 PSYCHOL. SCI. 13 (2012).

likelihood of producing an abject failure.<sup>36</sup>

That amplified risk seems to tie strong copyright to creativity in two ways. First, without the ability to appropriate a significant chunk of the social value generated by a successful risk (whether through copyright or through some alternative mechanism), profit-maximizing creators will favor less risky—and, as a result, more formulaic—projects.<sup>37</sup> The lower the expected value of a given risk, the less attractive that risk becomes. As former Register of Copyrights David Ladd once argued, any limitation on copyright’s appropriation mechanisms causes “the entrepreneurial calculus which precedes risk-taking in authorship and publishing [to] shift[] in the direction of not taking a chance . . . .”<sup>38</sup> Increasing copyright protection promotes creative risk-taking, the theory goes, by raising the upside of uncertain ventures. Without those extra carrots, firms would be more likely to abandon daring projects in favor of conventional ones.

Second, a strong derivative work right in particular helps firms build risk-diversified portfolios.<sup>39</sup> A novel that might be a bad investment on its own might become a good one when its potential revenue streams include sequels, film rights, theme parks rides, and merchandise. To be sure, this diversification effect isn’t likely to be robust. Success in any of those derivative markets probably correlates with success in the primary one. Seldom will an adaptation attract investment if the original itself flops.<sup>40</sup>

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36. Justice Holmes was an early proponent of this view. *See* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J.) (“[S]ome works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”).

37. *See, e.g.*, Barnett, *supra* note 34, at 410 n.35 (arguing that weakening copyright would lead producers to “favor the lowest-risk projects that appeal to the broadest population; conversely, expanding expected returns (by increasing copyright) provides producers with additional profits that can be invested in high-risk ‘artistic’ projects that appeal to niche audiences”); Paul Goldstein, *Copyright*, 55 *LAW & CONTEMP. PROBS.* 79, 83 (1992); (“In a world where fewer rights secure fewer paying markets, publishers would be even more inclined than they are at present to seek the common denominator that will ensure them some economic return.”).

38. David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 *J. COPYRIGHT SOC’Y USA* 421, 431 (1983).

39. This point is emphasized in Barnett, *supra* note 34, at 410; *see also* Bambauer, *supra* note 18, at 376 (describing, though ultimately rejecting, the theory that “[t]he derivative works right protects creators against producing their opus in the wrong form, and promotes development of works that may have large total value earned from multiple markets, any one of which would not be sufficient to cover production costs”).

40. *See* Bambauer, *supra* note 18, at 390 (“[F]or most works, success in derivative markets is strongly correlated with success in primary ones. Products unpopular with consumers initially are unlikely to be chosen as starter material for derivative works.”).

Even so, however, there may be enough variance in outcomes across the range of possible derivatives—perhaps one sequel may crash while another one takes off<sup>41</sup>—to hedge one’s bets at the margin. In any event, between raising the upside and reducing the uncertainty, the derivative work right appears to make the climate for creativity more hospitable for authors upstream.

But then, of course, the welfare analysis runs headlong into the “access” side of the incentives/access tradeoff. Whatever the size of the upstream incentives, these carrots have costs. When some observers look downstream, where the derivative work right blocks second comers from freely injecting protected expression into new works, they worry that society is getting the worse of the bargain.<sup>42</sup> Marginal increases in appropriability upstream, they argue, aren’t worth the decrease in public-domain resources downstream. Others disagree, contending that some combination of robust licensing markets and existing doctrinal limitations counterbalances the restrictions.<sup>43</sup>

As profound as this disagreement is, the space in which the divergence of opinion occurs is surprisingly narrow. Most seem to accept what the benefits and the costs are—it’s only their magnitudes that are up for grabs. The benefits are the upstream rights, and the costs are the downstream constraints. That’s it. The rights are costly not because of their effects on owners but only because of their corresponding con-

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41. *Compare* STAR WARS EPISODE III: REVENGE OF THE SITH (LucasFilm Ltd. 2005) *with* STAR WARS EPISODE II: ATTACK OF THE CLONES (LucasFilm Ltd. 2002). Careful readers will note that I have avoided a citation signal to “see” *Attack of the Clones*, which is an instruction that I cannot in good conscience give.
42. *See, e.g.*, LAWRENCE LESSIG, *FREE CULTURE* 104–06, 185–88 (2004) (questioning how much “creativity is never made just because the costs of clearing the rights are so high,” *id.* at 104, and lamenting this loss); Olufunmilayo B. Arewa, *Creativity, Improvisation, and Risk: Copyright and Musical Innovation*, 86 NOTRE DAME L. REV. 1829, 1840 (2011) (arguing that today’s copyright would have “inhibited creativity by composers such as Bach and Mozart,” who “borrowed extensively in their works”); Lydia Pallas Loren, *The Pope’s Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 14 (2008) (worrying that licensing costs lead to the creation of works that are “not as culturally rich or as authentic as they could have been if the costs of reuse were lower”).
43. *See, e.g.*, Terry Hart, *License to Remix*, 23 GEO. MA. L. REV. 837, 838 (2016) (arguing that because of a “robust and thriving” licensing marketplace and copyright’s inability to protect mere ideas, “the existing legal framework for remixes enables production of new works that is both economically significant and culturally relevant”); Paul Goldstein, *Copyright’s Commons*, 29 COLUM. J.L. & ARTS 1, 10 (2005) (“Copyright is not, to be sure, responsible for all of the cultural wealth we see and hear about us, but it is surely responsible for some, and if copyright imposes so relatively few constraints on users in return, that in my view is enough to make the case for copyright and author’s right as a powerful and empowering force in the service of creativity, culture and ideas in the present century.”).

straints' effects on copyists. The constraints, similarly, are beneficial not because of their effects on copyists but only because of their corresponding rights' effects on owners. As shown below in Table 1, this model suggests that copyright's basic optimization problem is to maximize the upstream effect and minimize the downstream one.

|                   | <i>Effect on Creative Production</i> |
|-------------------|--------------------------------------|
| <i>Upstream</i>   | +                                    |
| <i>Downstream</i> | -                                    |

TABLE 1: TRADITIONAL COST/BENEFIT FRAMEWORK OF INCREASED COPYRIGHT PROTECTION

In recent years, this two-variable picture has grown more complicated. Several commentators (myself among them) have called attention to underappreciated virtues of downstream constraint.<sup>44</sup> Copyright's restrictions needn't be *all* bad. They can reduce wasteful investment in economically-redundant derivative works,<sup>45</sup> encourage a diversity of expression,<sup>46</sup> and stimulate unforeseen creative choices by limiting access to the most familiar solutions.<sup>47</sup> The upshot of these arguments is to highlight downstream benefits as an overlooked third variable. Because the benefits of copyright restriction accrue not only upstream but also downstream, any downstream costs should be weighed against both.

Still, once one acknowledges that copyright's downstream effects include not just costs but also benefits, it invites the question of whether its upstream effects might include not just benefits but also costs. That question is seldom asked. The traditional incentives/access framework does not capture any losses from copyright's carrots that cannot be measured in terms of their corresponding sticks. If such costs

44. See, e.g., Abramowicz, *supra* note 22, at 357–61 (2005); Fishman, *supra* note 3; Justin Hughes, "Recoding" Intellectual Property and Overlooked Audience Interests, 77 TEX. L. REV. 923 (1999); Jake Linford, *Scarcity of Attention in a World Without Copyright*, unpublished manuscript on file with author.

45. See Abramowicz, *supra* note 22.

46. Hughes, *supra* note 44, at 981 (contending that by allowing follow-on creators to "borrow some, but not borrow too much, intellectual property laws force creators to express themselves by differentiating themselves from what has come before"); Pamela Samuelson, Essay, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1848 (2007) (theorizing that among "the normative reasons why copyright should extend to more than exact or near-exact copies," the "principal reason is that society is likely to get increased and more diverse contributions to science (broadly construed) and to culture if follow-on creators are induced to express themselves differently than previous authors").

47. See Fishman, *supra* note 3.

exist, our primary diagnostic tool wouldn't detect them.

Yet acknowledging the possibility of upstream cost is important for two reasons. First, as illustrated below in Table 2, it means that applying an incentives/access framework is actually even more difficult than previously understood. It's hard enough already tracking net welfare effects when all we're keeping tabs on is new works facilitated upstream versus new works foregone downstream.<sup>48</sup> As Rob Merges has observed, while “[i]t is easy to picture the toting up of costs and benefits, and to think of a good policy as one that equilibrates the scale at just the right point,” projecting all the necessary counterfactuals turns out to be “impossibly complex.”<sup>49</sup> That complexity seems to grow only more impenetrable as a given policy's incentive effects change from black and white on either side of the scale to varying shades of gray on each.

|                   | <i>Effect on Creative Production</i> |   |
|-------------------|--------------------------------------|---|
| <i>Upstream</i>   | +                                    | - |
| <i>Downstream</i> | -                                    | + |

TABLE 2: EXPANDED COST/BENEFIT FRAMEWORK OF INCREASED COPYRIGHT PROTECTION

Second, and more importantly, we should be especially troubled by whatever falls into the category of upstream cost because it is here where copyright could be cannibalizing itself. Granting extra carrots would hurt creative production not because of how it affects others but precisely because of how it affects the recipients. Such costs would remain even if somehow copyright imposed no restriction whatsoever on downstream creation. Put differently, upstream costs would be impervious to any argument that downstream creators can navigate around copyright constraint.

Critics of expanding protection have largely focused on tallying the costs of copyright's sticks, less so the costs of copyright's carrots. But there are a few exceptions. First, Glynn Lunney has argued that inflating copyright rewards past a certain point can encourage slack rather than productivity.<sup>50</sup> His theory is that if you've al-

48. Of course, the downstream-cost side of the scale would weigh even more heavily once one considers the supracompetitive prices that consumers must pay just to buy an exact copy—a subject that this Article brackets. *See supra* note 2.

49. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2 (2011).

50. *See* Glynn Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 890–91 (2001); Glynn S. Lunney, Jr., *Copyright's Mercantilist Turn*, 42 FLA. ST. U. L. REV. 95, 110–11 (2014).

ready paid people enough, some may decide that the marginal hour of leisure is worth more than the marginal dollar they could add to an already-healthy paycheck. As a result, once one travels far enough along the curve, marginal income starts reducing output. That phenomenon, what economists call the backward-bending supply of labor,<sup>51</sup> means that more copyright could paradoxically lead to fewer works—all before downstream creators even enter the picture.<sup>52</sup> Second, Mark Nadel has written that the additional rents from strong copyright perversely enable large firms to drown out smaller upstarts through marketing saturation.<sup>53</sup> Starting from the premise that small firms are the likeliest to produce less-popular but still socially-valuable works, he theorizes that reducing the copyright revenue available to large firms could increase welfare by opening up more breathing room for small firms to operate.<sup>54</sup> Finally, Dianne Zimmerman has pointed to psychological research suggesting that the availability of financial rewards could dampen creativity by interfering with individuals' intrinsic motivation.<sup>55</sup> If that's right, she worries, then "by making the promise of economic reward salient to creative production, the copyright system could even to some degree be undermining the very outcome that copyright theorists

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51. G. Hanoch, *The "Backward-Bending" Supply of Labor*, 73 J. POL. ECON. 502 (1965).
52. While this theory probably describes the decision-making of at least some highly successful artists, it's not clear how robust it is across the range of creators working under copyright. See Stan J. Liebowitz, *A Critique of Copyright Criticisms*, 22 GEO. MASON L. REV. 943, 951–52 (2015) (“[B]ackward-bending curves are more likely to occur for older and richer creators than for the entire group of creators, since there are likely to be many young and hungry suppliers who will be drawn to the market and induced to create by the higher prices and seemingly rich future marked by leisure.”). The same lottery-like effect that might induce slack from the few winners might also induce productivity from the many still striving to become winners themselves. See F. M. Scherer, *QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES* 194 (2004) (doubting that strong copyright in the nineteenth century might have disincentivized more musical composition than it catalyzed, and observing that “[t]he most important motivating force in the copyright system may be the demonstration effect of rare but great cases, leading young people optimistically to choose music and, with talent and luck, composition as a profession”).
53. Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 803–04 (2004).
54. On the other hand, limiting firms' overall revenue might encourage the very result Nadel seeks to avoid. As discussed above, see *supra* text accompanying notes \_\_ – \_\_, capping the upside of risky works should push *all* firms toward safer works at the margin. Indeed, perhaps the conglomerates prompting Nadel's concern would try to maintain existing profits by making fewer risky bets themselves, all while continuing to drown out other voices through just as much marketing as before. See Barnett, *supra* note 34, at 410 n.35.
55. Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 49 (2011) (“[T]he willingness to engage in creative activities, and the quality of what is produced, is not enhanced by the promise of salient financial rewards for performance, and indeed may actually be harmed by it.”).

most desire.”<sup>56</sup>

Whatever the merits of these theories, they all conceptualize copyright protection as an undifferentiated whole. According to each of them, the mischief is being caused by the simple fact of too much money, from whatever source within copyright. Still left unexplored is the effect of strength differentials *within* copyright’s forms of exclusivity. The notion of copyright protection is, of course, a shorthand for what in reality is a series of protections: against reproduction, against public performance, and so on.<sup>57</sup> Both those who think that strong rights promote creative risk-taking and those who think that they impede it have yet to address the more granular question of skewness between the protections that comprise a copyright.<sup>58</sup> What happens to the direction of creative investment when particular rights start to occupy a greater share of copyright’s carrots? That question is the subject of the next Part.

## II. CREATING IN THE SHADOW OF THE DERIVATIVE WORK RIGHT

Today, about one in five Hollywood films is a sequel.<sup>59</sup> Two decades earlier, it was one in twelve.<sup>60</sup> And back in the 1960s, sequels and reissues together combined

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56. *Id.* at 54. As Zimmerman recognizes, *id.* at 49 n.81, the psychological research on which she relies has been contested. Others have found that the failure of extrinsic rewards occurs only where subjects aren’t instructed on the criteria for evaluation; where, by contrast, such instructions are given, rewards increases performance, just as a rational actor model would predict. See Robert Eisenberger & Linda Shanock, *Rewards, Intrinsic Motivation, and Creativity: A Case Study of Conceptual and Methodological Isolation*, 15 CREATIVITY RES. J. 121 (2003); Robert Eisenberger et al., *Can the Promise of Reward Increase Creativity?*, 74 J. PERSONALITY & SOC. PSYCHOL. 704(1998); Robert Eisenberger & Judy Cameron, *Detrimental Effects of Reward: Reality or Myth?*, 51 AM. PSYCHOLOGIST 1153 (1996). The available experimental data looking at intellectual property incentives is consistent with this rebuttal. See Christopher J. Buccafusco, et al., *Experimental Tests of Intellectual Property Laws’ Creativity Thresholds*, 92 TEX. L. REV. 1921, 1978 (2014) (concluding based on creativity experiments that “while directly giving subjects high monetary incentives for performance without instructing them that they ought to be creative may reduce creativity, structuring those incentives through IP-like probabilistic thresholds and instructing them to act creatively may not”).

57. See § 106.

58. A brief exception appears in Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001), where the author observes that the use of copyright and trademark law to control movie-themed merchandise might “distort . . . story lines” by encouraging development of “characters and plots with an eye on toys and other merchandise that can be derived from the movie.” *Id.* at 128.

59. *Silver-Screen Playbook*, THE ECONOMIST, Feb. 27, 2016.

60. *Id.*

for one in twenty.<sup>61</sup> Not only are derivative works occupying an increasing share of the overall slate, but they're also occupying an increasing share of the hits. Between 2000 and 2015, the contribution of sequels to the top one hundred films' overall revenue moved from 10% to nearly 50%.<sup>62</sup> In 2013, thirteen of the top fourteen studio films were either sequels or adaptations of preexisting source material.<sup>63</sup> In 2011, ten of the top twelve were sequels, while the other two were the first installments in adapted comic-book franchises that would soon spawn sequels of their own.<sup>64</sup> Holding all else constant, a sequel today earns \$35 million more at the box office than other films.<sup>65</sup>

The rising tide of derivative works in Hollywood has provoked a lot of hand-wringing among critics.<sup>66</sup> Many have focused not so much on the quality of individual movies as on the overall homogeneity across all movies. It has become much harder to produce anything in between dirt cheap and wildly expensive—and wildly expensive nearly always means a big franchise film.<sup>67</sup> A significant number of audiences would probably prefer to be watching something that the film industry is not giving them. It may be convenient to blame the fact that executives rather than auteurs are calling the shots on which projects get greenlighted.<sup>68</sup> In a widely-discussed piece diagnosing the industry, one prominent journalist theorized as much:

If you asked a bunch of executives without a creative bone in their bodies to craft a movie lineup for which the primary goal is to prevent failure, this is exactly what the defensive

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61. Thomas Schatz, *The New Hollywood*, in *MOVIE BLOCKBUSTERS* 15, 27 (Julian Stringer ed. 2003).
62. Jan Dawson, *Hollywood Clings to Sequels Despite Diminishing Returns*, *VARIETY* (June 7, 2016, 10:30 AM), <http://variety.com/2016/film/features/hollywood-franchises-sequels-box-office-1201789704/>.
63. Derek Thompson, *The Reason Why Hollywood Makes So Many Boring Superhero Movies*, *THE ATLANTIC* (May 13, 2014), <http://www.theatlantic.com/entertainment/archive/2014/05/hollywoods-real-superhero-problem/370785/>.
64. *2011 Domestic Grosses*, *BOX OFFICE MOJO*, <http://www.boxofficemojo.com/yearly/chart/?yr=2011&p=.htm>; see also Michael Cieply, *Familiarity Breeds Hollywood Sequels*, *N.Y. TIMES*, Dec. 29, 2011, at C1.
65. *Silver-Screen Playbook*, *supra* note 59. Out of the top 100 movies in 2014, the median box office return on investment for sequels was 272 percent but 208 percent for original movies. Nicholas Wells & Eric Chemi, *For Hollywood Bottom Line, It's Better Second Time Around*, *CNBC* (May 15, 2015, 7:00 am) <http://www.cnn.com/2015/05/14/for-hollywood-bottom-line-its-better-second-time-around.html>
66. See *supra* note 11.
67. See Bailey, *supra* note 8.
68. See, e.g., Jason Dietz, *Are Original Movies Really Better Than Derivative Works?*, *METACRITIC* (Apr. 21, 2011), <http://www.metacritic.com/feature/movie-sequels-remakes-and-adaptations> (complaining that “Hollywood studios . . . will seemingly devote every resource they have to avoid developing an original idea”).



result would look like. It's a bulwark that has been constructed using only those tools with which they feel comfortable—spreadsheets, P&L statements, demographic studies, risk-avoidance principles, and a calendar. There is no evident love of movies in this lineup, or even just joy in creative risk. Only a dread of losing.<sup>69</sup>

Perhaps executives are indeed more averse to risk than they used to be. But I doubt it. The film industry's commercial need to satisfy the market is old. Its colonization by sequels is new. There's likely more to this story than simply fear of the unknown.

Proponents of strong copyright protection have a plausible story to tell about how we got here. On their theory of the relationship between risk-taking and appropriability, lowering the value of copyright for the studios means lowering the upside of risky bets. Perhaps, then, we shouldn't be surprised that the studios are financially pressured to play it safe more often than they used to. Anita Elberse, for example, writes that a cocktail of related, revenue-deflating forces—from piracy, to increased competition for consumers' leisure dollars, to lower willingness to pay—has sapped risky bets of their appeal in the content industries.<sup>70</sup> As a result, “only those titles in greatest demand have a shot at earning back their production and marketing costs, with the remaining products more likely to fall by the wayside.”<sup>71</sup> Major film studios are producing fewer films but continue to “doubl[e] down on blockbuster investments and focusing even less on smaller bets.”<sup>72</sup> Similarly, Eric Priest links these shrinking returns on investment with a rise in “formulaic blockbusters at the expense of experimentation and diversity.”<sup>73</sup>

There's a kernel of truth to this argument. Copyright law probably does have something to do with Hollywood's direction of investment. Decreasing appropriability, whether in copyright or in any other funding mechanism, exerts some pressure on firms to avoid risk. It happened in the 1970s, when the elimination of tax loopholes

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69. Mark Harris, *The Birdcage*, GRANTLAND (Dec. 16, 2014), <http://grantland.com/features/2014-hollywood-blockbusters-franchises-box-office/>.

70. ANITA ELBERSE, BLOCKBUSTERS: HIT-MAKING, RISK-TAKING, AND THE BIG BUSINESS OF ENTERTAINMENT 236–237 (2013).

71. *Id.*

72. *Id.*

73. Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 535–36 (2014); see also Ellen Seidler, *Box Office Profits NOT Proof Piracy Doesn't Hurt*, VOX INDIE (April 19, 2016), <http://voxindie.org/hollywood-profits-not-proof-piracy-doesnt-hurt/> (contending that piracy induces studios to make fewer and more homogeneous films).

made innovative films harder to finance.<sup>74</sup> It happened in the 1950s, when the rise of television coupled with antitrust law's elimination of the old "studio system" lowered the number of regular moviegoers and forced moviemakers to start marketing to new audiences for each film.<sup>75</sup> And it's happening again now, with increased competition for consumers' leisure dollars and a lower willingness to pay, which is partially underwritten by the availability of pirated content.<sup>76</sup> Studios are making fewer but bigger films, and those big films tend to resemble what has worked in the past.<sup>77</sup> Little surprise, then, that they also tend to resemble each other. As Jay Epstein has written, "If Hollywood is originality-challenged, it is not because studio executives find particular joy in mindlessly imitating bygone successes, or lack of imagination. It is because they must take into account the underlying reality of today's entertainment economy."<sup>78</sup>

But to blame this homogeneity on weak copyright is also deceptively incomplete. The problem is not simply the *declining* value of the exclusive right to perform publicly or to make and distribute reproductions. It's also the *enduring* value of the exclusive right to prepare derivatives. Firms are moving away from standalone films and toward big franchises because that's where the money is: in future sequels, merchandise, theme park rides, television spinoffs, and various other adaptations. The derivative work right, which has remained robust in both judicial interpretation and in the business-to-business transactional setting in which commercial exploitation most frequently occurs, sustains that profit center. If, by contrast, the value of the derivative work right were to shrink to become more similar to the other sticks in the copyright bundle, then risky bets would likely have a larger role in a profit-maximization strategy. The magnitude of investment might drop, but the direction of investment would likely diversify.

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74. See Schatz, *supra* note 61, at 27.

75. JAY EPSTEIN, THE HOLLYWOOD ECONOMIST 185–86 (2010).

76. See *Split Screens*, The Economist, Feb. 23, 2013 (describing the steady decline in both regular filmgoing and sales of DVDs and Blu-ray discs, and quoting an industry analyst's observation that "People are still watching the same amount of movies that they did a few years ago. . . . They're just spending \$6 billion less a year to do it.").

77. See Bailey, *supra* note 8 (describing how studios maintain profitability by making their output "both riskier and safer—more expensive, but with less variety").

78. See EPSTEIN, *supra* note 75, at 185.

### *A. Investing in Derivative Works*

[This section will discuss the basic market pressures that make derivative works more attractive even absent copyright protection, including the (1) cutting down marketing costs, (2) past success being some guarantor of future performance, and (3) managerial openness to failing conventionally but not unconventionally]

### *B. Copyright's Skew Toward Derivative Works*

[This section will discuss the selective benefit of the derivative work right. It doesn't raise the expected value of all copyright works. It does so only for those amenable to derivatives.<sup>79</sup> In addition, because courts have interpreted this right broadly and because it is typically exploited openly in business-to-business transactions where infringement is less of a meaningful alternative, it has maintained value better than other more consumer-facing rights. Together with the merchandising rights afforded by trademark law, copyright law shifts rational firms toward tentpole franchises and away from works that are marketable only as standalone products. In doing so, it amplifies the bias that the market already instills.]

## CONCLUSION

Copyright is sometimes described in Hohfeldian terms as a bundle of sticks.<sup>80</sup> Those sticks tell the world the range of activities over which copyright owners have exclusive control. But from a would-be owner's ex ante perspective, copyright is simultaneously a bundle of carrots. Within particular industries and at particular points in time, some of those carrots will turn out to be more valuable to their owners than will others.

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79. Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1727 (2013) (“One problem with th[e] explanation of the derivative-works right as an additional incentive is that it means we are encouraging authors to create more of the kinds of works that lead to derivatives, but not more of the kinds of works that don't lead to derivatives . . .”).

80. See, e.g., *Films by Jove, Inc. v. Berov*, 154 F. Supp. 2d 432, 455 (E.D.N.Y. 2001) (addressing ownership dispute by relying on the “proverbial ‘bundle of sticks’ commonly associated with the right of possession to an intangible item” and framing the question presented as “who owned what sticks in the bundle”). While Hohfeld is usually associated with the “bundle of sticks” metaphor, he never wrote used that precise term in his writings. See Hanoach Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1532 & n.88 (2003).

Typically, when policymakers try to weigh the social value of copyright protection, they ask whether the carrots are worth the cost of the sticks. But the cost of the carrots in their own right deserves greater scrutiny. The uneven distribution of private value along the range of copyright's exclusivities can skew the direction of firms' creative activity toward greater product uniformity. If there is a close correlation between exploitation of a high-value right and particular substantive content, we should expect the copyright system to bias production toward more of that substance.

To be sure, as a general matter, I am unconvinced that law's interference in the trajectory of creative activity is necessarily a bad thing in and of itself. Art is always contingent on external factors, from technology to the weather to, yes, even law. There is no such thing as a pure baseline from which to measure authentic versus inauthentic creativity.

But interference can indeed be a bad thing if it drives activity away from an identifiable component of social welfare. One such component is the supply of novel works that audiences deem appropriate. Another is expressive diversity. Both can suffer in a system that makes risk unattractive even to those best equipped to manage risk.

That scenario seems to be playing out today, paradoxically, in the U.S. film industry, the most-cited example of the need for strong copyrights. As the value of certain segments of copyright have dropped, risky bets have become less profitable than they used to be. Rational firms have predictably shied away from making the same investments in those risks as they once did. The derivative work right, meanwhile, is thriving. Exploiting that right offers studios a safer way to profit off of their investment. The catch is that they must make films that can easily monetize the exclusivity granted by that right. Those films tend to be franchises. The installments in a franchise tend to resemble one another. And the franchises as a whole tend to resemble one another. The upshot is a sameness that might please some but leaves a significant number of others wanting.

If the derivative work right were weaker, production budgets might fall as the revenue stream slows down. But if that right were on greater parity with other rights, risky bets would start to look more attractive again relative to the next best alternative. How to weigh the value of homogeneous, higher-budget films against the value of diversified, lower-budget films is a normative judgment. Nothing in my argument supplies the commensurability that could resolve that judgment. But there is a real cost involved, and policymakers should at least recognize that this tradeoff is actually occurring.