QUESTIONING THE ECONOMIC JUSTIFICATION FOR (AND THUS CONSTITUTIONALITY OF) COPYRIGHT LAW'S PROHIBITION AGAINST UNAUTHORIZED COPYING: §106

by Mark S. Nadel* © DRAFT 8/6/02

Note: To keep my article shorter and more readable, I have cut the 33 pages of detailed footnotes. The 58-page version with all 408 footnotes is available as a PDF file at www.ssrn.com/abstract=322120

This article questions the economic justification for copyright law's prohibition against unauthorized copying. Building on the thesis of Stephen Breyer's 1970 HARV.L.REV. *article,* The Uneasy Case for Copyright, *it contends that not only may copyright law's prohibition against unauthorized copying (17 U.S.C. §106) be unnecessary for stimulating an optimal level of new creations, but that §106 appears to have a net* negative *effect on such output! It observes that the higher revenues that §106 generates for popular creations are, in the lottery-like entertainment markets, generally used for promotional efforts (rent seeking), and that such marketing crowds out many borderline creations. The article also identifies and explains how new technologies and social norms provide many viable business models for financing new creations relying on only a heavily abridged version of §106. Hence, the article questions whether the current §106 could survive the intermediate scrutiny standards of the First Amendment.*

I. Introduction **3**

II. Inducements to Produce Currently Copyrightable Creations (CCCs) **6**

A. Non-Monetary Inducements *6*

B. Financial Issues Relevant to Creators *6*

1. Effects of Compensation on Output 6
2. Access to Raw Materials 7

C. Financial Issues Relevant to Publishers: Costs That Need to be Recovered *7*

1. Selecting CCCs 7
2. Preparation of First Copy 7
3. Reproduction & Delivery 8
4. Marketing: Promotional Expenses 8
   a. Artistic v. commercial considerations 8
   b. Generally overlooked aspects of marketing CCCs 8
   c. Consumers' selection assistants 9
5. Risk of Failure 10
6. Processing Payments 10

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III. Sources of Financial Rewards Absent §106's Broad Protection Against Copying 10

A. Sales in the Absence of Full §106 Protection 10

1. Technology/Architecture 10
   a. First mover/lead time advantage.. 10
   b. Pre-sales to consumers and investors 11
      (1). Specific commitments 11
      (2). Discretionary commitments.. 12
   c. Versioning... 12
   d. Self-help technologies 13
   e. Advertising & sponsorships... 13
2. Social Norms 14
   a. Resistance to payments 14
   b. Voluntary contributions 14
   c. Government payments 15
3. Laws 15

B. Social Norms and Rewards Other Than Sales...16

1. Payments Due to Consumer Gratitude, Desire for Affiliation or Expertise.................................. 16
2. Support for Particularly Valuable CCCs: "Merit Goods" 16

IV. Prohibiting Unauthorized Copying of CCCs (§106): The Marginal Effects...................17

A. Moral or Natural Rights 17

B. Effects on Creators 18

1. Financial Benefits 18
2. Cost of Inputs.. 18
   a. Overcoming impractical administrative costs for fair uses 18
   b. Ideas & transformative uses.. 18
3. Diverting Their Efforts Towards Financially Rewarding Output 19

C. Effects on Publishers...19

1. Negative Effects.. 20
2. Positive Effects of a Severely Truncated §106.. 21
   a. General provisions.. 21
   b. Provisions for specific industries... 21
   c. Compulsory licenses.. 22

D. Effects on Consumers & Empirical Data on Output..22

E. Hindering New Technologies & International Considerations...22

V. Apparent Constitutional Violations 23

A. Article I: The Exclusive Rights Clause 23

B. The First Amendment..24

VI. Conclusion 25

. . . when I first began to think about these issues, the insights coming most easily and quickly were those demonstrating that the traditional system of copyright simply did not fit the facts of the new communications technologies. . . Other grounds for charging, inappropriate in the past, may now become feasible points of control if supported by legislation. We must analyze the natural structure of the emerging systems of communication to identify what modes of payment might be enforceable and socially acceptable. . . . To work, property rights must correspond to natural strategic bottlenecks that arise in organic ways from accepted social practices. . . . Ithiel de Sola Pool (1983)

Stimulating content creation might involve a reexamination of the copyright laws.
FCC Chairman Michael K. Powell (2001)

I. Introduction

This article questions the current economic justification for the copyright law's prohibition against unauthorized copying: 17 U.S.C. §106. Building on the thesis of Justice Stephen *Harvard Law Review* article, *The Uneasy Case for Copyright*, this piece explains how new technologies appear able to support viable business models for each submarket of creative outputs without the need for the broad legal protections of §106. Although Breyer refrained from challenging the existing Copyright Act, this article focuses on consequences of conditions that have emerged since 1970. Most significantly, it explains how §106, through its effect on current marketing practices, may actually *diminish* the profitability of *borderline* potential new creations, thereby *reducing* creative output. The article also observes that §106 stifles an important new opportunity for using copyrighted materials to stimulate even apathetic voters to deliberate about public policy issues, and questions whether the First Amendment would tolerate this today, absent any evidence of §106's net public benefit.

Copyright law is supposed to serve two important, but conflicting, goals: 1) encourage authors, composers, artists, etc. (hereinafter "creators") and publishers, record companies, studios, etc. (hereinafter "publishers") to produce socially valuable, currently copyrightable creations (CCCs) and 2) maximize the social value from access to those CCCs. It has been well accepted that, in some optimal range, the benefits copyright yields in terms of new creations are greater than the harm from reduced access, caused by higher prices. Courts that have considered First Amendment challenges to the Act have affirmed the balance that copyright law has struck on this issue, and academic scholarship in this field generally considers where the equilibrium lies between these two goals. Moreover, most economic analyses of copyright have focused on how constraints on copying CCCs *ex post* (after they have been produced) affect consumer and social welfare. This article, however, concentrates on how §106 affects CCCs *ex ante*, i.e., on the decision of whether to publish.

The fundamental premise on which §106 rests is that, without copyright protection against unauthorized copying, many valuable CCCs would not be produced. Because CCCs' are "public goods," particularly vulnerable to copying, protecting the economic viability of CCCs is generally assumed to *require* legal protection like §106. If CCCs could be freely copied without paying creators, unauthorized copiers (hereinafter "copiers") would "free ride" on the creations and promotions of publishers, driving prices below the amount needed to induce most creators and publishers to invest the resources needed to produce new CCCs. Thus, copyright law is said to help remedy a market failure and to represent an "engine of free expression." Even most critics of the current copyright protection accept that thiner, but substantial, protection against unauthorized copying is an essential prerequisite to the production of much new work.

This article questions that premise. It asserts that, in the current media environment, the continued economic justification for §106 is highly suspect, particularly the assumption that §106 actually induces more new creations. Although offering only a preliminary analysis, the article concludes that, except in a few narrow circumstances, the net effect of §106's broad protection, although ambiguous, is probably negative on new creations. It suggests that limiting §106 to providing dramatically reduced protection to only a few specific categories of CCCs, while requiring copiers to prominently disclose that they are selling "unauthorized copies," would probably provide a superior result.

This does not ignore the issue of the moral rights of creators, which are discussed in IV.A., below, nor that monetary rewards remain an important motivator for almost all publishers, as well as most creators. Yet a need for financial support does not imply that legal protection against unauthorized copying is either necessary or even beneficial. For example, the fashion and food industries also require funding to stimulate new creations and both manage well with only trademark law protections and social norms. Of more direct relevance is Breyer's article. It presented empirical data circa 1970 to support economic analyses that, at least in some segments of publishing, the desired result would arise even without legal protection against copying, because technology arms publishers to overcome competing copiers. A 2002 article by Raymond Ku also challenged the economic basis for applying copyright law to digital music, but his analysis was premised on "minimal" costs of creation. This article addresses all types of popular culture CCCs, most of which, it finds, are expensive to create and promote.

The economic analysis below builds on Breyer and earlier economists in three important ways. First, and most importantly, it explains how, due to the nature of "superstar" markets for mass media products and the resulting promotional expenditures this incites, §106 probably *reduces* the economic viability of borderline publications. This raises the question of whether §106 provides a marginal benefit to the public that, in the constitutional terminology of section V, below, might represent a "substantial governmental interest." Second, since publication of Breyer's article, many new technologies have developed that can support viable business models for publishers, even without the broad protection of §106. Third, there appears to be great potential for employing social norms to provide substantial revenue streams. These latter two classes of revenue streams may represent more effective and less burdensome alternatives to the current §106. All three of these points deserve a slightly expanded review:

increases the reward available for very popular creations – by giving them quasi-monopoly protection – but it also has two significant negative effects. First, as William Landes and Richard Posner recognized in their 1989 economic analysis of copyright, §106 raises the cost of the raw materials, which creators often depend upon. The recent *Gone with the Wind* parody, musical sampling, and movie "fan edits," are only a few examples of the growing category of derivative, but transformative CCCs that is being chilled due to this effect.

More significantly, neither Landes and Posner's abstract economic model nor Richard Watt's 2000 book *Copyright and Economic Theory* account for the costs of promoting CCCs, and Ku only touches on the issue. In particular, the former did not consider *endogenous marketing costs* – those based on what competitors spend on promotion – although these represent a key cost of publication in many market segments, especially for Hollywood films, popular music, and other superstar markets. In fact, trying to draw real world conclusions about copyright without giving

substantial attention to those often large expenditures and their competitive effects is like assessing a political campaign without considering television advertising.

Regarding business models, Lawrence Lessig has perceptively observed that human behavior is regulated by four distinct, although interdependent, constraints – architectures (technologies), social norms, markets, and laws. Rephrasing this insight: the viability of markets for CCCs are based on the combined constraints of technologies, social norms, and laws. As technologies and social norms change, they alter the need for legal protections. Given that §106 imposes significant constitutional harms on speech, as discussed below, a regular review of alternatives appears appropriate. Although many other scholars have discussed various options, section III attempts to offer a first draft survey and conceptual assessment of viable choices.

Despite the availability of free online copies, the economic viability of selling hard copies of books, periodicals, and music and showing films on large screens does not appear to be endangered. In fact, two advantages, which initial publishers have long enjoyed – first mover advantage (lead time) and the chance to demonstrate a credible strategy of retaliation – still appear valid for those markets. Section III.A.1 considers these and many additional ways that the new media enable publishers to collect revenue streams in competition with copiers. For example, popular artists can more easily pre-sell CCCs to fans and publishers can shift from the sale of data set *products* (susceptible to copying) to offering *access services* (where raw data sets are not released). Many product placements are also becoming more valuable.

In addition, there is a potentially tremendous untapped source of revenue controlled solely by "social norms." Those norms lead many of the same consumers who do not hesitate to "steal" computer software to feel obligated to leave about $20 billion annually in tips to waiters and waitresses among others. When one also considers donations to street musicians, public broadcasters, and "shareware" authors, as well as charitable contributions and holiday gifts, this option deserves more than the limited attention it has received from scholars. Tips of a few dollars per CCC might cover the entire cost of production and promotion. Section III.A.3 explains that it may be practical to convince consumers to tip creators they like and want to encourage, particularly if copiers must prominently label their CCCs: "Unauthorized Copy."

This article does not prove either theoretically or empirically that the current version of §106 represents a net harm to the public. Still, it appears that neither Congress nor the industry lobbyists, who have shepherded the Copyright Act through its frequent expansions, have offered any evidence that §106 provides a net benefit to society or that it is less burdensome than alternatives. Rather, the industry's response to Breyer's 1970 wake up call appears to have been a combination of denial and of relief that he stopped short of advocating that copyright be abolished. Many continue to comment on the lack of economic analysis in the field. Although this article is unlikely to alter the position of the beneficiaries of current §106, particularly powerful publishers, section V suggests that the analysis raises serious questions about whether the current, bloated version of §106 can survive First Amendment scrutiny.

The remainder of the article proceeds as follows: section II considers the resources required for creations: both non-pecuniary inducements and the importance of financial considerations to creators and publishers. Sections III and IV describe the means for securing those resources. Section III explains the many ways that technologies and social norms, with the assistance of

some copyright laws support the operation of viable business models. Section IV considers the marginal effects – positive and negative – of current (and a substantially abridged) §106 on creators, publishers, consumers, and technological innovation. Finally, section V sketches an argument why the current version of §106 appears to fall short of meeting the constitutional standards of the First Amendment, if not also failing Article I's requirements.

II. Inducements to Produce Currently Copyrightable Creations (CCCs)

Even great artists acknowledge the tremendous importance of financial inducements. Not only are revenues necessary to pay for unavoidable, "hard" production and marketing costs, but creators need to cover their own living expenses and "opportunity costs." They may also demand a share of anticipated surplus value. This revenue requirement, however, does not imply a need for current §106. The alternatives discussed in section III may be quite sufficient. Non-monetary inducements should also not be ignored, particularly for creators.

A. Non-Monetary Inducements

Non-pecuniary motivations have long played a primary, if not dominant, role in stimulating artistic as well as scientific creations. Many artists create primarily for the joy they derive from the process, because it stimulates introspection, or to honor a deity. Many write memoirs or exposés to praise or punish others or to celebrate or mourn some event. Others may simply enjoy pleasing audiences. The desire for fame and respect (or "egoboo"), which can also often be converted into fortune, is probably the primary goal of law review writers, scientists, and journalists – even leading reporters to risk their lives. Many seek a Nobel, Pulitzer, or Grammy to prove that they are the best in their field. Some pay to disseminate their CCCs, like law review article reprints, to others. Non-pecuniary inducements also lead some to participate in community projects, such as to create software. Social, religious, moral, or political goals at least partially motivate creators and even some publishers.

B. Financial Issues Relevant to Creators

Creators are affected by both potential compensation and the cost of their raw materials.

1. Effects of Compensation on Output

Some creators exhibit typical responses to financial rewards, but the non-pecuniary benefits from CCC creation have led economists to recognize that standard "supply curves" fail to show the impact of income on most creators' output. Rather, for those not fully employed as creators, it is generally more useful to treat CCC creation as a leisure time activity or investment in the future, limited by the time required to meet their ongoing financial needs.

At some level of effective wages (or savings or family support) a creator will be able to pursue CCC work full-time, and mechanisms facilitating that result can increase creative output. Subsequently, however, pursuit of fame and/or other such goals are likely to be the primary drivers of greater output. Some may demand substantial sums for future creations, just as some celebrities demand significant fees to reveal their private lives, but such requests generally only represent a desire for perceived economic rent. Once creators are working full-time on CCCs, increased compensation would seem to have little affect on output. Moreover, even introductory

economics textbooks recognize that the supply curve for labor is "backward bending." That is, at some point, greater compensation will lead people to devote less time to work, and many famous creators seem to be in the high earnings range where this applies.

2. Access to Raw Materials

Courts have long recognized that all artists build on and borrow from their predecessors. Many of Shakespeare's plots were originated by others, many of whom used still others' ideas. In fact, it appears that the literary imagination is "but a weaving of the author's experience of life into an existing literary tradition." As Siva Vaidhayanathan eloquently reveals, even leading copyright advocate Mark Twain acknowledged that "but then, we are all thieves," and pop star Moby agrees. Some historians borrow so freely that they they fail to give appropriate credit. Plagiarism even appears to be common among preachers. Thus, many have challenged the very concept of *truly original* work or that any one person can be recognized as *the* author.

Free access is available to materials in the public domain, which includes content predating copyright or with expired copyrights, government publications, and facts. In addition, some creators have voluntarily "registered" their work under a general public license (GPL) or the like, making that work available free of charge. Ideas are also supposed to fall into this category. To the extent that CCC inputs represent property that must be purchased, however, its cost can have a significant negative impact on output, as discussed in IV.B.2, below.

C. Financial Issues Relevant to Publishers: Costs That Need to be Recovered

Although publishers may also be at least partially motivated by non-financial aspects of CCC production, most need to cover their hard costs, including a sufficient return on invested capital. Due to the combination of the six cost elements described below, less than 15% of CCC revenues is generally available for creators.

1. Selecting CCCs

Predicting which CCCs will be profitable, which one Hollywood observer labeled a "nobody knows" task, requires significant perceptiveness about quality and public tastes, as well as luck. Agents or other successful creators often provide a first level of screening, but publishers generally invest substantial resources in this task. Interestingly, copiers producing physical outputs can not escape this cost by simply selecting the best selling CCCs of the week. They need to predict whether the combination of future demand, industry output, and the resulting price will make a CCC profitable at the time they are able to release it to consumers.

2. Preparation of First Copy

Most creators benefit greatly from the assistance of a good publisher. In addition to editorial suggestions, psychological support, and strategic advice, creators often need funds to complete a first copy, particularly for a film, but for other media too, even though, technological progress has generally helped reduce the costs of materials and equipment. It is also important to avoid "the fallacy of regarding a film's costs as exogenous to its expected revenues" for many involved in a CCC production will inflate their fee requests if they foresee a surplus.

3. Reproduction & Delivery

Recent data indicates that hardcover books can now be printed in high volume for about $2 per copy, high-end paperbacks for less than $1, and about $1 for each CD. Distributing hard copies to retailers appears to cost book publishers about $2 per book. The impossibility of accurately estimating demand for physical copies of CCCs also adds a cost of overproduction. Meanwhile, new technologies, particularly personal computers and the Internet have cut the cost of reproduction and delivery of digital versions of CCCs to trivial levels. The MP3 standard compresses music so that a whole album can be sent via a high-speed connection in 18 minutes. Consumers with such broadband connections can easily receive films and tapes this way, and younger consumers may soon rely primarily on e-versions. Still, hard copies of most CCCs are likely to be quite popular for a long time, particularly for gifts.

4. Marketing: Promotional Expenses

Currently, advertising and other promotional efforts are often the most important and expensive element of selling CCCs. Although the Internet can help substantially cut these costs, even dot.coms have recognized the current importance of television advertising for national media products. As observed above, promotional efforts by the more popular CCCs commonly dominate and thus crowd out borderline CCCs.

a. Artistic v. commercial considerations

The importance of promotion, as opposed to “art” is reflected in the amount of money spent on marketing. The MPAA estimates the average costs in 2001 of producing and marketing a major feature film at $47.7 and $31.0 million, respectively, and yet that appears to dramatically *understate* the significance of marketing. Consider that if Tom Cruise was paid $15 million to star in a film, the industry would treat his salary as a production cost, even if the director and screenwriter preferred a different actor willing to work for a mere $150,000. When a producer insists on selecting a star like Cruise, primarily to improve revenues, that cost is more accurately a marketing expense. When that change is made, marketing costs, at least in the film industry, may actually exceed first copy costs. For other media, the relevance of marketing generally corresponds, at least in part, to the relative size of the “lottery effect” in that market niche. In the music industry, promotion, including payola, is quite substantial, with Sony spending about $25 million to market Michael Jackson’s album “Invincible.” According to one book publisher, “the big crisis in American publishing is the triumph of marketing.”

b. Generally overlooked aspects of marketing CCCs

A comprehensive review of the nature of consumer demand for CCCs and how it is influenced by marketing is beyond the scope of this article. Still, using standard supply curves for CCCs is comparable to treating a television set as a “toaster with pictures.” For a clear understanding of the role of promotion, it is critical to understand that many CCCs are "solidarity goods," which are products subject to "network effects." Consumers value them based in large part on their popularity: for enabling them to join in conversations with friends and colleagues about a story or character or to understand references made by comedians in late night monologues. This helps to create somewhat of a “superstar/winner*s* take all" environment – a market highly

skewed, with a few big winners, but mostly a lot of "losers."

This effect is further heightened by the exceptionally cluttered nature of the current CCC marketplace. In the year 2000, there were almost 500 new major feature films, about 20,000 new music albums, and significantly more than 40,000 books released. In addition, there are about 280 different broadcast and cable television networks, 13,000 licensed radio stations (and many more Internet-only broadcasters), and 10,000 more specialized magazines and other periodicals, all disseminating and/or producing CCCs. There are also all the CCCs from previous years. The Internet, meanwhile, includes millions of other otherwise unpublished materials, and it is beginning to offer customized news services.

Under these conditions, publishers, seeking to develop one of the few winners in each of the niche markets, feel compelled to match their competitors' spending in a form of rent seeking. CCC promotional efforts, then, often resemble political campaigns – highly competitive, with winning often more dependent on one's marketing efforts than on the quality of one's product. Marketing is king, and the tremendous spending to create stars leads most publishers to demand long-term artist contracts. The marketing expenditures of one's competitors also become a major factor in determining which projects will be profitable, creating a media "arms race." As a result, "richly deserving music can go unnoticed, drowned out by better-promoted albums . . .," and this occurs in many media.

c. Consumers' selection assistants

The Internet already helps cut some promotional costs because many publishers can now offer free online access to a highly abridged version of the CCC, e.g., the first chapter of a book, an article's abstract, a song, or a movie trailer. In the long run, the Internet can also dramatically reduce promotional costs by aiding the growth of entities that might be called "selection assistants" (SAs). SAs, in the image of travel agents, real estate brokers, or more accessible and flexible versions of *Consumer Reports (CR),* will enable buyers to override publisher promotional campaigns by obtaining instant, inexpensive access to unbiased advice.

Consumers are also likely to rely on SAs because of the ability of "collaborative filtering" to provide very accurate predictions about what products they will enjoy. Collaborative filtering uses consumers' prior reactions to items in a category to predict their responses to other items. Data about their past reactions to CCCs is used to search a database to find other individuals who had very similar, if not identical responses to those CCCs. The SA can then examine this similar-tastes group to identify other products it enjoyed most. The system would seem to be more accurate than any set of friends or experts for gauging one's likely reaction to a particular CCC. SAs can also help consumers to develop a customized, explicit "search profile."

Given the value of their time, most consumers should be willing to pay for such time-saving service. Moreover, as consumers place an increasing reliance on SAs, producers are likely to find unsolicited marketing to be less productive and less cost-effective. In the long run, the primary marketing expenses for publishers may be the cost of convincing reputable SAs and other independent experts of the quality of their offerings. Publishers may well pay trusted SAs for evaluating their creations, much the way firms pay auditors for their seals of approval.

5. Risk of Failure

The unpredictability and chaotic nature of consumer tastes makes investment in the production of CCCs unusually risky. Furthermore, because star talent and promotional fees are based on average revenue expectations, many publishers incur "losses" on most variations of CCCs. Publishers, meanwhile, are subject to the same danger of misjudgments and the winner's curse faced by other businesses, although they can somewhat alleviate risk by using royalties rather than large advances. To qualify as attractive investments, i.e., offering a reasonable risk reward tradeoff, highly risky projects must offer investors "big enough prizes for creations thrown to the small minority of winners." As noted above, copiers making hard copies face risks comparable to those faced by publishers.

6. Processing Payments

Even if dissemination is done electronically, processing payments is not free. This task may be outsourced to credit card companies, but handling extremely low prices, e.g., 10 cents/ minute for a few minutes, will likely require emerging new micro-payment technologies.

III. Sources of Financial Rewards Absent §106's Broad Protection Against Copying

Creators have two main sources of income for financing their efforts: sales of copies of their CCCs and indirect benefits flowing from the reputations they gained. This section discusses how many business models appear able to provide sufficient revenues for inducing popular creators to continue producing CCCs even without §106 and its current negative effects on borderline CCCs. Some of these business models depend upon demand for physical copies of CCCs, but most would also apply to CCCs disseminated online as electronic bits.

A. Sales in the Absence of Full §106 Protection

The ability of publishers to sell access to CCCs generally depends on at least three factors: the capabilities of available technologies to regulate access, relevant laws, and the social norms that dictate whether defeating technologies or evading laws will bring shame.

1. Technology/Architecture

Publishers' ability to sell access to CCCs depends, to a great extent, on the technologies available for providing access. Although the former generally criticize new technologies for threatening existing business models and requiring additional legal protection, new media also often spawn new ways for increasing the social value convertible into revenues and profits. For example, in 1982, when videotapes produced minimal revenues for Hollywood, MPAA President Jack Valenti testified that "the VCR is to the motion picture industry and the American public what the Boston strangler is to the woman alone." By the 1990s, however, Hollywood's income from videotapes dwarfed all other revenue streams.

a. First mover/lead time advantage

For physical copies, technology generally provides a publisher with a "first mover," or lead-time, advantage – the period after the publisher releases its output, but before copiers are able to

distribute competing copies. A publisher who accurately forecasts demand, efficiently reproduces and markets CCCs, and is willing to price aggressively has a tremendous advantage over copiers. The latter would recognize that any output they produced would create excess supply and trigger a price war – unprofitable to all. In fact, first mover status was so advantageous during the nineteenth century, when there was no copyright protection for the publishers of foreign books in the U.S., that U.S. publishers still made voluntary royalty payments to secure a first edition.

One key to deterring competition is the use of "limit pricing," i.e., setting prices just below that sufficient to attract copiers. This would likely consist of a higher price before copiers entered and then a close-to-cost price, although publishers might find it desirable to tolerate some unauthorized copying. Copiers would only see entry as attractive if they expected the publisher to maintain high prices and profit margins at the cost of market share.

The publisher's lead-time advantage would be greatest where there was strong consumer demand for immediate gratification, as where media attention made a CCC a hot topic of conversation, – leading consumers to buy hardcover books or stand on long lines to see the newest movies – and where copiers were unable to provide quick access. It diminishes dramatically to the extent consumers are willing and able to receive online transmissions, but not completely. For example, publishers could still benefit from a reputation for being first to offer hypertext-linked versions of the latest CCCs, e.g., legal decisions and law review articles.

b. Pre-sales to consumers and investors

The Internet also makes it more practical to employ pre-sales for specific items or in a more sophisticated manner, where buyers only commit to buy one out of a set of offerings. Still, both of these systems are suited primarily for well known creators or for CCCs endorsed by trusted experts, and both are somewhat vulnerable to free riders.

(1). Specific commitments

Creators/publishers often market themselves based on their special skills and seek a pre-sale contract or subscription for producing CCCs at a satisfactory price. Breyer recognized that pre-sales of books could entail substantial administrative costs, but the Internet makes it easier for buyers to post and receive responses to requests for proposals (RFPs), as for school texts. Certainly, shoppers generally prefer to consult prior purchasers or to sample a short excerpt before making a selection. Nevertheless, buyers commonly commit to purchases based on their experience with a creator's previous CCCs, and schools are likely to be comfortable ordering updated editions of their favorite textbooks.

The British band Marillion offers an excellent example of how the Internet facilitates the use of pre-sales by creators who already have a significant following. Despite being dropped by its recording company, the group solicited a 25,000-name email list of fans it had collected and received £200,000 in orders for its next album (£16 each) in just a few weeks. Stephen King's online publication of chapters of *The Plant* was closer to a "shareware" model – requesting voluntary payments after receipt of a chapter – but it was also a form of pre-sale since readers knew that if King did not receive sufficient payments he would not offer new chapters.

This model is certainly susceptible to free riding, but cyberspace appears to support an effective way to encourage consumer payments. A publisher could post the total dollar amount it required to finance a particular CCC, a deadline, and set one of two prices. It could post a fixed price, like Marillion, seeking orders contingent on total demand reaching some minimum level. Alternatively, it could seek "donations," like those used by fundraisers in telethons, contingent on reaching the goal sought. If potential free riders saw that consumer bids were likely to fall short of the required amount, they would have a strong incentive to help pay to ensure that the CCC they desired was produced.

(2). Discretionary commitments

Interestingly, even without §106, technology also appears to create the opportunity for a market resembling the current one for textbooks. Schools requiring a certain quantity of textbooks in a particular category by a set date would commit to make that purchase, but with discretion to choose from among all available options. As they do today, publishers would decide how many different textbooks to commission based on the estimated demand and likely competitors. Thus, a publisher might be willing to commission one author to write a college-level, advanced algebra textbook if it estimated market demand of at least $2 million for such textbooks, and a second author if the market appeared to reach $3.5 million. Different publishers would have other “trigger points” for each category. Publishers could be asked to designate an online page for displaying their trigger points for each category of texts as well as a running total of the contingent orders placed by potential purchasers. If purchasers desired at least one or two new books to choose from they would feel pressure to raise total commitments to reach the desired trigger point. This would replace the “spot market” in textbooks with one employing longer-term discretionary contracts, but would not appear to dampen publisher incentives to compete.

c. Versioning

As mentioned above, many consumers are willing to pay more to get earlier access to desired CCCs and publishers can exploit this situation by setting discriminatory prices. Yet timeliness is only one of the many dimensions along which publishers can differentiate versions of CCCs. For example, many creators are able to earn substantial fees for live performances of their creations and more could attempt to use this business model. Movie studios historically earned all their revenues from theatrical exhibition, and initial box office receipts (before films are made available to consumer homes) are still often enormous. Most academics rely primarily on the salaries they earn for teaching the material in textbooks, rather than writing them. The Grateful Dead relied primarily on performances in combination with endorsement and merchandising fees discussed in III.B.1. Playwrights might earn a substantial share of their income from consulting on performances of their work, poets from reading their material, and celebrity journalists from presenting live news analyses, with all taking questions.

Publishers are also often able to charge significantly higher prices for signed copies or CCCs that enable buyers to “participate.” Authorized online music services Rhapsody, Pressplay, or MusicNet, also charge higher prices by offering “branded” access that is both quick and limited to reputable copies. The latter may become particularly significant if traded CCCs are more commonly infected with harmful viruses or adware. If copiers had to prominently mark their offerings "unauthorized copy," as discussed below, they would clearly make less attractive gifts.

Publishers could also charge more for access to up-to-date versions of continuously changing data sets like telephone directories and weather or linked sets, like the materials in Westlaw, which permit easy access from one CCC to another. As Ithiel de Sola Pool observed, publishers could transform their business from providing a product to providing a service: access to continuously updated, corrected, and linked CCCs. If publishers only provided discrete search results or software capability or highly customized content (e.g., programming with viewer inserted), there would be little for copiers to copy. Service models are also well suited for evolving computer software and enable publishers to employ price discrimination.

d. Self-help technologies

New technologies have also made it easier for publishers to use code to protect against copying and to enable consumers to pay artists directly. Regarding the former, "trusted systems" and automated rights management technologies rely on a combination of hardware and software, including data shields, encryption technologies, and watermarks, to hinder, if not prevent, unauthorized copying. For example, the online music services discussed above limit how many files a subscriber may download to their hard drives or burn onto CDs. Although all systems of this type are vulnerable to hacking, if the technologies are reasonably robust and/or protected by social norms, some predict "[c]ode can, and increasingly will, displace law as the primary defense of intellectual property in cyberspace" even without the Digital Millennium Copyright Act. The Internet also makes it much easier for consumers to voluntarily contribute directly to creators they desire to reward or "tip" for the use of CCCs. Artists can set up their own websites to accept payments, or direct their audiences to clearinghouse websites, such as Fairtunes and Tipster or even Amazon's tip jar. Debit cards and new micro-payment technologies should simplify the process and make small online payments more practical.

e. Advertising & sponsorships

Publishers also help finance their CCCs with about $130 billion annually from advertisers desiring to reach the audiences attracted by those creations, and new technologies are both hurting and helping this approach. Television remote controls, which enable viewers to “zap” commercials with the mute button or avoid them by channel surfing have long distressed television advertisers. The even greater threats from the TiVo and ReplayTV digital video recorder (DVR) technologies have even led Paramount Pictures to charge that they violate copyright law by making it too easy for viewers to avoid commercials. Similarly, new online "screens" enable net surfers to view web pages stripped of their commercial messages.

Advertisers have traditionally responded, however, by offering commercials that are too entertaining for viewers to skip. In fact, many watch the Super Bowl more for the ads than the game. Publishers have also long recognized the value of “product placements,” as highlighted *E.T.*, and this practice may expand in books. Musicians already create product jingles and background music, and this practice may also expand. Advertisements on new media are also becoming more valuable. First, the Internet has created the opportunity for viewers to make impulse purchases of products they see on a show, e.g., fashions in *Sex in the City*. Second, media firms are improving their ability to target consumers with customized, and thus valued, ads. The danger that advertisers or others will try to use their financial influence to distort editorial or artistic creations remains real and problematic.

2. Social Norms

A publisher's ability to rely on architecture and law to ensure payments for their CCCs is heavily dependent on social norms and customs. While consumers often seek to resist laws and defeat technologies they consider unfair, they voluntarily make donations for other valued services.

a. Resistance to payments

Many web surfers interpret the cyberspace mantra "information wants to be free," to justify helping themselves to free copies of digital information. Some may act out of resentment for being denied "private copying" rights they believe they deserve. Others believe that excessive prices justify civil disobedience. After observing Microsoft escape significant penalties despite a conviction for illegal business practices, many may lack respect for related laws.

b. Voluntary contributions

On the other hand, consumers often donate cash to street musicians and at "pay what you can" performances and museums and send checks to public broadcasters and creators of shareware computer programs. Many willingly pay a "surcharge" for products "made in America" by "union labor," or by firms with admirable labor practices, like Ben & Jerry's, all to support higher payments to labor. Economists have found that such behavior is not only surprisingly common, but may even represent an efficient way to finance some activities. Cooperative behavior even appears to have positive neurological effects. Consumers who like to think of themselves as fair often decline to purchase items when their low prices are due to the exploitation of workers as illustrated by the California grape boycotts. This has led some scholars to recognize that tipping could help finance creators.

Restaurant tipping, which generates approximately $20 billion a year, is probably the model of voluntary payments most relevant to CCC creators. Although many claim that they tip to reward quality service, data shows that the size of the tip is only somewhat affected by that factor. Most North Americans tip even when they receive bad service and never expect to return, apparently to see themselves as "fair." Consumers actually treat tips as payments due for services rendered, as does the Internal Revenue Service.

Therefore, publishers might focus on convincing consumers that, at least in North America, it is both fair and proper to make voluntary contributions to reward creators of CCCs. A media campaign modeled after the "Look for the union label" jingle or the successful efforts to urge consumers to buy "green" (environmentally friendly), i.e., pay extra to do the right thing, should not be difficult for the kings of marketing. State governments, following the rationale of the 1995 White Paper, could require schools to teach students that using CCCs without paying the creators is as wrong as plagiarism and discourages creators from producing more CCCs, particularly emerging new artists, but also all other creators barely surviving.

Publishers, due to their first mover status, should be able to reproduce CCCs at lower cost than copiers and thus, if they treated creator and promotional costs separately, beat copier prices. They could then seek a surcharge on "authorized" versions to cover the latter costs, which many consumers would seem willing to pay to avoid exploiting the creator. Consumers could be asked to contribute that same amount for online copies or some lesser amount for CCCs borrowed from

a library or purchased used. Ku suggests that the government might even mandate that distributors of CCCs offer consumers a tipping option.

Ideally, contributors would be able to interact directly with the creator – visually and audibly – but since that might rarely be practical, websites might offer an interface represented by an enthusiastic fan, automated, if not live. Consumers might well be shamed into making a reasonable contribution if the interface simply asked – audibly or even in text – "Would you please help me/us finance this creation and enable us to continue our efforts?" "How much would you like to contribute towards the creative team of this recording? We suggest $1." Ideally, the voice would be that of the creator or another appealing salesperson. A similar function might be served by the cashier at a book store, even one that sold lower priced "unauthorized" copies of a book alongside the authorized copies.

Public schools and libraries might voluntarily choose to purchase only authorized copies of CCCs provided they were within some reasonable range of the price of unauthorized copies, and others in media industries could take similar measures. Certainly, there would be many free riders, but imperfection is tolerated in many other important areas of the world economy.

c. Government payments

Public museums, schools, and libraries already buy CCCs directly, including paying higher prices for periodical subscriptions to reflect their greater use. The "public lending rights" programs adopted in many European nations now pay creators based on the uses made of their work in libraries. Governments have also helped finance CCCs by imposing surcharges on technology devices, like the fee England imposes on receivers to fund broadcast programming, although these systems have major drawbacks. There has also long been support for using taxpayer-financed rewards instead of granting copyright or patent rights, although most analysis of this option has focused on patents rather than copyrights.

3. Laws

The technologies and social norms discussed above in combination with general laws, like those against theft, can provide significant revenue streams for CCC creators. Nevertheless, those writing the Constitution recognized that special additional legal protections might be necessary to support an optimal engine of free expression. Before considering current §106 in section V, below, it is useful to review some copyright laws that appear to provide net public benefits:

To most effectively capitalize on the pursuit of respect and reputation by CCC creators, it is important to ensure that they are accorded credit, i.e., paternity. In scholarly and scientific fields, authors generally give credit to the ideas upon which they build to gain credibility, as do courts when citing precedents (or compelling scholarly work). Social norms condemn significant omissions as plagiarism. Existing tort and unfair competition laws, appear to already require such attribution and prohibit fraudulent claims of authorship. Absent §106, publishers could create a campaign modeled on "Look for the union label," jingle, mentioned above, asking consumers to look for a statement indicating that a CCC was being offered by an authorized publisher. Better yet, copyright law should expressly require copiers to prominently label their CCCs as "unauthorized copies." Government entities could also require or at least encourage

public entities like schools and libraries to buy only authorized versions of CCCs, or at least to do so when authorized publishers offered prices within some percentage of unauthorized versions.

Publishers can also use contract law to help them manage their rights in CCCs. For example, where a CCC was being prepared for only a small number of consumers, such as a research report, non-disclosure/confidentiality agreements might be feasible. In fact, some scholars view copyright law as a set of default contract terms, many of which may be overridden by terms negotiated by the parties. Yet contractual provisions to extend copyright protection beyond the bounds of copyright law are limited by §301 (the preemption provision), the Constitution's Supremacy Clause, and general public policy. This reflects the discomfort the nation's founders had with government-enforced monopolies.

B. Social Norms and Rewards Other Than Sales

Two other social norms also provide substantial financial support for the production and financing of many CCCs. First, many consumers are willing to support favorite creators above and beyond making purchases. Second, there is strong social support for direct government and private sector financing of important artistic and scientific CCCs.

1. Payments Due to Consumer Gratitude, Desire for Affiliation or Expertise

Creators can often obtain financial support from consumers appreciative of their work or desiring to associate with them, for example the "angels" who "invest" in Broadway shows. Creators can also use their fame to promote merchandise, either as David Bowie does at his innovative website, or through endorsements. Hollywood studios have a long track record of developing films into product lines. Internet guru Esther Dyson observed long ago, that authors can write to increase their reputations and earn their income from ancillary services. Thus, CCC creators can often earn income from teaching in their areas of expertise, supported by student tuition and alumni donations. Many consumers willingly pay to hear authors on promotional tours like at the Smithsonian Museum's Resident Associate program.

2. Support for Particularly Valuable CCCs: "Merit Goods"

§106 is generally of little benefit to culturally or scientifically valuable, and often unpopular, CCCs characterized as "merit goods." Rather, society has generally supported them in three other ways: the generosity of wealthy and not-so-wealthy individuals and non-governmental organizations; government subsidies; and student tuition. In fact, most of what are generally considered to be the greatest artistic and literary works of humanity were financed by royal, feudal, and church patronage, rather than copyrights. Today many creators still receive funding for their work from private foundations, research centers, and arts institutions.

The government has long played a major role in subsidizing the production of new CCCs both through the salaries professors earn at public educational institutions and through grants to researchers in the public and private sector. In more recent decades, federal funds have financed artistic creations through entities like the National Endowment for the Arts, the National Endowments for the Humanities, and the Corporation for Public Broadcasting. State and local legislatures and arts groups also fund creators. Independent boards help guard creators' freedom

to produce CCCs critical of the entities that fund them.

Government bodies also play a number of other supportive roles. Public school help train creators in classes in English, music, and art, and school newspapers, yearbooks, etc. Public entities also help subsidize access to facilities like the Kennedy Center, public broadcasting stations, and public access channels on cable television systems. Finally, the tax deductibility of donations to qualified non-profit arts and science entities also subsidize CCC creators. Some have proposed financing content with funds from selling or leasing bands of the publicly owned radio spectrum.

IV. Prohibiting Unauthorized Copying of CCCs (§106): The Marginal Effects

While the factors discussed above induce the production of many CCCs, the Constitution empowers Congress to adopt copyright laws to promote additional output. Moreover, the beneficiaries of §106 – most popular creators and their publishers – claim that §106 codifies a natural and moral right. The current version of §106, however, appears to primarily increase the cost of important creative inputs and stimulate rent-seeking marketing efforts, both harmful to the economic prospects of borderline CCCs. Still, some limited protection against unauthorized copying would appear justifiable for some types of CCCs.

A. Moral or Natural Rights

There has long been strong public sympathy for rewarding creators of CCCs with long-term, if not permanent, rights to their creations, yet there are corresponding reasons not to do so. The view that authors have a special right to the fruits of their labor is an ancient one with two separate strands. The first rationale, generally associated with the French, recognized a natural, almost divine right to one's creations. That is, just as "the heavens and the earth belong to [God], because they are the work of his word . . . [s]o the author of a book is its complete master, and as such can dispose of it as he chooses." Or, as one philosopher observed, "it's mine because I made it . . . It wouldn't have existed but for me." The second theory, supported by classical English economists like Adam Smith, Jeremy Bentham, and John Stuart Mill, viewed one's right to ownership of the fruits of one's work as a just reward for the creation. The reasoning is that if the public is willing to pay some amount for access to a creator's work, why should the government or others deny them such benefit? Members of Congress, American states, courts, and treatises have implicitly accepted these rationales, as have the French, at least since Napoleonic times. The Sonny Bono Copyright Term Extension Act of 1998 did so implicitly by adding 20 years to the copyrights of previously created CCCs, retroactively even though this clearly offers no creative incentive.

These rationales, however, have serious weaknesses, including that creators are rarely solely responsible for their creations. Not only do they build on the work of their predecessors, as discussed in II.B.2, above, but they also depend on others, such as teachers for training and often taxpayers for funding. Furthermore, the American capitalist system fosters competition that drives prices down from levels reflecting the social value of output to cost-based amounts. Thus, teachers and doctors provide tremendously valuable services, yet society encourages competition that leaves their salaries at only a fraction of the social value they produce. Competition is welcomed as a means for shifting social value from producer to consumer surplus. Creators who

produce the most social value are expected to be satisfied with competitively based incomes supplemented by appreciation, fame, and respect.

B. Effects on Creators

§106 appears to benefit very popular creators, but harm creators of borderline CCCs.

1. Financial Benefits

Although §106 clearly increases the revenues of popular creators, once they are producing CCCs full time, additional income seems as likely to result in less output as more, as noted in II.B, above. If §106 was severely abridged there would likely be some initial negative effects, yet once creators recognized that the world had changed, they would likely adjust their expectations. Actors who earn $10 million per Hollywood feature film already accept work on smaller independent films or Off-Broadway for a fraction of their regular fee. As long as they can earn more than their opportunity cost, successful creators would likely remain in their fields.

2. Cost of Inputs

As Landes & Posner recognized in their formal mathematical model, and Yochai Benkler has also explained, because greater copyright protection increases licensing costs and administrative fees, creators, as a class, might actually be better off with *less* copyright protection!

a. Overcoming impractical administrative costs for fair uses

The fair use doctrine is supposed to permit creators to use expressions of their predecessors in cases where the administrative cost of obtaining permission make such efforts impractical, particularly in educational environments. And yet the standards for fair use are so vague and constrained by lower federal courts that creators are often chilled from fair use to avoid the risk of litigation. Thus, documentary filmmaker Davis Guggenheim finds that "if any piece of artwork is recognizable by anybody . . . then you have to clear the rights of that and pay' to use the work," requiring significant, if not prohibitive, payments to lawyers, among others, to track down the rights' owners. Moreover, this is not a paranoid overreaction. The films *Twelve Monkeys, Batman Forever,* and *The Devil's Advocate* were all challenged due to a lack of clearances. While many have observed that the Internet can diminish transaction costs for consumptive uses, that does not address the needs of creators seeking productive uses.

b. Ideas & transformative uses

§102(b) of the Copyright Act expressly provides that "In no case does copyright protection for an original work of authorship extend to any idea, . . . concept, . . . or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." Rather, as Learned Hand emphasized, ideas and plot outlines are "given up to the public" so that authors may draw from their predecessors' innovations and insights. Hand also observed that the dividing line between idea and expression, "wherever it is drawn, will seem arbitrary," but as Vaidhayanathan has perceptively reported, that dichotomy, plagued by inherent tension, has been collapsing under the weight of protection for derivative works. Although §106(2) does not expressly embrace the protection courts have granted to the "total concept and feel" of a song,

television show, or a greeting card, Litman finds that §106(2) now reads as though even "thinking about" a derivative work is prohibited! Moreover, copyright grants publishers not only a right to earn funds from licensing, but also the right to refuse access.

An excellent illustration of the current environment is the case of Alice Randall's parody *The Wind Done Gone,* which gives a slave's perspective of the *Gone with the Wind* story. The former's challenge of the latter's iconic view of the antebellum South as racist, makes it the type of CCC that would appear most deserving of First Amendment protection. Yet copyright law empowered Martha Mitchell's estate, adamantly opposed to any use involving interracial sex, to force Randall's publisher to incur litigation costs of $150,000 – the equivalent of a large fine – for publishing such a derivative work, even though Randall's side prevailed. The clear message that case sends to creators (and publishers) who seek to critically parody copyrighted messages is – to paraphrase Kevin Costner – if you publish it, they will come . . . to get you.

The effect of such lawsuits and the derivative works provision that support them resemble the chilling libel laws in many states, before the Supreme Court's landmark 1964 decision in *New York Times v. Sullivan* severely deflated them. Yet the Supreme Court did not fully rise to the occasion in 1994 when it considered the derivative works provision of copyright law in the context of 2 Live Crew's parody of Roy Orbison's "Pretty Woman," another case where the copyright owner was unwilling to license the use sought. Although the Court held that parodies could qualify as "fair use," it remanded the case for consideration of the resulting drain on the market for the parodied item. Sadly, the Court failed to observe that the chill imposed by even enabling publishers to sue those creating parodies or other criticisms so threatens First Amendment values that prophylactic protection comparable to that introduced in *Sullivan* is justified. The Court could have held that if the lower court found expression to be a *bona fide* parody, and not a disguised attempt to appropriate the market for the original, then the parody's effect on the market of the original would be irrelevant.

Lessig's *Future of Ideas* and Vaidhayanathan's *Copyrights and Copywrongs* offer numerous detailed and engaging examples of how copyright law has chilled creation. There are "fan edits:" musical sampling, described by some as "mashups" or "bootleg remixes," and "fan fiction," among other creations, in addition to political speech. It is not surprising that the derivative works provision is probably the most severely criticized aspect of copyright law. Even in an environment, where creators who could afford access could secure it "freely" at "neutral" compulsory license rates, other aspiring creators would lack the price of access.

3. Diverting Their Efforts Towards Financially Rewarding Output

Some scholars contend that using strong copyright protection to provide large rewards helps creators identify desirable areas to enter. Yet best seller lists, box office sales, reviews, and prizes already provide such signals. Meanwhile, as Glynn Lunney has explained in great detail, large rewards may divert some creators from more socially beneficial creations to those made more attractive by copyright protection.

C. Effects on Publishers

§106 has both positive and negative effects on publishers.

1. Negative Effects

§106 certainly substantially increases publisher revenues for popular CCCs, but rather than encouraging new creations, those funds may merely support larger marketing campaigns or greater rents for powerful talents. In fact, the rent seeking discussed above, may well fully dissipate 100% *or more* of the increased revenues generated by copyright protection, and this likely has a strong negative effect on borderline CCC projects. Just as the marginal candidates in a political campaign find it more difficult to attract financing when the major candidates are able to amass larger war chests, so marginal CCCs may find it more difficult to find publishers when copyright protection inflates major publisher spending on promotion. The need for "defensive" marketing to respond to the avalanche of advertising by popular CCCs seeking §106-enhanced prizes would likely to raise the costs of many borderline projects into unprofitable territory.

Increased revenues, meanwhile, would not necessarily translate into increased publisher profits since those involved in a CCC who had bargaining power would seek to divide any such amount among themselves. Even if publishers accrued greater profits, they would have no incentive to invest them in projects expected to be unprofitable. Publishers seem no more likely to finance "charitable" CCCs than those who would otherwise retain the funds absent §106.

The conventional wisdom has been that §106 could nudge some unprofitable CCCs into positive territory by allowing publishers to appropriate a greater portion of the social value generated by blockbusters. An example can help illustrate this view. Suppose creator X had a project and that a publisher estimated its publication costs, including promotion (in a world without §106) to be $49,000, but its expected revenues to be only $48,000, making it an unprofitable project. Assume, however, that the addition of §106 would raise its expected revenues, (in the slight chance that it was a blockbuster), by $2,000. This would increase its expected total revenues to $50,000 and make it profitable. Copyright supporters would argue that this demonstrates how §106 can nudge a multitude of otherwise borderline CCCs into profitability. Even critics of the current level of copyright protection appear to accept this rationale.

There is, however, a hidden and misleading assumption in this reasoning: that §106 increases the *net* benefit for borderline CCCs, like X's, and therefore its profitability. Yet that ignores the complicated interrelation between copyright and marketing, discussed above. Although §106 was apt to offer X relatively little benefit it would probably enable X's popular competitors to generate substantially greater revenues and thus enable them to disproportionally increase their promotional expenditures, likely leaving X in a relatively *worse* position.

§106 also appears to enhance media concentration because large media firms, controlling large amounts of copyrighted material, are apt to facilitate cross-licensing between creators whom they represent, alleviating the time and trouble they would face if they were independents. In addition, larger firms are more likely to find it cost effective to survey consumers so as to permit them to engage in price discrimination for their libraries of content. Other costs include the resources devoted to enforcement, which arise with the use of any property rights structure. Copyright-enhanced rewards also apt to attract some individuals into CCC creation who would be more socially valuable elsewhere.

2. Positive Effects of a Severely Truncated §106

Protection against unauthorized copying appears to be necessary to make some types of CCCs economically viable. Yet given the harms from such protection, it seems important to keep such protection to a minimum to produce "optimal" results. That, however, is a difficult and continuing task in light of the dynamic nature of CCC media. Congress could adopt general standards, modeled on the four-element test for judging "fair use" for copyright, and leave it to the courts to develop a more common law-like resolution of copyright protections as the latter do when judging allegations of "unfair competition." As Jessica Litman has suggested, copyright law could prohibit commercial exploitation, rather than all copying. A possible framework for providing publicly beneficial protection might resemble the following:

a. General provisions

Prohibiting copying that did not offer consumers any significant incremental benefit over what publishers were already providing would seem to be harmless. This would protect newspapers that permitted free "deep links" to their material against copiers who republished that content rather than providing a link to the source CCCs. Only copiers who provided consumers with significantly lower prices or easier access would be free to act unlicensed. In addition, the law could accord publishers protection for "hot news" under a misappropriation standard like that adopted by the Supreme Court in *International News Service v. Associated Press*. It could apply whenever copiers tried to destroy a publisher's first mover advantages, as by transmitting a publisher's live CCC feed simultaneously over a competing channel. Granting publishers less than, perhaps, 24-hour exclusivity for live sports and news CCCs could be recognized as unfair competition. More generally, the law might prohibit the unauthorized copying and dissemination of any CCCs before the publisher had had a reasonable chance to release them to consumer homes via the airwaves, wires, or in hard copies.

b. Provisions for specific industries

Although there is some danger in granting different statutory copyright protections to different industry segments, the current, relatively uniform standards for all varieties of CCCs likely yield greater harm. Instead, each individual industry segment should be considered on its own merits. If industry groups claimed that they needed additional legal protection to function at socially optimal levels, Congress could hold hearings and collect and evaluate evidence, as it did when adopting the Newspaper Preservation Act in 1970. Given the likely need for analysis of detailed and continually-changing economic data, an expert body, like the Copyright Office, might be assigned such a task and directed to use administrative rulemakings.

Those seeking additional protection could be required to show that: 1) they expended significant efforts to produce their CCCs, 2) alternative models did not provide sufficient compensation, and 3) their proposed additional protection was minimally burdensome. For example, producers of non-time-sensitive broadcast television programming might assert that 24-hour protection would be insufficient to recover the hard costs of the quality fare on HBO. Setting, the minimum duration of protection would be more difficult. Still, it is useful to note that publishers are able to earn large revenues from theaters, pay TV, and video rentals and from first run television despite viewer knowledge that the CCCs sold through those media will be available in a few

years free on television or from syndicators, respectively. In fact, economists have long believed that patent terms have been too long and it is unclear what justifies longer copyright terms. Two-year exclusivity might be more than sufficient to make these CCCs economically viable.

c. Compulsory licenses

Even in the absence of §106, compulsory licenses would still be quite relevant, because most creators, distributors, and copiers would probably want to avoid prominent “unauthorized copy” labels, particularly radio stations. Meanwhile, the cost of tracking down all relevant sources and paying the mandated fee could be alleviated if the Copyright Office adopted an efficient registration procedure. The problem is that setting “reasonable” rates is not an exact science, but rather, inherently political. Furthermore, some would object to transforming copyright from a property to a “liability” rule, which would deny creators the right to refuse to grant access to those of whom they did not approve. Courts could enforce such a requirement in the same manner they handle eminent domain and the essential facilities doctrine requirements.

D. Effects on Consumers & Empirical Data on Output

The monopolistically competitive arenas of creative industries are significantly constrained by both intra- and inter-industry competition. Nevertheless, it is well recognized that §106 permits publishers to set prices which deny access to many consumers who would be willing to pay marginal cost or even average cost for the CCCs. All economic analyses of copyright recognize this as a large “deadweight loss” to consumers and society. §106 also burdens consumers with the need to obtain permission for copying when it is not clear that the use is “fair use.” On the other hand, §106 probably diminishes the feelings of unfairness and anger directed at the significant numbers of likely free riders absent §106. Empirical analyses have not shown that current copyright protection increases net output, leading many to question the value of both copyrights and patents.

E. Hindering New Technologies & International Considerations

There is a long history of incumbent media industries attempting to slow the development of competitors armed with new technologies by denying them access to valuable, if not essential, CCCs. Thus, the film industry initially tried to stymie television broadcasters by denying them access to films; in turn, television broadcasters managed to constrain cable television systems' access to broadcast programming, and cable programmers tried to deny satellite companies access to cable networks. Restrictions today are hindering the roll out of broadband to the home. Furthermore, when representatives of existing technologies have negotiated over copyright laws, they have allocated benefits among themselves, minimizing the rights available for new technologies, thereby hindering innovation. Thus the Sony Bono Act has frustrated many innovative efforts to post valuable material online for easy public access, and proposed rules for PCs would constrain the tools creators need to produce innovative CCCs.

Once it became a net exporter of CCCs (with, today, approximately a $9 billion annual positive balance of trade), the U.S. sought to join the Berne Convention and to sign the World Intellectual Property Organization (“WIPO”) Copyright Treaty and WIPO Performance and Phonograms Treaty, Trade Related aspects of Intellectual Property (TRIPs), and the Universal Copyright

Convention. The existence of current §106 was crucial to this participation, and a sharply reduced §106 would likely force the U.S. to abrogate some, if not all, of those treaties. It would be difficult to believe that the rest of the world could rely on the business models discussed above given that so many nations regard copyright as a natural right and lack social norms supporting the tipping model.

V. Apparent Constitutional Violations

Although the analysis in sections III and IV is unlikely to sway the beneficiaries of current §106, it raises serious questions about whether the current, bloated version of §106, if challenged in court, could meet the First Amendment's intermediate scrutiny standard or even the lesser rational basis requirements of Article I.

A. Article I: The Exclusive Rights Clause

Prior to the passage of the Constitution, early American laws granting copyright protection were premised on the need to both encourage creation and provide creators with a just reward. The writings of Thomas Jefferson, Thomas Macaulay, Adam Smith, and James Madison indicate, however, a great concern about the evils of granting monopoly rights to authors and inventors. Thus, the Exclusive Rights Clause of the Constitutional appears to limit the authority of Congress to grant copyrights, and both the Supreme Court and Congress have recognized that copyright law must further the interests of the public. Moreover, some recent Congressional sentiment affirms the clear declaration of the 1909 House Report on the copyright statute:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served. . . Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. . . . In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public.

The Supreme Court has also interpreted the Exclusive Rights Clause in this manner. In *Sony Corp. v. Universal City Studios* it held that copyright's monopoly privileges "are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward." While observing that ensuring that creative artists receive "rewards commensurate with the services rendered," is a goal of copyright law, the Court noted that "The copyright law, like the patents statute, makes reward to the owner a secondary consideration." "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . ." Monopolies are not permitted under the Exclusive Rights Clause when there is no "concomitant *advance* in the 'Progress of Science and useful Arts.'"

Section IV finds that §106 probably generates a net cost rather than benefit in terms of new creations as well as both a deadweight loss from restricting consumer access and harm to technological development. In any case, there appears to be no evidence to the contrary. Still, measured against a mere "rational basis" legal standard and with only ambiguous data to rely

upon, it is most unlikely that a court would strike down §106 as unconstitutional under Article I.

B. The First Amendment

There is no dispute that copyright law abridges some speech, but courts have long accepted that its net effect, in light of provisions for fair use, is so clearly positive and constitutional that the D.C. Circuit stated in 2001 in *Eldred v. Reno* that "copyrights are categorically immune from First Amendment scrutiny." On the other hand, the 2nd Circuit's 2001 decision in *Universal City Studios v. Corley* indicates that at least one Circuit is now willing to seriously evaluate First Amendment challenges to copyright provisions. As the *Corley* court and a few others have found, the content-neutral provisions of the Copyright Act trigger the court's intermediate scrutiny standard. Still, courts are likely to be very reluctant to seriously examine the economic analysis above given their general resistance to upsetting longstanding legal architectures, particularly here where some limited level of protection against unauthorized copying appears constitutional for some types of CCCs and evaluating the details of which types and for how long is delegated to the Congress, assuming that seriously attempt the analysis. The Supreme Court's general attitude towards longstanding media regimes was illustrated by the Red Lion v. FCC decision, where a unanimous court upheld the FCC's fairness doctrine based on a finding of economic scarcity of airwaves, even though the unusual degree of scarcity was a result of the government's choice of broadcast licensing regimes.

Despite this reluctance, the courts may be hard pressed to ignore the economic analysis above if §106 is challenged by parties complaining that the provision stifles a critical catalyst for stimulating voter deliberation on issues of public policy. To appreciate how truly critical the use of some copyrighted material can be for this purpose one must understand the current role of the media. Although cyberspace now gives voters the opportunity to learn about issues and candidates by providing easy access to a vast amount of candidate information, voters with limited discretionary time are generally insufficiently motivated to read even an 800-word article on an important issue – like the nation's illegal drug problem. Voters are too busy with other obligations and escapes. And yet, even otherwise apathetic voters appear willing to budget a few hours to view the award-winning film *Traffic* which very thoughtfully explores the drug issue. In fact, such films, plays by Anna Deavere Smith on racism, and also even television shows like *Ally McBeal* (which examined myriad issues of sexual equality and harassment), can stimulate voters to deliberate about those issues at meals, parties, online discussion groups, and on radio call-in shows. In fact, such material, which permits audiences to vicariously participate in the fictional deliberations, may be the best way to break through the defenses of individuals who strongly resist even considering challenges to some of their values. It is well accepted that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

When broadband connections to homes become the norm it will be possible to post such content on websites for streaming video transmissions to all households at their own convenience. Until then, this programming could be disseminated to voter VCRs at scheduled times via cable channels, broadcast stations, or video rentals. §106, however, prevents the use of such CCCs without the owner's permission, and, in most cases, the cost of obtaining such approval would likely be prohibitive. Yet if using such copyrighted material is critical to achieving this result and the current 4-part "fair use" test does not exempt it, then §106 deserves to be scrutinized.

Absent a "fair use" exception, and evaluating the combination of §106/§107 protection under intermediate scrutiny, the provisions would need to serve a "substantial government interest" and represent a means that did "not burden substantially more speech than is necessary." The courts should require the government to show that "the record as it now stands supports Congress' predictive judgment" that §106 furthers important governmental interests; and does not burden substantially more speech than necessary to further those interests. With respect to the second, there does not appear to be any record evidence that Congress seriously considered the alternatives to §106 discussed above, and even if it had, technological changes would warrant an updated review. Meanwhile, the analysis above finds that current §106 also appears to fail to serve an important government interest, i.e., provide a net benefit to the public, at least one sufficient to outweigh the benefit just discussed of public deliberation on important issues of public policy, at the core of the purposes of the First Amendment. Harm to international treaties and trade, discussed in IV.E, above, would not appear to outweigh all other factors.

If courts were to strike down current §106, copyright beneficiaries could charge that they deserved just compensation for a "taking" although there case would seem little stronger than one that might have been brought by slaveholders, that the abolition of slavery was a taking. They could also seek to override the current Exclusive Rights Clause with a constitutional amendment based more on the natural rights or just desserts policies, but would require policy makers to reverse the apparent wishes of Jefferson, despite the strong policy reasons that support him, as discussed above in IV.A.

VI. Conclusion

The analysis above reveals that the long accepted, but rarely examined, public value of §106 of the copyright law is highly questionable. §106's impact on generally overlooked endogenous marketing costs appears to lead to a decrease in the economic viability of borderline CCCs, diminishing net new creations, thereby undermining the presumption that it serves the public interest in this manner. Meanwhile, Congress appears to have never seriously considered many less burdensome alternatives for stimulating creative output, neither those raised in Stephen Breyer's 1970 article nor any of the more recent technologies in combination with social norms. Meanwhile, §106 represents the key obstacle to the best chance for using cyberspace to stimulate a deliberative democracy incited by educational, entertaining, and engaging CCCs.