

SCARCITY OF ATTENTION IN A WORLD WITHOUT COPYRIGHT

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ABSTRACT

Compared to the world in which the last copyright act was drafted, we have shifted to an information economy: the costs of creating and sharing information have plummeted. These changes lead some to question the continued utility of strong IP protection, which creates artificial scarcity so that creators can recoup some costs of creation. But the lowered costs of producing and sharing information lead to information gluts that impose an externality on consumers in the form of overtaxed attention. Copyright infringement free rides on the attention attracted by earlier works, but copyright protection may alleviate the attention tax in unappreciated ways by slowing and refining the generation of new expression, and encouraging clearer differences between new and old expression. When we account for attention scarcity, consumers may benefit from fewer, better options. Preserving copyright protection in the post-scarcity world may help preserve important separation, reducing burdens on consumer attention.

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INTRODUCTION

Scholars have warmly welcomed a new world where resource scarcity - the *raison d'etre* for classic property regimes - is practically non-

existent, at least as it pertains to the resource of information. Indeed, in gross, there is an abundance of information. The decreasing cost of information has fueled speculation that in this brave new world, creators will not need intellectual property rights, or at most will need fewer and/or weaker IP rights to subsidize their creative efforts.

IP rights have traditionally been seen as a means of creating resource scarcity by erecting arbitrary barriers to reproduction and distribution. Access to a copyrighted song is not scarce because the song is rivalrous or excludable, but because the law says the owner of the copyright holds the exclusive right to authorize copying, distribution, public performances, and the creation of derivative works. IP rights make it possible for the creator of a song to subsidize the creative effort with ex post sales, a revenue stream that would be difficult to secure without those rights. In a world where the costs of generating and disseminating information have fallen, some posit there may be less need for IP rights.

Scholars have simultaneously recognized that while the cost of generating and transmitting information has fallen, the cost of finding the information one wants has increased because the volume of information has increased. Consumers and creators thus no longer face scarcities of information. In some cases, consumers face information gluts. Information abundance and information gluts increase as the cost of conveying information decrease. The scarce resource is attention - the ability to deal with the influx of information in a world without barriers to its creation. Attention scarcity imposes costs on consumers, making them more easily distracted, less able to acquire deep knowledge, distorting the information they receive and consumer, and even increasing their vulnerability to deception.

IP rights might, however, help us ameliorate the problem of information gluts and scarcity of attention. That possibility is clear enough in the trademark context - I know what Coke tastes like, and seeing Coke's logo and trade dress helps me pick a Coke product off of a crowded shelf. Copyright protection might also help us solve two types of information gluts. First, slowing down expression by artificially increasing the cost of production through copyright protection might benefit the public as the creator internalizes the cost of contributing to the glut, and therefore disseminates less information - ideally the most valuable information - in

order to avoid some of those costs. The effect can hold even though the costs are not imposed directly for the creation of the glut. Second, by maintaining some boundaries between otherwise close competitors might, copyright might provide important information to consumers.

In light of the ability of IP rights like copyright protection to alleviate some of the externalities imposed by information gluts, calls to reduce IP rights based solely on the reduction in the cost of generating information might be somewhat premature. Some caution should be applied before sacrificing those aspects of IP rights that aid consumers in dealing with attention scarcity.

This article proceeds in three Parts. Part I briefly reviews the standard economic account for intellectual property protection and describes how things are changing in the information economy. Part II explains why attention is the scarce resource in this new economy, identifies the costs imposed on consumers in the attention economy, and briefly summarizes how trademark law handles scarcity of attention. Part III reviews case law addressing the attention diverting effects of copyright infringement, and then explains how copyright protection may help moderate the effects of attention scarcity and thus might play a critical role for consumers even though information scarcity (and some types of resource scarcity) is less acute.

I. SCARCITY AND THE INFORMATION ECONOMY

A. *Economics and Scarcity*

Economics is a study of scarcity,¹ but the presumptions of resource excludability and rivalry that undergird foundational economic theory

¹ See, e.g., PAUL SAMUELSON, *ECONOMICS* 3 (New York: McGrawHill 1973):

Economics is the study of how men and society end up choosing, with or without the use of money, to employ scarce productive resources that could have alternate uses, produce various commodities and distribute them for consumption, now or in the future among various people and groups in society. It analyzes the costs and benefits of improving patterns of resource allocation.

from Adam Smith through Friedrich Hayek are dwindling in importance. Physical resources may still be scarce, but technology has lowered the cost of manufacturing and distributing physical goods.² Knowledge and information, however, are not scarce. In fact, there is a clear absence of scarcity with regard to information. Everybody generates a lot of information and nearly everyone has effectively uncountable quantities of information to process. If there is not a glut of information, it seems there is at least an abundance.

The modern economy has been frequently referred to as an information economy.³ Intellectual property rules are designed to impose scarcity on intangible information goods like copyrighted expression, trademarks, and patented inventions – to make them rivalrous and excludable so the creator, owner, or inventor can make some money from sale or licensing.⁴ Analysis about managing scarce *physical* resources often starts with Garrett Hardin’s “Tragedy of the Commons” and his warning about the overuse of common resources.⁵ No such danger is present with regard to information.

B. *Information Abundance*

The costs of creating and disseminating information have dropped. In the United States, nearly 90% on the population has access to the Internet.⁶ Many consumers own a phone that combines unprecedented

² See, e.g., Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 471-481 (2015).

³ See, e.g., CALVIN H.P. PAVA, *MANAGING NEW OFFICE TECHNOLOGY: AN ORGANIZATIONAL STRATEGY* 137 (1983) (describing “[t]he prevailing view ... that a new ‘information age’ will dawn, based on an ‘information economy’ and peopled with ‘information workers.’”).

⁴ See, e.g., Neil Weinstock Netanel, *Copyright and A Democratic Civil Society*, 106 Yale L.J. 283, 308-09 (1996) (summarizing although not advocating for the incentive rationale for intellectual property protection).

⁵ Garrett Hardin, *The Tragedy of the Commons*, __ SCIENCE __, __ (1968).

⁶ *Internet Users by Country* (2016), online at

processing power, cutting edge photo and video capabilities, and internet connectivity. Laptops are often sold with image, video and audio editing software included.⁷ A teenager at home with a good eye and a good ear can create at least quasi-professional music or video.⁸ All these technologies combine to enable an unprecedented level of information generation and information sharing.⁹ This technology appears to have democratized the sharing of information.¹⁰

Indeed, instead of a tragedy of the commons, we may have a “Comedy of the Commons,” where more information in the hands of more users begets more information,¹¹ a situation that at first glance looks like an improvement over a world in which providing information is costly or scarce. In “the new information economy of abundance,” we may no longer be restrained by the “old physical economy of scarcity.”¹² Information is so abundant that it now seems to be “overproduced.”¹³ As Ellen Goodman

<http://www.internetlivestats.com/internet-users-by-country/>.

⁷ See, e.g., Terry Sullivan and Donna Tapellini, *5 Best Laptops for Photographers*, CONSUMERREPORTS.ORG, Sep. 03, 2015.

⁸ Serdar Yegulalp, *4 video editors: Pro results for ambitious amateurs*, COMPUTERWORLD.COM, Apr. 26, 2013.

⁹ Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135 (2007) (“Over 100,000 books are published in the United States each year, thousands of movies and CDs are released, and the amount of textual, musical, and visual works on the internet continues to rise exponentially.”); Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 Hofstra L. Rev. 1373, 1386 (2007) (describing the world we live in as one of “virtually limitless information.”).

¹⁰ Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 Mich. St. L. Rev. 1, 24 (2006) (“Through online distribution and peer-to-peer technologies, consumers can now freely transmit information without the intervention of a third party.”).

¹¹ Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

¹² Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 535 (2010).

¹³ Monroe E. Price, *The Newness of New Technology*, 22 CARDOZO L.

writes, “The spread of digital innovations, in the form of networks, production techniques, and consumer products, has multiplied content and freed audiences from network schedules. Consumers now sit in the eye of a storm of bits surging through cable and satellite channels, DVDs, video games, and websites.”¹⁴

C. *Copyright and the Information Economy*

In addition, in a world with abundant information, it has been suggested that we don’t need the artificial scarcity of intellectual protections. For example, Mark Lemley has recently argued that the development of cost-reducing technologies, which enable cheaper copying of information (and even cheaper production of tangible things through technology like 3D printing) “may actually mean we have less, not more, need for IP,” because we may need fewer incentives to balance lower creation and distribution costs.¹⁵ Indeed, at the extreme, if intellectual goods like copyrighted expression are in abundance, perhaps there is no need for any protection at all. As Carol Rose noted, “Nobody bothers to create property for some resource that lies around in abundance.”¹⁶ Of course, even in this information economy, there is some limit on “human creativity,

REV. 1885, 1911 (2001). See also J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1148 (1996) (“All communications media produce too much information.”).

¹⁴ Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1392 (2004).

¹⁵ Lemley, *supra* note 2, at 464. See also Jonathan Zittrain, *Privacy 2.0*, 2008 U. Chi. Legal F. 65, 113 (2008) (“[T]he digital copyright problem could be solved if publishers could find a way to profit from abundance rather than scarcity”).

¹⁶ Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emissions Trades and Ecosystems*, 83 MINN. L. REV. 129, 134 (1998).

time, and attention."¹⁷ Thus, while information itself might be abundant, the inputs necessary to create it might not be.¹⁸

II. ATTENTION SCARCITY

Optimistic perspectives on the benefit of the information economy overlook the main cost of information abundance. While the cost of generating and transmitting information has fallen, the cost of finding the information one wants has increased. Consumers and creators thus no longer face a scarcity of information. The scarce resource is attention. As the Nobel Prize Laureate, economist Herbert Simon put it: "[A] wealth of information creates a poverty of attention."¹⁹ Attention scarcity imposes real costs on members of the public as consumers of information. When attention is scarce, consumers are prone to distraction. It also becomes difficult to acquire sufficient depth in important topics. Attention scarcity further distorts the marketplace for ideas and expression. Finally, attention scarcity can make consumers vulnerable to deception.

A. *What is Attention?*

Some 120 years ago, the psychologist William James defined attention as something akin to "the processing capacity of a human mind." Psychologists recognize that attention is a finite resource, one that we

¹⁷ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 107 (2006).

¹⁸ Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 *YALE L.J.* 1742, 1744 (2007) (explaining that while information is non-rival and non-excludable, creating the information and making it useful requires inputs from the creator, which are rival and "susceptible to efforts to exclude.").

¹⁹ Herbert Simon *Designing Organizations for an Information-Rich World*, in *COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST*, 40-41 (Greenberger, ed., 1971).

cannot stockpile, but that we constantly spend.²⁰ Attention requires effort.²¹ The total amount of effort we humans can expend is limited,²² and our control over our effort is likewise limited in scope.²³ When our attention is focused one place, it's not focused somewhere else – there are opportunity costs to our focus. As a result, concurrent activities that require attention may interfere with one another.²⁴ Current research also indicates that consumers don't have perfect control over their attention: It is a resource that can be "directed or grabbed without any voluntary choice having taken place, even against strong wishes to the contrary".²⁵ Attention might instead be described as capacity to process new information. Naturally, in a world with few barriers to information creation and distribution, attention is a resource that can be strained and drained.²⁶

²⁰ MATTHEW CRAWFORD, *THE WORLD BEYOND YOUR HEAD* (2015) "In the main currents of psychological research, attention is treated as a resource—a person has only so much of it."; Tim Wu, *Attention Brokers* 11, online at ____.

²¹ DANIEL KAHNEMAN, *ATTENTION AND EFFORT* 12 (1994)

²² *Id.*

²³ *Id.* at 27.

²⁴ *Id.* at 12. See also CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US* (2010) (focusing on some objects in an environment makes other objects effectively invisible).

²⁵ HAROLD E. PASHLER, *THE PSYCHOLOGY OF ATTENTION* 3 (1998).

²⁶ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004):

The digital revolution made a different kind of scarcity salient. It is not the scarcity of bandwidth but the scarcity of audiences, and, in particular, scarcity of audience attention. My speech has always competed with yours; as the costs of distribution of speech are lowered, and more and more people can reach each other easily and cheaply, the competition for audience attention has grown ever more fervent.

B. *The Attention Economy*

What we call the “information” economy is actually an “attention” economy.²⁷ Attention is the currency in this new economy.²⁸ In a way, attention is “mental capital.”²⁹ Some studies suggest that participants in the “sharing” economy of the Internet treat attention as a private good that they secure by posting things online.³⁰ For example, frequent contributors to YouTube will contribute until the newest post fails to draw as much attention as previous offerings. Then they drop out of the ecosystem perhaps because they no longer feel adequately compensated for their labors.³¹ The drive for attention is sufficiently strong, and the value of

²⁷ Michael H. Goldhaber, *The Attention Economy and the Net*, 2 FIRST MONDAY 4 (Apr. 1997).

²⁸ Elizabeth L. Rosenblatt, *A Theory of Ip’s Negative Space*, 34 COLUM. J.L. & ARTS 317, 343-44 (2011) (positing that “[i]n a society in which “cognitive surplus” often creates a much greater supply of works than demand for them, many creators would prefer to be noticed than to be paid”); James G. Webster, *User Information Regimes: How Social Media Shape Patterns of Consumption*, 104 NW. U. L. REV. 593, 594 (2010):

In this world, attracting and managing attention is a prerequisite for achieving almost any economic, political, or cultural objective. Attention might thus be thought of as the currency of a new economy

²⁹ W. Thorngate, *The Economy of Attention and the Development of Psychology*, 31 CANADIAN PSYCHOLOGY/PSYCHOLOGIE CANADIENNE, 262, 263 (1990).

³⁰ B. A. Huberman, D. M. Romero and F. Wu, *Crowdsourcing, Attention and Productivity* 35 J. INFO. SCI. 758, 759 (2009) (observing that the behavior of those who contribute to peer production systems like YouTube act inconsistent with the standard tragedy of the commons theory, and positing that “those contributing to the digital commons perceive it as a private good, in which payment for their efforts is in the form of the attention that their content gathers in the form of media quotes, downloads or news clicked on.”).

³¹ *Id.*

attention sufficiently high, that some hopeful attention entrepreneurs will even exchange money for YouTube views.³²

Attention is the valuable commodity for which companies compete,³³ and which they strive to manipulate. The competition is in many ways a zero-sum game.³⁴ For example, one recent study of household Internet use comparing 2008 to 2013 concluded that households spend the same amount of time on the net generally, and the same amount of time on various websites, in terms of both breadth (how many websites are sampled) and depth (how deeply they are sampled). But households have redirected attention from chat and news sites to social network and video streaming sites.³⁵ For instance, Facebook, the leading social network,³⁶ has become a

³² See, e.g., Chase Hoffberger, *I bought myself 60,000 YouTube views for Christmas*, THE DAILY DOT, Jan 3, 2013, online at <http://www.dailydot.com/upstream/how-to-buy-youtube-views/>.

³³ Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMP. L. REV. 67, 79-81 (2008) (examining the growth of attention economics as a way to explain how online creation generates value but not in a pure monetary manner). *Id.* at 82 (“cultural assets or norms that make up the attention economy become part of the property system”). See also Radin, 15 J.L. & COM. at 515 “Cultural norms can substitute for legal property rights as an incentive for production.”

³⁴ Bracha & Pasquale, at 1164-65 (arguing that internet sites compete fiercely for attention in a “zero-sum competition for recognition” where “a high ranking is critical to success” and being ranked later than the first page of search results “is almost as bad as not being indexed at all.”); Seth F. Kreimer, *Censorship By Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 40 & n.84 (2006) (if consumers are satisfied with the first link they see, then search engine ordering has a winner take all effect); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1240 (2005) (competition among authors for shelf space is also a zero-sum game).

³⁵ Andre Boik et al, *The Empirical Economics of Online Attention* (2016).

³⁶ Facebook is the leading social network in 129 out of 137 countries in a recent study, with nearly 1.6 billion monthly active users. *World Map of Social Networks*, VINCOSBLOG, online at <http://vincos.it/world-map-of->

key interface between its users and news organizations. Facebook is used by many consumers as a primary source of news, in part because they can discuss that news with others.³⁷

In this fierce competition for attention, one can more easily draw attention by “riffing off popular cultural artifacts.”³⁸ Some of those cultural artifacts are also copyrighted expression.³⁹ In an attention economy, the use of copyrighted expression, licensed or not, gives the user a leg up on the competition.

[social-networks/](#), last viewed July 2, 2016.

³⁷ Julia Greenberg, *Facebook has Seized the Media, and That’s Bad News for Everyone but Facebook*, WIRED, Apr. 13, 2016, online at <http://www.wired.com/2016/04/facebook-seized-media-thats-bad-news-everyone-facebook/>.

³⁸ Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 739 (2010). See also Hannibal Travis, *Of Blogs, Ebooks, and Broadband: Access to Digital Media As A First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1531 (2007) (“The sheer number and obscurity of many blogs means that only those blogs that discuss prominent public officials, celebrities, controversial issues, or pop culture conventions get any attention.”). Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705, 769 (2005) (“In an attention economy, works positioned off of popular brands will have an easier time getting attention and establishing a personality relative to consumer expectations.”).

³⁹ James G. Webster, *Structuring a Marketplace of Attention*, in THE HYPERLINKED SOCIETY: QUESTIONING CONNECTIONS IN THE DIGITAL AGE 23, 30 (Joseph Turow & Lokman Tsui eds., 2008) (“[C]onsumer-generated production makes liberal use of the most popular (often copyrighted) output of culture industries.”), citing YOCHAI BENKLER, WEALTH OF NETWORKS; HENRY JENKINS, CONVERGENCE CULTURE; LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (New York: Penguin, 2004). Thus, “[i]f new outlets are simply repurposing existing content and if petty producers are simply playing with the culture’s most salient themes and products, fragmentation may be more apparent than real.” Webster, *supra*.

The presumption that cheap and easily reproducible information reduces the need for IP assumes there are no costs associated with costless duplication and dissemination. Information is abundant. The attention to deal with it is scarce. And scarcity of attention complicates the comedy that is often told about a world with low or no information costs. Indeed, information has become so abundant that it is often compared to pollution or smog.⁴⁰ One consumer's treasure is trash for many multitudes.⁴¹ And as the next Section explains, the drag on consumer attention is a costly externality imposed on consumers, increasing search and processing costs.⁴²

C. *The Costs of Attention Scarcity*

Attention is scarce in this world of information abundance. There are at least four types of deficiencies facing consumers dealing with attention scarcity. Information gluts and scarce attention resources leave us prone to distraction, consuming ever-narrowing bands of information deeply or everything shallowly. Often what we are offered is distorted by attention intermediaries, intentionally or in response to our preferences. Likewise, how we consume is distorted by our reactions to overabundance – leading us to partake of fewer, more popular options as the number of options increases. Even worse, attention scarcity leaves us more susceptible to intentional deception.

1. Distraction

Information is a double-edged sword under the constraint of attention scarcity. Information can crowd our field of vision, and “attention

⁴⁰ Pasquale, *supra* note 9, at 140 (“[A]nalogizing information overload in the cultural environment to pollution of the physical environment”); DAVID SHENK, *DATA SMOG: SURVIVING THE INFORMATION GLUT*, 30-31 (1997) (describing declining “signal-to-noise ratio” in contemporary communication).

⁴¹ Pasquale, *supra* note 9, at 165 (“[A]ny bit of expression that signals something to one who wants exposure to it may constitute noise to thousands of others.”).

⁴² See *infra* Part II.C.

economists ... those who help filter and categorize information,"⁴³ obtain value by persuading those who rely on them that the next interruption, the next email, the next Twitter follow, the next Facebook like, is critically important.⁴⁴ Information then becomes "an expensive luxury, for it may turn our attention from what is important to what is unimportant."⁴⁵

2. Depth

When information is abundant, it becomes impossible to know all there is to know about a subject of interest. The interested are then left with two equally unsatisfying options: become knowledgeable in an ever-narrowing band of knowledge, or keep an ever-shallower finger on the pulse of a broad number of topics.⁴⁶ Well-intended attention intermediaries can help consumers choose between those two options, but cannot spare consumers that choice.

3. Distortion

Information gluts, and the inevitable reliance on search engines, can also distort the information we perceive. For example, Facebook filters a user's feeds based on who the user has friended and which stories the user has liked in the past. This can lead to a feedback loop where the user hears only what she is comfortable hearing, and little of what challenges her.⁴⁷

⁴³ Desai, *supra* note 33, at 83 (summarizing RICHARD A. LANHAM, *THE ECONOMICS OF ATTENTION* 13-18 (2006)).

⁴⁴ Tristan Harris, *How Technology Hijacks People's Minds – From a Magician and Google's Design Ethicist*, MEDIUM, May 18, 2016; Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 952-53 (1997) (blaming commodification of human attention for generating "media designed to force images and information at us, rather than to respond to our requests").

⁴⁵ Herbert A. Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. 1, 13 (1978).

⁴⁶ See, e.g., Thorngate, *supra* note 29, at 265.

⁴⁷ SUNSTEIN, *REPUBLIC 2.0*; Brian Stelter, *Is Facebook an echo chamber? If so, they're OK with that*, CNN MONEY, June 30, 2016, online at

Moreover, users might see dramatically different presentations of the news and important events due to this self-selection effect.⁴⁸ In addition, Facebook's algorithm purports to identify trending stories based on what has become popularity, and that popularity itself can create a feedback loop.

Distortion is also created when content is free. When the content is free, attention is the product. The content is used to attract the attention, which is then sold to advertisers.⁴⁹ Of course, content that advertisers dislike is unlikely to be produced.⁵⁰ The history of media protection and media consumption provides some warnings about taking at face value the assumption that there are no costs to the costless provision of information. Television programming in the 60s and 70s was defined by non-excludability and non-rivalry. Programmers couldn't charge directly for the programming, so the programmers sold their audience to advertisers. This creates distortions – a programmer might produce a niche program that 500,000 viewers will love if it can sell the program directly to them. If it cannot, the producer will instead produce a program that has a modest or weak appeal to 5 million viewers, and sell 5 million pairs of eyes to advertisers.

<http://money.cnn.com/2016/06/30/media/facebook-echo-chamber-news-feed-interview/>.

⁴⁸ *Blue Feed, Red Feed*, WALL STREET JOURNAL, online at <http://graphics.wsj.com/blue-feed-red-feed/> (demonstrating how different Facebook might look to users when their news feeds are full of either “very conservative” or “very liberal” sources), last viewed July 4, 2016.

⁴⁹ Randal C. Picker, *Online Advertising, Identity and Privacy* 16 (June 29, 2009) (John M. Olin Program in Law and Economics Working Paper No. 475) (“When consumers pay for content, they are the patrons served by content producers. If consumers don't pay for content, the advertisers are the patrons and it is their interests that will be served.”).

⁵⁰ *Id.* at 17.

4. Deception

Finally, our ability to distinguish truth from error depends in part on the time and effort we have to pay attention.⁵¹ When those resources are taxed, we are less capable of distinguishing truth from error. Thus, attention scarcity makes us more vulnerable to deception. Advertisers may well benefit from pushing aggressively on boundary between truth and error, and may even use user-generated “advertising” to do so.⁵² Indeed, demands on consumer attention are sufficiently high that some scholars have raised the possibility of property or constitutional rights in attention.⁵³ In addition, in the copyright infringement context, demands on attention could theoretically reach the level where consumers struggle to identify and choose between authorized copies or performances of copyrighted works and infringing substitutes, even if they would prefer the former to the latter.⁵⁴

⁵¹ See, e.g., Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383, 1389 (2007).

⁵² See, e.g., Tushnet, *supra* note 38, at 743-45 (noting that advertisers might benefit from aggressive or potentially untrue ads generated by users and that effective advertising regulation might require a revision of the immunity offered to internet services providers through the Communications Decency Act).

⁵³ Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 517 (1996) (commenting on the possibility of propertizing attention); Jasper L. Tran, *The Right to Attention*, 91 IND. L.J. 1023, 1051 (2016) (positing that “the right to attention can be interpreted as part of the ‘right to privacy[’s]’ ‘bundle of rights’ as guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments and their penumbræ.”).

⁵⁴ Bradford, *supra* note 38, at 711 (2005) (noting that there is a threshold beyond which “[secondary] uses distort consumers’ ability to identify and choose between [copyrighted] works.”).

D. *Limits of Standard Proposed Solutions*

Some have suggested that a diversity of consumption options is worth the cost of some attention scarcity, and that algorithms and search tools can provide what consumers want. Both conclusions are somewhat in doubt. First, diversity doesn't solve problems of attention scarcity. Instead, diversity of source can exacerbate these problems. Second, reliance on search engines and online intermediaries to mitigate attention scarcity presents its own problematic distortions. In addition, the providers of those tools have interests that are consistent with presenting the illusion of consumer satisfaction, or shaping the contours of what satisfies, rather than seeking to satisfy consumers' information needs.

1. Too many options can worsen attention scarcity

Scarcity of attention undercuts romantic notions that consumers presented with an endless bounty of information goods will consume a broader variety of those goods. Some scholars suggested that information abundance would lead to more diversity of choices for consumers.⁵⁵ For example, Yochai Benkler posits that the disintermediation and bottom-up formation of the Internet should prevent market distortions in this new world without scarcity.⁵⁶

Counterintuitively, more options leads to less diversity with regard to what type of expression is consumed. When viewers are faced with more choices, the abundance of those choices put more pressure on viewers' attention. Those consumers respond by relying on heuristics. One could picture entertainment options as following a power curve. Most media consumed is in the short head of the curve, and few options are selected from the long tail.⁵⁷ One might imagine that if the long tail thickens, and

⁵⁵ BENKLER.

⁵⁶ BENLKER.

⁵⁷ Webster, *Structuring the Marketplace of Attention*, at 31, citing P.J. Boczkowski & M. de Santos, *When More Media Equals Less News: Patterns of Content Homogenization in Argentina's Leading Print and Online Newspapers*, 24 POLITICAL COMM. 167 (Apr. 2007) ("Not wanting to be scooped and relying heavily on commonly available wire services and electronic media,

more options are presented, consumers will experience a greater diversity of choice. But the opposite is true: When viewers have fewer choices, they consume *more* choices from the long tail, those options that demand less popular attention. When viewers have more choices, they consumer *fewer* options from the long tail, and more from the short head – the most popular offerings.⁵⁸ Scarcity of attention and a glut of choices may lead consumers to over-consume from a few well-known sources.

2. Reliance on algorithms doesn't solve attention scarcity

If we have a glut of information, we may well need help processing that information.⁵⁹ So search engines become central players, “supernodes”

newspapers increasingly replicate the same stories.”).

⁵⁸ Clay Shirky, *Power Laws, Weblogs, and Inequality*, NETWORKS ECON. & CULTURE MAILING LIST, Feb. 8, 2003, online at http://www.shirky.com/writings/powerlaw_weblog.html (“Diversity plus freedom of choice creates inequality, and the greater the diversity, the more extreme the inequality. In systems where many people are free to choose between many options, a small subset of the whole will get a disproportionate amount of traffic (or attention, or income), even if no members of the system actively work towards such an outcome.... The very act of choosing, spread widely enough and freely enough, creates a power law distribution.”); James G. Webster, *Structuring a Marketplace of Attention*, in THE HYPERLINKED SOCIETY: QUESTIONING CONNECTIONS IN THE DIGITAL AGE 23, 29 (2008) (“Ironically, as we look across media that offer consumers progressively more options, audiences become more, not less, concentrated.”), citing M. Hindman, *A Mile Wide and an Inch Deep: Measuring Media Diversity Online and Offline*; J.G. Webster, *Diversity of Exposure* in MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS, 327-47, 309-25; J. Yim, *Audience Concentration in the Media: Cross-Media Comparisons and the Introduction of the Uncertainty Measure*, 70 COMM. MONOGRAPHS 114 (2003).

⁵⁹ Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 85 (2015) (internet platforms may “help to solve the problem of attention scarcity: users with limited time must decide what drops to drink out of a sea of content.”), citing Michael H. Goldhaber, *The Attention Economy and*

through which consumer attention is filtered.⁶⁰ Google,⁶¹ its subsidiary YouTube, and Facebook all make money by selling search results and data generated from how our attention flows to advertisers, just like broadcasters and programmers in the 70s.⁶² Scarcity of attention is the unavoidable condition in part responsible for recreating the “degrading effect of mass-consumption commercial models” of the 60s and 70s.⁶³ When

the Net, 2 FIRST MONDAY (1997),
<http://firstmonday.org/article/view/519/440>.

⁶⁰ Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1165 (2008) (search engines work like supernodes because “a very small number of significant players dominate the lion's share of the search engine market, which has inherent structural characteristics that accelerate concentration and erect high barriers to entry. The result is that very few entities control the critical junction of Internet communication, and this situation generates problems similar to those diagnosed in broadcasting long ago.”).

⁶¹ James Gleick, *How Google Dominates Us*, N.Y. Rev. Books, Aug. 18, 2011, <http://www.nybooks.com/articles/archives/2011/aug/18/how-google-dominates-us> (“The merchandise of the information economy is not information; it is attention. These commodities have an inverse relationship. When information is cheap, attention becomes expensive. Attention is what we, the users, give to Google, and our attention is what Google sells--concentrated, focused, and crystallized.”).

⁶² J.M. Balkin, [Media Filters, the V-Chip, and the Foundations of Broadcast Regulation](#), 45 DUKE L.J. 1131, 1145 (1996) (“In the Information Age, the informational filter, not information itself, is king.”); James Boyle, [Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors](#), 66 U. CIN. L. REV. 177, 194 (1997) (noting that filtering technologies supply state with “a different arsenal of methods with which to regulate content”).

⁶³ Bracha & Pasquale, *supra* note 61, at 1159, citing BENKLER, THE WEALTH OF NETWORKS 260-61. *See also* Derek E. Bambauer, *Middlemen*, 64 FLA. L. REV. F. 64, 65 (2012) (“[T]heories of disintermediation rapidly proved inaccurate, if not directly contradicted by an information environment dominated by attention scarcity and cognitive economics..”); Lucas D.

hundreds of thousands of options are available, consumers tend to shift to a few familiar ones. The selection of filter can then distort the information that is provided. For example, Facebook is now the primary interface between consumers and media outlets. As a result, Facebook can dictate to the news industry “how resources are spent and what stories are told.”⁶⁴ So when Facebook prioritizes video, news outlets with the money add a video team.

Facebook’s influence is not only format driven, but can distort content as well. For instance, accusations recently surfaced that human editors at routinely suppressed news stories of interest to conservative readers.⁶⁵ Even if untrue, the accusation is startling because Facebook’s central placement in the attention economy makes it far too likely that such an editorial decision *could* distort content and alter public perception. An intentional distortion of Google’s search algorithm would have similar frightening result. Relying on search engines to resolve all problems with information gluts likely puts too much responsibility in the hands of search engines,⁶⁶ a responsibility that providers of search technology may not be financially or legally motivated to meet.

Some have presumed that cheap and easily reproducible information reduces the need for IP assumes there are no costs associated with this costless dissemination and duplication.⁶⁷ But the drag on consumer attention is a costly externality imposed on consumers, increasing search and processing costs. In a world with a glut of

Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC’Y 169, 169-70 (under certain conditions, the new intermediaries of Internet communication may replicate many of the ills produced by the old intermediaries of the mass-media system).

⁶⁴ See Greenberg, *supra* note 37.

⁶⁵ Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO, May 9, 2016, online at <http://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006>.

⁶⁶ See, e.g., Harris, *supra* note 48.

⁶⁷ Lemley, *supra* note 2, at 495.

information, every new entry imposes new processing costs on consumers and the public as a whole.

E. *Trademark Protection and Consumer Attention*

IP rights might, however, help us solve the problem of information gluts and scarcity of attention. That possibility is clear enough in the trademark context. A trademark is an “attention getting symbol’ used basically, and primarily, to make clear to the customer the origin of the goods or the service.”⁶⁸ Trademark law provides protection for a valid mark because the trademark has a key role in helpfully channeling – and preventing costly imposition on – consumer attention. Indeed, the multifactor test used to determine whether alleged trademark infringement is likely to confuse consumers often directly inquires into the attention of consumers in a given purchasing context.⁶⁹ In addition, the frequently criticized⁷⁰ cause of action for initial interest confusion looks primarily at diversion of consumer attention as a significant harm, even if the consumer corrects the confusion before a purchase is made.⁷¹

⁶⁸ *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 44 (1st Cir. 1991), citing 1 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 11.17 at 476 (2d ed. 1984).

⁶⁹ See, e.g., *Nikon, Inc. v. Ikon Corp.*, 803 F. Supp. 910, 920 (S.D.N.Y. 1992), citing, *inter alia*, *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999, 1007 (2d Cir. 1983) (“Consumer sophistication refers to the care and attention a consumer takes in making a purchase.”); *Am. Home Products Corp. v. Barr Labs., Inc.*, 656 F. Supp. 1058, 1068 (D.N.J.), *aff'd*, 834 F.2d 368 (3d Cir. 1987) (in determining likelihood of confusion, courts are to consider “the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase.”).

⁷⁰ See, e.g., Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 825 (2004).

⁷¹ *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1018 (9th Cir. 2004) (“Initial interest confusion occurs when the defendant uses the plaintiff’s trademark in a manner calculated to capture initial consumer attention, even though no actual sale is finally completed as a result of the

The next Part provides a theoretical framework for how copyright protection may also moderate the effect of attention scarcity and might therefore be justified even though the costs of creating expressive works may be dropping.

III. COPYRIGHT PROTECTION AND ATTENTION SCARCITY

In light of evidence that the cost of creating and distributing copyrighted expression have fallen, some have advocated for lower levels of copyright protection. Holding other variables constant, if it costs less to create and disseminate a song or a novel, then less protection is necessary to incentivize that creation and dissemination, or so the argument goes. But that argument does not account for the type of entry most likely to occur in an attention economy when copyright protection is narrowed.

In this economy, attention is the scarce resource, and a successful copyrighted work garners attention. When copyrighted protection is narrower, a new entrant is more likely to create a close substitute for an existing work already available to consumers. Economic accounts of product differentiation and rent dissipation suggest that if those substitutes are too close, such entry will be wasteful.⁷²

On the other hand, if copyright protection is maintained at a higher level, the cost of creating around protected works constrains entry, and we should expect entry that is less redundant, and therefore less wasteful and more valuable compared to entry under weaker copyright protection. The same desire to free-ride on successful attention-grabbing expression will remain, but copyright protection will moderate the effect by shaping the type of entry we see.

A. *Copyright and Attention*

Copyright protection incentivizes the creation and dissemination of an author's expression by granting exclusive rights to exploit the expression. The owner of copyright has the exclusive rights to copy,⁷³

confusion.") (internal citations omitted)

⁷² See *infra* Part III.B.

⁷³ 17 U.S.C. § 106(1).

distribute,⁷⁴ perform,⁷⁵ and display the work.⁷⁶ In addition, the owner has the exclusive right to create derivative works based on the protected work.⁷⁷ All these rights are subject to limitations, the most important of which is the right of a new entrant to violate one or more of these rights without liability if the use is a fair use.⁷⁸

As with trademark law, courts recognize diversion of attention as a remediable harm – or at least a signal of problematic intent – in many copyright cases. Courts understand that alleged infringers of copyrighted works draw consumer attention by using the copyrighted expression of others. For example, Justice Holmes famously concluded that consumers need not be directly charged for music performed in dining rooms and restaurants for copyright liability to lie. “If the music did not pay,” he noted, “it would be given up. If it pays, it pays out of the public’s pocket.”⁷⁹ In dancehall and flea market cases, where the owner of the venue faces a claim of secondary liability, courts take note that the use of copyrighted works, like music, “attracts attention” to the venue, and venue therefore directly benefitted from its use.⁸⁰ Websites full of bootleg videos or songs draw

⁷⁴ *Id.* § 106(3).

⁷⁵ *Id.* § 106(4, 6).

⁷⁶ *Id.* § 106(5).

⁷⁷ *Id.* § 106(2).

⁷⁸ *Id.* § 107.

⁷⁹ *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917).

⁸⁰ *See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996) (holding swap meet operators “reap[ed] substantial financial benefits from admission fees, concession stand sales and parking fees, all of which flow[ed] directly from customers who want [ed] to buy the counterfeit recordings” available at the swap meets). *Fonovisa* follows a line of cases imposing vicarious liability on dance hall operators “where infringing performances enhance[d] the attractiveness of the venue[s] to potential customers.” *Id.* *See also* *Arista Records, Inc. v. Flea World, Inc.*, No. CIV.A. 03-2670(JBS), 2006 WL 842883, at *12 (D.N.J. Mar. 31, 2006) (same). *See also* *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 1003 (E.D. Cal. 2004) (same, with regard to the unauthorized use of copyrighted works in exhibition halls); *Polygram Int’l Pub., Inc. v. Nevada/TIG, Inc.*, 855 F. Supp.

clientele seeking free copies or free enjoyment of that content.⁸¹ The use of copyrighted software can even improve the efficiency of a website, helping the site retain consumer attention for longer than it otherwise might.⁸² Moreover, the use of a copyrighted character (or a reasonable imitation of that character) in a film can help draw attention to the film, just as the appearance of a copyrighted character on a t-shirt can help sell the t-shirt.

An intent to garner attention does not always equate to an actionable claim of copyright infringement. Copyright protection does not reach fair uses,⁸³ and many forms of parody or commentary gain attention by bringing the target of the parody or commentary to mind.⁸⁴ But the Supreme Court has noted that using the original “merely . . . to get attention or to avoid the drudgery in working up something fresh” entitles the borrower to a much weaker claim of fairness.⁸⁵ Scholars have likewise noted that creative expression can be subject to overgrazing that dissipates its power to draw attention, distinct from question of trademark confusion.⁸⁶

1314, 1333 (D. Mass. 1984) (same).

⁸¹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1010 (9th Cir. 2001), as amended (Apr. 3, 2001), *aff'd sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002), and *aff'd sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1045 (9th Cir. 2013).

⁸² *Adobe Sys. Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1052-53 (C.D. Cal. 2001).

⁸³ See 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

⁸⁴ *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1145 (C.D. Cal. 1998), *aff'd*, 296 F.3d 894 (9th Cir. 2002) (“Even if [the alleged infringer] knew that parodying a popular product would attract favorable attention, this knowledge alone cannot erase their First Amendment interests in commenting on Barbie: if it did, then no unknown group could criticize popular products because the accusation of trying to gain attention would always exist.”).

⁸⁵ *Campbell*, 510 U.S. at 580.

⁸⁶ Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907,

As we see, copyright case law has an account about diversion of attention that differs from the trademark account.⁸⁷ Trademark law is aimed primarily at preventing a competitor from passing off its goods as the marked goods. Copyright law instead allows the copyright owner to capture the benefit of the attention attracted by the creative expression of the work. Trademark law prevents consumer confusion, while copyright law prevents attention diversion. The following section considers the standard incentive account for copyright protection, the alternative product differentiation and rent dissipation accounts, and considers how copyright protection may have a continuing role in helping consumers handle information glut and attention scarcity. These roles suggest that calls to reduce copyright protection based on changes in costs of creation and dissemination may be premature.

B. *Incentives, Product Differentiation, and Rent Dissipation*

The standard economic account presumes that if copyright protection is too strong, it might over-encourage initial entry.⁸⁸ Thus, if

918-19 (2004); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 485-86 (2003) (discussing forms of “overgrazing” possible in the case of intellectual property, including the chance that overuse of a particular image might generate “confusion, the tarnishing of the image, or sheer boredom on the part of the consuming public”); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 96-97 (2001) (observing that limited consumer attention is a common pool resource that producers of works will tend to overharvest); Bradford, *supra* note 38, at 765 (2005) (“To avoid this aspect of “overgrazing,” secondary uses most likely to distort audience perception should remain subject to property remedies like an injunction.”).

⁸⁷ This matters because the Supreme Court held in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), that one cannot use trademark law to prevent the unauthorized use of a work for which copyright protection has expired.

⁸⁸ See, e.g., Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644, 1647 (2011) [hereinafter Abramowicz, *Uneasy Case*]

there is an information glut and too much entry, the prescription, under the standard account, is less copyright protection. If protection is lower, then many potential creators will be less likely to enter and will instead utilize their efforts to drive truck or what have you.⁸⁹ Thus, fewer copyright works will enter the market, potentially reducing information glut.

The standard account doesn't account for attention scarcity. In a system with significant attention scarcity and low levels of copyright protection, the rational move for any new entrant is to create a new work that is as similar to an existing, successful work as possible. The prior successful work will garner attention, making it more likely that the entrant secure a return on its investment. The weaker the copyright protection, however, the more likely an entrant will imitate expression rather than ideas or genre conventions, because there is less encouragement not to. The effect is exacerbated in an attention economy.

The exclusive right to copy and to adapt protected expression both police against wasteful duplicative entry. The right to copy reaches not only verbatim copies but also substantially similar copies.⁹⁰ The right to create derivative works reaches works that are not copies, but that appropriate protectable elements from the original without necessarily infringing the

("It is possible that we would be better off with copyright law that is somewhat weaker, not in spite of the fact that this would lead to the production of fewer works, but because it would do so.").

⁸⁹ Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 488 (1996) ("As a result, broadening copyright imposes a second critical cost: the lost value society would have associated with the alternative investments to which these resources would otherwise have been devoted."); *Cake: Flying High After A Record Low*, ALL THINGS CONSIDERED, Mar. 3, 2011, online at <http://www.npr.org/2011/03/03/134233768/cake-tk> (Cake front man John McCrea observed, after the bands 2011 album debuted at No. 1 on the Billboard 200 after selling just 44,000 copies, "I see music as a really great hobby for most people in five or 10 years. I see everybody I know, some of them really important artists, studying how to do other jobs.").

⁹⁰ Dan L. Burk, *Inventing Around Copyright*, 109 NW. U. L. REV. 547, 558 (2015).

exclusive right to copy.⁹¹ Standard incentive analysis nevertheless suggests that the derivative right is not efficient because it is not necessary to encourage initial creation.⁹² But a product differentiation / rent dissipation account of copyright protection, advanced independently by Christopher Yoo and Michael Abramowicz,⁹³ recognizes that modest controls on market entry may well improve consumer welfare.⁹⁴ The derivative right allows the copyright owner to create adaptations of reasonably high quality, without racing against subsequent entrants who would rush to obtain first mover advantages and, *ceteris paribus*, bring lower quality adaptations to market.⁹⁵

⁹¹ Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 372-373 (2005) [hereinafter Abramowicz, *Derivative Right*] (arguing that a new work infringes the reproduction right if it would cause significant demand diversion from the original, and the derivative right if would cause significant demand diversion from "actual or hypothetical" adaptations that the owner might plausibly bring to market).

⁹² Abramowicz, *Derivative Right*, *supra* note 91, at 329-30.

⁹³ Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004); Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33 (2004); Abramowicz, *Derivative Right*, *supra* note 91, at 343.

⁹⁴ Abramowicz, *Derivative Right*, *supra* note 91, at 321. *See also* Abramowicz, *Uneasy Case*, *supra* note 88, at 1665 ("Rent dissipation theory [] recognizes that the more works that exist, the more the marginal work is likely to be similar to existing works, and thus the lower the value of the marginal work."). *But see* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 268-69, 271-273 (2014) (arguing that the low incentive benefit from an entitlement to secondary markets will be outweighed by higher access costs, particularly for heterodox derivatives); Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345 (2008) (calling for an end to the derivative work right).

⁹⁵ Abramowicz, *Derivative Right*, *supra* note 91, at 319-20.

If copyright protection is narrowed because of a reduction in the costs of creation and dissemination, we should expect several changes in the output offered by new entrants, compared to a circumstance where we hold copyright protection constant.⁹⁶ First, one should expect less overall entry. If protection is narrower, financial incentives will be lower. Thus, fewer entrants will seek financial remuneration by selling copies. Second, one should expect *less creative* entry, at least if there is any mismatch between the reduced protection and the estimated reduction in cost to create and distribute works. If incentives are reduced too drastically, otherwise valuable entry will be discouraged. Perhaps, in light of the current information glut, we should prefer lower entry, even if we lose valuable copyrighted expression. Unfortunately, we are still likely to get entry with reduced protection, but it is more likely to be wastefully duplicative and therefore of relatively low value.

Narrower protection means lower financial incentives, but it does not reduce the value of entering to appropriate some of the attention garnered by a successful previous work. Indeed, duplicitous entry will become more likely. Consider *Figure 1* and *Figure 2*, in the Appendix. In an attention economy, holding other things constant, a new entrant will maximize the possibility of garnering attention by creating a work that is similar to a successful prior work. But narrowing copyright protection would likely lead to more entry of close substitutes, rather than more creative works. New entrants will still contribute to the information glut, but that entry is more likely to be wasteful and duplicative of prior works, and less likely to be a valuable new entry.

Lower levels of copyright protection may lead to lower numbers of new copyrighted works because there are fewer incentives to create.⁹⁷ But lower levels of copyright protection may result in overentry of redundant, rent-dissipating works because that copying will be valuable as a means to attract attention.⁹⁸ Rent dissipation is likely to occur as entrants race to be

⁹⁶ I assume here that the risk profile of each entrant is consistent. Recent scholarship suggests that creators might be risk seeking. Andres Sawicki, *Risky IP*, 48 LOY. U. CHI. L.J. __ (2017).

⁹⁷ See, e.g., Abramowicz, *Uneasy Case*, *supra* note 88, at 1647.

⁹⁸ *Id.* at 1648. Abramowicz argues that rent seeking by new entrants

the first to adapt a new work or free ride on the attention it has attracted.⁹⁹ The more redundant the work, the more likely the defendants use will drag on consumer's scarce attention. On the other hand, maintaining the current level of copyright protection may have two salutary effects on the type of new entry: less redundant entry, and clearer differentiation between competing expression.

C. *Constraining Entry to Reduce Attention Drain*

First, slowing down expression by artificially increasing the cost of production through permissions and licensing fees, or threat of litigation, might benefit the public as the creator internalizes the cost of contributing to the glut, and therefore disseminates less information – ideally only the most valuable information – in order to reduce some of those costs. While

whose offerings are close substitutes for one another is more likely to reduce social welfare, because rent seekers would at a minimum dissipate all the rents for unauthorized derivatives, as well as a portion of the rent the author would otherwise obtain from the derivative right. Abramowicz, *Derivative Right*, *supra* note 91, at 348, 358-59 (2005). *See also id.* at 350-51 (describing how property rights can reduce or entirely avoid rent-dissipating races). Pursuant to Abramowicz's analysis, the derivative right can prevent rent dissipating demand diversion, as well as "the suboptimal early release of adaptations." *Id.* at 359-60 ("A derivative right greatly reduces the possibility of inefficient races after the initial creation of copyrighted expression."). Yoo on the other hand argues that strong copyright protection may not harm access because increased entry will lead more competitors to enter the market with close substitutes, and describes that effect as access increasing. Yoo, *supra* note 93. But Yoo's use of close substitutes must differ from Abramowicz's use. Yoo is not contemplating infringing entry, but instead a high volume of entry triggered by strong incentives, which allows for increased access as close but not infringing substitutes compete with one another on price.

⁹⁹ Meurer, *supra* note 86, at 96-97 ("[M]ultiple producers ... sometimes race to get to the market first with essentially duplicative works.").

maintaining protection will continue to encourage entry generally, maintaining protection will also constrain the type of entry we see. That constraint should work to the public benefit.

This proposal builds in part on Joseph Fishman's recent recognition of the benefit of constraint in the context of copyrighted expression.¹⁰⁰ Constraint can increase creativity. The phenomenon has been recognized in cognitive psychology, management studies, and art history.¹⁰¹ Research in these disparate disciplines conclude there is an overlooked creative benefit to constraint. Consider the potential difference between writing free verse and writing a verse in iambic pentameter, or haiku. The constraint created by the form imposes some rigor in the process and that rigor can in turn improve the output. When an artistic endeavor is subject to constraint, whether imposed by genre or medium requirements or resource limitations, the output is often more original, arguably more valuable, and a better fit for the target audience or context than it would have been in the absence of that constraint. As Fishman noted, creativity "thrives best not under complete freedom, but rather under a moderate amount of restriction."¹⁰²

Fishman likewise recognized that copyright protection – the requirement that an author must do something distinguishable from earlier protected output in order to avoid copyright liability, or seek permission to appropriate earlier expression – can also provide a valuable constraint. Copyright protection not only bars verbatim copying of expression, but also polices the creation of "substantially similar" copies and derivative works (like adaptations or sequels).¹⁰³ For example, the restraint of copyright protection is the reason we have *Star Wars* instead of the *Flash Gordon* remake that George Lucas wanted to film, but couldn't license.¹⁰⁴ Without a derivative work right, Lucas would have given us a *Flash Gordon* retread.

¹⁰⁰ Joseph Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333 (2015).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1336-37.

¹⁰³ See *supra* note 90 and accompanying text.

¹⁰⁴ Fishman, *supra* note 100, at 1336, citing J.W. RINZLER, THE MAKING OF STAR WARS 4 (2007).

Instead, he created a film franchise that captured the imagination of multiple generations and was recently valued by Fortune magazine as having a value of nearly \$42 billion.¹⁰⁵

Copyright protection's moderate constraint may also reduce the impact of information glut by provide a sorting function. If a new entrant must enter more cautiously to avoid a valid claim of copyright infringement, not only is the new entrant more likely to provide a higher value creative good, but new entrants collectively are likely to provide a smaller number of higher value goods. This in turn moderates the effect of the output glut on consumer attention. The effect can hold even though costs are not imposed directly for the creation of the glut. Weakening copyright protection too drastically would squander those beneficial effects. While weaker rights may lead to depressed creative entry, it may lead to more wastefully duplicative derivative entry, where new entrants race to draw attention of consumers using expression already created.

Second, the ability of copyright to maintain some boundaries between otherwise close competitors might provide important information to consumers. The exclusive right to make derivative works allowed Lucasfilm before and Disney now to maintain a cohesive universe, to control the order and volume of Star Wars related copyrighted expression. Consumers find some value in the ability to distinguish authorized from unauthorized Star Wars merchandise, films, stories, and etc. That's a role that the copyrighted expression performs as effectively in its context as any trademark or branding.¹⁰⁶ The wider the berth that Star Wars appropriators must give – appropriate the genre, not the characters, dialogue, vehicles; or engage in parody, not mere preemption of derivative market – the clearer the difference and the lower the attention burden on consumers.

¹⁰⁵ Jonathan Chew, *Star Wars Franchise Worth More than Harry Potter and James Bond, Combined*, FORTUNE, Dec. 24, 2015, online at <http://fortune.com/2015/12/24/star-wars-value-worth/>.

¹⁰⁶ Cf. Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1423 (2013) (noting that consumers derive value from being able to distinguish authorized from unauthorized expressive content).

D. *Potential Obstacles and Initial Responses*

One salient critique of this attention economy defense of the current boundaries of copyright protection is that it may discount the value of “heterodox” derivatives. When the copyright owner has an exclusive right to develop derivative markets, it may well be that entrants with a heterodox or unconventional take on the copyrighted expression will face higher access costs, and those access costs will outweigh what some have described as the low incentive benefit of the derivative right.¹⁰⁷ The fair use right, which allows entry that is transformative and does not threaten the market for the original, should be sufficiently broad to account for truly unconventional entrants. To the extent that the perspective is truly different from the perspective of source work, the derivative is likely to be transformation and likely not to divert demand from the original or from authorized derivatives.

But the boundaries of fair use should also be subject to analysis from the perspective of attention scarcity. As discussed above, information overload is an externality imposed on consumers.¹⁰⁸ Frank Pasquale argues that fair use is “a natural way of ‘cleaning up’ the mess of expression encouraged by copyright law.”¹⁰⁹ Pasquale focuses primarily on privileging categorizers to do their work, and perhaps with regard to those categorizers who process metadata, there is good cause for a strong safe harbor.¹¹⁰ There

¹⁰⁷ Bracha & Syed, *supra* note 94, at 268-69, 271-273.

¹⁰⁸ See *supra* Part II.C; Pasquale, *supra* note 9, at 166.

¹⁰⁹ *Id.*

¹¹⁰ Compare Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1645 (2009) (arguing that fair use should protect technology that copies expression and that “acts of copying that do not communicate the author's original expression to the public do not typically constitute copyright infringement.”), with *But see* Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 624-25 (2011) (arguing that fair use properly requires new technologies and internet intermediaries to account for risk of loss imposed that unlicensed use imposes on copyright owners, including the risk of unintended exposure).

are reasons, outlined above, to be skeptical of categorizers and attention economists.¹¹¹ Nevertheless, in a world with a broader fair use exception, we are likely to have more close substitutes for copyrighted expression, fewer clear lines, and more overlap. If the barrier to qualify for fair use were lowered, we would expect overentry of redundant, rent-dissipating works. The user's profits would more likely come at the expense of the copyright owner,¹¹² the user's output would more likely be a marginal or redundant addition to the mass of copyrighted works, and thus less likely to be beneficial to society. A "Babel of signals" is more likely, not less likely, with broader exceptions for duplicative fair use.¹¹³

Finally, Laura Bradford has argued that cognitive research suggests broader fair use exceptions might be sensible in some cases of close substitutes because consumers are likely to resist heterodox messages, and because the existence of one "authorized" line of derivative expression meets consumer needs, making it more likely their attention will not be diverted by multiple close entrants.¹¹⁴ But as Bradford notes, there is a level at which frequent repetition is likely to distort audience perception. Thus, "frequent exposure may override the efficacy of other informational cues such as source and so confuse consumers as to authorized and illicit interpretations."¹¹⁵ In this attention economy, there is some value to consumers in ensuring that derivative expression adds something to the discourse, and care should be taken before assuming that the current contours of the derivative right and the fair use exception miss the mark.

IV. CONCLUSION:

There is a cost to costless creation – the glut of expression imposes search costs on consumers trying to find the highest value use for their limited attention bandwidth. Limited or non-existent copyright protection

¹¹¹ See *supra* Part II.D.

¹¹² Abramowicz, *Uneasy Case*, *supra* note 88, at 1668.

¹¹³ ORRIN KLAPP, *OVERLOAD AND BOREDOM 2* (Greenwood Press 1986).

¹¹⁴ Bradford, *supra* note 38, at 761-764 (2005).

¹¹⁵ *Id.* at 765.

exacerbates the information glut – we may see lower entry, but nevertheless entry of works that are more likely to impose costs on consumers’ scarce attention because they are wastefully redundant close substitutes for existing expression. Modest copyright protection not only continues to reward and/or incentivize creativity, but also may constrain the type of entry we see, encouraging new works that are less redundant and more original, and thus impose lower costs on consumer attention. In light of this potential for copyright protection to alleviate some of the externalities imposed by information glut, calls to reduce IP rights based solely on reductions in the cost of generating and distributing information may be somewhat premature. Some caution is warranted before sacrificing the attention-assisting aspects of IP rights based solely on the suggestion that we may require a lower level of ex post incentives to trigger ex ante production of expressive content, especially in this modern information economy when we are already, as David Bowie might say, up to our necks in it.¹¹⁶

¹¹⁶ David Bowie, *Changes*, on HUNKY DORY (RCA Records 1971).

APPENDIX

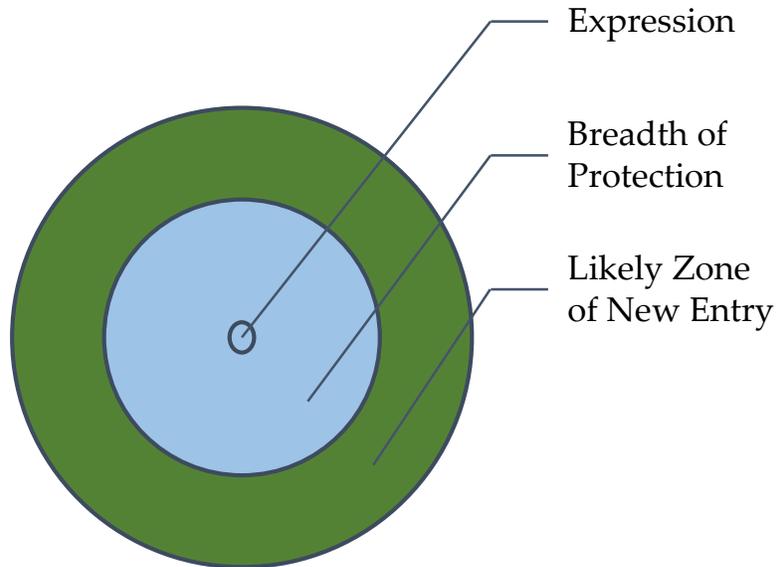


Figure 1 – Current Breadth of Copyright Protection

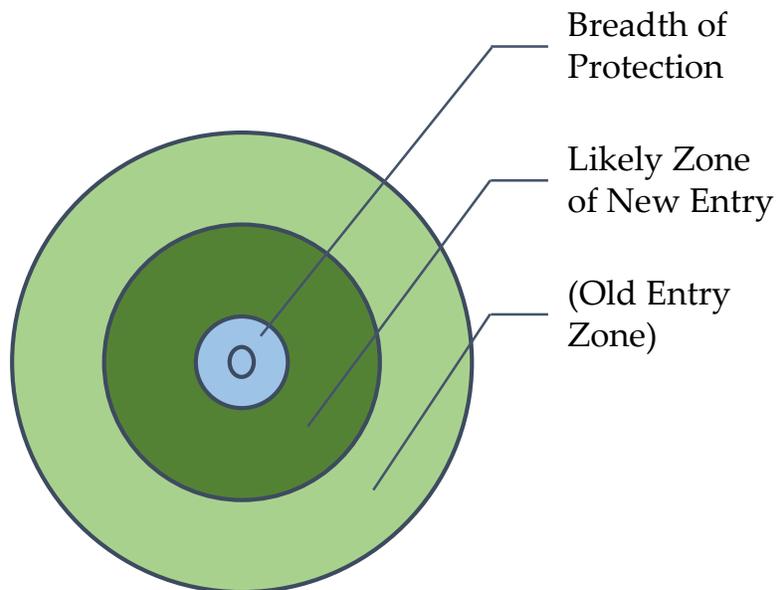


Figure 2 – Narrower Copyright Protection