

# COPYRIGHT LAW AS A SILENCING RESTRICTION ON NONINFRINGEMENT MATERIALS: UNVEILING THE SCOPE OF COPYRIGHT'S DIVERSITY EXTERNALITIES

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## ABSTRACT

The main argument presented in this Article is that the harms and social costs of copyright cannot be summarized just in terms of enclosure and exclusion. Copyright law, I will argue, also has a silencing effect toward noninfringing creative materials of other independent creators and producers.

Recent scholarly work has emphasized copyright's "dynamic effect," that is, the ongoing influence of expansive copyright protection toward an enclosure of the creative commons, and diminishment of cultural diversity. On the whole, however, this broad approach regarding the social cost of copyright in terms of diversity has focused only on instances and frameworks of creative activity in which a secondary author wishes to make use of existing copyrighted material, while a copyright owner (often a media conglomerate) imposes obstacles and limitations against such a use.

The argument presented in this Article goes one step further in exploring the nexus of copyright and diversity. As I will show, an expanded copyright regime diminishes diversity in a more intrusive

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manner. Extensive copyright protection also has a chilling effect on the variety and diversity of creative works that are both noninfringing and not affiliated to copyright portfolios, or to the communicative activity, of commercialized corporate media. This outcome derives from the advantages extensive copyright protection affords to excessive exposure of corporate media's creative materials, as well as to the economic and cultural dominance of these media products.

This Article demonstrates how the unique characteristics of media products, as public and solidarity goods, together with the advantages that extensive copyright protection grants large-scale corporate media, prevent alternative, noninfringing creative materials from reaching effective audience attention and competing equally for the public's attention and cultural preferences. Extensive copyright protection does so, first, by enabling commercialized media to deepen their market dominance and the cultural centrality of their products through ancillary and derivative markets, and second, by producing a "solidarity value" for the commercialized and commodified nature of media products. As this Article demonstrates, it is in this sense that extensive copyright protection has an undesirable silencing effect on noninfringing creative materials, and further diminishes diversity by inducing a wasteful competition among corporate media's relatively homogeneous products.

## INTRODUCTION

There is something misleading in the tendency to analyze the harms of copyright law just in terms of enclosure and exclusion.<sup>1</sup> There is also something misleading in the tendency to presume that copyright's limitations and burdens apply only with regard to further uses of copyrighted material itself.

Recent scholarly work has emphasized the chilling effect extensive copyright protection has on the diversity of additional creative works, which use existing copyrighted material as one of their main inputs.<sup>2</sup>

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1. By "enclosure and exclusion," I am referring to the restrictions and limitations copyright imposes on the public and on other creators with regard to the uses of copyrighted material. See *infra* Part I.

2. See Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81, 81 (2002) [hereinafter Benkler, *Intellectual Property and the Organization of Information Production*]; Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 400-12 (1999) [hereinafter Benkler, *Free As the Air to Common Use*]; Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853,

1866–80 (1991). Copyright protection has expanded in the last century, and especially in the last decade. Consider the following examples. First, Congress extended the term of copyright protection by twenty years in 1998. See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827–28 (1998) (codified as amended at 17 U.S.C. §§ 101, 108, 203(a)(2), 301(c), 302, 303, 304, 504 (2000)). The general term is now the life of the author plus seventy years; the term for anonymous works, pseudonymous works, and works-for-hire is ninety-five years from the year of the work's publication or 120 years from the year of its creation, whichever comes first. See 17 U.S.C. § 302. The constitutionality of the Sonny Bono Copyright Term Extension Act was challenged unsuccessfully in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). See *infra* Part II.C.1.

The second example refers to the issue of derivative works. Congress and the courts have intensified the extension of copyright protection to restrict works that borrow from already copyrighted works, but bear significant independent expression. Such works, like unauthorized translations, for example, once were not regarded as a copyright infringement. See *Stowe v. Thomas*, 23 F. Cas. 201, 201–08 (C.C.E.D. Pa. 1853) (No. 13,514) (holding that a German translation of *Uncle Tom's Cabin* was a new work and not merely a reproduction of the original). Today, copyright law recognizes a very broad exclusive right to prepare all manners of derivative works. See 17 U.S.C. § 106(2) (2000). In granting the derivative right, as part of the Copyright Act of 1976, Congress broadened and expanded the previous various exclusive rights to adapt certain types of work in certain additional media that were set forth in the Copyright Act of 1909. See Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075. Courts have given a very broad interpretation to the exclusive right to make derivative works, as well as to the exclusive reproduction right. See *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) (holding that a multiple-choice trivia quiz regarding the television series *Seinfeld* infringed the copyright in the series episodes); *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 163 (2d Cir. 1986) (holding that a set of still photographs of a ballet may infringe the copyright in an original choreographic work); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (holding that imitative greeting cards were infringing, even though the trial court found the art work "somewhat different" than the original copyrighted material); *infra* Part II.C.1.

The last example of copyright's expansion refers to the issue of digital technology in general and the Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 103, 1201, 112 Stat. 2860, 2863–65 (1998) (codified as amended at 17 U.S.C. §§ 103, 1201 (2000)), in particular. Digital technology further constricts the public domain by narrowing the scope of uses that were traditionally outside the copyright owner's prerogative or enforcement power. For one thing, merely viewing or listening to a work on the Internet may infringe the owner's copyright because such Internet browsing involves the temporary replication of the work in the RAM of the user's computer, which, recent cases suggest, might constitute a potentially actionable reproduction of the work. See, e.g., *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294–95 (D. Utah 1999). Furthermore, the Digital Millennium Act prohibits both the circumvention of technology that controls access to copyrighted works and the manufacture and sale of devices that are primarily used to circumvent technological controls over access to, or use of, copyrighted works. See 17 U.S.C. § 1201(a)(1)(A), (a)(2)(A), (b)(1)(A) (2000) (banning the circumvention of access controls, trafficking in devices for circumventing access controls, and trafficking in devices for circumventing use controls). The DMCA provides the legal foundation for supplanting traditional copyright (and the public domain) with an all-encompassing regime of digital encryption and technological control. Under the DMCA, content providers may effectively prevent circumvention to stop traditional copyright infringement even when the encrypted work is largely or entirely in the public domain, and even when the desired use would otherwise be permitted under copyright law. Although the DMCA purports to protect only the integrity of technological measures controlling access to, and uses of, works protected by copyright, its prohibitions would also encompass works containing little copyrighted material (such as a public domain literary work with a new introduction) and public domain works subject to the same technological control measures as copyrighted works (such as where public domain and copyrighted works are in the same database). See David Nimmer, *A Riff on Fair Use in the Digital Millennium*

In a society that embraces diversity as an important value in matters related to freedom of speech<sup>3</sup> and to the general well-being of society's individuals,<sup>4</sup> this scholarly work is of profound importance. It emphasizes the required caution and scrutiny in the construction of copyright's scope, even when taking into account copyright's role as "the engine of free<sup>5</sup>—a role that provides an economic incentive for the creation

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*Copyright Act*, 148 U. PA. L. REV. 673, 727–32 (2000) (presenting case studies showing how otherwise legal activity is rendered illegal under the Act). In particular, as a number of courts have held, the DMCA appears to prohibit the distribution of circumvention devices that enable access or copying even where user copying would constitute fair use. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 458–60 (2d Cir. 2001) (holding that the distribution of software, which enabled the circumvention of encryption that was designed to control access to, and reproduction of, films stored on DVDs, contravened the DMCA, even if user copying would constitute fair use); *Sony Computer Entm't Am., Inc. v. GameMasters, Inc.*, 87 F. Supp. 2d 976, 987–89 (N.D. Cal. 1999) (holding that a copyright holder demonstrated a strong likelihood of success in claiming that the sale of a video-game enhancer violated the DMCA's antitrafficking provisions, even if the enhancer did not give rise to traditional copyright infringement).

3. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 181 (1997); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657, 663 (1994); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); Benkler, *Free As the Air to Common Use*, *supra* note 2, at 377–84. The link between diversity and freedom of speech, as a constitutional value, relates both to the democratic-political aspects of free speech and to free speech as the bedrock of individual autonomy. In both aspects, freedom of speech establishes not just the rights of speakers but also the rights of the audience—the recipients, who rely on diversified, robust, and pluralistic expressive activity. The democracy-based defense of free speech is famously associated with Alexander Meiklejohn. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (developing the free-speech-based democratic argument, which states that the right of all citizens to understand political issues should be protected so they can participate effectively in the working of democracy). For autonomy-based accounts, see Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303 (1991); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). See also Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 37–43 (2002). Rubenfeld presents a pro-freedom-of-speech argument that focuses on what he defines as "freedom of

The freedom of imagination means the freedom to explore the world not present, creatively and communicatively. It means the freedom to see the world feelingly, to conceive as far as one is able how the world might be, or might have been, or could never be. It means the freedom to explore the entire universe of feeling-mediated-by-ideas. It means the freedom to explore, without state penalty, any thought, any image, any emotion, any melody, as far as the imagining mind may take it.

*Id.* at 38. Although Rubenfeld attempts to distinguish his freedom-of-imagination argument from previous arguments related to individual autonomy, *id.* at 34, such a distinction seems artificial. Once autonomy-based arguments encompass the rights of the audience—the recipients of the expressive activity (a point ignored by Rubenfeld)—there is a partial resemblance between autonomy-based arguments and the freedom-of-imagination argument. Rubenfeld's contribution lies in the convincing connection he makes between the process of mediated communicative activity and the inner ("imaginary" in his definition) world of both the speaker and the audience.

4. See Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 50–57 (2001); Raz, *supra* note 3, at 309–15.

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

and dissemination of creative works.<sup>6</sup> On the whole, however, this broad approach toward the social cost of copyright in terms of diversity has focused on instances and frameworks of creative activity in which a secondary author wishes to make use of existing copyrighted material, while the copyright owner (often a media conglomerate) imposes obstacles and limitations against such a use.<sup>7</sup>

The argument presented in this Article goes one step further in exploring the nexus of copyright and diversity. As I will show, an expanded copyright regime also diminishes the diversity of creative works that are both (1) noninfringing—that is, creative works that are not based on existing copyrighted materials up to an extent requiring authorization from subsequent copyright owners—and (2) not affiliated to copyright portfolios, or to the communicative activity of commercialized corporate media. Extensive copyright protection does so, first, by enabling corporate media to deepen their market dominance and the cultural centrality of their products through ancillary and derivative markets,<sup>8</sup> and second, by producing a solidarity value for the commercialized and commodified nature of media products.<sup>9</sup>

It is indeed hard to define the precise boundaries between “corporate media” and “independent creators and producers,” and the distinction is, of course, a very fragile and blurry one. However, for purposes of this Article, the distinction I am aiming at, well recognized from our daily lives, is between the industrial model of large-scale commercial media corporations that produce, control, and recycle wide inventories of copyright portfolios, and, on the other hand, much smaller-scale activities of independent creators and producers with no commitment to the creative parameters or limitations of commercialized corporate media.<sup>10</sup> As outlined in Part II.B, the main argument presented in this context is that

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6. For such an approach, see generally Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (analyzing the tension between freedom of speech and copyright, and demanding a scrutinized approach toward copyright’s expansion, even when taking into account the economic incentive that copyright law provides, as well as its contribution to the development of independent creative sectors).

7. See Benkler, *Intellectual Property and the Organization of Information Production*, *supra* note 2, at 83; Benkler, *Free As the Air to Common Use*, *supra* note 2, at 400–01. The entire economic model that is presented by Benkler in these articles is worthy of review.

8. See *infra* Part II.C.1.

9. See *infra* Part II.C.3.

10. See Benkler, *Free As the Air to Common Use*, *supra* note 2, at 401–05. Benkler describes five different prototypes of organizations that produce information and media products on a scale that ranges from the pure industrialized corporate media prototype to the other extreme of pure nonmarket actors.

products produced by corporate media consist of certain characteristics that influence and limit their contents' variety and diversity. The term "independent, noninfringing materials" refers to the category of alternative media products that at any point of time are excludable, by their nature, from the current creative agenda of corporate media.<sup>11</sup> To be clear, my argument does not undermine the cultural importance of creative materials that are produced by corporate media, and I am not arguing for any embodied differences in the quality (or any other value parameter) between creative materials within the commercialized corporate media system and outside of it;<sup>12</sup> rather, my claim is that corporate media's relatively narrow, unitary types of creative contents are bound to be limited in terms of effective diversity, and hence, tend to curtail society's ability to fully benefit from all the advantages and contributions a robust media environment could provide.

In a world where people's preferences, time, and money are scarce resources, the strengthening of some media products is bound to be at the expense of others. Independent creators and producers might formally enjoy the same scope of broad copyright protection. Substantively, however, they are relatively disadvantaged in their ability to gain effective audience attention.<sup>13</sup> The leverage for market and cultural domination that extended copyright protection grants corporate media is not one independent creators and producers could effectively benefit from because

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11. For a general description of "corporate media culture" and the characteristic media products that are produced by corporate media, see ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES 29-48 (1999).

12. See Rubinfeld, *supra* note 3, at 35-38 (describing the constitutional protection of freedom of speech as protecting freedom of imagination with "no distinction between high value and low value; between art and entertainment"); Jack M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1963 (1995) (critiquing the distinction between "low level" and "high level" speech). But see CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-65 (1993) (proposing a two-tier system of protecting free speech).

13. The phrase "effective audience attention" emphasizes the fact that the relevant measure in this context is substantive and not just a formal one (which examines the mere general grant of copyright as a statutory right). From a substantive perspective, the essential question is this: When taking into account all the other elements that compose and influence the allocation of speech powers, are there certain categories of entities, or individuals, who gain priority in reaching the attention of the audience, and what is the influence of expanded copyright protection on this de facto allocation of speech powers? Such an analysis implements a realistic legal insistence on looking to the actual effects, and scrutinizing actual rather than formal powers. This approach was developed and applied in the context of the First Amendment by Owen Fiss, and later analyzed and defined directly through the prism of legal realism jurisprudence by Jack Balkin. See Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 407-14; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1424-25 (1986).

they do not have the same economic and communicative backbone.<sup>14</sup> Moreover, due to the manner by which corporate media utilize extensive copyright protection, independent creators and producers are confronted with increasing difficulties in their ability to compete for the consumption of media products.

In locating the reasons and practical implications behind this diversity externality regarding noninfringing materials, it is important to focus on copyright law as one integral part of a much broader economic and regulatory scheme that governs the activity of producing and disseminating media products.<sup>15</sup> From this perspective, copyright should not be treated as an isolated island, merely granting private rights and incentives to sporadic individual creators; rather, copyright should be viewed as a resource which, together with other communicative and economic resources, might have an influence that exceeds its solitary impact.<sup>16</sup>

The Article will apply the following method of analysis: It will sketch the manner in which corporate media utilize and rely on broad and extensive copyright protection together with three central characteristics of media products: (1) their nature as public goods in general, (2) their nature as solidarity goods in particular, and (3) the influence that current

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14. See *infra* Part II.B.

15. See generally Jonathan Weinberg, *Digital TV, Copy Control, and Public Policy*, 20 CARDOZO ARTS & ENT. L.J. 277 (2002) (presenting the argument that the rulemaking process of policymakers, in the areas of communication and media regulation, should recognize and take into account copyright's potential restrictions on free speech, diversity, and other related interests); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587 (1997) (emphasizing the idea that copyright law cannot be viewed apart from information policy).

16. For a general presentation of such an approach with regard to freedom of speech dilemmas, see Balkin, *supra* note 13, at 415–18. Balkin draws on the work of Robert Hale, the legal realist who emphasized the fact that the background allocation of rights and powers sets the ground rules for how other rights are executed. According to Hale, what apparently seems like an equal allocation of a certain specific right between two confronting parties could actually embody a coercive relationship if the background allocation of other rights and powers is unequal. Hale focused on coercion in the context of what seems like a free-will contractual relationship, but is really coercion backed up by other legal rights (such as property rights) that are allocated unequally between the parties to the contract. See Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 625–28 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 473–77 (1923). Balkin imports this basic legal realist method of analysis and applies it to the allocation of effective speech powers, showing that behind what is perceived to be the protection of free speech of one person, there is a practical impairment of the free speech rights of others because the allocation of other background rights leads to a de facto disparity in the allocation of effective speech powers. See Balkin, *supra* note 13, at 404–14 (applying such an analysis in the context of access to the means of communication). My aim will be to show how equally-allocated, extensive copyright protection leads to a disparity in the effective speech powers of different categories of creators and producers (corporate media versus independent creators and producers) because of the different allocation of background rights and powers that each of these categories possess.

dominating media products have on shaping people's preferences regarding creative materials. Solidarity goods<sup>17</sup> are goods whose value derives prominently from the fact that they are consumed by other individuals who relate to each other in terms of social circles, archetype models for inspiration, self identification, or sometimes just mere imitation. As we will see, one consequence of media products' nature as solidarity goods is a cultural network effect,<sup>18</sup> which partially subordinates the value of a media product, for each individual, in relation to its centrality and significance for other individuals.

Next, we will examine the consequences of weaving these three characteristics of media products together with the market advantages that extensive copyright protection grants large-scale corporate media. This combination, I will claim, tends to make audiences less exposed and less attentive to noninfringing creative materials that are not similar to the types produced by commercialized mass media. I argue that broad copyright protection serves corporate media because it leverages their ability to dominate the market and shape the audience's tastes and preferences according to their common types and genres of creative materials, as well as their specific media products.

Before presenting the full argument, I should emphasize one caveat. I do not claim that broad copyright protection, by itself, has the power to undermine the competitive capability and the cultural presence of independent creators and producers. My only contention is that within the

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17. See *infra* Part II.A. The main source that we will rely on in this context is Cass R. Sunstein & Edna Ullmann-Margalit, *Solidarity in Consumption* (John M. Olin Law & Econ., Working Paper No. 98 (2d Series), 2000).

18. See *infra* Part II.A. On the purely economic level, network effects, or network externalities, are described as "markets in which the value that consumers place on a good increases as others use the good." See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 481 (1998). The term "cultural network effects" embodies a different meaning than the pure economic meaning of network effects, in that in cultural network effects there is no direct and definite value increase prorated to the number of users. The network effect is less stable and more flexible. For a cultural network effect to exist, there should be a connection between the benefit and enjoyment from consuming a media product and the fact that other individuals do so too. The network effect refers to the fact that in many circumstances, but certainly not always, the preferences of individuals for, as well as their attention to, a media product are affected and influenced according to its popularity and consumption by others. Some media products are what Sunstein and Ullmann-Margalit describe as "demi-solidarity goods," that is, goods that are desirable due to the fact that they are consumed by some people, but not too many people (such as a limited edition of a book or a lithograph). For such goods, the cultural network effect has both a positive aspect and a negative aspect—the goods should be consumed by some people, but not too many people. This is certainly not the case in the context of pure economic network effects. See Sunstein & Ullmann-Margalit, *supra* note 17, at 7–8.

current dominant media model of large-scale commercial enterprises, and alongside other characteristics of this model,<sup>19</sup> broad copyright protection tends to escalate the barriers and checks that independent creators and producers have to confront, even when they do not use existing copyrighted material as one of their main inputs.

This argument in itself, however, bears important normative implications regarding the desired scope of copyright protection. Like all other recognized social costs of copyright,<sup>20</sup> the institutional, antidiversity social cost of copyright regarding noninfringing materials raises a consideration that should be taken into account. American copyright law is based on a socially oriented legal measure. It is about weighing both the contribution and the harms of private intellectual property rights against the cultural well-being of individuals.<sup>21</sup> From this point of view, a presumption that a relatively narrow construction of copyright's scope would diminish some of the incentive to invest resources in the production of certain media products<sup>22</sup> is only one-half of the question. The other half refers to decreased diversity, which is associated with broad and extensive copyright protection. From a societal viewpoint, the harms of decreased diversity may outweigh the harms of some reduction in the incentive to produce more of the same kinds of media products. As outlined in Part II.C.2, in terms of allocative efficiency, one of the reasons why broad copyright protection is undesirable is exactly because it induces a wasteful competition among relatively homogeneous media products.<sup>23</sup> Moreover, once a diversity analysis becomes an integral component of freedom of speech and the value of autonomy, any reliance on a mere quantitative test becomes even more outmoded.<sup>24</sup> Therefore, in determining copyright's

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19. See *infra* Part II.B.

20. See *infra* Part I.

21. See *id.*

22. This presumption, in itself, has been doubted by the claim that the incentive to invest resources in the production of media products does not require broad and extensive copyright protection. See Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 628–53 (1996); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1213–20 (1996).

23. See Benkler, *Intellectual Property and the Organization of Information Production*, *supra* note 2 (presenting a similar argument regarding circumstances that require the use of existing copyrighted material as one of the main inputs of additional creative works). For a more general analysis of “fake diversity,” which characterizes commercialized media markets, see C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 30–37, 178–82 (2002).

24. See Rubinfeld, *supra* note 3, at 21–24. Rubinfeld doubts the constitutionality of an economic-wealth maximization approach, which justifies copyright's limitation on the freedom of speech of some speakers on the assumption that, as a whole, copyright's incentive will produce an increased total amount of speech. Such an approach, claims Rubinfeld, contradicts the entire essence

scope, there is a compelling need to give weight not only to matters of exclusion and enclosure but also to matters of excessive exposure and domination of specific types of media products. Losing some incentive for certain types of media products to provide room for others seems totally justified from a public-oriented viewpoint. In this Article, my only goal is to focus on unveiling the diversity externalities that extensive copyright protection induces in the context of noninfringing materials. Within this limited framework, however, I do not attempt to offer full normative and positive solutions for overcoming such deficiencies. This matter will be left for future, more detailed studies.

Structurally, this Article consists of two parts. Part I provides a brief survey of the current trends and developments regarding copyright's social cost. Part II presents my general analysis of copyright's social cost regarding noninfringing materials. It commences with a brief survey on the nature of media products as public-solidarity goods and on the political economy of modern media markets. Subsequently, it will demonstrate the manner in which corporate media use extensive copyright protection to leverage market and cultural dominance.

## I. THE SOCIAL COST OF COPYRIGHT: CURRENT TRENDS

American copyright law<sup>25</sup> is based solely on public and social considerations,<sup>26</sup> and so are its agreeable common presumptions. These

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of the First Amendment, whose purpose is certainly not to achieve an efficient speech market. Suppressing the expressive liberty of one individual in order to promote, on the whole, the net gain production of valuable works contradicts the goal of the First Amendment. This convincing argument, however, is targeted to circumstances when a later creator is prevented from using existing copyrighted material within his or her own independent creative work. It seems far reaching to apply the same argument to the indirect diversity externality that expanded copyright protection stimulates with regard to the creation and dissemination of additional independent, noninfringing works. As for this latter category, there is no direct limitation on the creation of the work and its dissemination. Nevertheless, even without reaching the stage of a constitutional challenge, the basic insight of Rubinfeld's argument remains convincing as a relevant policy consideration: When weighing the diversity social cost of copyright against the proclaimed incentive benefit of expanded copyright protection, a quantitative measure of the mere amount of speech produced seems to be lacking and inappropriate, especially from a freedom-of-speech perspective.

25. The basis of American copyright law is different from European-Continental philosophies of copyright law and the common law, which justify copyright on considerations related to the private rights that the author himself or herself, as a subject of rights, is entitled to, such as the personality theory, the labor theory, and the argument for desert. See generally Paul Edward Geller, *Must Copyright Be for Ever Caught Between Marketplace and Authorship Norms?*, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 159 (Brad Sherman & Alain Strowel eds., 1994); E.C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31 (1989); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

presumptions are<sup>27</sup> (1) that copyright is a public and socially oriented legal measure; its goal is to benefit the public by providing an economic incentive for the production and dissemination of nonexcludable, intangible works—works that due to their “public good” nature<sup>28</sup> would have lacked such an incentive without the recognition of a copyright; and (2) alongside protection, copyright involves a social cost that burdens and deters the public and future creators from gaining access to copyrighted material and from using it within their own independent works. This cost derives from the restrictions and limitations that are imposed on the public and on other creators with regard to certain uses of copyrighted material.

The combination of these two basic propositions leads to the main paradigm of a public-oriented copyright law and its various mechanisms: a constant effort to achieve the right balance between the benefits and the costs of a copyright regime;<sup>29</sup> to shape the content and extent of copyright’s protection in a manner that concurrently maximizes the incentive for investing resources in the production and dissemination of diversified, socially valued creative works; and to minimize the costs and burdens that copyright imposes on the public and on other creators. From this

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26. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (quoting the U.S. Constitution’s Intellectual Property Clause, U.S. CONST. art. I, § 8, cl. 8, which states copyright’s social-public purpose: “[t]o promote the Progress of Science and useful Arts”). Indeed, as several scholars have shown, authorship and natural rights theories did have some influence on American copyright jurisprudence, at least in earlier periods. See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 529–39 (1990). Nevertheless, the above-mentioned Supreme Court decisions have explicitly rejected the labor theory and argument for desert justifications of copyright, and have relied solely on a public-oriented justification.

27. Since American copyright law is based solely on a public-oriented justification, this is the main paradigm discussed by the literature. For a comprehensive and critical discussion of these matters, see generally Lunney, *supra* note 22; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 306–14 (1996); Sterk, *supra* note 22; Alfred C. Yen, *The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. 1343 (1991); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

28. Copyright’s subject matter—intangible works—are public goods because they are both nonexcludable and nonrivalrous. Because of the abstract nature of intangible works, without the support of any legal protection, once such works are publicly exposed, their creator cannot effectively exclude others from gaining access to the works and utilizing them freely; consequently, the creator is not rewarded for the efforts and resources invested in the production of such works. This prospective problem of “free riding” reduces the incentive for investing efforts and resources in the production and dissemination of intangible works. Copyright overcomes this problem by granting a legal right of exclusiveness, which enables the copyright owner to exclude others from using the work without authorization. Thus, the owner can collect fees for the use of the intangible work and secure a return on his or her investment. See Landes & Posner, *supra* note 27, at 326.

29. See Lunney, *supra* note 22, at 492–99; Zechariah Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 506 (1945).

public-oriented viewpoint, the aim of copyright law is to draw the optimal boundaries between the public domain and copyright owners' seemingly privately protected, but actually publicly inspired, domain of control.

The above-mentioned description of these two basic presumptions and the outcome of their accumulation, taken as a whole, is a very crude description of a much more complex array of economic considerations that have an influence on the desired copyright regime.<sup>30</sup> Furthermore, since copyright deals with the production and dissemination of creative and informational works, from a public perspective, any pure economic analysis does not suffice and is probably inappropriate. The costs and the benefits that are involved should also be weighed in terms of diversity, plurality, freedom of speech, autonomy, and democratic goals.<sup>31</sup> In this sense, wealth maximization, in its narrow economic meaning, is a misleading concept for determining matters related to copyright's social cost.<sup>32</sup>

Indeed, in the last decade, there has been considerable progress in scholarly work, which, rather than just examine copyright's social cost in terms of quantitative economic measures,<sup>33</sup> attempts to locate and characterize the deficiencies and harms of a copyright regime through the prism of freedom of speech<sup>34</sup> and diversity as constitutional and moral

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30. For a good discussion, see Lunney, *supra* note 22; Netanel, *supra* note 27.

31. See Benkler, *supra* note 4, at 84–88, 101–05; Benkler, *Free As the Air to Common Use*, *supra* note 2, at 400–12. The former article focuses on various aspects of law, including copyright law, in relation to the nexus of “control over information” and “autonomy.”

32. It is true that even within an economic analysis of copyright law, the costs and benefits to be measured and taken into account can include values and rights that are not purely quantitative. Aside from the practical and empirical difficulties of such attempts, some rights theories posit that the mere idea of measuring the “quantity” of constitutional rights and values contradicts the main essence of such rights as values that embody a preferential moral and legal status. See Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 153–59 (Jeremy Waldron ed., 1984); Rubinfeld, *supra* note 3, at 21–24.

33. For such an approach, see Landes & Posner, *supra* note 27. For an analysis of the fair-use exception focusing mainly on the issue of transaction costs, see Netanel, *supra* note 27, at 324–36, and the sources cited therein. Netanel critically examines the neoclassical approach to copyright law, which determines the desired scope of copyright mainly by the parameter of transactions costs, and hence, supports broad copyright protection as long as there are no extremely high transaction costs that prevent a voluntary transaction regarding the use of copyrighted material.

34. My main focus in this Article is on the institutional diversity implications of copyright protection regarding society at large, as an aggregation of audiences and recipients of media products. In addition, there is also the aspect that emphasizes the burdens and limitations that copyright imposes on the free speech liberties of an individual who wishes to execute a personal constitutional right as a speaker. These are, of course, two sides of the same limitations and burdens that copyright imposes, even though the aspect of the individual speaker's right may be perceived as a negative right that is closer to the fundamental constitutional protection of free speech. See RONALD DWORIN, *A MATTER OF PRINCIPLE* 387–89, 399 (1985).

measures.<sup>35</sup> This path of analysis, which is emphasized in the work of Yochai Benkler,<sup>36</sup> concentrates on the nature of copyright as a proprietary right—the grant of private sovereign power over informational and creative works that have direct influence on the political freedom of individuals and their right to autonomy. From this perspective, copyright regimes deal with cultural and political resources. The scope and nature of copyright’s protection influence both democratic and individual meaning-making processes. Hence, the pros and cons of copyright should be examined not only in terms of wealth maximization and allocative efficiency but also, if not foremost, in terms of diversity; that is, copyright should be evaluated by its implications on the range and variety of plural and diversified informational, political, and cultural options from which people could effectively choose in the course of authoring the “story of their own lives.”<sup>37</sup>

As a consequence of this broad, holistic view regarding copyright’s desired boundaries, one must focus on the different types of creative contents that a copyright regime encourages or discourages.<sup>38</sup> So far, the main emphasis in this context has been on two aspects. The first is an examination of copyright’s direct limitation on the ability of other creators—especially independent and noncommercial creators who do not belong to the commercialized mass media—to use copyrighted material

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35. See Yochai Benkler, *A Political Economy of the Public Domain: Markets in Information Goods Versus the Marketplace of Ideas*, in *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY* 267, 285–92 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., 2001).

36. See Benkler, *supra* note 4, at 84–88, 101–05; Netanel, *supra* note 6; Benkler, *Free As the Air to Common Use*, *supra* note 2, at 354; Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L.J.* 215, 267–94 (1996) (focusing on the limitations and burdens of a copyright regime from a democratic freedom-of-speech perspective).

37. This is essentially the expression used by Benkler, *supra* note 4, at 52.

38. This approach also convincingly criticizes the economic-oriented market-facilitation argument. According to this argument, copyright, as a property right, helps create and facilitate a market for intangible works, which allocates resources efficiently for the creation of the more socially valued media products. The argument, which was clearly articulated by Paul Goldstein, identifies a property-oriented market mechanism as the best way to ensure cultural diversity, due to the market’s ability to allocate resources efficiently to the media products for which people signal demand according to their preferences. See PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX*, 232–36 (1994). The market-facilitation argument has been criticized for ignoring the fact that market mechanisms with broad copyright protection tend to fail in providing an outcome of diversified outputs. As Benkler puts it, “a market structure of ‘diverse sources’ . . . is an assumption of the neoclassical model, not its prediction.” Benkler, *Free As the Air to Common Use*, *supra* note 2, at 397–98. See also Netanel, *supra* note 27, at 332 (questioning whether market pricing mechanisms can take into account and satisfy the demands and preferences of a diverse audience). Netanel also criticizes the market-facilitation argument for ignoring the costs and harms of copyright’s monopoly. For additional discussion on parallel matters, see *infra* Part II.C.2.

within new and independent creative works of their own.<sup>39</sup> The second is an examination of copyright's dynamic effect<sup>40</sup>—the ongoing influence of expansive copyright protection toward an enclosure of the creative commons and a diminishment of cultural diversity.<sup>41</sup> Such processes are explained by the inclination of corporate media, which own vast copyright portfolios to (1) use mainly their existing copyright portfolios (which includes recycling within additional creative activity)<sup>42</sup> and (2) burden the activity of independent creators and producers by demanding a super-competitive price for licensing materials from the corporate media's extensive copyright portfolios,<sup>43</sup> thereby making the expressive activity of independent creators relatively costly compared to that of corporate media. The result of these two aspects is a decreased degree of diversity both within corporate media's activity and outside of it (whenever additional, external creative activity requires the use of existing copyrighted materials).<sup>44</sup>

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39. See Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1904–11 (2000) (discussing the existence of a “speech hierarchy” between, on one hand, individuals and noncommercialized entities, and, on the other hand, media conglomerates).

40. The term “dynamic effect” was coined, in this context, by Netanel. See *id.* at 1911.

41. See Benkler, *Free As the Air to Common Use*, *supra* note 2, at 400–12; Netanel, *supra* note 39, at 1911–15.

42. See *infra* Part II.B.

43. In addition, there are also many circumstances under which copyright owners would refuse to grant permission for the use of their copyrighted materials. See Netanel, *supra* note 39, at 1909–11 (explaining why, in most circumstances, media conglomerates will be reluctant to license their copyright portfolio for new independent usages, even for a super-competitive price).

44. To some extent, copyright's internal mechanisms, and most notably the fair-use exemption, are expected to mitigate this tendency toward a reduced degree of diversity by freely permitting certain transformative uses, such as parodies and satires. A good example is the recent U.S. Court of Appeals decision regarding *The Wind Done Gone*—a sophisticated, satiric, free-style adaptation of the famous novel *Gone with the Wind*, which at the preliminary-injunction stage was classified as seemingly complying with the fair-use exemption. See *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001) (per curiam), *vacated by* 268 F.3d 1257 (11th Cir. 2001). There are, however, limits to the types and circumstances of uses that will fall within the fair-use exemption, especially under the current market-centered view of the fair-use defense. The current, prevailing judicial view classifies the fair-use exemption as an affirmative defense, which is denied whenever there is a possibility of licensing in any of the potential markets for the copyright holder's work. According to this approach, fair use rightly applies only in cases in which transaction costs prevent licensing, and in which, not only the use in question but also other similar uses by other persons would create no adverse effect on the potential market for the copyrighted work. See Netanel, *supra* note 6, at 20–23. See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (remanding a case involving an alleged fair-use parody for further findings on whether the defendant had met the burden of proving absence of harm to potential derivative work markets for plaintiff's song); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549–50, 559, 561, 566, 568 (1985) (holding that a story in *The Nation* composed of quotes, paraphrases, and facts drawn exclusively from a manuscript by former President Gerald Ford was not fair use under the Copyright Act). Needless to say, the more copyright's scope is

On the whole, however, this broad approach toward the social cost of copyright in terms of diversity has focused on instances and frameworks of creative activity in which a secondary author wishes to make use of existing copyrighted material, while the copyright owner (often a media conglomerate) imposes obstacles and limitations against such a use.<sup>45</sup>

As I will show, however, in Part II, an expanded copyright regime diminishes diversity in a more intrusive manner: It silences and limits the diversity of independent, noninfringing creative materials that are external to corporate media's line of production and are different in their creative content.

## II. COPYRIGHT'S SOCIAL COST REGARDING NONINFRINGING MATERIALS

As mentioned in the introduction, copyright's social cost regarding noninfringing materials is linked to a broader economic and regulatory scheme that governs the activity of producing and disseminating media products. Hence, in order to analyze properly this institutional social cost, a few general remarks about the nature of media products<sup>46</sup> as public-solidarity goods, and about the political economy of modern media markets, are required. Parts A and B include a brief survey of these issues, which will serve us later on.

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limited, and the more broadly defined freely permitted uses of copyrighted material are, the less harm there is in terms of decreased diversity regarding further creative works that are based on existing copyrighted materials.

45. See Benkler, *Intellectual Property and the Organization of Information Production*, *supra* note 2, at 83; Benkler, *Free As the Air to Common Use*, *supra* note 2, at 400–01. Also examine the entire economic model that is presented by Benkler in this article. Without underestimating the centrality of existing copyrighted materials as one of the main inputs of subsequent creative materials, it is worth mentioning that there still remains a relatively broad spectrum of additional and new creative materials that do not rely on previous copyrighted materials to an extent that requires authorization from their owners (such as new works based on the idea-expression dichotomy). In this context, the model presented by Benkler presumes but does not provide any empirical support for its broad and sweeping assumption regarding the deterministic and conclusive need of future creators to use existing copyrighted materials to such an extent.

46. For matters of convenience, the terms “media products,” “information,” “content,” “creative works,” and “cultural works” will be used interchangeably to describe the various sorts of creative materials, information, and opinions that are produced by, or disseminated through, media intermediaries. By using the phrase “media products,” I do not aim to reflect any judgment regarding the nexus of market forces and expressive and cultural materials. The term is used only for reasons of convenience and because it describes the whole variety of informational, creative, and cultural materials that the media deal with.

A. MEDIA PRODUCTS AS PUBLIC-SOLIDARITY GOODS: SOME  
PRELIMINARY REMARKS

Media products are public goods in the sense that some of the benefits from them do not affect their use by, or benefit to, other persons.<sup>47</sup> One aspect of media products as public goods, which applies even when their consumption is excludable by an intellectual property right, relates to the significant positive and negative externalities that media products produce. Media products are characterized by the fact that their impact overreaches the direct sides to the production and consumption of the media product, and their impact may also influence many other individuals, as well as society at large.<sup>48</sup> In some cases, positive and negative externalities refer also to instances when the direct consumers of a media product internalize only parts of its benefits or costs. People might watch, from time to time, public broadcasting television and appreciate its importance, but still refuse to support it either because of their true scale of personal preferences or because of a free-riding strategic behavior that derives from the nature of the media product as a public good.<sup>49</sup> Even if some people do internalize the positive and negative externalities of media products, in most cases, like many other public goods, problems of collective action would frustrate the ability of the audience to get its desired media products.<sup>50</sup>

In addition, media products have two other related attributes. The first, which was articulated by Edwin Baker, is that people's preferences for particular types of media products are not exogenous to people's previous and current interactions with media products; rather, people's

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47. For an illuminating discussion of media products as public goods, see BAKER, *supra* note 23, at 7–19. One derivative of this basic characteristic refers to intangible media products, whose abstracted content is nonexcludable. Hence, once disclosed publicly, intangible media products require some measure of legal fencing to prevent free riding and to maintain an economic incentive for their production and dissemination. This is, for example, the main target of copyright.

48. See *id.* at 41–62; MCCHESENEY, *supra* note 11, at 144–45; Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 516–17 (2000). The typical example of a negative externality is a violent television program, whose overall social negative implications are not taken into account either by its producers or by its direct viewers who internalize only their private interests and wants. The typical example of a positive externality is the contribution of investigative journalism to the functioning of a democratic system as a whole. This is a benefit that exceeds the private interests of the media entity or its direct consumers.

49. In fact, the essence of public broadcasting is to provide a governmental subsidy for the provision of public goods that the market itself will not generate, regardless of the positive externalities that are associated with such broadcasts.

50. See DOUGLAS BAIRD, ROBERT GERTNER & RANDAL PICKER, *GAME THEORY AND THE LAW* 191–95 (1994); Sunstein, *supra* note 48, at 516–17. This analysis has, of course, general implications regarding the debate whether, to what extent, and through what means media products should be regulated in order to better serve the public interest.

preferences are shaped and determined by any current media products to which they are effectively exposed.<sup>51</sup> Consequently, at least to some extent, any current dominant media system has a considerable advantage in shaping people's preferences regarding their cultural agenda.

This ability is amplified by the second related attribute of media products: their nature as solidarity goods.<sup>52</sup> Solidarity goods, a term coined by Cass Sunstein and Edna Ullmann-Margalit, refer to "goods whose value derives, in whole or in part, from joint consumption."<sup>53</sup> As Sunstein and Ullmann-Margalit have noted, "[t]he very fact that many other people are enjoying them creates *positive solidarity externalities*. In such cases, part of what is good about the experience, for many people, is precisely the fact that many other people have it too."<sup>54</sup> Consequently, part of the nature of solidarity goods is the information externalities that they produce in the sense that the behavior of people regarding such goods is influenced greatly by the information and signals carried by the behavior of others within the relevant group of reference.<sup>55</sup> As Sunstein and Ullmann-Margalit show, the attributes of solidarity goods are complex, and they carry along with them many variations and influencing variables: intrinsic, instrumental, objective, and subjective. Hence, the notion of solidarity goods is a relative one: A given good may have a solidarity attribute to one person but not to another. Likewise, the solidarity attribute may also be subordinated to the characteristics of the group that consumes the good, its social status, sometimes its exclusivity, and many other conditions and combinations.<sup>56</sup>

Media products are a classic example of solidarity goods. People value media products significantly for the value that is created through joint or simultaneous enjoyment by other individuals.<sup>57</sup> One could presumably

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51. See BAKER, *supra* note 23, at 87–92; Andrew Graham, *Broadcasting Policy in the Digital Age*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 151, 166–68 (Charles M. Firestone & Amy Korzick Garmer eds., 1998); SUNSTEIN, *supra* note 12, at 73–74 ("In a world that provides the existing fare, it would be not at all unsurprising if people generally preferred to see exactly what they are accustomed to seeing.").

52. See Sunstein & Ullmann-Margalit, *supra* note 17, at 5, 17.

53. *Id.* at 3.

54. *Id.*

55. *Id.* at 11. For information on externalities in general, see Andrew Caplin & John Leahy, *Miracle on Sixth Avenue: Information Externalities and Search*, 108 ECON. J. 60 (1998).

56. See Sunstein & Ullmann-Margalit, *supra* note 17, at 5–13. See also Robert J. Shiller, *Conversation, Information, and Herd Behavior*, 85 AM. ECON. REV. 181, 181 (1995) (discussing the systematic "herd externality[]" of imitating others and thereby concealing one's own information"); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1145–66 (1986) (canvassing the consumer-preference scholarship).

57. See RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* 178–82 (2000); Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads*,

enjoy reading a book that nobody else has ever read. Nevertheless, for most people, media products play a significant role in the fabric of their social life and their interactions with others. Culture is a social phenomenon in the sense that people want to experience, share, and consume media products that are related to their social circles of life and to their archetypal models of inspiration and self-identification. Even cultural expropriation and critical meaning-making processes, which intentionally recode the contextual meaning of symbols, icons, and metaphors of existing, well-established creative works (as in the case of satires, parodies, and appropriative art),<sup>58</sup> are based on a solidarity attribute, both with regard to the traditional, well-established meaning and connotation of the shuttered creative work, and with regard to the new meaning that is attributed to it under its new guise.

Consequently, media products consist of a cultural network effect. In many cases, the value of a media product for each individual is derived, at least partially, by its centrality and significance for other individuals.<sup>59</sup> The desirability of a media product derives, in part, from the fact that other individuals experience it as well.<sup>60</sup> Cultural network effects are not

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*Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 992–1026 (2000). See also LEO BOGART, COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST 221–24 (1995) (focusing more on the appeal to the familiar in the manufacturing of cultural preferences and tastes); ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 191–92 (1995) (analyzing and giving examples of peoples' preferences for media products that have gained significant popularity).

58. See SIMON STOKES, ART AND COPYRIGHT 123–34 (2001); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTY 73, 105 (1998); Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923–24, 930, 943, 971–74, 981 (1999); E.K. Ames, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1477–86 (1993); Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights*, 68 CHI.-KENT L. REV. 805, 825–27, 834–38 (1993); W.F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense after Rogers v. Koons*, 59 BROOK. L. REV. 373, 383–91 (1993). See also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (analyzing *The Wind Done Gone*, a satiric adaptation of *Gone with the Wind*); *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983). In *Warner Brothers*, the court stated:

Especially in an era of mass communications, it is to be expected that phrases and other fragments of expression in a highly successful work will become part of the language. . . . It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from works and add their own contribution of commentary or humor.

*Id.*

59. See CAVES, *supra* note 57, at 180–82; FRANK & COOK, *supra* note 57, at 36; PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 230–31 (Richard Nice trans., 1984) (viewing cultural preferences as being determined by social-class background and cultural knowledge, or "capital," as a means of reinforcing and enhancing social-class status).

60. For a similar argument, see Glynn S. Lunney, *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 883–84 (2001); Glynn

network effects in the economic meaning of increasing return to the scale of demand.<sup>61</sup> Unlike pure economic network effects, cultural network effects have no direct, linear, and definite value increase prorated to the number of consumers. Cultural network effects are, on one hand, more flexible and complicated, and, on the other hand, less homogeneous and stable. For media products, the solidarity element is not based on mere economic and quantitative measures, but rather is an element that relies on considerations of social circles, status and background, professional circles, beliefs, education, and many other criteria. A cultural network effect relies on the fact that in many circumstances, subject to changing conditions and variables, individuals' attention and preferences for media products are affected and influenced by the products' popularity and consumption by others. Nevertheless, even within this mingled vagueness of considerations, the basic aspect of a network good remains dominant.<sup>62</sup> As we will see in Part II.C, legal rules, such as copyright protection, can amplify the cultural network effect of media products by inducing synergy processes that strengthen the symbolic messages of a media product.

Hence, when speaking of effective audience attention as a precondition for a substantial, and not just formal, execution of speech powers,<sup>63</sup> the issue at stake is not just getting the attention of many sporadic individuals; the issue is about getting the attention of a cluster of individuals who, together and by their interactions, might treat someone's media product as a desirable solidarity good. Mediated cultural

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S. Lunney, *Lotus v. Borland: Copyright and Computer Program*, 70 TUL. L. REV. 2397, 2414–17 (1996).

61. See Lemley & McGowan, *supra* note 18, at 483. See generally Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985) (describing and explaining the phenomenon of network effects regarding goods that are characterized by increasing return to the scale of demand).

62. See Sunstein & Ullmann-Margalit, *supra* note 17, at 6–7. The two authors present a similar observation in the context of the general relation between network effects and solidarity goods.

In this light, we can see that network effects turn some goods into solidarity goods of a specific kind. But the category of solidarity externalities, as we understand it here, is far larger than the category of network externalities, above all because we are emphasizing solidarity in consumption. The increase in value from a television situation comedy, stemming from the wide viewing audience for that show, is not what is meant by a network externality. As we will see, moreover, many solidarity goods are not restricted to the causal connection that leads to the standard consequence of network effects, which is increasing returns to scale; solidarity goods come with a diverse range of value functions. But it is certainly possible to understand our analysis of solidarity goods as a large-scale expansion of the category of network effects, with the suggestion that similar effects stem from a wide range of goods and services.

*Id.*

63. See Balkin, *supra* note 13, at 406–09.

competition is very much about gaining preference for your media product as social glue, which produces a hue of solidarity around it.

The nature of media products, both as public goods in general and as solidarity goods in particular, together with the influence that current dominant media products have on the preferences of people regarding their desired creative contents, tell us something about cultural barriers of entry and cultural lock-ins. Any dominant media system is expected to impose some cultural barriers of entry on materials that are differentiated from its own reflective taste, both within the media system itself and in broader communication circles outside of it. The accumulation of the solidarity attribute, the influence of existing media products on cultural preference settings, and the inability of each individual to internalize positive and negative externalities of media products all increase people's inclination for cultural lock-ins within any influential media system in which they consume a considerable amount of their media products, be it a commercialized system or a public one (such as "BBC"—England's well-reputed public television and radio channel). When people are exposed to alternative media products, they will judge these products, at least initially and partially, through the prism of their preexisting preferences for media products.<sup>64</sup>

Consequently, in a concentrated media environment, creators who desire a truly effective audience reach have to bend themselves according to the creative preferences of the system, even when they are acting outside of it. Another consequence is that a reduced degree of diversity within a few dominant media organizations is expected to have some overall influence on people's preferences, decreasing the degree of diversity in channels of communication that are outside of these media organizations. There are, of course, limits to the validity and the relevance of such an analysis in real life. Media products are certainly not consumed by blind bulks of individuals who have totally waived their autonomous discretion and taste in matters related to creative materials and culture. Moreover, when speaking of media products as solidarity goods, there are many communities and diversified groups of individuals who establish differentiated solidarity groups with different preferences for media products. People can also change their own individual solidarity preferences in between different contexts of their lives. The first essential question is the extent to which the law supports the existence of cultural network effects, based not on real needs and autonomous preferences of

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64. See BOGART, *supra* note 57, at 221–24.

individuals, but on a considerable disparity in the allocation of effective communicative powers. The second question is the extent to which such a disparity was generated and is being induced by background legal rights.<sup>65</sup> Part II.B will describe the manner in which corporate media benefit from such a preferential position within modern media markets, and will analyze the role of extensive copyright protection as a supportive legal mechanism behind such processes.

## B. THE (POLITICAL) ECONOMY OF INDUSTRIAL MEDIA MARKETS

Part II.A described the nature of media products in the abstract. Reality, however, provides us with an institutional environment that utilizes media products' characteristics, as well as expanded copyright protection, in a manner that has an overall negative influence on the nature of media products produced and their diversity. The dominant existing media model is a traditional industrial model of large-scale commercial corporations,<sup>66</sup> mostly owned by a relatively centralized cluster of a few powerful entities.<sup>67</sup> This model prominently uses economics-of-scale and

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65. See BAKER, *supra* note 23, at 70.

66. In some aspects, the Internet has certainly undermined the hegemony of the traditional corporate media model and has originated alternative models of communicative activity, such as collaborative media, web-logs, multiparticipatory online computer games, and other common-based peer production and communication schemes. See generally Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002) (exploring the phenomenon of common-based peer production schemes and the advantages that such decentralized systems might have over traditional property and contract-based modes of production). Nevertheless, today, little more than a decade after the emergence of the Internet, it is well acknowledged that corporate media intermediaries, both traditional and new Internet intermediaries, especially when joining together and efficiently utilizing several regulatory, legal, and economic sources of power, have managed to gain a considerable dominance over the Internet and effective audience attention through it. See Niva Elkin-Koren, *Its All About Control: Rethinking Copyright in the New Information Landscape*, in THE COMMODIFICATION OF INFORMATION 79 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); MCCHESENEY, *supra* note 11, at 168–82; C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 895–99 (2002); Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Towards Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562–64 (2000); Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. 447 (2000) (book review); Netanel, *supra* note 39, at 1887–93. See also Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM. & ENT. L.J. 309, 318–29 (noting corporate domination of the World Wide Web and presenting a mathematical model in this context). Although my aim in this Article is not to focus on the Internet and its unique aspects, it should be noted that the arguments to be presented in Part II.C regarding the silencing effect of extensive copyright protection are applicable also in the context of the Internet, especially in its capacity as a distribution platform for traditional “nonvirtual” media products, such as books, CDs, DVDs, and other media-oriented products. A full discussion of this issue with all its complexities, however, exceeds the scope and the purpose of this Article.

67. See generally BEN. H. BAGDIKIAN, *THE MEDIA MONOPOLY* (1983); Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and*

economics-of-scope advantages to fully utilize the profit potential of media products.<sup>68</sup>

Due to their negligible marginal cost,<sup>69</sup> corporate media focus on maximizing profit by producing and distributing products to as many audiences and markets as possible, which includes rereleasing, repackaging, and reproducing media products for ancillary and derivative markets.<sup>70</sup> A Walt Disney classic animation film is a generic example of a media product that is recycled and repackaged for ancillary markets, such as video, DVD, and pay-per-view, and is used as a basis for numerous derivative works and products, both within the media industry and outside of it.<sup>71</sup> Another integral attribute of the corporate media model, at least in the context of broadcasted and printed media, is its heavy reliance on income from advertisements, that is, on selling audiences to advertisers. Hence, the corporate media model is aimed at capturing a wide share of the audience and following the appropriate mood that is required for promoting advertisers' products. The outcome is media products that have a relatively wide appeal and gloss, and follow the mood and the environment that is required to market the advertised products, rather than products that tend to the diversity of actual interests and needs of the audience.<sup>72</sup>

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*the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1099–1105 (1999) (discussing and criticizing the claim for an expressive right of access as an unavoidable outcome of modern communicative realities).

68. See 1 DIANA CRANE, *THE PRODUCTION OF CULTURE: MEDIA AND THE URBAN ARTS* 49–75 (1992). It is common to locate the foundation of the literature on the political economy of modern mass media in the work of Harold Innis. See HAROLD INNIS, *THE BIAS OF COMMUNICATION* 156–89 (1951). See also JAMES W. CAREY, *COMMUNICATION AS CULTURE* 142–72 (1989). It seems, however, that such accounts had already appeared in *THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS* 30–68 (1947).

69. Media products are characterized by relatively high production costs and low reproduction and distribution costs. Once the media product has been produced, adding more consumers produces hardly any marginal cost; rather, it constantly reduces the average cost and increases the average revenue. *Contra infra* Part II.C.2; text accompanying notes 84–87 (discussing the issue of marketing costs).

70. See MCCHESENEY, *supra* note 11, at 22; Robert W. McChesney, *The Political Economy of Global Communication*, in *CAPITALISM AND THE INFORMATION AGE* 1, 14–15, 19 (Robert W. McChesney, Ellen Meiksins Wood & John Bellamy Foster eds., 1998) [hereinafter McChesney, *The Political Economy of Global Communication*]; RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 79–103 (1996); BOGART, *supra* note 57, at 35–36; Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 582–83 (1999).

71. See MCCHESENEY, *supra* note 11, at 23–24.

72. See BAKER, *supra* note 23, at 24–30, 87–92; McChesney, *The Political Economy of Global Communication*, *supra* note 70, at 19; BOGART, *supra* note 57, at 65. See generally C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994) (providing factual evidence and analyzing the prominent influence that advertisers have on the content of media products within advertisement-supported media entities).

Such an institutional economic-communicative structure has a considerable influence on the nature of media products that are produced by commercialized mass media. Under this structure, the nature of such products is to reach the largest audience and to be reutilized in as many ancillary and derivative markets as possible. One prominent result of this media structure is a growing tendency toward concentration and vertical integration, including distribution, in order to fully utilize the advantages of scale and scope with regard to the production and distribution of media products. Market concentration and conglomeration become essential for the long-term profitability of corporate media,<sup>73</sup> and an unavoidable implication of this is the effect on the diversity and variety of media products. Once corporate media address and capture mass audiences, the economics of reduced copying and distribution costs strengthen corporate media's incentive toward producing content that is relatively homogeneous and not unique. In such circumstances, dividing the audience, which is the meaning of diversified and unique content, would just increase the per-person cost because, with greatly reduced distribution and reproduction costs, the media products' costs become concentrated mainly in the creation of the original content and its marketing. Indeed, according to several theoretical models, book publishers, film studios, and other media organizations show an inherent bias against minority tastes and in favor of expression that is likely to appeal to large audiences.<sup>74</sup>

At this stage, a clarification is required: Nothing in the above-mentioned description contends that corporate media represent a static model of cultural transmission; contrarily, corporate media tend to invest considerable resources in locating and advancing new cultural

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73. MCCHESENEY, *supra* note 11, at 27.

74. See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 101–50 (1992) (surveying their own models and those of others). See also BAKER, *supra* note 23, at 37–40, 292 (explaining why the public-goods characteristics of media products, and the derivative ability to price discriminate their provision, lead to a homogenization of the communicative realm and to the domination of blockbuster media products); BETTIG, *supra* note 70, at 98–101 (giving several examples and empirical data on these processes within the American media industry); CRANE, *supra* note 68, at 55–75 (canvassing studies that link the production of mainstream, prosaic expression with increased concentration of media ownership); Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 597–98 (2000) (noting that consolidated conglomerates, such as the one composed of Viacom and CBS, may prefer their entities' own content and thereby discourage independent investment in content production); Paul DiMaggio, *Market Structure, the Creative Process, and Popular Culture: Toward an Organizational Reinterpretation of Mass-Culture Theory*, 11 J. POPULAR CULTURE 436, 440 (1977) (noting that larger, established media organizations have poorer records than do smaller, independent firms in providing innovative products).

directions and trends<sup>75</sup> in order to maintain the appearance of freshness and to sustain audience appeal. In doing so, however, corporate media still tend to concentrate on media products that are suitable for ongoing packaging and utilization of the above-mentioned types.<sup>76</sup> In a similar manner, the activity of corporate media is characterized by what Edwin Baker describes as a “faked diversity,” which produces a wasteful amount of homogeneous mainstream media products. Corporate media do this while neglecting more marginalized media products that are less profitable (according to corporate media’s main sources of revenues).<sup>77</sup>

Independent producers and creators, on the other hand, are guided by a different set of considerations. They do not possess such a large audience share and do not benefit from the same reduced distribution costs as corporate media do. Consequently, independent producers and creators have a much greater incentive to produce unique media products. For them, the distribution costs capture a much larger share of the total costs. Therefore, in relative terms, the extra expenditure on individualizing unique media products does not increase the costs much, but could increase the media product’s appeal, especially when content is usually the only parameter through which independent producers and creators can compete with large-scale media corporations (as opposed to the parameters of price or the attractiveness of the media product to advertisers). In addition, since the activity of independent creators and producers is relatively diversified and sporadic, they are not subordinated to the same routine, unitary, and large-scale content biases, or to the bureaucratic, managerial commercial patterns that corporate media are exposed to. Hence, such creators and producers are capable of producing media products that are less

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75. See JEREMY RIFKIN, *THE AGE OF ACCESS* 182–85 (2000) (describing the phenomenon of “cool hunters”—people who look out and seek for new cultural trends that can be packaged, commodified, and sold in commercial marketplaces).

76. See BOGART, *supra* note 57, at 27–32. Bogart emphasizes the fact that economic considerations of minimizing risks and maximizing potential profit drive corporate media to focus on packaging “ongoing media” rather than investing resources in “one shot media.” A media vehicle of the ongoing type seeks to create patterns of habitual exposure. Producers constantly seek the continuity that comes with sequels and spin-offs—devices by which the success of a singular production can be extended by building on the public’s familiarity with the original.

77. See BAKER, *supra* note 23, at 30–37, 178–82. See also BILL RYAN, *MAKING CAPITAL FROM CULTURE: THE CORPORATE FORM OF CAPITALIST CULTURAL PRODUCTION* 147–84 (1991) (describing how the production of cultural goods under the bureaucratic formatting system of corporate media embodies a marked tendency toward typicality and repetition); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* (1986) (analyzing the continuous diminishment of public and educational values within modern media in general and television in particular, and discussing the domination of “entertainment for the masses”).

homogeneous and more diversified than the industrialized lineup of mass-media products.

An industrial corporate media model, however, leaves hardly any space for independent producers and creators. There are general economic reasons for this: Many media areas are characterized by high financial costs due to the use of effective communication technologies; the existence of a concentrated structure of markets due to advantages associated with the economics of scope and scale; and derivative de facto control over central distribution bottlenecks. All these factors give dominant media corporations a considerable degree of control over marketing and distribution channels, enabling them to be significant gatekeepers over effective audience attention to creative content and to promote their own affiliated media products and copyright portfolios.<sup>78</sup>

These are not the only reasons for the barriers that independent producers and creators have to confront, however. Based on Part II.A, one can also presume that audience's preferences, as they are shaped within such media environments, are being biased toward commercialized mass-media products. It is not just dominant market share and control over central channels of distribution that give corporate media's creative products a considerable advantage when competing over audiences. The centrality of corporate media's creative content within any current communicative agenda relies also on its considerable influence in shaping people's cultural preferences, as well as the common solidarity attributes of media products. Thus, due to the nature of media products as public goods, most individuals, both in their capacity as consumers and as independent creators and producers of media products, have neither much ability nor much incentive to unchain any existing cultural lock-ins and support the production and effective dissemination of other alternative patterns of media products. The hedges that have to be overcome are not just economic hedges of corporate media's market domination but also conceptual barriers in competing over people's tastes and media preferences.

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78. For a survey of these matters, see BETTIG, *supra* note 70 at 49–68, 79–103; MCCHESENEY, *supra* note 11, at 16–29. See also Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 BU. J. SCI. & TECH. L. 451, 534–35 (2002) (discussing the concentrated structure of the record industry); Roni Mueller & Gretchen Wettig, *The “New” Series Co-Production Deal in Network Series Television*, 31 SW. U. L. REV. 627, 638 (2002) (discussing the concentrated structure of the television production industry); Netanel, *supra* note 39, at 1879–86; Balkin, *supra* note 13, at 407–14 (analyzing this issue from a legal realist perspective of the allocation of effective speech powers in society).

My aim in Part II.C will be to show the significant role that extensive copyright protection has in such circumstances.

### C. THE ROLE OF EXTENSIVE COPYRIGHT PROTECTION

#### 1. Leveraging Market Dominance Through Extensive Copyright Protection

Along with other parameters, extensive copyright protection plays a significant role in nourishing and empowering corporate media's hegemony regarding the type and genre of creative content, as well as specific media products. First and foremost, copyright law is the background law that establishes, defines, and protects the boundaries of media products that can be privately appropriated by corporate media.<sup>79</sup> The long, commodified reach of a creative work (that was originally created for one media market) throughout other supplementary markets is a direct outcome of privatizing the creative work with regard to additional activities and uses (that then become additional markets). The ability of corporate media to fully utilize all the ancillary and derivative markets of a media product that is a copyrighted work relies solely on broad and extensive intellectual property protection with regard to such additional mediated activities. The merchandizing of a media product (its branding and mass distribution) throughout as many ancillary and derivative markets as possible are all based on broad copyright protection, and in some cases, the support of other intellectual property rights, such as trademarks.

One good example is the right to make derivative works,<sup>80</sup> which allows copyright owners to exploit all additional markets beyond the original market of the copyrighted work, including the transformation of the copyrighted work into another medium or format, as well as its adaptation or recasting.<sup>81</sup> The right to make derivative works is the anchor

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79. See BETTIG, *supra* note 70, at 101.

80. 17 U.S.C. § 106(2) (2000).

81. The full definition of a derivative work is:

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101 (2000). *Contra* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.09[A], at 8-138 (1997). The authors claim that the exclusive right to make derivative works overlaps either with the exclusive reproduction right or with the exclusive public-performance right because any substantial reliance on an existing copyrighted work would be an infringement of one of these two rights. This argument, however, does not change the analysis in the above-mentioned text

that enables corporate media to use synergistic practices, in which a single creative work generates a variety of other media products. This helps to extend their presence within other different cultural industries, as in the case of a single comic book character like Batman, which is a vehicle for the production and sale by subsidiary corporation or licenses of a wide range of entertainment channels and consumer products (novelizations, music soundtracks, music videos, videocassettes, feature films, games, clothes) and channels of distribution (theatrical exhibition, pay-cable, pay-per-view, and network television services, for example).<sup>82</sup>

Such utilization of media products is relevant and applicable mainly to large-scale corporate media, which can utilize the advantages of economics of scope either through their own channels of distribution and subsidiary corporations or through licensing agreements and joint ventures. Since the basic creative content is a joint one to all derivative and ancillary products, production costs are reduced, and thus, corporate media further gains competitive advantages and market domination with regard to the various supplementary markets.<sup>83</sup> The role of expanded copyright protection in such instances is crucial. Copyright protection is the source that makes economics-of-scope dynamics both possible and extremely desirable for corporate media. It is also broad copyright protection that gives corporate media the competitive advantage of being able to rely on media products

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because, for our purposes, the outcomes of a broad exclusive reproduction right would be exactly the same as the outcomes of a broad exclusive right to make derivative works.

82. See BETTIG, *supra* note 70, at 101; Eileen Meehan, *Holy Commodity Fetish, Batman! The Political Economy of a Commercial Intertext*, in *THE MANY LIVES OF BATMAN: CRITICAL APPROACHES TO A SUPERHERO AND HIS MEDIA* 47–65 (R.E. Pearson & W. Uricchio eds., 1991). For other examples of similar utilizations of a media product through various derivative and ancillary markets, see MCCHESENEY, *supra* note 11, at 23 (mentioning Disney's animated film, *The Lion King*, which generated over one billion in profit, and led to a lucrative Broadway show, a TV series, and 186 items of merchandising); BOGART, *supra* note 57, at 39. McChesney also mentions the similar manner in which Murdoch's News Corporation exploits its *X-Files* TV program. It produces the show, airs it over its Fox networks, and then shows reruns on its twenty-two Fox TV stations and its FX cable network. News Corporation has generated *X-Files* books and extensive merchandising, and Twentieth Century Fox (owned by News Corporation) released a movie version of the *X-Files* in 1998. News Corporation even has a traveling *X-Files* Expo, which visited ten U.S. cities in March 1998 with active promotion through other News Corp. media properties.

83. See MCCHESENEY, *supra* note 11, at 22–24. See also BETTIG, *supra* note 70, at 98–99. Bettig describes Disney's strategy to sell videocassettes directly to consumers: According to the first-sale doctrine, a subsequent rental of a lawful prerecorded videocassette does not require an authorization from its copyright owner. Thus, for example, *Beauty and the Beast* carried a suggested retail price of \$24.99 and whole-saled for about \$13.50. Each videocassette costs about \$2 to manufacture and \$2 to market. Disney expected to sell twenty million copies of this film, earning an estimated \$270 million from just this one video. This sum comes on top of the \$145 million the film earned at the U.S. box office and an additional \$200 million taken from box offices around the world.

that have already covered a considerable amount of their fixed production cost through their initial markets, and likewise, have already established their recognition and reputation.

From a cultural-diversity viewpoint, such processes are bound to weaken independent, noninfringing producers and creators who wish to gain effective audience attention and demand for their media products because, *inter alia*, such processes of excessive exposure to corporate media's multimarket media products decrease the total amount of cultural space left for other media products. The term "cultural space" embodies two distinct meanings in this context. The first refers to the limited amount of resources, such as time and money, that people can spend on media products. The second refers to the limited "mental shelf space"<sup>84</sup> that people have for cultural and media products. As a consequence, independent creators and producers must now spread their production costs over fewer consumers, which means higher prices to capture a decreased proportion of consumer surplus. Thus, corporate media can use their increased revenues from ancillary and derivative markets for marketing and promotional expenses, which both raise rival costs and further empower corporate media's influence on audiences' cultural preferences and tastes.

In such circumstances, the transfer of symbolic messages across media boundaries initiate a circular synergy that makes the whole more powerful and more profitable than the sum of its separate parts;<sup>85</sup> that is, the cultural-solidarity value of a media product is further empowered by its expansion to derivative and ancillary markets,<sup>86</sup> while concurrently, the revenues that are gained are used to further deepen the centrality of the media product through promotional expenses. The point is that at this stage, copyright protection no longer serves as a means to induce creation; rather, it serves as a financial source to recoup marketing costs that undermine the ability of marginal creators and producers to reach their potential audiences.<sup>87</sup>

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84. See FRANK & COOK, *supra* note 57, at 38–39 (quoting and commenting on WILLIAM J. GOODE, *THE CELEBRATION OF HEROES* 75 (1978)).

85. See BOGART, *supra* note 57, at 222.

86. See *infra* Part II.C.3.

87. See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 316–17 (2002). See generally Mark S. Nadel, *Questioning the Economic Justification for Copyright*, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=322120](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=322120) (last modified Feb. 21, 2003) (arguing that "borderline creations" are crowded out because a significant amount of revenue is generally used to promote popular creations).

Another reason for the weakening of independent producers and creators derives from the fact that what is a derivative or an ancillary market for corporate media might be an initial and only market for independent creators and producers. Consequently, while corporate media have usually covered their fixed production cost of copyrighted works (with a marginal cost of almost zero) when products reach the derivative and ancillary markets, independent creators and producers are often still at the stage of trying to cover their fixed production costs. Independent creators and producers, therefore, have a very limited ability, if any at all, to compete with corporate media's pricing flexibility<sup>88</sup> and use of strategic price discrimination through different channels of distribution (which, in itself, often requires large investments and control over large portfolios of copyrighted material).<sup>89</sup>

The mere formal fact that independent creators and producers are legally entitled to the same scope of copyright protection is barely of any comfort. What is at stake is not the formal allocation of intellectual property rights, but rather the substantive ability of a few powerful media corporations to utilize broad copyright protection in particular and their aggregated economic and speech powers in general as a lever for gaining market and cultural dominance for their relatively homogeneous lineup of media products. Not only is such ability not available to independent, noninfringing creators but their practical capability to reach consumers of media products is impaired and silenced by extensive copyright protection as corporate media use it.<sup>90</sup>

Another example is the Sonny Bono Copyright Term Extension Act, which extended the term of copyright protection, including retrospectively

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88. For a similar analysis in the context of international trade in media products, see C. Edwin Baker, *An Economic Critique of Free Trade in Media Products*, 78 N.C. L. REV. 1357, 1381–88 (2000).

89. See BAKER, *supra* note 23, at 38–40; Netanel, *supra* note 39, at 1915. See generally Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001) (discussing and analyzing the prominent role that price-discrimination methods occupy with respect to copyrighted works and in the context of ancillary and derivative markets).

90. Hence, the legal realism approach toward copyright law, as several commentators recently emphasized, is applicable not only in the context of the relationship between copyright owners and the rest of society (that is, the general public and other creators who wish to use existing copyrighted material). In addition, legal realism is relevant to copyright law with regard to the nexus, or collision, between two competing groups of copyright owners that are differentiated in their effective speech powers and cultural influence. For the legal realism approach toward copyright law, see Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998); Margaret J. Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1296 (1998); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1311–38 (1996).

for existing copyrighted materials, by an additional twenty years,<sup>91</sup> and which the Supreme Court recently upheld as constitutional.<sup>92</sup> The Act's consequences are not just in the additional revenues copyright owners will gain. What is more, a considerable amount of copyrighted works will now have to wait twenty years more before becoming a part of the public domain. In addition, extending copyright terms enables media corporations with a large inventory of popular copyrighted works to continue the mass distribution of these works through various media-products markets in the above-mentioned manners; again, the marginal cost is almost zero and less space is left for new, independent creative materials.

Scenarios of this kind teach us that there is something misleading in our tendency to analyze the harm of copyright law just in terms of exclusion and enclosure, such as the diminishment of the public domain, copyright's limitations on freedom of speech, and so on. Along with these harms is the harm of excessive exposure. The social cost of extensive copyright protection exists also in the increased power of major copyright-portfolio owners to "float" and "dump" their creative materials on society. Media corporations are able not only to exclude other creators from using their copyrighted materials but also to dominate society's cultural agenda. They can release creative materials with the timing, extent, amount, and price that give them a major influence over people's preferences for media products, leaving little place for outside independent, noninfringing media producers. Copyright law is a social engineering measure. It is intended to benefit the public by providing it with a variety of pluralistic creative materials and media products. From this perspective, the above-mentioned processes cannot be ignored. Copyright's goals and duties are to navigate the creative sector through paths that best serve the public interest. The combination of a media environment that is constituted of conglomerated, commercialized corporate media, together with broad and extensive copyright protection, leads to undesirable communicative and economic outcomes.

## 2. Copyright's Allocative Inefficiency and the Reverse Scenario

My analysis in Part II.C.1 emphasizes the deficiencies that expanded copyright protection could have in terms of allocative efficiency. Glynn Lunney has criticized broad and expanded copyright protection on the

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91. See Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 101, 108, 203(a)(2), 301(c), 302, 303, 304, 504 (2000)).

92. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

grounds that, from an overall test of allocative efficiency, expanded copyright protection will draw resources away from other socially valued, noncreative activities.<sup>93</sup> But according to Part II.C.1, the allocative deficiencies of expanded copyright protection are even further reaching. Strong copyright is expected to reduce opportunities for plural and diversified media products because it encourages corporate media to invest their resources in limited types and genres of media products that would have both the largest audience and the capability of being reutilized in as many markets as possible.<sup>94</sup> Hence, within a corporate media environment, broad copyright protection is expected to induce a wasteful competition among media products, most of which are relatively homogeneous.

Part II.C.1 also questions the validity of another argument that has been recruited to support strong copyright protection: the cross-subsidy argument. According to the cross-subsidy argument, strong copyright protection encourages the media to invest resources in more risky and marginal projects by enabling media corporations to recoup the costs of such projects from a greater portion of revenues assigned to the more successful and profitable projects.<sup>95</sup> The application of the cross-subsidy argument, however, is very much dependent on the identity and the characteristics of the relevant media entity. A professional publishing house that focuses on specific types of books might adopt a cross-subsidy policy in a manner that supports marginal and more risky projects in its unique area of interest, especially if its motivation and considerations for publication are not purely financial. Corporate media, on the other hand, are expected to adopt a cross-subsidy policy that best accords with their nature, both as a profit-motivated body and as a body possessing parameters that influence their investment policy.<sup>96</sup> Hence, the cross-subsidy policy of corporate media presumably would focus on allocating the risk among several media products, all of which have the potential of being blockbusters. The chosen products would be those that attract the largest audience and have the capability of being reutilized in as many additional markets as possible. From corporate media's point of view, there is no logic in using the backup of a cross-subsidy scheme to finance the production of more marginal and less profitable projects. A related issue is that an efficient utilization of a cross-subsidy scheme requires a considerable portfolio of projects, which enables an allocation of

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93. See Lunney, *supra* note 22, at 655–56.

94. See BAKER, *supra* note 23, at 15–19.

95. See Paul Goldstein, *Copyright*, 55 L. & CONTEMP. PROBS. 79, 83 (1992).

96. See *supra* Part II.B.

risk among them. Such a structure, however, characterizes mainly corporate media rather than independent creators and producers. As a consequence, broad copyright protection, which relies on the cross-subsidy argument, is expected to benefit mainly corporate media entities. But instead of using it for its proclaimed purpose of diversity, such entities would utilize it to produce more of the same kinds of media products with less risk.<sup>97</sup>

*The Reverse Scenario.* There still remains the question of the reverse scenario: whether a narrower scope of copyright protection would mitigate some of the institutional diversity externalities previously described. Natural intuition might lead to the following claim: Instead of having corporate media benefit from all the potential profits of expanded copyright protection, the only difference would be that other “free riders” would benefit from providing similar, if not identical, media products. Thus, for example, if Disney would not have an exclusive right to produce an ice ballet, a quiz book, or a calendar all based on *The Lion King*, other entrepreneurs would produce these products instead. Prices might decrease due to an emerging competition, but nothing would change in the landscape of diversity because the popularity of media products and their demand curve would remain the same, regardless of changes in the supplier’s identity.

This intuition, however, is misguided for several reasons, all related to our foregoing discussion. Such an analysis ignores the fact that people’s preferences for media products are determined by, rather than exogenous to, any current realm of media products and information they are effectively exposed to.<sup>98</sup> Such an analysis also ignores the fact that the success of a media product in markets generally and in derivative and ancillary markets particularly very much depends on the resources that corporate media invest in its marketing and promotion.<sup>99</sup> Hence, once corporate media lose one of their exclusive rights, and therefore refrain from further supporting their media products in certain markets, it is far from certain that the cultural landscape of these markets, as well as people’s preferences, will remain exactly the same.

Moreover, once corporate media is unable to gain the same market and cultural dominance in derivative and ancillary markets, their basic

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97. See Nadel, *supra* note 87 (claiming that the greater revenues, which broad copyright protection produces, are used mainly for marketing and promotional expenditures, and not for producing marginal and less profitable media products).

98. See *supra* Part II.A.

99. See Nadel, *supra* note 87, at 24–25.

strategy regarding the production of media products would be expected to go through some changes. It is one thing to invest \$100 million in a sequel to Batman when the movie promotes a whole array of Batman-branded products and ancillary media markets. It is a totally different thing to invest the same amount of money once the extent of exclusive rights within such derivative and ancillary markets shrinks significantly.

Any transformation in the extent and scope of copyright's protection would have some influence on the manner in which corporate media allocate their resources for the production of media products, as well as for their distribution, promotion, and marketing through additional markets. As a consequence, audiences' preferences and the cultural space left open for other media products would also be expected to undergo a certain transformation, at least regarding some of the media markets. It would be extremely speculative to try to evaluate what exactly would happen in such circumstances. The point is that if corporate media gain fewer profits from producing blockbuster media products that can be reutilized in the manner described in Part II.C.1, their basic incentive to produce and support such products, as well as to enter all their related markets, would be expected to decrease, at least to some extent. The result would be more space for independent creators and producers, as well as an improvement in the disadvantaged position from which they suffer now, given that the market is totally dominated by corporate media's products.<sup>100</sup>

### 3. Leveraging Cultural Dominance Through Extensive Copyright Protection

So far, our analysis has focused on the manner in which corporate media utilize expanded copyright protection to gain market dominance. In addition, extensive copyright protection plays a significant part in the commodified packaging of media products as an element with an independent influence on audience's preferences. The first association that comes to mind in this context is what Margaret J. Radin described as the "domino effect" of commodification.<sup>101</sup> The existence of a considerable amount of commodified media products causes a contagious commodification all through the integrated communicative arena, thus precluding, or at least diminishing, the value people attribute to alternative media products that are less commodified. This description is too sweeping, and even Radin doubted the validity and the empirical support

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100. See *infra* Part II.C.1.

101. MARGARET J. RADIN, *CONTESTED COMMODITIES* 95–96 (1996).

for the domino-effect argument in its extreme version.<sup>102</sup> Nevertheless, to some extent, the commodified nature of media products does seem to shape people's preferences,<sup>103</sup> and when it does, broad copyright protection, as well as other intellectual property rights protection (such as trademark protection), is there to support these preferences.

Intellectual property protection is also the legal source that enables the transformation of a media product into a fungible commodity within a wide range of derivative and related products, such as items of clothing, toys, food, and many other commodities. The proprietary aspects of a commodified media product, as they are constituted and supported by intellectual property protection, may amount to an independent consideration that influences people's preferences toward commodified media products as such. Once media products are shaped and packaged as fungible, commodified goods, people's attitude toward such products, especially in their capacity as solidarity goods, will be influenced by a consumer's perspective that sees in terms of brands, bargains, images, and social status.<sup>104</sup> In such instances of increased commodification, the issue at stake is not just the mere fact that a price has to be paid in order to consume the media product; rather, the issue is that part of the value that consumers attribute to the media product derives from its characteristic as a commodified product.<sup>105</sup> Thus, Coombe and Herman write:

Intellectual property laws structure a field of semiotic possession—control over a sign—and thereby shape forms of symbolic practice. They create proprietary rights in a cultural commodity or commodity-sign—the trademark—and capacities to control its potential meaning and interpretation. Proper signifying activity that connects the product, the brand name, and the corporate source in the mind of the consumer in a closed circuit of meaning and affect forms the basis for

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102. *See id.* at 98.

103. *See* Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 388–89 (1993). *See also* Cass Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 928–31 (1996) (emphasizing the fact that meanings and social roles affect preferences).

104. *See* STUART EWEN, ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE 79 (1988); Keith Aoki, *How the World Dreams Itself to be American: Reflections on the Relationship Between the Expanding Scope of Trademark Protection and Free Speech Norms*, 17 LOY. L.A. ENT. L.J. 523, 528 (1997); Schnably, *supra* note 103, at 388–89.

105. *See* Schnably, *supra* note 103, at 385 (explaining why “it is a mistake to equate commodification with the legality of [market] transfers”). According to Schnably, commodification is a set of relations in personal consumptions, which limit the potential for creativity and self-development that people inevitably strive to exercise.

the trademark holder's legal entitlement to fully exploit and appropriate the exchange value of the commodity-sign in the marketplace.<sup>106</sup>

Coombe and Herman refer to the general manner in which corporations utilize the value of symbolic signs that are attached to commodities, even in circumstances when such symbolic signs have gained independent recognition and value that have no connection to the nature or quality of the products they are attached to, such as t-shirts with a picture of Mickey Mouse.<sup>107</sup>

But there is another point: Just as Mickey Mouse, the cartoon character, promotes the t-shirt, the t-shirt of Mickey Mouse promotes and supports the solidarity value of Mickey Mouse, the cartoon character, within feature media products.<sup>108</sup>

In such circumstances, the value that is gained by assigning an intellectual property protection<sup>109</sup> operates in both directions. Not only does the original media product advance the sale of derivative consumption products, which embody its symbolic signs, but the commodified value of the derivative consumption products supports the cultural and solidarity value of the original media product and its symbolic signs. Hence, when the character of Mickey Mouse, which is protected by copyright independently and apart from the stories in which it appears,<sup>110</sup> is

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106. Rosemary J. Coombe & Andrew Herman, *Culture Wars on the Net: Trademarks, Consumer Politics, and Corporate Accountability on the World Wide Web*, 98 S. ATLANTIC Q. 917, 922 (2001). See also RYAN, *supra* note 77, at 190–91.

107. Within trademark law, such protection is granted by the dilution theory, which protects a trade symbol against uses that are likely to undermine the symbol's distinctiveness, even in the absence of any confusion regarding the product that is being sold and its goodwill. See Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (codified at 15 U.S.C. §§ 1051, 1125(c), 1127 (2000)).

108. See JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 198, 214 (1991).

109. Within copyright law, such protection would usually be applied either through the exclusive right of reproduction or through the exclusive right to make derivative works, both of which have been interpreted broadly. See *supra* note 2; text accompanying notes 107–08. Another powerful source of protection would be trademark law, which in this context operates not under its traditional role of preventing confusion about the product's source but under its more recent antidilution capacity of protecting the distinct value of the famous symbolic sign itself, even in the absence of any confusion regarding the product's source. See generally Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960 (1993) (describing the ongoing expansion of the legal protection of trademarks in the face of circumstances that far exceed trademark law's traditional role of preventing confusion of third parties and protecting the goodwill of a product).

110. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). See also 1 NIMMER & NIMMER, *supra* note 81, § 2.12, at 2–172.33 (stating that the prevailing view is that characters per se are entitled to copyright protection, independently and apart from the stories they

merchandised and licensed to a wide range of consumption products, there is a positive semiotic feedback process: Such commodified products both benefit from the copyrighted symbolic sign and further nourish the cultural-solidarity value of the originating copyrighted work<sup>111</sup>

In describing such processes, I am not claiming that fictional characters should never be entitled to an independent copyright protection, or that there should not be any legal protection against the dilution of a trademark. Likewise, there is no justification to undervalue the legitimacy of such media-oriented consumption products and the enjoyment and benefit people derive from consuming them. My only purpose is to show how broad intellectual property protection establishes a circular dynamic effect under which the cultural solidarity value of media products is leveraged and maintained by its related nonmedia commodified products.<sup>112</sup> Such processes, especially when occurring in large-scale measures, tend to steer audience attention to a limited track of media products, thereby preventing consumers from being open and attentive to the contents of other types of media products that are not part of, and do

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appear in). In the case of Mickey Mouse, such a protection might also be possible under the category of an original graphic work of art.

111. See PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION: ESSAYS ON ART AND LITERATURE* 37 (Randal Johnson ed., 1993) (explaining how “works of art exist as symbolic objects only if they are known and recognized, that is, socially instituted as works of art and revived by spectators capable of knowing and recognizing them as such”). Paradoxical as it may sound, in a postmodern world, for many media products, their manifestation as a commodified good is a factor that strengthens their symbolic meaning, their recognition, and their (solidarity) value as a cultural-media product. See Litman, *supra* note 109, at 1726 (describing how Batman-branded products became valuable trade symbols in a manner that far exceeded the movie sequels).

112. In a manner similar to the explanation provided in Part II.C.2, it is misleading to presume that in the absence of broad intellectual property protection, the commodified utilization of media products (through derivative markets) would be exactly of the same scope, only that the products would not be exclusively provided by the originators of the media product and their licensees. Again, in the absence of such broad intellectual property protection, it is presumable that corporate media’s decision-making process regarding the nature of the media products they produce, and regarding the amount of resources to be invested in their promotion and marketing, would not be identical. As a consequence, people’s preferences toward such media products, as well as toward their derivative and related products, are also expected to change. The demand for a derivative product, which embodies symbolic signs of a well-recognized media product, would not be the same without the protection of the originating media product via broad intellectual property rights. This is not only because the derivative product would not benefit from the same promotional and marketing efforts of corporate media but also because without such broad intellectual property protection there is no assurance that the originating media product would be produced exactly in the same manner, if at all. Cynical as it may sound, piracy would not have succeeded so much without “the protection of intellectual property laws.” Felix Cohen, *Transcendental Nonsense and the Function Approach*, 35 *COLUM. L. REV.* 809, 815 (1935) (describing the circularity of the economic value of the word “Palmolive,” which depends on its legal protection, while its legal protection depends on its economic value).

not fit into, this corporate media dynamic.<sup>113</sup> Consequently, alternative media products will have difficulties in reaching the attention of people who highly value commodified elements, regardless of the fact that these elements themselves are not related to the pure creative and communicative content of the media product.

In some aspects, there is a resemblance between this argument and the radical feminist critique of the free speech defense of pornography.<sup>114</sup> The commodification of media products through broad copyright protection and other intellectual property rights influences people; that is, their media preferences are not their own, but rather, they are constructed for them. This is similar to the way in which male patriarchy constructs, through the shield of freedom of speech, a world in which women's speech is constructed for them. I am not claiming that the silencing effect of copyright protection equals the silencing effect of pornography over the speech rights of woman. The point I wish to emphasize, however, is the prominent role that broad intellectual property protection plays in constructing social patterns that give priority to corporate media's commercialized culture. This perspective also sheds light on the issue of appropriative art, parodies, satires, and other transformative uses of corporate media's popular copyrighted materials. Among other things, such secondary uses could be regarded as embodying an act of social resistance to the cultural hegemony, which is achieved by the constructed meanings of commodified media products.<sup>115</sup>

## CONCLUSION

In an industrial, corporate-media institutional structure, broad and extensive copyright protection tends to support commercialized mass-media products and set barriers between consumers and independent,

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113. This is especially so when, due to the nature of media products as public goods, increased demand for certain types of media products (such as commodified media products) enables the producers to spread their costs among a larger group of people, thereby reducing their prices, and making other media products (such as noncommodified media products) relatively more expensive and also less profitable. See BAKER, *supra* note 23, at 47–48.

114. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 127–213 (1987); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 17–20 (1985). For a critique of the feminist "silencing argument," see Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1909–11 (1992).

115. Fiona Macmillan, *Copyright and Corporate Power*, in *COPYRIGHT IN THE CULTURAL INDUSTRIES* 99, 110–12 (Ruth Towse ed., 2002); Dorean M. Koenig, *Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark Protected Icons*, 11 T.M. COOLEY L. REV. 803, 804 (1994); Coombe, *supra* note 2, at 1861–64.

noninfringing creative materials. In addition, broad copyright protection tends to induce wasteful competition among a relatively homogeneous lineup of media products. Without undermining the value of commercialized mass-media products, an overbroad bias toward such products must come at the expense of other, alternative creative products. Audience attention is a limited and scarce resource. Therefore, any excessive leaning toward commodified mass-media products is bound to limit the effective exposure of people to other diversified cultural and creative offerings.

By limiting the diversity of media products people are exposed to, we are also limiting people's choices regarding the worlds that they could take part in. Moreover, from the perspective of independent, noninfringing creators and producers, there is an additional cost: the de facto silencing of their effective speech powers. A corporate media communicative structure, as supported by broad and expanded copyright law, diminishes and burdens the ability of independent creators to effectively reach their potential audience, and hence, limits their ability to fully execute their speech powers. It is a structural limitation of background rights and powers that has an indirect but prominent influence.

The central normative conclusion of the analysis in this Article is a compelling need for a reexamination of copyright's current scope, and renewed scrutiny of any further expansion of copyright law.<sup>116</sup> In addition to the well-established arguments regarding the harms of enclosure and the diminishment of the public domain, this Article adds an argument in support of a narrow copyright regime: Broad and extensive copyright protection decreases diversity, especially in the context of additional, noninfringing media products.

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116. Although this Article did not concentrate on the solutions for copyright's diversity externalities regarding noninfringement materials, two nonconclusive remarks should be mentioned. First, broad exemptions to copyright that would freely allow more transformative uses of copyrighted material, such as parodies and satires, are not expected to overcome the silencing effect of copyright toward noninfringing materials. As this Article has demonstrated, in this context, the source of copyright's silencing effect derives mainly from the economic and cultural dominance that it grants corporate media. Hence, potential solutions are expected to narrow the ability to commercialize media products through ancillary and derivative markets, rather than facilitate a more liberal approach regarding the use of existing copyrighted materials by other creators within their own independent creative works. Second, emphasizing the need for a reexamination of copyright's current scope should not, however, be taken as an implicit abandonment of various other regulatory mechanisms that are aimed to enhance diversity in media markets—among them, rules regarding the provision of communication facilities (such as compulsory must-carry rules) and rules regarding the structure of the media industry, the distribution of ownership, and the decision-making processes within corporate media (such as concentration and cross-ownership limitations, or licensing policy that induces local ownership).