

## BORROWED FICTION AND THE RIGHTFUL COPYRIGHT POSITION

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### *Abstract*

Works of “borrowed fiction”—unauthorized sequels or retellings of literary works—have long prompted legal, cultural, and social backlash. With respect to copyright disputes, this is because borrowed fiction entails a range of legitimate but conflicting interests. Copyright law has historically elevated the interests of the “original” author over those of other writers and the reading public. Scholars have offered a range of proposals to counter this tendency, but these reforms have focused on the infringement analysis and the fair use doctrine. Each of those, however, involves a binary decision, one that is not amenable to accommodating the conflicting interests at stake. This Article proposes that a better accommodation between and among these interests can be achieved at the remedial stage. By taking seriously both the “rightful position” notion in remedies law and the Supreme Court’s admonition against presumptive injunctive relief, courts can reach a more nuanced result in borrowed fiction cases. Under this approach, the full panoply of remedies would remain available, but rarely would anything more than compensatory damages be necessary to put the plaintiff in her rightful copyright position.

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## PROLOGUE

### *The genesis of this project*

When J.D. Salinger sued Frederik Colting (a.k.a. J.D. California) and his publisher for copyright infringement,<sup>1</sup> I was, as a copyright professor, understandably interested. Colting had written a sequel to *The Catcher in the Rye*, something that Salinger had never done himself, nor authorized anyone else to do. Salinger obtained a preliminary injunction against publication and distribution of Colting’s book.<sup>2</sup> Colting

<sup>1</sup> Complaint, *Salinger v. Doe*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09 CIV 5095), 2009 WL 1529592.

<sup>2</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250, 269 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

appealed the preliminary injunction to the Second Circuit, which remanded the case to the lower court for reconsideration in light of the Supreme Court's opinion in *eBay v. MercExchange*.<sup>3</sup> At some point during the litigation, Salinger died, and his estate persisted with the lawsuit; the case settled before the district court's decision on remand.<sup>4</sup>

I decided that I wanted to read Colting's novel, *60 Years Later: Coming Through the Rye*.<sup>5</sup> I did what I think many of us would do: I went to amazon.com. The website informed me that the book was not available in the United States, but directed me to amazon.co.uk.<sup>6</sup> I was able to order the book from the British site, I paid for it in British pounds, and I received it a couple of days later. When I opened the box, I was surprised—very surprised—to see that the book had a red sticker plastered across the front: “BANNED IN THE USA!”<sup>7</sup> Banned, like obscene pornography or treasonous materials.

I have been a reader all of my life. As I child, I read voraciously, sometimes a book a day. When I could not find a new book to read—when I could not get to the library or find the money to buy another one—I read and re-read the books I already had at home. Everything written by Madeline L'Engle: *The Chronicles of Narnia*,<sup>8</sup> and then *Pride and Prejudice*,<sup>9</sup> and *Jane Eyre*,<sup>10</sup> and yes, embarrassingly, *Flowers in the Attic*,<sup>11</sup> and then, of course, like so many teenagers, *The Fountainhead*.<sup>12</sup> If I could, I would still read that way, every day, as much as I could. I do read for pleasure these days, always fiction. I have always preferred fiction, but particularly as my career involves non-fiction—thinking and reading about the real world, all day—I find

<sup>3</sup> *Salinger v. Colting*, 607 F.3d 68, 70 (2d Cir. 2010); see *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (holding that injunctive relief should not be presumed in patent cases).

<sup>4</sup> See Andrew Albanese, *J.D. Salinger Estate, Swedish Author Settle Copyright Suit*, PUBLISHERS WKLY. (Jan. 11, 2011), <http://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html>.

<sup>5</sup> JOHN DAVID CALIFORNIA, *SIXTY YEARS LATER: COMING THROUGH THE RYE* (2009).

<sup>6</sup> Product Page for *60 Years Later*, AMAZON.CO.UK, [http://www.amazon.co.uk/Years-Later-John-David-California/dp/9185869546/ref=sr\\_1\\_1?ie=UTF8&qid=1341942735&sr=8-1](http://www.amazon.co.uk/Years-Later-John-David-California/dp/9185869546/ref=sr_1_1?ie=UTF8&qid=1341942735&sr=8-1) (last visited Sept. 11, 2013).

<sup>7</sup> An image with the sticker can be found online. Bob Denham, *Frye in Court*, EDUCATED IMAGINATION (May 30, 2010, 10:25 AM), <https://macblog.mcmaster.ca/fryeblog/2010/05/30/frye-in-court/>.

<sup>8</sup> C. S. LEWIS, *THE LION, THE WITCH AND THE WARDROBE* (HarperCollins, Reprt. ed. 1994) (1950); C. S. LEWIS, *PRINCE CASPIAN* (HarperCollins, Reprt. ed. 1994) (1951); C. S. LEWIS, *THE VOYAGE OF THE DAWN TREADER* (HarperCollins, Reprt. ed. 1994) (1952); C. S. LEWIS, *THE SILVER CHAIR* (HarperCollins, Reprt. ed. 1994) (1953); C. S. LEWIS, *THE HORSE AND HIS BOY* (HarperCollins, Reprt. ed. 1994) (1954); C. S. LEWIS, *THE MAGICIAN'S NEPHEW* (HarperCollins, Reprt. ed. 1994) (1955); C. S. LEWIS, *LAST BATTLE* (HarperCollins, Reprt. ed. 1994) (1956).

<sup>9</sup> JANE AUSTEN, *PRIDE AND PREJUDICE* (Pat Rogers ed., Cambridge Univ. Press, *The Cambridge Ed. of the Works of Jane Austen* 2013) (1813).

<sup>10</sup> CHARLOTTE BRONTË, *JANE EYRE* (Wilder Publ'ns 2009) (1847).

<sup>11</sup> V.C. ANDREWS, *FLOWERS IN THE ATTIC* (Gallery Books, Rprt. Ed. 2005) (1979).

<sup>12</sup> AYN RAND, *THE FOUNTAINHEAD* (Plume, Reprt. Ed. 1994) (1943).

escape, release, distraction in reading a novel, and I am always in the middle of one. I know that I am not alone in this feeling.<sup>13</sup>

It may be because of the long-standing American resistance to censorship, but I really think it is because of my long-held and deeply-felt love of books, that I was so surprised, shocked even, to see the “BANNED IN THE USA!” sticker on Colting’s unauthorized sequel to *The Catcher in the Rye*. I should not have been surprised; after all, I knew about the lawsuit and the injunction, and I had even ordered the book from Amazon’s British site upon finding it unavailable on their American site. I have litigated copyright cases and sought injunctions for copyright infringement. I have taught copyright law and copyright remedies. I know that this is commonly the result of a successful copyright infringement lawsuit. But still, it was a surprise. I decided to spend some time thinking about this vast power that the law gives to copyright owners.

#### *Borrowed fiction*

The banning of Colting’s book was the impetus for this project. As a professor of copyright law and a lifelong voracious reader of fiction, I decided that the way that I would approach the issue of the power of copyright law was to read. So I did. I started out by reading pairs of novels: “originals,” whether in the public domain or protected by copyright, and unauthorized sequels to or retellings of those novels. From *Jane Eyre* and *Wide Sargasso Sea*, to *King Lear* and *A Thousand Acres*, to *Gone with the Wind* and *The Wind Done Gone*, to *The Catcher in the Rye* and its unauthorized sequel, I have indulged in my love of reading.<sup>14</sup> I read *Madame Bovary* and *Flaubert’s Parrot*, *Pride and Prejudice* and *Death Comes to Pemberley*,<sup>15</sup> *Lolita* and *Lo’s Diary*.<sup>16</sup>

<sup>13</sup> See *infra* Part II.A for a discussion of the value of literature and of reading.

<sup>14</sup> BRONTË, *supra* note 10; JEAN RHYS, *WIDE SARGASSO SEA* (W. W. Norton & Company, Inc., Reissue ed. 1992) (1966); MARGARET MITCHELL, *GONE WITH THE WIND* (Scribner, 75th Anniversary Ed. 2011) (1936); ALICE RANDALL, *THE WIND DONE GONE*, (Mariner Books 2002) (2001); WILLIAM SHAKESPEARE, *KING LEAR* (Jonathan Bate & Eric Rasmussen eds., Modern Library 2009) (1623); JANE SMILEY, *A THOUSAND ACRES: A NOVEL* (Anchor Books 2003) (1991); J.D. SALINGER, *THE CATCHER IN THE RYE* (1991); CALIFORNIA, *supra* note 5.

<sup>15</sup> GUSTAVE FLAUBERT, *MADAME BOVARY* (Bantam Books, Bantam Classic reissue ed. 1982) (1857); JULIAN BARNES, *FLAUBERT’S PARROT* (First Vintage International ed. 1990) (1984); AUSTEN, *supra* note 9; P. D. JAMES, *DEATH COMES TO PEMBERLEY* (2011). For some reason, I could not bring myself to read *Pride and Prejudice and Zombies*, although I love the title. JANE AUSTEN & SETH GRAHAME SMITHE, *PRIDE AND PREJUDICE AND ZOMBIES* (2009).

<sup>16</sup> VLADIMIR NABOKOV, *LOLITA* (Second Vintage International ed., 1997) (1955); PIA PERA, *LO’S DIARY* (2001). This is just a sampling of the works in this genre, many of them based on works in the public domain. Some other examples include *The Hours* (borrowed from *Mrs. Dalloway*), *Ahab’s Wife, or the Star-Gazer* (based on *Moby Dick*), *March* (told from the perspective of the father in *Little Women*), and many others. See MICHAEL CUNNINGHAM, *THE HOURS* (1998); VIRGINIA WOOLF, *MRS DALLOWAY* (Oxford Univ. Press, Oxford World’s Classics ed. 2000) (1925); SENA JETER NASLUND, *AHAB’S WIFE: OR, THE STAR-GAZER* (2005); HERMAN MELVILLE, *MOBY DICK* (W.W. Norton & Co., 2d ed. 2002) (1851); GERALDINE

Then I read all of the opinions in the litigated cases, along with many of the briefs, and as much of the reported information on the cases as I could find, as well as scholarly articles.<sup>17</sup>

I refer to this genre as “borrowed fiction,” a term I, in turn, borrow from Michael Greenberg.<sup>18</sup> As used here, “borrowed fiction” includes sequels, retellings, mash-ups, fan fiction, and other written works that use portions of earlier works.<sup>19</sup> Fiction may be borrowed from works that are in the public domain or from works that are protected by copyright, and it may be high- or low-brow, commercial or noncommercial. Its essence is the use of aspects of a previous work of fiction—characters or plot, usually.

In a review of two pieces in this genre, Greenberg describes the general concept that artists have ever borrowed from others.<sup>20</sup> As he states, “artists have been appropriating each other as a means of jarring the way we see and redefining their predecessors,”<sup>21</sup> but borrowed fiction is different in some ways, in that it, “requires not just a preceding work of art, but an ur-text that has seeped into popular consciousness to become the property of the culture at large.”<sup>22</sup> In other words, authors rarely borrow from little-known authors or from works that are not widely read. This fact creates its own potential and its own problems. As Greenberg says:

Borrowed fiction . . . depends on the highly specific text that inspires it—one replete with all the tics and idiosyncrasies of an

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BROOKS, MARCH (2005); LOUISA MAY ALCOTT, *LITTLE WOMEN* (Bantam Dell, Bantam Classic reissue ed. 2007) (1868).

<sup>17</sup> I have also read book reviews, criticisms, op-eds, and popular press accounts of works of borrowed fiction and disputes about those works.

<sup>18</sup> See Michael Greenberg, *The Borrowers*, BOSTON REV., Oct./Nov. 1999.

<sup>19</sup> I include in this genre fan fiction and see no need to distinguish between fan fiction and some other kind of borrowed fiction. “Fan fiction” may, perhaps, be deemed low-brow or somehow different from, say, Jane Smiley’s *A Thousand Acres*, but it operates in exactly the same way. It is always a new take on an iconic work, even if that work is iconic only in a niche setting. Much fan fiction may be non-commercial, but that may not be much of a distinction; if it is, fan fiction nonetheless remains a subset of borrowed fiction. For the purposes of this Article, there are no reasons to distinguish fan fiction from the broader category of borrowed fiction. Many scholars have addressed fan fiction in particular. See, e.g., Anupam Chander & Madhavi Sunder, *Everyone’s a Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597 (2007); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997):

[T]he secondary creativity expressed in noncommercial fan fiction deserves the protection of the law. Section 107 of the Copyright Act allows ‘fair use’ of copyrighted material. Fan fiction should fall under the fair use exception to copyright restrictions because fan fiction involves the productive addition of creative labor to a copyright holder’s characters, it is noncommercial, and it does not act as an economic substitute for the original copyrighted work.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

individual novelist's imagination. Those idiosyncrasies are precisely what make borrowed fiction a peculiarly challenging and aesthetically perilous enterprise.<sup>23</sup>

Greenberg does not mention the legal perils, but they are significant as well. Authors of works of fiction have regularly complained about and sometimes sued over works of borrowed fiction, and writers of borrowed fiction are seen as interlopers, or plagiarists, or thieves.

#### INTRODUCTION

Reading these originals and the works of borrowed fiction prompted this project. As a reader, it was difficult for me to imagine that the world is worse off for the existence of *all* of these books.<sup>24</sup> As a copyright professor, I began to think about what interests copyright law does protect, and what interests copyright law *should* protect, when the question is whether a work of fiction should be “BANNED IN THE USA!” The first task of this Article is to identify and disentangle the variety of authorial interests asserted when there are objections to borrowed fiction, and then to bring into relief the interests of other authors, including the writers of borrowed fiction, and of readers, and of the public more generally. The second task is to propose an alternative by which an author's core copyright interests may be vindicated while at the same time allowing for as much new work as possible.

In the course of reading pairs of novels—“original” works and follow-on works of borrowed fiction—and thinking about the objections to borrowed fiction, two realizations crystallized. First, when authors object to unauthorized follow-on works, a variety of concerns are at play, but not all of them are what American copyright law might consider “core” copyright interests. Second, a variety of other relevant, even if not core, copyright concerns are often disregarded.<sup>25</sup>

In the United States, the Constitution makes clear that the central aim of copyright law is economic or utilitarian. Congress may pass copyright laws “[t]o promote the Progress of Science and useful Arts.”<sup>26</sup> This is widely understood to embody a utilitarian notion: some form of protection for expressive works is required in order to induce an optimal

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<sup>23</sup> *Id.*

<sup>24</sup> By no means do I intend to imply that all or even most of these works of borrowed fiction are good. But quality is beside the point; it is highly subjective, and we are less likely to get more of the “good” ones if writing them brings the prospect of litigation.

<sup>25</sup> Scholars have criticized the law in this area and offered a whole range of reforms. See, e.g., Chander & Sunder, *supra* note 19; Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 136 (2007); see also *infra* Part III.A.

<sup>26</sup> U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”).

level of creativity.<sup>27</sup> Consistent with this utilitarian approach, U.S. copyright law involves a limited grant of rights; authors receive a long term of protection, but that protection is limited in some significant ways by standards of protectability,<sup>28</sup> defenses,<sup>29</sup> and hurdles to recovery.<sup>30</sup> Underlying this approach is the understanding that the public, rather than the author, is the intended beneficiary of the copyright regime.<sup>31</sup> But while the utilitarian approach is aimed at the public interest, it gets there only indirectly; creators get rights, and those rights are to be calibrated in such a way that the public receives a benefit.<sup>32</sup>

While the economic interest, based on a utilitarian notion, is the one mentioned in the constitutional grant,<sup>33</sup> other interests or concerns play a large role in the discussions involving borrowed fiction. Primary among these is a moral rights interest, arising from a feeling that the author's personhood is embodied in the work.<sup>34</sup> For example, in talking about whether she would write another *Harry Potter* novel, J.K. Rowling said, "It's my baby and if I want to take it out and play, then maybe one day I will."<sup>35</sup> J.D. Salinger, notoriously reclusive and famously unwilling to license his work, said of *The Catcher in the Rye*, "I see my novel as a novel and only as a novel,"<sup>36</sup> demonstrating a

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<sup>27</sup> See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

<sup>28</sup> For example, the idea/expression dichotomy, the merger doctrine, and the useful article doctrine all serve to limit the scope of copyrightable subject matter. For an overview of these doctrines, see JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 81–98 (3d ed. 2010).

<sup>29</sup> The fair use defense serves an important role in limiting the strength of the copyright holder's rights by permitting unauthorized uses of copyrighted material under certain circumstances. See 17 U.S.C. § 107 (1992).

<sup>30</sup> For example, a plaintiff may recover statutory damages only if the copyright was registered within three months of publication and before the infringement occurred. 17 U.S.C. § 412 (2008).

<sup>31</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

<sup>32</sup> See *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992) ("The copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.").

<sup>33</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>34</sup> See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>35</sup> *J.K. Rowling: Maybe I Will Write More Harry Potter Books*, DAILYFILL (July 7, 2011, 3:09 PM), <http://www.dailyfill.com/JK-Rowling-At-Deathly-Hallows-Premiere-Maybe-I-Will-Write-More-Harry-Potter-Books-94899/>.

<sup>36</sup> Maryann Yin, *J.D. Salinger: 'I See My Novel as a Novel and Only as a Novel,'* Mediabistro (Dec. 20, 2010, 9:39 AM), [http://www.mediabistro.com/galleycat/j-d-salinger-i-see-my-novel-as-a-novel-and-only-as-a-novel\\_b18833](http://www.mediabistro.com/galleycat/j-d-salinger-i-see-my-novel-as-a-novel-and-only-as-a-novel_b18833) (noting J.D. Salinger's denial of a request to turn *The*

belief that he is entitled to absolute control over the work. Though American copyright law explicitly rejects a moral right approach, such a view clearly seeps into the justifications for and application of copyright principles.<sup>37</sup> Trademark-like arguments involving the danger of consumer perception and confusion also run through the discussions of borrowed fiction.<sup>38</sup> Some authors might plausibly object to borrowed fiction because readers might be confused. Though extremely unlikely, if I write a play in iambic pentameter in early middle English and call it *Cordelia, Regan, and Goneril: King Lear's Next Generation*, some readers might think that they had stumbled upon a new Shakespeare work. More plausibly, if a writer penned a sequel to *The Catcher in the Rye* while J.D. Salinger was still alive, readers might truly be deceived; Salinger certainly could have authored or authorized a sequel to his iconic novel. But a clear and obvious disclaimer—for example, “An Unauthorized Sequel”—is quite likely to dispel any associative concerns.

There are certainly other kinds of authorial interests that copyright law might be protecting, but it is these three issues—economic concerns, moral rights, and trademark-related worries—that appear in the cases and commentary. These three interests reflect the concerns of the “original” author, but the authors of borrowed fiction, readers, and the public, have interests in this matter as well. These interests, however, are not well represented in the discussions of borrowed fiction. The courts, for example, rarely address in any depth the interests of writers seeking to use pre-existing works, the interests of readers accessing a greater variety and type of work, or the free speech implications of banning books.<sup>39</sup> In other words, the discussion surrounding borrowed fiction disputes is both too broad and too narrow.

The legal approach to these disputes has been criticized from a variety of angles, and many commentators have proposed changes to the standards for protection of literary characters and infringement, for example, or tweaks to the fair use analysis.<sup>40</sup> But the doctrines involving protectability, infringement, and fair use involve a binary choice: protectable or not protectable; infringement or not infringement; fair use or not fair use. The proposed tweaks to these doctrines do not change that dynamic. While these doctrines certainly could benefit from an approach that takes more explicit account of the cognizable copyright interests, it is at the remedial phase that courts have an opportunity to

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*Catcher in the Rye* into a film).

<sup>37</sup> See *infra* Part I.B.

<sup>38</sup> See *infra* Part I.B.

<sup>39</sup> See *infra* Part I.B and I.C.

<sup>40</sup> See *infra* Part III.A



implement a nuanced, non-binary approach that is sensitive to the various, often conflicting, interests at stake.

Remedies law is animated by the rightful position notion: the goal of any remedial scheme is to return the plaintiff to her “rightful position,” which is measured by the nature and scope of the claims at issue. For example, a tort plaintiff’s rightful position is that which is closest to her pre-accident condition. A contract plaintiff’s rightful position is that which best approximates what her position would have been had the contract been fully performed. Similarly, the copyright plaintiff’s rightful position is determined by the scope and nature of the copyright claim. The Copyright Act provides for a broad range of remedies—from injunctive relief and statutory damages to actual damages and attorney’s fees—but the overarching purpose of those remedies is difficult to encapsulate. This is, in part, because the goals of copyright law remain hotly contested territory. Nonetheless, the rightful position notion could provide some focus for the court’s analysis. For example, preventing or rectifying consumer confusion is not the purpose of a copyright claim, so a remedy directed at that concern would not place the plaintiff in her rightful *copyright* position.

While the rightful position notion undergirds much of remedies law, the Supreme Court has recently added its gloss to intellectual property (“IP”) remedies in particular. In *eBay v. MercExchange*, the Court held that injunctions should not be issued as a matter of course in patent cases.<sup>41</sup> Instead, the Court called for consideration of injunctive relief in a case-by-case, fact-sensitive way.<sup>42</sup> Although the opinion has been rightly criticized,<sup>43</sup> it does provide an opening for a nuanced assessment of the plaintiff’s rightful position in copyright cases.<sup>44</sup> Under this approach, courts would rarely issue injunctions in borrowed fiction cases.<sup>45</sup> In turn, follow-on authors may ultimately feel freer to write

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<sup>41</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)

<sup>42</sup> *Id.*

<sup>43</sup> See *infra* Part III.B.2.

<sup>44</sup> Patent and copyright are distinct bodies of law, of course. See 35 U.S.C. §§ 1–390 (Patent Act) and 17 U.S.C. §§ 101–1332 (Copyright Act). However, they spring from the same grant of authority. See U.S. CONST. art. I, § 8, cl. 8. The Supreme Court not only relied on copyright cases in its *eBay* decision but clearly indicated that its holding applied to injunctive relief generally. *eBay*, 547 U.S. 388 at 394.

<sup>45</sup> In a recent symposium piece, Christina Bohannon discussed “the important subject of when injunctions may be granted in copyright cases and the role that harm should play in making that determination,” and suggested that *eBay* provides a vehicle for considering this issue. *Copyright Harm and Injunctions*, 30 CARDOZO ARTS & ENT. L.J. 11, 15 (2012). Bohannon’s discussion of harm focuses on the question of causation, a crucial and often overlooked issue. *Id.* at 20 (“If these requirements are not met—if there is no demonstrable harm or causation cannot be shown—then there should be no injunction.”). The tension between the First Amendment and copyright injunctions has been the subject of much scholarly debate. See, e.g., Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J.

their works, while the original authors may well receive a stream of compensation from the commercialization of borrowed fiction.<sup>46</sup>

As is perhaps already obvious, this Article proceeds in a somewhat unorthodox fashion. In Part I of the Article, I describe two recent borrowed fiction cases and demonstrate that the concerns expressed by the courts, the parties, and observers extend well beyond the interests theoretically protected by U.S. copyright law. Then, in Part II, I take an impressionistic approach to describing the larger set of plausible interests involved in writing borrowed fiction, in reading borrowed fiction, and in banning borrowed fiction. Finally, in Part III, I demonstrate that changes to the protectability, infringement, or fair uses analyses, while potentially useful, all result in binary solutions that do not allow for a nuanced balancing of the variety of relevant interests. I propose that this balancing can best be accomplished at the remedial stage. By taking seriously both the copyright plaintiff's rightful position and the Supreme Court's admonition against the presumption of injunctive relief, courts are in the position to achieve a better accommodation between and among authors—all authors—and readers. Finally, the Article concludes with a few suggestions for extending the analysis beyond borrowed fiction.

#### I. LITIGATING BORROWED FICTION DISPUTES

In the course of this project, I read not only the novels, but also court opinions, briefs, opinion pieces, popular press coverage, and a variety of other sources concerning borrowed fiction controversies. This review revealed that the variety of concerns laid out above—moral rights notions, reputational or associative concerns, and economic arguments—all play a part in the advocacy and resolution of the disputes. Rarely, however, do the courts or the parties differentiate or identify these various interests, nor is there much recognition that the

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147 (1998) (arguing that preliminary injunctions in IP cases will often violate free speech principles whereas permanent injunctions may pass constitutional muster); *see also* Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083 (2010) (arguing that copyright's "anomalous" First Amendment treatment is not generally justifiable); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002). This Article is informed by that literature but does not engage that debate directly. *See infra* Part III.B.4.

<sup>46</sup> There has been much discussion, in the context of intellectual property law and other areas, of property rules versus liability rules. This Article does not engage in that debate but is informed by it; the conclusions are consistent with the view that liability rules may be preferable in certain circumstances. The groundbreaking work in the field is Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For the extension of this analysis into the IP realm, see Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783 (2007).

plaintiffs and the courts rely so heavily on interests that are, theoretically at least, outside the core concerns of copyright law. In addition, many other plausibly relevant concerns are ignored or given short shrift. In this section, I first briefly summarize the various possible justifications for copyright protection and then describe a few of the borrowed fiction disputes, demonstrating that moral rights and trademark-like concerns are woven throughout the discussion of these disputes.

### A. *Justifications for Copyright Protection*

Before turning to the cases, a brief summary of some of the possible justifications for copyright protection is warranted to understand the various arguments put forth. While U.S. copyright law is generally understood to rest upon an economic or utilitarian approach, other arguments abound and they appear regularly.

The Constitution gives Congress the authority to pass legislation in order “[t]o promote the Progress of Science and the useful Arts.”<sup>47</sup> This is commonly understood to provide a utilitarian justification for copyright protection:<sup>48</sup> copyright rights are granted in order to incentivize the creation and dissemination of expressive works, not for the purpose of rewarding authors.<sup>49</sup> This means that copyright law provides for a set of exclusive rights, but those rights are somewhat limited: in term, in scope, and in force. For example, the copyright term, though long, is time-limited, and there are a variety of fairly robust defenses designed to benefit the public. Commentators generally explain these limits in terms of utility, expressing, “[i]f the exclusive rights are too strong, too broad, or too long, they inhibit more cultural growth than they encourage by chilling the creation of new works that

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<sup>47</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>48</sup> There is an extensive literature on moral rights, much of it advocating for broader moral rights protection in the United States. *See, e.g.*, Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41 (1998). But there are also some dissenters, arguing against increasing the scope of moral rights-types of protection. *See, e.g.*, Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009). Nearly all agree that, with just a few exceptions, American copyright law does not incorporate moral rights kinds of protections and is not based on a moral rights theory.

<sup>49</sup> *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The limited scope of the copyright holder’s statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”). *See also Fox Film v. Doyal*, 286 U.S. 123, 127 (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labor of authors. It is said that reward to author or artist serves to induce release to the public of the products of his creative genius.”).

might be as good as, or even better than, those on which they are based.”<sup>50</sup> Much of U.S. copyright law reflects this utilitarian approach, even if imperfectly.<sup>51</sup>

This is not the only possible justification for the grant of rights in creative works, however. Other countries, most notably France, provide rights to authors based on a moral rights theory.<sup>52</sup> A moral rights approach is focused on the authors themselves, rather than the creation and dissemination of creative works for the benefit of the public.<sup>53</sup> Under this view, the author and the work are intimately connected, and the author deserves a significant degree of control over the work.<sup>54</sup> This results, generally, in a stronger set of rights than is called for by the utilitarian approach. For example, moral rights often involve allowing for a right of disclosure, a right of paternity, a right of integrity, and, sometimes, a right of withdrawal of the work as well as a right to prevent excessive criticism.<sup>55</sup> French law provides a full complement of moral rights, which includes a copyright.<sup>56</sup> Emphasizing the personal nature of the moral right, French law is perpetual, rather than time-limited, whereas U.S. law does not confer any similar perpetual rights upon authors.<sup>57</sup>

Efforts to incorporate these kinds of protections into U.S. law have regularly been rejected.<sup>58</sup> To the extent that U.S. law reflects moral

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<sup>50</sup> Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 34 (2006).

<sup>51</sup> Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2 (1985) (“[T]he 1976 Act continues this country’s tradition of safeguarding only the *pecuniary* rights of a copyright owner.”).

<sup>52</sup> *Id.* at 20 (explaining that these theories can be described in other ways and with other words, among them the description that “[t]he standard dichotomy is that between instrumentalism (incentives) and so-called ‘natural rights’”).

<sup>53</sup> See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 355–56 (2006) (summarizing the standard complement of moral rights).

<sup>54</sup> See Kwall, *supra* note 47, at 7 (“To appreciate fully the theoretical basis for these two rights [to prevent excessive criticism and for relief from assaults on personality], one must recall that the moral right doctrine safeguards rights of personality rather than pecuniary rights.”); see also Radin, *supra* note 34 (discussing personhood theory).

<sup>55</sup> Kwall, *supra* note 47, at 5.

<sup>56</sup> Rigamonti, *supra* note 53, at 359–60 (“The copyright statutes currently in force in France, Germany, and Italy contain provisions dedicated to the protection of the rights of disclosure, attribution, integrity, and withdrawal. These rights are generally conceptualized as inalienable rights of authors in their works, which means that they share the same three legal characteristics that determine whether a particular right granted to authors qualifies as a moral right.”).

<sup>57</sup> *Id.* at 15 (“In France a creator’s moral or personality rights always have been regarded as a separate body of protections, rather than as a component of the creator’s pecuniary rights. Thus, in French theory no logical inconsistency results from protecting a creator’s moral rights in perpetuity, despite the limited duration of his copyright.”).

<sup>58</sup> The exceptions tend to prove the rule. In 1990, Congress passed the Visual Artists Rights Act (“VARA”), as part of the United States’ accession to the Berne Convention. 17 U.S.C. § 106A (1990). VARA does provide some limited moral rights kinds of protection for works of visual art. Authors of “works of visual art” have rights of attribution and integrity in the work and against

rights concerns, it is in trademark law. While copyright law is animated by the effort to incentivize the creation of new works, trademark law is focused on consumers and the marketplace and seeks to eliminate confusion on the market.<sup>59</sup> If consumers are likely to be confused as to the source of a good, the Lanham Act provides a remedy to competitors.<sup>60</sup> In seeking to protect against source confusion, trademark law does, in fact, provide some moral rights–like kind of protections.<sup>61</sup> But, unlike copyright law, trademark law does not generally seek to incentivize the creation of new works.<sup>62</sup>

Notwithstanding the divergence between these different justifications, they are all woven throughout the discussion of borrowed fiction disputes.<sup>63</sup> In addition to arguments about the economic incentive justification for copyright protection, moral rights and trademark-like arguments appear regularly.<sup>64</sup>

#### B. *The Catcher in the Rye vs. 60 Years Later: Coming Through the Rye*

As mentioned in the Introduction, J.D. Salinger sued Frederik Colting, under his pen name J.D. California, alleging that Colting's book, *60 Years Later: Coming Through the Rye*, infringed Salinger's copyright in *The Catcher in the Rye*.<sup>65</sup> Salinger sought, and the court awarded, a preliminary injunction prohibiting publication or distribution of the follow-on work.<sup>66</sup> On appeal, the case was remanded for

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mutilation and false attribution. *Id.* In the case of VARA, the moral rights imported into U.S. law are quite limited; they apply only to works of visual art and have numerous exceptions and limitations. Notably, the fair use defense applies to works of visual art just as it applies to any other copyrightable work.

<sup>59</sup> U.S. copyright law is not generally concerned with this question and indeed the Supreme Court has been somewhat careful to distinguish between the two bodies of law. *See, e.g., Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

<sup>60</sup> 15 U.S.C. § 1051 (2002).

<sup>61</sup> Rigamonti, *supra* note 53, at 363–64 (explaining that the moral right of attribution entails the right to have one's name affixed to one's works and the right to prevent others from doing so falsely).

<sup>62</sup> Instead, trademark law focuses on the marketplace and protection of consumers in that context. 15 U.S.C. § 1125(a) (providing a cause of action to competitors when consumers might be confused as to the source of goods). *See Tushnet, supra* note 19, at 675 (“[T]he interest in the integrity of characters is not an interest in market share, but a general reputational concern, which copyright law does not formally recognize.”).

<sup>63</sup> I am not the first person to note this phenomenon. *See, e.g., Karjala, supra* note 50, at 20–21 (“Historical analysis of the concerns of the drafters in placing the intellectual property power in the Constitution, as well as a long and, until recently, largely unbroken string of Supreme Court decisions would seem to place the United States firmly in the instrumentalist camp. Lower courts, however, often show an apparent natural rights bias in their analyses, and some commentators have argued that both natural rights and instrumentalism have played an important role in the underpinnings of United States copyright.”).

<sup>64</sup> *See infra* Part I.B. and C.

<sup>65</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250, 253–54 (S.D.N.Y. 2009).

<sup>66</sup> *Id.* at 269.

reconsideration, and the parties settled before there was resolution of the issues on the merits. Notwithstanding this early end to the litigation, there are several court opinions, along with the briefs and popular press items, addressing the copyright issues. These various sources reveal the influence of moral rights and trademark-like concerns, in addition to economic and utilitarian arguments that arise from the constitutional grant of authority.<sup>67</sup>

Arguments sounding in moral rights appear regularly throughout these documents. In discussing the first fair use factor, for example, the district court concluded that “*60 Years*’ plain purpose is not to expose Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, but rather to satisfy Holden’s fans’ passion for Holden Caulfield’s disconnectedness, absurdity, and ridiculousness, which *Catcher* has ‘elevated into the realm of protectable creative expression.’”<sup>68</sup> In denigrating Colting’s work by describing it as satisfying the “fans’ passion,” the district court implicitly indicates that Salinger has some claim on the readers’ reactions and interests.<sup>69</sup> The court dismissed with just a brief discussion of the possibility that the work was transformative in ways other than parody.<sup>70</sup>

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<sup>67</sup> There has been a considerable amount of academic commentary on *Salinger v. Colting*. For just a few examples, see Andrew Gilden, *Copyright Essentialism and the Performativity of Remedies*, 54 WM. & MARY L. REV. 1123 (2013); Deidré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511 (2012); Arlen W. Langvardt & Tara E. Langvardt, *Caught in the Copyright Rye: Freeing First Amendment Interests from the Constraints of the Traditional View*, 2 HARV. J. SPORTS & ENT. L. 99 (2011); Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769 (2013).

<sup>68</sup> *Salinger*, 641 F. Supp. 2d at 260 (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 143 (2d Cir. 1998)).

<sup>69</sup> Colting asserted that his work ought to be considered fair use in part because of the extent to which it commented upon and criticized Salinger himself. Because this critique was focused on Salinger rather than *The Catcher in the Rye*, the court rejected it as a “parody” for fair use purposes. The Second Circuit noted that “the *Catcher* mystique” is “[i]nseparable from . . . the lifestyle of its author, Salinger.” *Salinger v. Colting*, 607 F.3d 68, 71 (2d Cir. 2010). Part of this mystique involves Salinger’s isolation and his refusal to allow adaptations of his works. There may be other ways of commenting on Salinger and his “mystique,” but using *The Catcher in the Rye* as a launching pad is surely one of the most effective.

<sup>70</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250, 261–62 (S.D.N.Y. 2009). The district court rejected the defendants’ argument that the purpose of the work was, in part, to critique Salinger himself. Notably, the court relied fairly heavily on the defendant’s admissions as to the purpose of the work.

Furthermore, the non-parodic, transformative aspect of Salinger the character is limited. First, the admissions by Defendants’ as to the character and purpose of *60 Years* as a sequel to a beloved classic belies any claim that this critique of J.D. Salinger and his behavior was the primary purpose of the novel. It is simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona, while he and his agents’ previous statements regarding the book discuss no such critique, and in fact reference various other purposes behind the book.

*Id.* Given the Second Circuit’s most recent fair use opinion, *Cariou v. Prince*, it is worth considering whether the Court might now evaluate this question differently. In *Cariou*, the Court

In another part of the opinion, the court discusses the “right *not* to produce any sequels[,]”<sup>71</sup> concluding that “the right *not* to license derivatives sometimes act[s] as an incentive to the creation of originals.”<sup>72</sup> While the court describes this as part of the incentive structure of copyright law, it sounds in moral rights. As the court states:

[S]ome artists may be further incentivized to create original works due to the availability of the right *not* to produce any sequels. This might be the case if, for instance, an author’s artistic vision includes leaving certain portions or aspects of his character’s story to the varied imagination of his readers, or if he hopes that his readers will engage in discussion and speculation as to what happened subsequently.<sup>73</sup>

This seems closer to the moral right of integrity—providing to authors “a right to prohibit modifications of their works”<sup>74</sup>—than an American copyright, and implies that the author has some right to control not just other works but also others’ thoughts.

The district court held that the plaintiff was likely to succeed on the merits and entered a preliminary injunction, relying on case law establishing that irreparable harm is presumed when a *prima facie* case of copyright infringement is made.<sup>75</sup> The Second Circuit affirmed a majority of the decision, but remanded for reconsideration in light of the Supreme Court’s opinion in *eBay v. MercExchange*.<sup>76</sup> On the fair use issue, the Second Circuit concurred with the district court’s conclusion that there might be an effect on the market for derivatives, and it echoed the lower court’s language of consumer confusion, specifically, “the

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held that the transformative nature of a work was to be judged by an objective standard rather than by the defendant’s stated purposes or intent.

What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince’s work could be transformative even without commenting on Cariou’s work or on culture, and even without Prince’s stated intention to do so. Rather than confining our inquiry to Prince’s explanations of his artworks, we instead examine how the artworks may ‘reasonably be perceived’ in order to assess their transformative nature.

Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013).

<sup>71</sup> *Salinger*, 641 F. Supp. 2d at 268.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Rigamonti, *supra* note 53, at 364.

<sup>75</sup> *Id.* at 268–69.

<sup>76</sup> *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010) (“Because the District Court considered only the first of the four factors that, under *eBay* and our holding today, must be considered before issuing a preliminary injunction, we vacate and remand the case. But in the interest of judicial economy, we note that there is no reason to disturb the District Court’s conclusion as to the factor it did consider—namely, that *Salinger* is likely to succeed on the merits of his copyright infringement claim.”).

right *not* to authorize derivative works.”<sup>77</sup>

The Second Circuit did not resolve the question of injunctive relief, but the court did provide some texture to the analysis that might be conducted by the lower court.<sup>78</sup> In discussing the irreparable injury prong—the one significantly changed by *eBay*, in that irreparable injury can no longer be presumed—the court mentioned two interests of the copyright plaintiff.<sup>79</sup> The first is the “property interest in the copyrighted material.”<sup>80</sup> While the question of the extent to which copyright should be deemed property, rather than regulation or some other species of law, remains contested, calling it property sounds in a kind of natural law or moral rights theory, certainly when used in a conclusory way (as in, property right, therefore plaintiff prevails).

The second interest noted by the court is the copyright holder’s “First Amendment interest in *not* speaking.”<sup>81</sup> This right not to speak is indeed well established in First Amendment jurisprudence,<sup>82</sup> and in copyright law as well.<sup>83</sup> It is a leap, however, to conflate the right not to speak with the right to prohibit a work of borrowed fiction, and it—again—echoes a moral rights notion that authors have great control over the use of their works once they have been released into the world.

In discussing this issue, the courts simply presume that the publication of a work of borrowed fiction is tantamount to an infringement of the First Amendment right *not* to speak.<sup>84</sup> This appears

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<sup>77</sup> *Id.* at 74.

<sup>78</sup> Although the Second Circuit agreed with the District Court that Salinger was likely to prevail on the merits, the Court conceded that “rewrites” of *The Catcher in the Rye* have proliferated: “Literary critic Louis Menand has identified *Catcher* ‘rewrites’ as a ‘literary genre all its own.’” *Id.* at 71. Banning this one is unlikely to stem the interest in Salinger’s works. It may even increase it.

<sup>79</sup> *Id.* at 81.

<sup>80</sup> *Id.* This notion has a long pedigree, of course; the court cites *Wheaton v. Peters*, 33 U.S. 591 (1834), for this proposition. This is, however, a bit of an odd citation as it refers to the common law copyright question, not to any statutory copyright.

<sup>81</sup> *Salinger*, 607 F.3d at 81.

<sup>82</sup> *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348 (1968) (“The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”).

<sup>83</sup> *See, e.g.*, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“Courts and commentators have recognized that copyright, and the right of first publication in particular, serve this countervailing First Amendment value [of the right not to speak].”).

<sup>84</sup> Similarly, the right not to exploit one’s copyright is conflated with the right to prevent others from using that copyright—in other words, the right not to exploit one’s own copyright is the right not to be forced to write a sequel, but is often cast as the right to prevent others from doing so. *See, e.g.*, Plaintiff’s Memorandum in Support of Application for Preliminary Injunction at 8, *Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009) (No. 09 Civ. 5095 DAB) [hereinafter Plaintiff’s Memorandum] (“While Salinger’s copyright in *Catcher* could no doubt be put to lucrative use if he chose to author or allow an adaptation, sequel, or any other derivative work, he



to flow from the compelled speech line of cases, but surely it is much different to be required to pledge allegiance to the flag,<sup>85</sup> for example, than to have someone write an unauthorized sequel to one's novel. These are simply not the same thing, if only because it is clearly *not* J.D. Salinger speaking when Frederik Colting publishes a book.<sup>86</sup>

Such a leap appears to be based, at least in part, on the conclusion that readers will be confused as to the source of the work of borrowed fiction or will associate the new work with the author of the old work.<sup>87</sup> Note that both of these justifications sound more like trademark arguments than copyright arguments. In *Salinger v. Colting*, for example, the Second Circuit stated that “[i]n the context of copyright infringement cases, the harm to the plaintiff’s property interest has often been characterized as irreparable *in light of possible market confusion*.”<sup>88</sup> The court went on to hint quite strongly that, notwithstanding *eBay*, courts could continue to regularly issue injunctions in copyright cases.<sup>89</sup>

In discussing the effect on the market prong of the fair use analysis, the district court conceded that Colting’s work was unlikely to “undermine the market for *Catcher*,”<sup>90</sup> but nevertheless concluded “that the publishing of *60 Years* and similar widespread works could substantially harm the market for a *Catcher* sequel or other derivative works, *whether through confusion as to which is the true sequel or companion to Catcher*, or simply because of reduced novelty or press coverage.”<sup>91</sup> In this statement, the court invokes a trademark-like concern, that the reading public will be misled as to the source, origin or

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has instead chosen—as is his right—not to further exploit his copyright.”)

<sup>85</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that a school’s mandatory pledge of allegiance violates the First Amendment).

<sup>86</sup> Courts regularly talk about this right *not* to speak protected by the First Amendment. See, e.g., *Harper & Row Publishers*, 471 U.S. at 559, quoting *Estate of Hemingway*, 23 N.Y.2d at 348. I have not found a court in a copyright case discussing the state action doctrine in connection with this alleged violation of the First Amendment. Of course, the courts here are not discussing actual violations of the First Amendment, as the suits do not involve such a claim by the copyright plaintiff. But it is important to recall that the First Amendment requires state action and it is difficult to find state action in an individual’s writing or publishing a book. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001).

<sup>87</sup> The cases do not make this statement explicitly. Rather, they just conclude that the right *not* to speak justifies the conclusion that irreparable injury has resulted. See, e.g., *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (“Additionally, ‘[t]he loss of First Amendment freedoms,’ and hence infringement of the right *not* to speak, ‘even for minimal periods of time, unquestionably constitutes irreparable injury.’”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

<sup>88</sup> *Colting*, 607 F.3d at 81 (emphasis added).

<sup>89</sup> *Id.* at 82 (“This is not to say that most copyright plaintiffs who have shown a likelihood of success on the merits would not be irreparably harmed absent preliminary injunctive relief. As an empirical matter, that may well be the case, and the historical tendency to issue preliminary injunctions readily in copyright cases may reflect just that.”).

<sup>90</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250, 267 (S.D.N.Y. 2009).

<sup>91</sup> *Id.* at 267–68 (emphasis added).

sponsorship of a piece of borrowed fiction.<sup>92</sup>

It is not just the published opinions that reflect this kind of thinking. The terms of the settlement for example, reveal some of the same kinds of moral rights and trademark concerns. Although the agreement is confidential, *Publisher's Weekly* reported that it included, in addition to a ban on U.S. publication of the work, an agreement that Colting (1) would not use the title *Coming Through the Rye*; (2) would not dedicate the book to Salinger; (3) would not refer to *The Catcher in the Rye*, to Salinger, or to the book being “banned” by Salinger; and (4) would not use the litigation to promote the book.<sup>93</sup> These terms, if accurate, all reflect concerns relating to confusion or association, and to Colting's possible gains rather than Salinger's losses. Indeed, it is unlikely that Salinger sustained any economic loss as a result of the publication of Colting's book.

This concern about Colting's gains, rather than Salinger's (or the copyright system's) losses also appears in the plaintiff's briefing: “Rather than transform *Catcher*, the sequel simply appropriates it—its soul, its life, its characters, its narrative, and its essence—and uses it to try to attract the millions of readers who fondly remember *Catcher* and Holden Caulfield.”<sup>94</sup> Salinger himself consistently made statements reflecting a moral rights or personhood kind of view about his creations. In 1980, he stated: “There's no more to Holden Caulfield. Read the book again. It's all there. Holden Caulfield is only a frozen moment in time.”<sup>95</sup> And indeed his lawyers concluded that “Salinger has an *absolute right* to decide when, whether, and how to resurrect the life that he breathed into Holden Caulfield in another work and/or at some different age.”<sup>96</sup>

### C. *Gone with the Wind* vs. *The Wind Done Gone*

Likewise in *Suntrust Bank v. Houghton Mifflin*,<sup>97</sup> the plaintiffs made arguments based on notions of moral rights and confusion. Although the result in that case was different—the defendant ultimately prevailed—much of the rhetoric throughout the litigation reflected something other than core copyright concerns, just as in *Salinger v. Colting*.

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<sup>92</sup> The plaintiff's brief suggests a similar concern: “All these [statements in Colting's book] may well suggest to a reader that Salinger himself authored or at least authorized this Sequel, when he did not.” Plaintiff's Memorandum, *supra* note 84, at 28.

<sup>93</sup> Albanese, *supra* note 4.

<sup>94</sup> Plaintiff's Memorandum, *supra* note 84, at 3.

<sup>95</sup> *Id.* at 1.

<sup>96</sup> *Id.* at 27 (emphasis added).

<sup>97</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *rev'd*, 268 F.3d 1257 (11th Cir. 2001).

In 2001, Alice Randall published *The Wind Done Gone*, a retelling of and sequel to Margaret Mitchell's iconic book, told from the perspective of Cynara, Scarlett's half-sister.<sup>98</sup> The Mitchell estate sued for copyright infringement, upset with the unauthorized work that raised issues of race, gender, power, and sex in ways that *Gone with the Wind* either ignored or elided.<sup>99</sup> The Mitchell estate prevailed at the district court, but lost on appeal. The Eleventh Circuit held that *The Wind Done Gone* was a parody of *Gone with the Wind* and therefore fair use.<sup>100</sup> Randall's book, unlike Colting's sequel to *Catcher in the Rye*, is widely available. The sticker on the front says not "BANNED IN THE USA!" but "An Unauthorized Parody."<sup>101</sup>

Moral rights concerns and arguments weaved their way throughout the case. The Margaret Mitchell estate, unlike Salinger, authorized two sequels.<sup>102</sup> The agreements specified that "neither Scarlett O'Hara nor Rhett Butler may die, thereby, according to the plaintiff, preserving the reading public's expectations, as well as the Mitchell Trusts' ability to authorize sequels in the future."<sup>103</sup> Copyright law certainly does not grant to authors any kind of control or ownership over "the reading public's expectations."<sup>104</sup> The district court rejected Randall's fair use argument, concluding that "by killing two core characters from *Gone with the Wind* and marrying off another, *The Wind Done Gone* has the immediate effect of damaging or even precluding the Mitchell Trusts' ability to continue to tell the love story of Scarlett and Rhett."<sup>105</sup> These are both fairly remarkable statements. Of course, the Mitchell Trusts could write or authorize the writing of a book in which the characters live, or die, or get married, or have babies. Furthermore, it seems likely that many readers would be interested in such a work, given the power and history of *Gone with the Wind*. In all likelihood, this is so regardless of the existence of any unauthorized sequel. The Mitchell estate, like Salinger, seems to be trying to control not just the original work itself

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<sup>98</sup> See John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237, 1281 (2012) ("The main conceit of Randall's novel was its recasting of the *Gone with the Wind* story and world from the point of view of the African American slaves and mulattos rather than the white aristocrats.").

<sup>99</sup> *Id.* ("In Randall's work, Ashley Wilkes is gay, interracial sexual relationships are discussed, and the travails of daily life for the victims of the South's rigid and racist social hierarchy are vividly depicted.").

<sup>100</sup> *Id.* at 1284; *Suntrust Bank*, 268 F.3d 1257, 1277.

<sup>101</sup> See RANDALL, *supra* note 14, available at [http://books.google.com/books?id=oEnRrMJA6bQC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.com/books?id=oEnRrMJA6bQC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (last visited Mar. 18, 2014).

<sup>102</sup> ALEXANDRA RIPLEY, *SCARLETT* (Grand Central Publ'g, Reissue Trade ed. 2011) (1992); DONALD MCCAIG, *RHETT BUTLER'S PEOPLE* (2007).

<sup>103</sup> *Suntrust Bank*, 136 F. Supp. 2d at 1363–64.

<sup>104</sup> *Id.* at 1364.

<sup>105</sup> *Id.* at 1382.

but how that work is received and perceived by the public. This effort is similar to invoking the moral right against excessive criticism or the moral right of integrity.<sup>106</sup>

In discussing whether the injury to the Mitchell Trusts would be irreparable (for purposes of the preliminary injunction determination), the district court concluded that to hold that the harm is reparable would be to make the copyright holder an “involuntary licensor”<sup>107</sup> of the rights, which “would undoubtedly weaken the *integrity* of a copyrighted work.”<sup>108</sup> If the Mitchell Trusts have some broad right of integrity in *Gone with the Wind*, then the publication of *The Wind Done Gone* may well result in an irreparable injury to that “integrity,” but it is far from clear that such an injury is one that should be remedied by American copyright law.

The briefing in the case reflects this same focus, sometimes using melodramatic language to describe borrowed fiction, and it indicates that the plaintiff’s concerns go well beyond economic concerns. One of the amicus briefs sets forth a moral rights argument on Salinger’s behalf:

An unauthorized sequel (an infringing derivative work) that cannibalizes and manipulates a copyright holder’s characters, scenes, plot lines, and dialogue eradicates the “expressive management” of the intellectual property rights in a manner that cannot be remedied without injunctive relief. If injunctive relief is denied or even delayed, the harm caused by the publication of an unauthorized sequel cannot be undone because such creative control cannot be regained. The author’s ability to enhance and develop the original work may be impaired or lost once this unauthorized version reaches the public, because the public may not accept the author’s later attempts at revision, rehabilitation, or resurrection.<sup>109</sup>

This statement, like many in the plaintiff’s briefs, reflects a moral rights approach, presuming that the author has both a personal connection to the original work, and the right to control a vast array of uses of, and even reactions to, that work.

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<sup>106</sup> Rigamonti, *supra* note 53, at 364 (describing the right of integrity as “perhaps the most important moral right”); Roberta Rosenthal Kwall, *The Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 5 (“The moral right doctrine generally is said to encompass three major components: the right of disclosure, the right of paternity, and the right of integrity. Some formulations of the moral right doctrine also include the right of withdrawal, the right to prevent excessive criticism, and the right to prevent assaults upon one’s personality.”).

<sup>107</sup> *Id.* at 1384 (quoting *Paramount Pictures Corp. v. Carol Publ’g Grp.*, 11 F. Supp. 2d 329, 338 (S.D.N.Y. 1998)).

<sup>108</sup> *Id.* (emphasis added).

<sup>109</sup> Brief of Amici Curiae Paul Levinson and Walter Wager in Support of Plaintiff-Appellee Suntrust Bank’s Request for Affirmance at 24–25, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (No. 01-122-00-HH).

In addition to moral rights concerns, the plaintiffs in the *Gone with the Wind* litigation raised a number of trademark-like arguments. In one of the amicus briefs filed on behalf of Suntrust, the plaintiff in the case, the amici argued that injunctive relief “may be particularly appropriate where . . . the issue at stake is the infringement of the copyright in the work by a competitor, as opposed to the alleged infringement of the work . . . through the communication of current news items to the public.”<sup>110</sup> This is an interesting statement, as American law generally seeks to increase competition in the marketplace, rather than eliminate it. Additionally, it is more often the realm of trademark law, antitrust law, and unfair competition law to police the marketplace. Copyright is not focused on the market for expressive works; its goal is certainly not to police competition.

While generally courts have failed to identify the copyright interests on which they rely and have improperly relied upon non-copyright considerations, there are exceptions. The Eleventh Circuit, in reversing the district court in the *Gone with the Wind* case, did seek to disentangle the various interests sought to be protected by copyright law.<sup>111</sup> The court distinguished between “[t]he natural law copyright, which is not a part of our system,”<sup>112</sup> and “the statutory copyright, which was the limited-time copyright.”<sup>113</sup> According to the court, “[t]his has an important impact on modern interpretation of copyright, as it emphasizes the distinction between ownership of the work, which an author does not possess, and ownership of the copyright, which an author enjoys for a limited time.”<sup>114</sup> In contrast to the district court, the Eleventh Circuit declined to presume market harm.<sup>115</sup> According to the court, even if the defendant uses more than is strictly necessary to parody the original:

[A]ny material we suspect is “extraneous” to the parody is unlawful only if it negatively effects [sic] the potential market for or value of the original copyright. Based upon this record at this juncture, we cannot determine in any conclusive way whether “the quantity and value of the materials used” are reasonable in relation to the purpose of the copying.<sup>116</sup>

In discussing the market effect factor, the Eleventh Circuit was similarly circumspect, indicating that it required more and better

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<sup>110</sup> *Id.* at 12.

<sup>111</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>112</sup> *Suntrust Bank*, 268 F.3d at 1262.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 1263.

<sup>115</sup> *Id.* at 1281.

<sup>116</sup> *Id.* at 1274 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

evidence before drawing conclusions about market harm.<sup>117</sup> The concurrence likewise distinguishes between the plaintiff's arguments concerning potential harm and the harms protected against by copyright through stating that "it is not copyright's job to 'protect the reputation' of a work to guard it from 'taint' in any sense except an economic one—specifically, where substitution occurs."<sup>118</sup> Exceptions, like these, only serve to highlight the extent to which moral rights and trademark-like concerns generally pervade the discussions of borrowed fiction disputes.

## II. THE INTERESTS IN WRITING, READING, AND BANNING BORROWED FICTION

In the previous section, I suggested that when parties argue and courts decide that borrowed fiction should be banned they are arguing about more than the traditional economic or utilitarian interest in granting copyrights. Instead, the justifications put forth are much more varied, based also on of moral rights arguments, concerns about consumer expectations, and absolutist property rights contentions. In addition to teasing apart these often-undifferentiated arguments, it is important to consider other interests that are often overlooked or downplayed in borrowed fiction discussions. In this section, I attempt to do just that, in a first-person, impressionistic way. Based on conversations I had with authors and readers, popular press articles, book reviews, and a variety of other sources, I provide some examples of the range of arguments that can be made and the various conflicting interests involved in writing, reading, and banning borrowed fiction. This is far from comprehensive; the goal is simply to broaden the scope of the discussion and make clear that courts and commentators may have been too limited in their assessment of borrowed fiction and the disputes surrounding it.

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<sup>117</sup> *Id.* at 1274–75 ("An examination of the record, with its limited development as to relevant market harm due to the preliminary injunction status of the case, discloses that Suntrust focuses on the value of *GWTW* and its derivatives, but fails to address and offers little evidence or argument to demonstrate that *TWDG* would supplant demand for Suntrust's licensed derivatives."). The court makes a similar point in discussing the irreparable injury element of the preliminary injunction analysis. *Id.* at 1276 ("[Suntrust] has failed to show, at least at this early juncture in the case, how the publication of *TWDG*, a work that may have little to no appeal to the fans of *GWTW* who comprise the logical market for its authorized derivative works, will cause it irreparable injury."); *see also id.* at 1280 ("Next, it is worth emphasizing that the limited record at this preliminary stage in no way supports the district court's finding that *The Wind Done Gone* might act as a market substitute for *Gone with the Wind* or its licensed derivatives.") (Marcus, J., concurring).

<sup>118</sup> *Id.* at 1280–81.

A. *Reading Borrowed Fiction*

I read pairs of books slowly, over time, with other novels sprinkled in between. I read *Wolf Hall*,<sup>119</sup> *Freedom*,<sup>120</sup> *Swamplandia!*<sup>121</sup> and *Open City*.<sup>122</sup> I read *The New Yorker*, *The New York Times* and *The New York Review of Books* (admittedly a bit New York City-centric for a true Westerner). Yes, I read low-brow as well, including *Twilight*,<sup>123</sup> *The Hunger Games*<sup>124</sup> and *Us Weekly* (though that is usually only at the gym or in a doctor's office). I read *The Ranger's Apprentice* series<sup>125</sup> to my son. I doubt that I am a better person for it, but I have always felt that fiction has that potential—the potential to provide the reader with the imagination to understand and empathize with other people, or to make sense of the world. Indeed, there has been a spate of stories describing recent studies touting the benefits of reading fiction.<sup>126</sup>

It goes without saying that literature is a foundational part of our culture, and there is some support for the idea that reading fiction is a valuable and productive endeavor. For example, a recent study concluded that reading literature may make people more open-minded.<sup>127</sup> The empirical evidence is mixed,<sup>128</sup> but the sheer number of articles, opinion pieces, and blog posts regarding this question

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<sup>119</sup> HILARY MANTEL, *WOLF HALL* (2009).

<sup>120</sup> JONATHAN FRANZEN, *FREEDOM* (2010).

<sup>121</sup> KAREN RUSSELL, *SWAMPLANDIA!* (2011).

<sup>122</sup> TEJU COLE, *OPEN CITY* (2011).

<sup>123</sup> STEPHANIE MEYER, *TWILIGHT* (2005); STEPHANIE MEYER, *NEW MOON* (2006); STEPHANIE MEYER, *ECLIPSE* (2007); STEPHANIE MEYER, *BREAKING DAWN* (2008).

<sup>124</sup> SUZANNE COLLINS, *THE HUNGER GAMES* (2008); SUZANNE COLLINS, *CATCHING FIRE* (2009); SUZANNE COLLINS, *MOCKINGJAY* (2010).

<sup>125</sup> JOHN FLANAGAN, *THE RUINS OF GORLAN* (2006); JOHN FLANAGAN, *THE BURNING BRIDGE* (2007); JOHN FLANAGAN, *THE ICEBOUND LAND* (2008); JOHN FLANAGAN, *THE BATTLE FOR SKANDIA* (2009); JOHN FLANAGAN, *THE SORCERER IN THE NORTH* (2009); JOHN FLANAGAN, *THE SIEGE OF MACINDAW* (2010); JOHN FLANAGAN, *ERAK'S RANSOM* (2011); JOHN FLANAGAN, *THE KINGS OF CLONMEL* (2011); JOHN FLANAGAN, *HALT'S PERIL* (2012); JOHN FLANAGAN, *THE EMPEROR OF NIHON-JA* (2012); JOHN FLANAGAN, *THE LOST STORIES* (2013); JOHN FLANAGAN, *THE ROYAL RANGER* (2013).

<sup>126</sup> See, e.g., *'Losing Yourself' in a Fictional Character Can Affect Your Real Life*, SCIENCE DAILY (May 7, 2012), <http://www.sciencedaily.com/releases/2012/05/120507131948.htm> (describing a recent study in which readers who read a story and identified with a character were more likely to act like that character); Julia Ryan, *Study: Reading a Novel Changes Your Brain*, ATLANTIC (Jan. 9, 2014, 2:18 PM), <http://www.theatlantic.com/education/archive/2014/01/study-reading-a-novel-changes-your-brain/282952/> (“[A] new study suggests that reading doesn't just make a fleeting impression. It may make long-term changes to to [sic] the brain.”).

<sup>127</sup> See Tom Jacobs, *Study: Reading Novels Makes Us Better Thinkers*, SALON (June 15, 2013, 9:00 AM), [http://www.salon.com/2013/06/15/book\\_nerds\\_make\\_better\\_decisions\\_partner/](http://www.salon.com/2013/06/15/book_nerds_make_better_decisions_partner/).

<sup>128</sup> See Gregory Currie, *Does Great Literature Make Us Better?*, N.Y. TIMES (June 1, 2013, 2:45 PM), <http://opinionator.blogs.nytimes.com/2013/06/01/does-great-literature-make-us-better/> (“Many who enjoy the hard-won pleasures of literature are not content to reap aesthetic rewards from their reading; they want to insist that the effort makes them more morally enlightened as well. And that's just what we don't know yet.”).

demonstrates, at least, engagement and interest in the issue.<sup>129</sup>

My experience in reading these pairs of books bears this out. I did not only read the books; I talked about them. This project provided the best bridge I have found so far between my law-professor self and my non-law professor friends, and plenty of new acquaintances as well. Nearly everyone who asked me what I do or what I was working on responded with questions, interest and suggestions for more books to read. Not all people are readers of fiction, of course, but this project—more than any other scholarly endeavor I have worked on—engaged people in a way that was revealing to me: people enjoy reading books and talking about them.

In some ways, borrowed fiction is just another way of continuing a conversation about a book. “Popular fictional characters become a part of the vocabulary of modern life and can serve as building blocks for development and expansion of our cultural heritage. Optimally effective speech often requires at least the evocation of cultural associations.”<sup>130</sup> Borrowed fiction serves this purpose exceedingly well. It provides a platform for more discussion, more speech.

#### B. *Writing Borrowed Fiction*

While I was reading *A Thousand Acres*,<sup>131</sup> I went to hear Jane Smiley read from her recent novel, *A Private Life*.<sup>132</sup> After the reading, someone asked her about her use of “real” characters and how she incorporated them in the book.<sup>133</sup> She said that she absolutely used many elements of historical and family figures in many of her books. Then someone asked Smiley how she used *King Lear* to write *A Thousand Acres*, and she said that she did it very explicitly—she read *King Lear* five times before she started writing, so that she could follow the plot and the characters “almost automatically.” I then asked whether she thinks that there is a “novelists’ set of ethics” about what can be

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<sup>129</sup> See, e.g., *Fiction Readers Are Better People*, RACHELLE GARDNER (Aug. 23, 2013), <http://www.rachellegardner.com/2013/08/fiction-readers-are-better-people/>; Jonathan Gottschall, *Why Fiction Is Good for You*, BOSTON GLOBE (Apr. 29, 2012), <http://www.bostonglobe.com/ideas/2012/04/28/why-fiction-good-for-you-how-fiction-changes-your-world/nubDy1P3viDj2PuwGwb3KO/story.html>; Alex Greig, *Readers of Literary Fiction Are More Creative and Exercise Better Judgment, Claim Scientists*, DAILY MAIL (June 16, 2013, 4:43 PM), <http://www.dailymail.co.uk/news/article-2342635/Readers-literary-fiction-better-thinkers-according-new-research.html>; Keith Oatley, *Changing Our Minds*, GREATER GOOD (Dec. 1, 2008), [http://greatergood.berkeley.edu/article/item/chaning\\_our\\_minds](http://greatergood.berkeley.edu/article/item/chaning_our_minds); Keith Oatley, *Why Fiction is Good for You*, LITERARY REV. CAN., <http://reviewcanada.ca/magazine/2011/07/why-fiction-is-good-for-you/> (last visited Sept. 15, 2013).

<sup>130</sup> Karjala, *supra* note 50, at 26.

<sup>131</sup> SMILEY, *supra* note 14.

<sup>132</sup> JANE SMILEY, *A PRIVATE LIFE* (2010).

<sup>133</sup> Quotes of the Jane Smiley as remember by the author. Jane Smiley, Book Reading at Mrs. Dalloway’s Bookstore, Berkeley, California (Summer 2010).



used and what is off limits. She responded emphatically, “All novelists are unethical!” She said that writers have to do many things that are socially inappropriate—eavesdropping, staring at people, writing about their family members. According to Smiley, “it’s a wonder that novelists have any friends at all.”

When I talked to Smiley I told her about this project, and she referred to *13 Ways of Looking at the Novel*.<sup>134</sup> She said that “all writers are borrowers;”<sup>135</sup> for example, she borrowed many elements from Boccaccio for her novel, *Ten Days in the Hills*. I think—though I cannot be sure, of course—that she meant *all* writers are borrowers, not just those who set out to do a sequel or a retelling or a reworking.<sup>136</sup>

For this project I read only sequels to or retellings of *famous*, even iconic, books—not just books by famous authors, but individual books that have achieved really a quite unusual degree of notoriety and have seeped into the culture and the world. It is not clear how much fiction is borrowed from *non-famous* books. Certainly, few such follow-on books are published, but I tend to think that they are not even written in the first place. Borrowed fiction is a way of continuing the reading experience and entering into a conversation about it, and it is difficult to create a dialogue about a work of fiction that few people have read.<sup>137</sup>

For example, it is obvious why someone might re-tell *King Lear*: because of the intensity and power of the story and some of the enduring themes that are so powerfully rendered. This is also true of *Gone with the Wind*: because of its historical context and particular perspective. Most importantly, however, both of those works have seeped into the culture, and thus provide a launching-off point for a writer that will resonate with readers.<sup>138</sup> Borrowed fiction is a genre that

<sup>134</sup> JANE SMILEY, *13 WAYS OF LOOKING AT THE NOVEL* (2006).

<sup>135</sup> There is an extensive academic literature discussing the extent to which, as Smiley said, all writers—all creators—are borrowers, as well as much popular commentary in the same vein. See, e.g., LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2009); Kirby Ferguson, *Everything Is a Remix*, <http://everythingisaremix.info/watch-the-series/> (last visited Sept. 15, 2013); Matt Jessell, *Remix Culture: Rethinking What We Call Original Content*, Marketing Land (Apr. 30, 2013, 9:45 AM), <http://marketingland.com/remix-culture-rethinking-what-we-call-original-content-41791>.

<sup>136</sup> See Tushnet, *supra* note 19, at 656 (“Media creations on which fandom is based serve the same function for fan authors as Paul Bunyan, Coyote, and Ulysses did in earlier times in that they provide a common language. They are, as myths and folktales once were, the raw materials out of which people build their own original works. These works then link the stories and their authors to an existing and receptive community by virtue of their shared raw materials.”).

<sup>137</sup> *Id.*

<sup>138</sup> “It’s in the nature of beloved works that they become ingrained in our thinking, become part of our creative shorthand, and become part of our visual vocabulary.” Cory Doctorow, *When Love Is Harder to Show than Hate*, *GUARDIAN* (May 13, 2009, 10:00 AM), <http://www.theguardian.com/technology/2009/may/13/cory-doctorow-copyright> (putting forth “a vision of copyright that says that fannish celebration—the noncommercial, cultural realm of expression and creativity that has always accompanied commercial art, but only lately attained easy visibility

relies upon the fame and the widespread knowledge of the work from which it is borrowed.<sup>139</sup> Michael Greenberg has written about the difficulty of succeeding in the genre:

As with *Foe*, J. M. Coetzee's 1988 riff on the Robinson Crusoe story, or, in a more overtly commercial vein, Pat Conroy's recently publicized negotiation to write a "sequel" to *Gone With the Wind*, borrowed fiction generally requires not just a preceding work of art, but an ur-text that has seeped into popular consciousness to become the property of the culture at large. This makes it the legitimate cousin of the much older tradition of shared myth: Goethe and Marlowe with Faust, Milton with Genesis, Sophocles and Euripides conducting through their plays what amounts to a public conversation about Electra. There is, however, a crucial difference between shared myth and borrowed fiction: it is the nature of myth to be skeletal, the mere hint of a story upon which a writer is free to hang a wholly invented world. (So Mann constructs a four volume novel from the two-page biblical story of Joseph in Egypt.) Borrowed fiction, on the other hand, depends on the highly specific text that inspires it—one replete with all the tics and idiosyncrasies of an individual novelist's imagination. Those idiosyncrasies are precisely what make borrowed fiction a peculiarly challenging and aesthetically perilous enterprise.<sup>140</sup>

A "peculiarly challenging and aesthetically perilous enterprise" indeed. Greenberg did not mean this in a legal sense, but it is true in that way as well. If a writer pens a new version of a sequel to the *Harry Potter* series, she is almost certain to be sued and quite likely to lose. Whether that should be the case is the real issue.

### C. Banning Borrowed Fiction

Having just suggested that there are a variety of substantial, if

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thanks to the internet—should get protection, too. That once an artist has put their works in our head, made them part of our lives, we should be able to live those lives.”).

<sup>139</sup> See, e.g., Chander & Sunder, *supra* note 19, at 618 (“Parodic social commentary gathers its unique power *because* of its use of cultural icons. The abstract statement may not hold the same cultural currency as the one directed at, and employing, Superman. Thus, it is not the absence of creative genius on the part of the later author that requires the use of an earlier work. Rather, while the canon work's inventiveness or brilliance may have contributed to its current cultural status, it is the very popularity of the canon work that is the focus of the Mary Sue.”) (footnotes omitted).

<sup>140</sup> Greenberg, *supra* note 21. Greenberg further opines that these iconic books or characters become public property in some ways:

The appropriation of *Lolita* occurred long before *Lo's Diary*. With the help of Stanley Kubrick's movie version of the novel, she assumed a grip on the collective mind that surely transcended Nabokov's intention. *Lolita* became the iconic nymphet, the universal symbol for early pubescent allure—one needn't have heard of Nabokov or even seen the movie to know the meaning of her name. By the ineffable process of cultural pollination, *Lolita* had become the property of the world.

somewhat inchoate, interests in both reading and writing borrowed fiction, this section turns back to the interests in *banning* borrowed fiction and does so with a brief thought experiment.

Imagine that an unknown writer named Writer publishes a sequel to the *Harry Potter* books about Harry and Ginny's children and their fight against the heir to Voldemort.<sup>141</sup> The book is called *Hogwarts: The Next Generation*. The book clearly indicates that it is Writer's work, and it contains a bold disclaimer: **An Unauthorized Sequel**. If this were to occur, J.K. Rowling would almost certainly sue for copyright infringement.<sup>142</sup>

It is worth considering in what ways, and what extent, Rowling would be injured if an unauthorized sequel were published. First, what about Rowling's economic interest? Writer may well make money from the unauthorized sequel, but that is not the same thing, necessarily, as economic harm to Rowling. In other words, only if Rowling has an absolute right to control every possible permutation, variation, or reference to Harry Potter and his friends and family would we say that every dollar earned by another person is a dollar lost to Rowling. No one takes that position, however.<sup>143</sup>

A different approach would involve thinking about what Rowling could lose, rather than what Writer gained, with the publication of the unauthorized sequel. Rowling might, in fact, have lost whatever licensing fee or royalty stream she might have negotiated had Writer entered into a licensing deal. Rowling is unlikely to have agreed to such a deal, but the lost royalty stream is one type of potential economic loss. Another is lost sales. With respect to lost sales, the question is whether the publication of the unauthorized sequel is likely to reduce the demand for the first seven books written by Rowling. That is an empirical question not answered here, but the answer is probably not, and some studies have suggested that there are negligible or positive effects on the market for the original.<sup>144</sup>

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<sup>141</sup> This is far from idle musing. As Dennis Karjala has described, take-offs, send-ups, sequels to, and retellings of the *Harry Potter* books abound. Karjala, *supra* note 50, at 17–20.

<sup>142</sup> J.K. Rowling sued Steven Jan Vander Ark for his publication of the *Harry Potter Lexicon*. Warner Bros. Entm't, Inc. v. RDR Books, 575 F.Supp.2d 513, 517 (S.D.N.Y. 2008).

<sup>143</sup> Except, perhaps, Mark Helprin. See Mark Helprin, *A Great Idea Lives Forever. Shouldn't Its Copyright?*, N.Y. TIMES (May 20, 2007), available at <http://www.nytimes.com/2007/05/20/opinion/20helprin.html?pagewanted=all> (last visited Feb. 20, 2014) (arguing that “[n]o good case exists for the inequality of real and intellectual property, because no good case can exist for treating with special disfavor the work of the spirit and the mind.”).

<sup>144</sup> It seems possible, for example, that the publication of Colting's book prompted people to buy *The Catcher in the Rye*. (It also seems that more people read Colting's book because of the lawsuit.) See CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 183 (providing examples of situations in which derivative works did not negatively affect the market for the original works).

A related question is whether the unauthorized eighth book would reduce demand for a sequel written by Rowling rather than Writer. It is possible, of course, but this also seems unlikely.<sup>145</sup> It is difficult to imagine that the legions of *Harry Potter* fans would refrain from buying a Rowling book just because of the existence of another sequel by an unknown writer. Demand for an eighth *Harry Potter* book by J.K. Rowling is enormous and would not be satisfied by, for example, my version of the eighth book or, for that matter, multiple follow-on versions.<sup>146</sup> This seems true regardless of whether the “borrowed fiction” is good or bad. Such demand follows from the fame and notoriety of the author, as much as, if not more than, the quality of the original works.<sup>147</sup>

A different approach to the question of how J.K. Rowling might be harmed by Writer’s unauthorized sequel involves asking whether publication of the unauthorized version is likely to deter Rowling from writing her own sequel, or authorizing someone else to do so. Again, this is possible. Different authors may—and do—react differently to the appropriation of their work or portions of their work.

Even with the current legal structure, there is a broad range of appropriation—from non-commercial fan fiction, to using another’s idea as a jumping-off point, to simple plagiarism. Similarly, there is a broad range of reaction to that work. Some authors tolerate, and even encourage, all kinds of uses of their work, while others take a very restrictive stance, objecting to nearly every use of their words, characters, and works. Stephanie Meyer, the author of the *Twilight* series, for example, has been quite supportive of fan fiction and fan sites. Her own website contains links to a large number of *Twilight* fan sites, and she has been generally supportive of works inspired by

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<sup>145</sup> See Tushnet, *supra* note 19, at 672 (stating that the fan fiction works based on *Star Trek* seem not to have harmed the market for the original or any of the authorized derivative works).

<sup>146</sup> In 2013, J.K. Rowling published a mystery under an assumed name. It was reviewed relatively well but did not sell so well. Once it was revealed that Rowling was the author, sales shot through the roof. This is not the same as the thought experiment here, but it certainly indicates that for Rowling, at least, reader interest is tied at least as much to her name and her fame as to her writing ability. Julie Bosman, *Rowling Book Skyrockets to Instant Hit*, NY TIMES (July 16, 2013), available at <http://www.nytimes.com/2013/07/17/business/media/rowling-book-skyrockets-to-instant-hit.html>. Karjala raised this issue in a 2007 article:

Would [Rowling] have done something else had she known that her characters might be used without her permission in Russia, China, or India, in new stories adapted to local conditions? Because such takeoffs in other countries are extremely unlikely absent international success with the originals, their possibility would not likely have been a deterrent to her as a new writer.

Karjala, *supra* note 50, at 35.

<sup>147</sup> It is important to note that as a matter of procedure, the plaintiff in a copyright suit—in this case Rowling—bears the burden of proving the categories and amount of loss. Thus, Rowling would have to substantiate any claims of reduced demand for sequels and provide evidence quantifying the corresponding loss.

*Twilight*.<sup>148</sup> Regarding *Fifty Shades of Grey*,<sup>149</sup> the adult novel inspired by the Bella and Edward characters in the *Twilight* series, Meyer stated that although she hasn't "gotten into it that much," she thinks the fact that the author is "doing well" is "great."<sup>150</sup>

Other authors do not take such a tolerant view, however. J.K. Rowling sued Steve Vander Ark when he sought to publish his *Harry Potter Lexicon* (after maintaining a website for years, to which Rowling did not object).<sup>151</sup> As mentioned above, J.D. Salinger was notoriously restrictive in licensing or otherwise tolerating uses of his work, and Vladimir Nabokov (and his estate) objected to a variety of uses of Nabokov's works.<sup>152</sup>

Given this diversity of responses, it is difficult to predict how the existence of an unauthorized sequel or retelling will affect the author. Some might indeed decide not to write a sequel or another book.

Of greater concern, and more relevant to the utilitarian justification for copyright protection, might be the more general incentive effect of allowing unauthorized retellings. It is possible that some authors will decide not to write at all if they know that unauthorized sequels might appear. Some writers might be scared off by the potential for follow-on works and copycats. I grant that it is a possibility, but it strikes me as remote.<sup>153</sup> The prospect of striking it rich as a writer is relatively small, and most writers write for reasons other than (or in addition to) the

<sup>148</sup> See *Twilight Series Fansites*, THE OFFICIAL WEBSITE OF STEPHENIE MEYER, [http://www.stepheniemeyer.com/ts\\_fansites.html](http://www.stepheniemeyer.com/ts_fansites.html) (last visited Feb. 20, 2014).

<sup>149</sup> E L JAMES, *FIFTY SHADES OF GRAY* (2011).

<sup>150</sup> Krystal Clark, *Stephenie Meyer: 50 Shades of Grey is "Not My Thing,"* SHEKNOWS.COM (May 29, 2012), <http://www.sheknows.com/entertainment/articles/961639/stephenie-meyer-50-shades-of-grey-not-my-thing>.

<sup>151</sup> Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

<sup>152</sup> For a review of Pia Pera's unauthorized re-telling of *Lo's Diary* and a summary of the dispute between Dmitri Nabokov and Pia Pera, Mim Udovitch, *Lo. Lee. Ta.*, N.Y. TIMES, (Oct. 31, 1999), <http://www.nytimes.com/books/99/10/31/reviews/991031.31udovitt.html>.

<sup>153</sup> Dmitri Nabokov, in criticizing Pia Pera's re-telling of *Lolita* from Lolita's perspective, hypothesized that there could be such a disincentive. As part of the settlement, Nabokov wrote a preface to Pera's work. In that preface, he states:

*Lolita* isn't in the public domain, and won't be until well into the next millennium when its copyright expires— notwithstanding which the Washington Post advanced the view that I should lighten up: *Lolita*, their editors urged, should be fair game in the fields of copyright because it has "come inescapably into common consciousness."

I thought then, and think now, that this is silly. Is *Lolita* to pay this price because it is too good, too famous? Are writers to strive for mediocrity lest their works similarly enter the "common consciousness?" Are icons of popular culture— *Star Wars* perhaps— to be made subject to plundering by free riders because they have entered the common consciousness? The *Post* urged me to "rethink" my stance, asking whether books like Madam Pera's "can truly do the original anything but homage?" By ignoring the fact that homage to *Lolita* can be and has been paid with bona fide licenses, the question seems naïve.

Dmitri Nabokov, *On a Book Entitled Lo's Diary*, EVERGREEN REVIEW (Aug. 23, 1999), available at <http://www.evergreenreview.com/103/losdiary/preface.html>.

prospect of monetary reward. As a disincentive, the possibility of a borrowed fiction author capitalizing on one's future success must be fairly minor. It seems crazy to believe that anyone would, *ex ante*, decide not to write the first seven *Harry Potter* books because someone else might write an eighth.

While empirical studies could buttress these conclusions, it is clear that the economic interests of the author are unlikely to be affected in any significant way. This is so because—first—borrowed fiction nearly always borrows from famous, if not iconic, works whose economic value and cultural cachet are likely to be robust. Second, to be clear, I discuss herein only works of fiction, not the full range of possible derivative works.<sup>154</sup>

But clearly the J.K. Rowlingses of the world have other concerns, in addition to these potential economic complaints. As discussed above in Part I.B and I.C, many of the statements by authors complaining about borrowed fiction indicate interests other than, or in addition to, the economic interest.

Rowling's moral rights in the work would almost certainly be harmed by the publication of the unauthorized sequel.<sup>155</sup> The moral rights of integrity and attribution, as well as the rights against excessive criticism, assume that a work reflects the author, and that because of that connection the author has a personal and indelible interest in the work. An unauthorized work of borrowed fiction would certainly infringe at least some of these moral rights.

Just as it is easy to concede the moral rights concerns in the context of borrowed fiction, the trademark-like concerns might well have force in some instances. Continuing with the thought experiment, if Writer's version of the eighth *Harry Potter* book is published and readers (consumers) believe that Rowling wrote the book or is otherwise associated with the book—that, for example, Rowling authorized it—then Rowling may well have suffered an associative or reputational injury. But this is a classic trademark injury, not a copyright injury, and if the book is clearly marked “unauthorized,” or it is otherwise clear that the follow-on book is not authored by or

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<sup>154</sup> One or more additional works of fiction are unlikely to affect the market for other works of fiction, given the loss cost of books and the expanse of the market. By contrast, an unauthorized movie version of work of fiction is substantially more likely to displace the market for an authorized version. It is for this reason, among others, that I advocate for an approach that alters neither the infringement nor the fair use analysis, which would almost certainly have the effect of going too far down the road of permitting expansion into new and different markets by borrowed fiction authors, but instead focuses on the remedies analysis. *See infra* Part III.

<sup>155</sup> *See, e.g.,* Karjala, *supra* note 50, at 35 (“One suspects that it is natural rights notions that underlie the Dutch court's injunction against Tanya Grotter [the author of a Harry Potter take-off] in Holland.”).

affiliated with the original author, then concern about confusion as to source or association is unlikely.

Based on this impressionistic survey of the interests in and ways of thinking about borrowed fiction, it is apparent that, as described in Part I, courts and commentators have incorporated into their analyses interests that lie outside the purview of the standard copyright justifications. At the same time, other significant concerns have been ignored or downplayed.

### III. BALANCING THE INTERESTS IN BORROWED FICTION DISPUTES

The balance between the author's interests and the benefits to other writers and the public could be tweaked in a variety of ways. Some lawyers and scholars have argued for changes in the standards for protection of derivative works and of literary characters, while others have advocated refinement of the infringement and fair use analyses in these kinds of cases. It would behoove courts to place a sharper focus on the copyright owner's core interests and the defendant's often ignored concerns, and this kind of focus might change the results in a variety of cases. Tweaking the fair use, protectability, and infringement doctrines, however, still involves only binary choices: protectable or not protectable; fair use or not.

In the remedial phase, however, courts have the opportunity to implement non-binary solutions. The full panoply of remedies, from injunctions and damages to attorneys' fees, can be awarded, or a court may calibrate the award to reflect the variety of conflicting interests and concerns. In borrowed fiction cases, this might be accomplished by refusing to enter an injunction (thus permitting the dissemination of a new creative work), but rather by awarding compensatory damages (and thus vindicating the copyright owner's economic interests).<sup>156</sup>

#### A. *To Protect or Not to Protect; To Infringe or Not to Infringe; To Be or Not to Be Fair Use*

In the context of borrowed fiction, copyright owners have had no

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<sup>156</sup> There is a range of critiques of the current state of copyright law, and many suggestions for reform. For a summary and discussion of deconstructionist critiques, see Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 1010 (1999). Hughes encourages reform as follows:

Arguments about cutting back or reshaping intellectual property laws are usually at the margins . . . . But such "recodings" of the intellectual property system should be advocated and their assumptions tested—when possible, in more than our thought experiments. When that is not possible, then alternative scenarios and divergent interests—like those of non-owners in intellectual property—should be developed as fully as possible in our scholarly discussions. That is the best hope for moving new ideas from the margin to the mainstream.

*Id.*

problem demonstrating their entitlement to copyright protection. Under the 1976 Copyright Act, copyright owners have the right to make or authorize derivative works,<sup>157</sup> and under the standards applied by the courts, works of borrowed fiction will generally be deemed infringing derivative works.<sup>158</sup> Moreover, literary characters are often sufficiently “delineated” such that they qualify for copyright protection independent of that provided to the stories in which they appear.<sup>159</sup> Some scholars have argued in favor of changes to the derivative works right,<sup>160</sup> others for a more robust infringement analysis,<sup>161</sup> and still others for altering the standard concerning the protectability of literary characters.<sup>162</sup> These possibilities would certainly alter the outcome in many borrowed fiction disputes. While some of these changes would be salutary, they all result in binary outcomes that are not amenable to a balancing between conflicting, but legitimate, interests. In addition, they might have far-reaching undesirable consequences.<sup>163</sup>

Almost all borrowed fiction cases focus on fair use because use of the characters or the plot from a protected work is generally deemed infringing;<sup>164</sup> thus scholars have focused their attention on that doctrine.<sup>165</sup> When a defendant asserts the fair use defense, the court

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<sup>157</sup> 17 U.S.C.A. § 106(2) (2002).

<sup>158</sup> See Karjala, *supra* note 50, at 32 (“[A] sequel consisting of entirely new text and story but relying on the same character set that is found in a protected work is prima facie infringing.”).

<sup>159</sup> See, e.g., Karjala, *supra* note 50, at 25 (“Now, however, literary characters are routinely held by courts to be copyright protected. If they are presented in a context involving a set of human or nonhuman companions, it may take little more than a name and a few general attributes to enter the realm of protected ‘expression.’”).

<sup>160</sup> Mark Lemley suggests that taking the derivative works right away from copyright owners might be more consistent with a system that seeks to promote the “progress of science and the useful arts,” by encouraging competition in the market for “improvements” (in patent parlance; “derivatives” in copyright parlance), just as patent law does. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997).

<sup>161</sup> Dennis Karjala has proposed that courts “should take the infringement analysis much more seriously, asking what the scope of protection is for a character like Harry Potter. When a Tanya Grotter appears on the scene who is obviously derived from but clearly distinguishable from Harry, infringement simply should not be found.” Karjala, *supra* note 50, at 39.

<sup>162</sup> See, e.g., Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 772, 776 (2013) (describing the “tension between characters as freely circulating cultural signifiers, and characters as legal property whose circulation is subject to their owners’ granting permission,” and concluding that “copyright law would do well to take account of the ways in which literary texts and theories reveal characters to be much more complicated than copyright law currently contemplates.”).

<sup>163</sup> For example, a finding that literary characters are not protectable might mean that the copyright owner could not control a motion picture involving those characters; a finding that a work of borrowed fiction is a fair use would mean that the author of the original gets no compensation, even if the work becomes a bestseller.

<sup>164</sup> See Karjala, *supra* note 50, at 32.

<sup>165</sup> For a discussion of cognizable copyright interests in the context of the fair use analysis, see Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701 (2010).



must consider the four-factor test set forth in Section 107 of the Copyright Act: weighing (1) the purpose and character of the defendant's use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect on the market of the defendant's use.<sup>166</sup> As in many other contexts, the fair use determination is unpredictable and highly fact-dependent. The number of reported borrowed fiction cases is not huge, but some generalizations can be drawn about how courts analyze the fair use factors. First, if the courts find that the borrowed fiction is not a parody, they tend to hold that the use is not fair. Second, the courts tend to presume the existence of market harm and fail to require proof—or even any evidence—of actual market harm.

The majority of scholars who have discussed borrowed fiction disputes have focused on the fair use doctrine and have offered a variety of potential reforms. These suggestions would go a long way toward balancing the legitimate, cognizable interests of the author with the underappreciated interests of the borrowed fiction author and readers. But, notably, as with protectability and infringement, the fair use question remains a binary one: if the use is deemed fair, the copyright owner has no recourse; if the use is not deemed fair, the defendant loses. Thus, as with the possibility of adjusting the protectability and infringement analyses, there is not much opportunity to accommodate a variety of conflicting interests.

Rebecca Tushnet has argued that fan fiction ought to be deemed a fair use, because it nearly always includes a disclaimer, provides attribution, and rarely has any effect on the market for the original. According to Tushnet, “focus[es] on the most relevant fair use factors and make[s] a persuasive case for fan fiction as fair use.”<sup>167</sup> Tushnet focuses on the fair use inquiry and urges courts to include consideration of disclaimers in the analysis. “Correct attribution helps prevent confusion and preserves the market for the official product and bears an indirect relation to the fourth fair use factor.”<sup>168</sup> Anupam Chander and Madhavi Sunder similarly have argued that fair use should be much more capacious in the context of fan fiction.<sup>169</sup> They contend that fan fiction “that challenge[s] the orthodox representations in the original work should constitute fair use . . . in many cases,” and argue that “semiotic democracy requires the ability to resignify the artifacts of popular culture to contest their authoritative meaning.”<sup>170</sup> Others have

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<sup>166</sup> 17 U.S.C. § 107 (1976).

<sup>167</sup> Tushnet, *supra* note 19, at 664.

<sup>168</sup> *Id.* at 680.

<sup>169</sup> Chander & Sunder, *supra* note 19.

<sup>170</sup> *Id.* at 601.

likewise suggested that the cultural or critical value of fan fiction or borrowed fiction may best be viewed through the fair use lens.<sup>171</sup>

### B. *Injunctive Relief and the Rightful Copyright Position*

The first goal of this Article has been to demonstrate that courts and parties (and others) talk about much more than copyright concerns when they talk about borrowed fiction. In Parts I and II, the Article sought to identify and disentangle the range of interests asserted in reading, writing, and banning borrowed fiction. The next task is to suggest ways in which courts, and ultimately the parties themselves, can focus on core copyright concerns when resolving borrowed fiction disputes. While these copyright interests can and should be addressed in the context of both the infringement analysis and the fair use determination, as discussed above, both of those doctrines operate in a binary way, lacking refinement in their application. Remedial doctrines, on the other hand, provide an opportunity for courts to make decisions along a broad spectrum, allowing for a nuanced and careful approach that would better balance the relevant interests.

In seeking to take into account the relevant copyright interests, the remedies concept of the rightful position proves helpful. The rightful position notion is foundational to the remedies doctrine, providing a guidepost for evaluating the propriety of various remedies by asking how a prevailing plaintiff can be returned to, or maintained in, her “rightful position.” The rightful position can only be determined by reference to the claim or claims asserted, however. The rightful position in a tort case is different from that in a contract dispute, for example. Thus, the copyright plaintiff’s rightful position can only be evaluated by looking to the contours and objectives of the copyright claim.

The Supreme Court’s opinion in *eBay v. MercExchange*—problematic though it may be<sup>172</sup>—provides an opportunity for the courts to begin to consider the copyright plaintiff’s rightful position in borrowed fiction cases in a way that accounts for the interests of the original author, those of the borrowed fiction author, and those of the public. Reduced to its simplest formulation, *eBay* stands for the proposition that injunctions should not be issued as a matter of course in patent and, by extension, copyright cases.<sup>173</sup> Withdrawing the presumption of injunctive relief means that courts ought to engage in an inquiry regarding the propriety of such relief. Conducting this inquiry

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<sup>171</sup> See, e.g., John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 B.Y.U. L. REV. 1237 (2012); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201 (2005).

<sup>172</sup> See *infra* Part III.B.2.

<sup>173</sup> *Id.*

with the plaintiff's rightful *copyright* position in mind would likely lead to different results in the vast majority of borrowed fiction cases.

### 1. The Remedies "Rightful Position" Concept

The concept of the plaintiff's "rightful position" undergirds much of American remedies law. Although it is not much discussed in the case law,<sup>174</sup> it is nonetheless a powerful tool.<sup>175</sup> It only has meaning, however, in the context of a particular claim or set of claims and a particular set of facts.<sup>176</sup> That is, the rightful position concept has little independent content; it merely commands that the remedy or remedies awarded to a prevailing plaintiff put that plaintiff in her "rightful position" as best as possible.<sup>177</sup>

Often, this involves substitutionary remedies, such as money, to compensate for a physical injury. In the case of a tort involving injury to

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<sup>174</sup> See, e.g., *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958) ("The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party."); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 209 (Wolters Kluwer Law & Business, Concise 4th ed. 2012); ("The injunction against future violations of law seeks to maintain plaintiff in his rightful position—to ensure that he is not illegally made worse off. It seeks to prevent harm rather than compensate for harm already suffered. This is the hallmark of preventive relief, of which injunctions are by far the most important example.")

<sup>175</sup> The rightful position concept explains, as a descriptive matter, a great deal of American remedies law. As a normative matter, scholars have not given it a great deal of sustained attention. I do not here attempt to justify the rightful position concept across the breadth of remedies law. Rather, I argue that it could be a powerful tool in copyright law generally and in borrowed fiction cases in particular. There is certainly room for disagreement on this point. See, e.g., Samuel L. Bray, *Announcing Remedies*, 97 CORNELL L. REV. 753, 762 (2012) (arguing against nuanced or case-by-case remedies in some situations: "[T]he radical imprecision that pervades large swaths of remedies is important for normative theory. Where remedial precision is impossible, the rationale for not announcing is diminished.")

<sup>176</sup> See *id.* at 760. ("In the United States, civil remedies are usually determined one case at a time. Behind this practice stands a powerful and straightforward idea: when legal decision makers determine remedies case by case they can match the remedy to the violation more precisely.") While Bray argues for a less nuanced approach—announcing remedies—in some circumstances, he describes the U.S. remedial system as animated by the rightful position notion:

Remedial precision seems just as crucial if a legal system is pursuing the goal of compensatory justice. For legal decision makers to restore a wronged person to her rightful position, they need to know what her rightful position was or would have been. This is exactly the information that legal decision makers can develop and employ when focusing on a single case.

*Id.*

<sup>177</sup> Accounts of and justifications for the rightful position notion differ to a significant degree. Compare Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 441 (1992) (arguing for a corrective justice conception of compensation: "Corrective justice imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions."), with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.10 at 202 (7th ed. 2007). Under the economic view set forth by Judge Posner, "[c]ompensation and corrective justice have nothing to do with this view of damages; the point is to manipulate incentives of potential defendants. . . . The economic reason for paying damages to victims is so that they will have a reason to sue and enforce the rules against defendants." LAYCOCK, *supra* note 174, at 15.

the plaintiff's leg, the court awards compensatory damages, and compensation is measured by comparing the plaintiff's *ex ante*, pre-tort condition to the condition that resulted from the tort. The court ought to award sufficient money damages to "restore" the plaintiff to the pre-tort condition as the plaintiff cannot, presumably, actually be restored to her pre-tort condition. Stated another way, the plaintiff's rightful position is her condition but for the tortious action. The remedy is thus backward-looking because tort law is animated by the purpose of compensating for past wrongs. Many compensatory remedies are similarly backward-looking.

In contrast, contract remedies are animated primarily by the notion that a contract is a promise about the future. Thus, a prevailing contract plaintiff is generally entitled to a remedy that would put her in the position she would have been in in the future had the contract been fully performed.<sup>178</sup> This, rather than the difference between the plaintiff's pre-contract position and her post-breach position, is the contract plaintiff's rightful position.<sup>179</sup>

Many civil law remedial approaches can be explained and understood through the rightful position standard. There are exceptions, such as punitive damages, which are obviously meant to punish defendants rather than compensate plaintiffs, and restitutionary remedies that look to the defendant's gains rather than the plaintiff's losses. These exceptions serve only to highlight the general approach offered by the rightful position.

This focus on the plaintiff's position is a nuanced one. It is probably true that prevailing plaintiffs are systematically under-compensated;<sup>180</sup> yet courts are quite careful not to overcompensate, as that would put a plaintiff in better than the rightful position.<sup>181</sup> In a

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<sup>178</sup> See LAYCOCK, *supra* note 174, at 33 ("[W]hy does the law protect expectancies? The rule is well settled. It is fundamentally premised on the view that the contract creates rights to which the plaintiff becomes entitled, and this contractual entitlement is what the plaintiff loses when defendant breaches.").

<sup>179</sup> The rightful position in a tort case is measured by reference to the plaintiff's change from her *ex ante* position. The court is to determine how best to return the plaintiff to the position she was in before the harm occurred. In contrast, a plaintiff's rightful position in a contract case is determined by comparing where the plaintiff ended up with where the plaintiff expected to end up if the contract had been fully performed. This protects the expectancy interest in a contract and flows from the notion that a contract is a promise about the future. Thus, the rightful position is measured from a theoretical *ex post* perspective. See, e.g., *Hawkins v. McGee*, 146 A. 641, 644 (N.H. 1929) (in a contract case about damages flowing from a botched operation, rejecting a tawdry—backward-looking—measure of damages and applying instead the expectation measure of damages from contract law).

<sup>180</sup> See John A. Seibert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565 (1986); See also Scott DeVito & Andrew W. Jurs, "Doubling-Down" For Defendants: The Pernicious Effects of Tort Reform, 118 PENN ST. L. REV. 543 (2014).

<sup>181</sup> There are exceptions to the rightful position notion, of course. Punitive damages are one

negligence case, for example, the prevailing plaintiff would not generally be entitled to damages for lost wages in an amount greater than what the plaintiff would have earned but for the tort. Generally, the rule against a “double recovery” is based on the rightful position notion; the plaintiff ought to be maintained in or returned to that position but should not exceed that position.

The rightful position is useful in the copyright context as well. Here again it has no independent substance, but rather operates as an over-arching concept animated by the purposes of the copyright claim. In remedying a copyright injury, the court should seek to put the prevailing plaintiff in her rightful copyright position. I suggest here that when a copyright plaintiff seeks copyright remedies for non-copyright harms, such a claim would exceed the rightful position and would be over-compensatory.<sup>182</sup> For example, if the alleged harm to the plaintiff involves possible consumer confusion as to the source of or affiliation with a work of fiction, a copyright remedy would be inappropriate, as such harms are *trademark* harms. Likewise, if the plaintiff has complaints related to the defendant’s profits, a copyright injunction may well put the plaintiff in a place much better than the rightful copyright position.

There are, of course, disputes about the nature and contours of the rightful copyright position, but there is some common ground. Most would agree that copyright does not incorporate moral rights protection, except in a few limited circumstances.<sup>183</sup> Similarly, most would agree that copyright is not designed to protect consumers’ marketplace expectations, as that is the realm of trademark law.<sup>184</sup> If the primary concern in the case of a copyright infringement is that consumers will, for example, believe that J.D. Salinger wrote a sequel to *The Catcher in*

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obvious example, in that they may result in what would otherwise be considered overcompensation. They are justified, however, on deterrence grounds. *See id.* at 171 (“Punitive damages are unlike any other kind of remedy. They are measured neither by the plaintiff’s rightful position nor by the defendant’s, and they do not directly restore anyone to her rightful position or maintain anyone in it.”).

<sup>182</sup> Other scholars have hinted at such a notion and made recommendations consistent with the idea. *See, e.g.*, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 506 (2009) (recommending that courts “not award statutory damages to compensate the plaintiff for injuries that are not cognizable by U.S. copyright law, for example, reputational harm or privacy intrusions.”).

<sup>183</sup> *See, e.g.*, Visual Artists Rights Act, 17 U.S.C. § 106A (2012).

<sup>184</sup> Even this, of course, is a matter of debate in the literature, as scholars have debated the history and normative foundations of trademark law (as well as copyright law). *See, e.g.*, Mark McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1840–41 (2007) (describing the debate and arguing that “trademark law was not traditionally intended to protect consumers. Instead, trademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors.”). Compared to copyright law, however, trademark law’s focus on the marketplace is clear. *Id.*

*the Rye* that he in fact did not write, providing a copyright remedy would put Salinger in better than his rightful *copyright* position. If copyright is not designed to protect associative interests, it would be inappropriate to award remedies to advance such concerns just as it would be inappropriate for a court to award expectation-based compensatory damages in a torts case.<sup>185</sup>

Notwithstanding disputes about the nature of copyright rights, there is no doubt that copyright is a limited right in some ways; a copyright owner may not simply demand any and all kinds of remedies for infringement of a copyright. The remedies for copyright infringement must be tailored.

## 2. *eBay v. MercExchange*

Although it has been much maligned and criticized on a variety of grounds, the Supreme Court's opinion in *eBay v. MercExchange* provides an opportunity for courts in copyright cases to take account of the rightful position notion and tailor the remedy.<sup>186</sup> In *eBay*, the Supreme Court reviewed an injunction entered by the Federal Circuit in a patent infringement case. Standard practice at that point was entry of an injunction upon a showing of success on the merits, which gave patent holders substantial leverage in settlement negotiations, and had a major impact on litigation strategy.<sup>187</sup> However, the District Court held that even though MercExchange, the plaintiff, prevailed on its patent claims, it had failed to show irreparable injury because it was willing to license its patents.<sup>188</sup> The Federal Circuit reversed, applying a presumption that permanent injunctive relief is appropriate in patent cases once liability has been shown.<sup>189</sup>

The Supreme Court reversed the Federal Circuit, holding that presumptions, or any kind of automatic relief, constitute "a major departure from the long tradition of equity practice,"<sup>190</sup> making it

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<sup>185</sup> See *Hawkins v. McGee*, 84 N.H. 114 (1929).

<sup>186</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>187</sup> See generally Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

<sup>188</sup> *Id.* at 390–91.

<sup>189</sup> *Id.* at 393–94.

<sup>190</sup> *eBay*, 547 U.S. at 391. What constitutes the "long tradition of equity practice" is a matter of considerable dispute. For example, H. Tomás Gómez-Arosetgui has argued, based on extensive primary source research, that "the historical record suggests that in copyright cases, legal remedies were deemed categorically inadequate," and that therefore injunctive relief was presumed. H. Tomás Gómez-Arosetgui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-At-Law Requirement*, 81 S. CAL. L. REV. 1197, 1201 (2008). Gómez-Arosetgui concludes that "[e]liminating the inadequacy requirement [in copyright cases] would . . . bring courts in line with traditional equitable principles, rather than running afoul of them." *Id.* at 1280. See also Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008).

abundantly clear that “traditional equitable principles” apply equally in patent cases.<sup>191</sup> The four “traditional” factors elucidated by the Court are: (1) whether the plaintiff has suffered an irreparable injury; (2) whether the remedies at law are inadequate; (3) whether the balance of hardships favors one party or the other; and (4) whether the public interest would be disserved by a permanent injunction.<sup>192</sup> The Court rejected any kind of categorical approach and made clear that a rigorous and even-handed application of the traditional four-factor test was required in all cases.<sup>193</sup> In essence, the *eBay* Court held that rights are distinct from remedies and that entitlement to equitable relief must be demonstrated, rather than simply presumed.<sup>194</sup>

When the Court considered the dispute between eBay and MercExchange, many in the patent community had become concerned about the perceived problem of non-practicing entities, or patent “trolls.” Although the majority does not mention patent trolls, the opinion clearly responds to concerns about these entities.<sup>195</sup> If non-practicing entities are able to hold out the threat of near-certain injunctive relief, they gain great leverage in licensing or settlement

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<sup>191</sup> *eBay*, 547 U.S. at 392; *see* *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979–80 (9th Cir. 2011) (“The [*eBay*] Court detected no evidence in the language of the Patent Act that Congress ‘intended such a departure’ from traditional equity practice, rejecting the argument that courts could find congressional intent to depart from the four-factor framework in statutory language giving patent holders a ‘right to exclude others from making, using, offering for sale, or selling the invention.’”) (citations omitted).

<sup>192</sup> *Id.* at 391. There has been substantial criticism of the Court’s description of the “traditional” four-factor test, with a number of scholars insisting that there is no such clearly-established test, and that the four factors are instead an amalgamation of the four-factor *preliminary* injunction test and some of the factors regularly employed in the permanent injunction context. *See, e.g., Laycock, supra* note 174.

<sup>193</sup> *eBay*, 547 U.S. at 391.

<sup>194</sup> *eBay*, 547 U.S. at 392 (“[T]he creation of a right is distinct from the provision of remedies for violations of that right.”).

<sup>195</sup> The majority opinion references the fact that MercExchange was willing to license its patents. *See id.* at 390. Justice Kennedy’s concurrence, however, makes the reference explicit:

In cases now arising trial courts should bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. . . . For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest. In addition injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.

*Id.* at 396–97 (citation omitted).

negotiations.<sup>196</sup> Under the Court's approach, withdrawing the presumption of injunctive relief allows courts to take a more nuanced approach to fashioning the remedy, allowing for different factual situations to play out differently. For example, non-practicing entities are not likely to be awarded injunctive relief, but an entity in the market may well be awarded injunctive relief and damages.<sup>197</sup> One way to read the case is to conclude that, at least in equity, courts *must* engage in remedial tailoring.

### 3. Injunctions in Copyright Cases, Before and After *eBay*

This remedial tailoring is exactly what is needed in borrowed fiction cases. In *eBay*, the Supreme Court relied on copyright law in reaching its conclusion regarding the availability of injunctive relief in the patent context, stating that its "approach is consistent with our treatment of injunctions under the Copyright Act. Like a patent owner, a copyright holder possesses 'the right to exclude others from using his property.'"<sup>198</sup> As in patent law, before *eBay*, courts regularly awarded injunctions to prevailing copyright plaintiffs<sup>199</sup> but since then, the courts have applied the *eBay* approach in copyright cases.

The First, Second, Fourth, Ninth, and Eleventh Circuits have all modified their approach to copyright injunctions.<sup>200</sup> Considering the question of whether and how to extend the Supreme Court's ruling in *eBay* outside of the patent context, the Ninth Circuit reversed its earlier precedent, concluding that its "longstanding rule that '[a] showing of reasonable likelihood of success on the merits in a copyright infringement claim raises a presumption of irreparable harm . . . is clearly irreconcilable with the reasoning' of the Court's decision in *eBay* and has therefore been 'effectively overruled.'"<sup>201</sup>

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<sup>196</sup> The Court's opinion has been seen as providing some relief for patent defendants and as altering the balance between patent plaintiffs and patent defendants. *See, e.g.,* Lily Lim & Sarah E. Craven, *Injunctions Enjoined; Remedies Restructured*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 787, 788 (2009) (arguing that the opinion also is likely to have unintended consequences for some non-practicing entities like universities).

<sup>197</sup> Gómez-Arostegui, *supra* note 190.

<sup>198</sup> *eBay*, 547 U.S. at 392.

<sup>199</sup> *Id.*

<sup>200</sup> This is true at least as a rhetorical matter. Whether the results are any different is an interesting question. Professor Jiarui Liu argues, "the majority of post-*eBay* decisions on copyright injunctions have totally ignored the *eBay* decision as well as the four-factor test advocated therein. Even among the cases that did cite *eBay*, most courts were reluctant to withhold injunctive relief upon a finding of copyright infringement." Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215, 215 (2012).

<sup>201</sup> *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981 (9th Cir. 2011) (internal citations omitted). *See also* *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 111–12 (1st Cir. 2008) (applying *eBay* in the copyright context); *Salinger v. Colting*, 607 F.3d 68, 77 (2d Cir. 2010) ("We hold today that *eBay* applies with equal force (a) to preliminary injunctions (b) that are issued for alleged copyright infringement."); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir.



In the *Salinger* case, the court issued a preliminary injunction after finding that Salinger was likely to prevail on the merits.<sup>202</sup> The Second Circuit agreed with the district court's view on the merits, but remanded for consideration of the preliminary injunction in light of the Supreme Court's opinion in *eBay v. MercExchange*.<sup>203</sup> The Second Circuit concluded that, although it was a patent case, "*eBay* applies with equal force (a) to preliminary injunctions (b) that are issued for alleged copyright infringement."<sup>204</sup> The *eBay* case provides an opportunity, one the courts have yet to exploit,<sup>205</sup> to craft a new approach to borrowed fiction cases that recasts the balance in order to vindicate copyright owners while providing greater predictability for the authors of borrowed fiction.<sup>206</sup>

#### 4. Tailoring the Remedy in Borrowed Fiction Cases to Achieve the Rightful Copyright Position

I do not suggest that courts should take the possibility of injunctive relief off the table in borrowed fiction cases. Given the language of the Copyright Act, that is neither a real possibility, nor would it be a good idea.<sup>207</sup> Nonetheless, a careful application of the four-factor test in these

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2007) (in a copyright case, citing *eBay* in rejecting the plaintiff's argument "that it is *entitled* to injunctive relief."); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1323 (11th Cir. 2008) ("As the Supreme Court has observed, a permanent injunction does not automatically issue upon a finding of copyright infringement.").

<sup>202</sup> *Salinger*, 607 F.3d at 73 ("On July 1, 2009, the District Court granted Salinger's motion for a preliminary injunction, barring Defendants from 'manufacturing, publishing, distributing, shipping, advertising, promoting, selling, or otherwise disseminating any copy of [*60 Years Later*], or any portion thereof, in or to the United States.'").

<sup>203</sup> *Id.* at 76 ("Defendants do not claim that the District Court failed to apply this Circuit's longstanding preliminary injunction standard. Rather, they argue both that this standard is an unconstitutional prior restraint on speech and that it is in conflict with the Supreme Court's decision in *eBay, Inc. v. MercExchange, L.L.C.* We agree that *eBay* abrogated parts of this Court's preliminary injunction standard in copyright cases, and accordingly, this case must be remanded to the District Court to reevaluate Salinger's preliminary injunction motion. In light of that holding, we need not decide whether the preliminary injunction issued by the District Court constituted an unconstitutional prior restraint on speech.") (citation omitted).

<sup>204</sup> *Id.* at 77. Other courts that have addressed this same issue have reached the same conclusion. *See, e.g., Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 996 (9th Cir. 2011) ("Thus, under *eBay*, a presumption of irreparable harm is equally improper in a case based on copyright infringement as it is in a case based on patent infringement.").

<sup>205</sup> *But see MercExchange, L.L.C. v. eBay, Inc.*, 275 F. Supp. 2d 695 (E.D. Va. 2003) (discussing the issue of irreparable injury in the patent context).

<sup>206</sup> Courts have held not only that the *eBay* standard applies outside the patent context—indeed, they have held that it applies to the consideration of permanent injunctive relief in all cases—but that it applies to preliminary injunctions as well. *See, e.g., Flexible Lifeline*, 654 F.3d at 996 ("Thus, we conclude that *eBay* applies with equal force to preliminary injunction cases as it does to permanent injunction cases."). *Flexible Lifeline* further discusses *Winter v. NRDC*, 555 U.S. 7, 9 (2008), in which the Supreme Court reversed a Ninth Circuit opinion and held that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Id.*

<sup>207</sup> This discussion is complicated by the fact that the Copyright Act provides a set of remedies that do not always operate in a way that is consistent with the rightful position notion.

cases will almost never result in the issuance of an injunction.<sup>208</sup> Regardless of its consistency, or lack thereof, with prior equitable jurisprudence, the Supreme Court's *eBay* opinion provides a clear opening for a careful approach not just to patent cases, but in the copyright context as well.<sup>209</sup> Although the lower courts have applied the *eBay* approach in copyright cases, the application still lacks nuance, fails to consider copyright's goals, and gives short shrift to the rightful position notion.

More sustained attention to the notion of the plaintiff's rightful position would go a long way toward addressing these concerns and incorporating the variety of interests involved. Taking into account the elements of a copyright claim and the cognizable interests of the copyright owner, the rightful position standard assists in applying the now "traditional" four-factor test for injunctive relief. In this section, I demonstrate how a more robust consideration of the four factors and the range of relevant interests would alter the analysis and likely the result in the *Salinger* case.

#### a. Irreparable Injury

Although the first two factors—irreparable injury and the inadequacy of the remedy at law—overlap to a significant extent, the Supreme Court has articulated them as two separate inquiries. In thinking about whether the plaintiff's injury is "irreparable," the court must consider the kind of injury inflicted and ought to do so by thinking about what interests are protected. It would exceed the rightful position standard to protect or vindicate interests that are not cognizable under copyright law. Thus, to the extent that moral rights are not cognizable under copyright law, they ought not be considered irreparable in copyright terms. For example, to order the defendant to properly attribute a work of authorship as part of the remedy for copyright infringement would be to go beyond the plaintiff's rightful *copyright* position because American copyright law does not generally involve an attribution right.<sup>210</sup> That is, a failure to give credit may be an injury, but it is not a *copyright* injury, and therefore should not be considered irreparable in the context of a copyright claim.

It is important to recall that the plaintiff bears the burden of

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<sup>208</sup> Dennis Karjala suggested a similar reform, arguing, "where the same character is used in a new story, the court should consider denying injunctive relief where the new work broadens in any meaningful way the qualitative cultural choices available to consumers." Karjala, *supra* note 50, at 39.

<sup>209</sup> Some have argued that nuance, in the form of specific remedial tailoring, is inappropriate in some circumstances. *See, e.g.,* Bray, *supra* note 175, at 754–55. For the reasons set forth here, however, borrowed fiction disputes present just the circumstances in which tailoring is necessary.

<sup>210</sup> *But see* 17 U.S.C. § 106A.

demonstrating that the injury is, in fact, irreparable. A focus on the cognizable copyright interests implicated by the publication of *60 Years Later* sharpens the inquiry. Salinger *may* have some non-negligible economic interest, but it is not clear whether any economic harm would be irreparable. With respect to works like *60 Years Later*, it is difficult to imagine that sales of *Catcher in the Rye* will be negatively affected by the follow-on publication. In fact, it seems more likely that sales of *Catcher in the Rye* might increase. The issue presented in the case was not whether an unauthorized film adaptation, for example, ought to be enjoined, for that would have presented a much stronger irreparable injury argument.<sup>211</sup>

Rather than an economic argument, however, the arguments likely to be made on Salinger's behalf sound in absolutist property terms, moral rights language (the right against destruction or criticism or alteration of the original), or in trademark terms (concern that readers will associate Colting's book with Salinger). But none of these concerns, no matter how deeply felt or valid as a general matter, is a *copyright* concern. Thus, those kinds of injuries should not be considered irreparable in a copyright infringement case, even if they might be irreparable in some other context. To enjoin the publication of a book based on those particular injuries in a copyright case would be to place the plaintiff in a position much better than his rightful copyright position.<sup>212</sup>

For example, in the Salinger case, Salinger, or his estate, would likely argue that the copyright injury is irreparable because the copyright right is akin to a property right and that injuries to property rights are presumptively irreparable. Indeed, copyright rights are regularly referred to as property rights.<sup>213</sup> This, however, is the exact line of reasoning that the Court rejected in *eBay*. Patent rights are also deemed property rights, or at least property-like, but the Supreme Court nonetheless indicated that no presumption of injunctive relief should apply.

The plaintiff would also argue that invasion of the "right to prohibit follow-on works,"—a "right" derived by analogy from the First Amendment right not to speak—would be undermined if injunctive relief was not issued.<sup>214</sup> Under this line of reasoning, Colting's book is

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<sup>211</sup> Note that this is where an evaluation at the remedial phase allows for decision-making along a spectrum that might more adequately account for the multitude of factors and interests.

<sup>212</sup> See Karjala, *supra* note 50, at 39 ("Injunctive relief should only be granted where the copyright owner demonstrates a real possibility of substantial future losses due to overexposure of the character.").

<sup>213</sup> See, e.g., Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 909–10 (2007) (describing some of the history of categorizing copyright as property).

<sup>214</sup> *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010).

some kind of “forced” speech. This argument is, again, one that is not directed at a copyright problem. Rather, it sounds in moral rights terms. Finally, Salinger’s estate is also likely to make what is a trademark argument: that the injury is irreparable because the only way to prevent association or confusion between Colting’s book and Salinger’s is to issue an injunction.<sup>215</sup> Not only is this not a copyright injury, it is far from clear that it is irreparable. Such market confusion likely could be combatted with a simple disclaimer: a sticker stating “An unauthorized sequel,” for example.

Keeping in mind the idea of the plaintiff’s rightful copyright position, none of these arguments is compelling with respect to irreparability.

#### b. Inadequate Remedy at Law

Attempting to apply the second factor—the adequacy of the remedy at law—in a way that is different from the irreparable injury inquiry is a difficult task, as the two lines of analysis tend to converge.<sup>216</sup>

First, one ought to ask what remedies at law are available to the victorious copyright plaintiff. Here, Salinger, having demonstrated that *60 Years Later* is infringing and is not fair use, has the possibility of recovering compensatory damages<sup>217</sup> or statutory damages,<sup>218</sup> costs,<sup>219</sup> and attorney’s fees,<sup>220</sup> and punitive damages.<sup>221</sup> The threshold question is whether this panoply of remedies is “inadequate.” The remedy at law might be inadequate for a variety of reasons: if the defendant is judgment-proof, or if the damages would be very difficult or impossible to prove, or if the extent of the injury is not one that is capable of measurement.

In real property cases, specific performance is the default remedy because each piece of property is considered unique and individual valuation of the property is idiosyncratic—property is thought not to be

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<sup>215</sup> Indeed, this is exactly what the Second Circuit concluded in the case. *Id.* (“In the context of copyright infringement cases, the harm to the plaintiff’s property interest has often been characterized as irreparable in light of possible market confusion.” (citing *Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96–97 (2d Cir. 2002))).

<sup>216</sup> Generally an injury is considered “irreparable” when the damages at law are inadequate. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990). This rule, whether broken into two parts or considered as a single inquiry, has been roundly criticized and even declared dead. *Id.* Nonetheless, it is the inquiry that the Supreme Court has instructed courts to undertake.

<sup>217</sup> 17 U.S.C. § 504(b).

<sup>218</sup> 17 U.S.C. § 504(c).

<sup>219</sup> 17 U.S.C. § 505.

<sup>220</sup> *Id.*

<sup>221</sup> *See infra* Part III.B.1.

perfectly fungible, and other remedies are thus inadequate.<sup>222</sup> But, as with the irreparability analysis, the Supreme Court instructed in *eBay* that the analogy between real property and intellectual property is not to be taken so far as to result in a presumption. In other words, merely claiming that copyright infringement involves an “intangible” or “property” injury is insufficient to justify injunctive relief. To so conclude “would lead to the very presumption that *eBay* prohibits.”<sup>223</sup> This means that courts should take a hard look at the actual or potential injuries to a plaintiff in a particular case, and the available remedies, and must not simply draw a line from “copyright” to “property” to “injunction.”

In the *Salinger* case, the monetary remedies potentially available to the *Salinger* estate are significant. Although strong rightful position arguments exist against the imposition of statutory damages,<sup>224</sup> if such damages are available, the court certainly ought to take account of the fact that these damages are potentially quite substantial. Assuming that *Salinger* would be awarded the maximum amount of statutory damages, he could receive \$150,000, along with costs and attorneys’ fees. If the compensatory damages—lost sales, for example, or the profits on *Colting’s* book—were larger, *Salinger* could elect to recover those instead. Given the substantiality of these numbers, the remedy ought only be deemed “inadequate” if the injury is one that is “irreparable.” This brings us yet again back to irreparability and the very presumption that *eBay* sought to eliminate.

While intangible injuries—dignitary harms, for example—may well be “irreparable” and thus inadequately remedied with money damages, economic harms are not generally, and certainly not presumptively, irreparable because money damages are often adequate. To the extent that *Salinger’s* injuries are injuries to his moral rights interests, the remedy at law may be inadequate, but they are not properly a part of a copyright case.

Likewise, concluding that the remedy at law is inadequate because money damages cannot undo the associations that readers or others may

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<sup>222</sup> See generally Laycock, *supra* note 216, at 703.

<sup>223</sup> *Bethesda Software, L.L.C. v. Interplay Entm’t Corp.*, 452 F. App’x 351 (4th Cir. 2011).

<sup>224</sup> There are some ways in which statutory damages may well be compensatory and thus satisfy the rightful position standard, see, e.g., Samuelson & Wheatland, *supra* note 182, at 446 (“Statutory damages in U.S. copyright law have historically been intended to ensure that copyright owners could obtain at least some measure of compensation when it was difficult to prove how much damage they had suffered as a result of the defendants’ infringements.”), but this is likely not how they operate in practice. See *id.* (“Although Congress made some effort to cabin statutory damage awards to avoid excessiveness in the Copyright Act of 1976, the presence of the enhanced damage provision available for willful infringements has led to an increasing number of awards that are not only punitive in effect, but punitive in intent.”).

make between Salinger's iconic work (or Salinger himself) and Colting's borrowed fiction would be to vindicate a trademark or moral rights interest with a copyright injunction. This would be an inappropriate use of injunctive relief in a copyright case because Salinger would be put in a position better than his rightful *copyright* position. This associative injury may well be "irreparable" or not capable of being remedied with money damages, but it is simply not a copyright injury.

#### c. Balance of Hardships

The balance of hardships does not appear to tip very far in either direction in the *60 Years Later* case. Salinger was quite obviously put out by the advent of Colting's book, but the continued existence, publication, and distribution of the book is not easily described as a hardship. The sense in which it is a hardship is that it offends Salinger's interest in not being associated with the book or his somewhat intangible interest in not having his work defiled or degraded by Colting's follow-on work. As described above, those sorts of injuries are not copyright injuries.

Similarly, Colting's interests are obviously affected by the entry of an injunction, but the injunction reaches only so far. The hardship to Colting is of the intangible, dignitary kind: the injunction is a restraint on speech. This is perhaps not a major issue as to Colting personally, although it is not clear why courts are so unconcerned about the free speech effects of injunctions in copyright cases.<sup>225</sup> The courts regularly protect much more offensive and much less useful speech than a work of borrowed fiction.<sup>226</sup> In the copyright context, the free speech and first amendment issues are perhaps best addressed with respect to the fourth factor, the public interest.

#### d. Public Interest

The final factor to be considered in evaluating a request for injunctive relief is whether the public interest is likely to be harmed by the entry of an injunction. With this factor, the courts have yet another opportunity to engage in a careful and nuanced analysis based on the particular factual circumstances.

In assessing this factor, courts regularly state that the public

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<sup>225</sup> Scholars, on the other hand, have focused a great deal of attention on this issue. *See, e.g.*, Bohannon, *Copyright Infringement and Harmless Speech*, *supra* note 45; Rubinfeld, *supra* note 45; Netanel, *supra* note 45. I do not take on the First Amendment question directly here but merely note it as a substantial issue and one additional reason to refrain from injunctive relief in borrowed fiction cases.

<sup>226</sup> *See, e.g.*, *United States v. Stevens*, 559 U.S. 460 (2010) (invalidating on First Amendment grounds a statute that banned trafficking in depictions of animal cruelty).

interest favors enforcement of the copyright laws, without much more.<sup>227</sup> While this is undeniably true, it is insufficient and not particularly compelling on its own, particularly when there are other interests affected by the decision to enter an injunction. One is the interest of the public in the availability of additional creative works; another is the freedom to write works of borrowed fiction and the free speech concerns implicated by that interest. An injunction in a borrowed fiction case is equivalent to banning a book and making it unavailable or at least difficult to acquire. This concern ought to weigh in the balance.<sup>228</sup> As discussed above in Part II, the interests of readers and writers in the availability of and access to works of fiction are a profound part of our culture.

Although the free speech elements presented in copyright cases may not be particularly acute in considering the balance of hardships—the effect on the individual parties—those same concerns should weigh much more heavily in evaluating whether and to what extent the public interest may be harmed by the entry of an injunction.<sup>229</sup>

Outside of the copyright context, the courts have been generally loath to issue injunctions against the publication or distribution of expressive works. It was, for example, a matter of considerable constitutional difficulty to determine whether pornographic images of animal cruelty could be banned.<sup>230</sup> Although the courts have held that copyright law contains “built-in free speech safeguards” obviating the need for independent first amendment scrutiny,<sup>231</sup> that cannot mean that First Amendment concerns are irrelevant in considering the appropriate form of relief.<sup>232</sup> To the extent that the courts have refrained from this analysis under the fourth factor, they should change their practice.<sup>233</sup>

Courts have tended to summarily conclude that if a particular work is infringing and not fair use, it has little to no First Amendment value. For example, in the *Salinger* case, the Second Circuit gave a nod to the

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<sup>227</sup> *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 112 (1st Cir. 2008) (The public interest is in the “enforcement of federal statutes.”).

<sup>228</sup> See Samuelson & Wheatland, *supra* note 182, at 508 (recommending in the context of statutory damages that the courts “not find infringement to be willful in close cases, especially not in close fair use cases when freedom of speech or of expression values are at stake.”).

<sup>229</sup> See Christina Bohannon, *Copyright Infringement and Harmless Speech*, *supra* note 45 (arguing that using copyright law to suppress critical speech is inappropriate).

<sup>230</sup> *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008).

<sup>231</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); see also *Golan v. Holder*, 132 S. Ct. 873, 891 (2012).

<sup>232</sup> See Netanel, *supra* note 45, at 2 (noting that courts exempt copyright from First Amendment scrutiny and arguing that “with the recent exception of the Eleventh Circuit [in the *Gone with the Wind* case], the courts have consistently gotten it wrong.”).

<sup>233</sup> As indicated, I am far from this first to say this, and I do not set forth the full First Amendment critique here. Rather, I rely on the extensive work of others. See, e.g., Lemley & Volokh, *supra* note 45; Netanel, *supra* note 45; Rubinfeld, *supra* note 45.

First Amendment concern—“[e]very injunction issued before a final adjudication on the merits risks enjoining speech protected by the First Amendment”<sup>234</sup>—but then denied the problematic nature of the injunction. According to the court, “[s]ome uses, however, will so patently infringe another’s copyright, without giving rise to an even colorable fair use defense, that the likely First Amendment value in the use is virtually nonexistent.”<sup>235</sup> While this may be true in some cases, it is almost certainly not true in the *Salinger* case—or in most borrowed fiction disputes—where the borrowed fiction author has a strong fair use defense and contributes a great deal of his own creativity to the endeavor.

The courts’ consideration of the public interest ought to include not just the general interest in enforcing the copyright laws, but the specific interests implicated by the plaintiff’s successful copyright suit along with the variety of other interests that, as described above in Part II, are often overlooked. These include the interests of borrowed fiction authors in expressing themselves and publishing their work—an interest of not insignificant dimension—and the interests of the public in access to additional creative works.

### C. *The Plaintiff’s Rightful Position in Borrowed Fiction Cases*

Courts should rarely, if ever, issue injunctions in borrowed fiction cases. Doing so generally would result in an excessive remedy that puts the plaintiff in much better than her rightful position by vindicating non-copyright interests, and it would conflict with the admonition against presumptive injunctive relief. This does not mean that a prevailing copyright plaintiff should receive no remedy, however. While the decision whether to enter an injunction is a binary one, there are a variety of remedial options that, together, allow for the vindication of the plaintiff’s copyright concerns and accommodate other interests as well.

Compensatory damages are authorized by the statute and offer the most obvious route to the plaintiff’s rightful position.<sup>236</sup> In a substantial number of cases, borrowed fiction plaintiffs may be unable to demonstrate any kind of measurable loss. There may be no lost sales, the borrowed fiction author may have made little or no money, and so on. In some cases, however, the plaintiff might be able to demonstrate losses, at least of some kind of royalty stream from the infringing book if not of sales of the original work. An award of damages for any demonstrated, actual losses would clearly be consistent with the rightful

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<sup>234</sup> *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010).

<sup>235</sup> *Id.* at 82–83.

<sup>236</sup> 17 U.S.C. § 504(a)–(b) (2010).



copyright position.<sup>237</sup>

It must be conceded that, given the remedial structure of the Copyright Act, courts cannot simply apply the rightful position standard. The Court's opinion in *eBay* provides an opening for incorporating that notion into the question of whether to award injunctive relief, but other aspects of the Act make it difficult to do so across the range of remedies.

The Copyright Act allows for an award of substantial statutory damages,<sup>238</sup> but the opening that the Court provided for a rethinking of injunctive relief does not exist for statutory damages.<sup>239</sup> As the law stands, plaintiffs are entitled to request statutory damages in lieu of actual damages.<sup>240</sup> It is important to note the ways in which statutory damages can operate in practice like automatic injunctive relief and, similarly, can be inconsistent with the rightful position notion. The amount of statutory damages is so large, up to \$150,000 per infringement (in addition to defendant's profits, defense costs, and so on), that defendants—innocent or not, justified in their actions or not—are quite unlikely to contest a claim of copyright infringement in a vast number of cases. Just as with the threat of injunctive relief, the possibility of statutory damages provides settlement and other litigation leverage to plaintiffs, and, in borrowed fiction cases, is quite likely to have a chilling effect on the creation and dissemination of such works.<sup>241</sup> As Samuelson and Wheatland conclude, despite good

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<sup>237</sup> *But see* H. Tomás Gómez-Arostegui, *Prospective Compensation in Lieu of a Final Injunction in Patent and Copyright Cases*, 78 *FORDHAM L. REV.* 1661, 1664–65 (2010) (arguing that the federal courts do not have the “authority to award compulsory prospective compensation—whether a continuing royalty or a lump-sum damages award—for postjudgment copyright and patent infringements.”). One conclusion flowing from Gómez-Arostegui's extensive historical research is that “courts will discover that in many of the cases where they denied final injunctions, they probably should have granted them.” *Id.* at 1665. I do not take issue with Gómez-Arostegui's conclusions. I am not here concerned with the power of the courts to reach the rightful copyright position, but rather the normative arguments for that approach. To fully implement the recommendations here might well require a statutory amendment.

<sup>238</sup> 17 U.S.C. § 504(c) (2010).

<sup>239</sup> The *eBay* case was explicitly about equitable remedies, injunctive relief in particular. Although statutory damages have at times been considered equitable, the Supreme Court has held that the Seventh Amendment applies, entitling the parties to a jury. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998). According to Samuelson and Wheatland, this means that “juries now also play a significant role in awarding statutory damages. . . . *Feltner* has exacerbated the potential for excessive and arbitrary awards when skillful lawyers are able to persuade juries to become outraged about infringing conduct.” Samuelson & Wheatland, *supra* note 182, at 456.

<sup>240</sup> *See* Samuelson & Wheatland, *supra* note 182, at 451 (“[S]tatutory damages are available only ‘in lieu’ of awards of actual damages and the defendant's profits; a successful plaintiff could, in other words, get statutory damages or actual damages and defendant's profits but not all three.”).

<sup>241</sup> It may well be that this leverage operates to benefit the large industry players but not the average copyright holder. *See* Samuelson & Wheatland, *supra* note 182, at 454 (“The prompt registration requirement for statutory damages has not become a meaningful inducement to

intentions, the statutory damages provision of the 1976 Copyright Act “has devolved into a regime in which the innocent infringer provision is essentially never used, and willful infringement is commonly found in cases when infringement should properly be deemed ordinary.”<sup>242</sup> In many of these cases, however, statutory damages would not serve a compensatory purpose. Instead, they are a deterrent, or they are punitive.<sup>243</sup> In either event, they are inconsistent with the rightful position notion.

Statutory damages may be appropriate, perhaps, in cases where infringement is likely to be both widespread and difficult to detect.<sup>244</sup> In those cases—file-sharing is an excellent example—both injunctive relief and statutory damages serve as deterrents to infringement as well as leverage in settlement and litigation. In this way, they depart from the rightful position notion. Such a departure is justifiable in some circumstances but not in all, as seen in the borrowed fiction context.

Ultimately, without a legislative change, fully implementing the rightful position notion in borrowed fiction cases is not possible. Although the *eBay* case provides this opening with respect to injunctive relief, the statutory damages provision stands in the way of a better overall balance of interests between copyright owners and copyright users, between writers and readers, and between writers and other writers.

#### CONCLUSION: BEYOND BORROWED FICTION

For perhaps somewhat idiosyncratic reasons, this paper has focused on borrowed fiction, but the lessons drawn from this study may extend to other copyright cases. There are a variety of situations that present an array of legitimate but conflicting interests, much like borrowed fiction. Many works that might be described as remixes, mash-ups, or collages, for example, might fall into this category. Disputes over these kinds of works may best be resolved at the remedies phase. These scenarios are like borrowed fiction in that the original

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registration for all authors who value copyright protection, but rather a substantial boon to major copyright industry players . . . . Because individual authors and small firms do not typically register their copyrights within three months of publication, they rarely qualify for statutory damages or attorney’s fee awards.”).

<sup>242</sup> *Id.* at 460.

<sup>243</sup> *Id.* at 462 (“Even when judges or juries do not explicitly say they are intent on punishing defendants, the awards they sometimes make are punitive in effect.”).

<sup>244</sup> In these situations, statutory damages may well serve a compensatory purpose. *See, e.g., id.* at 499 (“[Statutory] damages have long been intended to compensate plaintiffs in situations in which it was difficult for a copyright owner to prove what actual damages she sustained and what profits the defendant made or when it would be too expensive, for example, because of a possible need to hire an expert witness, to prove damages or profits in comparison with the amount that could be recovered.”).

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author has a cognizable copyright interest, but the new users of the work add their own creative content and have free speech concerns that merit deference. Enjoining the new uses would be a net negative for the culture and the speech ecosystem, and the threat of statutory damages might have a chilling effect. An award of compensatory damages would nonetheless provide some satisfaction for the copyright owner.

Other situations present a clear case in the other direction. When the copyright owner's interests are strong and there is merely "slavish" copying<sup>245</sup> by the defendant with the effect of displacing the market for the original or in situations in which infringement is either difficult to detect or difficult to prove, the rightful copyright position might only be achieved through the threat of injunctive relief and statutory damages. In other words, the only way to get to the rightful position is to deter the infringement in the first place. This is clearly not the case in borrowed fiction disputes, but it may well be true in, for example, the file-sharing context.

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<sup>245</sup> Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1269 (10th Cir. 2008) (describing "slavish copying" as the "antithesis of originality.").