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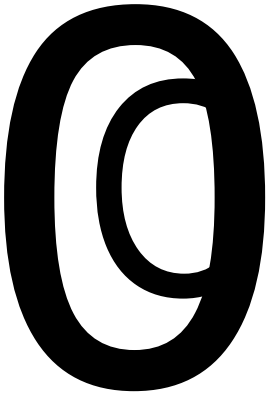

What's So Fair About Fair Use?
The 1999 Donald C. Brace Memorial Lecture

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ARTICLES

WHAT'S SO FAIR ABOUT FAIR USE?

THE 1999 DONALD C. BRACE MEMORIAL LECTURE DELIVERED AT FORDHAM UNIVERSITY SCHOOL OF LAW ON NOVEMBER 11, 1999†

by ALEX KOZINSKI*
CHRISTOPHER NEWMAN**

Good evening, ladies and gentlemen. It is a great honor to be invited to deliver the Twenty-ninth Annual Brace Memorial Lecture. It's an honor, but also a bit daunting to have to speak to a group of highly knowledgeable people in their field of expertise. So naturally, I did what any conscientious federal judge would do when faced with an intellectual problem of this magnitude — I asked one of my law clerks to go and look for a topic. It turns out that one of the copyright decisions to have caused most controversy in the last few years is one I was already familiar with, because it came out of my very own Ninth Circuit. The case is called *Dr. Seuss Enterprises v. Penguin Books.*[1] Penguin published a book about the O.J. Simpson trial, illustrated and written so as to look and sound like a Dr. Seuss book. The book was called *The Cat Not in the Hat,* by *Dr. Juice,* and it contained such memorable lines as, "One knife / two knife / red knife / dead wife." Well, you can just imagine what happened:

> Those lawyers for Seuss were so sly and so slick,
> that they wrote a complaint and they filed it real quick:
> "We took a look. We saw a book.
> We saw a book writ by a crook.
> This crook had took our own book's look!
>
> It looks the same way in a box.
> It sounds the same way with a fox.
> It tastes the same with bagels and lox!

†This lecture was delivered by Judge Kozinski. Hence the folksy first person style. However, we have it on good authority that all the best parts were put in by Judge Kozinski's law clerk.

*Judge, Ninth Circuit Court of Appeals, Pasadena, California.
**J.D., University of Michigan, 1999.

1 See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

It copies rhymes from here and there.
this book infringes everywhere!

And though they say Juice use is fair,
their claim is just so much hot air.
It's satire, not a parody! Read it! Read it! You will see!
Read the book and see, we plea! Pay heed to Justice Kennedy!

And Cindy Loo Who who is no more than two,
If she saw this crook book would not know what to do.
Why, she *might* even think it was by *you-know-who!*

So DON'T let poor Who boys and girls be ensnared!
Please, save us from damage that can't be repaired!
In closing we say, and the court may it please:
This book MUST go the way of the Truffula trees!"

The rest, as they say, is history. The district court held that Seuss was "threatened with the prospect of immediate and irreparable harm to its interests by the further advertising and sales of the Defendant's work,"[2] and granted a preliminary injunction forbidding its distribution. Penguin appealed, and the Ninth Circuit affirmed. The book was never seen again.'

Let me make clear at the outset that I do *not* intend to speak tonight on the merits or demerits of the *Dr. Seuss* opinion. For one thing, it's already been done at length by Professor Ochoa and others.[4] Also. while I doubt. I would have decided the case the same way myself, I find it difficult to say the opinion is clearly wrong. For one thing, when you're applying a multi-factor test in which the factors are not clearly defined or weighted. it's very difficult to *be* clearly wrong. (I'm not saying it can't be done, but it requires real work.) In any event, even if I did have some major beef with the opinion, I'm sure you know that we Ninth Circuit judges are far

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[2] Dr. Seuss Enters.. L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559. 1574 (S.D. Cal. 1996).

[3] I once met one of the lawyers who had been involved in the case, and asked if he could get me a copy of the book, just for my academic interest. He said, "Are you crazy? There's an injunction!"

[4] See Tyler T. Ochoa. *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced A Parody. 45* J. COPYR. SOC'Y 546 (1998). See *also* Gregory K. Jung. *Dr. Seuss Enterprises v. Penguin Books,* 13 BERKELEY TECH. L.J. 119 (1998): Mary L. Shapiro. *An Analysis of the Fair Use Defense in Dr. Seuss Enterprises v. Penguin. 28 GOLDEN GATE* U. L. REV. 1 (1998); Jason M. Vogel, Note. *The Cat In The Hat's Latest Bad Trick: The Ninth Circuit's Narrowing of the Parody Defense to Copyright Infringement in Dr. Seuss Enterprises v. Penguin Books USA, Inc., 20* CARDOZO L. REV. 287 (1998).

too nice and collegial to go around taking potshots at our colleagues.[5] Finally, 1 really don't think that any theoretical fine-tuning of fair use doctrine is going to solve the problem. In fact, tonight I'm going to modestly propose that when it comes to derivative works, fair-use doctrine is a red herring and we should just dump it.

In advancing this thesis, I feel a bit like Steve Forbes addressing a convention of tax lawyers. Fair use is after all the bread and butter of copyright theorists. not to mention Brace Lecturers. It is also a deeply-entrenched feature of our jurisprudence. As Professor Weinreb described in last year's Lecture, the fair use problem has been with us about as long as the Statute of Anne itself.6 There is a very good reason for this. Fair use theory is our legal tradition's way of grappling with the central issue of intellectual property: At what point does protecting it start to defeat the purpose for having it in the first place?

In drafting the Copyright Act, Congress pretty much punted on this issue, leaving it to courts to just go on making case-by-case determinations as they had done all along. It did list four factors for us to consider, but didn't say anything about what these factors mean or how they should be weighted relative to each other. Many talented thinkers have puzzled and puzzled about section 107 until their puzzlers were sore, and have come up with some of those wonderfully nuanced, multi-faceted analyses that make judging so much fun. Now don't get me wrong — I have nothing against nuanced, multi-faceted analyses; the world is after all a nuanced, multi-faceted place. The problem is that we ask courts to engage in a nuanced query to determine whether something is fair use, but don't provide any way for them to give a nuanced answer. In fair use, as with pregnancy tests. "a little bit" isn't considered an acceptable response. Fair use is conceptually a hard-edged box; either you're in it or you're out of it. If you're out, you can be enjoined out of existence like *Dr. Juice.* If you're in, you can keep doing what you're doing and thumb your nose at the copyright holder while you rake in the bucks. Personally, I find both of these alternatives troubling in different ways.

Imagine that the now disgruntled authors of the *Dr.* Juice parody — oops! I mean, satire — decide to get even by penning a libelous expose about Theodor S. Geisel himself. They are careful to write it in dull prose, with not a single rhyme. They also leave out any infringing illustrations. In this book, the authors purport to divulge that the real inspiration for Dr. Seuss's whimsical works was long-term LSD use, a habit he picked up while running a secret child pornography ring headed by Mr. Rogers. Sup-

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[5] *But* see Stephen Rtinhardt, *The Anatomy of an Execution.. Fairness vs. "Process:* 74 N.Y.U. L. REV. 313 (1999).

[6] *See* Lloyd L. Weinreb, *Fair Use and How It Got That Way. 45* J. COPYR. SOC'Y 634. 636 (1998).

pose further that the book presents bogus statistical data showing that children who grow up reading Dr. Seuss have a significantly higher incidence of teen pregnancy, owing to the glorification of single parenthood found in *Horton Hutches the* Egg. Not to mention membership in Lorax-inspired anti-industrial terrorist groups. But that is not all. Oh, no. That is not all. The book goes on to claim that Seuss's illustrations contain subliminal Satanic messages and — even worse — cleverly hidden Marlboro advertisements. Finally, if you can, imagine that these scoundrels are so low as to attribute a fabricated quote to Geisel, in which he purportedly says: "Big G, little g, what begins with G? Geisel the gifted gigolo's favorite girlish spot, you see."

If Dr. Seuss were still with us, and got word that this book was about to be published, would he be entitled to go into court and get a preliminary injunction preventing its distribution? Perish the thought. Even though Seuss would be able to show a high likelihood of success on the merits of his libel claim; even though the potential damage to his reputation would be great; even though we all know that such rumors, once unleashed, are impossible to stuff back into the bottle — the fact remains that an injunction against speech that had not yet been proven to be constitutionally unprotected would be an unconstitutional prior restraint. Even if Seuss ultimately proves that the speech is unprotected libel, it is highly unlikely he could get a permanent injunction. In fact, I doubt that most of you here have ever even heard of a libel case in which an injunction was issued.

When it comes to an infringing parody, however, the rule is very different. All of a sudden injunctions are thneeds, which everyone, everyone, EVERYONE needs. Section 502 of the Copyright Act confers power to grant an injunction on any terms a court "deem[s] reasonable to prevent or restrain infringement of [the] copyright."[7] The district court's opinion in *Seuss Enterprises* notes in passing that in copyright cases, irreparable injury is *presumed* upon a showing of likelihood of success.* In fact, if the district court had thought it necessary, it was even authorized under section 503 to have all copies of the O.J. book impounded and destroyed.[9]

Think about this for a moment. Congress has given courts the power to order books burned. In a legal regime as jealously protective of freedoms of speech and press as ours, this ought to give us some pause. What's that you say? Classified documents about our Vietnam war effort have been stolen from the Pentagon and given to the newspapers? You want an injunction to avoid risking the death of soldiers, the destruction of

7 17 U.S.C. §502(a) (1994).
8 *See Seuss Enters., supra* note 2, at 1574.
9 See 17 U.S.C. $503 (1994).

alliances, the prolongation of war? No way, Jose; this is the land of the brave and the home of the free. But wait a minute — did you say someone drew a picture of O.J. Simpson wearing a goofy stovepipe hat? Light the bonfires, it's Nuremberg time!

I don't think you can distinguish the two simply by claiming that one has more public value than the other. The district court may have been right that *Dr.* Juice fell short of his billing as "wickedly clever," but the book was not merely a copy of preexisting material. It was clearly an original and creative work, expressing an opinion on an event of considerable public interest. One might object that the Juice authors could have commented on the O.J. trial without piggy-backing on Dr. Seuss. This is true, just as it's true that Paul Robert Cohen *could* have worn a jacket reading "I Strongly Resent the Draft." But as the Supreme Court pointed out, restraining the ***form*** of expression suppresses content as well.[10]

The Supreme Court in *Campbell v. Acuff-Rose*[11] disparaged the use of pre-existing works as a vehicle for satire, describing it as a mere attempt to "avoid the drudgery in working up something fresh."[12] I'm not so sure. It's easy enough to spew a few lines of impromptu Seussian doggerel, but it takes some creativity and work to write a sustained satirical pastiche that people will enjoy enough to pay money for and recommend to their friends.

Nor is it true that the would-be satirist can just latch onto *anything* famous and use it to comment on the subject he wants to spoof. Even if the original work is used only as a vehicle, not just any vehicle will get you where you want to go. You can only get so many chuckles by mimicking something familiar. When this kind of satire really works well, it's because there is something about the original that fits — or pointedly doesn't fit — the subject. When the Capitol Steps did Paula Jones singing "Don't Cry For Me Judge Scalia,"[13] the humor wasn't just in the reworked lyrics — it was also in the casting of Jones as Evita, the self-proclaimed public martyr. And they were able to do this without saying so explicitly, by tapping into the reservoir of our shared cultural experiences. The Capitol Steps *could* write entirely original songs to fit every new current event, but something would be lost — lost to all of us, not just to them — if they did so. The Ninth Circuit may have been right to reject as "pure shtick [sic]" the claim

10 See Cohen v. California, 403 U.S. 15 (1971). This, by the way, is why I find it unconvincing when First Amendment objections to copyright injunctions are simply brushed aside with the response that the idea-expression distinction in copyright has already struck the proper balance.

11 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

12 *Id.* at 580.

13 *Hear* Capitol Steps, *Don't Cry For Me, Judge Scalia, on Sixteen Scandals* (1997).

that *Dr.* Juice was really a commentary on the moral myopia of Dr. Seuss,[14] but that doesn't mean the Cat in the Hat had nothing to tell us about O.J.

The presumption that an injunction is available to stop copyright infringement is particularly troubling in this case, because the only real harm was the prospect of the author's work being associated with something unsavory. After all, it's not likely that a lot of parents would decide to pass up *Green Eggs and Ham* and bring *Dr. Juice* home to their kids instead. In fact, this case suggests why the distinction between parody and satire may not be as useful as some would think. The rationale behind the distinction is that parodies are likely to fall victim to a market failure caused by the unwillingness of authors to have their work disparaged. When, on the other hand, the author's work is to be used as a vehicle to comment on something else, the author has little subjective reason to forego the profits he could get from selling a license. Or so we are told. But now notice something: Both courts that looked at the case concluded that the O.J. book could not plausibly be read as a critical comment on Seuss's work. How, then, do we explain the unwillingness of Seuss Enterprises to sell a license to Penguin?

One explanation would recognize that while imitation may be the highest form of flattery, it is also the commonest form of ridicule. Since an artistic imitation, to be recognizable as such, has to emphasize the essential characteristics of the original, it is never far from caricature. Even when the intent is not to make fun of the original, the very reproduction of these characteristics holds them up for scrutiny. That's why, even though you can do an entirely good-natured impression of someone whom you hold in the highest regard, you usually don't do it when they're around for fear of being misunderstood. (I know for a fact that there is a running contest among my current and former clerks as to who can do the best Kozinski impression. But they seldom do it when I'm around.) So whatever the *purpose* of an imitation, imitation itself always has undertones of ridicule that are likely to make owners of the original work uncomfortable. If the imitated work expresses something the author takes seriously, he will very likely object to its being trivialized by being used to make fun of something else.

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14 *Seuss Enterprises*, *supra note* 1, at 1403. I happen to prefer pure schtick to the adulterated variety, but in either case I think it should be spelled with an "sch." For an important discussion of the first appearance of the term "schtick" in a reported legal opinion, see Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, *103 YALE* L.J. 463,466 (1993) (all the best parts written by the law clerk).

Another obvious reason authors might refuse to license their work for use in what Judge Posner calls "weapon" parody's is the one I've already alluded to: It creates associations between your work and the object of satire that you might find undesirable. Now it's possible that Seuss Enterprises has a commercial interest in not having its children's products gratuitously associated with a grisly double murder. If so, however, it's an interest that should be protected under trademark law, which has concepts for dealing with this sort of problem. And, in fact, Seuss Enterprises *did* raise trademark claims. But the court said their copyright claims standing alone supported the injunction.[16]

The premise behind copyright (and patent law too) is that the best way to promote production of valuable intellectual works is to give authors and inventors the ability to demand and receive compensation for the value they create. Of course, people will produce intellectual works even without this compensation, but if they can't make a living at it, such production will be restricted to those who have other sources of income. If we want a thriving intellectual marketplace, we need to enable people to concentrate their energies on producing for it. The best way to do this is to grant property rights that give their products exchange value.

Though the bundle of legal rights we have created for this purpose is known as "intellectual property," it's worth reminding ourselves that these rights stand on a somewhat different footing from the property rights our founders held to be so sacred. In fact, the Constitution doesn't refer to them as "property" at all. Their protection is not one of the ends of government, but an instrumental means to an end. The Constitution gives Congress the power 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." As David Mayer tells us,

> [Thomas] Jefferson emphatically denied that inventors had "a natural and exclusive right" to their inventions. "If nature has made any one thing less susceptible than all others of exclusive property," he argued, "it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it." Society "may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas," but such a right would be entirely utilita-

15 See Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL. STUD. 67, 71 (1992). See also Vogel. *supra note* 4, at 310-16 (critiquing Posner's distinction between "weapon parody" and "target parody").

16 See Seuss *Enters.*, *supra* note 2. at 1574.

rian, "according to the will and convenience of the society, without claim or complaint from anybody."[17]

If Jefferson is right, it means that in order to justify an injunction in situations like the Dr. Seuss case, we have to present a utilitarian argument that such protection will promote the progress of the arts. One approach could argue that artists get some extra incentive to create from the knowledge that they'll be able to prohibit uses of their work that they find unsavory. But how do we know that this leads to enough extra creation by original authors to outweigh ail the derivative works that we know are thereby prevented or suppressed? We know the cost to society of granting Seuss Enterprises an injunction — a creative work addressing a matter of public interest was suppressed, and other similar works were probably deterred. How do we measure what we gained in return? Even if we assume that Dr. Seuss's creative muse would have gone vamoose at the thought of Dr. Juice, how much reassurance can other authors rationally draw from Dr. Seuss's victory? The Dr. Juice book was enjoined, but only after a bunch of highly indeterminate weighings and balancings; a different district judge or a different court of appeals panel could easily have reached a different conclusion. Even then, there really isn't much that the Dr. Seuss people could do about the various pseudo-Seussian rhymes involving Bill Clinton and others that are bouncing around the Internet.'* Once a work becomes embedded in our culture, the urge to use it as a vehicle for satire or social commentary is nigh irresistible.

But perhaps this is the wrong way to analyze the problem. Perhaps we should look beyond the specific instance in which the injunction seems to disserve the purposes of copyright. The real question isn't whether we should grant authors the power to exclude uses of their work they don't like. The question is whether we need to give them the power to exclude infringing derivative works in general.

At first blush, the foregoing is likely to sound like an all-out attack on the legitimacy of intellectual property in general, of the sort David Ladd eloquently argued against in his 1983 Brace Lecture.[19] But the Jeffersonian position I am advancing here is not one that begrudges authors the "exclusive right to the profits arising from [the works they create]."[20] Indeed, as will become clear later, I am rather more solicitous of this right

'7 DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 78 (1994).

18 One of these even involved an elaborate animated piece that, much like the enjoined book, used recognizable visual themes such as the Cat in the Hat's trademark headgear.

19 See David Ladd, *The Harm of the Concept of Harm In Copyright, 30* J. COPYR. SOC'Y 421 (1983).

20 See *supra* note 17 and accompanying text.

than is our current regime. What I would like to call into question is whether the "exclusive Right" of authors to profit from their work need necessarily entail an exclusive right to control the uses to which that work is put. It is no answer to say the First Amendment shouldn't be read to repeal Congress's copyright power. This begs the question by assuming that without injunctions there can be no copyrights. Yet property rights can and do exist even though damages are the only remedy for their loss. The First Amendment doesn't answer the question, but it does suggest that to the extent we can do without copyright injunctions, we should.

Framed in this way, the problem is akin to that of deciding when real property should be protected by a liability rule as opposed to a property rule. One of the big advantages of private ownership is that it leads to efficient allocation of scarce physical resources. But private property can also be used inefficiently. If Donald Trump offers you a billion to let him tear down your family home and put a casino in its place, you have the right to say no, even though your house is a dump. You can say no because grandpa built the dump and you're attached to it; you can say no because you hate Donald Trump and want to irk him; or you can just say no for no particular reason at all. As a general rule, we don't override your right to exclude in the name of efficiency. Why? There are a number of reasons. One is that, not being omniscient, we can't go around second-guessing every failed transaction to figure out whether it was inefficient. It may have been a rational decision to hold out for a better price. So even though individual refusals to sell may sometimes be inefficient, respecting the owner's right to hold out promotes efficiency overall.

Does the same hold true for copyrights? Again, we have a system that generally tends toward utility maximization, this time by encouraging the production of valuable intellectual works. On the other hand, we also have inefficient hold outs, in the form of authors who use their exclusive right to prevent the creation of valuable derivative works. So far the analogy looks pretty good. But there's a very important difference between the two: A piece of land can't serve both as your living room and Trump Towers, but a piece of intellectual property suffers from no such limitations. I would be willing to wager that by this time next year, the copyrighted character Harry Potter will have provided the basis of a McDonald's promotion, a Saturday morning cartoon, a Saturday Night Live sketch (which of course will inevitably be turned into a movie), and a Nintendo game. None of these uses conflicts with any of the others. The crucial role of the right to exclude in generating an "order of actions" is therefore less important.[21]

[21] For a discussion of the "order of actions" problem, see RANDY BARNETT, **THE** STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 43 (1998).

Another important reason why we generally respect the right to hold out when it comes to real and personal property is that these institutions are not simply utilitarian devices for creating societal wealth, but also the anchors of personal autonomy and liberty. To pursue any sort of a life path, you have to rely on the resources that make it possible. We invest a lot of time and personal identity in our belongings, and while you can be compensated for the cost of your house, if your whole way of life has been built around your position in a particular neighborhood, you will suffer serious disruption nonetheless. Even if we were infallible identifiers of efficient transactions, to override people's property rights every time we saw one — even if we provided monetary compensation — would be to create a totalitarian society. It's not clear that this concern has the same force in the case of copyright. Suppose someone besides J.K. Rowlings writes an unauthorized Harry Potter sequel. Assume that everyone knows this sequel is not by Rowlings or authorized by her.[22] We can imagine that Rowlings might find it disturbing to see her character in someone else's book. But does the ersatz sequel really rob Rowlings of the use of her character the same way taking away your car deprives you of its use? The appearance of this sequel certainly doesn't require Rowlings to alter her day to day existence. Further, her identity as the creator of Harry Potter is still intact; her reputation is unharmed. She is still just as able to do all the things with her character that she could before, and will be able to continue earning the appreciation of the people who like what she does. From Jefferson's perspective, the only thing wrong with this picture is that value has been created from Rowlings's work for which she has not been compensated. So long as we make sure she gets her share of the profits, Jefferson would say Rowlings has no other "claim or complaint."

One might object that Rowlings will be robbed of the use of her character, because there is an order of actions problem here that we haven't recognized. Even though there is no physical impossibility involved in simultaneously exploiting the character in numerous ways, an unrestrained glut of knock-off Harry Potter books will cause people to get sick of him, thus dissipating demand. This might destroy the market for future sequels, depriving Rowlings of the chance to create any. Such an outcome could harm the progress of the arts, by preventing the creation of authentic works that would have been of higher quality. Such a scenario is conceiva-

22 It seems to me that this is all authors can rightfully demand in the name of "moral rights." It would be immoral to alter Rowlings's reputation by causing people to attribute my work to her. But why is it immoral simply to build on her ideas in my own name, so long as 1 compensate and give her credit for the value of whatever I borrow?

ble, but in my view unlikely.[23] Cervantes had no power to enjoin unauthorized sequels to his immensely popular *Don Quixote*. He did, however, have the power to provide the real thing — and the world could tell the difference.[24]

I am not the first to question the use of injunctions in copyright cases. Mark Lemley and Eugene Volokh have recently argued that preliminary copyright injunctions deserve stricter First Amendment scrutiny,[25] and copyright judge extraordinaire Pierre Leval made a similar point ten years ago in this very forum.[26] In his Brace Lecture, Judge Leval lamented the harm caused by overly automatic injunctions, and urged us not to assume that we should grant one every time we rejected a claim of fair use. Though Judge Leval identified this admonition as perhaps the most important part of his message, it occupied a relatively small portion of his talk. The overall focus of his speech was on — you guessed it — the fair use doctrine. In fact, his lecture was entitled "Fair Use or Foul?" Judge Leval, along with so many other people who have thought about this topic, concluded that the problem was the lack of a sufficiently nuanced, utility-maximizing application of fair use doctrine, which he likened to a crumbling pillar in the temple of copyright law. Here we are ten years later, and it doesn't look like the pillar has been repaired to anyone's satisfaction. I'm wondering whether we might have better spent those ten years trying to develop Judge Leval's insight that calibration of remedies is more important than categorization of uses.

If you look at the four fair use factors, you see that they are of two different types.[27] Numbers 3 and 4 call for quantitative assessments:

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23 It also seems to run counter to Mr. Ladd's assurance that "[q]uality does emerge from quantity." Ladd, *supra* note 19, at 429.

24 Cervantes's own Part II is a classic, and the spurious sequel is remembered only because it was ridiculed therein. See 2 MIGUEL DE CERVANTES, DON QUIXOTE 505-08, 924, 965-66, 974-76 (Samuel Putnam trans., Modern Library ed. 1949) (1615). Indeed, we may owe the completion of Cervantes's masterpiece to the spur provided by the competition. See *id.* at xxx (stating that Cervantes came across the sequel in 1614, and was thereby induced to hurry the completion of Part II, which came out in 1615, the year before his death).

25 See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, *48* DUKE L.J. 147 (1998).

26 See Pierre N. Leval, *Fair Use Or Foul?*, *36* J. COPYR. SOC'Y. 167,179.80 (1989). Judge Leval's sentiments have even been endorsed by the Supreme Court. See *Campbell, supra* note 11, at 578 n.10. As illustrated by the opinions in *Dr. Seuss* however, the presumption of irreparable harm appears still to be firmly in place. See *supra* note 8 and accompanying text.

27 See 17 U.S.C. §107 (1994):

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

amount, substantiality, effect. How much of the derivative work's value comes from the original? *How much* is the exchange value of the original affected? These are questions that make perfect sense if we are trying to determine how much in damages the author of an infringed work is entitled to. In fact, they are precisely the same questions we ask when determining actual damages and profits under section 504. But here we're trying to use them as threshold determinants of two absolutes: Whether the author is entitled to damages *at* all, and whether the derivative use will be allowed to continue.

Fair use factors 1 and 2, on the other hand, call for qualitative assessments: purpose, character, nature. What are the relative values to society of the protected work and the infringing use? These questions make sense if we're trying to determine whether an infringing use should be enjoined to avoid unproductive harm to the value of a protected work. But even if we decide that a use should be allowed, why does it follow that no compensation is due to the owner of the infringed work?

Suppose the Ninth Circuit had done what all the law reviews seem to think it should have, and declared the *Dr.* Juice book to be a fair use. Suppose also that the trademark concerns had been resolved by hefty disclaimer notices. A new work would have been allowed to enter the intellectual marketplace. Troubling questions of free speech would have been avoided. Fans of satire the world over would have broken out the celebratory who pudding and roast beast. And maybe, the purposes of copyright would have been better served. But is it a fully satisfactory result? I don't think so. Once you decide that *Dr.* Juice is a fair use, you have cooked Dr. Seuss's goose: Penguin and the Juice authors would now be reaping all the profits, even though the value of the book is due in some part to the use of Seuss's copyrighted material.

I argued earlier that satirists create value but, like all makers of derivative works, they also borrow quite a bit of it. It's hard to say just how much, but clearly some part of what made the *Dr. Juice* book funny and interesting would have been based on the fact that Dr. Seuss has become a household word. The fundamental premise of our copyright law is that the best way to encourage the creation of valuable works is to let authors capture the market value of those works. This means that even if we don't want to give the Dr. Seusses of the world power to enjoin uses that offend them, we do want to protect their ability to share in all the profits that their work gives rise to.

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(2) the nature of the copyrighted work:
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

But wait! The Seuss crowd wanted to ban this book. How are the utilitarian purposes of copyright served by rewarding people for things they would have prevented if they could? If artists knew in advance that they would not be entitled to any profits from satirical uses of their works, would they be less likely to create? This poses the question too narrowly. No producer can foresee all the uses to which his product will be put, or would approve of all of them if he could. The beauty of property rights is that they allocate resources to producers in proportion to the amount of value they create for others, whether or not the producers are aware of all the subjective preferences and other factors that go into that value.

Works that inspire derivative works add value to society — even if the derivative works are parodies. After all, not just anything is worth parodying. In fact, people *do* write with the goal of being parodied, indirectly — because they write with the goal of becoming the kind of success that attracts parody. The value of those parodies, therefore, ought to be reflected somehow in the original author's compensation. It's probably true that an individual author quickly reaches the point at which the additional money coming in is only marginally relevant to his productivity. But institutions like publishers who also profit from copyright use their profits to invest in other authors. By rewarding them for publishing writers whose works are popular enough to spawn parody, we give them the means to find and support other potentially valuable writers as well.

So our current copyright law leaves us with two unsatisfactory choices when someone makes a derivative work that the original author is unwilling to license. Either it's not a fair use, in which case we usually enjoin the work out of existence, or it is a fair use, in which case the work gets published and the copyright holder gets to pay the attorney's fees. Fair use doctrine doesn't help, because however nuanced it is, all it can do is choose between these two blunt responses.

What if we were to try a different approach to derivative works, one that turned categorical determinations of fair use into nuanced questions of appropriate remedy? Let's imagine that tomorrow Congress were to revise the Copyright Act as follows. From now on, when an infringing use contains enough original expression to qualify as a derivative work, the following provisions will come into play: First off, section 107 does not apply. If you use someone else's work to make profits, or in such a way that you reduce the copyright owner's ability to profit, you may be held accountable. At the same time, however, sections 502 and 503 also do not apply. No longer do courts have special authorization to grant injunctions simply to prevent or restrain infringing derivative works. Instead. they are to treat copyright injunctions in these cases the way equitable relief is usually treated, granting them only when there is strong reason to believe that damages will be inadequate. This is what we already do in patent law,

where probability of success on the merits does not create a presumption of irreparable harm.

So what remedies *will we* give copyright holders? Under the current section 504, owners are entitled to any profits earned by the infringer. When it comes to a derivative work, however, the copyright holder doesn't get all the infringer's profits, but only those attributable to the infringement.[28] This is as it should be: Copyright holders receive compensation for the value arising from their work, but derivative users are allowed to profit from the value they add. So we'll leave this provision basically as it is. The only change will be to shift the burden of proof, so that copyright holders have to establish how much of the derivative work's value stems from the infringement.

Section 504 also gives copyright holders a right to receive their actual damages, to the extent that these are not already counted among the infringer's profits. Actual damages are usually demonstrated by showing a decline in the copyright holder's profits that correlates with the distribution of the infringing work. Defendants are currently allowed to rebut this by showing that the copyright holder's profits would have declined anyway.

The only problem that arises in our new system is that, since there's no fair use escape, copyright holders could recover actual damages even when they were caused by critical commentary on the protected work, such as a parody. It's one thing to reduce the exchange value of a protected work by flooding the market with knock-offs; it's quite another to reduce it by criticism. So we need to revise this provision somewhat. Now it will read: "The copyright owner is entitled to recover the actual damages suffered as a result of the infringement, *except* those damages attributable to critical evaluation of the copyrighted work."

Finally, statutory damages are no longer available for derivative works. Copyright holders are entitled to compensation only for actual harms or profits of the infringer which they are able to demonstrate. Section 505 stays much the same, leaving intact the court's discretion to award costs and attorney's fees to a prevailing party, but with one modification: We insert a provision which is similar to Rule 68 of the Federal Rules of Civil Procedure, except that it applies even prior to the beginning of any litigation. Either a copyright holder or a derivative user can offer to enter into a license, and an offeree who refuses will have to pay costs and attorney's fees if he fails to be awarded better terms at any subsequent infringement trial. The combined purpose of all these changes should be pretty

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28 See 17 U.S.C. $504(b) (1994) ("The copyright owner is entitled to any profits of the infringer *that are attributable to the infringement .*") *(emphasis added).*

clear: We are stripping copyright owners of their right to control the uses to which their work is put, while strengthening their right to demand compensation for the value they create.

Let's see how the Dr. Seuss scenario would play out under our new copyright regime. The first thing we know is that Seuss Enterprises would have no power to prevent Penguin from distributing its book. Since the Seussians would know this, when Penguin came asking for a license they'd have some incentive to bargain for the best terms they could get. The big question is whether Penguin has any incentive to bargain. I think it does. For one thing, it would much rather have a sure deal in advance than wonder what percentage of its profits a court in the future might choose to give away. For another, if Seuss offers to license the book and Penguin refuses to pay, it risks having to pay all the costs of litigation should the court find the work to be infringing and the offer to have been reasonable.

But now suppose the Seuss people are really adamantly opposed to the Juice book. They think it is in bad taste, and don't want to give it any official sanction by entering into an agreement with Penguin. They still can't prevent the book's publication, but they can sue for actual damages and profits. Personally, I doubt very much that publication of the O.J. **book** would have caused Seuss Enterprises any actual damages, but if they could show that it did, compensation would be in order.

Seuss would also be entitled to demand whatever proportion of Penguin's profits the court determined to be attributable to the infringement. Presumably this would be a pretty sizeable fraction, but it wouldn't be everything, since the authors did contribute some original elements to those they borrowed from the Seussian repertoire. It may seem incongruous to demand a share in the profits from something of which you strongly disapprove, but from Seuss's perspective this is better than letting them off Scot-free. Suppose, however, that there are no profits to speak of. Either the O.J. market is glutted, or the book just isn't all that funny. In that case, unless there are actual damages, Seuss Enterprises gets nothing.

Now imagine that this system had been in effect when Penguin evaluated the proposal for the *Dr.* Juice book. What would their ex-ante analysis have looked like once Seuss refused to grant a license? To undertake the financial risk of publishing the book anyway, they'd have to believe that profits not attributable to the infringement would exceed Seuss's actual damages. So even without the threat of injunction, commercial publishers would be willing to produce infringing works only when they promised to create a lot more original value than they took from the copyright holder. In other words, we have given publishers the incentive to infringe only when it is efficient. If this means *Dr.* Juice can't find a publisher, no big loss.

Of course, not all publishers have commercial ends in mind. If someone thinks the message important enough, he may wish to publish *Dr.* Juice even though financially it causes him a net loss. Since we have eliminated statutory damages, he would be able to do this with impunity, so long as the book did not cause the Seuss copyright holders any actual damages. If, on the other hand, Seuss is able to show that the appearance of the infringing feline actually did cause people to start staying away from the original in droves. the mere fact that the publisher was non-profit would not shield it from liability.[29] The only defense then would be to argue that the *reason* the book hurt Seuss's sales was that the parody had revealed what pernicious moral lessons his work actually imparts to young people.

Thus the question as to whether *Dr. Juice* was legitimately a parody of Dr. Seuss would still arise. but it would arise as part of a determination of damages, rather than as the gatekeeper of liability. The court would weigh the evidence. and to the extent it thought the O.J. book constituted a critical comment on Dr. Seuss, it would reduce the actual damages awarded. To the extent it believed the damages resulted from simple market substitution or from gratuitous negative associations created between Seuss and O.J., it would require the payment of compensation. This is obviously a difficult. nuanced query. but the court would be able to give a nuanced answer, by choosing a level of damages that reflected its best estimate as to the relative importance of the various factors. If the infringers lacked the means to make the required compensation, then the equitable requirements for an injunction would be met. Thus, in this system injunctions could still issue, but only against infringing works whose original added value was outweighed by the damage to the copyright holder. In other words. we would enjoin only inefficient infringement.

This approach would also remove the oft-noted circularity in a court's speculation as to the fourth fair use factor — effect upon the potential market. Under our hypothetical system, the plaintiff can only collect if he demonstrates that there actually is a market, either by showing that the infringing use has cost him profits he would have made, or by showing that the infringer actually profited from the infringing use. This undeniably puts copyright holders in a weaker position than they occupy now, since they may suffer losses from infringement that can't be clearly demonstrated at trial. But this is the same predicament faced by victims of libel, and we seem to think it a reasonable price to pay for the preservation of

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[29] Whether a work is for profit or not strikes me as irrelevant to the question whether it is infringing. just as whether speech is commercial or not should be irrelevant to the level of First Amendment protection it gets. See Alex Kozinski & Stuart Banner. *Who's Afraid of Commercial Speech?, 76* VA. L. REV. 627 (1990) (also written mainly by the law clerk).

free speech. Our new system would simply put copyright holders on the same footing as everyone else in this regard.

Of course, the fair user's ox doesn't get off gore-free either. People who wish to use copyrighted materials over the owner's objection are able to do so, but they have to be careful. If you want to make pornographic cartoons starring Mickey Mouse, you'd better be sure you can convince a court that this constitutes critical evaluation of Disney's work. If not, you'll be liable for any damages Disney can prove, and subject to an injunction if it looks like you can't pay up. And if you're marketing your oeuvre in such a way that people might innocently confuse it with Disney's products, your conduct will still be actionable under trademark law. We may not enjoin you to stop publishing, but we can still force you to clearly label what you're selling. As for bona fide critics, while they don't have to pay for causing the value of an author's work to decline, they do have to share whatever portion of their own profits is attributable to their use of quotes from the copyrighted material. Mechanical licensing systems will no doubt spring up to cover this without giving anyone pause.

Despite the advantages I've outlined, I suspect that copyright holders will treat my proposal with all the enthusiasm Sam-I-Am showed for a certain colorful breakfast dish. There will no doubt be dire predictions as to the devastating damage such rules would inflict on the various industries that depend on copyright. To which I have a one-word answer: Betamax. These were precisely the kinds of arguments raised by Hollywood when home video recorders first came on the market. And yet, as everyone now recognizes, it was the best thing that could have happened to the movie industry. Far from wiping out the incentive to make movies, the home VCR has revitalized the industry. The very thing copyright owners feared turned out to be their salvation.

The simple fact is that owners of intellectual property tend to be control freaks, and regard anyone who would erode this control as an enemy. "It's my creation," they will say. "What right do others have to tamper with it?" To this I say: It's your creation if you keep it secret. Once you release it to the rest of us, it enters our minds and becomes ours as well. As Jefferson put it. "it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it."[30] So long as their right to a share in the profits of derivative uses is enforced, I suspect that copyright holders would actually be better off in a system in which everyone was allowed to exploit the work. When set free to do so, people will find ways to extract value from intellectual properties that original authors, too fearful of sullying their creations, would never dream of. They do not like this. So they say. Try it and they may, I say.

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30 MAYER, *supra* note 17 at 78.

I don't expect Congress to adopt my proposal this session, and I'm not even sure that it should. But I do think it's worth thinking about. Even if there are good reasons why it wouldn't work, I think the exercise of clearly identifying those reasons would be valuable. If it turns out that we *do* need copyright injunctions, at least we would have a good explanation as to why. And that might help us develop a doctrine as to when we should employ them and when we shouldn't. And who knows? What we end up with might turn out to be fairer than fair use.