

COPYRIGHT’S MARKET GIBBERISH

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Abstract: There is a growing contradiction at the core of copyright law. Although courts and scholars frequently assert that copyright is only about authors’ economic interests, copyright law routinely protects interests such as privacy, sexual autonomy, reputation, and psychological well-being. It just uses the language of money and markets to do so. This Article shows that copyright law routinely uses economic rhetoric to protect a broad range of noneconomic interests—a practice this Article names “market gibberish.” Market gibberish muddies copyright jurisprudence and has sweeping practical, conceptual, and distributive impacts.

In a wide range of copyright cases, plaintiffs use economic and market-based theories to achieve goals that have little to do with economic rights. If plaintiffs can plausibly tell a story of market harm, courts will often respond by manipulating economic rhetoric to provide the desired outcomes. For example, courts have protected celebrities’ rights to permanently suppress wedding photos and sex tapes, under the theory that they have the “right to change their mind” and someday reap profits from these materials. When courts engage in market gibberish, they obscure the diverse range of economic, emotional, and cultural interests at stake within copyright law. This Article argues that, instead of dogmatically hewing to economic incentives and market rhetoric, courts should engage in a more transparent examination of the interests actually at stake in copyright disputes.

This Article makes three primary contributions. First, it provides the first comprehensive account of market gibberish and shows, through detailed analysis of case law, that litigants have long used market gibberish to advance their noneconomic goals. Second, it shows how the prevalence of market gibberish erodes copyright theory and practice. Rather than rigorously police market interests—as many scholars have proposed—courts should more explicitly engage with the diverse motivations for asserting copyright infringement. An interest-transparent approach would shed light on the complex normative work copyright is already doing and better distinguish between legitimate and abusive copyright assertions. Finally, this Article shows how market gibberish contributes to inequality under copyright law. A plaintiff’s ability to tell a story about potential markets is often limited to the most powerful rightsholders—famous artists, celebrities, and corporate creators—and not to the wide range of vulnerable and lesser-known individuals who are turning to copyright to stop the viral spread of their words, images, or voices.

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INTRODUCTION

Copyright law often forces litigants to answer some very strange questions. For example:

Would anyone pay to see you get attacked by an orca whale?¹

Do you plan on selling that video of you having sex with your best friend's wife?²

Do you make a living off of your own wedding photos?³

Did you join a monastery in order to make a few bucks?⁴

Will you ever *really* be famous?⁵

If litigants can plausibly answer “yes,” then they stand a decent chance of establishing infringement, demonstrating sufficient “market harm” to defeat a fair use defense, and obtaining monetary and injunctive relief. If they are forced to say “no,” courts increasingly shut their doors to their claim, deny any form of relief, and cast their interests as beyond what copyright law is meant to protect.

1. *Smith v. NBC Universal*, No. 06 Civ. 5350 (SAS), 2008 U.S. Dist. LEXIS 13280 (S.D.N.Y. Feb. 22, 2008).

2. *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

3. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012).

4. *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012).

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

Copyright law in the United States today is typically justified by the need to provide authors with economic incentives to create original works.⁶ This longstanding justification for copyright, however, has in recent years become a doctrinal limitation. Although authors historically used copyright to protect nonpecuniary interests,⁷ contemporary courts and scholars now frequently insist that rightsholders can *only* challenge the use of a work if it implicates a genuine economic interest in the protected work.⁸ If, instead, what motivates a dispute is family privacy, sexual autonomy, reputation, or physical and psychological well-being, the rightsholder must look to other areas of law, even if copyright law provides the only realistic avenue for relief.⁹ Under this view, if copyright is meant to provide market exclusivity and to financially reward authors of creative works, then copyright assertions unrelated to markets and money accordingly have no place in the system.

Despite courts' and scholars' frequent insistence that copyright is only about economic incentives and reward, this Article shows that other noneconomic interests are still quite regularly vindicated through the rhetoric of markets. Even if a lawsuit is rather obviously motivated by interests having *nothing* to do with economic interests, if a plaintiff can plausibly tell a story about market harm, they are able to vindicate a wide

6. See *Harper & Row Pubs. v. The Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2445 (2016) (“It is a familiar, even uncontroversial, notion among judges and scholars that American copyright law is not driven by so-called ‘moral’—i.e., non-pecuniary—considerations.”).

7. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (“[T]he legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.”).

8. See *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Christina Bohannon, *Copyright, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007) [hereinafter Bohannon, *Copyright, Foreseeability, and Fair Use*]; Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083 (2010) [hereinafter Bohannon, *Harmless Speech*]; David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359 (2014); Jeanne C. Fromer, *Market Effects Bearing Upon Fair Use*, 90 WASH. L. REV. 615 (2015); Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1255 (2014); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1188 (2010); Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 657 (2006).

9. See, e.g., Jennifer Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUM. J.L. & ARTS 441, 442 (2015) (discussing Cindy Garcia’s use of a copyright claim where her state publicity and privacy claims were likely barred by federal law).

range of noneconomic interests.¹⁰ This ability to tell a story about market harm, unfortunately, is often limited to the most powerful rightsholders—famous artists, celebrities, and corporate creators—and not to the wide range of vulnerable and lesser-known individuals who are increasingly turning to copyright to stop the viral spread of their words, images, or voices.¹¹

This Article gives a name to courts' manipulation of market rhetoric in order to advance noneconomic copyright interests: market gibberish. Market gibberish hides the true motivations behind a copyright lawsuit as well as courts' resolution of the dispute, thereby masking the interests actually at stake in contemporary copyright law. Privacy, autonomy, security, family, and friendship are driving a wide range of contemporary copyright assertions, but there is currently almost no place within the dominant approaches to copyright infringement to expressly acknowledge those nontraditional interests.¹² Accordingly, courts resort to market gibberish as a way to protect nontraditional copyright interests in a seemingly traditional way. Although courts in copyright cases—particularly in fair use cases—increasingly recognize a broad range of *defendants'* interests in copying as part of news reporting, scientific research, parody, critique, and other forms of free speech,¹³ these courts typically do not acknowledge which plaintiffs' interests they are weighing against them. Within the rhetoric of fair use, it is market gibberish versus free speech, or it is nothing at all.

Copyright law desperately needs an expanded vocabulary for the interests it serves.¹⁴ In previous work, I have shown that intellectual property law—largely outside of courts—plays an important role in resolving a broad range of social and cultural disputes that are hard to

10. See *infra* Part I.

11. See generally Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 71 (2018) (“IP can be used to address a broad range of social and emotional vulnerabilities associated with the viral spread of images and text.”).

12. As discussed *infra* Part II, to the extent that these non-traditional assertions are protected in any explicit manner, it is when they are lumped into the category of “unpublished” works, alongside early drafts of mass publications and prepublication licensing deals, which often have little to do with personal privacy or social boundaries.

13. See generally Pamela Samuelson, *Unbundling Fair Use*, 77 FORDHAM L. REV. 2537 (2008) (providing a taxonomy of fair uses).

14. See, e.g., Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use*, 89 CALIF. L. REV. 369, 378 (2001) (“In fair use disputes, litigants argue over central human concerns such as work, thought, knowledge, freedom, property, identity, or privacy by using the strangely truncated vocabulary of copyright.”); Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 259–60 (2006) (“To put it bluntly, there are no ‘giant-sized’ intellectual property theories capable of accommodating the full range of human values implicit in intellectual production. But there should be.”) (citations omitted).

square with economic incentives theory.¹⁵ This Article shows that when copyright disputes do result in a judicial opinion, the parties' diverse motivations and implications often collapse into the homogenous rhetoric of market gibberish. It argues that instead of doing non-market work under the cover of market gibberish, courts should openly and explicitly discuss the range of interests they are weighing when deciding whether a given use is infringing.

This interest-transparent approach would have numerous benefits. First, it would place rightsholders on more equal footing, regardless of wealth or celebrity, when they have otherwise identical motivations in bringing a copyright claim. Second, it would better reveal the important policy decisions courts are making in copyright disputes by helping to distinguish lawsuits motivated by truly censorial concerns—e.g., preventing criticism of business practices¹⁶ or squelching opposing political views¹⁷—from other non-traditional lawsuits—e.g. to combat revenge porn¹⁸—that the copyright system may legitimately wish and be well-suited to address. Not all noneconomic interests are—or should be—treated equally, yet copyright has not developed a coherent way of teasing them apart. Third, deemphasizing market interests may help rein in socially suboptimal lawsuits brought by powerful actors by limiting their ability to harness market gibberish to market-irrelevant ends. And finally, a fuller airing of the actual interests at stake in copyright disputes would facilitate improved tailoring of infringement remedies to the nature of the harms alleged. Copyright remedies often wrongly conflate interests in compensation and control,¹⁹ an interest-transparent approach would not.

Previous scholars have responded to uncertain, circular, or otherwise questionable market analyses in copyright by advocating for a more rigorous inquiry into actual, demonstrable market harms and benefits.²⁰ This Article takes a different approach. It shows that any effort to rigorously police market interests in copyright law will likely benefit the most powerful rightsholders, regardless of whether they are plaintiffs or defendants. Doubling down on markets might appear to claw back the

15. See *Gilden*, *supra* note 11 (arguing that copyright and publicity rights are effective and normatively-desirable legal tools for addressing disputes involving revenge porn, celebrity sex tapes, and mourning families).

16. See *Katz v. Google, Inc.*, 802 F.3d 1178 (11th Cir. 2015); *Small Justice v. Xcentric Ventures*, 99 F. Supp. 3d 190 (D. Mass. 2015).

17. See *Savage v. Council on Am.-Islamic Rels., Inc.*, No. C 07-6076 SI, 2008 WL 2951281 (N.D. Cal. July 25, 2008).

18. See Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025 (2013); *Gilden*, *supra* note 11.

19. Mark Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185 (2007).

20. See, e.g., *infra* Part II.

reach of copyright for the benefit of cultural participation and public knowledge, but it instead claws back copyright protections primarily for those on the market's periphery. A resolutely market-centered approach to copyright does nothing to dislodge—and indeed likely fortifies—the cultural dominance of celebrities, corporate authors, and other powerful rightsholders. And in doing so, a market-centered approach comes at the expense of everyday copyright holders. It is time to free copyright jurisprudence from the stranglehold of the market and the market gibberish it produces.

Part I provides the first in-depth account of market gibberish through an extensive survey of copyright case law. It shows decisions where courts refuse to redress copyright claims because the lawsuit is not motivated by a cognizable market interest, and then also shows decisions where courts vindicate nearly identical interests using the rhetoric of market harms. It highlights five contexts in which market gibberish has been particularly prevalent: sexual imagery, private documents, religious disputes, political opponents, and emotional distress damages.

Part II shows the negative impact of market gibberish on copyright theory and practice. Numerous scholars have argued that courts need to double down on copyright's market-based commitments in order to weed out abuse and private censorship. However, courts *have* increasingly pledged allegiance to market-based justifications for copyright, yet they nonetheless continue to smuggle in other justifications through market rhetoric. The result has been opaque reasoning and uneven access to the copyright system. Pulling from literature in economic sociology and feminist legal theory, this Article emphasizes that efforts to keep economic and other interests legally distinct often can result in negative distributive consequences along the lines of gender, race, and class.

Given that courts are already implicitly vindicating noneconomic interests, copyright law would greatly benefit from a more transparent approach to the actual interests at stake in litigation. Part III outlines an interest-transparent approach, sets forth its advantages, and identifies some potential obstacles. Considering noneconomic interests would not require any statutory changes—for example, the fair use statute expressly refers to the “effect on the potential market *or value*”²¹ of the copyrighted work, and an interest-transparent approach would surface the important work copyright law is already doing behind the veil of market gibberish.

21. 17 U.S.C. § 107 (2012) (emphasis added).

I. MARKET GIBBERISH IN ACTION

Even though a variety of natural and moral rights theories can support intellectual property rights,²² the U.S. legal system expressly embraces an economic incentives theory to justify its copyright laws.²³ In both *Eldred v. Ashcroft*²⁴ and *Harper & Row v. The Nation*,²⁵ the Supreme Court explained that “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”²⁶ The “economic philosophy”—or market-based rationale—of copyright is to provide authors with personal, financial gain as an incentive for them to create works that will benefit the broader society.²⁷ Without the market exclusivity copyright provides, the concern is that authors would be unwilling to invest in creative activities out of fear that their work would be copied and consumed without compensation.²⁸ Copyright accordingly solves the public goods problem associated with intellectual labor and allows a market for creative works to flourish.²⁹

This market incentives theory repeatedly has been used to justify the expansion of copyright protections in highly criticized ways. In *Eldred*, for example, the Supreme Court justified extending the copyright term by twenty years as an additional incentive for authors and publishers to create and disseminate creative works, even though the author would be long dead and would be highly unlikely to change their behavior based on possible additional revenue for their heirs 100 years in the future.³⁰ In

22. See generally ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011); Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1946 (2006).

23. See Sunder, *supra* note 14, at 259 (2006) (“Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as being about incentives.”).

24. 537 U.S. 186 (2003).

25. 471 U.S. 539 (1985).

26. *Eldred*, 537 U.S. at 219; see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

27. *Harper & Row*, 471 U.S. at 558 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954))

28. *Id.* at 559 (“If every volume that was in the public interest could be pirated away by a competing publisher . . . the public [soon] would have nothing worth reading.”) (alteration in original) (quoting Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 ASCAP COPYRIGHT L. SYMP. 43, 78 (1971)).

29. *Apple Comp., Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1025 (N.D. Cal. 1992) (“Copyright’s purpose is to overcome the public goods externality resulting from the non-excludability of copier/free riders who do not pay the costs of creation.” (citing Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Applications Programs*, 41 STAN. L. REV. 1045, 1059 (1989))).

30. 537 U.S. 186 (2003).

Harper & Row, the Supreme Court emphasized that the right to control the first publication of a work was an important economic incentive for authors, justifying limited fair use protections for news organizations that use unpublished material.³¹ The economic incentives theory accordingly has come under considerable fire as both empirically questionable³² and as ushering in an overly broad property right that inhibits a wide range of socially valuable expression,³³ including audience engagement with popular works,³⁴ artistic modifications of such works,³⁵ and journalistic or scholarly accounts of the work.³⁶ Nonetheless, under an incentives framework, any of these activities could *potentially* provide licensing revenue to the copyright owner, and accordingly provide additional financial incentives to engage in creative activities.

In recent years, courts and scholars have begun to flip copyright's economic incentive theory on its head. Although the economic incentives theory has historically served to *expand* copyright, courts and scholars³⁷ are increasingly using this theory to *limit* the reach of copyright and prevent censorship or other abuses. If a copyright owner is not motivated by a desire to protect their market exclusivity, or if a challenged use is unlikely to cause any harm to an author's economic interests, courts will reject copyright liability and/or deny the copyright owner their requested damages or injunctive relief.

The most prominent example of courts using markets as a substantive limit on copyright is the Ninth Circuit's en banc decision in *Garcia v. Google, Inc.*³⁸ In *Garcia*, Cindy Garcia asserted copyright infringement claims against Google for refusing to remove the infamous *Innocence of Muslims* video from YouTube.³⁹ Garcia had been "bamboozled" into briefly performing in the blasphemous portrait of the Prophet Mohammed,

31. 471 U.S. 539 (1985).

32. See, e.g., Buccafusco & Fagundes, *supra* note 6 (summarizing empirical literature on economic incentives); JESSICA SILBEY, *THE EUREKA MYTH* (2014) (showing the limits of the incentives theory to explain the behavior of real-world creators).

33. See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); WILLIAM F. PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009).

34. See generally *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

35. See generally *Dr. Seuss Enters. v. Penguin Books*, 109 F.3d 1394 (9th Cir. 1997); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

36. See generally *New Era Publ'ns. Int'l. v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

37. See *infra* Part II.

38. 786 F.3d 733 (9th Cir. 2015).

39. *Id.*

and she received multiple death threats after an Egyptian cleric issued a fatwa⁴⁰ against all those who participated in the movie.⁴¹ Although the Ninth Circuit was “sympathetic to her plight,”⁴² the court nonetheless rejected her arguments that she owned the copyright in her five-second performance and—more relevant for purposes of this Article—that she had been irreparably harmed “in the copyright sense” by the dissemination of copyrighted content on YouTube and the emotional and reputational harm that followed.⁴³ “The difficulty with Garcia’s claim,” according to the majority, “is that there is a mismatch between her substantive copyright claim and the dangers she hopes to remedy through an injunction.”⁴⁴ The court contrasted “copyright’s function,” “the protection of the commercial interest of the author,” with the concerns motivating Garcia’s suit, namely, “the vicious frenzy against Ms. Garcia that the Film caused,” and the resulting “severe emotional distress, the destruction of her career and reputation[] and credible death threats.”⁴⁵ According to the Ninth Circuit, Cindy Garcia’s “harms are untethered from—and incompatible with—copyright and copyright’s function as the engine of expression.”⁴⁶

In the wake of *Garcia*,⁴⁷ most commentators⁴⁸ have embraced the

40. A fatwa is “[a] legal ruling or opinion given by a recognized authority on Islamic law.” *Fatwa*, BLACK’S LAW DICTIONARY (10th ed. 2014). While many in the U.S. may be most familiar with fatwas in the context of death threats, the limited use of this term in the media may result in a limited understanding of its meaning. See Muhammad Hisham Kabbani, *What Is a Fatwa?*, THE ISLAMIC SUPREME COUNCIL OF AMERICA, <https://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/44-what-is-a-fatwa.html> [<https://perma.cc/W72Z-CK6A>]. It is worth noting that because there is no central Islamic governing authority, Islamic clerics frequently issue divergent or contradictory fatwas. *Id.*

41. *Id.* at 736.

42. *Id.* at 737.

43. *Id.* at 745 (quoting *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M. D. Fla. 2012)).

44. *Id.* at 744.

45. *Id.* at 786 F.3d 733, 744–45.

46. *Id.*

47. The debate about whether copyright law should protect privacy, however, is not new. See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1130 (1990) (“Privacy and concealment are antithetical to the utilitarian goals of copyright.”); see also Michael Cohn, *Rights in Private Letters*, 8 BULL. COPYRIGHT SOC’Y 291 (1961); Jane T. Dana, *Copyright and Privacy Protection of Unpublished Works—The Author’s Dilemma*, 13 COLUM. J.L. & SOC. PROBS. 351 (1977); John M. Kernochan, *Protection of Unpublished Works in the United States Before and After the Nation Case*, 33 J. COPYRIGHT SOC’Y 322 (1986); Jon O. Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459 (1987).

48. But see Margaret Chon, *Copyright’s Other Functions*, 15 CHI.-KENT J. INTELL. PROP. 364 (2016). Professor Edward Lee agrees that there are certain assertions of copyright that are “impermissible or suspect,” but he believes copyright may legitimately protect reputation and privacy

court's analysis of the "mismatch" between copyright law's economic rights and the emotional and psychological interests pursued by Cindy Garcia. Judge McKeown, the author of *Garcia*, has vigorously defended the opinion, emphasizing that "copyright cannot be everything to everybody No matter how noble and important the values of privacy and protection of reputation, copyright is not the direct vehicle for their vindication."⁴⁹ Professor Alfred Yen is similarly skeptical of copyright plaintiffs who "sue to protect personal interests that bear little relation to income streams associated with the exploitation of copyright rights."⁵⁰ Professors Eric Goldman and Jessica Silbey have critiqued the "weaponization" of copyright law for privacy-related purposes, suggesting that such uses threaten the creation of "memory holes"—dangerous gaps in public knowledge and depletion of the historical record.⁵¹ Professor Jeannie Fromer has also critiqued lawsuits such as Cindy Garcia's, which reveal "mismatched motivations" compared to the "particular scenarios" lawmakers had in mind when enacting the Copyright Act.⁵² Cindy Garcia and other plaintiffs canvassed by Professor Fromer stand in contrast with the "archetypical" copyright plaintiff: "one who practices in the marketplace, having made a valuable contribution to society with the creation and dissemination of a protected work, and would like to prevent copying of that work by asserting rights in it."⁵³

Garcia provides the clearest and most prominent articulation of the market-based limit of copyright law, and it already has been cited

in some cases, but only when "the author of the work is asserting copyright." Edward Lee, *Suspect Assertions of Copyright*, 15 CHI.-KENT J. INTELL. PROP. 379, 379–82 (2016); accord Rebecca Tushnet, *Fair Use's Unfinished Business*, 15 CHI.-KENT J. INTELL. PROP. 399, 405 (2016) ("[A]ny interests of the subject of the work as the person about whom the work communicates are not copyright interests, though they may well be important personhood interests. Their protection must lie in the law of defamation and privacy, rather than in copyright.").

49. Hon. M. Margaret McKeown, *Censorship in the Guise Of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1, 16 (2016); see also Deirdre Keller, *Copyright to the Rescue: Should Copyright Protect Privacy?*, 20 UCLA J.L. & TECH. 1, 36–37 (2016) ("[E]ven if copyright can be contorted to cover a case like the Ashley Madison case, perhaps it should not."); Pamela Samuleson, *Protecting Privacy Through Copyright Law?*, in *PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS* 191, 198 (Marc Rotenberg et al., eds. 2015) ("[P]rivacy harms were quite different in nature from the market harms with which copyright is mainly concerned.").

50. Alfred Yen, *The Challenge of Following Good Advice About Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 412, 413 (2016).

51. Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. Rev. (forthcoming 2019).

52. Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 587 (2015).

53. *Id.* at 588–89.

repeatedly in briefs and case law for its limiting principle.⁵⁴ The Ninth Circuit pulled this principle from three different doctrinal contexts. First, the court relied on fair use cases in which plaintiffs were motivated by a desire for privacy,⁵⁵ in particular under the critically important fourth fair use factor,⁵⁶ “the effect of the use upon the potential market for or value of the copyrighted work.”⁵⁷ Second, the court relied on cases rejecting emotional distress damages under the Copyright Act.⁵⁸ Finally, the court looked to other cases finding no irreparable harm where plaintiffs sought to use copyright to protect themselves against embarrassment or invasion of privacy.⁵⁹ The court correctly observes that cases in each of these areas state quite explicitly that copyright law solely is meant to protect the economic interests of the rightsholder and not their emotional, psychological, or privacy interests.⁶⁰ Additionally, there are no reported

54. See, e.g., *City of Inglewood v. Teixeira*, No. CV-15-01815-MWF(MRWx), 2015 WL 6146269, at *3 (C.D. Cal. Oct. 8, 2015) (“As Defendant rightly notes, the main justification of the Copyright Act is ‘the protection of the commercial interest of the author.’”); *Feldhacker v. Homes*, 173 F. Supp. 3d 828, 836 (S.D. Iowa 2016) (“[C]ourts having addressed the issue have found emotional distress damages are not available under the Copyright Act.”); *Cohen v. G&M Realty*, 320 F. Supp. 3d 421, 442 n.18 (E.D.N.Y. 2018) (“Plaintiffs contend that they are entitled to damages for emotional distress. Under traditional copyright law, plaintiffs cannot recover such damages.”); *Kelley v. Universal Music Grp.*, No. 14 CIV. 2968 (PAE), 2016 WL 5720766, at *10 (S.D.N.Y. Sept. 29, 2016) (“Because emotional distress damages are not compensable under the Copyright Act, this claim must also be dismissed.”); Defendant Scholastic Inc.’s Memorandum of Law in Opposition to Plaintiff’s Motion for Temporary Restraining Order, *James Castle Collection and Archive, LP v. Scholastic, Inc.*, No. 1:17-cv-437-BLW, 2017 WL 9534149 (D. Idaho Oct. 27, 2017) (“Thus, the Castle Collection must show that, in the absence of preliminary relief, there will be irreparable harm to the Castle Collection’s *copyright interests* in Castle’s works.”).

55. *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015) (citing *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003)). For a detailed discussion of the *Bond v. Blum* case, see *infra* Part II(B).

56. Lemley, *supra* note 19, at 187–88 (“Of the four factors—the purpose of the defendant’s use, the nature of the copyrighted work, the amount taken, and the market effect on the copyright owner—the market-effect factor has generally been considered the most important. This likely reflects a logical connection between copyright law and market injury.”).

57. 17 U.S.C. § 107 (2012). Fair use, codified in section 107 of the Copyright Act, instructed courts to determine on a case-by-case basis whether a particular use should be deemed noninfringing, in light of four factors: (1) the purpose and character of defendant’s use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the copyrighted work used; and (4) the effect of the use on the market or value of the copyrighted work. *Id.*

58. *Garcia*, 786 F.3d at 745 (citing *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002)).

59. *Id.* (citing *Bollea v. Gawker Media, LLC*, 913 F.Supp.2d 1325, 1327 (M.D. Fla. 2012)).

60. See, e.g., *Dawson v. Wash. Mut. Bank*, 390 F.3d 1139, 1146 n.3 (9th Cir. 2004) (noting that “‘actual damages’ in the context of the Copyright Act . . . cover only economic damages”) (internal citation omitted); *Bond*, 317 F.3d at 395 (“[T]he protection of privacy is not a function of the copyright law.”); *Bollea*, 913 F. Supp. 2d at 1327 (“The only evidence in the record reflecting harm to [Hogan] relates to harm suffered by him personally and harm to his professional image due to the ‘private’ nature of the Video’s content. This evidence does not constitute irreparable harm in the context of copyright infringement.”).

decisions that flatly say the opposite, namely that emotional, psychological or privacy interests *are* valid aims of the copyright system.⁶¹

What courts say they are doing, however, is very different from what they actually are doing. Courts may insist that copyright law only protects an author's interest in selling their works in reasonably available markets, and that only economic harms are redressable through the copyright system,⁶² but a closer look at copyright's cognizable market interests reveals a much more complex picture.⁶³ In all of the contexts addressed by the Ninth Circuit—and in several others—courts often vindicate interests in copyrighted works that have almost nothing to do with access to markets and revenue. They just say they are doing something else.

The following sections reveal a copyright system with a much more questionable allegiance to market interests. Across a variety of different factual contexts—such as sexual imagery, private documents, religious disputes, and political advocacy—courts at times will deny liability or a requested remedy when the copyright owner lacks a sufficient market interest. Yet at other times, when presented with nearly identical noneconomic interests, courts will conjure up a market interest in highly questionable ways. Rather than acknowledge the noneconomic

61. At least one court has suggested that emotional distress damages *might* be available in some cases, but it nonetheless denied such damages in the case before it. *See* *Smith v. NBC Universal*, 2008 U.S. Dist. LEXIS 13280 (S.D.N.Y. Feb. 22, 2008). Additionally, some cases addressing unpublished works have noted that an author's common law right to first publication reflected both the economic value of being first to market as well as the desire of authors to keep certain writings out of public view. *See also* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 554 (1985). Post 1978, common law copyright has been largely abolished in the United States, *see* 17 U.S.C. § 301, and, as shown *infra*, courts now often resist expressly embracing privacy interests, even when dealing with unpublished works.

62. *See* *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 480 n.3 (2d Cir. 2007) (“[C]opyright laws are not ‘matters of strong moral principle’ but rather represent ‘economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole.’”); *Buccafusco & Fagundes, supra* note 6, at 2451 (“Copyright law assumes that authors will only object to uses of their works that threaten these sorts of market substitution harms.”).

63. *See* *Chon, supra* note 48, at 366 (“If we limit our understanding of legitimate goals of copyright protection to market actors or commercial ends, we are missing a lot of the copyright story, past and especially present.”). Professor Balganesch demonstrates that copyright assertions in service of noneconomic interests have a long historical tradition, notwithstanding more recent efforts to circumscribe legitimate copyright motivations. *See* Shyamkrishna Balganesch, *Censorial Copyright*, 73 VAND. L. REV. (forthcoming 2020) (manuscript at 2) (“Ever since its origins, copyright law has seen a robust set of infringement claims being brought that have no connection whatsoever to the market. These are not just infringement claims that lack a market basis owing to the creator's unique circumstances; they are instead claims that are motivated by decidedly non-market considerations.”).

stakes at issue in the case—and expressly weigh the policy interests actually at stake in the dispute—courts find a way to pigeonhole only some sympathetic claims into traditional economic justifications. The result is market gibberish—opaque reasoning that further entrenches the perception of copyright as a property right designed for the powerful.⁶⁴ Each of the following sections reveals a different factual setting in which market gibberish draws inconsistent and often deeply troubling lines between legitimate and illegitimate copyright interests.

A. *Sex Tapes*

The *Garcia* Court's primary authority for the notion that a disputed use must cause an economic injury in "the copyright sense" is Hulk Hogan's copyright lawsuit against Gawker Media.⁶⁵ In *Bollea v. Gawker*,⁶⁶ Hulk Hogan was denied a preliminary injunction against the distribution of secretly recorded, sexually explicit video clips of him and a woman.⁶⁷ As introduced by the court, "[a]ccording to Plaintiff's submissions, approximately six years ago, he engaged in consensual sexual relations with a woman that was not his wife. Allegedly unbeknownst to Plaintiff, the encounter was videotaped."⁶⁸ After Gawker posted excerpts of the video on its website, the court denied Hogan's request for an injunction on the basis that the use was likely fair and that Hogan was not sufficiently irreparably harmed.⁶⁹ On the issue of fair use, the court explained:

Plaintiff in this case cannot legitimately claim that he seeks to enforce the copyright because he intends to publish the Video . . . [I]t cannot reasonably be argued that Gawker Media is usurping Plaintiff's potential market for the Video (which Plaintiff himself characterizes as a 'sex tape') by publishing excerpts of the video.⁷⁰

The excerpted video was likely legitimate news-reporting "on the public's

64. See, e.g., Tushnet, *supra* note 48, at 409 ("Another lesson that might be taken away from *Garcia*, however, is that American copyright law hesitates to threaten large corporations.").

65. *Garcia*, 786 F.3d at 745. This case is now best known for Hogan's subsequent, successful state law privacy claim against Gawker, which ultimately bankrupted the company through a \$140 million jury verdict. See Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html> [<https://perma.cc/HUE5-KL8Q>].

66. 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

67. *Id.*

68. *Id.* at 1327.

69. *Id.* at 1329.

70. *Id.*

fascination with celebrity sex in general, and more specifically Plaintiff's status as a 'Real Life American Hero to many.'"⁷¹

Similarly, addressing irreparable harm, the court emphasized, "[t]he justification of the copyright law is the protection of the commercial interest of the artist/author."⁷² Hogan's lawsuit, by contrast, sought to protect other interests:

After attempting to quell any distribution or publication of excerpts of the Video in an effort to protect his mental well-being, personal relationships, and professional image, Plaintiff cannot legitimately claim that he is concerned with protecting the financial worth of the Video. This is not a case in which the posting of copyrighted materials implicates the ownership value of the copyright because it impacts the commercial advantage of controlling the release of those materials.⁷³

Because there was "no evidence that Plaintiff ever intends to release the Video," and because Gawker's posting of blurry excerpts "may actually increase" demand for the film, the court denied relief.⁷⁴

The court in *Bollea* repeatedly drew its reasoning from *Michaels v. Internet Entertainment Group* ("*Michaels II*"),⁷⁵ an earlier case against Paramount Pictures and its tabloid news program, *Hard Copy*.⁷⁶ In *Michaels II*, *Hard Copy* had aired excerpts of a sexually explicit video that Poison-lead singer Bret Michaels and actress Pamela Lee (née Anderson) had made while dating and that had leaked online.⁷⁷ Michaels and Lee had both sued an Internet-based pornography company, IEG, for copyright infringement, and Lee individually sued Paramount. In September 1998, the district court granted summary judgment to Paramount on Lee's copyright claims, finding fair use.⁷⁸ Lee and Michaels "made the Tape for their personal use with no intent of publishing it at any time," while "Paramount used the brief excerpts described above to illustrate its news story about the Tape's imminent release, and to arouse viewer interest in the *Hard Copy* broadcast."⁷⁹ Although the "unpublished" nature of the

71. *Id.*

72. *Id.*

73. *Id.* at 1330.

74. *Id.* at 1330–31.

75. No. CV 98-0583 DDP (CWx) (*Michaels II*), 1998 U.S. Dist. LEXIS 20786 (C.D. Cal. Sept. 10, 1998).

76. *Bollea v. Gawker*, 913 F. Supp. 2d 1325, 1328 (M.D. Fla. 2012).

77. *Michaels II*, 1998 U.S. Dist. LEXIS 20786, at *2.

78. *Id.* at *2.

79. *Id.* at *33.

work often militates against fair use, the court emphasized that Lee planned to “destroy” the tape, not to reap the benefits of first publication.⁸⁰ Moreover, under the “market effects” fair use factor, the court reasoned, “Lee is not in direct competition with Paramount in the production of television entertainment news programs such as *Hard Copy*. Paramount’s transformative use of the Tape excerpts to produce an entertainment news story does not affect Lee’s market for the same service, because Lee is not in such a market.”⁸¹

Bollea and the September 1998 *Michaels II* opinion might appear to establish a clear rule for celebrity sex tapes—if you want to keep them private, copyright is not for you. Except five months earlier, the *Michaels I*⁸² Court sent a very different message. In April 1998, the same judge granted Michaels and Lee a preliminary injunction against the Internet pornography website, IEG, forbidding it from releasing even short excerpts of their sex tape.⁸³ The April/September contrast in *Michaels I/II* is stark. The court in *Michaels I* expressly acknowledged that “plaintiffs have declared that they made this Tape for their personal use only with no intent of publishing it at any time,” and there was testimony that Bret Michaels had even turned down a \$1 million offer to license the video.⁸⁴ Unlike in *Michaels II*, however, the court emphasized without qualification, “[t]he fact that a work is unpublished is a critical element of its ‘nature.’”⁸⁵ Moreover, Michael’s *rejection* of licensing opportunities did not doom—and instead may have helped—his claim:

“IEG has presented evidence of extensive interest among Internet users in text and images regarding Lee . . . [W]ere IEG to disseminate short segments of the Tape under the guise of fair use, these segments would propagate quickly through the Internet, saturating the potential market for the plaintiffs’ copyrighted work.”⁸⁶

Bret Michaels and Pamela Lee had expressly disclaimed any actual interest in profiting from their sex tape, yet the court in April 1998 granted

80. *Id.* at *34 (distinguishing *Harper & Row v. Nation Enters.*, 471 U.S. 539, 564 (1985)) (“It cannot be said therefore that Paramount ‘scooped’ Lee’s intended first publication in the way that the Nation scooped Harper & Row’s intended first publication of President Ford’s memoir.”).

81. *Id.* at *38.

82. *Michaels v. Internet Entm’t Grp.* (*Michaels I*), 5 F. Supp. 2d 823 (C.D. Cal. 1998).

83. *Id.*

84. *Id.* at 832, 835.

85. *Id.* at 835.

86. *Id.* at 836.

them—or whichever of them was ultimately deemed the author⁸⁷—exclusive control over a marketplace that had “extensive interest” in naked imagery of Pamela Lee.⁸⁸ Because the court could point to a market that had an interest in Lee, copyright law gave Lee and Michaels the right to effectively destroy that market.⁸⁹ Five months later, however, Lee’s disclaimer of any actual market interest doomed her claim against Paramount.

What explains the difference? Why does a desire to protect privacy and emotional well-being deny Hogan and Lee relief in *Bollea* and *Michaels II*, while Michaels can pursue those interests in *Michaels I* when he disclaimed the profit motives that copyright is designed to protect? None of these cases have anything to do with the rightsholder’s economic incentives, so why does Bret Michaels have a right to control the potential market for his sex tape? There are two possible explanations.

The first possibility is that the different reasoning in the cases reflects the very different defendants in *Bollea/Michaels II* compared with *Michaels I*. The former cases involved defendants who were at least arguably engaged in celebrity news reporting, while the defendant in *Michaels I* was unquestionably a commercial pornography company.⁹⁰ News reporting and journalism are core activities protected by the fair use doctrine, while commercial exploitations of copyrighted works are much more likely to be deemed unfair.⁹¹ *Bollea* and *Michaels II* defer charitably

87. Michaels apparently recorded the video—i.e. pressed “record”—but there was a dispute as to whether Lee could be deemed a coauthor and thus joint owner over the work. *Id.* at 830.

88. *Id.* at 836. See Fromer, *supra* note 52, at 577 (“In the course of finding a likelihood of success on copyright infringement and no fair use, the court treated the sex tape as if Michaels and Anderson were market participants who would be harmed by the tape’s release.”); Stephen McIntyre, *Private Rights and Public Wrongs: Fair Use as a Remedy for Private Censorship*, 48 GONZ. L. REV. 61, 81 (2012) (“The court’s emphasis on market harm is difficult to square with the plaintiffs’ obvious lack of concern for the sex tape’s marketability.”).

89. See also *Balsley v. LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012) (rejecting fair use of news anchor in a wet t-shirt contest even though plaintiffs had “no present intention of exploiting the market” because they showed “ample evidence of the vast market for the Bosley photograph, and they persuasively argued that Defendant’s publication and sale of the picture ‘directly competed for a share of the market for’ the Bosley photograph” (quoting *Harper & Row v. Nation Enters.*, 471 U.S. 539, 568 (1985))).

90. See also *Balsley*, 691 F.3d at 754 (rejecting Hustler Magazine’s fair use defense and describing it as “a monthly magazine that ‘contains graphic images and stories about sex’” and that “publishes extremely illicit photographs, both real and fabricated”).

91. See *Michaels I*, 5 F. Supp. 2d at 834 (“IEG’s president has declared that IEG builds its subscriber base by promising and delivering digital images from ‘celebrity video tapes.’ The commercial nature of IEG’s proposed display of short segments of the Tape weighs against a finding of fair use.” (internal citation omitted)).

to the transformative, journalistic purposes of Gawker and Hard Copy,⁹² whereas the *Michaels I* court is demonstrably skeptical of any comparably transformative value of IEG's offerings.⁹³ To be clear, the distinction between news reporting and commercial exploitation may sufficiently justify the divergent outcomes in these cases,⁹⁴ and the court in *Michaels I* legitimately may have been more protective of privacy when dealing with a purely commercial endeavor.

The problem, however, is that the courts never say that they are balancing privacy vs. journalism or privacy vs. pornography. They instead manipulate the plaintiffs' market interests to variably include or exclude defendants' use, when there is no indication that their desire for sexual privacy at all hinges on the identity of the defendant. In all three cases, the plaintiffs' goal is to claw back and eliminate the sexually explicit videos from the public sphere; what changes between the three cases is the interests of the *defendants* in publishing those videos.⁹⁵ But rather than acknowledging that the plaintiffs' interests remain constant, the courts reframe the plaintiffs' supposed market interests to bolster the courts' assessment of the defendants' respective endeavors. There is no evidence that the plaintiffs had any actual economic interest in their sexual imagery in any of the three cases, yet the courts conjure one up when confronted with a highly unsympathetic defendant. The unchanging underlying interests in sexual autonomy and privacy are buried under the market gibberish.

The second, and more troubling, explanation is that the different reasoning between the cases reflects the different *plaintiffs*. There is some reason to be concerned that courts are manipulating market interests based less on the relative merits of the plaintiffs' claims and more on their relative character. In *Bollea*, the court repeatedly mentions that the secretly-recorded video was of the plaintiff having "sexual relations with

92. *Bollea v. Gawker*, 913 F. Supp. 2d 1325, 1328 (M.D. Fla. 2012) ("Defendants[] published the video excerpts 'in conjunction with the news reporting function.' That factual finding supports a colorable fair use defense."); *Michaels II*, No. CV 98-0583 DDP (CWx), 1998 U.S. Dist. LEXIS 20786, at *31 (C.D. Cal. Sep. 10, 1998) ("Paramount's use of the excerpts on Hard Copy clearly has the character of 'news reporting.'").

93. *Michaels I*, 5 F. Supp. 2d at 835 ("From the descriptions of the Tape presented to the Court, it does not seem likely that the portrayal of two people engaged in sexual relations on the Tape constitutes a set of facts or ideas whose discussion requires seeing the Tape.").

94. *But see* Jennifer Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1933 (2015) ("To date, no convincing basis has been articulated for distinguishing commercial and noncommercial speech and uses in IP laws.").

95. *See id.* ("Even though the use of a copyrighted work in commercial advertising and other commercial settings might raise dignitary concerns, it does not necessarily raise more concerns than in a noncommercial context.").

a woman that was not his wife”⁹⁶—a detail that might add to the salacious appeal of the Gawker post, but that should have little bearing upon the public’s right to watch Hulk Hogan having oral sex and intercourse. Similarly in the *Michaels* cases, the court repeatedly emphasized that Pamela Lee had become famous in large part based on “sex and sexual appeal”—a characterization it expressly (and arguably incorrectly⁹⁷) did *not* apply to Michaels.⁹⁸ The implication might therefore be that Lee’s and Hogan’s past sexual exploits implicitly give them a weaker stake in controlling the public dissemination of their recorded sexual relationships. The only person, by contrast, who undeniably deserved to control downstream spread of their sexual imagery was the upstanding musician (Michaels) who had been offered \$1 million to decide whether he and his ex-girlfriend’s sexual relationship would be widely seen.⁹⁹ The two of them together had a cognizable market interest; she alone did not. Again, the difference in outcome between the cases may very well be due to the courts’ desire to protect free press interests, but the opacity of the courts’ market gibberish makes it impossible to know.

The division in reasoning between *Michaels I* and *Bollea/Michaels II* might seem like an overly academic concern or merely a problem for wealthy celebrities thrust further into the spotlight than they might otherwise wish. This, unfortunately, is not so. Copyright law has become an increasingly valuable tool for everyday people to combat the unauthorized disclosure of sexual images via the Internet—i.e. revenge porn¹⁰⁰—and the takeaway from these cases is quite grim for non-celebrity victims of revenge porn similarly seeking to protect their sexual autonomy

96. 913 F. Supp. 2d at 1327.

97. See, e.g., Poison, *Unskinny Bop*, GENIUS, <https://genius.com/Poison-unskinny-bop-lyrics> [<https://perma.cc/X84W-TJ4P>] (“What’s got you so jumpy?! Why can’t you sit still, yeah?! Like gasoline, you wanna pump me/ And leave me when you get your fill, yeah.”); Poison, *Talk Dirty to Me*, GENIUS, <https://genius.com/Poison-talk-dirty-to-me-lyrics> [<https://perma.cc/WN6M-KRFH>] (“Cause baby we’ll be/ At the drive-in/ In the old man’s Ford/ Behind the bushes/ Till I’m screaming for more/ Down the basement/ Lock the cellar door/ And baby/ Talk dirty to me.”).

98. See *Michaels I*, 5 F. Supp. 2d at 842 (“Michaels and Lee declare that they have cultivated fame throughout their careers In Lee’s case, her fame arises in part from television and movie roles based on sex and sexual appeal.”); *Michaels II*, No. CV 98-0583 DDP(CWx), 1998 U.S. Dist. LEXIS 20786, at *26 (C.D. Cal. Sep. 10, 1998) (“There is no genuine issue of fact as to the reason for Lee’s fame. She is famous as a sex symbol.”); *id.* at *28–29 (“Given the uncontroverted fact that images of Lee engaged in sex are already widely available, the intrusiveness of these images is slight when balanced against Paramount’s First Amendment interest in conveying information about the imminent release of the Tape, and the effect of such imminent release on Lee’s entertainment career.”)

99. See also *Balsley v. LFP, Inc.*, 691 F.3d 747, 766 (6th Cir. 2012) (“Looking to the totality of the circumstances, counsel’s comment that Bosley is a role model for his daughter was brief and did not impermissibly characterize any of the relevant facts or legal theories.”).

100. *Gilden*, *supra* note 11.

and privacy. For example, if a woman's ex-boyfriend posts sexually explicit photos of her online and she (assuming she was the author of the photos) sues her ex or the hosting website to take the copyrighted photos down, *Bollea* and *Michaels II* map onto her case quite directly and negatively.¹⁰¹ She similarly "cannot legitimately claim that [s]he seeks to enforce the copyright because [s]he intends to publish the Video" and similarly is not concerned with "commercial advantage of controlling the release of those materials"; instead, she is seeking to protect her "mental well-being, personal relationships, and professional image."¹⁰² Copyright assertions have been very useful in getting websites to voluntarily take down revenge porn imagery, and have resulted in some default judgments in victims' favor, but no copyright revenge porn case has resulted yet in a published judicial decision.¹⁰³ The sex tape precedents signal that unless the plaintiff can point to some preexisting market interest in her sexual relationships,¹⁰⁴ she will not have suffered harm in the copyright sense sufficient to obtain the necessary injunctive relief. Bret Michaels could point to one million dollars in market demand for his sex tape; the vast majority of other individuals similarly seeking to protect their sexual privacy cannot.

B. Privacy

The sex tape cases are merely the tip of the iceberg of copyright's market gibberish. Although these sexually explicit works present copyright law with a uniquely intimate set of interests in privacy and autonomy, numerous other copyright disputes involve documents that plaintiffs wish to keep out of the public eye.¹⁰⁵ And again, rather than explain how they are balancing plaintiffs' privacy interests against defendants' expressive, commercial, journalistic, or scholarly interests,

101. See Peter W. Cooper, *The Right to Be Virtually Clothed*, 91 WASH. L. REV. 817, 829–30 (2016) (citing *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015)) ("Ultimately, while copyright law has been useful for survivors that took the pictures or videos themselves, it was not designed to protect privacy, and survivors are out of luck if someone else took their nude photo.").

102. *Bollea*, 913 F. Supp. 2d at 1329–30; accord *Balganesh*, *supra* note 63, at 3 ("As should be obvious, copyright's market rationale played no role in the plaintiff's creation of the work and in her infringement claim. Instead, the claim was driven by distinctively non-economic considerations.").

103. See *Gilden*, *supra* note 11, at 82–87.

104. See *Balsley*, 691 F.3d at 761 (pointing to "ample evidence of the vast market for the Bosley photograph").

105. See *Fromer*, *supra* note 52, at 560–61 (surveying cases where the plaintiff "appears to be interested in preventing the defendant from revealing, or at least further proliferating, information about him or her" and "does not seem to worry about being harmed in the marketplace for his or her copyrighted work, which is the utilitarian motivator for the copyright incentive.").

courts instead regularly engage in inconsistent and tortured market rhetoric. As much as contemporary courts¹⁰⁶ insist that “the protection of privacy is not a function of the copyright law,”¹⁰⁷ the cases below show that copyright indeed protects privacy under the guise of market interests.

Outside the sex tape context, courts have inconsistently permitted copyright holders to stop the spread of intimate or embarrassing documents. The most notable example of this tension is the divergent analyses of similar privacy interests in *Núñez v. Caribbean International News Corp.*¹⁰⁸ and *Monge v. Maya Magazines*.¹⁰⁹ In *Núñez*, the plaintiff had taken nude modeling photos for Joyce Giraud, who later won the Miss Puerto Rico Universe pageant.¹¹⁰ A local news station and newspaper obtained and published these photos to discuss whether they were “pornographic” and whether Giraud was, accordingly, morally fit to serve as Miss Puerto Rico Universe.¹¹¹ The First Circuit held that the newspaper had made fair use of the photos.¹¹² The court emphasized that the defendant sought “merely to provide news reporting to a hungry public. And the fact that the story is admittedly on the tawdry side of the news ledger does not make it any less of a fair use.”¹¹³ Moreover, it rejected any cognizable market harm:

[T]he purpose of dissemination of the [modeling portfolio] pictures in question is not to make money, but to publicize; they are distributed for free to the professional modeling community rather than sold for a profit. The fact that a relatively poor reproduction was displayed on the cover of a newspaper should not change the demand for the portfolio. If anything, it might increase it . . . Núñez does not suggest that he ever tried to sell portfolio photographs to newspapers, or even that he had the right to do so under the contract with Giraud.¹¹⁴

Because *Núñez* never tried to make money off the sale of the

106. In old common law copyright cases, now expressly preempted by the federal Copyright Act, courts would sometimes recognize authors’ privacy interests in their unpublished works. *See* Newman, *supra* note 47, at 463–66; Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC’Y OF U.S.A. 585, 618–20 (2011).

107. *Garcia v. Google*, 786 F.3d 733, 745 (9th Cir. 2015) (quoting *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003)).

108. 235 F.3d 18 (1st Cir. 2000).

109. 688 F.3d 1164 (9th Cir. 2012).

110. *See Núñez*, 235 F.3d at 21.

111. *Id.*

112. *Id.* at 25.

113. *Id.* at 22–23.

114. *Id.* at 25.

photographs, he had no cognizable market interest in the photos. Moreover, to the extent that what was *really* motivating the lawsuit was his ability to protect his professional reputation—in part by protecting the reputation, privacy, and dignity of clients like Giraud—the court concluded, “[t]he overall impact to Núñez’s business is irrelevant to a finding of fair use.”¹¹⁵ Because no one had tried to make money off the nude photos in question, and because reputational interests were off the table, the use here did not implicate a legitimate copyright interest.

When the context shifts from private nude photos to private wedding photos, however, the market analysis changes dramatically. In *Monge*, plaintiffs Noela Lorelia Monge and Jorge Reynoso were a pop singer/model and manager/producer who had secretly married.¹¹⁶ After the couple’s driver obtained secret photos of the wedding celebrations—including a photo of Monge revealing her underwear—and sold them to a celebrity gossip magazine, the couple successfully sued the magazine, defeating a fair use defense.¹¹⁷ The Ninth Circuit concluded that the publication harmed the potential market for their copyrighted works, even though “the couple did not intend to sell publication rights to the photos.”¹¹⁸ If they didn’t intend to sell these photos, why then did they have a sufficient market interest? Because in the past these celebrities had sold *other* photos to celebrity gossip magazines:¹¹⁹ “The couple is undisputedly in the business of selling images of themselves and they have done so in the past.”¹²⁰ Even though the couple had actively hidden their wedding from the public, they “have ‘the right to change [their] mind.’ They reasonably could decide to sell the images for profit in the future”¹²¹ Because there was a market ready to pay for their photos, the couple had the right to keep their private lives out of the hands of that market. Only because the couple had been willing and able to sell their privacy in the past were they allowed to use copyright law to protect their privacy interests in the future. Although the court “pointedly note[d]” that

115. *Id.* at 24.

116. *Monge v. Maya Magazines*, 688 F.3d 1164, 1168 (9th Cir. 2012).

117. *Id.* at 1175. Distinguishing *Núñez*, the Ninth Circuit observed, “[t]he photos were not even necessary to prove that controverted fact—the marriage certificate . . . may have sufficed to inform the public.” *Id.*

118. *Id.* at 1180.

119. *Id.* at 1168 (“In the past, Maya has paid Monge to pose for pictures published in its magazine, ‘H Para Hombres.’ Reynoso was paid \$25,000 for photos of his wedding to his former wife Pilar Montenegro, as well as \$40,000 for photos of his vacation in Paris with Montenegro.”).

120. *Id.* at 1181.

121. *Id.* at 1182 (quoting *Worldwide Church of God v. Phila. Church of God Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000)).

it was proceeding “only under copyright principles, not privacy law,” the couple was able to leverage potential market demand into heightened privacy control.¹²²

In *Núñez*, Miss Puerto Rico Universe was merely trying to break into a modeling career, so her photos were up for grabs by media outlets interested in discussing her naked body and moral fitness.¹²³ In *Monge*, Monge and Reynoso had been able to cash in on their celebrity, so they had the right to choose if and when their private moments became public in the future.¹²⁴ The cases purport to be focused on reasonable market effects, when they are really about who can use copyright’s economic rights to protect their personal needs. As with the sex tape cases, there is a lot more going on in these privacy cases that might be swaying the ultimate outcome—i.e. theft versus lawful acquisition of the photos; direct versus indirect profit—but again the courts reframe privacy interests as market interests in order to reach the preferred outcome within copyright’s traditional economic framework.

Numerous other decisions reveal courts manipulating market interests in order to variably protect privacy concerns. For example, although the Second Circuit in *Salinger v. Random House*¹²⁵ gave J.D. Salinger the right to use copyright law to stop the quotation of his private letters in an unauthorized biography, the heirs of other authors have been denied such opportunities.¹²⁶ Even though Salinger “disavowed any intention to publish [his letters] during his lifetime,” his potential market had been sufficiently impaired.¹²⁷ Like the celebrity couple in *Monge*, “Salinger has the right to change his mind. He is entitled to protect his opportunity to sell his letters, an opportunity estimated by his literary agent to have a current value in excess of \$500,000.”¹²⁸ By contrast, even though Richard Wright’s widow *had* previously entered into an agreement to publish her late husband’s personal letters, the court found insufficient harm to her potential market interest because “little has been done on the project in two decades Plaintiff has offered no evidence that the project will go forward.”¹²⁹ The court in *Shloss v. Sweeney*¹³⁰ went even further, allowing

122. *Id.* at 1177.

123. *See Núñez*, 235 F.3d 18, 22–23 (1st Cir. 2000).

124. *See Monge*, 688 F.3d at 1181–82.

125. 811 F.2d 90 (2d Cir. 1987).

126. *See id.* at 99; *infra* notes 121–125.

127. *Random House*, 811 F.2d at 99.

128. *Id.* (emphasis omitted).

129. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991).

130. 515 F. Supp. 2d 1068 (N.D. Cal. 2007).

a Joyce scholar to assert a “copyright misuse” defense against the Joyce estate for prohibiting a biographer from publishing letters exchanged between Joyce and his daughter, Lucia.¹³¹ As alleged by the scholar, “Stephen Joyce, as an agent of the Estate, made veiled threats of copyright litigation to effect his underlying purpose of protecting the Joyce family’s privacy.”¹³² According to the court, Joyce’s aggressive efforts to protect his family’s privacy lacked a sufficient “nexus between the copyright holder’s actions and the public policy embedded in the grant of a copyright.”¹³³ His effort to maintain family privacy “undermined the copyright policy of ‘promoting invention and creative expression.’”¹³⁴

Yet in plenty of other cases, courts have been willing to allow authors to suppress downstream creative works in the absence of any reasonably likely market competition with the rightsholder.¹³⁵ Take for example, the Second Circuit’s other major J.D. Salinger decision, *Salinger v. Colting*,¹³⁶ where the court held that Salinger’s estate was likely to defeat a fair use defense raised by the author of the book *60 Years Later: Coming Through the Rye*. Even though “Salinger has publicly disclaimed any intention of authorizing a sequel” to *Catcher in the Rye*, “Salinger has the right to change his mind and, even if he has no intention of changing his mind, there is value in the right not to authorize derivative works.”¹³⁷ Similarly in *Love v. Kwitny*,¹³⁸ the court rejected a fair use defense where the author of a book critical of interventionist U.S. foreign policy quoted portions of an unpublished manuscript written in 1960 by the New York Times’ Iran correspondent.¹³⁹ Even though over twenty years had passed and the former correspondent had “no more than ‘uncrystallized plans’”¹⁴⁰ to ever publish the manuscript, he nonetheless retained “‘the right to change his mind. He is entitled to protect his opportunity to sell’ his

131. *Id.* at 1080.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See also* *Morris v. Guetta*, No. LA CV12-00684 JAK, 2013 WL 440127, at *13 (C.D. Cal. Feb. 4, 2013) (“The record does not clearly show a harm to the market for, or value of, the Photograph, and the amount of harm and potential harm based on the nature of the market is disputed. However, even assuming there was no harm to the market, this would not excuse an unjustified use . . .”).

136. 607 F.3d 68 (2d Cir. 2010).

137. *Id.* at 74 (emphasis omitted).

138. 706 F. Supp. 1123 (S.D.N.Y. 1989).

139. *Id.* at 1135.

140. *Id.* (quoting *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 (2d Cir. 1986)).

paper.”¹⁴¹

This “right to change his mind” is framed entirely as an author’s economic prerogative to decide whether and when to exploit a market, and not as a way to protect the broader range of socioemotional interests tied up in creative works.¹⁴² Courts in the Second Circuit have maintained, for decades, that “the justification of the copyright law is the protection of the commercial interest of the artist/author. It is not to coddle artistic vanity or to protect secrecy, but to stimulate creation by protecting its rewards.”¹⁴³ Yet the inconsistent availability of this “right to change his mind” makes it hard to escape the conclusion that, like in the sex tape context, courts are manipulating market interests based on their subjective views of the parties.¹⁴⁴ Successful plaintiff J.D. Salinger was “a highly regarded American novelist and short-story writer,”¹⁴⁵ while the losing defendant in *Love* was skeptical of where his “country’s real interests lie.”¹⁴⁶ The court in *Monge* pitted “music celebrities” against “a gossip magazine” and a “paparazzo.”¹⁴⁷ Stephen Joyce was widely known as presiding “over one of the most combative and obstructive of all literary estates,”¹⁴⁸ and “Puerto Ricans were generally concerned about the qualifications of Giraud for Miss Puerto Rico Universe.”¹⁴⁹ The difference

141. *Love v. Kwitny*, 706 F. Supp. 1123, 1135 (S.D.N.Y. 1989) (quoting *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987)) (emphasis omitted); *accord* *New Era Publ’ns Int’l v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989) (“Since the district court accepted New Era’s contention that it would commission an authorized biography of Hubbard and that all Hubbard’s writings, published and unpublished, would be made available for that purpose, it is difficult to conclude, as does the district court, that the book published by Holt would have no effect on the market for New Era’s forthcoming book.”).

142. *See* Newman, *supra* note 47, at 469 (“For the most part, however, the degree to which American copyright law protects the privacy of writers today appears to depend on whether the privacy interest can be advanced almost coincidentally with the advancement of the economic interests.”).

143. *Salinger v. Colting*, 607 F.3d 68, 81 n.9 (2d Cir. 2010) (quoting *New Era Publ’ns Int’l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988)) (emphasis omitted).

144. *See* Kate O’Neill, *Against Dicta: A Legal Method for Rescuing Fair Use From the Right of First Publication*, 89 CALIF. L. REV. 369, 374 (2001) (“In a judgment for the copyright holder, the judicial rhetoric often includes indignant allusions to the copier’s greed or laziness in attempting to capitalize on another’s creativity, while a judgment for the copier piously affirms the defendant’s scholarly and selfless contribution to the expansion of knowledge.”).

145. *Salinger v. Random House, Inc.*, 811 F.2d 90, 92 (2d Cir. 1987).

146. *Love v. Kwitny*, 706 F. Supp. 1123, 1126 (S.D.N.Y. 1989).

147. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1168 (9th Cir. 2012).

148. Mark O’Connell, *Has James Joyce Been Set Free?*, NEW YORKER (Jan. 11, 2012), <https://www.newyorker.com/books/page-turner/has-james-joyce-been-set-free> [<https://perma.cc/7J7V-VZCR>]; *see also* Robert Spoo, *Three Myths for Aging Copyrights: Tithonus, Dorian Gray, Ulysses*, 31 CARDOZO ARTS & ENT. L.J. 77 (2012).

149. *Núñez v. Caribbean Int’l. News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

in outcomes cannot be justified in terms of whether the rightsholder in each of these cases actually had an economic interest in publishing their work—none did;¹⁵⁰ the difference instead might be justified based on where the perceived equities lie between the parties.

Courts' repeated assurances that copyright law does not vindicate privacy interests accordingly cannot be taken as a coherent policy limit; it must instead be seen as a selective way of screening out unsavory cases. The strange case of *Bond v. Blum*¹⁵¹ is perhaps the best example of this screening function. In *Bond*, the copyright owner “beat his father to death with a hammer in his grandparents’ garage” when he was seventeen; after a stint in juvenile detention, he changed his name and wrote the manuscript for a book titled *Self-Portrait of a Patricide: How I Got Away with Murder*, which “describes in horrific detail how Bond planned and committed the murder of his father.”¹⁵² In the late 1980s, Bond unsuccessfully circulated his manuscript in an attempt to find a publisher.¹⁵³ Several years later he met and married a woman named Alyson Slavin.¹⁵⁴ In July 2000 Alyson sued her ex-husband for exclusive custody of their three children.¹⁵⁵ In the state custody hearing that followed, her ex-husband attempted to introduce Bond’s unpublished manuscript—which he obtained through a private investigator—as evidence that the Bond household was not a safe place for children.¹⁵⁶

Bond sued in federal court for copyright infringement to prevent this courtroom use of his copyrighted work, and the Fourth Circuit ultimately found the proposed use to be fair.¹⁵⁷ The court observed, “the narrow purpose of defendants’ use of the manuscript is for the evidentiary value of its content insofar as it contains admissions that Bond . . . bragged about his conduct in murdering his father.”¹⁵⁸ Moreover, with respect to the potential market harm from the proposed use, the court reasoned as follows:

150. See Stephen McIntyre, *Private Rights and Public Wrongs: Fair Use as a Remedy for Private Censorship*, 48 GONZ. L. REV. 61, 80 (2012) (“Courts applying the doctrine in private censorship cases often give unnecessary attention to market harm, even though the copyright owner clearly does not care about the marketability of his or her work.”).

151. 317 F.3d 385 (4th Cir. 2003).

152. *Id.* at 390.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 391.

157. *Id.* at 392, 397.

158. *Id.* at 395.

The only harm that we can discern from his arguments is a claim that he has lost the right to control the release of a “private” or “confidential” document [T]he *protection of privacy is not a function of the copyright law* If privacy is the essence of Bond’s claim, then his action must lie in some common-law right to privacy, not in the Copyright Act.¹⁵⁹

Because there was “no evidence that the admission into evidence of Bond’s manuscript would adversely affect its marketability”¹⁶⁰ and the potential privacy interest was categorically beyond the reach of copyright law, Bond’s copyright action was dismissed.¹⁶¹

To be clear, *Bond* should be an easy case for fair use. It is hard to conjure any policy justification that would allow a copyright holder to keep relevant¹⁶² documentary evidence of past misdeeds out of the view of a family court and, accordingly, place the interests of an author in a twenty-year-old unpublished manuscript over the best interests of a child. To the extent that Bond had actively solicited publishers for his work, this suggests that there was not any bona fide privacy interest at all.¹⁶³ The problem in this case is *not* that Bond was trying to protect his privacy; the problem instead is that Bond lacked *any* interest that would justify preventing the very limited use of his old manuscript.¹⁶⁴ But instead of just saying that, the court flatly declares that copyright is not meant to protect privacy. This statement gets picked up by cases like *Garcia*¹⁶⁵ and *Bollea*¹⁶⁶ to reject privacy and safety interests that may be far more significant.

The interests at stake in copyright’s diverse set of “privacy” cases vary dramatically, and the policy questions they raise differ greatly. For example: when does celebrity gossip justify privacy intrusions? Do heirs

159. *Id.* (emphasis added).

160. *Id.* at 396.

161. *Id.* at 395–96.

162. Bond argued that the manuscript was “a highly fictionalized and stylized work,” that might potentially raise questions of undue prejudice in the custody hearing, but local rules of evidence would seem better suited to this concern than copyright law. *Id.* at 390.

163. *Id.* at 395 (“But at oral argument, he conceded that the document was not confidential.”).

164. *Cf.* Newman, *supra* note 47, at 475 (“Perhaps it is sufficient to recognize that the continuum exists and to accord a lesser degree of protection to the privacy interest as the circle of distribution becomes broader. There need not be an ‘all or nothing’ test.”).

165. *Garcia v. Google*, 786 F.3d 733, 745 (9th Cir. 2015).

166. *Bollea v. Gawke Media, LLC*, 913 F. Supp. 2d 1325, 1330 (M.D. Fla. 2012).

have privacy interests in works they inherit from a family member?¹⁶⁷ Does copyright *ever* limit a court's evidentiary needs? Copyright courts are actively confronting and resolving these difficult policy questions that have little to do with an author's economic incentives,¹⁶⁸ but they shy away from answering them directly.¹⁶⁹ Rather than confront the privacy interests before them, they muddle market interests in order to facially adhere to the traditional economic rationales for copyright while nonetheless reaching their desired results. The results in these cases are not necessarily wrong, but their opaque reasoning draws boundaries around the copyright system based on wealth, celebrity, and perceived moral worth, and not based on a principled allegiance to economic interests.

C. *Religious Disputes*

The third area in which market gibberish repeatedly emerges is in the perhaps surprisingly large body of copyright cases involving disputes over religious practices and related texts. To the extent that religious beliefs, rituals, and evangelism are rooted in the dissemination of authored texts, copyright law has proven to be an appealing vehicle for religious entities to protect themselves from critique, for rival sects to gain an upper hand, or for shutting down certain religious practices altogether. Although money does, of course, often mix with religion,¹⁷⁰ it is difficult to ultimately reduce any of the following disputes to a genuine economic interest in a copyrighted text. Yet success in these cases typically hinges precisely on reframing religious interests as economic ones.

The Church of Scientology and its affiliated organizations have repeatedly tried to use copyright law to maintain the secrecy of its core texts, as well as related writings of Scientology founder L. Ron

167. See, e.g., *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 585 (2d Cir. 1989) (Oakes, J., concurring) (“*Salinger* is a decision which, even if rightly decided on its facts, involved underlying, if latent, privacy implications not present here by virtue of Hubbard’s death.”).

168. See *Newman*, *supra* note 47, at 460 (“[C]opyright law often raises issues that require hard thinking about the essential nature of the right to be protected and especially about the relationship of that right to other rights protected by neighboring fields of law.”).

169. See *McIntyre*, *supra* note 150, at 80 (“By treating private censorship cases in the same manner as traditional copyright disputes, courts engage in awkward analyses that fail to properly balance public and private interests.”).

170. See OUR LADY OF PERPETUAL EXEMPTION CHURCH, <http://www.ourladyofperpetualexemption.com/> [<https://perma.cc/LWS4-YBHP>]; Melissa Locker, *John Oliver Becomes a Televangelist and Finally Starts His Own Church*, TIME (Aug. 17, 2015) <http://time.com/3999933/john-oliver-televangelist-church-alst-week-tonight/> [<https://perma.cc/75TG-QLXY>].

Hubbard.¹⁷¹ Their track record shows how religious interests have been variably rejected and vindicated through copyright's traditional market frame. For example, in the *Religious Technology Center v. Lerma* cases,¹⁷² Religious Technology Center (RTC), the exclusive licensee to Hubbard's writings, sued both a former Scientology member who posted various "Advanced Training" materials online, as well as the Washington Post for quoting from these materials in its reporting. These materials described "a detailed program for warding off the[] evil influences" of extraterrestrial spirits; Church doctrine flatly forbade disclosure of these materials to non-members.¹⁷³

With respect to its claims against the Washington Post, the Church's arguments—and the court's rejection of them—candidly engaged with the noneconomic motivations behind the lawsuit. The Church argued that publication of the documents threatened "irreversible alteration of religious beliefs, including compelled annihilation of a core belief,"¹⁷⁴ and would result in "devastating, cataclysmic spiritual harm."¹⁷⁵ The court flatly refused to allow copyright law to suppress the Post's reporting on these bases, and it found fair use:

Were they arguing to a religious council placed within a theocratic government, RTC's arguments might prevail. But this Court is a secular branch of a secular democratic government. Our traditional separation of church from the state, combined with the heterogeneity of religious practices in this country compel us to reject the RTC's arguments RTC may not employ the machinery of this Court to enforce its religious prescriptions against The Post by enjoining otherwise permissible activity.¹⁷⁶

Rejecting the "spiritual harm" argument, the court emphasized, "[t]he First Amendment represents a conscious and explicit trade-off which the Founding Fathers made between paternalistic protection from 'harmful'

171. See generally *Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995); *Religious Tech. Ctr. v. F.A.C.T.Net, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995); *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629 (S.D. Cal. 1993); *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989); *New Era Publ'ns Int'l v. Carol Publ'g Grp.*, 904 F.2d 152 (2d Cir. 1990).

172. See *Religious Tech. Ctr. v. Lerma (Lerma I)*, 897 F. Supp. 260 (E.D. Va. 1995); *Religious Tech. Ctr. v. Lerma (Lerma II)*, 908 F. Supp. 1353 (E.D. Va. 1995); *Religious Tech. Ctr. v. Lerma (Lerma III)*, 908 F. Supp. 1362 (E.D. Va. 1995); *Religious Tech. Ctr. v. Lerma (Lerma IV)*, No. 95-1107-A, 1996 U.S. Dist. LEXIS 15454 (E.D. Va. Oct. 4, 1996).

173. See *Lerma IV*, 1996 U.S. Dist. LEXIS 15454, at *3.

174. *Lerma II*, 908 F. Supp. at 1356.

175. *Id.* at 1357.

176. *Id.* at 1356.

thoughts and free access to information.”¹⁷⁷ Even though the materials in question were previously unpublished, they were not disclosed by the Washington Post in an effort to deprive the Church of the economically valuable right of first publication,¹⁷⁸ or to “avoid payment of a royalty.”¹⁷⁹ It accordingly was “doubtful” that there would be any negative effect on the value of the training documents.¹⁸⁰ The *Lerma II* Court expressly engaged with the Church’s religious and reputational interests and dismissed them against the overriding interests in free speech and secular government; it did not flatly declare that the Church’s concerns were beyond the reach of copyright—it instead acknowledged a hierarchy of values baked into our constitutional system.¹⁸¹ As discussed further in Part III, copyright law can benefit greatly from such transparent balancing of interests.

The same court, nonetheless, took a remarkably different approach with respect to the Church’s claims against Arnaldo Lerma, the former Scientologist who posted full copies of the training documents online: “The full record clearly shows that Lerma’s motives, unlike those of news reporters, were not neutral and that his postings were not done primarily ‘for public benefit.’”¹⁸² Even though Lerma argued that he was engaged in extensive research and commentary about the Church, “[t]hat argument does not justify the wholesale copying and republication of copyrighted material.”¹⁸³ Moreover, even though the Church “never intends to publish”¹⁸⁴ its confidential training documents, and the evidence of potential market harm was “speculative,”¹⁸⁵ the court concluded that the right of first publication “encompasses [also] the choice whether to publish at all.”¹⁸⁶ Quoting *Salinger v. Random House*, the court explained, “[p]otential harm to value of plaintiff’s works ‘is not lessened by the fact

177. *Id.* at 1357.

178. See *Lerma I*, 897 F. Supp. 260, 264 (E.D. Va. 1995).

179. *Lerma III*, 908 F. Supp. 1362, 1366 (E.D. Va. 1995).

180. *Lerma II*, 908 F. Supp. at 1358. Moreover, to the extent that plaintiffs were concerned with “potential loss of new parishioners” and the competition from “splinter groups,” the court countered that “this is the price paid in a free society which encourages an open marketplace for ideas.” *Id.*

181. *Id.* 1357.

182. *Lerma IV*, No. 95-1107-A, 1996 U.S. Dist. LEXIS 15454, at *14 (E.D. Va. Oct. 4, 1996).

183. *Id.* at *15.

184. *Id.* at *21.

185. *Id.* at *30.

186. *Id.* at *21 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985)).

that their author has disavowed any intention to publish them during his lifetime . . . he is entitled to protect his opportunity to sell his letters.”¹⁸⁷

In addition to its strikingly differing treatment of the Church’s “choice whether to publish,” the *Lerma* Court’s previous First Amendment concerns largely disappeared.¹⁸⁸ The most striking example appears in the court’s rejection of *Lerma*’s copyright misuse claim:

[A] misuse is quite distinct from the legitimate invocation of one’s copyright even though prompted by ulterior motives. To misuse a copyright, therefore, the copyright owner must use the copyright in an impermissible way by ‘extending his monopoly or otherwise violating the public policy underlying copyright law.’ *Lerma* fails to make such a showing . . . *Lerma*’s infringement is unmistakable, and RTC’s opposition is sound.¹⁸⁹

Unlike in its earlier decisions focused on the Post, the court only obliquely references the “motives” of *Lerma* (“not neutral”) and RTC (“ulterior”), but does not spell out what is really going on in the case—a former Scientologist sought vengeance against his former denomination, and that denomination used copyright laws to keep its teachings secret.¹⁹⁰ When the Church loses, the court is upfront about free speech outweighing religious interests, and it characterizes the Church’s motivations as “reprehensible.”¹⁹¹ Yet when the Church wins, and its “opposition is sound,”¹⁹² the court obfuscates the Church’s religious interests behind an “opportunity to sell” its documents.¹⁹³

Several other decisions similarly hide religious disputes behind a façade of economic interests. In *Peter Letterese & Associates, Inc. v. World Institute of Scientology Enterprises, International*,¹⁹⁴ a former

187. *Id.* (quoting *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987)).

188. *Id.*

189. *Id.* at *34–35 (quoting *Nat’l Cable Television v. Broadcast Music, Inc.*, 772 F. Supp. 614, 652 (D.D.C.1991)).

190. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 923 F. Supp. 1231, 1243 (N.D. Cal. 1995) (downplaying former Scientologist’s motivation in posting Hubbard texts to a newsgroup: “Because there is insufficient evidence to support plaintiffs’ claim that Erlich’s copying was made out of spite or for other destructive reasons, the court will assume Erlich’s intended purpose was criticism or comment.”).

191. *Lerma III*, 908 F. Supp. 1362, 1368 (E.D. Va. 1995) (“[T]he Court finds that the motivation of plaintiff in filing this lawsuit against The Post is reprehensible. Although the RTC brought the complaint under traditional secular concepts of copyright and trade secret law, it has become clear that a much broader motivation prevailed—the stifling of criticism and dissent of the religious practices.”).

192. *Lerma IV*, 1996 U.S. Dist. LEXIS 15454, at *34.

193. *Id.* at *21 (quoting *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987)).

194. 533 F.3d 1287 (11th Cir. 2008).

Scientologist gave the Church of Scientology a taste of its own copyright medicine. Peter Letterese was a Scientology member for over two decades, and he held several positions within the Church before he was excommunicated in 1994 for “violating certain Church policies.”¹⁹⁵ Shortly before his excommunication, however, Letterese’s company, Peter Letterese & Associates (PL&A), acquired the exclusive rights in the book *Big League Sales*, which had been incorporated in the Church’s training materials for its “registrars.” PL&A withdrew *Big League Sales* from publication and ultimately sued the Church and several affiliates for copyright infringement. The Eleventh Circuit reversed the district court’s finding of fair use.¹⁹⁶ Even though PL&A had conceded that it “[has] never made a sale, [and is] never going to make a sale.’ . . . [s]uch a concession . . . falls short of establishing that the intrinsic value of the copyright is zero.”¹⁹⁷ “Even an author who ha[s] disavowed any intention to publish his work during his lifetime . . . has the right to change his mind.’ . . . ’[T]he copyright law must respect that creative and economic choice.”¹⁹⁸ According to the court, “the decision to withdraw a work from the market and then rerelease it can be a valuable marketing tool—taking advantage of timing and pent-up market demand.”¹⁹⁹

As much as the Eleventh Circuit persisted in framing PL&A’s interest in economic terms, its decisions with respect to *Big League Sales* cannot plausibly have anything to do with the “creative and economic” decisions of an author or publisher. Letterese acquired rights in a book he had shown zero interest in commercially exploiting, and the entity holding such rights was—as noted in footnote 33 of the opinion—in the business of “dental consulting.”²⁰⁰ Two weeks after his Eleventh Circuit victory, Letterese sued the Church for \$250 million in RICO violations, alleging that it was a “crime syndicate.”²⁰¹ It accordingly is highly unlikely that his copyright

195. *Id.* at 1295–96.

196. *Id.* at 1323.

197. *Id.* at 1316–17 (quoting *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enter., Int’l*, No. 04-61178-CIV-HUCK/SIMONTON, 2005 WL 8167095, at *3 (S.D. Fla. Aug. 23, 2005), *aff’d in part, rev’d in part, and remanded sub nom.* *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enter., Int’l*, 533 F.3d 1287 (11th Cir. 2008)).

198. *Id.* at 1317 (first quoting *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000); and then quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 146 (2d Cir. 1998)).

199. *Id.* at 1314.

200. *Id.* at 1316 n.33.

201. Graham Smith, *Tom Cruise Named in \$250 Million Scientology Racketeering Lawsuit*, DAILY MAIL (July. 31, 2008), <http://www.dailymail.co.uk/tvshowbiz/article-1040182/Tom-Cruise-named-250-million-Scientology-racketeering-lawsuit.html> [<https://perma.cc/T9U7-3ASF>].

lawsuit had anything to do with a financial interest in exploiting a creative work. The Eleventh Circuit nonetheless blessed Letterese's personal, religious dispute by framing it as an "economic choice"²⁰² and a marketing tool.²⁰³

The Church of Scientology is not the only religious organization to, at times, be throttled by market gibberish.²⁰⁴ For example, in *Worldwide Church of God v. Philadelphia Church of God*,²⁰⁵ a church was able to use copyright law to suppress the racist ideology espoused by a rival sect's core documents. The Worldwide Church of God's founder, Herbert Armstrong, had written the book *Mystery of the Ages* shortly before his death in 1986.²⁰⁶ The book had expounded "outdated views that were racist in nature," prompting the Worldwide Church (which inherited Armstrong's copyright interest) to withdraw it from circulation shortly after his death.²⁰⁷ Beginning in 1989, however, two former Worldwide Church ministers founded the Philadelphia Church of God, which strictly followed Armstrong's teachings, and began distributing unauthorized copies of *Mystery of the Ages*.²⁰⁸ The Ninth Circuit rejected Philadelphia Church's fair use defense. Even though Worldwide Church had failed to exploit the book for ten years and lacked a "concrete plan to publish a new version," this did not mean that the book "has no economic value"; once again, an author "has the right to change his mind" and eventually publish the work.²⁰⁹ The court acknowledged that religious organizations may not be motivated by strictly financial interests, but it nonetheless characterizes *Mystery of the Ages* as a "marketing device" to evangelize new members.²¹⁰ The alleged infringement could, according to the court "divert[] potential members and contributions" away from Worldwide

202. *Peter Letterese*, 533 F.3d at 1317 (quoting *Castle Rock Entm't, Inc. v. Carol Publishing Grp.*, 150 F.3d 132, 146 (2d Cir. 1998)).

203. *Peter Letterese*, 533 F.3d at 1317.

204. *See also Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012) (finding copyright infringement when one Eastern Orthodox monastery posted to the Internet a set of religious texts translated into English by a rival monastery).

205. 227 F.3d 1110 (9th Cir. 2000).

206. *Id.* at 1113.

207. *Id.*

208. *Id.*

209. *Id.* at 1119.

210. *Id.* ("Those rewards need not be limited to monetary rewards; compensation may take a variety of forms."); *see also Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 64 (1st Cir. 2012) ("[T]he Copyright Act looks beyond monetary or commercial value and considers other forms of compensation for a work.").

Church.²¹¹ Framing this dispute as about economics and marketing entirely overlooks what was really going on in *Worldwide Church of God*—two rival religious sects were fighting over the continued validity of their founder's racist views, and copyright allowed one sect to prevail.²¹² As abhorrent as Armstrong's views may have been, it is impossible to understand this dispute as economic, and not ideological.

The religious dispute cases show that copyright caselaw provides a ready supply of market rhetoric that can be deployed to achieve distinctly noneconomic ends—e.g. stifling criticism, countering opposing views, and hindering evangelism. Each of these motivations can be reframed as merely a strategic marketing decision “whether to publish” a work—a rational business decision that downstream users reliant on a work are forced to respect. Market gibberish in these cases both raises serious First Amendment concerns for minority religious groups²¹³ and buries the political work—both progressive and conservative—that copyright law is doing in these cases. Copyright law outright celebrates free speech and free exercise in the moments when it rejects the expansion of religious copyright interests against institutions like the Washington Post. Yet when courts *allow* such invocations, they profess to zealously adhere to copyright orthodoxy while simultaneously converting the parties' religious fervor into rational economic choices.

D. Political Opponents

Even when copyright is invoked in unquestionably political disputes, courts nonetheless still resort to market gibberish. Politicians or political organizations frequently use copyrighted works either to promote their position or to critique their opponents, and the owners of those works often stridently object to their use in furtherance of a cause they do not support.²¹⁴ Yet rarely, if ever, are the copyright objections expressly

211. *Worldwide Church of God*, 227 F.3d at 1119.

212. *See id.* at 1125 (Brunetti, J., dissenting) (“In this lawsuit, WCG appears less interested in protecting its rights to exploit MOA than in suppressing Armstrong's ideas which now run counter to church doctrine.”).

213. *See* Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 330 (2003) (“A growing number of cases nevertheless show how copyright can impact religious practice, how legal institutions arguably exhibit bias against minority religions, and how a consideration of copyright doctrines in novel contexts can illuminate aspects of those doctrines that may be important in other contexts as well.”).

214. *See* John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245 (2015) (collecting examples) [hereinafter Tehranian, *The New Censorship*]; Steve Knopper, *Why Politicians Keep Using Songs Without Artists' Permissions*, ROLLING STONE (July 9, 2015), <https://www.rollingstone.com/music/music-news/why-politicians-keep-using-songs-without-artists->

framed in terms of underlying beliefs—doing so would immediately trigger core First Amendment concerns. Indeed, courts have in several cases found fair use based upon political speech.²¹⁵ Instead, copyright owners—and some receptive courts—take part in the disingenuous posturing of market gibberish: licensing deals that will never happen and “rights to change their mind” that will never be exercised. For example, when a former member of the band Survivor sued Newt Gingrich for using “Eye of the Tiger” in his rallies, he explained that “a song could lose value if it became entwined in the public’s mind with the politician ‘My motives have nothing to do with politics I’m just exercising the laws of this great country.’”²¹⁶ Although his copyright patriotism may be admirable, copyright law can provide this and other rights holders the ability to mask their dislike for certain people behind the façade of money and lost revenue streams.

Republican politicians have fared particularly poorly in their efforts to use copyrighted content.²¹⁷ Although the vast majority of such complaints have resulted in settlement in the artist’s favor,²¹⁸ *Henley v. DeVore*²¹⁹ shows how market gibberish can facilitate politically-motivated disputes

permission-36386/ [https://perma.cc/K944-W8BL]; James C. McKinley, Jr., *G.O.P. Candidates Are Told, Don’t Use the Verses, It’s Not Your Song*, NEW YORK TIMES (Feb. 3, 2012), <https://www.nytimes.com/2012/02/04/arts/music/romney-and-gingrich-pull-songs-after-complaints.html> [https://perma.cc/QWH3-CSRE].

215. See, e.g., *Galvin v. Ill. Republican Party*, 130 F. Supp. 3d 1187, 1197 (N.D. Ill. 2015) (“Plaintiffs’ only argument related to market effect is that Defendants’ political commentary harms the reputation of Mr. Galvin’s subjects and thus the value of his photographs. Avoiding this result is simply not a purpose of copyright law.”); *Dhillon v. Doe*, No. C 13-01465 SI, 2014 U.S. Dist. LEXIS 24676, at *15 (N.D. Cal. Feb. 25, 2014) (“[T]he defendant used the headshot photo as part of its criticism of, and commentary on, the plaintiff’s politics. Such a use is precisely what the Copyright Act envisions as a paradigmatic fair use.”); see also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986) (finding fair use where “the Defendants used the copies to generate moral outrage against their ‘enemies’ and thus stimulate monetary support for their political cause”); *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012) (finding fair use of a pro-choice video by a group opposing abortion); *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *9 (N.D. Cal. July 25, 2008) (“[P]laintiff admits that the effect of defendants’ usage is limited to the public criticism and condemnation of the ideas within the original work, not market damage in the economic sense.”).

216. *McKinley*, *supra* note 214 (quoting Interview with Frankie Sullivan, former Survivor band member).

217. See *Knopper*, *supra* note 214 (“Mick Fleetwood recently said Bill Clinton’s campaign never requested permission for what became his iconic 1992 campaign anthem, ‘Don’t Stop,’ but the band generally voted Democratic and didn’t object to the exposure ‘If it wasn’t Hillary, and I didn’t necessarily agree with their stance, it’d definitely be an awkward position.’” (quoting interview with Travie McCoy, Band Member, Gym Class Heroes)).

218. See *id.*; *Tehrani*, *The New Censorship*, *supra* note 214 (documenting successful DMCA takedowns of political opposition).

219. *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010).

if they end up in front of a judge. In 2009, a Republican Assemblymember, Charles DeVore, ran political advertisements critical of Barack Obama, Nancy Pelosi, and Barbara Boxer; these ads rewrote the lyrics of Henley's songs "The Boys of Summer" and "All She Wants to Do is Dance" in order to convey this message.²²⁰ The court rejected DeVore's fair use defense.²²¹ Even though DeVore argued that "there is no market for licensed use of the works because the Plaintiffs refuse to license their works,"²²² the court extended to Henley "the right to change his mind"²²³ and eventually grant such license, even though there was no evidence that this would ever occur.²²⁴ Henley further bolstered this potential market interests through hiring an expert, who testified that "licensees and advertisers do not like to use songs that are already associated with a particular product or cause."²²⁵ The court agreed that "advertisers would be deterred from using the [Henley's] music because it has been used before, not because of the particular association with DeVore's message This injury is the very essence of market substitution."²²⁶ Don Henley was able to use copyright law to frustrate the campaign of a California republican he did not support,²²⁷ and he was able to achieve this political end through reframing his political opposition as preserving an implausible licensing market.²²⁸

When a California Republican was on the other side of the battlefield, however, the court was far less willing to entertain a potential market

220. *Id.* at 1148; *see also* Browne v. McCain, 612 F. Supp. 2d 1125 (C.D. Cal. 2009) (rejecting motion to dismiss Jackson Browne's copyright claim against John McCain's presidential campaign).

221. *Henley*, 733 F. Supp. 2d at 1162–63.

222. *Id.* at 1162.

223. *Id.* (quoting *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1119 (9th Cir. 2000)).

224. *Id.* at 1162.

225. *Id.* at 1163.

226. *Id.*

227. Henley has long been active in left-leaning political causes. *See, e.g.*, Lars Brandle, *Don Henly Calls Out Donald Trump Twice on 'The Late Show'*, BILLBOARD (Sept. 22, 2015), <https://www.billboard.com/articles/news/6700847/don-henley-onald-trump-late-show> [<https://perma.cc/KRA4-AE3W>].

228. *See* Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 25 (2013) ("It seems unlikely that, by using his songs in videos satirizing Democratic politicians, DeVore somehow harmed Henley economically."); Laura A. Heymann, *The Law of Reputation and the Interests of the Audience*, 52 B.C. L. REV. 1341, 1403 (2011) (observing that musicians can rely on the market effects fair use factor "to argue that uses that are inconsistent with the plaintiff's current reputational status will have an economic effect on the plaintiff's ability to license or sell copies of the work in the future").

interest. In *Dhillon v. Does 1-10*,²²⁹ Harmeet Dhillon, the Chairman of the state Republican Party had commissioned a headshot in connection with her campaign for California State Assembly, and she sued for infringement when the headshot was posted on a website critical of her political associations.²³⁰ In trying to establish market harm from the posting, she made several arguments that previously had persuaded courts to acknowledge a potential market. She argued that she “used the headshot photo as a tool to positively market herself,”²³¹ echoing the “marketing tool” arguments successfully used in *Worldwide Church of God and Peter Letterese & Associates*. She also argued that the photograph “has been tainted with a prior negative association,”²³² echoing the concerns of Don Henley’s expert. Nonetheless, the court found the posting to be a “paradigmatic fair use.”²³³ In contrast to many of the cases above, the court emphasized that she never “sought or received a licensing fee from anyone at any time in connection with the use of the headshot photo . . . plaintiff fails to allege that she ever attempted to sell the headshot photo at any time in the past, or that she had any plans to attempt to do so in the future.”²³⁴

The court in *Dhillon* might have extended to plaintiff the “right to choose” when and whether to license her headshot, but it ultimately chose not to deploy market gibberish in her favor. This decision might legitimately have been due to the core political speech presented in this case—indeed, this case standing on its own seems entirely justified by the free speech commitments of the fair use doctrine. When compared with many of the other cases surveyed above, however, it is difficult to discern precisely why Harmeet Dhillon does not get to control highly implausible potential markets while Don Henley does. Is it because of Henley’s celebrity status? Is it because of the marginal role of Republicans in California? If the presiding judge *opposed* the political message of the defendants, would the result have been different?²³⁵ When courts discriminately lean on potential markets to distinguish between infringing and fair uses, it becomes difficult to tell whether the resulting doctrinal

229. *Dhillon v. Doe*, No. C 13-01465 SI, 2014 U.S. Dist. LEXIS 24676, at *1–15 (N.D. Cal. Feb. 25, 2014).

230. *Id.*

231. *Id.* at *14.

232. *Id.*

233. *Id.* at *15.

234. *Id.* at *18.

235. *See, e.g., Hill v. Pub. Advocate of the U.S.*, 35 F. Supp. 3d 1347 (D. Colo. 2014) (denying motion to dismiss copyright claim by wedding photographer whose photos of a gay couple were used in political advocacy in opposition to same-sex marriage).

lines reflect a reasoned hierarchy of free speech interests or instead simply mirror the relative economic and political power of the parties.

E. Remedies for Emotional Distress

The cases surveyed in the previous subsections demonstrate that, notwithstanding courts' insistence that copyright is a purely economic right, copyright holders routinely vindicate noneconomic interests through infringement actions. But what happens next? As litigation shifts away from questions of liability, how does market gibberish translate into remedies?

With respect to injunctive relief, copyright law has struggled in recent years to identify what in particular constitutes sufficient irreparable harm to enjoin dissemination of a work.²³⁶ If copyright infringement is a violation of primarily an economic interest, then monetary relief would seem to map onto plaintiff's injury more directly than injunctive relief, even if the precise amount of money is difficult to calculate. Courts have nonetheless adopted a few strategies in order to maintain the market-based nature of irreparable injury.²³⁷ First, they characterize copyright as "principally, a property interest in the copyrighted material," and from this property classification reflexively flows injunctive relief.²³⁸ Second, the copyright injury is reframed as almost trademark-like; the infringement has created "market confusion."²³⁹ Third, courts insist that "prov[ing] the loss of sales due to infringement is . . . notoriously difficult."²⁴⁰ And finally, they have obliquely observed that a copyright holder has a "First Amendment interest in *not* speaking" that would be

236. See generally Andrew Gilden, *Copyright Essentialism and the Performativity of Remedies*, 54 WM. & MARY L. REV. 1123 (2013).

237. See Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2442 (2016) ("[I]njunctive relief made available by copyright law is intended to prevent irreparable monetary harm caused by the possibility of further infringement.").

238. *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010); see also *eBay v. MercExchange*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (explaining the long history of injunctive relief in IP cases "given the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to *use* an invention against the patentee's wishes.").

239. *Colting*, 607 F.3d at 81 (citing *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96-97 (2d Cir. 2002)).

240. *Omega Importing Corp. v. Petri-Kine Camera Co.*, 451 F.2d 1190, 1195 (2d Cir. 1971); see Laura A. Heymann, *The Law of Reputation and the Interests of the Audience*, 52 B.C. L. REV. 1341, 1402 (2011) ("Artists may, therefore, use copyright law to assert what is essentially a trademark-related claim—in other words, they use their ability to control the exploitation of the work to challenge uses that suggest an authorization or sponsorship of the message conveyed by the defendant's use.").

irreparably injured through continued unauthorized use of their work.²⁴¹ Each of these three strategies are sufficiently vague, flexible, and/or market-oriented to accommodate noneconomic interests without expressly acknowledging them: undesired political associations create market confusion, an author's right to choose when to publish dovetails nicely with a right not to speak, and it will, of course, be difficult to calculate lost sales from potential markets that will never exist.

With respect to monetary relief, courts are similarly able to squeeze noneconomic harms into an economic framework. As a preliminary matter, the Copyright Act provides statutory damages for works that were timely registered, seemingly giving courts substantial wiggle room in awarding damages without precise calculation. Nonetheless, with respect to both statutory and actual damages,²⁴² almost all courts have held that emotional distress damages are unavailable under the Copyright Act,²⁴³ even for violations of visual artists' limited moral rights.²⁴⁴ In *Núñez v. Rushton*,²⁴⁵ for example, the court denied an award of actual damages solely based on the "mental anguish"²⁴⁶ that a romance novel author experienced from the infringement of her work.²⁴⁷ In addition to surveying

241. *Colting*, 607 F.3d at 81 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)).

242. See *Buccafusco & Fagundes*, *supra* note 237, at 2442 ("[S]tatutory damages are still generally intended to serve as a means of protecting the markets of copyrighted works because actual damages are hard to measure and infringement is difficult to deter.").

243. See *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) (observing that "hurt feelings" are not compensable under the Copyright Act); *Stern v. Does*, 978 F. Supp. 2d 1031, 1050 (C.D. Cal. 2011); *Kelley v. Universal Music Grp.*, No. 14 Civ. 2968(PAE), 2015 WL 6143737 (S.D.N.Y. Oct. 19, 2015). *But see* *Smith v. NBC Universal*, 06 Civ. 5350 (SAS), 2008 U.S. Dist. LEXIS 13280, at *7 (S.D.N.Y. Feb. 22, 2008) ("I conclude that damages for emotional harm may be recovered in a copyright action, though only where such harm is foreseeable.").

244. The Visual Artists Rights Act (VARA) gives rights of attribution and integrity to certain visual artists. Such moral rights might seem to open the door for emotional distress and reputational damages. However, VARA provides damages under "the same standards that the courts presently use" under traditional copyright law rendering emotional damages unrecoverable. H.R. Rep. No. 101-514, at 21–22 (1990). See *Cohen v. G&M Realty*, 320 F. Supp. 3d 421, 422 n.18 (E.D.N.Y. 2018) ("Plaintiffs contend that they are entitled to damages for emotional distress. Under traditional copyright law, plaintiffs cannot recover such damages."). *But see* *Hanrahan v. Ramirez*, No. 2:97-CV-7479 RAP RC., 1998 WL 34369997, at *6 (C.D. Cal. Jun. 3, 1998) ("Plaintiff's request for \$100,000 in actual damages to reflect the loss of reputation and emotional distress is excessive, although some relief is certainly warranted.").

245. *Núñez v. Rushton*, 299 F. Supp. 3d 1216 (D. Utah 2018).

246. *Id.* at 1226 ("Núñez does not argue that the infringement caused the sales of her existing novels to suffer. Nor does Núñez contend that Rushton obtained any ill-gotten gains that must be disgorged because Rushton never sold any copies of her infringing novel to the public. Instead, Núñez alleges that Rushton's copyright infringement caused her mental anguish.").

247. *Id.* at 1225. It is unclear how this lack of economic injury would play out in a fair use analysis, as the court held that the defendant had waived the affirmative defense.

existing case law and commentary, the court looked to the purpose animating the statute to decide whether actual damages under the Copyright Act included emotional distress. Unlike the Fair Credit Reporting Act or the Equal Credit Opportunity Act, both of which allow emotional distress damages, “[n]o such purpose to protect consumers, prevent discrimination, or eradicate racial prejudice can be attributed to the Copyright Act.”²⁴⁸ The purportedly limited policy reach of the copyright laws accordingly limited actual damages to redressing economic injuries.

This does not mean, however, that noneconomic injuries are actually off the table. In *Smith v. NBC Universal*,²⁴⁹ for example, the plaintiff was attacked by an orca whale at Sea World in 1987.²⁵⁰ The attack was video-recorded, and the author of the video gifted all rights to Smith while he was in the hospital recovering. Smith granted licenses to two news organizations in 1987 and 1988 to help fund his litigation against Sea World, but he then spent the next two decades trying to prevent other news and entertainment programs from airing the video.²⁵¹ In his successful lawsuit against NBC Universal, Smith “claim[ed] that the broadcast of the Video caused him emotional harm, and [he] seeks to redress such harm.”²⁵² Smith admitted that he “has no plans to market the Video and it is not immediately clear that defendants profited substantially from their violation of Smith’s copyright.”²⁵³ The court rejected Smith’s request for emotional distress damages, but concluded that “Smith can prove his damages in [] other ways” such as by demonstrating “the fair market price that defendants would have had to pay had they attempted to license the Video.”²⁵⁴ Smith had no desire to ever license his video ever again, but he was entitled to monetary relief in the amount he would be able to obtain should he change his mind. Smith could seek compensation for an economic injury he would never in fact experience, “[b]ut he cannot argue that statutory damages should be based on the emotional harm he suffered as a result of the broadcast.”²⁵⁵ As a result, the damages phase of the trial focused on calculating a market-based harm that Smith had expressly

248. *Id.* at 1228–29.

249. 524 F. Supp. 2d 315 (S.D.N.Y. 2007).

250. *Id.*

251. *Id.*

252. *Smith v. NBC Universal*, No. 06Civ.5350(SAS), 2008 U.S. Dist. LEXIS 13280, at *4 (S.D.N.Y. Feb. 22, 2008).

253. *Id.*

254. *Id.* at *9.

255. *Id.*

declared had nothing to do with his motivations in bringing his lawsuit.²⁵⁶

Market gibberish accordingly has seeped into all stages of copyright litigation. If a plaintiff seeks, for example, to protect their sexual privacy or stop the spread of racist spiritual texts, liability will hinge upon some history of licensing or some plausible market demand that a court can slide into a narrative of economic incentives and harm. If the same plaintiff seeks to enjoin the disputed use of a copyrighted work, they must continue to tell a tale about irreparably damaged market opportunities. And if they seek compensation for privacy or dignitary invasions, they must be able to place some dollar amount on the materials they never intend to sell.

The rhetoric and the reality of copyright law ultimately fail to match.²⁵⁷ Courts repeatedly insist that copyright law does not protect privacy, or redress emotional harms, or “coddle artistic vanity,”²⁵⁸ or take sides in ideological disputes. This, ultimately, is just not true. Copyright law is enmeshed in a diverse range of contemporary social and political disputes, and the large body of cases surveyed above refutes any claim to the contrary. By engaging in market gibberish, courts are able to avoid confronting the actual role of copyright law in contemporary society while doing a tremendous amount of normative work under the radar. Courts, scholars, and advocates may *want* copyright law to stay within its traditionally narrow lane of commercial authorship and publishing, but the system’s coherence, predictability, and fairness require acknowledging the work that copyright jurisprudence is actually doing. Copyright’s economic framework frequently contorts to redress a broad range of noneconomic concerns, but it does not do so consistently, and it does not do so for everyone.

ii. Economics and Emotions in Copyright

The previous Part demonstrated serious flaws and inconsistencies in courts’ analyses of copyright markets, but this is not the first Article to critique how courts assess the impact of a disputed use on a copyright owner’s actual or potential markets. In particular, numerous scholars have critiqued the speculative, incomplete, and circular nature of courts’ analyses of the fourth fair use—the “market effects”—factor. The analysis

256. *Id.* at *9–20; see *Smith v. NBC Universal*, 524 F. Supp. 2d 315, 330 (S.D.N.Y. 2007) (“Smith has indicated that he suffered no economic damage.”).

257. See Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996) (arguing that the rhetoric of economic incentives and authorial labor have expanded copyright protections far longer and broader than either of those narratives requires).

258. *Salinger v. Colting*, 607 F.3d 68, 81 n.9 (2d Cir. 2010).

is speculative in that courts sometimes find a harm to an alleged market without actual proof of lost sales or concrete plans to enter a derivative market.²⁵⁹ The analysis is incomplete in that it only considers the market “harm” from the disputed use, and not the potential market “help” that might come from increased publicity or wider access to the work.²⁶⁰ And the analysis is circular in that market harm can be shown based upon the loss of a license fee from the disputed use, when such a license is only needed if a court finds the disputed use to be infringing.²⁶¹ Many of the cases above exhibit these traits—they recognize markets that are highly unlikely to ever form,²⁶² they disallow uses that might enhance the marketability of a work,²⁶³ or they base market harm entirely on the defendant’s failure to pay.²⁶⁴

The above cases, however, exhibit another set of traits that tends to be

259. See, e.g., Bohannon, *Harmless Speech*, *supra* note 8, at 1098 (“[N]either the copyright statute nor the case law currently requires adequate proof of harm to avoid or minimize conflicts with the First Amendment.”); Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 657 (2006) (“When it comes to derivative markets, owning a copyright means having the exclusive right to use the work in markets that one chooses to enter or not, to use the work in ways both foreseen and unforeseen. With enough imagination, judges can find harm in almost any use, however remote from the market for the original work.”). For an example of such speculative analysis, see *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2d Cir. 1998).

260. See, e.g., Fagundes, *supra* note 8, at 362 (“[R]ather than interpret the Copyright Act’s factor-four inquiry as the statute apparently mandates—to include consideration of all economic effects of the use, good and bad alike—courts (as well as commentators and practitioners) . . . have interpreted it to require consideration only of market harm, not market help.”); Jeanne C. Fromer, *Market Effects Bearing Upon Fair Use*, 90 WASH. L. REV. 615, 629 (2015) (arguing that “market benefits ought to be considered as relevant market effects alongside market harms”). For an example of a case excluding market benefits, see *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (“Any allegedly positive impact of defendant’s activities on plaintiffs’ prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs’ copyrighted works.”).

261. See, e.g., Bohannon, *Harmless Speech*, *supra* note 8, at 1099 (“[T]here is a potential for circularity in the definition: a copyright holder can always argue that the defendant’s use caused her harm (and therefore is not fair) because the defendant could have paid her a license fee for any unauthorized use; yet, if the use is deemed fair, then no payment is required.”); Lemley, *supra* note 19, at 189 (“[C]ourts began to count as market harm not just actual lost sales of the copyrighted work or plausible derivative works, but also the loss of money they supposed users would pay to license the right to use the copyrighted work.”); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1, 39 (1997) (“Consideration of the permission fees allegedly ‘lost’ in determining whether a use is a fair use is inappropriate because no fees are required unless the use is not a fair use.”).

262. See *supra* notes 219–228 and accompanying text (discussing *Henley v. DeVore*, 733 F. Supp. 2d 1144 (C.D. Cal. 2010)).

263. See *supra* notes 238–241 and accompanying text (discussing *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010)).

264. See *supra* notes 205–212 and accompanying text (discussing *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110 (9th Cir. 2000)).

overlooked in scholarly critiques. Case law addressing dubious market interests is not uniformly speculative, incomplete, or circular; it is selectively so. The trouble with market gibberish is not just that each decision's analysis is internally flawed. The larger problem is that courts sometimes deploy market gibberish to allow a noneconomic claim to proceed, but then refuse to extend the same analysis to claims motivated by nearly identical interests. Courts are nowhere near uniformly charitable in their willingness to contort market interests in favor of a finding of infringement—they instead do so when an often-unstated mix of policy concerns point in favor of infringement and the plaintiff can manufacture some plausible story of economic harm. When the policy balance points in another direction—for example, when the defendant is a news organization—courts cut the market gibberish and scrutinize the purported economic harm quite closely. Accordingly, it is important both to investigate the policy choices behind courts' invocation of market gibberish—i.e. *why* did the court bend market rhetoric in plaintiff's favor—and to ask what sorts of parties are able to take advantage of it—i.e. *who* can most plausibly tell a story of an economic interest in copyright protection.

Because of the opacity and selectivity of market gibberish, this Article diverges with the vast majority of previous scholarly critiques. Most scholars have responded to speculative, incomplete, and circular reasoning by doubling down on the role of markets in copyright law—they argue that courts should more rigorously screen copyright assertions to make sure that the copyright owners' financial interests have been harmed and accordingly that their economic incentives have been impacted by unauthorized copying. Numerous scholars have argued that copyright owners must empirically demonstrate that the defendant financially harmed them in a way that was reasonably foreseeable.²⁶⁵ If

265. See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1605 (2009) (“The requirement of ‘foreseeable copying’ would ask *whether the defendant’s use (that is, copying) of the protected work was foreseeable to the plaintiff—in form and purpose—when the work was created.*” (emphasis in original)); Christina Bohannon, *Copyright, Foreseeability, and Fair Use*, *supra* note 8, at 1025 (“At the very least, the *Dr. Seuss* court should have required the plaintiff to provide concrete evidence of market harm, showing that it has licensed such works in the past or that it had immediate plans to do so. If the plaintiff could not provide such evidence, the use should have been deemed fair.” (emphasis in original)); Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1255 (2014) (arguing copyright should never allow an infringement claim to succeed absent market substitution because “a use that does not interfere with the plaintiff’s market in some way generally does no relevant harm.”); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1188 (2010) (recommending “that copyright owners be required to

there is no history of exploiting a particular market, and no reasonably concrete plan to do so, then the disputed use generally should fall outside the boundaries of copyright infringement. Several other scholars have further argued that courts should consider both market harm and market “help,” i.e. the total effects of the disputed use on plaintiff’s economic interests.²⁶⁶ If the use does not negatively impact, or if it even improves, the market value of the copyrighted work, then this positive impact should weigh in favor of fair use. Both of these approaches—ratcheting up the empirical burden on plaintiffs and considering the full market impact of the disputed use—are designed to better exclude abusive, censorial, or otherwise illegitimate interests from the copyright system.²⁶⁷ Although these approaches seek a more empirically-grounded and holistic assessment of the effects of defendant’s use, the focus nonetheless remains on the “pecuniary impacts” on the copyright owner.²⁶⁸

Although any alleged economic harm absolutely should be empirically grounded, doubling down on markets alone is unlikely to make the copyright system fairer or more coherent. The remainder of this Part explains why. First, a more rigorous screening of market interests might have the effect of narrowing the total reach of copyright law, but it is unlikely to do so in a way that is distributively fair. Second, the distinction between market and nonmarket interests poorly tracks the underlying

prove commercial harm when they make claims of infringement other than those involving exact or near-exact copies that operate in the same market as the allegedly infringed work”).

266. See Fagundes, *supra* note 8, at 386 (arguing that courts should consider “all information regarding the pecuniary impact of the defendant’s use into the evaluation of the final fair use factor.”); Fromer, *supra* note 8, at 618 (“[C]ourts should focus on market benefit alongside market harm in assessing fair use. A full-bodied assessment of the effect of a defendant’s use on a work—not merely its harmful effects—gets courts to look at all effects once they surpass a specified degree of speculativeness, be they licensing harms or sales benefits.”).

267. See, e.g., Tehranian, *The New Censorship*, *supra* note 214, at 290 (“[C]ourts could deem a defendant’s actions protected under the First Amendment and immunized from copyright liability as a matter of law where: (1) the plaintiff lacks a legitimate economic motivation to preserve an established market for the licensing of its copyrighted works; and (2) the defendant’s use of the work at issue advances the expression of basic facts or comments on matters of public concern.”)

268. See Bohannon, *Copyright, Foreseeability, and Fair Use* *supra* note 8, at 987 (“Consistent with copyright’s purpose, copyright harm should be limited to profits that would be likely to affect incentives to create or distribute copyrighted works”); Bohannon, *Harmless Speech*, *supra* note 8, at 1156–57 (“[C]opyright harm clearly includes the harm of market substitution, where the defendant’s use of plaintiff’s copyrighted material actually supplants the market for the copyrighted work in a way that is likely to decrease economic incentives to create or distribute the work. By contrast, the First Amendment severely limits judicial recognition of nonmarket harms.”); Fagundes, *supra* note 8, at 386; Fromer, *supra* note 8, at 642 (“Market effects are irrelevant if they are empirically implausible, and market effects ought to be excluded unless they are copyright-relevant.”); Lemley, *supra* note 19, at 188 (“[W]hat the doctrine really cares about [is] whether the use substitutes for the copyrighted work and so is likely to cost the copyright owner a sale.”).

concerns about abuse and censorship in the copyright system. Third, segregating economic and emotional interests downplays the needs and experiences of women, minorities, and other marginalized groups.

A. *Distributive Consequences*

First, a copyright system with a firm, exclusive commitment to market interests is likely to most benefit those with an undisputed licensing history and reasonable prospects of future revenue. In other words, doubling down on markets further channels copyright protections to celebrity authors and corporate rightsholders.²⁶⁹ In the cases surveyed above, plaintiffs are able to trigger market gibberish where they had a clear track record of successfully profiting off their work and accordingly could tell a plausible story of market harm. These include plaintiffs such as Don Henley, J.D. Salinger, and Bret Michaels. Whether they are asserting copyright in order to recoup lost profits or in opposition to uses they dislike, these parties have an economic track record they can wield to their strategic advantage.²⁷⁰ The “choice whether to publish”²⁷¹ a work in a particular context can almost *always* be framed in terms of a rational market choice, and the “right to change his mind”²⁷² about when to permit a use is fairly easily reframed as a “marketing tool.”²⁷³ In other words, famous and wealthy individuals can more easily cloak themselves in business narratives in order to vindicate personal interests.²⁷⁴ Everyday

269. See Rebecca Tushnet, *Fair Use's Unfinished Business*, 15 CHI.-KENT. J. INTELL. PROP. 399, 409 (2016) (“Another lesson that might be taken away from *Garcia*, however, is that American copyright law hesitates to threaten large corporations.”).

270. See Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C.L. REV. 927, 987 (2016) (“Therefore, digital assets that may hold noncommercial but desired information about a decedent’s life would not be protected on either the grounds of privacy or of copyright unless the documents, emails, or photos had some kind of commercial value a decedent’s family wished to control by asserting the decedent’s copyright.”).

271. *Lerma IV*, No. 95-1107-A, 1996 U.S. Dist. LEXIS 15454, at *21 (E.D. Va. Oct. 4, 1996).

272. *Katz v. Google Inc.*, 802 F.3d 1178, 1184 (11th Cir. 2015) (quotation omitted) (quoting *Monge v. Maya Magazines Inc.*, 688 F.3d 1164, 1181 (9th Cir. 2012)).

273. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287, 1314 (11th Cir. 2008).

274. Similarly, businesses are able to cloak themselves in some of the author-centered interests animating the cases surveyed above in order to protect their purely economic interests. See, e.g., *Castle Rock Entm’t v. Carol Publ’g Grp.*, 150 F.3d 132, 145–46 (2d Cir. 1998) (“Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on *Seinfeld*, such as by creating and publishing *Seinfeld* trivia books . . . the copyright law must respect that creative and economic choice.”). *Video Pipeline v. Buena Vista Home Entertainment*, 342 F.3d 191 (3d Cir. 2003) (rejecting argument that unauthorized display of movie trailers did not cause market harm because no one had ever paid Disney to watch those trailers, and noting that the value of a copyrighted work “need not be limited to monetary rewards; compensation may take a variety of

individuals, or struggling artists, by contrast, are far less likely to be able to invoke a plausible market interest to achieve the same personal ends.²⁷⁵

Doubling down on market commitments in copyright law also particularly benefits celebrity or corporate defendants. If courts decide to give greater weight to the total market effects of a disputed use, and ignore any noneconomic interests involved in the dispute, well-known defendants can employ one of two strategies. They first can argue that they brought valuable attention to a previously unknown work, and therefore that they enhanced the value of that work.²⁷⁶ For example, after Elon Musk used a cartoon drawing of a “farting unicorn” in Tesla products and promotions—and the artist objected—Musk responded, “[h]e can sue for money if he wants, but that’s kinda lame. If anything, this attention increased his mug sales.”²⁷⁷ Beyoncé similarly defended her prominent sampling of a deceased artist’s YouTube videos; she argued that her (unattributed) use “‘helped (or perhaps even created) that market’ for Anthony Barré’s works.”²⁷⁸ Additionally, The Four Seasons band successfully invoked this “market creation” theory to justify their unattributed, uncompensated use of an unpublished manuscript when developing the musical, *The Jersey Boys*.²⁷⁹

Celebrity defendants also might argue that there is no market harm from their use because they have access to a market that is practically off-

forms.” (quoting *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1119 (9th Cir. 2000)); see generally Sterk, *supra* note 257, at 1198 (“The beneficiaries of expanded copyright doctrine often are not struggling authors but faceless corporate assignees well-versed in the ways of the business world.”).

275. See generally Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous*, 80 U. CHI. L. REV. DIALOGUE 88 (2013) (comparing favorable outcome for famous author in *Salinger v. Colting* with the less favorable outcomes for lesser-known artists like the plaintiff in *Cariou v. Prince*). Religious organizations, which regularly mix economic and spiritual concerns, remain in an ambiguous place within more rigorously policed markets. Some of the purported economic interests in the above cases are quite clearly speculative or disingenuous, see *Worldwide Church of God*, 227 F.3d 1110 (planning to publish annotated version of racist book), while other purported interests, such as with certain Scientologist texts, might be more bona fide.

276. See Fagundes, *supra* note 8, at 379 (“Infringement can, however counterintuitively, serve as a source of publicity and drive up demand in a way that more than makes up for the lost sales of some copies.”).

277. See Sam Levin, *Elon Musk Drawn Into Farting Unicorn Dispute With Potter*, THE GUARDIAN (June 27, 2018), <https://www.theguardian.com/technology/2018/jun/27/elon-musk-farting-unicorn-mug-cartoon-tom-edwards> [<https://perma.cc/KN5J-MAKW>].

278. *Estate of Barré v. Carter*, 272 F. Supp. 3d 906, 917 (E.D. La. 2017).

279. See *Corbello v. DeVito*, 262 F. Supp. 3d 1056, 1068-69 (D. Nev. 2017) (“The evidence at trial indicated that before the [Jersey Boys] Play debuted, the Work had no market value If anything, the Play has increased the value of the Work.”); Fagundes, *supra* note 8, at 382 (observing that unauthorized use can “reincarnate” a work “by creating visibility for a work that has fallen out of (and, perhaps, was never even in) the public eye”).

limits to the copyright owner. For example, the world-famous artist Richard Prince established fair use over his extensive appropriation of photographer Patrick Cariou's work because Prince's work "appeal[ed] to an entirely different sort of collector" than did Cariou's.²⁸⁰ Prince's work sold for millions of dollars at elite galleries, and hordes of celebrities (including Beyoncé) attended his gallery openings; Cariou, by contrast, had earned only \$8,000 in royalties and had only sold four prints from his photography book, to acquaintances.²⁸¹ Musk, Beyoncé, and Prince all likely profited significantly from their use of relatively obscure works,²⁸² and a market-oriented approach to fair use allows them to say either that they did the copyright owner a favor, or that the copyright owner never had a chance to compete in the first place. If any of these uses were ultimately deemed infringing,²⁸³ it would have to rest upon some additional moral or cultural concern and not the logic of market harm or substitution. Doubling down on markets accordingly redounds to the benefits of those with market power.

B. *Normative Mismatch*

Second, in addition to exacerbating distributive divides in copyright, doubling down on markets also fails to adequately root out abusive or censorial copyright assertions. As much as copyright courts and scholars might try to segregate legitimate market interests from illegitimate nonmarket interests, this segregation often poorly maps onto the

280. *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013).

281. *Id.*

282. Advocates of the "market help" approach put forward examples such as online filesharing and fan fiction as examples where the defendants use could increase the value of the copyrighted work, which might make fair use fairer for everyday users of intellectual property. *See* Fagundes, *supra* note 8, at 380–85. What these users probably still cannot do, however, is profit off their use, as they are appropriating from an author with a dominant market position. *See id.* at 387 ("Imagine that a small, rogue book publisher printed a thousand unauthorized copies of a major publishing house's current bestselling novel, and that the rogue publisher then sold all the copies at cut-rate prices. Factor four would still favor a finding of infringement even if the court used a net market effects approach.").

283. Musk quickly settled his dispute. *See Elon Musk Reaches New Deal with Artist in 'Farting Unicorn' Image Row*, INDEPENDENT REPORTER (July 21, 2018, 10:29 PM), <https://www.independent.co.uk/news/world/americas/elon-musk-tesla-artist-potter-farting-unicorn-mug-image-tom-edwards-a8458096.html> [<https://perma.cc/T48X-A2W5>]. Beyoncé settled her dispute after a court denied her motion to dismiss. *Beyoncé Settles One Lawsuit, Gets Hit with Another over "Formation"*, THE FASHION LAW (Jan. 31, 2018), <http://www.thefashionlaw.com/home/beyonc-settles-one-lawsuit-gets-hit-with-another-over-formation> [<https://perma.cc/43SQ-TMC3>]. The Second Circuit found that Richard Prince had made fair use of twenty-five of the thirty works in dispute as a matter of law. *Cariou*, 714 F.3d at 712. The parties settled as to the remaining five works. Brian Boucher, *Landmark Copyright Lawsuit Cariou v. Prince is Settled*, ART IN AMERICA (Mar. 18, 2014), <https://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/> [<https://perma.cc/BZL4-DHVS>].

underlying concerns for system abuses. On the “legitimate” side, courts and scholars largely agree that an author’s “right of first publication” is an important economic component of copyright protection, justifying at least some heightened protection for unpublished works as against putative fair uses.²⁸⁴ However, this “unpublished” category includes at least three very different categories of works: early drafts of what will eventually be mass publications; completed works subject to often-lucrative early- or pre-publication agreements; and works that the author never intends to see the light of day.²⁸⁵ The first two categories can be justified by economic interests; the third requires market gibberish.²⁸⁶ Nonetheless, courts allow the three categories of works to blend,²⁸⁷ permitting authors of entirely private works—like sex tapes or private correspondences—to control the dissemination of works based upon a questionable analogy to other unpublished works.²⁸⁸ As Professor

284. See, e.g., Bohannon, *Harmless Speech*, *supra* note 8, at 1157 (“Courts should view uses of unpublished works very skeptically, maintaining the current rule that such uses will ordinarily be deemed infringing. In all other cases, courts should recognize harm only when copyright holders suffer monetary loss of a nature that is likely to decrease ex ante incentives to create or distribute copyrighted works.”); Lee, *Suspect Assertions*, *supra* note 48, at 385 (“Other uses of copyright for privacy beyond the right of first publication are suspect, however.”); PAUL GOLDSTEIN, 2 COPYRIGHT PRINCIPLES, LAW AND PRACTICE 191–92 (1989) (arguing that copyright protection should generally extend only to holders seeking monetary exploitation of the work, while observing that privacy interests might receive some deference in unpublished works).

285. See, e.g., William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 J. LEGAL STUDIES 79 (1992); O’Neill, *supra* note 14, at 434 (“At least three different interests underlie the right of first publication: privacy, creative control, and commercial exploitation of prepublication rights. Which is involved in a given case depends on the kind of writing involved and the author’s intention in regard to the writing.”).

286. O’Neill, *supra* note 14, at 427 (“By focusing on the right of first publication, including an irrelevant concern for creative control, the Court nearly equates creative control over the text with control over marketing strategies. In so doing, the Court places a ‘penumbra’ of personal privacy and autonomy over a commercial conflict between two rival journals.”); *id.* at 434 (“Had the [C]ourt acknowledged these various interests, it would have recognized that *Harper & Row* had little relevance to the *Salinger* case.”).

287. See, e.g., Newman, *supra* note 47, at 468 (“Significantly, this case had very little to do with privacy and a great deal to do with protecting the economic interests of authors and their publishers. Harper & Row did not go to court to protect the privacy of President Ford from the intrusion of *The Nation* magazine.”); Diane Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 15, 31–32 (1990) (closely analyzing *Harper & Row v. The Nation* and observing that “the Court may be protecting the right of first publication for reasons other than simply maintaining the incentive to create.”).

288. See, e.g., *Michaels v. Internet Entm’t Grp. (Michaels I)*, 5 F. Supp. 2d 823 (C.D. Cal. 1998); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987). When courts are looking for reasons to find fair use, however, they will sometimes draw a distinction between the scooping of prepublication copies, as in *Harper & Row*, which cause demonstrable financial loss, and the publishing of private documents, which do not. See *Michaels v. Internet Entm’t Grp. (Michaels II)*, 48 U.S.P.Q.2D (BNA) 1891 (C.D. Cal. 1998); *Lerma II*, 908 F. Supp. 1353, 1355, 1357 (E.D. Va. 1995).

Shyamkrishna Balganesch emphasizes in a forthcoming Article, common law rights to control the first publication of a work quite explicitly reflected concerns with an author's privacy, autonomy, and dignity.²⁸⁹ The contemporary emphasis on the primacy of market interests, however, has blurred the diverse range of economic and noneconomic interests embedded in the legitimately robust protection for unpublished works.

On the "illegitimate" side, by creating a binary between market and nonmarket interests, scholars too often lump all nonmarket interests together, regardless of their legitimacy. Certain interests that are almost undoubtedly illegitimate—e.g. suppressing negative reviews online or keeping incriminating evidence out of court—are conflated with important interests that copyright law may wish to vindicate—e.g. family privacy or sexual autonomy.²⁹⁰ What can result is a false binary between economic interests and censorship.²⁹¹ If all that copyright cares about is whether a particular dispute can be assimilated to its traditional myth of economic incentives, then there is no reason to engage with—and distinguish between—the wide diversity of concerns coded into a copyrighted work.²⁹² This laser-focused attention on markets may provide surface-level coherence to copyright law, but it both maps poorly onto

289. See Balganesch, *Censorial Copyright*, *supra* note 63, at 4 ("Publication, which for long had been seen as copyright's principal analytical device for protection, is routinely conceived of in entirely commercial terms. In so doing, this exclusive focus on the commercial aspects of publication ignores the complex set of non-economic factors that motivate an individual's decision of whether, when, and how to embrace the identity and title of 'author' . . ."); cf. Patrick R. Goold, *The Lost Tort of Moral Rights Invasion*, 51 AKRON L. REV. 51 (2017) (describing how copyright courts until the 1980s centuries often protected an author's "moral rights" in attribution and the integrity of their work at first publication).

290. See, e.g., Buccafusco & Fagundes, *supra* note 6, at 2452–53 (grouping together cases involving private letters, political rallies, "anti-Muslim rants," angry widows, and family-friendly versions of films as "rooted in motivations unrelated to preserving owners' financial interests in their works" and that may "tend to undermine copyright's goal of optimizing creative production."); Fromer, *supra* note 52, at 557–65 (observing a similar grouping of cases as those where "the plaintiff appears to be interested in preventing the defendant from revealing, or at least further proliferating, information about him or her. The plaintiff does not seem to worry about being harmed in the marketplace for his or her copyrighted work, which is the utilitarian motivator for the copyright incentive."); see generally Goldman & Silbey, *supra* note 51 (critiquing both the suppression of negative business reviews and Cindy Garcia's privacy interests as creating illegitimate "memory holes").

291. See, e.g., McIntyre, *supra* note 150, at 75 ("[T]here are cases in which the author is not at all concerned with the commercial value of his or her work In these 'private censorship' cases, copyright enforcement is far less compelling.").

292. See Chon, *supra* note 48, at 374–75 ("Under closer scrutiny, the analogy between the privacy interests of the NCP [nonconsensual pornography] victim and of those who might suppress valid dissent does not hold up. NCP is different from the other scenarios that Judge McKeown and Fromer rightly criticize, because of the pre-existing confidential, and indeed intimate, sexual relationship between two partners, and the desire of one of those partners to keep the work private pursuant to their original agreement.").

copyright's jurisprudential past and turns its back on the potential for copyright to address evolving social needs.²⁹³

C. *Structural Effects*

Third, by distinguishing between economic and personal interests, and delegitimizing the latter, copyright courts and scholars risk falling prey to a separate spheres ideology long critiqued by feminist scholars. Many areas of law have attempted to strictly separate the spheres of economic and intimate activity—e.g. contract law concerns business activity and domestic relations law deal with emotional support and caregiving. Legal scholars and economic sociologists have pushed back against this division, both empirically and normatively.²⁹⁴ Professor Viviana Zelizer's body of work demonstrates that the supposedly hostile worlds of markets/money and intimacy/emotions just do not map onto the actual experience of either realm. Business relationships are deeply embroiled with emotional connections to coworkers and to the work itself, and intimate relations are often the subject of complex financial negotiations.²⁹⁵

Moreover, by ignoring this real-world blending of economics and intimacy, and generally prioritizing economic over emotional concerns, various aspects of our legal system devalue and undercompensate harms experienced by women and other individuals with historically marginalized positions in the public sphere.²⁹⁶ For example, domestic

293. See Gilden, *supra* note 11, at 110.

294. See, e.g., Jill E. Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 163 (2013) ("Family law scholars and legal historians have paid extensive attention to the courts' refusal to bring contract law into the domestic sphere and this refusal's historical effect of undervaluing the contributions of women."); HENRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE* (2012) (showing that family caregiving is often motivated by a mix of ethical, emotional, and material concerns).

295. See generally VIVIANA ZELIZER, *ECONOMIC LIVES: HOW CULTURE SHAPES THE ECONOMY* (2010); VIVIANA ZELIZER, *THE PURCHASE OF INTIMACY* (2005); Martha Ertman, *For Both Love and Money: Viviana Zelizer's 'The Purchase of Intimacy'*, 34 L. & SOC. INQUIRY 1017 (2009).

296. See Hasday, *supra* note 294, at 517 ("[L]egal efforts to mark the specialness of intimate relationships by limiting or prohibiting economic exchange within them appear to have systematically adverse distributional consequences for women and poorer people, maintaining and increasing distributive inequality."); Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 854–55 (1997) ("The value judgments and assumptions fueling the attack on nonpecuniary loss damages are particularly problematic for women, because many aspects of women's injuries are more likely to be redressed as nonpecuniary loss."); Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL'Y & L. 183, 192 (2007) ("Dualism thus sets the stage for the supposedly inferior, feminized category to be given a status that allows domination and exploitation by members of the privileged category; it is a social and rhetorical

labor is rarely compensated,²⁹⁷ contractual relationships between men and women in intimate relationships are often circumscribed,²⁹⁸ and statutory limits on emotional distress damages disproportionately limit tort awards for women.²⁹⁹ Moreover, due to ongoing under-compensation and underrepresentation in wage labor, finance, and public sphere economic activities, women typically receive substantially less than men under standard techniques of measuring damages.³⁰⁰ By erecting a barrier between the economic and emotional arenas of life, and emphasizing the primacy of the economic sphere, the resulting doctrines in effect prioritize the needs of those individuals stereotypically associated with the economic sphere and turn their back on the needs of individuals stereotypically associated with the emotional.³⁰¹

Copyright law appears to share these priorities. Courts and scholars “casually regard[] copyright infringement as a mere economic injury with narrow moral valence,” ignoring the often complex psychological and social attachments surrounding a work.³⁰² By only expressly recognizing an author’s economic interest in a work, copyright owners that are expressly driven by noncommercial interests are less able to invoke

strategy that ‘naturalizes domination.’” (quoting ROSEMARY RADFORD RUETHER, *NEW WOMAN NEW EARTH: SEXIST IDEOLOGIES AND HUMAN LIBERATION* 189 (Myra E. Barrer ed., 1975)).

297. See, e.g., Hasday, *supra* note 294, at 518–19. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 *YALE L.J.* 1073 (1994).

298. See, e.g., Matsumura, *supra* note 294, at 177–78.

299. See, e.g., Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 *EMORY L.J.* 1263, 1266 (2004) (“[J]uries consistently award women more in noneconomic loss damages than men, and that the noneconomic portion of women’s total damage awards is significantly greater than the percentage of men’s tort recoveries attributable to noneconomic damages. Consequently, any cap on noneconomic loss damages will deprive women of a much greater proportion and amount of a jury award than men.”).

300. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 *U. PA. L. REV.* 463, 464 (1998) (“Most empirical studies indicate that women of all races and minority men continue to receive significantly lower damage awards than white men in personal injury and wrongful death suits.”).

301. *Id.* at 469 (“Emotional harm and nonpecuniary loss are devalued because of their cognitive association with women, and the harm that women suffer is more likely to fall into one of the disfavored ‘female’ categories. On a material level, operation of the vicious cycle thus perpetuates lower awards for women because their losses are more likely to rank lower on the hierarchy.”); see also Hila Keren, *Valuing Emotions*, 53 *WAKE FOREST L. REV.* 829, 846 (2018) (“A vicious cycle has been created where emotional harms are undercompensated due to their association with women, and ‘feminine’ injuries are in turn classified as emotional even when they have a salient physical aspect.”).

302. See Buccafusco & Fagundes, *supra* note 6, at 2461.

copyright law to prevent the spread of a particular work.³⁰³ Although most authors are motivated at least in part by noneconomic concerns,³⁰⁴ women are likely disproportionately excluded by copyright's market commitments.³⁰⁵ This is because women are disproportionately likely both to turn to copyright to combat revenge porn³⁰⁶ and to actively participate in noncommercial creative communities.³⁰⁷ If women copyright owners wish to protect their sexual autonomy or to prevent commercial exploitation of their work, they must try to engage in market gibberish and disingenuously recast their interests in commercial terms, or they must actually commercialize their work in order to earn the respect of copyright law. To the extent that copyright law pushes authors towards commerciality, it undermines the complex socioemotional incentives in many creative communities and potentially reduces the quality of work produced in these communities.³⁰⁸ For authors who cannot invoke the blessings of the marketplaces, the effect of a threshold market/nonmarket binary is that work by women, minorities, and other economically marginal groups are available for the taking, for free, for whatever reason, by financially powerful individuals and organizations.³⁰⁹ Whoever first

303. See Rothman, *Commercial Speech*, *supra* note 86, at 2005 (“[T]here is no justification for treating creators who do not wish to commercially profit from their works as second-class copyright citizens who should have fewer rights to control uses of their works.”).

304. See, e.g., JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015).

305. See generally Carys Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U.J. GENDER SOC. POL'Y & L. 207 (2007); John Tehranian, *Copyright's Male Gaze: Authorship and Inequality in a Panoptic World*, 41 HARV. J.L. & GENDER (forthcoming 2018).

306. See, e.g., Danielle Citron & Mary A. Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

307. See, e.g., Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 301 (2007); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL'Y & L. 461, 468 (2006) (“Women have long been the dominant force behind fan fiction; like many types of creative work performed by women, their contributions are usually circulated among informal, decentralized, and largely unrecognized communities outside of the mainstream.”). Moreover, women were historically much less likely than men to own registered copyrights. See, e.g., Robert Brauneis & Dotan Oliar, *An Empirical Study of the Race, Ethnicity, Gender, and Age of Copyright Registrants*, 86 GEO. WASH. L. REV. 46, 73 (2018) (“The most striking statistic about authors' gender is that two-thirds of the authors in our study are male. At the same time, the data show a statistically significant time trend of increased female representation among authors of registered works.” (citations omitted)).

308. See Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497 (2008).

309. Chon, *supra* note 48, at 376–77 (“Copyright's other function to further Internet privacy is a response to this systematic valorization (and conversely devaluing) of certain legal and social categories. The assumptions that 'progress' can only be expressed through the smooth functioning of market mechanisms reinforces, and even magnifies, the structured nature of economic, gender and other forms of inequality.”); Tushnet, *My Fair Ladies*, *supra* note 266, at 291 (“Making fair game of

figures out how to make money off the images, texts, and sounds that circulate in our culture—be it Google, gossip magazines, Beyoncé, or Richard Prince—has free access to a vast swath of raw materials that other people care about deeply.³¹⁰

Looking back at the market gibberish cases through a gender-focused lens reveals several associations of legitimate market activities with male prerogatives and illegitimate personal interests with women. When J.D. Salinger seeks to protect his peculiarly strong desires for isolation, the Second Circuit makes sure to emphasize that this “highly regarded American novelist” was seeking to protect his “commercial interest”; the court was not seeking “to coddle artistic vanity or to protect secrecy, but to stimulate creation by protecting its rewards.”³¹¹ “Coddling” and “vanity”—two concepts stereotypically associated with women and motherhood—would undermine both the purposes of copyright law and, implicitly, the author’s masculine bona fides. Instead, copyright seeks to “stimulate creation”; in other words, copyright facilitates the potent virility of a great author.

When an author seeks to stop the publication of private documents, they have expressly disavowed any intention to sell, courts nonetheless frequently say that the author nonetheless has “the right to change his mind” and make money off the work in the future. The key phrase is “the right to change *his* mind,” which is used in at least fifteen reported copyright decisions; by contrast, in no reported case has the court extended “the right to change *her* mind” to women plaintiffs and in only one case has a court extended “the right to change *their* mind” (to the husband/wife pair in *Monge*).³¹² Although the dominance of male pronouns in these cases may arguably be attributable to their historically default use, the total absence of female pronouns at least suggests a greater willingness for courts to see markets interests when men serve as copyright plaintiffs. Through market gibberish, male litigants can choose whether and when to reveal deeply intimate moments of their lives, and courts will provide both legal redress and rhetorical cover for their

women in public is part of patriarchy.”). See generally Julie Cohen, *The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy*. PHIL. & TECH. 1 (2017) (“The information extracted from individuals plays an increasingly important role as raw material in the political economy of informational capitalism.”).

310. See Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355 (2016); Ertman, *supra* note 295, at 1030–31 (discussing *Moore v. Regents of University of California* and showing how anti-commodification concerns allowed for-profit researchers to have free access to Moore’s body).

311. *Salinger v. Colting*, 607 F.3d 68, 81 n.9 (2d Cir. 2010).

312. Westlaw Boolean search, July 25, 2018, of “Federal Copyright Cases” database (on file with author).

vulnerability. By contrast, when copyright owners express concerns with “spiritual harm” or “emotional distress” or “mental anguish”—injuries again typically associated with women—courts not so subtly nudge plaintiffs to reframe their injuries in purely market terms.³¹³

Copyright's market commitments—both doctrinal and scholarly—create a false and unfair division between economic and emotional interests in creative works. As much as courts and scholars seek to neatly divide legitimate market interests from illegitimate personal interests, the world ultimately is just not structured according to this binary, and the market gibberish cases reveal just how easily markets and emotions bleed into each other. To the extent that courts and scholars really, really want to limit copyright to pecuniary incentives—some conceptual messiness be damned—the overall effect is likely to be highly regressive. Individuals and entities with wealth, fame, and a recognizable stake in the market can access the copyright system for a tremendous range of reasons, so long as they tell a good story about how a disliked use affects their bottom line. Others are simply shut out, even though copyright law is often well-positioned to materially improve the lives of everyday people who create copyrighted works. Separating markets from emotions incentivizes market gibberish for those at the top, and leaves everyone else behind.

III. FROM MARKET GIBBERISH TO INTEREST TRANSPARENCY

As the previous Parts demonstrate, as much as copyright law tries to disclaim interests that are unrelated to an author's economic interests in a work, it is in fact constantly confronting noneconomic interests and deciding when such interests are outweighed by some countervailing value in the defendant's use. But because of copyright law's resolute attachment to market rhetoric, courts are rarely transparent about how they are weighing the complex mix of economic, cultural, political, and emotional interests before them.

This Article concludes with a modest proposal: quit the gibberish and show your cards. Rather than try to conjure a plausible market interest that would support infringement, or categorically exclude nonmarket interests when infringement seems like the wrong result, courts should expressly balance the policy concerns triggered by the defendants' use under the four fair use factors and allow evidence of emotional and psychological harms for purposes of injunctive and monetary relief. If the alleged harm is economic, then the rigorous screening of market effects is entirely

313. See *Smith v. NBC Universal*, 524 F. Supp. 2d 315, 330 (S.D.N.Y. 2007).

appropriate. But if the alleged harm is noneconomic, then harm should be considered on its own merit and not in terms of whether it can be forced into a market framework.

The following subsections discuss the statutory basis of this proposal and the merits of the proposal and concludes by addressing anticipated objections and areas for future research and refinement.

A. *Statutory Basis*

In previous work, I have demonstrated some comparative advantages of using copyright law to protect certain noneconomic interests compared with privacy torts, contracts, or criminal law.³¹⁴ This Article emphasizes that such an approach is fully supported by the Copyright Act. There is nothing in the statute that forecloses express consideration of a plaintiff's noneconomic interests; all arguments to the contrary are based upon policy-based concerns with censorship³¹⁵ or an argument that the constitutional imperative "[t]o promote the Progress of Science and the useful Arts"False"³¹⁶ requires strictly adhering to the economic incentives theory discussed in Part I.³¹⁷ Even if one strongly adheres to these understandings of the purposes of copyright law or disagrees with the normative thrust of this Article, such policy preferences are not rooted in the explicit text of the Copyright Act. The exclusive rights conferred by sections 102³¹⁸ and 106³¹⁹ state no limitations on the reasons why those rights may be asserted; they instead create entitlements with many of the qualities of a property right that, facially, may be asserted for any reason.³²⁰

The most prominent limitation on the rights conferred by the Copyright Act is the fair use doctrine. Codified in section 107, the fair use doctrine also does not require courts to consider only economic harms. Section 107

314. See Gilden, *supra* note 11.

315. See, e.g., McKeown, *supra* note 49.

316. U.S. CONST. art. I, § 8.

317. See Goldman & Silbey, *supra* note 51, at 9–10.

318. See 17 U.S.C. § 102(a) (1990) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

319. See 17 U.S.C. § 106 (2002) (providing the owner of copyright the exclusive rights to reproduce, prepare derivative works of, distribute, publicly perform, publicly display, and perform by digital audio transmission).

320. See also 17 U.S.C. § 201(d)(1) (1978) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").

requires courts to consider four factors, on a case-by-case basis, to determine whether a disputed use furthers an important policy goal of copyright.³²¹ None of the four factors set forth in the statute precludes consideration of noneconomic interests, and none of the decisions above point to the text of the Copyright Act as supporting a substantive barrier to entry for privacy-seeking plaintiffs like Cindy Garcia and Hulk Hogan.

The second fair use factor—“the nature of the copyrighted work”—can easily encompass the emotional and/or economic nature of the author’s investment in a work. As mentioned above, courts frequently address whether a work has been previously published under this factor, and the Supreme Court in *Harper & Row* expressly pulled from common law privacy concerns when addressing an author’s right to control first publication.³²² Although courts have squeezed a variety of different types of work into the category of “unpublished,” there is nothing in the text of the statute that forecloses court from expressly considering a broader set of attributes.³²³ Courts might ask whether the work was created in a sexual context, whether the work was secretly recorded, whether it contains private information, whether the work was inherited from the original author, or what if any financial resources were expended in its creation. Asking these questions would greatly illuminate the “nature” of the allegedly infringed work and transparently tee up the interests that the court is ultimately balancing.

The fourth fair use factor, which prompts courts to consider “the effect of the use upon the *potential market for or value of* the copyrighted work,” also places no such limit on considering noneconomic harms.³²⁴ Even though the fourth fair use factor is often shorthand as the “market harm” factor,³²⁵ “market” and “value” are stated in the disjunctive, meaning that a use can be assessed in terms of its impact within the marketplace or upon some other set of “values.” A few courts have acknowledged this disjunction in dicta—that “[t]he statute by its terms is not limited to market effect but includes also ‘the effect of the use on the *value* of the

321. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”(alterations in original) (quoting *Stewart v. Abend*, 495 U.S. 2017, 236 (1990)).

322. *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 554 (1985) (“It is true that common-law copyright was often enlisted in the service of personal privacy.”).

323. Cf. *Goldman & Silbey*, *supra* note 51, at 54 (observing that the “second fair use factor—typically given little love in fair use analyses—has a much more significant role to play when copyright claims implicate privacy concerns”).

324. 17 U.S.C. § 107 (emphasis added).

325. See *Fagundes*, *supra* note 8.

copyrighted work.”³²⁶ Moreover, the Supreme Court has expressly opened the door to this inquiry. It noted in *Sony Corp. of America v. Universal City Studios, Inc*³²⁷:

The copyright law does not require a copyright owner to charge a fee for the use of his works, and as this record clearly demonstrates, the owner of a copyright may well have economic *or noneconomic* reasons for permitting certain kinds of copying to occur without receiving direct compensation from the copier.³²⁸

Although the Court in other cases has emphasized the economic incentive of copyright, both case law and statute permit courts to expressly consider the noneconomic impact of putative fair uses.

And finally, the remedies provisions of the Copyright Act place no limitation on considering noneconomic injuries. With respect to injunctive relief, section 502 empowers courts to “grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”³²⁹ With respect to damages, section 504 provides that the “copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement” as well as “any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”³³⁰ “Profits” are almost certainly measured in terms of dollars,³³¹ but “actual damages” need not be.³³² Moreover, in lieu of actual damages and profits, the copyright owner may elect for statutory damages in an amount “the court

326. *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1119 (9th Cir. 2000) (emphasis in original) (quoting 17 U.S.C. § 107(4)). As discussed above, however, the court nonetheless proceeded to immediately engage in market gibberish as to the plaintiff’s market interest in deciding when if ever to release its founder’s racist texts. *See also* *Soc’y of the Holy Transfiguration Monastery v. Gregory*, 689 F.3d 29, 64 (1st Cir. 2012) (“[T]he Archbishop argues that the Monastery has not shown specific lost sales or profits as a result of the alleged infringement. But the fourth factor of the fair use inquiry cannot be reduced to strictly monetary terms. Statutory law expressly states that it considers not only the impact of a work’s use on the potential market, but also its effect on the ‘value of the copyrighted work.’” (emphasis in original) (quoting 17 U.S.C. § 107(4))).

327. 464 U.S. 417 (1984).

328. *Id.*, at 446 n.28 (emphasis added).

329. 17 U.S.C. § 502(a).

330. 17 U.S.C. § 504(b).

331. BLACK’S LAW DICTIONARY 1404 (10th Ed. 2014) (defining “profit” as “[t]he excess of revenues over expenditures in a business transaction”).

332. BLACK’S LAW DICTIONARY 471 (10th Ed. 2014) (defining “actual damages” as “[a]n amount awarded to a complainant to compensate for a proven injury or loss”); *see also* *Smith v. NBC Universal*, No. 06 CIV. 5350(SAS), 2008 WL 483604, at *1 (S.D.N.Y. Feb. 22, 2008) (“Section 504 of the Copyright Act employs the term ‘actual damages,’ and ‘[c]ourts and commentators agree it should be broadly construed to favor victims of infringement.’” (quoting *On Davis v. The Gap*, 246 F.3d 152, 164 (2d Cir. 2001))).

considers just” within a proscribed range.³³³ The Ninth Circuit has justified—albeit in a cursory manner—its ban on emotional distress damages because such damages would be too “subjective.”³³⁴ Even if this is a valid policy limitation on redressing noneconomic injury in copyright, its nonetheless a limitation without any express anchor in the governing statute.

B. *Merits*

A more explicit weighing of the parties’ economic and noneconomic interests in the disputed use would greatly improve the quality of fair use jurisprudence. Several scholars have recently emphasized the need for a more “behaviorally realistic” account of copyright litigation,³³⁵ but doing so requires cutting through the gibberish.³³⁶ Copyright law desperately needs an expanded vocabulary to capture why authors create works, why copyright owners litigate, and how copying affects others. In the past two decades, copyright law has made great strides in articulating the range of interests and values implicated by the *defendant’s* use of a copyrighted work. In the growing taxonomy of “transformative” uses,³³⁷ courts have recognized that unauthorized copying can provide important social commentary,³³⁸ parody a well-known work,³³⁹ facilitate internet research,³⁴⁰ and greatly enhance scholarly and historical works.³⁴¹ Scholars have further emphasized the autonomy-enhancing, identity-developing, and community-building work that unauthorized copying can

333. 17 U.S.C. § 504(c) (2012).

334. See *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) (“Although it is not hard to be sympathetic to his concerns, the market value approach is an objective, not a subjective, analysis. Consequently, Mackie’s subjective view, which really boils down to ‘hurt feelings’ over the nature of the infringement, has no place in this calculus.”).

335. See Buccafusco & Fagundes, *supra* note 6, at 2483.

336. Cf. Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 175 (2018) (“[T]he joint opinion [in *Casey*] fills the void with strategic bullshit: the authors wax philosophical even when the content of their message is unclear, argue that stare decisis ties their hands, cloak their line drawing with a non-existent justification, and try to seem more principled than perhaps they really are.”).

337. See generally Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

338. See *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

339. See *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

340. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

341. *Bill Graham Archives; SOFA Entertainment, Inc. v. Dodger Productions*, 709 F.3d 1273 (9th Cir. 2013).

facilitate.³⁴²

The market gibberish cases show a need to develop a similarly rich taxonomy of interests on the plaintiff's side. Copyright owners do sometimes invoke copyright to squelch criticism or protect their business interests, but they also do so to fortify their sexual autonomy, protect their privacy, and continue bonds with deceased relatives.³⁴³ Copyright of course is not, and should not be, the only area of law that addresses privacy, autonomy, and familial bonds, but—as I have spelled out more extensively in previous work—it can provide a useful supplement to tort and criminal law.³⁴⁴ Copyright often can provide more robust protections for plaintiffs than privacy torts, without forcing individuals to turn to law enforcement in order to shore up the vulnerabilities that can emanate from the dissemination of a copyrighted work.³⁴⁵

The only potential place, however, within the current fair use framework for plaintiffs to explicitly slot these interests is under the category of unpublished works. The greater protection for unpublished works reflects the variety of economic and emotional interests that justified a common law right to control first publication; these justifications included the author's privacy.³⁴⁶ As discussed above, "unpublished" overly conflates a range of very different economic and personal interests.³⁴⁷ If courts were to expressly consider economic and noneconomic investments in copyrighted works throughout the fair use analysis, copyright jurisprudence could accurately and honestly recognize the interests that it is being asked to juggle. Recognizing that plaintiffs' noneconomic interests exist does not mean that they win the day; it simply allows them to be on the playing field. And, most importantly, it clarifies the normative work that copyright law is already doing.

There are a few good examples of courts engaging in such open, transparent balancing of interests. As discussed above, the *Lerma* Court, when denying a preliminary injunction against the Washington Post, expressly balanced the Scientology Church's desire to prevent "spiritual harm" and limit the spread of secret texts against the Post's interest in

342. See, e.g., Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463 (2010); 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); Katyal, *supra* note 266.

343. See Gilden, *supra* note 11.

344. See *id.*

345. *Id.*

346. See generally Balganesch, *Censorial Copyright*, *supra* note 63.

347. See *supra* notes 283–292 and accompanying text.

reporting on an ongoing controversy between the Church and its former members.³⁴⁸ The court held that our constitutional commitments to free press and separation of church and state militated against civil liability for the Post. Another district court presiding over a related Scientology dispute similarly was willing to openly balance the interests at stake—a very weak claim to economic harm and a religious interest that was outweighed by interests in free speech. In *Religious Tech. Ctr. v. F.A.C.T.net, Inc.*,³⁴⁹ the court stated, clearly and emphatically, “RTC effectively requests that I advance its religion at the expense of Defendants’ lawful rights to use the materials for the purposes of criticism and research. The United States Constitution, common law and the Copyright Act preclude me from doing so.”³⁵⁰

The Eleventh Circuit in *Katz v. Google*³⁵¹ openly recognized that the plaintiff was suing for copyright infringement in order to stop the spread of an unflattering photograph of him by an outspoken critic of his business practices:

Katz profoundly distastes the Photo and seeks to extinguish, for all time, the dissemination of his “embarrassing” countenance . . . While we recognize that even an author who disavows any intention to publish his work “has the right to change his mind,” the likelihood of Katz changing his mind about the Photo is . . . incredibly remote.³⁵²

The court acknowledged the interests motivating the litigation, acknowledged the plaintiff’s efforts at market gibberish, and found no sufficient policy basis for infringement. Because the courts in the three above examples openly weighed the noneconomic interests of the plaintiffs against the free speech interests of the defendant, these cases help piece together a hierarchy of personal interests and free speech values within fair use.

Missing from fair use cases, however, is an explanation of when and why, in cases like *Monge, Peter Letterese & Associates*, and *Henley*, copyright interests outweigh free speech interests. Copyright case law contains many specific examples of free speech expressly outweighing noneconomic interests, but why do the noneconomic interests underlying market gibberish outweigh free speech in so many cases? Is it because of the acute privacy concerns? Because there really is a concern with market

348. See *supra* notes 174–176 and accompanying text.

349. 901 F. Supp. 1519 (D. Colo. 1995).

350. *Id.* at 1527.

351. *Katz v. Google Inc.*, 802 F.3d 1178 (11th Cir. 2015).

352. *Id.* at 1184 (citations omitted).

substitution? Because of some bad faith activity, such as theft? Answering these questions would be extremely useful for clarifying how copyright law—with its diverse mix of economic and emotional investments—fits into the larger constellation of First Amendment law. For example, are privacy assertions in copyright subject to the stringent constitutional limits on other privacy-motivated lawsuits, as shown in cases such as *The Florida Star v. B.J.F.*³⁵³ or *Snyder v. Phelps*?³⁵⁴ Or is copyright law, with its express footing in the original articles of the constitution, somehow different, as suggested by the Supreme Court in *Eldred* and *Golan*?³⁵⁵ Regardless of whether one believes that copyright needs to be substantially constrained due to its potential for censorship, or one supports a more robust copyright system, the current system would benefit greatly from increased transparency. By avoiding express engagement with noneconomic interests, current fair use law is opaque, inconsistent, and de facto prioritizes the interests of powerful market actors.

Expressly considering the full range of economic and noneconomic interests would also much better align copyright infringement with an appropriate remedy. As discussed above, courts continue to regularly provide injunctive relief for copyright infringement, even though the supposedly economic interests underlying copyright infringement would seem much better suited to purely monetary relief.³⁵⁶ By allowing

353. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that the First Amendment prohibited liability for a newspaper for publishing the name of a sexual assault victim); see also Bohannon, *Harmless Speech*, *supra* note 8, at 1156 (“If First Amendment concerns are weighty enough to prevent courts and legislatures from presuming harm to privacy from the publication of a rape victim’s name, then surely courts should not presume similar harm from the copying of copyrighted material.”).

354. *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) (“Westboro’s choice to convey its views in conjunction with Matthew Snyder’s funeral made the expression of those views particularly hurtful to many, especially to Matthew’s father. The record makes clear that the applicable legal term—‘emotional distress’—fails to capture fully the anguish Westboro’s choice added to Mr. Snyder’s already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a ‘special position in terms of First Amendment protection.’” (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983))).

355. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles.”); *Golan v. Holder*, 565 U.S. 302, 327–28 (2012) (“Concerning the First Amendment, we recognized that some restriction on expression is the inherent and intended effect of every grant of copyright.”); see also JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 143 (2018) (“[A]lthough the Supreme Court has never explicitly said so, it has repeatedly indicated that First Amendment defenses have less traction against IP claims.”).

356. See Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215 (2012) (“One might imagine that the unequivocal teaching in *eBay* might have had a significant impact on the way that lower courts adjudicated copyright injunctions. The empirical evidence suggests otherwise.” (citations omitted)).

prevailing copyright owners to spell out their noneconomic interests during both liability and remedies phases of litigation, courts could better tailor injunctive relief to the scenarios where it gets at the plaintiff's underlying concerns—for example, to stop the spread of a sex tape—and to deny it when the plaintiff's sole interest is in getting paid.³⁵⁷ Mark Lemley has argued that copyright law too often conflates a rightsholder's interests in “compensation” and “control,”³⁵⁸ and this tendency to conflate makes sense in a system that provides a highly truncated account of why a copyright owner might legitimately want to control a work's dissemination.

In an interest-transparent copyright system, rightsholders can obtain monetary relief (beyond baseline statutory damages) if they can establish foreseeable harm to actual licensing prospects—precisely the approach previous scholars have advocated.³⁵⁹ However, if they can establish a credible harm to interests that have nothing to do with compensation—and that those harms outweigh the defendant's and public's interests in accessing the work—then injunctive relief may better respond to the needs to the prevailing plaintiff.³⁶⁰ Importantly, injunctive relief does not necessarily mean a complete restraint on the work's dissemination—for example, it could entail redaction (e.g., if plaintiff seeks to protect privacy) or require attribution (if plaintiff seeks recognition).³⁶¹ Moreover, although injunctive relief in copyright law is often associated with concerns about prior restraints on speech,³⁶² in many circumstances

357. See Orit F. Afori, *Flexible Remedies as a Means to Counteract Failures in Copyright Law*, 29 CARDOZO ARTS & ENT. L.J. 1, 45–46 (2011) (“The way to resolve this problem is by introducing flexible remedies, determined on case by case, which would permit courts to balance the conflicting interests inherent in copyright law, reflecting both the need to protect owners' interests and the public interest in enabling greater use of copyrighted works.”).

358. Lemley, *supra* note 19, at 191–96.

359. See *supra* notes 260–266 and accompanying text; see also Lemley, *supra* note 19, at 195 (“Licensing-market cases are one circumstance in which it seems to make sense to provide compensation but no control.”).

360. *Id.* at 194 (“Copyright owners occasionally make claims that invoke an interest in control but not compensation. The easiest such example is attribution as the author of a work . . . If we truly think of these as moral rather than economic rights, the right remedy is not to compensate the copyright owner for their loss but to ensure that they retain some control over the use of their work.”).

361. See Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1797–98 (2012) (arguing that authors may value attribution more highly than pecuniary rights and that attribution rights could be cheap to implement); Buccafusco & Fagundes, *supra* note 6, at 2495 (“[W]hen the nature of the harm comes from diminished creative incentives associated with the failure to provide attribution to the author, courts could impose injunctive relief mandating that all subsequent copies of a work include appropriate attribution.”).

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

a targeted injunction may have a less substantial impact on the defendant than potentially crippling damages award.³⁶³ An interest-transparent approach would shift attention away from disingenuous pecuniary interests and focus on ways to actually and directly remedy the harms that can accompany the loss of control.

C. *Potential Roadblocks*

There are three likely objections to courts explicitly considering the full range of a copyright owner's economic and noneconomic interests. This subsection addresses each in turn.

The first objection is that by opening the doors of copyright law expressly to noneconomic interests, copyright protections will overly expand and trample on the free speech interests of downstream users. This is one of the primary concerns of previous scholars who have focused on plaintiffs asserting non-traditional motivations—by entertaining emotional or dignitary concerns, courts may distort the copyright system and further enable rightsholders to stop critical, unflattering, or journalistic uses of their work.³⁶⁴

An interest-transparent approach does not, however, necessarily lead to a significant retrenchment of free speech; in fact, it may rein in censorship through copyright.³⁶⁵ In the examples above where courts have been transparent about the plaintiff's motivations—*Lerma II*, *F.A.C.T.net*, and *Katz*—the courts *rejected* the plaintiffs' interests in light of overriding policy commitments to research, criticism, and free speech. By expressly acknowledging the interests at stake, these courts were able to *avoid* the trap of market gibberish and refused to conjure some loss to a potential market. The problem in many of the cases above, and what often leads to an overly expansive copyright system, is not the noneconomic motivation, but the ability of powerful rightsholders to use gibberish to expand into speculative, disingenuous markets. And if one of the reasons that courts speculate about markets is to vindicate privacy or dignitary interests for certain sympathetic plaintiffs, like Bret Michaels or Monge & Reynoso, an interest-transparent approach would remove the incentive to manipulate markets to such an end. Courts could engage with these sympathetic interests more directly and expressly. This analytical shift would not necessarily change the ultimate results in cases like *Bond*, *Garcia*, and *Bollea*; in each of those cases there were other obstacles—

363. Gilden, *supra* note 236, at 1173–74 (2013).

364. *See, e.g.*, McKeown, *supra* note 49, at 1; Fromer, *supra* note 52, at 563–64, 587.

365. *See* Buccafusco & Fagundes, *supra* note 6, at 2481 (arguing that recognizing the “heterogenous motives” of authors will better enable courts to achieve the consequentialist goals).

child welfare, highly questionable ownership claims, and news reporting interests—that may have doomed the copyright claims. However, by knocking out plaintiffs' claims in these cases *because they invoked privacy*, courts also knock out noneconomic claims—such as in revenge porn cases—that are less likely to significantly disrupt free speech ecosystems while meaningfully protecting vulnerable individuals.³⁶⁶

The second objection is that by allowing judges to acknowledge and balance the full range of parties' interests, the infringement inquiry becomes unconstrained and overly subjective. Nonetheless, the cases above demonstrate that the infringement inquiry—and particularly fair use—is already highly subjective; courts are reaching highly divergent results when confronted with similar issues in different cases. This is in large part unavoidable when operating pursuant to a fair use statute that mandates case-by-case balancing of multiple open-ended factors.³⁶⁷ Moreover, numerous scholars and judges have pointed out the inevitably subjective nature of a body of law that requires assessing whether two works are sufficiently similar to impose infringement.³⁶⁸ The line between infringing and non-infringing in many cases is just not susceptible to a crystal clear rule, meaning that judges and juries are going to inevitably be forced to rely on their intuitions and common sense to resolve a dispute.³⁶⁹ If courts are going to engage in a deeply subjective endeavor,

366. See Chon, *supra* note 48, at 377 (“[T]he privacy concerns expressed by plaintiffs in [nonconsensual pornography] cases can be accommodated with little distortion, either to copyright first principles, or to First Amendment concerns.”).

367. See 17 U.S.C. § 107 (2012) (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . [four fair use factors]”); Harper & Row, Publishers, Inc., v. Nation Enterprises, 471 U.S. 539, 549 (1985) (“Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered.”).

368. See, e.g., Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (“Nobody has ever been able to fix that boundary, and nobody ever can.”); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 63 (2012) (“Although market effect has the ring of an objective factual investigation, it is in fact a highly subjective assessment.”); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 605 (2001) (“The fair-use doctrine of American copyright law has been derided as among the most hopelessly vague of legal standards, requiring complex and often subjective interpretation.”); Stacey M. Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright*, 21 MICH. TELECOMM. & TECH. L. REV. 263, 297 (2015) (“The malleability of the transformative use factor contributes to the problem of courts relying on their personal aesthetic judgments. The transformative use factor has developed in such a way as to force works into narrow categories, shoehorning what could be cultural dialogue into preexisting expectations.”).

369. See, e.g., Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469 (2015); Robert K. Walker & Ben DePoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U.L. REV. 343 (2015); Christine H. Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

influenced by a wide variety of considerations, those considerations should at least be allowed to come to the surface.

The third likely objection is that noneconomic injuries will be too hard to quantify, too easy to manufacture, and too uncertain to be workable. These arguments, however, have all been raised and frequently contested in the context of emotional distress damages generally. For example, tort reform initiatives designed to reduce wasteful or abusive litigation have often sought to limit emotional distress damages out of a fear that they are too easy to falsify and too hard to reduce to a monetary award.³⁷⁰ In response, several legal scholars have argued that (1) emotional distress damages are not necessarily any more uncertain than often highly speculative consequential pecuniary damages³⁷¹ and (2) this skepticism structurally hurts women, racial minorities, and the poor, who lack the earning potential of other groups and organizations.³⁷² An interest-transparent approach sends a message that noneconomic injuries are neither less important nor less credible than the economic injuries asserted by traditional copyright owners. If anything, the market gibberish cases demonstrate the need for courts to carefully scrutinize both economic and noneconomic injuries before determining liability and the remedies that follow.

An interest-transparent approach shines a light on what policy questions are actually being considered in copyright litigation and helps level the playing field for the wildly diverse set of individuals and institutions who hold copyrights. The long-term question for future courts and scholars is where each particular interest fits into the hierarchy of

370. See, e.g., Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 912 (1989) ("Whatever the categories of non-economic damages allowed in a given jurisdiction, the law provides no objective benchmarks for valuing them."); Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers,* 73 CALIF. L. REV. 898, 899 (1985) ("Like establishing fault, translating a noneconomic loss such as pain into dollars is an extremely uncertain process fraught with large transaction costs. Highly emotional evidence and arguments are at a premium as both sides try to win the sympathies of the jurors." (citations omitted)); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 HARV. L. REV. 1033 (1936).

371. See Finley, *Female Trouble,* *supra* note 296, at 852–53; Ira M. Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1298–301 (1996).

372. See Chamallas, *supra* note 300, at 499 ("My hypothesis is that legal claims for emotional distress have been devalued in part because they are associated with female plaintiffs. In a less biased, more inclusive tort system, claims for damage to emotions and relationships would not be viewed either as property rights or commodities, on the one hand, or as lacking in value, on the other."); Finley, *Female Trouble,* *supra* note 296, at 854 ("When tort law favors market-referenced damages over the nonpecuniary, it is also reinforcing the discriminatory valuations of the market and entrenching the tendency for higher income white males to receive better results in the tort system than people of color, women, and the poor.").

values confronted by the copyright system. By avoiding direct engagement with the full range of copyright interest, market gibberish has made it exceedingly difficult to even begin such a project. An interest-transparent approach pushes copyright law to better assess and explain its underlying value system.

CONCLUSION

Copyright is not, and never has been, entirely about money.³⁷³ The images, texts, and sounds covered by this area of law are the repositories of a rich mix of psychological, cultural, *and* financial investments, and the dissemination of a copyrighted work inevitably implicates the economic and personal interests of authors, subjects, and audiences. Copyright law claims to slice away emotions from economics in creative works, and to concern itself solely with the latter. But a large body of case law reveals that copyright does not practice what it preaches. As much as courts purport to screen out noneconomic interests from the copyright system, in actuality they do no such thing. Instead, they use the rhetoric of markets to protect the noneconomic interests of copyright owners who can plausibly tell a story about market harm. This Article has shown that doubling down on copyright's traditional market-based rationale primarily claws back copyright protections for those on the margins and can actually enhance the ability of copyright to do the bidding of its most powerful rightsholders. This approach is opaque, inconsistent, and leaves far too many people behind. Copyright law has the potential to serve a broad range of rightsholders: wealthy, poor, celebrities, aspirants, and all gender identities. To do so fairly and effectively, however, courts must be far more explicit and transparent about what underlies the disputes that come before them.

373. See Chon, *supra* note 48, at 366 ("If we limit our understanding of legitimate goals of copyright protection to market actors or commercial ends, we are missing a lot of the copyright story, past and especially present.").