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# The Copy Process

Joseph P. Fishman

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# THE COPY PROCESS

JOSEPH P. FISHMAN\*

*There's more than one way to copy. The process of copying can be laborious or easy, expensive or cheap, educative or unenriching. But the two intellectual property regimes that make copying an element of liability, copyright and trade secrecy, approach these distinctions differently. Copyright conflates them. Infringement doctrine considers all copying processes equally suspect, asking only whether the resulting product is substantially similar to the protected work. By contrast, trade secrecy asks not only whether but also how the defendant copied. It limits liability to those who appropriate information through means that the law deems improper.*

*This Article argues that copyright doctrine should borrow a page from trade secrecy by factoring the defendant's copying process into the infringement analysis. To a wide range of actors within the copyright ecosystem, differences in process matter. Innovators face less risk from competitors if imitation is costly than if it is cheap. Consumers may value a work remade from scratch more than they do a digital reproduction. Beginners can learn more technical skills from deliberately tracing an expert's creative steps than from simply clicking cut and paste. The consequences of copying, in short, often depend on how the copies are made.*

*Fortunately, getting courts to consider process in copyright cases may not be as far-fetched as the doctrine suggests. Black-letter law notwithstanding, courts sometimes subtly invoke the defendant's process when ostensibly assessing the propriety of the defendant's product. While these decisions are on the right track, it's time to bring process out into the open. Copyright doctrine could be both more descriptively transparent and more normatively attractive by expressly looking beyond the face of a copy and asking how it got there.*

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## INTRODUCTION

One of intellectual property (“IP”) law’s core challenges is distinguishing productive acts of copying from counterproductive ones. In both copyright and trade secret law, copying from the owner is necessary for liability but not sufficient.<sup>1</sup> Because not all copying is actionable, these regimes must decide which to penalize and which to permit.<sup>2</sup> The inquiry largely involves a comparison between products. One can’t assess infringement without holding up a protected good next to an accused copy and asking whether they appear too alike.<sup>3</sup>

But appearances don’t always tell the whole story. Similar products—even ones that are copied from the same original source—can have dissimilar provenances. Some reproductions are made with skill and labor, while others are made easily and cheaply. Some reproductions are made in ways that teach their makers new know-how, while others are made in ways that yield nothing more than the reproduction itself. Within most areas of human creativity, there’s more than one way to copy.

To a wide range of actors within the IP ecosystem, the means of copying matters. Innovators face less risk from competitors if imitation is costly than if it is cheap. Consumers may value a work remade from scratch more than they do an otherwise identical digital reproduction. Beginners can learn more technical skills from deliberately tracing an expert’s creative steps than from simply clicking cut and paste (ask anyone who’s taken a painting class or built a homemade

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Rob Merges, Will Ortman, Betsy Rosenblatt, Guy Rub, Matthew Sag, Pam Samuelson, Sean Seymore, Lea Shaver, Chris Sprigman, Kevin Stack, Cara Suvall, Rebecca Tushnet, and Melissa Wasserman, along with participants at the 15th Annual Intellectual Property Scholars Conference, the Illinois IP Colloquium, and the University of Pennsylvania Law School’s Copyright Scholarship Roundtable. I am indebted to Chen-Chen Jiang and Sarah O’Loughlin for excellent research assistance. Any errors are products of no one’s processes but my own.

<sup>1</sup> Patents, by contrast, are enforceable even against one who independently develops an identical invention. Copying is irrelevant to liability. *See infra* Section I.B.

<sup>2</sup> *See, e.g.*, *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (“[N]ot all copying . . . is copyright infringement.”); *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1293 (11th Cir. 2003) (“[I]f the defendant independently created the allegedly misappropriated item with only ‘slight’ contribution from the plaintiff’s trade secret, then the defendant is not liable for misappropriation.”) (quoting *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 40 cmt. c (AM. LAW INST. 1995)); *cf.* *TraFiX Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001) (“[C]opying is not always discouraged or disfavored by the laws which preserve our competitive economy. . . . Allowing competitors to copy will have salutary effects in many instances.”).

<sup>3</sup> *See* Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1252 (2014) (“A principal question in IP infringement disputes is whether the defendant’s product (or work, or brand, or idea) is too similar in some respect to the plaintiff’s.”).

radio). The consequences of copying, in short, often depend on how the copies are made.

That's a significant contingency for IP policy, which most commentators in the United States justify in terms of the consequences that it generates.<sup>4</sup> Copyrights and trade secrets alike are supposed to generate enough social value to outweigh their costs.<sup>5</sup> If some copy processes are more valuable or less costly than others, one might expect the law to scrutinize not only what gets copied but also the means through which that copying is done.

Trade secrecy, however, is the only IP regime that explicitly does so. Secret information isn't protected against all methods of copying, just against the ones that the law deems to be "improper."<sup>6</sup> That element requires courts to assess "whether the means of acquisition are inconsistent with accepted principles of public policy."<sup>7</sup> Under that test, using reverse engineering to decipher and then exploit the information is fully permissible.<sup>8</sup> Indeed, courts encourage reverse engi-

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<sup>4</sup> There are so many sources on this point that a single footnote can only skim the surface. *See, e.g.*, Brett Frischmann & Mark P. McKenna, *Intergenerational Progress*, 2011 WIS. L. REV. 123, 123 (2011) ("The Intellectual Property Clause of the U.S. Constitution identifies 'Progress of Science and useful Arts' as the ends served by exclusive rights to writings and discoveries. Courts and scholars alike overwhelmingly have conceived of these ends in utilitarian terms, seeking more and better inventions and works of authorship."); Lawrence B. Solum, *Questioning Cultural Commons*, 95 CORNELL L. REV. 817, 834 (2010) (noting that under "the mainstream of American theory . . . [r]egimes for the management of information resources are assessed by reference to the consequences they produce, and the key question is whether a given regime is welfare- or utility-maximizing"). To be sure, several IP scholars have recently questioned whether consequentialism can perform all the work asked of it, *see, e.g.*, ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2011) ("The sheer practical difficulty of measuring or approximating all the variables involved means that the utilitarian program will always be at best aspirational."), and argued that deontic theories can perform a greater share of the normative heavy lifting, *see, e.g., id.* (invoking Locke, Rawls, and Kant to justify IP scope); Frischmann & McKenna, *supra*, at 123 (asserting that "the normative basis for IP laws need not be utilitarianism" and that "there is room for a normative commitment to intergenerational justice"). Still, despite this developing pluralism, in the interests of space I limit myself in this Article to the familiar consequentialist lens.

<sup>5</sup> *See* Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401, 1408 (2014) ("[Trade secrecy] is increasingly theorized as a subset of intellectual property because it shares the incentive-promoting goals of patent and copyright. Courts and scholars often justify patent, copyright, and trade secret laws as mechanisms to encourage the invention or creation of new technological advances and expressive works.").

<sup>6</sup> *See, e.g.*, UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 437 (1990), [http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa\\_final\\_85.pdf](http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf); *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(a) (AM. LAW INST. 1995); RESTATEMENT (FIRST) OF TORTS § 759 (AM. LAW INST. 1939).

<sup>7</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt. c.

<sup>8</sup> *See* *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974) (observing that trade secret law "does not offer protection against discovery by . . . so-called reverse engineering,

neering expressly because of the positive externalities that the process can generate.<sup>9</sup> Although one may not derive, say, the undisclosed formula for Coca-Cola through industrial espionage, deriving it through experimentation in a food lab would be fair game.

By contrast, copyright doctrine treats all copy processes as equally suspect. It doesn't matter how laborious, how skillful, how expensive, or how edifying the defendant's method is. So long as the end product looks substantially similar to the original, the means of copying are irrelevant.<sup>10</sup> Consider, for example, the 200 photographers who descended on Yosemite National Park on September 15, 2005, hoping to recreate Ansel Adams's iconic photograph, *Autumn Moon*.<sup>11</sup> Astronomers had previously determined the exact location, date, and time at which Adams had taken the photograph fifty-seven years earlier.<sup>12</sup> For a four-minute interval that comes around only once every nineteen years, the moon returned to the same sky location in the same phase, enabling skilled photographers to replicate Adams's shot.<sup>13</sup> Does that backstory distinguish the recreated photographs from a quick digital duplicate? No, at least according to black-letter copyright doctrine. Any of these new photographs sufficiently similar to Adams's original would be problematic. The same goes for

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that is by starting with the known product and working backward to divine the process which aided in its development or manufacture"); *Chi. Lock Co. v. Fanberg*, 676 F.2d 400 (9th Cir. 1982) (holding that publishing key codes for locks did not constitute trade secret misappropriation because the codes had been acquired through reverse engineering).

<sup>9</sup> See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989) (praising reverse engineering as "an essential part of innovation" that "often leads to significant advances in technology"); *Rockwell Graphic Sys. v. DEV Indus.*, 925 F.2d 174, 178 (7th Cir. 1991) (noting that reverse engineering is a proper means of deducing another's trade secret because it "involves the use of technical skills that we want to encourage").

<sup>10</sup> See, e.g., *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1237 (3d Cir. 1986) ("[T]he fact that it will take a great deal of effort to copy a copyrighted work does not mean that the copier is not a copyright infringer. The issue . . . is simply whether the copyright holder's expression has been copied, not how difficult it was to do the copying."); Dan L. Burk, *Method and Madness in Copyright Law*, 2007 UTAH L. REV. 587, 599 (observing that by focusing on products, the Copyright Act may "protect[] a suite of processes, as any process that reproduces that particular painting or soundtrack is precluded by copyright, whether the process is painstakingly reproducing the Picasso image by hand or whether the process is simply scanning and printing the image"). For further discussion, see *infra* Section I.B.

<sup>11</sup> See Roger W. Sinnott, *An Ansel Adams Encore*, SKY & TELESCOPE, Jan. 2005, at 93, <https://digital.library.txstate.edu/bitstream/handle/10877/4032/fulltext.pdf>.

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

<sup>13</sup> *Id.*

repainting a portrait by hand,<sup>14</sup> or even refilming an entire feature-length motion picture shot for shot.<sup>15</sup>

The divergence between these two branches of law highlights a system design choice that's been hiding in plain sight. Whenever IP policymakers seek to regulate copying, they can either focus only on its ends or also on its means. But there hasn't yet been much deliberation about that choice. IP scholarship tends to emphasize *which* products are made more than *how* they are made.<sup>16</sup> To the extent that this scholarship has examined the defendant's process, it has concentrated on the question of whether copying should be an element of infringement to begin with. Copyright and trade secret law say yes, patent law says no, and observers debate the difference.<sup>17</sup> I don't intend here to make inroads into that already rich discussion. But there remains a

<sup>14</sup> See *infra* notes 176–78 and accompanying text.

<sup>15</sup> See *infra* notes 171–75 and accompanying text. I focus here on graphic and audiovisual works because, as I explain in Part III, they're the most likely to be affected by my proposal. With literary works, a given copy process will rarely offer significantly greater benefits than any other. But see *infra* note 309 and accompanying text. With dramatic works, whose marketability depends on live performance, even laborious copy processes will threaten the owner's ability to recoup investments. And with sound recordings, the existing compulsory license under 17 U.S.C. § 115 permits recreations already.

<sup>16</sup> Welfarists' emphasis on end products encompasses both sheer quantity of new works, e.g., Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 75 (2014) ("Most utilitarians understand social welfare to be maximized—in the context of copyright law—by the creation of ever more artistic works."), and works of particular social value, e.g., Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 37 (2004) (advancing a product-differentiation theory of copyright scope in which "[t]he importance of incentives to produce new works is less significant when the number of existing works and the chance that a new work will be largely redundant are greater"); Fromer, *supra*, at 84 (using information theory to identify what kinds of works the copyright system should promote); Robert P. Merges, Essay, *The Concept of Property in the Digital Era*, 45 HOUS. L. REV. 1239, 1267 (2009) (defending copyright's tradeoff in which "[t]he cost of premium creative works . . . is a slight reduction in the volume of amateur works"); cf. Sean M. O'Connor, *The Central Role of Law as a Meta Method in Creativity and Entrepreneurship*, in CREATIVITY, LAW AND ENTREPRENEURSHIP 87, 87 (Shubha Ghosh & Robin Paul Malloy eds., 2011) (lamenting IP scholarship's "unfortunate fixation on *artifacts* as the locus of human ingenuity," which overlooks the methods through which those artifacts are produced); Brett M. Frischmann, Book Review, *Cultural Environmentalism and The Wealth of Networks*, 74 U. CHI. L. REV. 1083, 1096 (2007) (arguing that the legal community "place[s] too much emphasis on easily observable and measurable outputs—works and inventions," resulting in "an impoverished understanding of the cultural environment").

<sup>17</sup> See, e.g., Oskar Liivak, *Rethinking the Concept of Exclusion in Patent Law*, 98 GEO. L.J. 1643 (2010); Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 528 (2004); Stephen M. Maurer & Suzanne Scotchmer, *The Independent Invention Defence in Intellectual Property*, 69 ECONOMICA 535 (2002); Robert P. Merges, *A Few Kind Words for Absolute Infringement Liability in Patent Law*, 31 BERKELEY TECH. L.J. 1 (2016); Samson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 MICH. L. REV. 475 (2006).

follow-up question left largely understudied.<sup>18</sup> Once one decides that copying does matter, as our copyright and trade secret regimes have, there still remains a policy question as to whether the manner of copying should matter along with it.

In this Article, I argue that it should. Copyright doctrine ought to borrow a page from trade secrecy doctrine by factoring the defendant's copying process into the infringement analysis. The scope of copyright protection has expanded as the cheapest available form of copying has grown ever cheaper. But not every copyist wants the cheapest method—some want to learn how to do it the hard way, others seek to tap a market that prizes labor-intensive recreations, and still others may prefer a difficult process for its expressive value. An infringement doctrine that looks only to the cheapest common denominator will unnecessarily sweep in copying that threatens no market harm to the owner. Moreover, from the consumer's perspective, a second comer's recreation of a familiar work is by definition something that the original creator cannot provide. Audiences celebrate the act of replication from professional appropriation art<sup>19</sup> to amateur videos on YouTube.<sup>20</sup> In these contexts, handmade copying can become its own act of performance in a way that quick, digital copying cannot. It's the audience's loss if copyright law inhibits those performances by grouping them together with mechanical duplications. Finally, as a number of commentators have already acknowledged,<sup>21</sup> learning-by-doing often requires replicating others' successes. Copying today can be great training for creating tomorrow. But this educational spillover is more likely to emerge from hands-on involve-

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<sup>18</sup> An important exception is Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 *YALE L.J.* 1575 (2002). Samuelson and Scotchmer focus on reverse engineering in technological fields like software and semiconductors. As I argue here, some expressive fields not only implicate many of Samuelson and Scotchmer's economic insights, but even invite another set of process distinctions above and beyond the ones they identify. See *infra* Part II.

<sup>19</sup> See, e.g., *Mike Bidlo*, in 1 *THE GROVE ENCYCLOPEDIA OF AMERICAN ART* 266 (Joan Marter ed., 2011) (noting Bidlo's "series of remarkably accurate copies" of Jackson Pollock and "exact replicas of art central to the modernist canon"); Nadine Rubin Nathan, *Asked & Answered: Mike Bidlo*, *T MAG.* (July 2, 2010, 12:43 PM), <http://tmagazine.blogs.nytimes.com/2010/07/02/asked-answered-mike-bidlo/> (discussing Bidlo's "dead ringers" for Warhol's famous Brillo boxes and other "exact replicas").

<sup>20</sup> See, e.g., Tiffany Lee, *Beyoncé Gives Props to 16-Year-Old's Shot-by-Shot "Countdown" Cover Video Starring—A Snuggie!*, *YAHOO! NEWS* (July 24, 2012), <https://ca.news.yahoo.com/blogs/the-juice-celeb-news/beyonc%C3%A9-gives-props-16-old-shot-shot-countdown-133452942.html> (describing a sixteen-year-old boy's "mind-bogglingly accurate remake" of a Beyoncé music video). As of this writing, the remake has attracted over three million views. Ton Do-Nguyen, *Countdown (Snuggie Version) [Comparison]*, *YOUTUBE* (July 9, 2012), <https://www.youtube.com/watch?v=W4aiwTkDwCY>.

<sup>21</sup> See *infra* Section II.C.

ment than from an automated process that the user doesn't understand. Discriminating in favor of productive copy processes thus offers a novel way to promote the development of creative skills without significantly undermining the upstream creator's incentives.

Copyright's indifference to the defendant's process likely persists on the strength of the trope that core copyrightable works like art, music, and film reveal their relevant know-how to the world as soon as they're published.<sup>22</sup> If disclosure were instantaneous and automatic, then distinctions between copy processes would indeed be trivial.<sup>23</sup> But this account of copyrightable works is incomplete. To be sure, artistic expression readily discloses the information necessary for mechanical *duplication*. Obtaining a copy of the latest Hollywood blockbuster or top-40 pop song is often just a few clicks away. Nevertheless, that expression often does not so readily disclose all the information necessary for *recreation* from scratch. Recreating a complicated expressive work can be as technically challenging as recreating a complicated industrial device. Once duplications and full-fledged recreations are disaggregated, many expressive works start to look more like secrets.

Fortunately, getting courts to consider process in copyright cases may not be as far-fetched as the doctrine suggests. Courts sometimes subtly invoke the defendant's process when ostensibly assessing the propriety of the defendant's product. While these decisions are on the right track, it's time to bring process out into the open. Copyright doctrine could be both more descriptively transparent and more normatively attractive by expressly looking beyond the face of a copy and asking how it got there.

The Article proceeds in three parts. Part I begins by describing the different ways that black-letter copyright and trade secrecy doc-

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<sup>22</sup> See, e.g., Dotan Oliar & Christopher Sprigman, *There's No Free Lunch (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94 VA. L. REV. 1787, 1832 n.96 (2008) (commenting that within the copyright paradigm, "the information the work embodies is clear on its face"); J.H. Reichman, *Computer Programs as Applied Scientific Know-how: Implications of Copyright Protection for Commercialized University Research*, 42 VAND. L. REV. 639, 660 (1989) (citing the "artistic work" as the archetype of an informational product that "tends to bear its know-how on its face" and therefore is "exposed to instant predation when successful and is likely to enjoy zero lead time after being launched on the market"); Samuelson & Scotchmer, *supra* note 18, at 1585 ("The artistic and literary works [copyright] law traditionally protected did not need to be reverse-engineered to be understood. . . . To access this information, one can simply read or analyze the work.").

<sup>23</sup> See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 370 (2003) ("[F]rom an economic standpoint there is little distinction between *really* cheap reverse engineering on the one hand and piracy on the other.").



trines approach the defendant's copying process. In Part II, I offer a framework for evaluating different processes' welfare implications. I make the case that copyrighted works are subject to many of the same justifications for process sensitivity as trade secrets. In Part III, I argue that courts could work that sensitivity into copyright adjudication through the fair use doctrine without any legislative intervention and likely at a manageable marginal evidentiary cost. I close by offering a few rough recommendations for how courts might apply this factor in fair use cases.

## I

### COPY PROCESS IN IP DOCTRINE

Should infringement liability focus solely on the defendant's product or also on her process? The question can be broken down into two issues. Policymakers first need to decide whether to distinguish between imitators and independent creators. A regime that focuses on product alone wouldn't care whether the defendant was a slavish copyist or instead an innocent developer haplessly unaware that someone else had already beaten him to the punch. This decision is IP's first question of process sensitivity.

If only the product counts, that's the end of the matter. But if liability requires copying, it invites a second question: whether all copy processes should be weighted equally in the infringement analysis. Does infringement doctrine ask only whether the plaintiff's work was copied, or does it also ask how it was copied?

Each IP regime offers a different model, summarized below in Table 1.<sup>24</sup>

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<sup>24</sup> The major IP subfield missing from my scheme is trademark law. I don't focus on trademarks in this Article because, unlike the other regimes that center on promoting innovation and creativity, trademarks' traditional purpose is reducing consumer confusion. Given this aim, though, it should be unsurprising that trademark infringement does not require copying. A confusing mark will remain confusing no matter how it is produced. As the Second Circuit recently noted: "The trademark system . . . stands in sharp contrast to the copyright system. Copyright, unlike trademark, rewards creativity and originality even if they interfere with the rights of an existing copyright holder. In the copyright system there is a defense to infringement known as 'independent creation' . . . . The trademark system, unlike the copyright system, aims to prevent consumer confusion even at the expense of a manufacturer's creativity: in trademark, if a branding specialist produces a mark that is identical to one already trademarked by another individual or corporation, he must 'go back to the drawing board.'" *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 224 n.20 (2d Cir. 2012); *see also* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 269-70 (1987) (noting the free rider problems with which trademark law is concerned). *But see* Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525, 1525 n.1 (2007) (noting that, although independent creation is no defense to trademark infringement, many courts still treat the defendant's intent to trade on the

Patent law focuses exclusively on product. Anyone who exploits a patented invention without authorization, even one who's never seen the patented invention before, is an infringer.<sup>25</sup> Whether one copied, let alone how one copied, is irrelevant.<sup>26</sup> At the other extreme lies trade secrecy. To begin with, only copying counts.<sup>27</sup> If I happen to develop the same algorithm that you have taken pains to keep secret, the law will not intervene. On top of that, only certain kinds of copying count. Trade secret law distinguishes between the copyists who use proper means and those who don't. "It is the employment of improper means to procure the trade secret, rather than mere copying or use, which is the basis of liability."<sup>28</sup> Copyright doctrine occupies a middle ground. Like a trade secret, a copyright guards only against copying. Independent creation is a complete defense.<sup>29</sup> But unlike a trade secret, a copyright is not circumscribed by an "improper means" element. Hornbook law dictates that one means of copying is as good (or bad) as any other.<sup>30</sup>

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goodwill of the protected mark as strong evidence that consumers would likely be confused by the defendant's mark).

<sup>25</sup> See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974) ("[Patent] protection goes not only to copying the subject matter . . . but also to independent creation."); *Allen Eng'g Corp. v. Bartell Indus.*, 299 F.3d 1336, 1351 (Fed. Cir. 2002) ("[C]opying . . . is of no import on the question of whether the claims of an issued patent are infringed."). For a good example of this strict liability in action, see JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE* 47 (2008) (describing a successful lawsuit against the maker of the BlackBerry mobile device, which had independently invented a wireless e-mail technology that was covered by the plaintiff's existing patents).

<sup>26</sup> A caveat here is that copying, though unnecessary for liability, does affect some other doctrines, like willfulness. See Christopher A. Cotropia & Mark A. Lemley, *Copying in Patent Law*, 87 N.C. L. REV. 1421, 1428–31 (2009).

<sup>27</sup> See *id.* at 1466 ("Trade secret law punishes only misappropriation of one's ideas by another—that is, copying.").

<sup>28</sup> *Chi. Lock Co. v. Fanberg*, 676 F.2d 400, 404 (9th Cir. 1982) (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. a (AM. LAW INST. 1939)); see also Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 250 (1998) ("Trade secret law does not impose liability for mere copying; others are free to inspect a publicly available product or use reverse engineering to glean secret information from it.").

<sup>29</sup> E.g., *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1169 (7th Cir. 1997) ("The Copyright Act forbids only copying; if independent creation results in an identical work, the creator of that work is free to sell it."); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951) (noting that a copyright owner "has no right to prevent another from publishing a work identical with his, if not copied from his").

<sup>30</sup> See *supra* note 10 (collecting sources).

	<i>Whether Copied</i>	<i>How Copied</i>
<i>Patents</i>	No	N/A
<i>Copyrights</i>	Yes	No
<i>Trade Secrets</i>	Yes	Yes

TABLE 1. RELEVANCE OF DEFENDANT'S PROCESS

This Part surveys the role of process within the two copying regimes, trade secrecy and copyright. Section I.A outlines the long-standing “improper means” limitation on the tort of trade secret misappropriation. Section I.B turns to the copyright system. It first discusses copyright’s doctrinal indifference to the defendant’s appropriation method. It then turns to some inconsistent judicial rhetoric suggesting that at least some courts are influenced by process considerations, whether they explicitly acknowledge it or not.

### A. Trade Secret Law

Consider this epicurean example. In 2007, a finance manager and cooking enthusiast named Ron Douglas decided to leave Wall Street in order to spend his time deciphering how to recreate famous restaurant dishes.<sup>31</sup> One of his top goals was cracking the code to KFC’s “Original Recipe” fried chicken, based on an undisclosed blend of herbs and spices that the company had long guarded as a trade secret.<sup>32</sup> At one point, he even tried to bribe KFC cooks, but to no avail—the seasoning always arrived prepackaged.<sup>33</sup> Unable to buy the answer, he eventually began tapping into a growing online community of culinary reverse engineers and hired part-time chefs to help him experiment at home. Over a year and several failed attempts later,<sup>34</sup> Douglas finally produced a dish that one reporter described as “the best KFC I ever had” and “an exact match with the fast food joint.”<sup>35</sup> During interviews, Douglas would recount the “pleasure of knowing that you’ve . . . conquered that recipe and you could make it your-

<sup>31</sup> See Jennifer Fermino, *Fryin’ on a Wing & a Prayer*, N.Y. POST (July 20, 2009), <http://nypost.com/2009/07/20/fryin-on-a-wing-a-prayer>; Vidya Rao, *Don’t Tell the Colonel! KFC Recipe May Be Out*, TODAY.COM (July 21, 2009), <http://www.today.com/food/dont-tell-colonel-kfc-recipe-may-be-out-2D80556209>.

<sup>32</sup> On the recipe’s status as a trade secret, see *KFC Corp. v. Marion-Kay Co.*, 620 F. Supp. 1160, 1172 (S.D. Ind. 1985); Bruce Schreiner, *KFC Closely Guards Colonel’s Secret Chicken Recipe*, ASSOC. PRESS NEWSWIREs, July 23, 2005 (describing the great lengths to which KFC has gone to protect its secret recipe).

<sup>33</sup> See Fermino, *supra* note 31; Rao, *supra* note 31.

<sup>34</sup> See *Ron Douglas Masters the Secret Recipe for KFC Chicken*, SECRET RECIPES FROM RON (May 15, 2011), <http://secretrecipessfromron.blogspot.com/>.

<sup>35</sup> Fermino, *supra* note 31.

self . . . .”<sup>36</sup> His replica recipe can now be yours (no conquering required) as part of his New York Times best-selling cookbook.<sup>37</sup> Assuming that the reporter’s taste test was accurate and that KFC’s secret is now exposed,<sup>38</sup> does KFC have a claim against Douglas for trade secret misappropriation?

Because of Douglas’s copy process, the answer is no. Under the Uniform Trade Secrets Act, some version of which has been enacted in almost every state,<sup>39</sup> only those who acquire protected information through “improper means” may be liable.<sup>40</sup> Similar limitations appear in the Restatement (First) of Torts’s early codification of trade secret doctrine<sup>41</sup> as well as in the more recent Restatement (Third) of Unfair Competition.<sup>42</sup> That rule makes the propriety of the defendant’s process a critical issue in trade secret cases.<sup>43</sup> Douglas’s conduct was a form of reverse engineering, which the Supreme Court has called a “fair and honest means . . . [of] starting with the known product and working backward to divine the process which aided in its development or manufacture.”<sup>44</sup> Trade secret law considers it perfectly legitimate.<sup>45</sup> Had Douglas instead learned the secret recipe directly from the employee whom he had tried to bribe—a textbook form of improper means—the result would have been flipped.<sup>46</sup>

Trade secrecy’s discrimination between proper and improper copying methods has a long pedigree. In the 1889 case *Tabor v.*

<sup>36</sup> Ron Douglas, *Ron Douglas on Fox and Friends*, YOUTUBE (Aug. 2, 2009), <https://www.youtube.com/watch?v=DCDTq6OOetw> (statement beginning at 3:13).

<sup>37</sup> See generally RON DOUGLAS, AMERICA’S MOST WANTED RECIPES (2009).

<sup>38</sup> According to KFC, which has no interest in conceding that the secret’s out, the reporter was mistaken. See Rao, *supra* note 31 (quoting KFC spokesman’s statement, “Plenty of people have tried to duplicate the recipe over the years, but there is still only one place to get authentic Original Recipe Chicken—at a KFC restaurant.”).

<sup>39</sup> See *Trade Secrets Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?titletrade+Secrets+Act> (showing the UTSA’s adoption in forty-seven states and the District of Columbia).

<sup>40</sup> UNIF. TRADE SECRETS ACT § 1 (UNIF. LAW COMM’N 1985).

<sup>41</sup> RESTATEMENT (FIRST) OF TORTS § 759 (AM. LAW INST. 1939).

<sup>42</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40(a) (AM. LAW INST. 1995).

<sup>43</sup> See, e.g., *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 660 (4th Cir. 1993) (“Apart from breach of contract, abuse of confidence or impropriety in the means of procurement, trade secrets may be copied as freely as devices or processes which are not secret.” (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. a (AM. LAW INST. 1939))).

<sup>44</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974).

<sup>45</sup> See UNIF. TRADE SECRETS ACT § 1 cmt. (UNIF. LAW COMM’N 1985) (including reverse engineering within a catalog of proper means).

<sup>46</sup> See RESTATEMENT (FIRST) OF TORTS § 759 cmt. c (AM. LAW INST. 1939) (including “bribing or otherwise inducing employees or others to reveal the information in breach of duty” in a catalog of improper means); see also *Liberty Power Corp. v. Katz*, No. 10-CV-1938, 2011 WL 256216, at \*5 (E.D.N.Y. Jan. 26, 2011) (finding improper means where the defendants would not have gained access to the trade secret but for a bribe to the plaintiff’s employee).

*Hoffman*,<sup>47</sup> the New York Court of Appeals remarked that once a medicine is sold to the public, anyone is permitted to use “chemical analysis and a series of experiments, or . . . any other use of the medicine itself aided by his own resources only” in order to “discover the ingredients and their proportions.”<sup>48</sup> And, the court continued, if through that process the experimenter discovers “the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts.”<sup>49</sup> Since then, courts in trade secret cases have frequently dwelled on the defendant’s process just as much as the defendant’s product.<sup>50</sup>

It might be tempting to label this rule a simple protection against predatory freeriding. Generating valuable information in the first instance can be expensive, while appropriating it can be cheap, so perhaps trade secrecy is simply channeling second comers into shouldering enough cost to preserve the original innovator’s ability to recoup his investment.<sup>51</sup> Sure enough, some judicial opinions frame the improper means inquiry as a test of the defendant’s expenditures.<sup>52</sup> As one early case put it, the law should not “advantage the competitor who by unfair means . . . obtains the desired knowledge without himself paying the price in labor, money, or machines expended by the discoverer.”<sup>53</sup> The problem with this account, though, is that trade secret doctrine penalizes even costly and other-

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<sup>47</sup> 23 N.E. 12 (N.Y. 1889).

<sup>48</sup> *Id.* at 13.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., *Pioneer Hi-Bred Int’l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1238 (8th Cir. 1994) (“[T]he critical inquiry is whether the defendant obtained the secret by ‘improper means.’”) (quoting RESTATEMENT (FIRST) OF TORTS § 757(a)); *Hurst v. Hughes Tool Co.*, 634 F.2d 895, 898 (5th Cir. 1981) (finding no improper means where the defendant acquired information by asking an inventor questions); *E. I. Du Pont De Nemours & Co. v. United States*, 288 F.2d 904, 911 (Ct. Cl. 1961) (“Anyone is at liberty to discover a particular trade secret by any fair means, as by experimentation or by examination and analysis of a particular product. Moreover, upon discovery the idea may be used with impunity.”); *B.C. Ziegler & Co. v. Ehren*, 414 N.W.2d 48, 53 (Wis. 1987) (holding that obtaining discarded customer lists from a scrap paper dealer was improper means); *Drill Parts & Serv. Co. v. Joy Mfg. Co.*, 439 So.2d 43, 49–50 (Ala. 1983) (holding that acquisition of secret engineering diagrams by searching through scrap metal and trash was improper means).

<sup>51</sup> On the importance of first-mover advantage, see Samuelson & Scotchmer, *supra* note 18, at 1586.

<sup>52</sup> See, e.g., *Lamont v. Vaquillas Energy Lopeno Ltd.*, 421 S.W.3d 198, 215 (Tex. App. 2013) (“Obtaining knowledge of a trade secret without spending time and resources to discover it independently is improper . . .”).

<sup>53</sup> *A.O. Smith Corp. v. Petroleum Iron Works, Co. of Ohio*, 73 F.2d 531, 539 (6th Cir. 1934).

wise legal methods of appropriation.<sup>54</sup> Thus, for example, the Fifth Circuit imposed liability on a competitor that flew a plane over DuPont's still-under-construction methanol plant and photographed its layout—acts that would have been perfectly lawful but for trade secret protection.<sup>55</sup> Industrial espionage like that can get expensive, particularly where a surveillance arms race ensues between competitors.<sup>56</sup> Of course, it's not always as expensive as conducting the R&D in the first instance (if it were, competitors would have no particular incentive to copy), but the same can be said of legal means like reverse engineering.<sup>57</sup>

Trade secrecy's improper means regime is thus hard to justify on imitation-cost grounds alone. If the innovator's ability to recoup R&D investment is the only thing at stake, it's not obvious why the law would differentiate between costly reverse engineering and equally costly snooping.<sup>58</sup> Misappropriation doctrine would need only to balance the defendant's imitation costs against the plaintiff's innovation costs, regardless of the form that the imitation takes.

A more complete explanation looks at the competitor's copy process not just in terms of its private cost but also in terms of its social value. Industrial espionage is wasteful. Sifting through trash and reconstructing shredded documents might give a competitor a hot tip, but eventually the resources devoted to the activity will outweigh the value of the secret information itself. There's little public payoff from

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<sup>54</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt. c (1995) (“The acquisition of a trade secret can be improper even if the means of acquisition are not independently wrongful.”).

<sup>55</sup> E. I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012 (5th Cir. 1970).

<sup>56</sup> See Douglas Lichtman, *How the Law Responds to Self-help*, 1 J.L. ECON. & POL'Y 215, 235 (2005) (“[D]o we really believe that DuPont's rival acquiesced, rather than instead looking to rent a faster airplane or an airplane that flies at higher altitudes, two among dozens of adjustments that would have made it more difficult for DuPont to detect the espionage in the first place?”); Bone, *supra* note 28, at 298 (“After *Christopher*, future trade secret owners will expect competitors to fly over their property at higher altitudes and use more sophisticated cameras to reduce the likelihood of detection.”).

<sup>57</sup> See Benjamin N. Roin, *The Case for Tailoring Patent Awards Based on Time-to-Market*, 61 UCLA L. REV. 672, 731–34 (2014) (describing various costs borne by innovators that reverse engineers may avoid); Samuelson & Scotchmer, *supra* note 18, at 1587 (arguing that a reverse engineer will generally spend less time and money than the initial innovator because the reverse engineer is able to avoid wasteful expenditures investigating approaches that do not work, and in part because advances in technology typically reduce the costs of rediscovery over time).

<sup>58</sup> See Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 322 (2008) (questioning why, under *Christopher's* standard, legal activities like “reverse engineering a chemical, or learning a competitor's prices by walking through their store during business hours, or attempting to predict a competitor's business strategy based on their market behavior, aren't similarly cheap efforts to acquire knowledge that would be expensive to protect”).

cultivating a brigade of expert dumpster divers.<sup>59</sup> Reverse engineering, by contrast, has an immense teaching function. It incubates useful know-how and reveals opportunities for incremental improvements, benefits that the rest of society reaps. The Supreme Court has called reverse engineering “an essential part of innovation” that often results in new products that “may lead to significant advances in the field.”<sup>60</sup> Similarly, the Seventh Circuit has noted that the improper means doctrine “emphasizes the desirability of encouraging inventive activity by protecting its fruits from efforts at appropriation that are, indeed, sterile wealth-redistributive—not productive—activities.”<sup>61</sup> The doctrine privileges reverse engineering because it “involves the use of technical skills that we want to encourage.”<sup>62</sup> Picking up on this theme, a number of scholars have emphasized the positive externalities of steering competitors toward reverse engineering in place of espionage.<sup>63</sup> The public gains more from reverse engineering not just because of the particular products it yields in the short term, but also because of the valuable skills it breeds in the long term.

The law of trade secrets thus reflects the different welfare effects of different copy processes. The improper means doctrine sorts roughly between those appropriation methods that offer enough benefits to pay for themselves and those that don't. It's not enough, trade

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<sup>59</sup> Little, but not zero. Government intelligence agencies can always learn from the private sector. Cf. Jacob Aron, *DARPA's Shredder Challenge Solved Two Days Early*, NEWSIDENTIST, Dec. 5, 2011 (11:28 AM), <http://www.newscientist.com/blogs/onepercent/2011/12/darpas-shredder-challenge-has.html> (describing a Department of Defense challenge in which “9000 teams compet[ed] to reconstruct five shredded documents using a combination of computer science and jigsaw-solving skills”).

<sup>60</sup> *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 160 (1989).

<sup>61</sup> *Rockwell Graphic Sys. v. DEV Indus.*, 925 F.2d 174, 178 (7th Cir. 1991).

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., Jeanne C. Fromer, *A Legal Tangle of Secrets and Disclosures in Trade: Tabor v. Hoffman and Beyond*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP 286* (Rochelle C. Dreyfuss & Jane C. Ginsburg eds., 2014) (“[R]equiring third parties to reverse engineer—rather than use the secret directly—might also be helpful to the third parties (and society at large) by teaching them more about the information, its uses, and further refinements.”); LANDES & POSNER, *supra* note 23, at 370 (“[R]everse engineering will often generate knowledge about the product being reverse engineered that will make it possible to improve it or develop or improve other products.”); Jerome H. Reichman, *How Trade Secrecy Law Generates a Natural Semicommons of Innovative Know-how*, in *THE LAW AND THEORY OF TRADE SECRECY 189* (Rochelle C. Dreyfuss et al. eds., 2011) (“[T]he process of reverse engineering itself, by methodically extracting the innovator’s know-how from a given application, tends to generate technical improvements over time, including cost-saving modes of manufacture that reduce prices to consumers.”); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 *CARDOZO L. REV.* 121, 174 (1999) (“[W]hen competitors do opt for independent development or reverse engineering, these alternatives channel their investment into socially useful activity—either option develops productive technological or business expertise within the firm, rather than wasteful expertise in industrial espionage.”).

secret doctrine says, to decide cases looking only at a final product, even when that final product was unabashedly copied from the owner's original work. To understand a copy's value to society, one also needs to look at the history of its creation.

### B. Copyright Law

Copyright's treatment of the copy process starts out like trade secrecy's but quickly diverges. Every copyright case, like every trade secret case, commences with the question of whether copying has occurred.<sup>64</sup> "[T]wo works may be identical in every detail, but, if the alleged infringer created the accused work independently . . . , then there is no infringement."<sup>65</sup> This doctrine allows the Bee Gees to pen *How Deep Is Your Love* despite the song's substantial similarity to a protected work that the band had never before heard.<sup>66</sup> It allows fashion designer Albert Nipon to create a dress featuring a pattern substantially similar to a protected work that Nipon had never before seen.<sup>67</sup> And it allows Carnival Cruise Lines to produce a Super Bowl commercial featuring "lingering shots of the sea, of characters gazing at the water and . . . a 1962 narration by President John F. Kennedy about humanity's connection to and love for the sea" strongly resembling a freelance film bearing all of those same traits that Carnival had never before viewed (at least so far as anyone can tell).<sup>68</sup> The moral of each of these examples should already be familiar from trade secrecy: if there is no copying, there is no claim.

Once independent creation can be ruled out, however, copy process seems to disappear from the picture. Infringement liability doesn't hinge on the ease of copying.<sup>69</sup> As one court tidily put it, "[t]he issue in a copyright[] case is simply whether the copyright holder's expression has been copied, not how difficult it was to do the copying."<sup>70</sup> An unauthorized copy is supposed to be equally infringing

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<sup>64</sup> See *supra* note 29.

<sup>65</sup> *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

<sup>66</sup> *Id.* at 901–06.

<sup>67</sup> *Cameron Indus. v. Albert Nipon Co.*, 630 F. Supp. 1293, 1296 (S.D.N.Y. 1986).

<sup>68</sup> Allan Brettman, *Coincidences in Carnival Cruise Line's Super Bowl Ad Catches Attention of Portland Filmmaker*, THE OREGONIAN (Feb. 3, 2015, 3:31 PM) [http://www.oregonlive.com/playbooksprofits/index.ssf/2015/02/coincidences\\_in\\_carnival\\_cruis.html](http://www.oregonlive.com/playbooksprofits/index.ssf/2015/02/coincidences_in_carnival_cruis.html).

<sup>69</sup> See *supra* note 10; cf. LANDES & POSNER, *supra* note 23, at 370 ("A law that forbade deliberately appropriating trade secrets by either theft or reverse engineering would be closely analogous to copyright law, which penalizes copying.").

<sup>70</sup> *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1237 (3d Cir. 1986); see also *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300 (D.C. Cir. 2002) (observing that copyright's inquiry into unlawful copying turns on "whether [the defendant's] end product . . . is substantially similar to [the plaintiff's], not how it got that way"); *Lasercomb*



whether it was spat out by a machine or painstakingly produced by hand.<sup>71</sup> According to the leading copyright treatise, it is “fundamental” that copyright “protects against unauthorized copying not only in the original medium in which the work was produced, but also in any other medium as well. Thus copyright in a photograph will preclude unauthorized copying by drawing or in any other form, as well as by photographic reproduction.”<sup>72</sup> Copyright doctrine cares about these processes’ observable artifacts rather than about the processes themselves.

A good example of copy process’s black-letter irrelevance is *Time, Inc. v. Bernard Geis Associates*.<sup>73</sup> In that case, an author writing a book on President Kennedy’s assassination sought a license to include a series of reproduced frames from the famous Zapruder film. The copyright owner refused. “Doubtless having in mind the probability of an action for infringement,” the court surmised, the author and his publisher hired a graphic artist to make charcoal drawings of the individual frames rather than reproducing them photographically.<sup>74</sup> Although the court ultimately held that reproducing these shots for the purpose of historical commentary was a fair use, it went out of its way to brush aside the act of manual recreation. The artist’s “so-called ‘sketches,’” according to the court, “[we]re in fact copies of the copyrighted film. That they were done in charcoal by an ‘artist’ is of no moment.”<sup>75</sup>

But for the backstop of fair use—which had everything to do with authorial purpose and nothing to do with authorial process—the defendants would have been liable for infringement. Indeed, that precise outcome occurred in a later case that involved similar manual reproduction without the commentary on historical events. In *Peker v. Masters Collection*,<sup>76</sup> the defendant was a retail company in the business of producing replicas of famous oil paintings, at least some of which remained under copyright. The company would first apply acrylic paint to poster-sized prints and then, once the acrylic had absorbed the image from the poster ink, mount it on a canvas.<sup>77</sup> Next,

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*Am., Inc. v. Holiday Steel Rule Die Corp.*, 656 F. Supp. 612, 616 (M.D.N.C. 1987) (rejecting defendant’s argument that its “very laborious and expensive process” should weigh against infringement liability).

<sup>71</sup> See Burk, *supra* note 10, at 599.

<sup>72</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[E] (2015).

<sup>73</sup> 293 F. Supp. 130 (S.D.N.Y. 1968).

<sup>74</sup> *Id.* at 138.

<sup>75</sup> *Id.* at 144.

<sup>76</sup> 96 F. Supp. 2d 216 (E.D.N.Y. 2000).

<sup>77</sup> *Id.* at 217–18.

“specially trained artists” would apply oil paint to the canvas to match the brush strokes of the original as closely as possible.<sup>78</sup> Finally, the company would apply a thin veneer of protective varnish and frame the piece, leaving a final product that looked and felt, in the defendant’s own words, “virtually indistinguishable from the original oil painting masterpiece.”<sup>79</sup> The court held that these reproductions infringed the owner’s copyright, notwithstanding the considerable labor that the defendant had to invest in order to make a convincing replica.<sup>80</sup>

Another court recently reached a similar result in an appropriation art case. In *Friedman v. Guetta*,<sup>81</sup> an artist recreated a photograph of the musical group Run DMC by stripping out the background and any shading, projecting that altered image onto a large piece of wood, painting the image onto the wood, and then gluing 1000 shards of broken vinyl records on top of it.<sup>82</sup> The end result was an “almost exact[ ] replicat[ion]” of the outline of each group member’s figure.<sup>83</sup> When the owner of the copyright in the photograph sued, the artist asserted a fair use defense. The court rejected it, holding that the artist’s use was not sufficiently “distinct” as to render it a permissible transformation of the plaintiff’s work.<sup>84</sup> That fair use finding was based on the similar end products. The process, jigsawing vinyl record shards into that recognizable product, didn’t enter the analysis.

The *Time* and *Peker* decisions seem to stand for the proposition that a copyist’s process does not affect the infringement inquiry. The *Friedman* case appears to apply that proposition, even if silently. To determine liability, copyright primarily asks “what” questions—in large part, what elements of the copyrighted work the defendant copied. The fair use doctrine tacks on a “why” question, inquiring into the defendant’s reason for making the copy.<sup>85</sup> These two sets of ques-

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<sup>78</sup> *Id.* at 218.

<sup>79</sup> *Id.* at 219.

<sup>80</sup> *Id.* at 220–21.

<sup>81</sup> No. CV 10-00014, 2011 WL 3510890 (C.D. Cal. May 27, 2011).

<sup>82</sup> *Id.* at \*1.

<sup>83</sup> *Id.* at \*5. The original photograph and the recreation at issue can be found at Sean Bonner, *Thierry Guetta, aka Mr. Brainwash Sued for Copyright Infringement Over Run DMC Image*, BOINGBOING (Jan. 6, 2011, 10:30 AM) <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.

<sup>84</sup> *Friedman*, 2011 WL 3510890, at \*6.

<sup>85</sup> See 17 U.S.C. § 107(1) (2012) (directing courts to consider the “purpose and character of the use” of the work); *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (finding fair use because the defendant’s “purposes in using [the copyright owner’s] image are sharply different from [the owner’s] goals in creating it”); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 467 (2008) (concluding based on review of appellate decisions that “in evaluating transformativeness

tions, what and why, cover the entire landscape of the infringement inquiry. Copyright doctrine appears uninterested in asking “how.”<sup>86</sup>

Nevertheless, the doctrine doesn’t fully capture the reality of all copyright litigation. One of the most prominent copyright cases of the last decade, *Fairey v. Associated Press*,<sup>87</sup> featured an extensive dispute over copy process. Graphic artist Shepard Fairey used an unlicensed AP photograph of Barack Obama in creating the ubiquitous image from the 2008 presidential campaign popularly known as the “Hope Poster.”<sup>88</sup> Fairey filed a lawsuit seeking a declaratory judgment of non-infringement. Although the case ultimately settled before the court issued a definitive ruling, Fairey argued throughout the litigation that the elements he copied from the photograph weren’t copyrightable expression and that, even if they were, the copying would still be permitted as fair use.<sup>89</sup> Neither argument ought to implicate copy process. Even so, Fairey fought to prove that his method of converting the photograph into his poster image required great expertise and many hours of labor hand-cutting rubylith films, rather than a simple Photoshop job that the AP alleged to be “a form of computerized ‘paint by numbers.’”<sup>90</sup> Consistent with conventional doctrine, the AP argued that the entire factual dispute was immaterial.<sup>91</sup> At the same

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the courts focus more on the purpose of a defendant’s use than on any alteration the defendant has made to the content of the plaintiff’s work”).

<sup>86</sup> To be sure, fair use does immunize some copying in the course of reverse engineering software, but only where it is an intermediate step toward developing an end product that isn’t substantially similar to the original. The focus, in other words, remains on what the final output looks like, regardless of the process through which it’s produced. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1528 (9th Cir. 1992) (permitting a reverse engineer to copy software elements while in the process of developing interoperable programs but noting that “[o]ur conclusion does not, of course, insulate [the reverse engineer] from a claim of copyright infringement with respect to its finished products”); Andrew Johnson-Laird, *Software Reverse Engineering in the Real World*, 19 U. DAYTON L. REV. 843, 845 n.8 (1994) (observing that *Sega* doesn’t allow “using software reverse engineering to produce infringing copies of the original software. Surely an infringing computer program would be viewed as infringing by a court without regard to the process by which it was produced.”).

<sup>87</sup> Amended Complaint for Declaratory Judgment and Injunctive Relief, *Fairey v. Associated Press*, No. 09-1123 (S.D.N.Y. Nov. 13, 2009). On the case’s notoriety, see Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 BROOK. L. REV. 1487, 1487 (2011) (introducing the *Fairey* litigation as “[t]he recent copyright ‘case’ célèbre”).

<sup>88</sup> For background on the case, see generally William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243 (2012).

<sup>89</sup> *Id.* at 257.

<sup>90</sup> The Associated Press’s First Amended Answer, Affirmative Defenses and Counterclaims at 41, *Fairey*, No. 09-01123 (S.D.N.Y. Nov. 12, 2009); *see also* Fisher et al., *supra* note 88, at 252 n.39.

<sup>91</sup> *See, e.g.*, Associated Press’s Motion in Limine No. 3 to Exclude Evidence of Fairey’s Use of Rubylith and for an Adverse Inference at 4, *Fairey*, No. 09-01123 (S.D.N.Y. Mar.

time, it continued to stress its version of the facts: Fairey's copying was trivially easy to do.<sup>92</sup>

If copyright doctrine says the copy process doesn't matter, why litigate the issue? Perhaps because the labor involved in an act of copying can sway jurors' minds. To begin with, hardworking copyists might seem more sympathetic than do their stereotypically freeriding counterparts. Moreover, those labor-intensive copies might strike viewers as more expressively compelling than cut-and-paste digital reproductions (more on this below).<sup>93</sup> Either effect would seem to place a thumb on the defendant's side of the scale.<sup>94</sup>

In fact, juries may not be the only decisionmakers receptive to such arguments. Judges, too, sometimes subtly invoke the defendant's process when ostensibly assessing the propriety of the defendant's product, despite process's black-letter irrelevance. Probably the most recognizable touchstone for the notion that process can influence case outcomes is the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.<sup>95</sup> There, Time Magazine had purchased the exclusive right to print prepublication excerpts from President Gerald Ford's forthcoming memoir, only to be "scoop[ed]" by the defendant, a competitor that had received an unauthorized copy of the manuscript.<sup>96</sup> When the promise of exclusivity was lost, Time cancelled the agreement, and the book's publisher sued.

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10, 2011) ("The particular process whereby Mr. Fairey copied the Obama Photo—completely digitally or partially digitally and partially using Rubylith—is totally irrelevant because copyright law simply does not take into account 'sweat of the brow.'" (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991))); Associated Press's Motion in Limine No. 5 to Preclude Obey Clothing from Presenting Fairey's Expert Witnesses at Trial at 8, *Fairey*, No. 09-01123 (S.D.N.Y. Feb. 25, 2011) ("[O]pinions about how Shepard Fairey may have made the Obama Image are not relevant to the issue of whether the Obama Image is substantially similar to the Obama Photograph. . . . [T]he impression that a copy leaves with the ordinary lay observer . . . is the touchstone for determining infringement.").

<sup>92</sup> Fisher et al., *supra* note 88, at 252 n.39 (summarizing deposition testimony in which AP's expert witness "contended that he himself was able to create an approximation of the Hope Poster using an 'all-digital process' that mimicked the traditional rubylith-based technique but performed all of the steps on the computer—and that, moreover, [he] was able to do so in only ninety minutes").

<sup>93</sup> See *infra* Section II.B.

<sup>94</sup> At least one commentator has made a similar argument. See Bruce E. Boyden, *The Obama "Hope" Poster Case—How Was the Poster Created?*, MARQ. U. L. SCH. FAC. BLOG (Feb. 27, 2009) <http://law.marquette.edu/facultyblog/2009/02/27/the-obama-%E2%80%99Chope%E2%80%9D-poster-case-%E2%80%94how-was-the-poster-created/> ("[A]tmospherically . . . it just seems easier to credit a claim of substantial similarity, or conversely harder to credit a claim of fair use, if Fairey copied the original and altered it down, rather than creating a similar-looking version from the bottom up . . .").

<sup>95</sup> 471 U.S. 539 (1985).

<sup>96</sup> *Id.* at 542.

Rejecting the defendant's fair use argument, the Court emphasized that the doctrine relies in part on "the propriety of the defendant's conduct."<sup>97</sup> The fact that the defendant had "knowingly exploited a purloined manuscript" therefore significantly weakened its case.<sup>98</sup> While the Supreme Court's reasoning doesn't directly speak to recreations versus duplications, the conduct-centered move that it makes opens the door to such comparisons.<sup>99</sup> Under *Harper & Row*, courts may scrutinize not just end products but the circumstances through which they're brought into being.

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court's most recent foray into the fair use doctrine, the Court separated between fair users and the paradigmatically wrongful copyists who copy in order to "avoid the drudgery in working up something fresh."<sup>100</sup> The dichotomy between the freeriding copyist and the hardworking original creator has a long and familiar history in copyright jurisprudence,<sup>101</sup> but *Campbell's* rhetoric suggests the dichotomy runs even deeper. Drudgery doesn't just distinguish creators from copyists; it also separates *among* copyists. The fair use analysis involves, as the Second Circuit put it in another case, "an inquiry into the infringer's creative effort."<sup>102</sup>

One can find similar narratives across a number of judicial opinions. Take, for example, *Leibovitz v. Paramount Pictures Corp.*,<sup>103</sup> in which the Second Circuit found fair use where an advertisement for the film *Naked Gun 33 1/3* mimicked Annie Leibovitz's famous photograph of an unclothed and seven-months-pregnant Demi Moore. The court permitted the advertisement, which featured male comedian Leslie Nielsen's head superimposed onto a female body, as a parody of Leibovitz's work.<sup>104</sup> That's a product rationale, not a process one, and it's the rationale for which the case is always cited. But

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<sup>97</sup> *Id.* at 562.

<sup>98</sup> *Id.* at 563.

<sup>99</sup> Though the Supreme Court didn't dwell on the defendant's labor, the dissenting judge in the court below did. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 214 (2d Cir. 1983) (Meskill, J., dissenting), *rev'd*, 471 U.S. 539 (1985) (taking the position, ultimately vindicated by the Supreme Court's reversal of the majority's decision, that the copying at issue should be distinguished from prior fair use findings because the defendant had not done "a substantial amount of original research").

<sup>100</sup> 510 U.S. 569, 580 (1994).

<sup>101</sup> See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033 (2005) (describing courts' and commentators' "almost obsessive preoccupation with identifying and rooting out that great evil of the modern economic world—free riding").

<sup>102</sup> *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253, 1260 (2d Cir. 1986).

<sup>103</sup> 137 F.3d 109 (2d Cir. 1998).

<sup>104</sup> *Id.* at 117 (holding that the balance of the four fair use factors favored the defendant parodist).

seldom noticed is the court's discussion of the creative labors that the defendant took to evoke the original: "[R]ather than mechanically copying the portion of the original Leibovitz photograph depicting Moore's body, Paramount commissioned another photograph to be taken of a nude, pregnant woman, similarly posed. Great effort was made to ensure that the photograph resembled in meticulous detail the one taken by Leibovitz."<sup>105</sup> If process doesn't figure into the analysis of this "meticulous[ly] detail[ed]" resemblance, there should be no difference between the defendant's from-scratch recreation and the sort of "mechanical copying" from which the court took pains to distance it. The court's framing of the defendant's process as the opposite of mechanical copying suggests that the process was significant for (even if not decisive of) its case.

Likewise, in *Fuentes v. Mega Media Holdings, Inc.*,<sup>106</sup> the court held that fair use protected a video journalist who used copyrighted footage as part of commentary that, the court stressed, "was no mere cut-and-paste job."<sup>107</sup> The defendant "did much more than merely re-run the videos in a different context," going so far as to "select[ ] which scenes out of the hours of video they would broadcast during the show on each particular night and invite[ ] guests onto the show that could (and did) provide insight into and commentary on those scenes."<sup>108</sup> As in *Leibovitz*, it's not clear why any of these facts would matter in a product-centered copyright regime. And yet *Fuentes* tellingly falls back on how much the defendant did, not just what he produced. Other cases dealing with research and journalism take a similar approach.<sup>109</sup>

Contrast the *Fuentes* and *Leibovitz* defendants with the defendant in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*<sup>110</sup> There, the defendants wrote a send-up of the O.J. Simpson murder trial in the style of Dr. Seuss's *The Cat in the Hat*.<sup>111</sup> Rejecting their fair use defense, the Ninth Circuit invoked the Supreme Court's "drudgery" language.<sup>112</sup> The satire, according to the court, evinced

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<sup>105</sup> *Id.* at 111.

<sup>106</sup> No. 09-22979-CIV, 2011 WL 2601356 (S.D. Fla. June 9, 2011), *report and recommendation adopted by* 2011 WL 2609550 (S.D. Fla. June 30, 2011).

<sup>107</sup> *Id.* at \*9.

<sup>108</sup> *Id.* at \*10.

<sup>109</sup> See *supra* note 99 (discussing the dissent from the Second Circuit majority's decision in *Harper*, later reversed by the Supreme Court); *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989) (finding fair use where an author quoted copyrighted material not to engage in "opportunistic free riding" but rather to produce a "laboriously researched" biography).

<sup>110</sup> 109 F.3d 1394 (9th Cir. 1997).

<sup>111</sup> *Id.* at 1396.

<sup>112</sup> *Id.* at 1401 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994)).

“no effort to create a transformative work.”<sup>113</sup> Here again, the court is speaking in terms of what the producer did rather than what the product is.

Even beyond fair use, the copy process might be playing an unacknowledged role. In *Bridgeport Music, Inc. v. Dimension Films*,<sup>114</sup> the Sixth Circuit rejected a de minimis defense for music sampling on the rationale that “if an artist wants to incorporate a ‘riff’ from another work in his or her recording, he is free to duplicate the sound of that ‘riff’ in the studio.”<sup>115</sup> Like the fair use cases, *Bridgeport* emphasizes an implicit narrative that handmade recreations are privileged while mechanical reproductions are not. Better to work for your copies.

In these cases, copy process may be lurking beneath copyright’s doctrinal surface after all. If the judicial rhetoric finds no foothold in contemporary doctrine, it can at least claim some fidelity to copyright’s early history. Students in every copyright course learn that an author’s sheer investment and effort, or “sweat of the brow” in legal parlance, are insufficient for earning IP protection.<sup>116</sup> But although sweat of the brow is today a discredited copyrightability issue focused on the plaintiff, it actually began as a legitimate infringement issue focused on the defendant.<sup>117</sup> Prior to the twentieth century, courts asked whether a second comer bestowed enough “new toil and talent”<sup>118</sup> or “care and pains”<sup>119</sup> to avoid infringement. The currency

<sup>113</sup> *Id.* (emphasis added).

<sup>114</sup> 410 F.3d 792 (6th Cir. 2005).

<sup>115</sup> *Id.* at 801.

<sup>116</sup> See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–54 (1991) (finding the sweat of the brow doctrine flouts basic copyright principles); see also *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1268 (10th Cir. 2008) (“[I]n assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability.”); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005) (“Protection derives from the features of the work itself, not the effort that goes into it.”).

<sup>117</sup> See Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569, 1573 (1963) (“[C]ourts [applying the sweat of the brow doctrine] were not speaking of requisites to procuring copyright; their language was not meant to be descriptive of the sort of efforts that would achieve the minimum ‘originality’ to be protected by law. The courts were merely stating that the defendant in the cases before them had not engaged in enough original work to prevent a finding of infringement.”); see also Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1880 (1990) (discussing early courts’ “longstanding practice of protecting information, qua information, when a rival engaged in what the courts perceived to be inadequate effort of his own”); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1402–03 (2011) (noting nineteenth-century cases’ emphasis on the defendant’s intellectual labor).

<sup>118</sup> *Webb v. Powers*, 29 F. Cas. 511, 517 (C.C.D. Mass. 1847).

<sup>119</sup> *Burnett v. Chetwood* (1721) 35 Eng. Rep. 1008, 1009; 2 Mer. 441, 441.

of the realm was the defendant's "exercise of skill, or labor, or expense."<sup>120</sup> Indeed, the case that originated the fair use doctrine in U.S. law, *Folsom v. Marsh*,<sup>121</sup> contrasted the fair user's "intellectual labor and judgment" with the infringer's "facile use of scissors."<sup>122</sup>

More recently, the same judicial impulse can be found in cases addressing the compulsory license for musical compositions under the now-superseded 1909 Copyright Act. That statute provided that once a composer had licensed the recording of a musical work, anyone else could make a "similar use" of that work by paying the statutorily-determined royalty.<sup>123</sup> Then, as today, the compulsory license permitted cover songs—that is, songs re-recorded by second comers. But in the 1970s, defendants in several cases tried to invoke the compulsory license to allow even the unauthorized duplication of existing sound recordings themselves. Just as in *Bridgeport* thirty years later, courts rejected the argument out of hand. The Seventh Circuit, for example, determined that "duplicating a recording is not similar to making a recording of the composition. The duplicator does not take the composition as 'raw material' and go through the creative and financial steps of producing a recording."<sup>124</sup> Similarly, the Third Circuit offered this process-focused explanation:

The use to which the original licensee put the composer's work, i.e., the musical score, was much more elaborate, involving as it did the preparation of an arrangement from the written composition and its performance by musicians and vocalists. The mere duplication of a recording by the pirate is not the same as, or "similar" to, the efforts made by the original licensee in utilizing the characters on a piece of paper as the basic plan for producing harmonious sounds.<sup>125</sup>

Highlighting the process/product distinction even more starkly, the Fifth Circuit concluded that mechanical duplication was beyond the compulsory license's scope because "[t]he end product, of course, is not only 'similar' but virtually indistinguishable; the process, however, is completely dissimilar."<sup>126</sup> Similar decisions from that era abound.<sup>127</sup> Modern practitioners may be familiar with the version of

<sup>120</sup> *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

<sup>121</sup> 9 F. Cas. 342 (C.C.D. Mass. 1841).

<sup>122</sup> *Id.* at 345.

<sup>123</sup> 17 U.S.C. § 1(e) (1970).

<sup>124</sup> *Heilman v. Bell*, 583 F.2d 373, 376 (7th Cir. 1978) (quoting *Edward B. Marks Music Corp. v. Colo. Magnetics, Inc.*, 497 F.2d 285, 288 (10th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 1120 (1975)).

<sup>125</sup> *Jondora Music Publ'g Co. v. Melody Recordings, Inc.*, 506 F.2d 392, 395 (3d Cir. 1974).

<sup>126</sup> *Fame Publ'g Co. v. Ala. Custom Tape, Inc.*, 507 F.2d 667, 669–70 (5th Cir. 1975).

<sup>127</sup> *See, e.g., Edwards B. Marks Music Corp.*, 497 F.2d at 288 ("Magnetics may make its own arrangement, hire its own musicians and artists, and then record. It does not mean



this rule that is now codified in the current Copyright Act.<sup>128</sup> It was the courts, though, that first articulated the principle that the process of recreating sound recordings in the studio should be legally favored over the process of mechanically duplicating them.

Thus, the notion that copyright doctrine would assess the defendant's labor is hardly unprecedented. Despite this historical lineage, however, the present-day role of copy process remains frustratingly subterranean. Whatever influence the defendant's appropriation methods might have behind the scenes, the black-letter infringement rule continues to insist that process is beside the point.

If the doctrine and the rhetoric can't both be right, there are two possible ways to proceed. Courts could cut back on the process talk, confirming that copyright cases are decided based on end products just as the doctrine intends. Or they could embrace that same talk by moving closer to trade secrecy and expressly incorporating the copy process into the infringement analysis.<sup>129</sup> How to make that decision is the subject of the next Part.

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that Magnetics may use the composer's copyrighted work by duplicating and copying the record of a licensed recording company. Such, in our view, is not a *similar* use."); *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974) ("The statute, as amended, places no impediment to the defendants collecting their own talent and technicians to imitate on a new tape or record a performance embodied on the protected sound recording."); *Fame Publ'g Co. v. S & S Distribs., Inc.*, 363 F. Supp. 984, 988 (N.D. Ala. 1973) (holding that duplicating sound recordings was an "identical use," rather than the statutorily required "similar use," and that consequently "[a]nyone who seeks to rely on the compulsory license premium must hire some musicians, take them into a studio and make his own recording"); see also *Æolian Co. v. Royal Music Roll Co.*, 196 F. 926, 927 (W.D.N.Y. 1912) (holding that the statutory license did not permit a player piano-roll manufacturer to "avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same," and that statutory licensees must instead "resort to the copyrighted composition or sheet music, and not pirate the work of a competitor who has made an original perforated roll").

<sup>128</sup> See 17 U.S.C. § 115(a)(1) (conditioning the statutory license in cases of mechanical duplication, but not in cases of recreation from scratch, on receiving permission from the owner of the separate copyright in the duplicated sound recording); H.R. Rep. No. 94-1476, at 108 (1976) (noting that under § 115, "a person is not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another").

<sup>129</sup> One could imagine a third possibility: that the status quo actually enhances welfare through a form of acoustic separation between on-the-books doctrine and frequent judicial practice. See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (advancing a theory of acoustic separation through which the criminal law may project a stringent set of rules to shape public perception of permissible conduct and a more lenient set of rules to govern how officials should treat that conduct). But whatever value acoustic separation might have in other contexts, I'm skeptical that it has much here. Acoustic separation is justified, the argument goes, where the perceived strictness of a rule elicits desirable behavior from the relevant public. *Id.* at 645 (explaining that greater latitude given by courts to defenses like duress or necessity may reflect a belief that they will not lead to negative signaling to the

## II HOW TO EVALUATE COPY PROCESS

Employing a particular copy process affects multiple constituencies, from creators to copiers to consumers. Some of those effects might be more acute when the copied products are technological, others when the copied products are cultural. It's thus not self-evident that trade secrecy and copyright should treat the copy process similarly. Perhaps, it might be argued, the usual justifications for trade secrecy's improper means doctrine—the market-insulating effect of high imitation costs and the educational benefits of reverse engineering—don't apply to copyrightable works, except possibly in the case of functional expression like software.<sup>130</sup> Or, even if those justifications apply, perhaps they're outweighed by costs that are especially severe within the context of the copyright system.

In this Part, I contend that these views would be mistaken. Cultural works like fine art and film are in fact subject to similar justifications as the industrial knowledge of the trade secret regime. Indeed, certain arguments may be even stronger for such works because audiences value expressive replicas in a way that consumers of technology and business know-how do not. The key is to recognize the difference between acts of mechanical *duplication* and acts of hands-on *recreation* that trace the original author's creative steps. Those two activities are unfortunately lumped together whenever copyright doctrine speaks of "copying" as a single, uniform process—which is, essentially, whenever copyright doctrine speaks of copying at all. Once recreations are properly unbundled from copyright's sprawling notion of the copy, it becomes easier to see their benefits for both copier and con-

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public). The goal is to deter more conduct than a simple decision rule could alone. *See id.* at 670 (offering the example of the duress defense, where widespread knowledge "might move people to succumb to threats under circumstances in which such a decision, though personally rational, would be socially undesirable"). Broadcasting the irrelevance of copy process doesn't fit that mold. Costly overdeterrence is a greater risk in copyright cases than in the criminal cases around which the acoustic separation theory began. *See id.* at 638 n.29 (warning of the welfare losses from overdeterrence). Society likely benefits from a wider range of behavior at the margins of fair use doctrine than at the margins of murder, burglary, and other core offenses. *See* Gideon Parchomovsky & Kevin A. Goldman, Essay, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1497–98 (2007) (outlining the foregone social value of fair uses that the copyright system unnecessarily deters); Christopher Buccafusco & Jonathan S. Masur, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 288–89 (2014) (noting that in intentional murder cases, unlike negligence torts, "the magnitude of the harm will always exceed the costs of avoiding it"). As a result, even borderline fair use cases don't merit the extra dollop of deterrence that acoustic separation provides.

<sup>130</sup> *Cf.* Samuelson & Scotchmer, *supra* note 18, at 1650 (observing that until copyright subject matter expanded to include software, reverse engineering wasn't a significant policy lever for copyright law).

sumer, as well as their comparatively weak threat to the original creator. As the sections below discuss, the copy process belongs in the welfare calculus for technological and cultural appropriation alike.

### A. *Incentives and Imitation Costs*

According to the standard economic-incentives account, the case for IP protection becomes stronger, all else being equal, as copying becomes easier. IP rights target a particular public-goods problem: when it's costly to innovate but cheap to imitate, an innovator may be unable to recoup fixed costs and so decide to forego the enterprise altogether. In order to make innovation a more palatable investment, IP law artificially raises the cost of others' imitation. But if imitation is naturally costly to begin with, the need for legal intervention is weak.<sup>131</sup>

Optimal IP strength thus depends on the process through which creation and copying occur. Technological advances often make copying cheaper over time. If imitation costs fall more quickly than do innovation costs, IP may need to shoulder a greater burden tomorrow than it does today.<sup>132</sup> Copyright incentives, for example, become more important as copyists move from rewriting manuscripts by hand to operating a printing press to hitting a few keystrokes on a computer.<sup>133</sup> The Internet has been dubbed "the world's biggest copying

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<sup>131</sup> See, e.g., LANDES & POSNER, *supra* note 23, at 42 ("[M]odern technology has reduced the time it takes to make copies, as well as enabled perfect or near-perfect copies to be made at low cost, and as a result the importance of copyright protection has increased for many types of expressive works."); *id.* at 51 ("The higher the cost of a copy relative to that of the original, the smaller is the advantage to the copier from not having borne any part of the cost of creating the original."); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1585 (2003) ("If imitation is impossible even in the absence of patent protection, there is little need for the incentives patents provide. Even assuming imitation is possible, if it is sufficiently expensive or time consuming the inventor may be able to make enough money to justify the cost of R&D." (footnote omitted)); Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 66 (2005) (noting that "if the costs of copying are high," no IP regulation may be necessary "because the market will exclude copiers without the aid of the law"); Roin, *supra* note 57, at 734 ("Patent scholars occasionally simplify the economic analysis of optimal patent strength into a quick rule of thumb: The need for patent protection is a function of the ratio of total R&D costs to total imitation costs.").

<sup>132</sup> An important caveat is that if the cost of innovation falls sufficiently, IP incentives become unnecessary. The bare fact that copying grows easier thus shouldn't be a one-way ratchet expanding IP protection. See LANDES & POSNER, *supra* note 23, at 50 (contending that even while improved technology has reduced the cost of copying, that same technology has also "reduc[ed] the cost of expression" and along with it "the importance of copyright protection as a means for enabling the recovery of the cost of expression").

<sup>133</sup> See LANDES & POSNER, *supra* note 23, at 51 (discussing the expense of producing books following the invention of the printing press).

machine.”<sup>134</sup> Patent rights similarly take on heightened significance as advances in design and prototyping tools facilitate quicker reverse engineering and reduce first-mover advantages.<sup>135</sup>

This increasing ease of copying has more than once induced Congress to extend IP exclusivity to media not previously protected. Sound recordings, for example, weren’t made copyrightable until 1972, by which point the technological hurdles facing so-called record pirates had dwindled sufficiently.<sup>136</sup> Boat hull designs earned their own federal exclusivity regime in 1998, after the rise of plug-molding enabled reverse engineering them with trivial ease.<sup>137</sup> Semiconductor chips, too, received special protection in 1984 in response to increasingly effective cloning technology.<sup>138</sup> Dynamic technological change thus raises copy process’s significance for appropriate IP policy.

And there’s more. Even when looking at a static snapshot at a given moment in history, typical imitation costs will vary across different IP-intensive industries. Particular inventions and expressive media remain harder to copy than others.<sup>139</sup> A generic drug is techno-

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<sup>134</sup> *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009) (quoting Stephen Summer, *Music on the Internet: Can the Present Laws and Treaties Protect Music Copyright in Cyberspace?*, 8 CURRENTS: INT’L TRADE L.J. 31, 32 (1999)).

<sup>135</sup> See Roin, *supra* note 57, at 733 (noting the advancements in reverse engineering complex biological compounds); see also Douglas Gary Lichtman, *The Economics of Innovation: Protecting Unpatentable Goods*, 81 MINN. L. REV. 693, 733 (1997) (“Innovations are becoming inherently more copyable. Copying technologies are becoming faster, cheaper, and more accessible. Patent law’s implicit assumption that lead time advantages adequately protect unpatentable innovation is becoming correspondingly unrealistic.”).

<sup>136</sup> See, e.g., Harry Surden, *Technological Cost as Law in Intellectual Property*, 27 HARV. J.L. & TECH. 135, 138 (2014) (“The absence of a positive legal right over sound recordings [before 1972] was . . . partly explainable because technological limitations were, in effect, reliably performing the constraining function normally performed by copyright law.”).

<sup>137</sup> See Samuelson & Scotchmer, *supra* note 18, at 1591–94 (describing state and federal attempts to protect boat hull designs from plug-molding). In 1989, the Supreme Court held that federal law preempted state statutes attempting to provide “patent-like protection” for boat hull designs. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989). Nearly a decade later, Congress plugged the gap (so to speak) by enacting the Vessel Hull Design Protection Act, Pub. L. No. 105-304, 112 Stat. 2905 (1998) (codified as amended at 17 U.S.C. §§ 1301–1332).

<sup>138</sup> See Semiconductor Chip Protection Act, Pub. L. No. 98-620, 98 Stat. 3347 (1984) (codified as amended at 17 U.S.C. §§ 901–914). On the decline of imitation costs preceding the act’s passage, see Samuelson & Scotchmer, *supra* note 18, at 1598.

<sup>139</sup> See Burk & Lemley, *supra* note 131, at 1585 (noting that the time and cost of imitation varies depending on the invention and industry).

logically easier to produce than is a copycat jetliner.<sup>140</sup> A DVD is easier to duplicate than a dramatic stage production is to reenact.<sup>141</sup>

IP policymakers have multiple options for how to respond to this diversity in innovation-cost-to-imitation-cost ratios. First, Congress could statutorily increase or decrease protection for specific classes of products. Indeed, it has already done just that in a variety of settings. From the *sui generis* schemes for semiconductors and boat hulls<sup>142</sup> to the labyrinthine, industry-specific exemptions that run through the Copyright Act<sup>143</sup> to the occasional one-off carve-outs from the Patent Act's otherwise general standards,<sup>144</sup> statutory IP law has seen its fair share of technological idiosyncrasy. Surveying jurisdictions beyond the United States reveals other examples. Italy, for one, has inserted imitation costs directly into its statutory limitations on copyright, permitting copying for personal use "when made by hand or by a means of reproduction unsuitable for circulating or diffusing the work in public."<sup>145</sup> Nonetheless, policymakers shouldn't rely heavily on legislative fixes to calibrate IP scope for particular copy processes. As others have discussed at length, such an approach would be cumbersome, vulnerable to industry capture, and likely to produce results destined for quick obsolescence.<sup>146</sup>

A second, more promising option looks to the courts. Courts adjudicating infringement cases could expand the scope of IP protection along some dimension when imitation is easy and contract it when imitation is hard.<sup>147</sup> From an evidentiary standpoint, the sim-

<sup>140</sup> See F.M. Scherer, *Pharmaceutical Innovation*, in 1 HANDBOOK OF THE ECONOMICS OF INNOVATION 539, 560–61 (Bronwyn H. Hall & Nathan Rosenberg eds., 2010) (contrasting the cheap development of generic drugs to costly aircraft manufacturing, where "[e]ven without patents, the firm that would seek to imitate the Boeing 787 would have to build its own scale models, perform its own wind tunnel tests . . . spending very nearly as much as Boeing did to develop its 787").

<sup>141</sup> See LANDES & POSNER, *supra* note 23, at 42 (noting that despite modern copying technology, plays still take a significant amount of time to duplicate).

<sup>142</sup> See *supra* notes 137–38 and accompanying text.

<sup>143</sup> See 17 U.S.C. §§ 108–122 (2012) (providing for various "limitations on exclusive rights"); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 105–08 (2004) (describing the limitations).

<sup>144</sup> See, e.g., 35 U.S.C. § 271(e)(1) (2012) (allowing generic drug companies to make certain uses of patented pharmaceuticals); *Id.* 287(c) (prohibiting enforcement of medical procedure patents against doctors).

<sup>145</sup> PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 381 (3d ed. 2012) (quoting Legge 22 aprile 1941, n.633, in G.U. July 16, 1941, n.166 (It.)).

<sup>146</sup> See Burk & Lemley, *supra* note 131, at 1634–38 (cataloging the flaws of industry-specific patent legislation).

<sup>147</sup> For an analogous proposal targeting protectability, rather than infringement, see *id.* at 1661 (noting that "[w]here R&D costs are especially high relative to the costs of imitation, lowering the standards for patentability may increase the incentive to invest in

plest approach would be to consult the typical imitation process used within the relevant industry.<sup>148</sup> An industry-wide inquiry would spare the court the burden of determining in each case how costly the particular defendant's copying was relative to the particular plaintiff's innovation. There is an accuracy tradeoff to that administrability gain, however. Just because the average imitator can work cheaply doesn't mean that all imitators will. Some may proceed through more complicated and costly methods. Some, for example, might seek to teach themselves something about the product by building it anew.<sup>149</sup> For cultural works, others might wish to express something through a particular recreation process.<sup>150</sup> In either scenario, copyists aren't always using the cheapest and fastest methods available to them. In some cases, the cost of imitating will not lag far behind the cost of creating in the first instance.<sup>151</sup> A legal standard that reflects only the possible imitation costs, rather than the defendant's actual ones, will penalize more behavior than it needs to.

Thus, putting aside administration costs for the moment,<sup>152</sup> an infringement regime would ideally sort defendants according to their individual copy processes. Trade secret doctrine already does this through its improper means inquiry.<sup>153</sup> Copyright law does not, with the notable exception of the compulsory "cover" license for musical works discussed above.<sup>154</sup> That exception, though, provides some proof of concept for how courts might incorporate imitation costs into the copyright infringement analysis. The statutory text in force during the rise of tape piracy in the early 1970s, unlike the one in force today,

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innovation by increasing the likelihood of financial reward" and suggesting that "the Federal Circuit could take account of the cost and uncertainty of post-invention development . . . by creating a new secondary consideration of nonobviousness that measures the cost of innovation").

<sup>148</sup> See *id.* at 1662 (arguing that examining an industry as a whole would be more efficient than assessing each innovation individually).

<sup>149</sup> See *infra* Section II.C. (describing the phenomenon of "learning by doing").

<sup>150</sup> See *infra* Section II.B. (discussing various recreations that made statements unique and distinct from those of the original works).

<sup>151</sup> Indeed, imitation costs could conceivably be greater. See George E. Newman & Paul Bloom, *Art and Authenticity: The Importance of Originals in Judgments of Value*, 141 J. EXPERIMENTAL PSYCHOL.: GEN. 558, 563 (2012) ("[A]rtistic originals are not always more difficult to create than artistic duplicates. For instance, the time required to identically duplicate an abstract painting by Jackson Pollock may be greater than the time that it took to produce the original."); EVELYN TOYNTON, JACKSON POLLOCK (2012) (recounting how appropriation artist Mike Bidlo "had thought it would be easy to [re]create a Pollock," yet "it took him months of dogged practice to come up with anything credible").

<sup>152</sup> These costs are discussed *infra* Section II.D.

<sup>153</sup> See Samuelson & Scotchmer, *supra* note 18, at 1590 (defending trade secrecy's allowance of reverse engineering because "the costs and time required for reverse engineering already protect most innovators").

<sup>154</sup> See *supra* notes 123–28 and accompanying text.

did not expressly distinguish between mechanical duplication and rerecording from scratch.<sup>155</sup> Nevertheless, imitation costs drove courts to reach the same result anyway through their interpretation of the statute's open-ended "similar use" clause.<sup>156</sup> As one court explained its decision to withhold the license from mechanical duplicators:

[W]hile the difference between making a recording and duplicating a recording (making a recording of a recording) may seem negligible semantically, the impact of the latter upon the copyright interest of the composer is clear. The copyright holder's benefit is substantially reduced by the inevitable lower profits which result from duplicators who can re-record for a fraction of the original cost and thus undersell the authorized recorder.<sup>157</sup>

Though these cases were limited to a specific statutory license for musical works, they offer a blueprint for analyzing other recreations as well. One could easily apply the same reasoning to, say, recreated photographs<sup>158</sup> or paintings.<sup>159</sup> Indeed, as I argue below in Part III, the Copyright Act's fair use provision already gives courts an analogous statutory foothold for doing just that.<sup>160</sup> Considering the imitation costs actually borne by particular copyright defendants is both precedented and feasible.

### B. Process Preferences

While imitation costs present a familiar story in the IP literature, individual preferences for particular copy processes do not. That absence is surprising. Within other legal fields, both the courts and the academy have begun to confront the notion that people may care not just about what a product is but also about how it gets to be that way.<sup>161</sup> IP has lagged behind.

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<sup>155</sup> Compare 17 U.S.C. § 1(e) (1970) (amended 1976) (establishing a compulsory license for "mak[ing] a similar use of the copyrighted work"), with 17 U.S.C. § 115(a)(1) (2012) (denying the compulsory license to one who merely "duplicat[es] a sound recording fixed by another" unless one also receives separate permission from the owner of the copyright in the copied sound recording).

<sup>156</sup> See *supra* notes 123–28 and accompanying text (discussing how various courts distinguished between "covering" songs and mere duplication).

<sup>157</sup> *Heilman v. Bell*, 583 F.2d 373, 376 (7th Cir. 1978).

<sup>158</sup> See *supra* notes 11–13 and accompanying text.

<sup>159</sup> See *supra* notes 76–80 and accompanying text.

<sup>160</sup> See *infra* Part III (discussing the "character of the use" factor under 17 U.S.C. § 107(1) (2012)).

<sup>161</sup> See *Salters v. Beam Suntory, Inc.*, No. 14-cv-659, 2015 WL 2124939 (N.D. Fla. May 1, 2015) (considering, and ultimately rejecting, a false advertising claim against Maker's Mark for calling its bourbon "handmade"); *Kwikset Corp. v. Superior Court (Velasquez)*, 246 P.3d 877, 889 (Cal. 2011) (noting that "[t]o some consumers, processes . . . matter," offering examples of conflict-free diamonds and union-made goods); Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118

To be clear, my argument in this section does not deal much with trade secret law (or, for that matter, patent law). Consumers of technological goods like pharmaceuticals and smartphones probably don't care much about copy process. Most of us wouldn't favor one generic drug over another simply because its manufacturer had to work harder to copy a branded version. We just want to know whether it will work.<sup>162</sup>

Expressive goods, however, are another story. Audiences often relate differently to recreations than they do to mechanical duplications. Start with one of the more notable recreations of the Renaissance, Andrea del Sarto's replica of Raphael's portrait of Pope Leo X. According to the sixteenth-century art historian Giorgio Vasari, the Duke of Mantua had been promised the original portrait as a gift, but its Medici caretaker did not want to see it leave Florence.<sup>163</sup> So the enterprising caretaker had Andrea repaint it and pass off the copy as the original.<sup>164</sup> When the Duke received the gift, neither he nor even Raphael's disciple could tell it was a copy—Andrea had so expertly copied the painting, right down to “the spots of dirt,” that no one could tell the difference.<sup>165</sup> But Vasari himself had seen Andrea in the act of copying and blew the whistle, informing the Duke that he had received a mere imitation.<sup>166</sup> No matter. According to Vasari's telling, the Duke simply shrugged and announced:

I value it no less than if it were by the hand of [Raphael]—nay, even more, for it is something out of the course of nature that a man of excellence should imitate the manner of another so well, and should

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HARV. L. REV. 525, 532 (2004) (“[C]onsumer products—even when physically indistinguishable—are not perfect substitutes to the extent that they are produced using different processes about which consumers have strong feelings.”); *id.* at 601–02 (“[C]onsumers are willing to pay a premium for goods derived from certain production processes, even in the absence of appreciable differences in the resulting products. Among other items, such preferences have been demonstrated for non-GM foods, sustainably harvested timber, and fairly traded goods.”); *cf.* *United States v. Darby*, 312 U.S. 100, 116 (1941) (rejecting a Commerce Clause challenge to the Fair Labor Standards Act and, along with it, the once-accepted product/process distinction under which “Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property”).

<sup>162</sup> To be sure, consumers of new technologies may very well care about certain aspects of the manufacturing process, such as fair trade or environmental sustainability. *See generally* Kysar, *supra* note 161. But when comparing innovator and imitator, any difference along those axes doesn't present as clear a case for specialized IP treatment as the difference between duplication and recreation does.

<sup>163</sup> 5 *GIORGIO VASARI, LIVES OF THE MOST EMINENT PAINTERS, SCULPTORS, AND ARCHITECTS* 107 (Gaston du C. De Vere trans., AMS Press reprt. 1976) (1550).

<sup>164</sup> *Id.* at 108.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*



make a copy so like. It is enough that it should be known that Andrea's genius was as valiant in double harness as in single.<sup>167</sup>

Nearly five centuries later, fascination with recreations doesn't seem to have worn off. In 2012, a teenage boy spent months remaking a Beyoncé music video shot for shot, recreating every bit of choreography, cinematography, and even the singer's facial expressions.<sup>168</sup> He became a minor Internet celebrity.<sup>169</sup> Millions of viewers flocked to watch his video not so much because of the product itself, which looked stunningly like the original (minus, of course, the identity of the singer), so much as because of everything he did to bring it into being.<sup>170</sup> The replicated performance exemplifies just how difficult it is to do certain things consciously that a predecessor has done unconsciously: blinks, the slightest of smiles, momentary glances away. The project is challenging (and therefore captivating) not just because of resource constraints, but also because of the performer's talent at forcing previously random outcomes to reappear on command.

Likewise, when a group of fans spent years faithfully recreating the film *Raiders of the Lost Ark* from scratch, their remake became a cult classic, screening at the SXSW festival and inspiring a feature-length documentary film about the creation process.<sup>171</sup> Critics lauded the group members for their skill in comprehensively replicating an iconic Hollywood blockbuster "on a shoestring budget."<sup>172</sup> After seeing the remake, director Quentin Tarantino commented that "they

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<sup>167</sup> *Id.* at 108–09.

<sup>168</sup> See *supra* note 20.

<sup>169</sup> See *id.*

<sup>170</sup> See Jen Carlson, *Meet Ton Do-Nguyen, the Snuggie "Countdown" Kid Beyoncé Calls "Brilliant,"* GOTHAMIST (July 21, 2012, 10:22 AM), [http://gothamist.com/2012/07/21/we\\_talk\\_to\\_ton\\_do-nguyen\\_the\\_snuggi.php](http://gothamist.com/2012/07/21/we_talk_to_ton_do-nguyen_the_snuggi.php) (praising the "incredibly talented teenager reenacting Beyoncé's 'Countdown' video in the most perfect way" and noting that "[h]e nails every part of the fast-moving video—if you blink an eye you'll miss a perfectly synched up detail"); Mawuse Ziegbe, *Beyoncé Co-signs "Snuggie" Version of Her "Countdown" Video*, BOSTON.COM: POP RADAR (July 19, 2012, 2:48 PM), [http://www.boston.com/ae/celebrity/blog/popradar/2012/07/beyonce\\_co-signs\\_snuggie\\_version\\_of\\_her\\_countdown\\_video.html](http://www.boston.com/ae/celebrity/blog/popradar/2012/07/beyonce_co-signs_snuggie_version_of_her_countdown_video.html) (ascribing the video's viral popularity largely to "the fairly faithful recreation of the video's elaborate choreography and pop-art style editing").

<sup>171</sup> SXSW SCHEDULE, *Raiders of the Lost Ark: The Adaptation*, [http://schedule.sxsw.com/2015/events/event\\_FS19208](http://schedule.sxsw.com/2015/events/event_FS19208) (last visited Feb. 14, 2016); RAIDERS! THE STORY OF THE GREATEST FAN FILM EVER MADE (Jeremy Coon Productions 2015).

<sup>172</sup> See Jim Windolf, *Raiders of the Lost Backyard*, VANITY FAIR, Mar. 2004, at 254, 254; Daniel Kreps, *After 30 Years, 'Raiders of the Lost Ark' Devotees Finish Adaptation*, ROLLING STONE (Mar. 4, 2015), <http://www.rollingstone.com/movies/videos/after-30-years-raiders-of-the-lost-ark-devotees-finish-adaptation-20150304>; Amy Nicholson, *After 33 Years and an Airplane Explosion, Their Raiders of the Lost Ark Remake is Almost Complete. Are They?*, LA WEEKLY (Nov. 12, 2014), <http://www.laweekly.com/arts/after-33-years-and-an-airplane-explosion-their-raiders-of-the-lost-ark-remake-is-almost-complete-are-they-5205358>.

start bowling you over with their ingenuity. Because you know the movie so well, you can't wait for them to do the next scene. 'How are they going to do this? Well, they can't do that!' And then they come up with a way to do it."<sup>173</sup> One reviewer noted that, compared to the ones recreating the film, "Spielberg had it easy."<sup>174</sup> After all, "[h]e had a studio budget and hundreds of helpers. More importantly, he had creative freedom. If a shot wasn't working, he could change it. If a stunt failed, he could scrap it. By contrast, *The Adaptation* was manacled to Spielberg's caprice. . . . Mimicry can be even harder than the original."<sup>175</sup>

A similar fascination with recreating an expert's achievement underlies the recent documentary *Tim's Vermeer*.<sup>176</sup> The film chronicles a novice's efforts to recreate a Vermeer painting using the process that, according to this hypothesis, the artist himself had once used. He spent years on the project, including developing and building the optical devices on which he believed Vermeer relied, building a full-scale replica of the room that was the subject of the original painting, mixing pigments, and finally a painstaking several months of putting brush to canvas.<sup>177</sup> As one film critic put it, the story captivates because it centers on an individual "erect[ing] his own Everest and then proceed[ing] to climb it."<sup>178</sup>

Recreations needn't be in the precise medium that the original creator used. Sometimes expressive reasons exist to recreate in a different one. Take, for example, Jojakim Cortis and Adrian Sonderegger, who built detailed scale models replicating famous historical photographs like the Hindenburg crash, the Loch Ness monster, and the first moon landing.<sup>179</sup> Over the course of days and sometimes weeks, they used various physical materials, from tarps to sand to

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<sup>173</sup> Nicholson, *supra* note 172.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *TIM'S VERMEER* (High Delft Pictures 2013).

<sup>177</sup> See Kurt Andersen, *Reverse-engineering a Genius (Has a Vermeer Mystery Been Solved?)*, VANITY FAIR (Nov. 29, 2013, 2:03 PM), <http://www.vanityfair.com/unchanged/2013/11/vermeer-secret-tool-mirrors-lenses>; Peter Debruge, *Telluride Film Review: Tim's Vermeer*, VARIETY (Sept. 2, 2013, 10:14 AM), <http://variety.com/2013/film/markets-festivals/telluride-film-review-tims-vermeer-1200596123>; Joe Morgenstern, *A Magical Tour of "Vermeer" Mystery*, WALL ST. J. (Jan. 30, 2014, 7:10 PM), <http://www.wsj.com/news/articles/SB10001424052702303519404579351750724256752>.

<sup>178</sup> Debruge, *supra* note 177.

<sup>179</sup> See Sheena McKenzie, *12 Famous Photos Painstakingly Recreated with Miniature Models*, CNN (Dec. 23, 2015, 9:22 AM), <http://www.cnn.com/2015/03/27/world/historys-most-famous-photos-recreated-miniature-models/>; Zachary Slobig, *History's Most Iconic Photos, Recreated in Miniature*, WIRED (Mar. 9, 2015, 5:30 AM), <http://www.wired.com/2015/03/jojakim-cortis-adrian-sonderegger-iconen/>.

cotton balls, to construct their recreations.<sup>180</sup> It was arguably that investment of labor that caught observers' attention.<sup>181</sup>

These anecdotes might seem extreme, but they resonate with a familiar form of consumer behavior. Over a century ago, Thorstein Veblen observed that a hand-wrought silver spoon could be identical to, and yet deemed far more valuable than, a machine-made one.<sup>182</sup> There remains a similar premium on intensive creation processes today. Many are willing to spend a little bit extra for a handmade quilt. Or handmade furniture. Or handmade ceramics. Or pretty much anything on the Etsy website.<sup>183</sup> Think of it as a "handmade effect." According to a recent marketing study, consumers in Western countries perceive many handmade objects to be more attractive and are willing to pay more for them even while holding product quality constant.<sup>184</sup> What's more, the value of handmade process is robust enough that this preference holds true even when dealing with an unspecific, anonymous producer.<sup>185</sup>

A similar phenomenon may be at work in audience reception of artistic work. Several controlled experiments have found that perceptions of the effort and skill involved in a creation process affect evaluation of the resulting creation.<sup>186</sup> Two deserve special mention. First, psychology professors George Newman and Paul Bloom presented participants with an original artwork and an identical duplicate,

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<sup>180</sup> See Slobig, *supra* note 173.

<sup>181</sup> See sources cited *supra* note 179 (focusing on the difficulty of the recreation process).

<sup>182</sup> THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 85–86 (Oxford Univ. Press 2007) (1899).

<sup>183</sup> See Rob Walker, *Handmade 2.0*, N.Y. TIMES MAG. (Dec. 16, 2007), <http://www.nytimes.com/2007/12/16/magazine/16Crafts-t.html> (describing Etsy's capitalization on "the appeal of the handmade to those who might not have the inclination to do the making").

<sup>184</sup> See Christoph Fuchs et al., *The Handmade Effect: What's Love Got to Do with It?*, 79 J. MKTG. 98, 107 (2015).

<sup>185</sup> See *id.*

<sup>186</sup> See, e.g., Justin Kruger et al., *The Effort Heuristic*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 91, 92 (2004) ("[A]ll else being equal, people tend to believe that a painting that takes 2 days to paint is better than one that takes 2 h[ours], just as people tend to believe that an additional manuscript revision will result in a better paper."); see also Hyejeung Cho & Norbert Schwarz, *Of Great Art and Untalented Artists: Effort Information and the Flexible Construction of Judgmental Heuristics*, 18 J. CONSUMER PSYCHOL. 205, 208 (2008) (replicating these results when participants were first asked to evaluate the quality of the work, though not when they were first asked to evaluate the talent of its creator). Kruger and his colleagues hypothesize that perceived effort is simply a heuristic for aesthetic value, which is difficult to pin down. See Kruger, *supra*, at 92. One need not accept that hypothesis—artisanal investment could be a real preference, after all, not just a heuristic—in order to accept their underlying finding that observers treat laboriously-created art better than physically-identical but less easily-created art.

varying the accompanying information on whether the original or the duplicate required significant effort to produce.<sup>187</sup> They found that, as a general matter, audiences tended to rank duplicates inferior to originals.<sup>188</sup> Yet when a low amount of effort was required to create the original and a high amount of effort was required to duplicate it, participants rated the two artworks as equally valuable.<sup>189</sup> Laboriously produced duplicates took on special worth. The authors of the study theorized that participants had judged both original and recreation to be “the products of unique creative acts: one that resulted in the original design and one that used an entirely new process to replicate that design.”<sup>190</sup> Even when dealing with copies, then, sequestering product from process is easier said than done.

Second, Shyamkrishna Balganes and colleagues have recently explored the role of labor in the specific context of copyright infringement cases. In their experiment, telling lay jurors that the creator expended significant labor to produce the original work at issue increased the perceived similarity between that original and a non-exact copy of it.<sup>191</sup> The study designers conjecture that perhaps “the creator’s expenditure of labor led subjects to view the copying involved as entailing greater (and more morally outrageous) free-riding, which they treated as wrongful.”<sup>192</sup> The study sheds only limited light on copy process per se, as none of the experimental conditions varied jurors’ information on the amount of labor that the copyist expended in replicating the copyrighted work. Nevertheless, the study still provides reason to suspect that Newman and Bloom’s findings on the perceived aesthetic value of laborious recreations could cash out in copyright trials.

Why might audiences value particular copy processes over others? It may be that, at least in some contexts, the act of copying acquires a different moral valence when the creator hasn’t had to work much harder than the copyist, as Balganes and colleagues suggest.<sup>193</sup> That intuition would track the economic imitation costs argument outlined in the previous section, and it’s consistent with precedent that emphasizes the perceived morality of the defendant’s

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<sup>187</sup> See Newman & Bloom, *supra* note 151, at 564–65.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> *Id.* at 565.

<sup>191</sup> See Shyamkrishna Balganes et al., Essay, *Judging Similarity*, 100 IOWA L. REV. 267, 282–84 (2014).

<sup>192</sup> *Id.* at 288.

<sup>193</sup> See *id.*

methods.<sup>194</sup> It may also be that, as Newman and Bloom posit, difficult acts of copying impress audiences in ways similar to difficult acts of creating in the first instance.<sup>195</sup> Newman and Bloom ground their hypothesis in aesthetic theories claiming that audiences experience expressive goods, even static objects like paintings, as conclusions of their creators' performances.<sup>196</sup> Change the performance and you necessarily change the product. From this perspective, the copy process is a performance all its own. Labor-intensive recreations are capstones to performances that audiences care about; mechanical duplications aren't. Obviously, there remains value in the work being reproduced separate and apart from the means of reproduction—few of us would prefer to convene a new cast and crew of *Raiders of the Lost Ark* every time we want to watch it. But effective recreations can bring pleasure to audiences even on top of the content that is recreated.

The idea that the means of reproduction casts a shadow over aesthetic objects harkens back at least as far as Walter Benjamin's 1936 essay *The Work of Art in the Age of Mechanical Reproduction*.<sup>197</sup> Benjamin argued that increasingly widespread technological reproduction was extinguishing an original copy's "aura" of authenticity.<sup>198</sup> "[A] work of art has always been reproducible," Benjamin wrote, but "[m]echanical reproduction of a work of art . . . represents something new."<sup>199</sup> When a work is copied quickly and pervasively, it loses its authority as a unique artifact, leaving little difference between any given copy and another.<sup>200</sup>

As Barton Beebe has recently emphasized, though, Benjamin overlooked the fact that "in producing ever more copies, 'mechanical

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<sup>194</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562–63 (1985) (invoking "the propriety of the defendant's conduct" to reject a fair use argument where the defendant had "knowingly exploited a purloined manuscript").

<sup>195</sup> See Newman & Bloom, *supra* note 151, at 565.

<sup>196</sup> See *id.* at 559 (citing theorists). Among the theorists cited is Denis Dutton, who has argued that all works of art are artifacts of their creation histories: "If we see an actor or a dancer or a violinist at work, we are constantly conscious of human agency. Less immediately apparent is the element of performance in a painting . . . . Yet we are no less in such cases confronted with the results of human agency." Denis Dutton, *Artistic Crimes*, 19 BRIT. J. AESTHETICS 302, 305 (1979); see also Kendall L. Walton, *Style and the Products and Processes of Art*, in *THE CONCEPT OF STYLE* 80 (Berel Lang ed., Cornell Univ. Press rev. ed. 1987) ("[T]he notion of the style of a work of art is to be understood somehow in terms of the notion of the manner in which it was made. . . . [W]e 'see' in a work the action of producing it . . . .").

<sup>197</sup> Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS* 217 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955).

<sup>198</sup> See *id.* at 221.

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

<sup>200</sup> See *id.*

reproduction' only amplifies all the more the distinctive 'aura' of those things that are perceived not as mechanically reproduced copies, but rather as authentic originals."<sup>201</sup> Beebe's observation can be extended even further: Mechanical reproduction amplifies not just what is perceived to be an authentic original, but also what is perceived to be an authentic recreation.<sup>202</sup> In an age of mechanical reproduction, non-mechanical reproduction takes on heightened aesthetic, and even political, significance. Advancing technologies like 3-D printing and robotics are making more and more resources less and less scarce.<sup>203</sup> As today's burgeoning craft movement reflects, human involvement may be one of the few scarce things remaining.<sup>204</sup> There's a growing "revenge of analog."<sup>205</sup> The rarity of hands-on production processes creates value that can inure in recreations just as much as it can in the originals on which they're based.

All of this matters for copyright law for two reasons. First, as a descriptive matter, it may help explain why some courts invoke the defendant's labor even without a doctrinal basis.<sup>206</sup> The labor involved in creating and copying seems to matter to laypeople.<sup>207</sup> It seems to matter to potential copyright jurors.<sup>208</sup> And so it probably matters to judges, too. Beyond the infringement cases discussed in Part I, there are glimpses of this attitude in the handful of decisions addressing whether authorized replications of artwork merit their own copy-

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<sup>201</sup> Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 868 (2010).

<sup>202</sup> See WINNIE WON YIN WONG, VAN GOGH ON DEMAND: CHINA AND THE READYMADE 16 (2013) ("In the culture of the ubiquitous copy . . . it is the *manual* technology of reproduction—that is, hand-copied painting—that has been reinvested with a certain, though now paradoxical, authenticity.").

<sup>203</sup> See generally Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460 (2015) (contemplating the effects of technological innovations on scarcity and IP law).

<sup>204</sup> See FAYTHE LEVINE & CORTNEY HEIMERL, *HANDMADE NATION: THE RISE OF DIY, ART, CRAFT, AND DESIGN* 44 (2008) ("Because each item is unique and handmade, it goes against the grain of mass manufactured products"); Walker, *supra* note 183, at 78 (quoting the "Handmade Pledge," endorsed by Etsy, stating that "[o]ur ties to the local and human sources of our goods have been lost . . . . Buying handmade helps us reconnect"). As one Etsy consumer wrote in a blog post, "the older I got, the more I felt drawn to things made by hand . . . . I want a connection to a person who has put a bit of herself into the creation of [the object]." Imagineannie, *The Etsy Girl*, FOREST STREET KITCHEN (June 22, 2012), <https://imagineannie.wordpress.com/2012/06/22/the-etsy-girl/>.

<sup>205</sup> David Sax, *Why Startups Love Moleskines*, NEW YORKER (June 14, 2015), <http://www.newyorker.com/business/currency/why-startups-love-moleskines>.

<sup>206</sup> See *supra* notes 47–124 and accompanying text (discussing judicial opinions emphasizing the defendant's labor).

<sup>207</sup> See Newman & Bloom, *supra* note 151 (finding that perceived labor can affect perceived value).

<sup>208</sup> See Balganesch et al., *supra* note 191, at 284 (finding that perceived labor can affect perceived similarity in simulated copyright cases).

rights. In one case, for instance, a court held that a reduced-size rendering of a Rodin sculpture was copyrightable because the reduction “requires far more than an abridgement of a written classic; great skill and originality is called for when one seeks to produce a scale reduction of a great work with exactitude.”<sup>209</sup> In a subsequent case, a court denied copyrightability to a plastic replica of a public-domain toy bank, distinguishing the Rodin case based on the “true artistic skill” and “complexity and exactitude” involved in that reproduction process.<sup>210</sup> There’s good reason to think that judges can be similarly impressed by complexity and exactitude on the defendant’s side of the “v.,” too. Infringement policy would at least be more transparent if we acknowledged that the copy process may already be influencing legal decision-makers, even if only at the margins.

Second, as a normative matter, black-letter doctrine’s inhibition of recreations inflicts a social cost that the standard analysis doesn’t normally reflect. The most-recognized static cost of copyright limitations on unauthorized reproductions is the deadweight loss from supracompetitive pricing. Recreations pose a separate problem. There, copyright liability is not so much increasing prices for the same good as suppressing a qualitatively different good. We have remakes of *Raiders* and Beyoncé music videos only at the sufferance of copyright owners.<sup>211</sup> Unlike garden-variety derivative works such as a cinema adaptation of a novel, recreations lose expressive force if performed by the original work’s author. Audiences rally around one who recreates a Vermeer precisely because he is *not* Vermeer. And under fair use principles, the inability of a copyright holder to enter a particular market is a good reason for letting others do so.<sup>212</sup>

Relying on licensing isn’t a very attractive solution either. To begin with, it’s an open question how often creators would actually permit others to share the limelight. Though recreations can be loving tributes, they can also diminish the luster of romantic genius that sometimes surrounds the original.<sup>213</sup> Yet even if licenses were readily

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<sup>209</sup> *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 267 (S.D.N.Y. 1959).

<sup>210</sup> *See L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491–92 (2d Cir. 1976).

<sup>211</sup> *See Windolf, supra* note 172, at 264 (describing the *Raiders* adaptation creators’ “fantasy” that “Spielberg would one day see the movie they were making—and . . . would congratulate them, rather than sue,” a fantasy that ended up coming true).

<sup>212</sup> *See, e.g., Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 560 (S.D.N.Y. 2013) (observing that fair use is more likely to be found “when the use . . . takes place in a market that the copyright holder is unlikely to develop,” such as the market for parodies, reviews, or news analyses) (quoting *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993)).

<sup>213</sup> *See, e.g., Debruge, supra* note 177 (“[W]hat if someone told you that anybody could paint as well as Vermeer? Is it still a masterpiece if an amateur could do it?”).

available, it would be perverse to require them in instances where imitation costs are already high. Moreover, while ubiquitous forms of copying like online photo embedding have nudged copyright owners into offering blanket licenses, there's as of yet no voluntary blanket license for recreations,<sup>214</sup> and there's not likely to be one any time soon. Directly negotiating one-off deals, with its inevitable transaction costs, would be the only realistic choice. If licensing fees and transaction costs are stacked on top of the natural expense of recreating from scratch, some recreations simply won't get made. That market failure seems an unnecessary price to pay if recreators pose little threat to copyright owners as it is—doubly so if they aren't even seeking to compete with owners commercially.<sup>215</sup>

So long as authors of original works remain able to keep authoring, subsidizing recreations is a socially worthy end. As recent case law has emphasized, owners “cannot prevent others from entering fair use markets” merely through eagerness to license.<sup>216</sup> Whether offering copyright protection is the best way to enrich society, not just whether owners would license, should guide the analysis.<sup>217</sup>

Foregone recreations are one way that infringement liability could leave the public worse off. The next section introduces another.

### C. *Learning by Doing*

The most valuable copy processes yield more than just a copied product. They also yield skills for creating new products.

In 1916, philosopher and educational reformer John Dewey introduced the pedagogical theory that we today associate with experiential learning.<sup>218</sup> Dewey explained that “[t]he knowledge which comes

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<sup>214</sup> See generally Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY TECH. L.J. 1447 (2014) (describing the increasing frequency, but persistent flaws, of copyright licensing for noncommercial or formerly noncommercial uses).

<sup>215</sup> See *supra* Section II.A (discussing the relationship between imitation costs and copyright incentives).

<sup>216</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006); see also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1357 n.19 (Ct. Cl. 1973) (“[T]o measure the detriment to plaintiff by loss of presumed royalty income . . . assume[s] at the start the merit of the plaintiff’s position . . .”), *aff’d by an equally divided Court*, 420 U.S. 376 (1975) (per curiam).

<sup>217</sup> See Wendy J. Gordon, *Fair Use Markets: On Weighing Potential License Fees*, 79 GEO. WASH. L. REV. 1814, 1842 (2011) (“When circumstances give us no reason to trust that the market that the Copyright Act enabled will serve social goals, or if there is affirmative reason to trust nonmarket modes of circulation and productivity to do a better job, then those factors should help persuade toward fair use.”).

<sup>218</sup> JOHN DEWEY, *DEMOCRACY AND EDUCATION* 217 (1916).



first to persons, and that remains most deeply ingrained, is knowledge of *how to do*; how to walk, talk, read, write, skate, ride a bicycle, manage a machine, calculate, drive a horse, sell goods, manage people, and so on indefinitely.”<sup>219</sup> “[T]he natural course of development,” he claimed, “always sets out with situations which involve learning by doing.”<sup>220</sup> By the 1960s, the core insight of learning by doing had begun to influence the literature on innovation economics. Kenneth Arrow famously theorized in *The Economic Implications of Learning by Doing* that the act of production itself fosters solutions to new problems.<sup>221</sup> Producing old things benefits society as the producers obtain more knowledge and, often enough, start to produce new things.

As John Duffy recently argued, this knowledge spillover gives “the productive activity itself . . . a theoretical claim to favorable regulatory treatment similar to the claim for favoring investment in research.”<sup>222</sup> In Duffy’s framework, favorable treatment comes in the form of granting greater rights to patentees who have successfully practiced their inventions compared to patentees who have merely conceived them on paper.<sup>223</sup> The underlying theory, though, can be extended further. It needn’t depend on whether the object being produced happens to be the producer’s own creation or instead someone else’s. The production process itself carries the potential to incubate know-how all the same. Learning by copying is just a form of learning by doing. Ideally, then, production would receive some form of subsidy even when the product is a reproduction.

Copying an expert’s work, as many art school students know, is a great way to learn the tricks of the trade.<sup>224</sup> Individuals with experience copying art often speak of the greater understanding of the original that the activity affords them. One expert copyist got his start

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<sup>219</sup> *Id.*

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

<sup>221</sup> Kenneth J. Arrow, *The Economic Implications of Learning by Doing*, 29 REV. ECON. STUD. 155, 156 (1962) (“[T]echnical change in general can be ascribed to experience, that it is the very activity of production which gives rise to problems for which favorable responses are selected over time.”).

<sup>222</sup> John F. Duffy, *Reviving the Paper Patent Doctrine*, 98 CORNELL L. REV. 1359, 1394 (2013).

<sup>223</sup> See *id.* at 1374, 1396–97.

<sup>224</sup> See Jonathan Jones, *Why Would-be Artists Should Imitate the Greats*, GUARDIAN (Sept. 19, 2009, 07:01 AM), <http://www.theguardian.com/artanddesign/2009/sep/19/aspiring-artists-should-imitate-masters> (highlighting the benefits that accrue to aspiring artists from copying the masters); Malcolm Jones, *There’s Nothing Wrong—and a Lot That’s Right—About Copying Other Artists*, DAILY BEAST (Jan. 26, 2014, 06:45 AM), <http://www.thedailybeast.com/articles/2014/01/26/there-s-nothing-wrong-and-a-lot-that-s-right-about-copying-other-artists.html> (describing historical tradition and personal practice of learning to paint by copying).

while lecturing on painting technique at London's National Gallery, after deciding to copy the subjects of his lectures in order to figure out, in his words, "how do they do that?"<sup>225</sup> Another remarked that "[o]ne of the reasons I do what I do is to absorb what the painters were getting at."<sup>226</sup>

This attitude goes back a long way. In 1755, German art historian Johann Winckelmann notably asserted that "[t]he only way for us to become great, and indeed—if this possible—inimitable, is by imitating the ancients."<sup>227</sup> The Louvre has throughout its history encouraged painters to train by copying masterworks in its collection.<sup>228</sup> Degas, a Louvre copyist himself, is reputed to have said "[y]ou have to copy and recopy the masters . . . and it's only after having proved oneself as a good copyist that you can reasonably try to do a still life of a radish."<sup>229</sup> New York City's Metropolitan Museum of Art has offered a "Copyist Program" since 1872, intended to "celebrate[ ] intensive technical study, problem solving, and dialogue with artists and artworks of the past."<sup>230</sup> The National Gallery of Art has offered one since 1941.<sup>231</sup> One might think that such educational programs' existence demonstrates that copyright law is doing fine even without adding copy process to the mix. Yet even they must operate in the shadow of copyright liability. Museums frequently limit participants to repainting public domain or permanent collection works within their control.<sup>232</sup>

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<sup>225</sup> Iain Gale, *Never Say 'Fake'. Forget 'Forgery'. It's Got to Be 'Copy' or 'Pastiche,'* INDEPENDENT (Sept. 4, 1995), <http://www.independent.co.uk/arts-entertainment/art/never-say-fake-forget-forgery-its-got-to-be-copy-or-pastiche-1599527.html>.

<sup>226</sup> *Id.*

<sup>227</sup> Johann Winckelmann, *Thoughts on the Imitation of the Painting and Sculpture of the Greeks*, in GERMAN AESTHETIC AND LITERARY CRITICISM: WINCKELMANN, LESSING, HAMANN, HERDER, SCHILLER, GOETHE 33 (H.B. Nisbet ed. & trans. 1985).

<sup>228</sup> Joseph A. Harriss, *Master Class*, SMITHSONIAN MAG. (Mar. 2001), <http://www.smithsonianmag.com/arts-culture/master-class-69130767/> (tracing the encouragement of copying at the Louvre to its opening two centuries ago).

<sup>229</sup> *Id.*

<sup>230</sup> *Copyist Program*, METRO. MUSEUM OF ART, <http://www.metmuseum.org/events/programs/art-making-programs/copyist-program> (last visited Feb. 19, 2016).

<sup>231</sup> *Copyist Program*, NAT'L GALLERY OF ART, <http://www.nga.gov/content/ngaweb/visit/copyist.html> (last visited Feb. 19, 2016).

<sup>232</sup> See, e.g., *Visiting FAQ and Announcements*, CLEVELAND MUSEUM OF ART, <http://www.clevelandart.org/visit/visitor-information/visiting-faq-and-announcements> (last visited Feb. 19, 2016) ("It is prohibited to copy works of art on loan to the museum and works of art restricted by copyright."); *Tips for Visiting the Frye*, FRYE ART MUSEUM, <http://fryemuseum.org/tips/> (last visited Feb. 19, 2016) ("It is prohibited to copy works of art on loan to the Frye Art Museum and works of art restricted by copyright."); *Tips for Visitors*, MUSEUM OF FINE ARTS BOS., <http://www.mfa.org/visit/plan-your-visit/tips-visitors> (last visited Feb. 19, 2016) ("Only paintings owned by the MFA may be copied.").

Learning by copying isn't just limited to painting and sculpture. Architecture students at the Ecole des Beaux-Arts in Paris honed their craft by trying to imitate the great structures of antiquity and the Italian Renaissance.<sup>233</sup> Jazz musicians learn how to improvise by replicating famous solos.<sup>234</sup> Trumpeter Art Farmer, for instance, once reflected that transcribing others' solos early on taught him what sounded good and what didn't, "like getting your vocabulary straight."<sup>235</sup> Recreating entire tracks in the studio teaches music producers how to build a hit record.<sup>236</sup> To the same end, the musicology program in which I studied as an undergraduate devoted the first several semesters to mimicking the compositional style of classical greats, first Bach, then Haydn, Mozart, and Beethoven. Bach himself arranged others' works in his youth as a learning aid.<sup>237</sup>

In this respect, the arts are a lot like engineering. Automotive manufacturers routinely disassemble each other's latest models in an effort to discern the choices that competitors make and why they make them.<sup>238</sup> "As much as you think you know," one industry analyst explained, "nothing beats picking up the parts, feeling them, weighing them, and knowing the processes that made them."<sup>239</sup> Over the last two decades, dissection and reverse engineering have become more important in undergraduate engineering curricula.<sup>240</sup>

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<sup>233</sup> See Raleigh W. Newsam, II, *Architecture and Copyright—Separating the Poetic from the Prosaic*, 71 TUL. L. REV. 1073, 1098 (1997) (noting that the Beaux-Arts system derived universal architectural principles from study and imitation of the past).

<sup>234</sup> See PAUL F. BERLINER, THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION 95–97 (1994) (describing various ways in which, "[j]ust as children learn to speak their native language by imitating older competent speakers, so young musicians learn to speak jazz by imitating seasoned improvisers").

<sup>235</sup> *Id.* at 95.

<sup>236</sup> See JOHN SEABROOK, THE SONG MACHINE: INSIDE THE HIT FACTORY 59 (2015) (recounting how Clive Calder and Mutt Lange's early experience of "taking hit songs apart, figuring out how they worked, and putting them back together again . . . gave both men a keen appreciation for what went into making a hit, knowledge that served them both very well later on").

<sup>237</sup> See Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 610 (2006).

<sup>238</sup> See Carl Hoffman, *The Teardown Artists*, WIRED (Feb. 1, 2006, 12:00 PM), <http://www.wired.com/2006/02/teardown/>.

<sup>239</sup> *Id.*

<sup>240</sup> See Katie Grantham et al., *A Study on Situated Cognition: Product Dissection's Effect on Redesign Activities*, ADVANCES IN ENGINEERING EDUC., Summer 2013, at 2 (describing adoption of product dissection in academic settings and noting that it has been found to: (1) increase awareness of the design process; (2) encourage the development of curiosity, proficiency, and manual dexterity; (3) give students early exposure to fully operational and functional products and processes; as well as (4) increase motivation and retention (footnotes omitted)).

Picking up on this pedagogical theme, some copyright scholars have tried to conceptualize copying as a stepping-stone to originality.<sup>241</sup> If copyright is meant to promote creativity, the argument goes, then it may be shooting itself in the foot by controlling downstream users' ability to copy from others. Yet extending the learning-by-doing insight from IP owners' conduct to potential infringers' conduct is tricky. It seems to prove too much. As Jane Ginsburg has observed, activities that copyright law brands infringing might enable subsequent creation, but "the same might be said of everything, from works of authorship to cups of coffee, that becomes an input in a prospective author's creative process."<sup>242</sup> Before the idea of learning by copying can be operationalized, it needs a limiting principle.

The copy process supplies one. Some processes are simply more likely to cultivate expertise in the field than others. Repainting a painting is not the same as scanning it. Restaging a photograph is not the same as photocopying it. Rerecording a track of music is not the same as cutting and pasting it. For each, the former engages more deeply than the latter with the content of the copied work, looking underneath the hood to see how it works. Generally speaking, the act of retracing a predecessor's creative steps sows more know-how about the work than does the act of duplicating the work through a keystroke or two.

If copyright doctrine could differentiate between the processes through which a copy is produced, it could select for those activities that are most apt to underwrite future creativity. That kind of sorting isn't unprecedented. Indeed, it is precisely what trade secret law does already. Trade secrecy's improper means doctrine, discussed above,<sup>243</sup> attempts to separate what one court has called the "inventive" copy processes from the "sterile wealth redistributive—not productive" ones.<sup>244</sup> Case law shows special solicitude for reverse engineering

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<sup>241</sup> See, e.g., Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 851 (2013) ("By copying a master's work, the 'pupil' might at least get a glimpse of the great author's mind, which would seem like a normatively desirable process."); Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 646 (2006) ("In copying technique, one learns technique; in copying style, one learns style. If the copyist is lucky, he finds his own style in the end, but even if he does not, his mastery of technique makes him capable of creating beauty.").

<sup>242</sup> Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1390 (2014).

<sup>243</sup> See *supra* text accompanying notes 59–63.

<sup>244</sup> *Rockwell Graphic Sys., Inc. v. DEV Indus.*, 925 F.2d 174, 178 (7th Cir. 1991); see *supra* note 61 and accompanying text; see also Gerard N. Magliocca, *Ornamental Design and Incremental Innovation*, 86 MARQ. L. REV. 845, 883–84 (2003) (arguing that trade secret law sets a good model for the protection of industrial design because "the focus

largely because of its dynamic benefits for skill development and incremental innovation.<sup>245</sup> Were copyright doctrine to feature a similar policy lever, it could carve out some space for educative copying without needing to throw up its hands and declare all copying fair game.

#### D. *Administrative Costs*

The previous three sections introduced the benefits of empowering courts to discriminate among copy processes. But, as usual, there's a catch. Judging a product on its face is simpler than trying to piece through testimony or paper trails concerning production methods.<sup>246</sup> Both the potential plaintiffs monitoring possible infringement and the courts that ultimately adjudicate any disputes would have an easier time if process is kept out of the picture entirely.

Anxiety over administration costs has long appeared in debates over whether infringement should require copying to begin with, the first question of process sensitivity.<sup>247</sup> Defenders of patent liability's conflation of imitative and independent development often point to the heavy cost of correctly distinguishing one from the other. As early as 1837, for example, a patent treatise contended, "it is a matter of too much difficulty and intricacy of proof, to distinguish the cases of others who have made the same invention without any assistance from his ingenuity, from those of mere imitations. The law, in order to be practicable and convenient to be administered, must give the exclusive

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should be on channeling would-be copiers into conducting independent research rather than allowing them to engage in relatively unproductive activities such as industrial espionage or copying simpliciter").

<sup>245</sup> See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989).

<sup>246</sup> See, e.g., Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 705–08 (2003) (discussing the evidentiary difficulty of determining the creation process of outwardly similar works); Roin, *supra* note 57, at 705 (noting the challenges that the government faces in obtaining information on firms' imitation costs). This concern over unobservable history evokes the concept of "historicity" that Philip K. Dick explored in his 1962 novel, *The Man in the High Castle*. At one point, an antiquities specialist holds up two outwardly identical objects, one that had belonged to President Roosevelt and one that hadn't. The character observes: "One has historicity, a hell of a lot of it. As much as any object ever had. And one has nothing. Can you feel it? . . . You can't. You can't tell which is which. There's no 'mystical plasmic presence,' no 'aura' around it." PHILIP K. DICK, *THE MAN IN THE HIGH CASTLE* 63–64 (Vintage Books ed. 1992). I thank Matthew Sag for the reference.

<sup>247</sup> See *supra* text accompanying notes 16–18 (discussing debates over whether patent law should join copyright and trade secrecy laws in making copying an element of liability).

right.”<sup>248</sup> That same concern continues in today’s patent policy discussions.<sup>249</sup>

Copyright is spared a similar fate because of the relative infrequency with which separate authors independently create substantially similar expression.<sup>250</sup> But were the copyright infringement test to ask not just whether but also *how* copying was done, it would invite a different challenge. By definition, anyone asserting a “proper means” defense would concede an act of copying. The court would then need to determine whether the manner of the copying excuses it. Sorting among copyists would cost private monitoring resources for copyright owners considering whether to go to court and public adjudicative resources once they got there. The “Hope Poster” copyright litigation,<sup>251</sup> with its protracted back and forth over whether the defendant used a series of simple Adobe Photoshop edits or instead a more labor-intensive method, offers a glimpse at the work courts might need to do if improper means became an infringement factor.<sup>252</sup>

Nevertheless, there’s good reason to expect that such sorting wouldn’t significantly tax the copyright system if it became part of the law. First of all, the current Copyright Act has already successfully followed a similarly process-sensitive model in administering protection of sound recordings. Section 114(b) of the Act provides that the reproduction right for sound recordings is limited to “directly or indirectly recaptur[ing] the actual sounds fixed in the recording,” expressly excluding “the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the

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<sup>248</sup> WILLARD PHILLIPS, *THE LAW OF PATENTS FOR INVENTIONS* 6 (1837), *quoted in* Liivak, *supra* note 17, at 1675.

<sup>249</sup> See, e.g., John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 9 (2007) (“An independent-invention defense would also present difficult administrative problems because courts would have a difficult time distinguishing between true and false claims of duplication.”); Richard A. Posner, Essay, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 626 (2003) (arguing that patent law’s lack of an independent-invention defense is cost-justified because of “the difficulty of determining independent discovery by the methods of litigation and the resulting likelihood that the courts would commit many errors in adjudicating patent infringement claims in cases in which independent discovery was the defense”).

<sup>250</sup> See Duffy, *supra* note 249, at 9 (explaining that copyright can afford an independent creation defense because “in the copyright area, claims of true independent duplication are much more rare”); Lichtman, *supra* note 246, at 705 (“An originality requirement . . . empowers courts to exclude from the copyright system a particularly messy class of cases: cases in which courts would not be able to use similarity as the basis for even a weak inference regarding the likelihood of impermissible copying.”).

<sup>251</sup> *Fairey v. Associated Press*, No. 1:09CV-01123 (S.D.N.Y. filed Feb. 9, 2009).

<sup>252</sup> See *supra* text accompanying notes 87–92.

copyrighted sound recording.”<sup>253</sup> In other words, the statute distinguishes between a digital reproduction and a recreation from scratch, even if the two sound identical. That process discrimination has worked without much fuss since Congress instituted it in 1971.<sup>254</sup> Courts’ successful history administering this particular section of the Copyright Act suggests that they could employ process discrimination more broadly.

Moreover, one must consider the baseline against which any such change would be measured. In order to rule on a fair use defense, a court must already consider a host of contextual factors. Why did the copyist copy?<sup>255</sup> What value did it add to the copied material?<sup>256</sup> How significant—both quantitatively and, more opaquely, qualitatively—was the material that the copyist used?<sup>257</sup> How would a reasonable observer evaluate the resulting work?<sup>258</sup> In order to answer these existing questions properly, courts need to look at more than just the works themselves. They need to peer behind the curtain and look at the defendant’s background and goals, relevant market customs, and audience expectations. The marginal burden of asking courts to look at copy process alongside these other matters should be manageable. The same evidence that establishes why the defendant copied may in many cases establish how the defendant copied. On top of that, where copyists have expressive reasons for adopting a particular process, proof of that process will often be readily available. Indeed, in many

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<sup>253</sup> 17 U.S.C. § 114(b) (2012). Musical compositions, unlike sound recordings, are subject to a separate copyright that can be infringed even through recreation.

<sup>254</sup> See Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 391 (formerly codified as 17 U.S.C. § 1(f), the predecessor provision to today’s § 114(b)).

<sup>255</sup> See 17 U.S.C. § 107(1) (2012) (requiring courts to consider “the purpose and character of the use”); *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (finding fair use where the defendant’s purposes in using the owner’s image were “sharply different” from the owner’s goals in creating it).

<sup>256</sup> See *Blanch*, 467 F.3d at 251–52 (finding fair use more likely if “the secondary use adds value to the original—if copyrightable expression in the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings”).

<sup>257</sup> See 17 U.S.C. § 107(3) (requiring courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994) (concluding that the fair use test requires courts to devote “thought not only about the quantity of the materials used, but about their quality and importance”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (reversing lower court’s finding of fair use, notwithstanding the defendant’s quantitatively small excerpt, because the court had “accorded too little weight to the qualitative importance of the quoted passages of original expression”).

<sup>258</sup> See *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (holding that courts weighing defenses of transformative fair use must “examine how the artworks may reasonably be perceived”).

of the cases reviewed in this Article, the copyists deliberately disclosed that evidence to the public.

Concerns about proof could be further addressed through burden shifting. Placing the burden of production on the defendant is sometimes offered as a possibility for patent law under a proposed independent invention regime. Judge Learned Hand, for example, made the suggestion while testifying before the Senate Subcommittee on Patents, Trademarks, and Copyrights in 1956.<sup>259</sup> Recognizing the possibility that patentees would struggle to prove that an accused infringer had copied rather than developed the same invention independently, Judge Hand proposed that “[i]f the patentee brought the infringer to court and showed the infringer was making the same thing, you might throw the burden on the supposed infringer to show that he did not have to have recourse to the patent in order to do what he did.”<sup>260</sup>

Whatever logistical complexity might have been involved in implementing Judge Hand’s proposal, placing the burden on copyright defendants to show their copy processes would be far simpler. Unlike Judge Hand’s scenario, which requires evidence of a negative (namely, the absence of copying), recreators’ burden would be the cleaner task of proving that they copied in a particular manner. Using a certain copy process lends itself to contemporaneous documentation more easily than does developing a product independently of a predecessor whose existence is not yet known. Defendants alleging a permissible copy process would usually be the least-cost bearers of that burden. Unsurprisingly, then, some courts in trade secret cases place the burden of production on the defendant whenever it asserts that it derived the plaintiff’s secret information through proper means.<sup>261</sup> Courts in copyright cases could do something similar.

Of course, minimizing the cost of figuring out what the defendant did doesn’t address a separate but substantial question for many copyright owners and downstream users: legal uncertainty. Even if proving historical facts can be done at manageable expense, the legal significance of those facts might still be up for grabs unless clear *ex ante* boundaries are drawn. As the familiar rules versus standards debate

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<sup>259</sup> *American Patent System: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 84th Cong. 114–15 (1956) (statement of Learned Hand, Retired Judge).

<sup>260</sup> *Id.* at 114.

<sup>261</sup> See, e.g., *Pioneer Hi-Bred Int’l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1240 (8th Cir. 1994); *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 572 F. Supp. 2d 400, 406 (S.D.N.Y. 2008), *vacated on other grounds*, 559 F.3d 110 (2d Cir. 2009); *Integrated Cash Mgmt. Servs., Inc. v. Dig. Transactions, Inc.*, 732 F. Supp. 370, 377–78 (S.D.N.Y. 1989); *Combs & Assocs. v. Kennedy*, 555 S.E.2d 634, 639 (N.C. Ct. App. 2001).



teaches, however, such clarity must be traded off against flexibility.<sup>262</sup> As I argue in Part III, harnessing the flexible fair use doctrine as copyright's vehicle for applying an improper means doctrine has much to commend it—both because of the large diversity of possible dispute scenarios and also because no new legislation would be needed. But if the law were to go the fair use route, one might fairly wonder if it would ultimately shortchange downstream users by making the fair use inquiry that much more complicated.<sup>263</sup> Indeed, any suggestion of broadening the range of information that's fair game for fair use tends to bring out similar objections.<sup>264</sup>

My answer is threefold. First, the uncertainty objection is more a generic critique of the fair use system we already have, not of the improper means inquiry in particular.<sup>265</sup> Fair use famously eschews bright-line rules.<sup>266</sup> Instead, it calls for a balancing of factors under an “equitable rule of reason analysis.”<sup>267</sup> Consequently, the marginal layer of complexity that considering copy process would add to existing fair use doctrine is minimal.<sup>268</sup> Second, as additional inquiries go, the copy process is at least a reasonably straightforward one for downstream users to grasp. Those users have the best information on how they actually copy. That private information stands copy process in stark contrast to other fair use inquiries that require knowledge of the copyright owner's market or of an audience's likely response to a work.<sup>269</sup> Those factors require much more predictive guesswork than copy process would.

<sup>262</sup> See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

<sup>263</sup> See Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 476 (2002) (“As a general matter, we prefer to have clear entitlements, since clarity reduces both the potential for, and the cost of, disputes.”).

<sup>264</sup> See, e.g., Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 797 (2003) (noting the criticism that “[t]hat's all we need—another dial on the fair use control panel” in response to a proposed additional fair use factor).

<sup>265</sup> See, e.g., Parchomovsky & Goldman, *supra* note 129, at 1496 (arguing that the application of existing fair use doctrine has become too unpredictable).

<sup>266</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (cautioning that the fair use test “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis”).

<sup>267</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).

<sup>268</sup> Cf. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 85 (2007) (contending that adding a fifth “attribution” factor wouldn't make fair use more “fuzzy” than it already is and would “focus [courts'] attention on this important matter, but at the same time would not bind them”); Liu, *supra* note 263, at 476 (arguing that considering time as an additional factor “would in fact add little appreciable uncertainty beyond the levels that already exist in copyright law more generally”).

<sup>269</sup> See 17 U.S.C. § 107(1), (4) (2012) (instructing courts to consider whether the use is of a commercial or nonprofit nature, and the effect of the use on the potential market); *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (examining how the defendant's work

Third, and perhaps most importantly, if some cases are already smuggling in process considerations as it is, recognizing copy process would make the fair use calculus more—not less—transparent. As I’ve argued above, both experimental evidence and occasional judicial rhetoric suggest that a copyist’s labor can influence decision-makers’ evaluation of the copy.<sup>270</sup> If that’s right, then the best way forward would be to bring that consideration out into the open, where it can be better understood.<sup>271</sup> Despite the additional complexity that an expanded analysis would bring, it may ultimately make outcomes easier to follow and predict.

### III

#### INTRODUCING IMPROPER MEANS TO COPYRIGHT LAW

Although copyright doctrine doesn’t currently consider the defendant’s process, nothing in the Copyright Act requires this status quo. There are two conceivable mechanisms through which courts could weigh process in the infringement analysis: (1) as an element of the plaintiff’s prima facie case or (2) as a factor in the fair use defense. While both are theoretically possible, the fair use option is the more realistically attainable.

Altering the prima facie case would be an analytically sound—but extremely ambitious—approach. Under such a regime, the plaintiff would need to prove that the defendant’s process of copying was improper, just as the plaintiff currently needs to prove that the defendant’s amount of copying was improper. In each case, courts would equitably determine whether the copy process at issue could support an infringement claim.

To implement such a proposal, one first needs to address the statutory text. The Copyright Act grants the owner a seemingly expansive right to “reproduce the copyrighted work in copies,”<sup>272</sup> appearing to encompass all conceivable means of copying. But more is up for grabs in the reproduction right than meets the eye. As one court noted in interpreting the exclusive right to “copy” under the previous version of the statute, “Read with blinders, this language might seem on its

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“may reasonably be perceived”); *see also* Hughes, *supra* note 264, at 798 (making similar argument with respect to downstream users’ knowledge of how much of the work’s copyright term has so far elapsed); Liu, *supra* note 263, at 476–77 (same).

<sup>270</sup> *See supra* Sections I.B, II.B.

<sup>271</sup> *Cf.* Balganesch et al., *supra* note 191, at 288 (observing that if juries care about the original creator’s labor even when copyright law doesn’t, “the law could embrace the reality that moral intuitions relating to labor and free-riding directly influence the assessment of similarity, which in turn serves as a simple proxy for wrongfulness”).

<sup>272</sup> 17 U.S.C. § 106(1) (2012).

surface to be all-comprehensive . . . but . . . ‘copy’ is not to be taken in its full literal sweep.”<sup>273</sup> By way of example, the court conjectured that copying out a text by hand or with a typewriter may be distinguishable from photocopying it.<sup>274</sup> Though that distinction has never taken hold, it nevertheless reflects the Supreme Court’s maxim that “[n]ot all copying . . . is copyright infringement.”<sup>275</sup>

Judicial decisions have regularly innovated infringement doctrines without much statutory guidance.<sup>276</sup> Take, for example, the bedrock copyright rule that independent creation is a complete defense, which dates back well into the nineteenth century.<sup>277</sup> Allowing independent creation is, I have argued, IP infringement policy’s most basic form of sensitivity to process.<sup>278</sup> That sensitivity began in the courts, not in the legislature. Before the current Copyright Act was enacted in 1976, predecessor versions of the reproduction right did not just speak of a right against copying. They spoke also of rights against “printing” and “publishing,” terms that appear to cover independently created material just as much as copied material.<sup>279</sup> In fact, when a Second Circuit panel in *Hein v. Harris* actually engaged with the 1870 Act’s language of “printing, publishing, and vending,” it held that the

<sup>273</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1350 (Ct. Cl. 1973) (quoting Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1075), *aff’d by an equally divided court*, 420 U.S. 376 (1975) (per curiam).

<sup>274</sup> *See id.*

<sup>275</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *see also* *Stillman v. Leo Burnett Co., Inc.*, 720 F. Supp. 1353, 1357 (N.D. Ill. 1989) (“[A] defendant who has copied from a plaintiff’s work as a factual matter . . . may not have copied as a legal matter . . .”).

<sup>276</sup> *See* BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 40 (1966) (“[T]he [1909] statute, like its predecessors, leaves the development of fundamentals to the judges. . . . [T]he courts have had to be consulted at nearly every point . . .”).

<sup>277</sup> *See, e.g., Reed v. Carusi*, 20 F. Cas. 431 (C.C.D. Md. 1845) (No. 11,642) (stating that the defendant was allowed to produce “the same” musical composition as the plaintiff if “it was not taken from [the plaintiff], but was the effort of his own mind, or taken from an air composed by some other person, who was not a plagiarist from [the plaintiff]”); *Emerson v. Davies*, 8 F. Cas. 615, 624 (C.C.D. Mass. 1845) (No. 4,436) (concluding that courts in infringement actions should ask whether the defendant’s work is “a servile or evasive imitation of the plaintiff’s work, or a bona fide original compilation from other common or independent sources”). William Patry, author of an influential copyright treatise, dates the independent creation defense as far back as the English case of *Roworth v. Wilkes* (1807) 1 *Campbell* 94, 98–99. WILLIAM F. PATRY, 3 *PATRY ON COPYRIGHT* § 9:32 n.1 (2015).

<sup>278</sup> *See supra* Part I (identifying whether to provide an independent creation defense as IP’s “first question of process sensitivity”).

<sup>279</sup> *See, e.g.,* Copyright Act of 1909, ch. 320, § 1(a), 35 Stat. 1075, 1075 (granting owners the exclusive right to “print, reprint, publish, copy, and vend the copyrighted work”); Copyright Act of 1870, ch. 230, § 86, 16 Stat. 198, 212 (granting authors of protected works “the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same”). The presence of actions besides “copying” in the statutory list arguably suggests that even independent creation could trigger liability.

statute precluded an independent creation defense, contrary to the weight of common-law authority.<sup>280</sup> That decision, along with its literal reading of the statute's phraseology of exclusive rights, was the exception that proved the rule. Elsewhere and even within the same circuit, other decisions agreed that copyright, in Judge Learned Hand's words, "imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted."<sup>281</sup> Indeed, in a later case, Judge Hand authored an opinion for the Second Circuit expressly repudiating its prior holding in *Hein* as "contrary to the very foundation of copyright law."<sup>282</sup> That foundation, copyright's prevailing process-based limitation on liability, has historically been more of a judicial assumption than a statutory mandate.<sup>283</sup>

Not only did courts create the requirement of actual copying, but they also created a "substantial similarity" framework intended to detect which copying is permissible.<sup>284</sup> The contours of that doctrine find little foothold in the bare words "reproduce" or "copy," yet judges fashioned it anyway.<sup>285</sup> Judge-made law thus already recog-

<sup>280</sup> See *Hein v. Harris*, 183 F. 107, 108–09 (2d Cir. 1910).

<sup>281</sup> *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 147 (S.D.N.Y. 1924) (Learned Hand, J.). Curiously, Judge Hand was also the district court judge that the Second Circuit affirmed in the directly contrary *Hein* case, though he never cited it in *Fred Fisher*. See *Hein*, 183 F. at 108.

<sup>282</sup> *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 275 (2d Cir. 1936); see also GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 634 n.114 (2d ed. 2011) (discussing Judge Hand's pre-conference memo in *Arnstein*, which called *Hein* "just as wrong as a decision can possibly be in copyright . . . an abysmally ignorant decision" (quoting Pre-conference Memorandum from Learned Hand on *Arnstein v. Edward B. Marks Music Corp.* (Oct. 20, 1935) (on file with the Harvard University Law School Library in the Learned Hand Papers Collection, box 195 folder 22))). The *Arnstein* court did try to connect the existence of an independent creation defense to the 1909 Act's text, but its reasoning assumes its own conclusion. The court determined that because the statute framed the exclusive right around "the work," that right could extend only to "mak[ing] use of the corporeal object by means of which the author has expressed himself," and not to "creat[ing] other 'works' even though they are identical." *Arnstein*, 82 F.2d at 275 (quoting 17 U.S.C. § 1(a) (1970)). That reasoning only succeeds if one has already defined "the work" as something unique to a particular author, a move that seems to depend on—rather than prove—an independent creation doctrine.

<sup>283</sup> See PATRY, *supra* note 277, § 9:100 n.1 (describing the independent creation defense as an "assum[ption] by the courts from the beginning").

<sup>284</sup> See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (formulating the now-ubiquitous test under which, even if some copying occurred, a plaintiff must still prove that it was "improper").

<sup>285</sup> See Shyamkrishna Balganes, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 215 (2012) (noting that substantial similarity is an even more "common-law-like" body of law than fair use because "[u]nlike fair use, which today finds mention in the Copyright Act of 1976, substantial similarity continues to remain a doctrine that is policed, enforced, and molded entirely by courts" (footnote omitted)); Shyamkrishna Balganes & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in*

nizes that some acts of copying should fail even a *prima facie* case.<sup>286</sup> If courts can cultivate a common law for determining which copies are improper, they could also conceivably cultivate a common law for determining which copy processes are improper.

Nevertheless, though the *prima facie* route might work on a theoretical level, it faces a steep climb on a practical level. The elements of copyright infringement are by this point well entrenched. Those elements do not provide a doctrinal infrastructure for considering a defendant's copy process. While independent creation doctrine does a good job looking for actual copying, it provides no tools for evaluating the nature of any copying it finds. Courts would need to develop those from scratch. And substantial similarity, a doctrine whose mechanics has always focused on end products, would be an awkward vehicle for promoting greater attention to process. Relying on courts to graft copy process onto the plaintiff's *prima facie* case without an amendment to the Copyright Act is thus, as a practical matter, a long shot.

As a result, this Article suggests a more modest intervention that relies on another judge-made copyright doctrine: fair use.<sup>287</sup> Through fair use, copyright law already measures the welfare effects of allowing particular instances of copying. "[A] use that generates value for the 'broader public interest,'" as one recent case concluded, "weighs in favor of fair use."<sup>288</sup> In determining this broader public interest, courts favor various kinds of products, be they parodies,<sup>289</sup> thumbnail images in search engine results,<sup>290</sup> or incidental snippets of

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*Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1869 & n.52 (2015) (noting that substantial similarity "find[s] no mention . . . in the text of the statute").

<sup>286</sup> See Balganesch, *supra* note 277, at 221 (describing substantial similarity's "large normative component in which courts are to judge the wrongfulness of a defendant's act of copying, once shown to exist").

<sup>287</sup> While fair use is today codified at 17 U.S.C. § 107 (2012), it began as a creation of the courts. See *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4901).

<sup>288</sup> *Assoc. Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 552 (S.D.N.Y. 2013) (quoting *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006)); see also *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) ("[C]ourts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest.").

<sup>289</sup> *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting that parody "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one").

<sup>290</sup> *E.g.*, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (permitting reproduction of thumbnails because they "do not supplant the need for the originals" and simultaneously "benefit the public by enhancing information-gathering techniques on the internet").

copied material.<sup>291</sup> I propose that they favor various kinds of processes as well.

This proposal would not mean that uses already deemed fair under the law risk reverting to infringing status just because they're automated. Copy process could function like a one-way ratchet, a tool that's already familiar to courts from other multifactor analyses,<sup>292</sup> either weighing in favor of fair use or in no direction at all.<sup>293</sup> If a product—say, Google Books—offers sufficient public benefit to merit a fair use finding, the absence of a preferred process shouldn't change that outcome.<sup>294</sup> That Google employees scan manuscripts, rather than transcribing them by hand, shouldn't push the whole enterprise into liability; the product itself provides enough social value on its own. In a case like that, process is at worst a neutral factor. But in a different case, where the product doesn't offer enough benefit, courts should consider process benefits as well. The upshot is that, under a process-sensitive regime, fewer acts would be branded infringement.

Adding copy process to the fair use inquiry would cover scenarios that the current doctrine doesn't already reach, whether *de jure* or *de*

<sup>291</sup> *E.g.*, *Jackson v. Warner Bros.*, 993 F. Supp. 585 (E.D. Mich. 1997) (excusing the incidental use of lithographs in a motion picture); *Italian Book Corp. v. Am. Broad. Cos.*, 458 F. Supp. 65 (S.D.N.Y. 1978) (excusing the incidental use of a song playing in the background of a news segment).

<sup>292</sup> *See, e.g.*, *Golden Gate Nat'l Senior Care, LLC v. Minich ex rel. Shaffer*, No. 14-4459, 2015 WL 6111426, at \*4 (3d Cir. Oct. 16, 2015) (noting that, within the *Colorado River* abstention factors, the adequacy of the state forum "is generally a one-way ratchet, serving only to weigh *against* abstention where a state court is incapable of protecting a party's interests"); *SEC v. Thompson*, 732 F.3d 1151, 1168 (10th Cir. 2013) (observing that one of the factors for determining whether a promissory note qualifies as a security is a "one-way ratchet[ ] allowing notes that would not be deemed securities under a balancing of the other three factors nonetheless to be treated as securities if the public has been led to believe they are," but not allowing notes which under "the other factors would be deemed securities to escape the reach of regulatory laws" (quoting *Stoiber v. SEC*, 161 F.3d 745, 751 (D.C. Cir. 1998)); *United States v. Tadio*, 663 F.3d 1042, 1047 (9th Cir. 2011) (discussing cases holding that Rule 35(b) of the Federal Rules of Criminal Procedure provides a "one-way ratchet" under which "a district court may apply non-assistance factors to award a lesser sentence reduction than a defendant's assistance alone warrants or to award no reduction at all, but may not apply these factors in deciding whether to order a greater reduction").

<sup>293</sup> Others have proposed unidirectional fair use factors in different contexts. *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990) ("When the secondary use does substantially interfere with the market for the copyrighted work . . . this factor powerfully opposes a finding of fair use. But the . . . fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified."); Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935, 980 n.242 (2014) ("[A]n accused copyright infringer's good-faith intent to comply should serve as a one-way ratchet that favors fair use.").

<sup>294</sup> *See Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (holding that the copying involved in the Google Books program was a fair use), *cert. denied*, 136 S. Ct. 1658 (2016).

*facto*. To be sure, there is some conceptual overlap with the existing “transformative purpose” test, which favors second comers who use a work “in a different manner or for a different purpose from the original.”<sup>295</sup> In theory, the copyist laboring in the museum gallery, for instance, could invoke that doctrine to insulate her educationally motivated work. Nevertheless, in practice, purpose hasn’t proved up to the task. Copyright restrictions continue to limit the range of paintings from which gallery copyists can work.<sup>296</sup> Given the muddy nature of fair use analysis, policymakers may be better off shielding welfare-enhancing recreations behind multiple factors rather than banking on purpose alone.<sup>297</sup>

Moreover, a strictly purpose-based test is both under- and over-inclusive. It’s under-inclusive because sometimes it’s not primarily the copyist’s purpose that drives the use’s social value. Take a recreator who simply seeks attention for himself; the educational payoff is a pleasant byproduct, not a bona fide purpose.<sup>298</sup> In that case, process goes where purpose cannot. Purpose is over-inclusive in that, even when done for identical purposes, some processes are simply more valuable than others. One can pay homage to an author by recreating a work from scratch. Or one can pay homage to that author by distributing copies on BitTorrent with a “no copyright infringement intended” disclaimer.<sup>299</sup> Same purpose, different payoff. Tracking process *and* purpose would thus yield fewer doctrinal misfires than would trying to shoehorn the same policy goals into a test that has room only for purpose and nothing more.

Importantly, courts don’t need any new legislative authority to start counting copy process in the fair use analysis. This Article’s proposal is ready to use right out of the box. The first statutory factor of the fair use test already tells judges to consider the “character of the use.”<sup>300</sup> Courts have interpreted that provision capaciously, invoking it to examine not only whether the defendant’s use was commercial (which is specified in the statutory text) but also whether the use was

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<sup>295</sup> *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 309–10 (4th Cir. 2010) (quoting *Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009)).

<sup>296</sup> See *supra* note 232 and accompanying text.

<sup>297</sup> Cf. John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629 (2016) (examining how legal doctrine might be designed to benefit from redundancy while mitigating anti-redundancy concerns).

<sup>298</sup> Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (concluding that “the claim to fairness in borrowing from another’s work diminishes” if the alleged infringer uses the original work “merely . . . to get attention”).

<sup>299</sup> See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1534.

<sup>300</sup> 17 U.S.C. § 107(1) (2012).

transformative (which isn't).<sup>301</sup> There is nothing about the text that cabins it to the defendant's product. Quite the opposite. The defendant's "use" is an action, not a result. It makes at least as much sense for the word "use" to cover the defendant's process as it does the defendant's product.<sup>302</sup> Perhaps the only reason courts have yet to interpret it this way is that they lacked a justification to do so.

Thus far, this Article has sought to provide that missing justification. The remainder briefly sketches out how things might work in practice. Though trade secret law is a helpful template for the existence of a policy lever that assesses the means of copying, on the finer details of implementation copyright must part ways. As a general matter, the trade-secret analogy breaks down in spots where permitting recreation (or the subsequent exploitation of an existing recreation) would destroy the economic incentives that justify copyright's grant of an exclusive right to begin with. Those spots, as I've argued above, are nowhere near as pervasive as conventional copyright theory suggests, but they do exist. The following subsections examine them.

### A. *Subject Matter Limitations*

An improper means inquiry could take several forms. The definition of improper means could be made either a rule or a standard. Separately, the absence of improper means could be a complete defense or merely a thumb on the scale. Trade secrecy's approach to reverse engineering chooses the first option on each, establishing a standalone rule: if you reverse engineer, you're in the clear.<sup>303</sup> It doesn't distinguish based on product or industry. So long as the model

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<sup>301</sup> See, e.g., *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 939 (4th Cir. 2013) (dividing its first-factor analysis between whether the new work was transformative and whether the defendant's use of the owner's work served a commercial purpose).

<sup>302</sup> Cf. *Heilman v. Bell*, 583 F.2d 373, 375-76 (7th Cir. 1978) (rejecting an attempt to fit mechanical duplication within the 1909 Act's compulsory license governing cover songs because, even though there was similarity "in the end product" there was still "no similarity in the 'use' of the composition" as required by statute (quoting 17 U.S.C. § 1(e) (1970))).

<sup>303</sup> Other forms of derivation are judged according to an open-ended reasonableness standard. See *E. I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) ("A complete catalogue of improper means is not possible. In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct." (quoting RESTATEMENT (FIRST) OF TORTS § 757 cmt. f (AM. LAW INST. 1939))).



containing the information being reverse engineered was itself acquired lawfully, the means are proper.<sup>304</sup>

Trade secret law can afford that open-tent approach on the back-end infringement inquiry because it is selective on the front-end protectability inquiry. Only information that is “not . . . readily ascertainable by proper means” is eligible for trade secret protection to begin with.<sup>305</sup> As a result, there wouldn’t be any right to infringe unless the act of reverse engineering was necessarily hard to do.

Copyright protection, by contrast, extends to works regardless of how easy they are for another to recreate.<sup>306</sup> All that’s needed is, in the Supreme Court’s formulation, “independent creation plus a modicum of creativity.”<sup>307</sup> That means the ease, audience reception, and learning benefits of recreation will all vary according to the medium involved. Across such a wide range of subject matter, copy process won’t always be a meaningful factor. An important question is whether the act of recreation requires technical skill. Repainting a painting, refilming a movie, or rerecording a musical composition fit neatly within this Article’s framework. Copying out in longhand the text of a poem is more complicated. On the one hand, it costs little and probably doesn’t impress most audiences the way that an exact recreation of visual or cinematic works do (try copying out this article with a pen and paper and see how many people celebrate your achievement).<sup>308</sup> On the other hand, copying poetry by hand still has potential pedagogical value.<sup>309</sup> So the case for allowing handmade copies of verbal texts may be weaker, but it’s not negligible. Courts must stay attuned to the welfare effects of particular processes, just as they do with particular products.

Trade secrets have another homogeneity that copyright subject matter lacks. They all derive their economic value from being kept

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<sup>304</sup> See UNIF. TRADE SECRETS ACT § 1 cmt. (UNIF. LAW COMM’N 1985) (“The acquisition of the known product must, of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful . . .”).

<sup>305</sup> See *id.* § 1(4)(i).

<sup>306</sup> See *supra* note 116 and accompanying text (discussing courts’ refusal to protect “sweat of the brow”).

<sup>307</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

<sup>308</sup> *But see* JORGE LUIS BORGES, *Pierre Menard, Author of Don Quixote*, in *FICCIONES* 29–38 (Anthony Bonner trans., Emecé Editores S.A. 1993) (offering a fictional account of a DON QUIXOTE recreator who tries to rewrite the book word for word not by copying the text but by deriving inspiration from life experiences, including an initial attempt to “know Spanish well, to re-embrace the Catholic faith, to fight against Moors and Turks, to forget European history between 1602 and 1918, and to *be* Miguel Cervantes”).

<sup>309</sup> Jack London, for example, reportedly acquired his chops by copying out great literature in the San Francisco public library word for word, focusing on what made each sentence tick. See SUSAN WISE BAUER & JESSIE WISE, *THE WELL-TRAINED MIND: A GUIDE TO CLASSICAL EDUCATION AT HOME* 64 (3d ed. 2009).

secret.<sup>310</sup> So long as they remain generally unknown, they are valuable, even if a handful of third parties successfully reverse engineer the information for their private benefit. Copyrightable works, on the other hand, derive economic value in different ways, some of which are more affected by recreations than others. Take, for instance, a script for a play. Although there may be a small market for reproductions of the script itself, its primary value comes from the exclusive right to perform it on stage. It may very well be that bringing the play to life is difficult and time-intensive, educative for the performers, and appreciated by audiences in a way that a filmed copy of another's performance isn't—all facts that would weigh in favor of allowing a recreation. And yet doing so would eviscerate the market for the original script. Authors who depend on income from performances are more vulnerable to unauthorized recreations, since recreations are, at bottom, performances.<sup>311</sup>

Generally speaking, then, copy process should matter most in industries that don't rely heavily on licensing recreative performances. This suggested rule is simply an extension of the well-established copyright principle that a market harm for licensing revenues will only be recognized for "traditional, reasonable, or likely to be developed markets."<sup>312</sup> The primary beneficiaries would likely be those working in visual media—painting, graphic design, film, and the like. Some musical compositions would also be affected but for the fact that they are already subject to the compulsory "cover" license under § 115 of the Copyright Act.<sup>313</sup>

### B. *Derivative Works*

Another question is how to handle translations into new languages or new media. The Copyright Act grants owners the exclusive right to prepare not only literal reproductions but also "derivative

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<sup>310</sup> See UNIF. TRADE SECRETS ACT § 1(4)(i) (UNIF. LAW COMM'N 1985) (limiting trade secret protection to information that "derives independent economic value, actual or potential, from not being generally known" and "not being readily ascertainable").

<sup>311</sup> See *supra* note 196 and accompanying text (noting how each piece of art is a performance by an artist that audiences enjoy).

<sup>312</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006) (quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994)).

<sup>313</sup> See 17 U.S.C. § 115 (2012); *supra* text accompanying notes 123–28 (discussing compulsory licenses). Because composers in some genres tend to rely on other artists to record their work (e.g., country songwriters and classical composers) while in other genres they tend to record it themselves (e.g., singer/songwriters and rock bands), the economic impact would not be uniform. Those composers whose business depends on licensing others to record their work would, like the playwrights discussed in the preceding paragraph, have a strong argument against permitting unauthorized recreations.

works,”<sup>314</sup> a category that expressly includes translations, dramatizations, and motion picture versions.<sup>315</sup> Yet these works seem to carry all the benefits of recreations as I have defined them here. Translating well, whether from English to German or from novel to cinema, is extremely difficult. It also cultivates great skill.<sup>316</sup> Why then shouldn’t it be allowed? Or, put differently, why don’t the exceptions that I’ve advanced in this Article swallow the derivative work right whole?

Part of the answer may simply be that, even taking into account recreations’ value, the benefits of allowing authors to control derivative works still outweigh the benefits of letting anyone make them. The derivative work right can incentivize original creation,<sup>317</sup> permit authors to craft sequels and spinoffs without needing to rush them to market,<sup>318</sup> and push downstream users to make more creative use of existing cultural materials.<sup>319</sup> But each of those justifications is strongest when applied to the markets that the creator of the original work can reasonably expect to reach.<sup>320</sup> To the extent that recreating a work is beyond those reasonable expectations, there’s less reason to

<sup>314</sup> *Id.* § 106(2).

<sup>315</sup> *See id.* § 101. The definition also includes “art reproduction[s],” *id.*, which might at first suggest that Congress specifically foreclosed a use that I’ve offered here as a paradigmatic recreation when done from scratch. That reading of the statute, however, would be too broad. The word “reproduce,” which the statute does not define, is the operative verb in the provision granting the owner the basic right to make copies. *See id.* § 106(1). There’s no good reason to read “art reproduction” as any more impervious to fair use considerations than the reproductions of any other work. Thus, in analyzing fair use arguments, the statute leaves courts as free to distinguish between the copy processes of “art” as of any other kind of work.

<sup>316</sup> Indeed, early case law allowed unlicensed translations because of the intellectual labor involved. *See Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514) (“To make a good translation of a work often requires more learning, talent and judgment, than was required to write the original. Many can transfer from one language to another, but few can translate.”). That rule lasted until 1870, when Congress amended the copyright statute to give owners the ability to control translations. *See Copyright Act of 1870*, ch. 230, § 86, 16 Stat. 198, 212.

<sup>317</sup> *See Pamela Samuelson, The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 GEO. L.J. 1505, 1528–30 (2013) (describing certain classes of authors for whom “derivative markets factor into decisions about whether to create new works and what kinds of works to create”).

<sup>318</sup> *See id.* at 1530–31.

<sup>319</sup> *See Michael Abramowicz, A Theory of Copyright’s Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005) (arguing that without a derivative work right, authors may invest in inefficiently similar adaptations); Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333 (2015) (arguing that the derivative work right may generate creativity by constraining authors’ use of familiar expressive solutions).

<sup>320</sup> *See Samuelson, supra* note 317, at 1521 (noting that a common denominator of derivative works is that they are all “aimed at clearly foreseeable markets to the works on which the derivatives are based”).

label it infringement.<sup>321</sup> Developing a novel into a movie, for example, is well within the heartland of uses that many novelists anticipate.<sup>322</sup> Recreating the same movie from scratch isn't. There will also be certain transformations between media that are similarly remote, like a three-dimensional restaging of a photographed scene.<sup>323</sup> Though the derivative work right covers widely foreseeable kinds of translation, it shouldn't include such distant activity.

Moreover, audiences' process preferences are probably weaker for the average derivative work than for the average close copy. Recall that audiences often value recreations precisely because they are the work of someone other than the original author.<sup>324</sup> Seeing a second comer skillfully replicate an author's creation tends to be more rewarding than seeing the author do the same thing twice. That's not necessarily the case with derivative works. An audience may value a work recast in a new medium regardless of whether the original author is the one doing the recasting. The justification for allowing recreations is thus somewhat stronger for close copies.

### C. *Post-Copying Use*

A third set of questions revolves around what the copyist may do with a recreation once it's made. In trade secret law, a successful reverse engineer stands on the same footing as the original possessor of the trade secret. She may use or disclose the information however she wishes.<sup>325</sup> In theory, that would allow a single second comer to destroy a trade secret through public disclosure. In practice, however, the law assumes that appropriators "will often have the same incentive as the originator to maintain the confidentiality of the secret in order to profit from the proprietary knowledge."<sup>326</sup> As a result, trade

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<sup>321</sup> See *id.* at 1559–60 (explaining how the more unforeseeable the market, the less compelling the various rationales for the derivative work).

<sup>322</sup> See *id.* at 1529 ("Novelists and playwrights frequently expect their works to be transformed into movies or translated from one language to another. Screenwriters and novelists often anticipate having their works adapted for the stage.").

<sup>323</sup> See *supra* notes 179–81 and accompanying text.

<sup>324</sup> See *supra* notes 211–12 and accompanying text.

<sup>325</sup> See, e.g., *Tabor v. Hoffman*, 23 N.E. 12, 13 (N.Y. 1889) (concluding that it is permissible to reproduce a product through reverse engineering but not through bribing someone for the necessary information); *Bone*, *supra* note 28, at 250 n.44 ("[T]hose who learn the secret lawfully have trade secret rights of their own provided they too keep the information secret—at least until the information is discovered by too many people.").

<sup>326</sup> *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 119 (2d Cir. 2009); see also *Samuelson & Scotchmer*, *supra* note 18, at 1658 (noting that trade secret cases seldom need to address a reverse engineer's attempt to publish the secret "because reverse engineers have generally had little incentive to publish or otherwise disclose information they learn from reverse engineering. Reverse engineers have typically kept the resulting know-how secret for competitive advantage."); *Varadarajan*, *supra* note 5, at 1436–37

secret law can get away with granting lawful appropriators broad leeway for post-appropriation use.

Copyright law can't reasonably make the same assumption. Once someone has laboriously recreated a work, there still often remains an incentive to use it in ways that are harmful to the owner's primary market. If the law didn't regulate that activity, a copyist could effectively launder millions of cheap and even instantaneous duplications through a single laborious recreation. A factory could churn out quick copies based on a handmade "patient zero" copy. Unlike a transformative fair use, a purely process-based fair use does not generate a new work that its author is fully free to exploit. The recreator's fair use right shouldn't guarantee a subsequent right to duplicate the work endlessly.<sup>327</sup> Rather, post-recreation use, like any use of another's copyrighted work, should be judged according to the standard fair use factors. Those factors leave room for communicating a recreation to others on a small scale, even if they don't provide *carte blanche* for all forms of commercial exploitation.<sup>328</sup>

Of course, noncommercial copying itself weighs in favor of fair use, raising the question whether it—not copy process—should be doing the real work in my recreation examples. There are, however, two reasons why the commercial use factor doesn't obviate consideration of copy process. First, many fair use cases have interpreted the commercial use concept broadly, extending it to personal uses from which the user derives some nonmonetary benefit without paying the customary market price.<sup>329</sup> Downloading a free mp3 file for your pri-

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("[T]rade secret disputes often arise between competitors, and neither wants to destroy the secret's value by publishing it . . .").

<sup>327</sup> One could plausibly imagine a different model based on the Section 115 compulsory license, which specifies a minimum royalty rate for duplications of a musical work's recorded performance. Congress could legislate a similar licensing scheme for multiple fields besides music, where a second comer puts in the work to recreate the original and in return can rely on a statutorily mandated licensing scheme without needing to worry about the owner holding out. The details of such an alternative, legislative solution would be difficult to get right—even on the music side, where the system has been in place for over a century, there exists profound disagreement over whether the compulsory license ought to be scrapped or at least overhauled in any of several divergent directions. See U.S. COPYRIGHT OFFICE, *COPYRIGHT AND THE MUSIC MARKETPLACE* 105–14 (2015). Consequently, the merits of any proposed compulsory licensing scheme are beyond the scope of this Article.

<sup>328</sup> See Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 413 (2003) (observing that fair use permits modest modifications to existing works "even if communicated to others, particularly if the use is noncommercial and poses no harm to the market"). A firm that recreated the same work on an industrial scale may fail this test. For an existing example of this business model that's limited to public-domain works, see *Copyrights*, 1ST ART GALLERY, <http://www.1st-art-gallery.com/copyrights.html> (last visited Feb. 18, 2016).

<sup>329</sup> See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

vate consumption counts as commercial.<sup>330</sup> By that rationale, it seems reasonable to say that recreating a Picasso and then hanging it on the wall for your private admiration should count, too. After all, the copyist in either case avoids compensating the owner for the reproduction. Incorporating copy process into the analysis could uncouple the recreator from the downloader. Second, even if some recreations are indeed noncommercial uses, overlapping factors are still useful as fail-safes, as discussed above.<sup>331</sup>

A final point is that attribution looms particularly large in this sphere. Although copyright law does not require providing attribution to one's source, courts have occasionally held that doing so weighs in favor of fair use.<sup>332</sup> Usually, the concern is that a copyist won't credit the original author, and certainly that concern remains for recreators just as much as for duplicators.<sup>333</sup> But given the acute potential for forgery, an even greater worry should be that recreators may attempt to pass off their work as the original. To address that possibility, courts could discount a fair use argument if the defendant hasn't identified a recreation as such.<sup>334</sup>

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<sup>330</sup> See *BMG Music v. Gonzalez*, 430 F.3d 888, 890–91 (7th Cir. 2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); see also *Sega Enters. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (downloading free video games counts as commercial).

<sup>331</sup> See *supra* note 297 and accompanying text.

<sup>332</sup> See, e.g., *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (holding that by “neglect[ing] to credit [a writer] for her authorship of [the work]” and “substituting his name as author in place of hers,” the defendant “severely undermine[d] his right to claim the equitable defense of fair use”); *Williamson v. Pearson Educ., Inc.*, No. 00 Civ. 8240(AGS), 2001 WL 1262964, at \*5 (S.D.N.Y. Oct. 19, 2001) (holding that “attribution, coupled with the transformative nature of the defendants’ use of the quoted passages, favors a finding of fair use”); *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 211 (D. Mass. 1986) (finding that the “‘character’ of the use” factor weighed in the defendant’s favor because he “credited [the owner] with the copyright of the reproduced works and informed readers of how they could buy them from him” (quoting *Harper & Row*, 471 U.S. at 562)); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2579 (2009) (“The defendant’s willingness to attribute the contributions of the first author to the subsequent work has also sometimes favored fair use in authorial fair use cases.”).

<sup>333</sup> See, e.g., Joel Rose, *New Paintings Reignite the Bob Dylan Copycat Debate*, NPR, <http://www.npr.org/2011/10/18/141423977/new-paintings-reignite-the-bob-dylan-copycat-debate> (Oct. 18, 2011, 4:34 PM) (describing popular backlash against Bob Dylan when it was revealed that his paintings were copied from historical photographs rather than from nature, as he had claimed).

<sup>334</sup> Cf. Gale, *supra* note 225 (interviewing a copyist artist who signs her name to the back of each replica public-domain painting in order to head off any forgery concerns); Malcom Jones, *supra* note 224 (distinguishing between simply copying a painting from passing off that copy as the original).

## CONCLUSION

Because “[n]ot all copying . . . is copyright infringement,”<sup>335</sup> copyright cases necessarily involve a normative judgment concerning which copying should be regulated and which shouldn’t.<sup>336</sup> In this Article, I’ve argued that this judgment should be based on copying’s processes, not just its products. Copyright’s fair use inquiry has grown to encompass almost all of the five W’s. Courts ask what was copied and what (if anything) was created with it. They ask who did the copying. They ask why that copying was done. There have even been repeated calls for courts to ask when during the copyright term the copying was done.<sup>337</sup> Asking how the copying is done, on the other hand, remains conspicuously absent.

But how matters. It matters to the ones recreating existing works. It matters to the ones whose works are being recreated. And it matters to the audiences experiencing those recreations. Indeed, beneath copyright’s black-letter veneer, some judges may already be feeling copy process’s influence as audience members themselves.

The conceptual move of recognizing copy process’s effect on each of these groups is a simple but deeply significant one. As the easiest way to copy keeps getting easier, copyright law has affected an increasing range of activities across an increasing range of works. There ought to be some mechanism for courts to recognize—just as they are able to recognize in trade secret law—that some cases aren’t about the easiest way. Some means of copying predictably lead to better ends than others. The law should be able to tell the difference.

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<sup>335</sup> Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

<sup>336</sup> See Balganesch, *supra* note 285, at 206 (discussing the “large, underappreciated normative dimension” to copyright doctrine’s conception of actionable copying).

<sup>337</sup> See Hughes, *supra* note 264 (arguing that the fair use doctrine should consider how much of the owner’s copyright term has elapsed); Liu, *supra* note 263 (same).