COMMENT: WHERE DOES CREATIVITY COME FROM? AND OTHER STORIES OF COPYRIGHT

Michael J. Madison[†]

In this brief Commentary, I want to take up some of the questions implicit in Lydia Loren's *Untangling the Web of Music Copyrights* ("*Untangling the Web*")[1] and to use those questions to frame some broader themes. *Untangling the Web* is an ingenious paper, because it takes the Supreme Court's decision in *New York Times Co. v. Tasini*[2] for what it is (a story about copyright law) rather than for what it appears to be (an analysis of a rather obscure provision of the Copyright Act of 1976). The Court's story of copyright is about "Authors" – "Authors" who happen to be journalists, historians, and freelance writers and researchers. The Court tells a simple story, with a simple premise. The Court wants justice for Authors. *Untangling the Web* takes the Court's premise and tells a richer and more complex story, the story of a "web" of overlapping and unclear copyright interests, based on Authors' interests, that have captured a particular industry (composers and recording artists and various institutional players in the music business), ensnaring creators and consumers. As I explain below, *Untangling the Web* resolves its story of copyright in a sensible way, but it leaves some possibilities – other plot lines, other resolutions – unexplored. There are at least two stories of copyright here. Are there more?

The Supreme Court in *Tasini* notwithstanding, we know that there are multiple stories of copyright. And about copyright. The alternative narrative presented in *Untangling the Web* itself implies as much. Copyright doctrine suggests stories of artists, artisans,

---

[†] Assistant Professor, University of Pittsburgh School of Law. Email: madison@law.pitt.edu. This Commentary is based on a talk presented at the Symposium held at the Case Western Reserve University School of Law on November 1, 2002, entitled *Copyright in the Digital Age: Reflections on* Tasini *and Beyond.* Many thanks to Craig Allen Nard, the organizer of the Symposium, for inviting me to participate, and to the editors of the Case Western Reserve Law Review, for giving me the opportunity to expand on my talk.

[1] Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003).

[2] 533 U.S. 483 (2001).

tradespeople, and industries with different but overlapping interests, all expressed through the prism of a single body of law. There are stories at different levels of abstraction and stories of no abstraction at all, only the concrete. *Tasini* presents one such story, *Untangling the Web* resolves another. Below, I suggest what some additional stories might be. As Jessica Litman pointed out recently,[3] in ongoing debates over the shape of copyright law and policy there are disparities in financial and rhetorical resources that advantage copyright industries in contemporary copyright story-telling. The story implicitly told by the Court in *Tasini* may or may not reflect that advantage, but its story of copyright, like any story, is fairly deserving of challenge.

The stories I suggest are inspired by the motion picture industry, rather than by the music business ("Music Copyrights," in the title of the main paper), or the world of the Internet ("the Web"), or the world of journalists and historians (*Tasini*). This is partly my own idiosyncrasy, since I am a movie fan. In truth, my first reaction to the argument of *Untangling the Web*, that there are too many copyright interests represented in the music business, was a quotation from the film adaptation of *Amadeus*, a reference that I explain below. It represents an appeal to the inherent if conventional narrative form that Western motion pictures have given audiences for decades.[4] Story-telling has a long and respected pedigree as a tool of legal persuasion, and motion picture melodrama is, in contemporary culture, an almost uniquely effective form of story-telling.[5] What follows, then, is a series of stories inspired by

---

[3] *See* Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002). Coyright debates, it has been observed, often involve a s much mythology as reality. *See* Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991); Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2d 37 (2002).

[4] On narrative structure and narrative construction in legal practice, see Anthony B. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992). For an analysis of adapting film narrative to legal practice, see Philip N. Meyer, *"Desperate for Love": Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994). For histories of narrative in film, see DAVID A. COOK, A HISTORY OF NARRATIVE FILM (3d ed. 1996); JOHN L. FELL, FILM AND THE NARRATIVE TRADITION (1974). For quite different analyses of narrative form in motion pictures, see SEYMOUR CHATMAN, COMING TO TERMS: THE RHETORIC OF NARRATIVE IN FICTION AND FILM (1990) (discussing a language-based approach); CHRISTIAN METZ, FILM LANGUAGE: A SEMIOTICS OF THE CINEMA (1974) (discussing a semiotics-based approach); GEORGE M. WILSON, NARRATION IN LIGHT: STUDIES IN CINEMATIC POINT OF VIEW (1986) (arguing that an internal rather than external narrative perspective is required).

[5] For one excellent recent example of a critique of advocacy from a story-telling perspective, see Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry's Spence's Closing Argument in the* Estate of Karen Silkwood v. Kerr-McGee, Inc., 9 CLINICAL L. REV. 229 (2002). On the use of literary devices in judicial opinions, see Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV.

motion pictures and intended both as illustrations of the multiple ways of framing copyright controversies and as tools for advocates and analysts.

I. THE STORY OF *NEW YORK TIMES CO. V. TASINI*

On the surface, *Tasini* is not much of a tale. The New York Times, among other publications, purchased freelance articles written by Jonathan Tasini and fellow freelancers, published them in its print editions, and then re-published them electronically, by including those articles in searchable electronic databases. The republication occurred without the permission of the original authors, raising a presumptive case of copyright infringement. The publications defended their practices by invoking section 201(c) of the Copyright Act, which permits the publisher of a collective work to republish contributions to that collective work copyrighted by others, so long as the republication is a "revision" of the original collective work.[6] Newspapers are copyrighted as collective works. The legal issue before the Supreme Court was whether republishing newspapers in searchable electronic databases constituted making "revisions" of those collective works.[7] The Court ruled that the revision privilege did not apply.[8] So far, so simple, and from the standpoint of pure statutory interpretation, probably unremarkable.

From a narrative standpoint, in the hands of the Court majority, this was not really the story of *Tasini* at all. To the Court, the case presented a noble Author, Jonathan Tasini, and five colleagues, standing tall against institutional forces that in effect conspired to appropriate the value of the Authors' art, without their permission or fair compensation. *Tasini*, the lawsuit, was the story of a freelance journalist, Tasini, and his fight against the corporate culture of modern publishing.[9]

This narrative is subtle but apparent from the very outset of the Court's opinion: "Respondents are . . . authors (Authors)."[10] The original publishers of their works are the "Print Publishers,"[11] and the companies responsible for the electronic databases in

---

1477 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1386-90 (1995).

[6] *See* 17 U.S.C. § 201(c) (2000).

[7] New York Times Co. v. Tasini, 533 U.S. 483, 492-93 (2001).

[8] *Id.* at 492.

[9] The lead plaintiff in the lawsuit is president of the National Writers' Union, an affiliate of the AFL-CIO. Information about the NWU and its role in the *Tasini* litigation is available at National Writers Union Home Page, *at* http://www.nwu.org (last visited Oct. 26, 2002).

[10] *Tasini*, 533 U.S. at 488.

[11] *Id.* at 489.

which the Authors' articles ultimately appeared are the "Electronic Publishers."[12] The manner in which the Court abstracts the parties' identities neatly sets the stage for its statutory analysis. Section 201(c) of the Copyright Act of 1976 allocates rights in a collective work so as to protect authors from the superior bargaining power of publishers and to protect the interests of freelance authors in selling their articles to others on a stand-alone basis even after initial publication in a collective work. [13] Publication of freelance articles in electronic databases is a form of stand-alone publication since the searchability of the databases means that each article can be retrieved absent the context provided by the original collective work.[14] The database user reads the work of the Author, in other words, rather than the work of the Publisher. The Author vs. Publisher narrative abstraction also feeds nicely into the majority's climactic rhetorical flourish, an unprecedented Supreme Court appeal to "authorial rights" as a policy justification for its interpretation of section 201(c).[15] If the "Publishers" want access to the Authors' works, the Publishers can and should pay for that access. And so the curtain falls on the Publishers' defense.

II. THE STORY OF *UNTANGLING THE WEB OF MUSIC COPYRIGHTS*

Untangling the Web recognizes the Court's opinion for what it is, a narrative about the role of authors and publishers rather than an interpretation of the revision privilege of section 201(c). The article situates that narrative in the context of the music industry, and then proceeds to retell the story. No longer is copyright the story of oppressed Authors victimized by big Publishers seeking refuge in the protection granted by Congress in the Copyright Act. Instead, the development of copyright law itself comprises an interactive and complex narrative involving music publishers, composers, record companies, recording artists, radio interests, and Webcasters, among others. As this narrative has become too intri-

---

[12] *Id.* at 491.

[13] 17 U.S.C. § 201(c) (2000) provides:

> Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

See also Tasini, 533 U.S. at 494-96.

[14] *See id.* at 500-02.

[15] *Id.* at 505-06.

cate either to be fair to Authors (in this respect, the revised story adopts the premise of *Tasini*) or to be persuasive to its audience[16] (in this respect, it extends *Tasini*), it needs an alternative resolution. Simply declaring that Authors are heroes (as the Court did, rhetorically, in *Tasini*), does not suffice. Instead, the narrative should be simplified.

To borrow language from the domain of motion pictures, the Court's opinion in *Tasini* rhetorically indulges the fictionalized genius composer portrayed by Tom Hulce in the film adaptation of Peter Shaffer's *Amadeus*.[17] Art, that film argues, demands accommodating authorial excess. Copyright, the Court implies, demands accommodating what might appear to be excessive demands of Authors. *Untangling the Web* in effect borrows a different theme from that same film, less inspiring but more pragmatic. It adopts the alternative resolution proposed by the Emperor Joseph II, as immortalized on screen by Jeffrey Jones, in his critique of Mozart: "My dear young man, don't take it too hard. Your work is ingenious. It's quality work. And there are simply too many notes, that's all. Just cut a few and it will be perfect." The "too many notes" in *Untangling the Web* are the lack of derivative work independence, the statutory license for mechanical reproductions of musical compositions, and the multiplicity of overlapping rights represented in section 106 of the Copyright Act.[18] Cutting those notes will not solve all of the problems of contemporary copyright law. Cutting them does, however, address the most significant problems faced by the music industry. Equally important, doing so brings closure to the more elaborate narrative about copyright that requires both compensation to Authors and incentives to take advantage of multiple avenues for distributing works to the consuming Public. *Untangling the Web* usefully points out that the Court's narrative in *Tasini*, even if that narrative is appropriate in the context of that case, does not fit the music business. The history and interests of that business, and perhaps of others, require telling a more elaborate story.

With the door thus opened to multiple narratives and different endings, the balance of this Commentary reviews, in *Rashomon*-like fashion,[19] several others. Some are suggested by the opinions of the majority and dissent in *Tasini*. Some are suggested by *Un-*

---

[16] Jessica Litman makes this point with respect to consumers in *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 34-39 (1994).

[17] AMADEUS (Warner Bros. 1984).

[18] *See* 17 U.S.C. § 201(c).

[19] RASHOMON (1950; U.S. Distrib. RKO Radio Pictures, 1951). Kurosawa's classic film tells the story of a rape from the perspective of four different characters.

tangling the Web. Others claim no particular birthright but might be traced more broadly to themes circulating in contemporary discussions of copyright law and policy. Each "story" invokes the motion picture theme introduced above, and each is organized around a famous movie quotation. I cannot argue that any one of these is any more "right" than *Tasini* as an account of copyright arguments.[20] I do suggest that these are fair game for lawyers, judges, and policymakers. One or more of them may be coming to a courtroom soon.

III. OTHER STORIES OF COPYRIGHT

A. *"Follow the money"*[21]

The investigative reporters Bob Woodward (played by Robert Redford) and Carl Bernstein (Dustin Hoffman) in *All The President's Men* looked beyond the narrow question (who broke into the headquarters of the Democratic National Committee at the Watergate complex?). Taking cues from "Deep Throat," the still-unidentified source who urged them to "follow the money," they followed a trail that led to the Oval Office. Much as the film has been praised as a portrait of working journalists, however, the protagonist in the Watergate saga, however, turns out not to be the reporters themselves (although they were frequently challenged by their editors). The protagonist turns out to be the public interest, vindicated in the end by the recognition ultimately given Woodward and Bernstein[22] and by the resignation of President Nixon.

The version of *Tasini* that focuses on Authors' rights to fair compensation from Publishers appears to overlook broader themes in the same way that Woodward and Bernstein initially overlooked the scale of the Watergate story and that the editors of the *Washington Post* initially overlooked the work of Woodward and Bernstein. To the *Tasini* majority's emphasis on "authorial" rights, the dissent responds:

> [T]he primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors.' . . . The majority's decision today unnecessarily subverts this fundamental goal of copyright law in favor of a narrow focus on 'authorial rights.'

---

[20] I do have my personal favorite, which is reflected in the title of the Commentary.

[21] Hal Holbrook as "Deep Throat," in ALL THE PRESIDENT'S MEN (Warner Brothers 1976).

[22] The *Washington Post* won a Pulitzer Prize in 1973 for their reporting.

> . . . Although the desire to protect such rights is certainly a laudable sentiment, copyright law demands that 'private motivation must ultimately serve the cause of promoting *broad public availability* of literature, music, and the other arts.'[23]

The *Tasini* majority have their reply ready. The Authors, though victorious, are not necessarily entitled to injunctive relief. "The parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution."[24] At least in this brief aside, the Court is not inattentive to some of the broader implications of its holding.[25] Its story seems to hold together.

Yet the majority's variation on the story of *Tasini*, one that acknowledges that there are multiple ways to compensate Authors, is incomplete. In *All the President's Men*, the story of Watergate was not resolved by disclosure of the fact that the Plumbers who broke into the Democrats' Watergate headquarters were financially linked to the Nixon White House. The public interest was not served merely by knowledge of the extent to which the political process was corrupt. The corruption itself had to be addressed. The copyright story that I am suggesting here is metaphorical, not literal; there is no evidence that negotiations among Authors and Publishers are "corrupt."[26] Yet the form that the *Tasini* narrative takes, that the players consist of abstractions known as Authors and Publishers and the Public, and all can be served via statutory interpretation and licensing, seems almost willfully blind to the extent to which contemporary copyright debates depend upon the organization of large-scale markets for what copyright terms

---

[23] New York Times Co. v. Tasini, 533 U.S. 483, 519-20 (2000) (Stevens, J., dissenting) (citations omitted).

[24] *Id.* at 505; *see* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1295 (1996) (arguing that strong property rules for intellectual property rights are likely to encourage the development of collective rights organizations to license those rights).

[25] In context, it is difficult to tell how seriously the Court intended this quotation. Immediately following this quotation, the Court majority disclaims judging the wisdom of a compulsory licensing approach, by emphasizing the plaintiffs' authorial rights. *See Tasini*, 533 U.S. at 506. On the other hand, in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), the Court famously suggested that injunctive relief may not always be the appropriate remedy for infringement-by-parody. *See id.* at 578 n.10.

[26] Well, there is *some* evidence on this point. *See, e.g.*, Lauren J. Katunich, Note, *Time to Quit Paying the Payola Pipe: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 643-45 (2002) (addressing the need for the restructuring of federal payola laws to promote a more honest music industry).

"works of authorship."[27] *Tasini* resolves the apparent problem, but it does not deal with the underlying issues. As a result of the Court's judgment that reproducing freelance newspaper articles in electronic databases does not fall within the revision privilege of section 201(c) of the Copyright Act, Authors have a negotiating lever, in principle, that in many circumstances they previously lacked. As a practical matter, freelance authors and photographers see little if any of this extra compensation. As the other contributions to this Symposium make clear, the structure of the publishing industries and publishers' power to require contractual forfeiture of *Tasini*-based electronic publishing rights is overwhelming.

The "Follow the money" story about copyright, then, is this: If we are serious about providing authors and other creators with fair compensation for their efforts, and balancing that compensation with appropriate levels of access for new creators and for consumers, then we need to do more than reform copyright law itself (the narrow point of the *Tasini* majority, the broader theme of the *Tasini* dissent, and the argument of *Untangling the Web*); we need to examine structural reform of the publishing and distribution industries, using not only copyright law but also tools of the common law and of unfair competition law.[28]

B. *"What we have here is failure to communicate"*[29]

Cool Hand Luke is a 1960s parable of the counterculture, the story of a free-spirited iconoclast who escapes from "the system" and resists a return at all costs. The setting is a Southern work farm. The iconoclast is a prisoner/escapee (Luke) played by Paul Newman, and his antagonist is a nameless prison captain played by Strother Martin, who uses the line quoted above to try to entice Newman to give up life on the lam. Newman will have none of it. He chooses death instead. The prison captain's appeal to Newman is, metaphorically speaking, the appeal of transactions costs. It is cheaper and easier for Newman to play by the rules than for him to set himself up as the outsider. Most, if not all, of copyright law can be similarly understood as an appeal to transactions costs. It is cheaper and easier to find efficient ways to compensate Authors and Publishers than it is to justify reasons not to do so. In this

---

[27] *See* 17 U.S.C. § 102(a) (2000).

[28] *See, e.g.*, Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 115-16 (1999) (arguing that the influence of intellectual property law and policy is a function of federal preemption as well as copyright misuse, federal public policy, and state intellectual property rules).

[29] Strother Martin as the prison captain, in COOL HAND LUKE (Warner Brothers 1967).

spirit, *Untangling the Web* identifies the enormous transaction costs involved in the rights clearances required to produce, perform, and distribute recorded music as one major consequence of the complexity of the copyright industries.[30] Fewer transactions costs will bring us a cheaper, easier, and more efficient copyright system.

But what of Paul Newman? Can problems with copyright law, even only within the copyright dimensions of the music industry, be solved by better communications? Can transaction cost analysis bring us a stable copyright system? Complexity equivalent to that identified in the music industry consumes hundreds of thousands of dollars per year in the motion picture industry, in commercial book publishing, and in academic teaching and publishing, among other places. That complexity does not begin to count the transaction costs associated with consumer use of and access to copyrighted works, whether those works are in electronic form (and thus likely guarded not only by copyright, but also by the anti-circumvention provisions of the Digital Millennium Copyright Act,[31] by click-through agreements,[32] and by the doctrine of trespass to chattels[33]) or not. We can clear out many of those transaction costs and simplify the system by limiting the nature and number of the exclusive rights currently held by different copyright interests. Yet making transaction costs even the initial focus of copyright policy risks overlooking some foundational questions.[34] Perhaps the story of copyright is that of Luke, the iconoclast outsider, rather than that of the authority of the system. To what extent are relevant copyright industries, including "authors," entitled to compensation in the first place? To what extent are consumers, users, and new creators wrongly led to assume that they ought to compensate?[35] Copyright itself may be a species of

---

[30] The article's careful analysis of the role of transactions costs is consistent with Professor Loren's earlier work. *See* Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 7-8 (1997) (exploring the use and misuse of the market failure approach in fair use cases with a focus on permission systems and non-transformative fair uses).

[31] 17 U.S.C. §§ 1201-1205.

[32] *See* Specht v. Netscape Communications Corp., 306 F.3d 17, 23 (2d Cir. 2002) (finding that the defendants did not provide reasonable notice of license terms in locating the terms at the bottom of a webpage below the download button and accessible only through scrolling downward).

[33] *See* eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1069-72 (N.D. Cal. 2000) (granting preliminary injunctive relief to eBay based on its trespass claim).

[34] For a similar argument from inside an economics perspective, see Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000).

[35] *See* Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 87 FORDHAM L. REV. 1025 (1998).

transactions cost.[36] There may be no reason *a priori* to prefer transactions costs that appear to operate in favor of one class of copyright interests (the already published) over those that appear to operate in favor of others (those yet to create).[37] Costs of one sort or another, and a complex copyright system, may simply be part of the price we pay for reasonable limits on authors' and publishers' demands for compensation, in the service of other interests.

C. *"Frankly, my dear, I don't give a damn."*[38]

Complexity is, well, complex. The *Cool Hand Luke* scenario tries to argue that consumers and new creators may benefit from copyright complexity. But consumers and new creators are also opting out of the consensual copyright system, in part because they just cannot fathom its complexity. Copyright consumers, in these words of Rhett Butler in *Gone With the Wind*, may no longer give a damn about authors and publishers. *Gone With the Wind* is, among other things, a love story gone sour. The film's heroine, Scarlett O'Hara, is both an individualized romantic ideal and the symbol of the "pure" white antebellum South, and in both roles she holds an improbable appeal for the modern cynic, Captain Rhett Butler. Her copyright parallel is the Author idealized by the Court in *Tasini*, entitled to the favor of the law notwithstanding the consequences to others. Her apparent triumph over adversity (the collapse of the South, the collapse of her family, and collapse of her marriage) parallels the Authorial triumph.

The story of copyright law may not be the story of Scarlett, but the story of Rhett, modern and cynical and ultimately repulsed by Scarlett's incomprehensibility and endless demands for accommodation in a vastly changed world.[39] *Untangling the Web* properly points out that the current system of rights clearances makes accessing and enjoying music needlessly expensive, and at

---

[36] "[Lord] Macaulay wrote that copyright is 'a tax on readers for the purpose of giving a bounty to writers.'" New York Times Co. v. Tasini, 533 U.S. 584, 519 (2001) (Stevens, J., dissenting) (quoting T. MACAULAY, SPEECHES ON COPYRIGHT 11 (A. Thorndike ed., 1915)).

[37] *But see* Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1468 (1995) ("[T]he perspective of user rights, albeit important, should remain secondary. Without authors, there are no works to use.").

[38] Clark Gable as Rhett Butler, in GONE WITH THE WIND (Warner Bros. 1939).

[39] As copyright scholars know well, a different retelling of *Gone With the Wind* led to an epic copyright battle and a most interesting opinion ultimately affirming the right of the new author and publisher to distribute their version. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001) (vacating preliminary injunction preventing distribution of parody entitled "The Wind Done Gone").

times too expensive to bother. Perhaps we should take the argument farther. Significant numbers of music consumers, even consumers and other users of all works of authorship, may now be recognizing that the romance of the deserving Author (represented in this narrative example by Scarlett O'Hara) has faded, and not just because that romantic ideal never existed in the first place.[40] Litigation and controversy over digital music[41] and over digital copyrights generally in the consumer context may have a signaling function.[42] Copyright owners may intend the signal to be a message about the need to comply with existing copyright norms. The unintended interpretation of the signal may be different. Consumers may not be sophisticated enough in general to grasp the details, but they may be savvy and cynical enough to react as Rhett Butler did when confronted with one too many demands by Scarlett: "Frankly, my dear, I don't give a damn." Consumers are told by

---

[40] The deconstruction of the romantic author from historical, critical, and philosophical perspectives has been underway for some time, most notably in the work of Peter Jaszi, Martha Woodmansee, Mark Rose, James Boyle, Keith Aoki, and Michel Foucault. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS x-xiii (1996) (discussing the role the ideology of authorship might play in an information society); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1-13 (Martha Woodmansee & Peter Jaszi eds., 1994) (providing various insights into authorship and copyright demonstrating that the conception of the author as the bearer of legal rights and cultural privileges implicates how power and wealth are distributed); Michel Foucault, *What is an Author?*, *reprinted in* LANGUAGE, COUNTER-MEMORY, PRACTICE 113 (Donald F. Bouchard ed., 1977) (1969); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993) (discussing the role of authorship in copyright and the contradiction between the romantic idea of authorship underlying copyright and the corporate reality of the entertainment industry); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1294-99 (1996) (noting the delineation between public and private in intellectual property law is vested in the deeply imbedded concept of romantic authorship); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (explaining how copyright law deals with the "authorship construct" inherited from literary and artistic culture); *see also* Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993) (examining copyright law in light of principles of contemporary literary criticism). *But see* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS (1996)) (suggesting that the explanatory power of the "romantic Author" thesis has limits). Despite this work, the Author remains central to copyright law, and to some, rightfully so. *See* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1 (2001) (arguing that "intent" should be the touchstone of authorship under American copyright law).

[41] *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001) (affirming entry of injunction against Internet-based system supporting peer-to-peer transmissions of digital music files); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000) (holding that the defendant infringed plaintiff's copyrights by providing services allowing Internet users to access digital music files stored on defendant's servers).

[42] In a different intellectual property context, Clarisa Long has argued that patenting behavior can be understood as a manifestation of industry signaling. *See* Clarisa Long, *Patent Signals*, 69 U. CHI. L. REV. 625 (2002). Eric Posner argues that social norms are understood as collections of signals that individuals use for organizing informally. *See* ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

copyright owners that culture has its price, and copyright law is the mechanism by which that price is enforced. But consumers also know, more than they ever did before, that the "art" that they read, watch, listen to, and otherwise use derives from corporate hierarchies. The copyright industries have successfully commoditized culture, making what was a relatively elite industry at the time of copyright's inception three centuries ago into a mass and popular phenomenon. In important senses, copyrighted books, records, movies, and computer programs are no different than mass-produced, fungible widgets. Copyright industries should not be surprised to see their story take this turn, with consumers treating the resulting products with consumerist indifference.[43]

D. "I like to watch"[44]

Sometimes, the virtues of simplicity are overrated. *Being There* is Jerzy Kozinski's cautionary tale of an ordinary man, a simple man, whose quiet observations about his daily experience (and his knowledge of the world, derived entirely from a lifetime of watching television) are wildly misinterpreted by those around him. The phrase "I like to watch," which in its original form refers to the main character's interest in television, becomes a statement of profound, worldly reserve. Peter Sellers's Chance the Gardener (acknowledged by those around him as "Chauncey Gardner") retains his innocence to the end, while those around him are made out to be fools. The film itself is hardly simple (the simplicity of Chance the Gardener is not made out to be foolish; the film scorns those who project their preferences for the simple onto him), and it follows a less conventional narrative than other examples in this Commentary. Here, I use the film and its signature quotation to suggest that acknowledging and accepting complexity can bring benefits. *Untangling the Web* suggests some provocative and likely beneficial simplifications of copyright doctrine. Simplicity, however, cannot be the law's only benchmark. Complexity has an important role in the story of copyright, both as a description of copyright's past and perhaps as a prescription for copyright's future. Complexity in current copyright law is partly a result of uncoordinated political responses to particular cases. It is partly a result of the uses of economic power. It is partly a result of legis-

---

[43] Of course, the final chapter to this story of copyright has yet to be written; even *Gone With the Wind* ends not with Rhett's signature line, but with the resilience of Scarlett, who proclaims, "Tomorrow is another day." Vivian Leigh as Scarlett O'Hara, in GONE WITH THE WIND (Warner Bros. 1939).

[44] Peter Sellers as Chance the Gardener, in BEING THERE (Warner Brothers 1979).

lative and judicial adaptations of copyright principles to changing technology. And complexity in copyright is partly a result of the mass production of and demand for cultural expression, to an extent never witnessed before the early twenieth century. Nineteenth century copyright law could afford to be simple, since the sources of cultural production were few and the demand for cultural products relatively limited.

In other words, complexity in copyright may be an unavoidable feature of a diverse society, with unresolved conflicts regarding cultural and economic interests. The story of copyright in the future may be not, "Why isn't the copyright system simple?," but instead "When is simplicity appropriate, and when we should live with complexity?" Even in a domain such as the music industry, where simplicity seems far preferable to the morass of interests and rights that now plague the business, contrasts between competing interests and competing norms highlight important issues for resolution – or preservation. The process of addressing those conflicts over time can produce imprecise but enduring solutions, recognizing both the persistence and the variability of the interests that produced them. Permanent resolution of those disputes may not be feasible. This story may not have a happy ending, or even an ending at all. It may, however, be the most accurate in representing the world as it actually is.

E. "Romeo and Ethel, the Pirate's Daughter"[45]

Where does creativity come from?[46] How do "creative" works of authorship come about? We care about the copyright system because we care about the answers to these questions, yet the questions are rarely asked in a formal way in connection with

---

[45] Joseph Fiennes as Will Shakespeare, giving the title of his next play, in SHAKESPEARE IN LOVE (Miramax 1998). A close runner-up for this category was "Inconceivable!." Wallace Shawn as Vizzini, in THE PRINCESS BRIDE (MGM/United Artists 1987).

[46] The term "creativity" comes freighted with an enormous amount of scholarly baggage. Connections among the philosophical and psychological literature (focusing on the mental processes of the creative individual, and to some extent on social influences on the individual), and copyright standards, are explored in Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 824-44 (1993). A good introductory collection of the psychological literature is HANDBOOK OF CREATIVITY (Robert J. Sternberg ed., 1999). The popular celebration of creativity as a characteristic of the gifted "creative person" is reflected in contemporary works such as HAROLD BLOOM, GENIUS: A MOSAIC OF ONE HUNDRED EXEMPLARY CREATIVE MINDS (2002) and MIHALY CSIKSZENTMIHALYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION (1997) and in recent legal scholarship such as Alan L. Durham, *The Random Muse: Authorship and Indeterminacy*, 44 WM. & MARY L. REV. 569 (2002). For an older example of the genre, see THE CREATIVE PROCESS (Brewster Ghiselin ed., 1952). Some computer scientists have begun to model emergent (creative) behavior in automated systems, with no ongoing human influence. *See* MITCHEL RESNICK, TURTLES, TERMITES, AND TRAFFIC JAMES: EXPLORATIONS IN MASSIVELY PARALLEL MICROWORLDS (1997).

copyright debates. In *Shakespeare in Love* the screenwriter Tom Stoppard (with collaborator Marc Norman) uses "Romeo and Ethel, the Pirate's Daughter" as the working title of the play that becomes "Romeo and Juliet," not only to mock the notion that Shakespeare composed his plays as a sole "romantic" author but to remind us of the sometimes messy, unplanned, accidental, idiosyncratic nature of creativity and creation. It has been long recognized that Shakespeare borrowed shamelessly, from contemporaries, fellow actors, Anglo-Saxon literature, and Roman historians and playwrights.[47] What we do not know is how purposive or fortuitous this process was. Likewise, in connection with copyright, we do not often ask whether the notion of authorship matters. We know, both in *Tasini* and in *Untangling the Web*, that authorship shapes the character of copyright law. But does authorship shape what copyright law cares about – the creative work of authorship?

"Authorship" of a sort does matter both in law and in practice, even if authorship is merely a literary conceit, so long as the creative process, whether individuated or collective, is more or less purposive. Copyright as a system of incentives must start with someone to reward. Copyright as a system of moral right must start with someone with a soul, or at least with free will.[48] The Second Circuit once suggested that the work of the accidental author could be protected, on the ground that what mattered was not the "authorship" but the character of the resulting "work."[49] The Supreme Court appears to have corrected that impression in *Feist Publications, Inc. v. Rural Telephone Service, Co.*[50] In *Feist*, the Court emphasized that a copyrightable work of authorship must manifest a "modicum" of what the Court characterized as "intellectual production, . . . thought, and conception."[51] Purposive authorship is required, even though the legal threshold for demonstrating its existence is extremely low.

Suppose the Purposive Author does not exist. As Stoppard inverts our assumptions about Shakespeare, perhaps copyright

---

[47] The name "Shakespeare" itself is alleged to have been borrowed. *See, e.g.*, John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1373 (1992) (examining the view that Edward de Vere is the author of the Shakespeare Canon); *see also* John Paul Stevens, *Section 43(A) of the Shakespeare Canon of Statutory Construction*, 1 J. MARSHALL REV. INTELL. PROP. L. 179, 188-90 n.38 (2002) (elaborating on the theory that Shakespeare was really Edward de Vere).

[48] *See generally* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (comparing intellectual property theories with general property theories).

[49] *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 104-05 (2d Cir. 1951) (discussing, in dicta, how a bad copying job may produce distinguishing variations).

[50] 499 U.S. 340, 362 (1991).

[51] *Id.* (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59-60 (1884)).

should invert its presumption of authorship, not (only) because authorship is a literary fiction, but because we might develop an empirical model that declares that most works of authorship have significant, or are even dominated by, non-purposive components. In that sense, where does creativity come from? What sources do authors of new works draw on, when, and to what extent? The proposition should be tested; if it turns out that the dominant model (at least in a given industry or artistic community) is that of Stoppard's Shakespeare, rather than the romantic genius Shakespeare (or Shaffer's Mozart), that might tell us a number of things about how copyright law should be shaped.

For example, advocates of copyright reform today point out that consumers have legitimate interests in access to works of authorship at a reasonable cost, even sometimes for free. Why? Because they might be new authors, inevitably standing on the shoulders of those who came before.[52] Because they need to exercise their rights as citizens of a democratic republic. Because they need to flourish as fully-realized individuals. Or because they build communities of different sorts using the language of common culture. If Stoppard's Shakespeare supplies the model of the Author, the force of some or even all of these theories may be re-evaluated. Among other things, copyright's author-centered, incentive-driven philosophy would carry far less weight. Inadvertent authors presumably need little incentive to create, but they might need broad incentives to distribute. What becomes of the availability of copyright protection? Should we protect the inadvertent work at all? Or protect only a narrow range of authentically innovative and purposive creativity? Or something else? The scope of sections 106 and 107 of the Copyright Act[53] might be broadened, or narrowed, and compulsory licenses in copyright re-examined. Different types or classes of authors may work in systematically different ways, suggesting that copyright's contours should vary, rather than remaining uniform across time and across all works. To flesh out this story about copyright, what is needed is not theorizing but research. How does information of different types, and

---

[52] *See In re* Alappat, 33 F.3d 1526, 1553 n.12 (Fed. Cir. 1994) (en banc) (quoting Sir Isaac Newton – "If I have seen further it is by standing upon the shoulders of Giants" – as support for the freedom of abstract ideas from intellectual property protection). The science historian John Gribbin suggests that Newton's remark was a cutting characterization of his rival Robert Hooke and thus should be seen as evidence of Newton's *refusal* to credit any of his predecessors. *See* JOHN GRIBBIN, SCIENCE: A HISTORY 1543-2001 163-64 (2002). The classic investigation of the quotation is ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT (1965) (tracing its origins to the twelfth century).

[53] Section 106 provides the basic menu of the exclusive rights of the copyright owner; section 107 is the codified doctrine of fair use. *See* 17 U.S.C. §§ 106, 107 (2000).

particularly works of creative authors, figure in different types of further creativity (whether copyrightable, or not), or cultural dialogue, or self-building?[54] If we do not need incentives to create, do we nonetheless need incentives to distribute, or publish, so that the inadvertent creator has a field of resources to draw on? The questions are similar to, but not the same as, "Why do people create things?" and "Can there really be something called 'authorship?'" The new questions include, "How do 'authors' behave?" and "What kinds of resources do different authors use, and how, and when?"

Until we have better answers for these questions, we will have a difficult time pinning down the costs and benefits of both the current system and any alternatives. That is, we may never construct a truly persuasive story about copyright. We need research and analysis that explores not only, "Do we need the incentive of intellectual property law or of copyright in particular?," but in what ways and by what methods do creators (individuals, firms, other institutions) draw on different resources in the creative process, and what does that tell us about how the relevant legal regime should be structured? We have workable supply-side models of law and creativity.[55] The law declares that it provides incentives of different sorts to create. We need demand-side models, and empirical investigation of their robustness.[56] What kinds of inputs do different kinds of creators need or use? How are works created?

F. *"I'll make him an offer he can't refuse"*[57]

The Godfather needs little explanation or summary, as one of the few motion pictures of the last 25 years that has not only ex-

---

[54] I recognize that in framing these questions, I indulge some Western assumptions about the possibility and nature of "individual" creativity.

[55] In fact, we have less a complete model than a robust set of untested assumptions about the incentive value of the copyright system. *See* Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but to encourage the Progress of Science and the useful Arts.") (citations omitted); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 558 (1985) (stating that the Framers intended copyright to be "the engine of free expression"); THE FEDERALIST NO. 43 (James Madison) ("The utility of this [intellectual property] power will scarcely be questioned. . . . The public good fully coincides . . . with the claims of individuals.").

[56] *Cf.* Cohen, *supra* note 34, at 1819 ("We need an economic syntax that acknowledges and accommodates the essentially unpredictable nature of creativity, and an economic model that focuses on creating the conditions for random or fortuitous access to copyrighted content.").

[57] Marlon Brando as Don Corleone, in THE GODFATHER (Paramount 1972). First runner-up in this category is the following: "I once asked this literary agent what type of writing paid the best. He said 'ransom notes.'" Gene Hackman as Harry Zimm, in GET SHORTY (MGM/United Artists 1995).

plored American mythology but that has assumed almost mythic status itself.[58] The story of *The Godfather*, like the received story of copyright,[59] is the story of capitalism. As Francis Ford Coppola pointed out in the film, the capitalist system represents opportunities that may both create and represent the American dream, but those opportunities come with an underside that cannot be ignored. Like the Mafia Don Corleone, who capped discussions of recalcitrant "business" partners with the coded threat quoted above, parties on all sides of copyright debates often assume that creation and distribution of copyrighted works are purely incentive-driven enterprises. The only way in which copyright and its incentives may legitimately relate to creative expression is via the marginal dollar (or euro, or yen, etc.) and the propertization of the intangible that is otherwise too easy to steal. The capitalist story about copyright logically concludes with the argument that all means are legitimate to prevent "theft" and enforce the market dynamic.

I cannot come up with a retelling of *The Godfather* that undoes this logic, though one could imagine a market economy without "market failures" of one sort or another.[60] The alternative story about copyright here may not have a filmic parallel. We may be trapped, at some level, by our characterization of intellectual property as *property*, and by the congruence of the intellectual property rights "system," our capitalist assumptions, and the desire to capture that system and its assumptions in a comprehensive narrative framework of one sort or another.

It was not always so. Copyrights and patents have been around for centuries, but the phrase "intellectual property" as a general concept encompassing both fields did not enter American legal terminology until the mid-1800s[61] and did not enter the mainstream legal lexicon here for more than a century. The label obscures differences between copyright and patent, and obscures sub-

---

[58] According to Tom Hanks as Joe Fox in YOU'VE GOT MAIL (Warner Studios, 1998), "[t]he Godfather is the I Ching. The Godfather is the sum of all wisdom. The Godfather is the answer to any question."

[59] *See* Marci A. Hamilton, *The Distant Drumbeat: Why the Law Still Matters in the Information Era*, 20 CARDOZO ARTS & ENT. L.J. 259, 261-62 (2002) (discussing how capitalism furthers creativity and the invention of new ideas and products).

[60] The Don's threat could be characterized itself as a form of market failure rather than market discipline, but that characterization admits the possibility of exiting the market altogether. That is precisely the possibility that *The Godfather* argues American capitalism negates.

[61] *See* Davoll v. Brown, 7 F. Cas. 197, 199 (C.C. D. Mass. 1845); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895 n.123 (1997) (examining the evolution of the term "intellectual property"). Copyrights and patents were more likely to be referred to as "monopolies" than "property" in the 19th century. *See* William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, *at* http://eon.law.harvard.edu/property99/history.html (last visited Feb. 6, 2002).

tleties within them. Within copyright, the label "property" suggests that all of copyright is a manifestation of a common impulse to preserve and protect the Author's output, when in fact (as *Untangling the Web* teaches) copyright law comes from a variety of sources and impulses.

The Godfather's story about copyright may thus be a non-*Godfather* story about copyright. The underside of capitalism in copyright ought to be exposed and replaced. Modern American legal education is at least partly to blame for shielding students and lawyers from this underside. We teach beginning lawyers that these bodies of law (copyright, patent, and trademark) are connected and that what connects them is their ability to create invisible property rights that protect investment-backed expectations and limit "the tragedy of the [intangible] commons." We teach the *commodity* and the *economy* of intellectual property. We do not, as a rule, also teach the *morality* and *humanity* of copyright and the production of cultural goods, either domestically or, importantly, internationally.[62] We should. Those themes should be part of yet another story about what copyright might be, and about what copyright might become.

CONCLUSION

Stories simplify. They may conceal as much as they illuminate. There is much missing in these accounts. The stories themselves are more suggestive than exhaustive. I have avoided making explicit judgments about which of them, or any other, is the right or best story about copyright. I have avoided setting up any method for evaluating their respective merits. I have avoided applying them, or any of them, to particular copyright problems. This is not post-modernism; at least, I do not intend it as such. It is a lawyer's effort to articulate some arguments about copyright law in ways that may be useful in contemporary debate. It seems to me that the very point of the legal system (at least the American legal system) is to enable scholars, policymakers, and advocates of different positions to bring their best arguments to their respective tables. Stories are powerful tools in this process. Where the Supreme Court appears to have adopted one story among many possibilities as the basis for its decision in *Tasini*, it seems only proper for the rest of us to raise the possibility of competing stories, if

---

[62] *See generally* Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain*, 18 COLUM.-VLA J. L. & ARTS 1 (1993) (Part I); 191 (1994) (Part II) (describing consequences for public-ness of international cultures of private intellectual property protection).

only to ensure that the law that results best fits the facts of the case, and society's needs.