**A Note to Readers (January 2024)**

**Dear Philosophically inclined workshop participants:**

The incomplete draft below by myself and Talha Syed, *Copyright’s Atom: The Expressive Work as the Basic Unit of Analysis*, is part of a larger series of projects in progress, to be eventually collected into a book titled Copyright Rebooted.Given the rudimentary stage of the draft and the fact that its argument is best illuminated when seen alongside the other parts, let me first locate this draft in the context of the overall project.

The project has three main components. The first is conceptual. In this component we elaborate and reinterpret fundamental concepts of the field. Our starting point here is the concept of copyright’s apt subject matter as *forms of expression*, be it expressions *of* some other *information (e.g., ideas, facts) or expressions simpliciter (e.g., expressions of mood, feeling,* personality, imagination). Next is an explanatory component: a political economy of the institutional and discursive drivers of copyright as a market-based institution. This explanatory component ties central patterns and dynamics of modern copyright to market-driven imperatives to maximize exchange-value. Finally, we advance a normative component: a political philosophy of “democratic equality” on which the aim of copyright is to secure enough proprietary control over expressive works to ensure fair recompense and recognition to their creators within a robust level of market-enabled cultural creativity, while also ensuring the sort of wide and equitable access to the fruits of creativity and participatory engagement with meaning-making that are (or should be) the hallmarks of a democratic culture.

Among the principal doctrinal recommendations that issue from the above are as follows:

(1) Copyright’s *eligible subject matter* or *domain* should be strictly restricted to *forms of expression*. This means (a) first, as a threshold matter, only *expressive works* are to be eligible for protection; and (b) for works passing that threshold, only truly *expressive elements* within them are to be protected. This conception, based on a constructive reinterpretation of existing American copyright doctrine, reworks current understandings of that doctrine in important ways, including subject matter rules and originality doctrine.

(2) The above domain principle is reflected in the area *infringement:* To count as potentially infringing, uses of copyrighted works *must involve* *expressive takings*. A purely non-expressive use of a copyrighted work—i.e., one that does not implicate the expressive form of the work but only, for instance, its purely ideational, factual, functional, or, for that matter, tangible material aspects—should not be taken to constitute even a potentially infringing activity (and hence not require any analysis of similarity, fair use, or other exemptions). Any other result would unmoor the reach of copyright from its anchoring purpose: to foster the creation *of expressive forms*, by securing protection *over* *them*.

(3) With respect to the right’s *scope:* the above account endows the long-obscured specific rights of reproduction and of making derivative works with concrete meaning. The scope of the *reproduction* right should be restricted to cover only those expressive uses of a work that provide a close substitute of the aesthetic experience of the work for its intended audience. In other words, the test for *prima facie* infringement of copyright—that notoriously vague inquiry into “improper appropriation” resulting in “substantial similarity,” often treated as little more than a quick stop on the way to fair use—should be restored to its rightful place as a central plank of copyright analysis, by being tethered back to its orienting purpose, of protecting a copyright owner’s ability to exploit their rights over a work for its primary use. Meanwhile the ever-expanding right of *derivatives* is reinterpreted as a right of *adaptations*. Properly conceived, that right should be understood as limited to close reproductions of the expressive form of entire works, albeit now typically involving changes in the medium of expression (such as translations from one language to another, or adaptations from one artistic genre to another).

(5) *Fair Use:* Tightening copyright’s domain and scope at the front end, with clear eligibility rules and recalibrated infringement inquiries, has a major ancillary benefit at the back end: restoring fair use to its proper place as a residual or safety-valve doctrine, whose main purpose is to exempt certain expressive uses (primarily critical and educational ones) even when they entail substitution effects for the work and hence fall within the *prima facie* coverage of copyright protection. Fair use’s current status, as the workhorse of the system yet one providing little-to-no clear guidance—with each of its multiple “factors” being highly indeterminate on its own and, in tandem, often pointing in opposite directions—is simply untenable, both administratively and substantively. The above reinterpretation takes much of the weight off fair-use’s too slender shoulders and assigns it a more tenable role of a back-end safety valve.

The present draft adds, alongside the foregoing proposals, another one, that goes to the conceptual core of the field, namely: what is copyright’s *basic unit* of protection and analysis? The field’s answer to this question is: *a work of authorship*. Unfortunately, the concept has fallen prey to forces of erosion and malformation. Only too often, the work is treated as a malleable, almost endlessly flexible concept that could be endowed with any meaning, depending on context and motivation. The draft explains the driving forces behind the destabilization of the work and the destructive consequences of undermining the core conceptual unit of analysis of the field. We propose to correct this unfortunate trend by taking the concept of the work seriously: the *basic unit* of copyright protection should be taken to be an *integral expressive work*, understood as an integrated aesthetic object, as opposed to merely expressive fragments (the first four notes in Beethoven’s fifth) on the one hand, or expressive “universes” spanning multiple works (the Harry Potter expressive universe), on the other. The argument in this draft draws mainly on the conceptual and explanatory components of our project, with a more minor role played by the normative one. The reason: we believe that the basic unit of analysis is such a fundamental conceptual element of the field (the field’s conceptual “atom”) that having a stable and coherent version of it is an essential requirement from any plausible normative point of view of the field.

I very much look forward to our discussion.

Oren Bracha

**Copyright’s Atom:**

**The Expressive Work as the Basic Unit of Analysis**

*Oren Bracha and Talha Syed[[1]](#footnote-1)\**

*Copyright’s outward expansion—in coverage, scope, and duration—has been much discussed. Much less noticed, however, has been copyright’s inward growth: copyright has come to be applied to an ever-growing array of expressive fragments of works, instead of expressive works as a whole. This process has had two unfortunate implications. First, the extension of copyright protection to expressive fragments is not supported by any plausible underlying rationale. Second, and perhaps even more troubling, this extension has generated conceptual chaos precisely where clarity is most needed, namely, at the level of copyright’s fundamental basic building block. Copyright in expressive fragments breaks up the atom of the field’s fundamental unit of analysis—the expressive work—leaving behind a purposeless conceptual vacuum. This conceptual vacuum is the source of numerous doctrinal puzzles and confusions. The way forward is to take seriously what has always been copyright’s most fundamental principle: that the field and each of its rules apply to expressive works of authorship. Restoring the “expressive work” as the field’s basic unit of analysis issues in three salutary effects. First, existing confusion and instability about copyright’s object of protection is replaced by conceptual clarity grounded in sound purpose, which, in turn, allows numerous doctrinal puzzles, strewn across the field, to be solved. Second, the resolution of these doctrinal puzzles adjusts copyright to better serve its underlying rationales. On the front end of eligibility for protection, application of copyright to works, and works alone, alleviates the various “anti-commons” difficulties associated with fragmentation of rights and ownership. On the back end of infringement, denying protection to expressive fragments maintains copyright’s incentive/access balance, thereby avoiding dangers parallel to those of outward extension of its scope. Third, the doctrinal-policy tuning is done at the correct conceptual level: examining what claims fit the field’s basic object of property rights, rather than engaging in ad hoc application of a hodgepodge of secondary doctrines, to result in a more stable and sustainable doctrinal structure.*

**Copyright’s Atom:**

**The Expressive Work as the Basic Unit of Analysis**

*Oren Bracha and Talha Syed*

[I. Introduction 4](#_Toc156471221)

[II. The Problem 8](#_Toc156471222)

[*A.* *The Symptom: The Mirror House of the “Work”* 8](#_Toc156471223)

[*B.* *The Cause: The Market Directive to Maximize Exchange-Value and Copyright’s Political Economy* 11](#_Toc156471224)

[III. What’s Wrong? 15](#_Toc156471225)

[*A.* *The Full Internalization Fallacy* 15](#_Toc156471226)

[*B.* *Conceptual Disintegration* 19](#_Toc156471227)

[IV. Some Problematic Solutions 21](#_Toc156471228)

[*A.* *Contextual Ad Hocery: Intuitions and Factors* 22](#_Toc156471229)

[*B.* *The Mirage of Optimization* 24](#_Toc156471230)

[V. Stabilizing Copyright’s Atom 27](#_Toc156471231)

[*A.* *Taking Works Seriously* 27](#_Toc156471232)

[*B.* *Objections and End Runs* 29](#_Toc156471233)

[VI. Conclusion 29](#_Toc156471234)

“Copyright protection subsists… in original works of authorship”

 —*17 U.S.C. §102(a)[[2]](#footnote-2)*

“[H]e who breaks a thing to find out what it is has left the path of wisdom”

 —*Gandalf the Grey to Saruman of Many Colours[[3]](#footnote-3)*

# Introduction

Much ink has been spilled over copyright’s outward expansion process, i.e., the way its coverage has reached an ever-broader range of content and activities at ever-decreasing levels of similarity.[[4]](#footnote-4) Jessica Littman has even likened the process to the “billowing white goo” from the cult movie *The Stuff* that keeps bubbling out until everything is covered by it.[[5]](#footnote-5) *Relatively* less noticed, however, has been copyright’s process of *inward* fragmentation, i.e., the application of copyright to ever-smaller fragments of expressive works.[[6]](#footnote-6) Perhaps the most familiar illustration of this is the emergence and normalization of copyright in fictional characters.[[7]](#footnote-7) But the process hardly stops there. If copyright can apply to a character rather than the literary or visual work of which it is a part, then why not to a paragraph, or a small expressive element of a pictorial or sculptural work?

The question is not rhetorical. Courts and lawyers have been applying copyright to fragments of works rather than works routinely, sometimes by directly recognizing the fragment as the object of ownership, at other times by assuming it to be the unit of analysis for various doctrinal purposes. Courts largely ignore the question of copyright’s proper unit of protection and analysis. They often make the relevant choices *sub rosa*, and when they occasionally do confront the question, it is as a merely local doctrinal puzzle. Commentators have identified the phenomenon and occasionally express bewilderment about the seemingly malleable character of the expressive work and about the lack of a clear doctrinal test for its stabilization.[[8]](#footnote-8) Some have identified the problem as one of “microworks.”[[9]](#footnote-9) And others have pointed at copyright’s “framing problem”—the fact that its unit of analysis can seemingly be strategically set at different levels or “sizes,” with significant effects on legal and policy outcomes.[[10]](#footnote-10)

What has been largely missed in the discussion so far is that copyright’s internal fragmentation is the microscopic twin of copyright’s macroscopic outward expansion. The first Copyright Act of 1790, following in the footsteps of the 1710 Statute of Anne, defined copyright as the exclusive right to make and sell *copies* of *books*.[[11]](#footnote-11) Since then, copyright has expanded outwardly in numerous ways: subject matter has been extended to all expressive works unified under the term “works of authorship”; the exclusive rights have come to encompass a broader panoply of profit-generating activities for a longer duration; and the narrow concept of “a copy” has been abandoned in favor of an ever-more capacious understanding of “substantial similarity.”[[12]](#footnote-12) In a parallel, although less noticed move, copyright has also grown inwardly: rather than applying to a well-defined expressive whole (such as a “book” or a “painting”), the organizing concept of the “work” has often been bent to apply to ever-smaller slices of expressive elements.[[13]](#footnote-13)

These parallel developments have been propelled by the same force: commodification. Seeking to achieve its public policies through the mechanism of market exchange, modern copyright is entangled with a constant drive by rights holders to seek and squeeze out any source of market value generated by expressive works.[[14]](#footnote-14) Added to this fire of interest is the fuel of pseudo-policy (indeed, more of an unargued-for ideology): the implausible notion (one both question-begging and partly circular) that copyright’s animating ideal should be to allow its owners to internalize the entire social value of their works.[[15]](#footnote-15) The directive of maximizing the extraction of market value knows no direction: further profits can often be found in submarkets for fragments, just as they can be found in expanding “external” spheres for use of works. The markets for public display of full-scale adaptations of the (hypothetically copyrighted) Mona Lisa and for reproductions of small fragments of it are equally sources of value. As such they are both targets for propertization through copyright. The malleability of the work is not a puzzling lacuna of copyright law. It is a predictable effect of the political economy of market-based property rights.

Expansion and fragmentation share not only a driving force, but also the deleterious effects they generate when left unchecked. On the policy level, both disrupt copyright’s balance between the benefit it creates by supporting creation through the conferral of pricing power, rooted in rights to exclude, and its cost, in the form of reduced access generated by exclusion and marked-up pricing. As copyright is extended, either outwardly or inwardly, it entails a declining benefit bang for the buck with increasing access cost.[[16]](#footnote-16) The case of crawling extension to smaller fragments involves a high potential for a particular kind of access cost, that of anti-commons' effects. Although sometimes consumed as works in their own right, expressive fragments are likely to be used as building blocks for other larger works, as in the case of a literary character that is planted in a new novel or a sound recording bit sampled into a new recorded song. In such cases the cost implicated by copyright’s exclusionary effect is dynamic: it applies not to frustrated consumption of existing works, but to barriers erected on further creation of new works. When the creation of a downstream work requires the use of multiple expressive fragments, the result is mounting transaction costs and potential holdouts that may frustrate the ability of market licensing to alleviate copyright’s drag on downstream creation.

Perhaps more fundamental and troubling is the conceptual toll taken by fragmentation. Boundless expansion and fragmentation both erode copyright’s conceptual integrity. In the case of the former, the conceptual harm takes the form of the decay of the infringement test and the basic concepts that define copyright’s scope. The conceptual harm entailed by fragmentation is even more severe because it operates at copyright’s most fundamental level of analysis: the concept of the work. The work is copyright’s “atom.” It is the field’s basic unit of analysis, a constitutive building block used almost everywhere. Whether we ask if something satisfies the threshold requirements for copyright protection, what the scope of protection in that thing is, or whether some use of it is fair, we first must have some organizing *concept* of what that “something” is. In copyright this fundamental unit of analysis is “the work.” And it is exactly this unit of analysis that fragmentation undermines. When this conceptual atom is destabilized, the forces of disintegration that are unleashed are felt throughout the copyright universe, undermining the coherence of the entire field.

The way out of this quagmire is straightforward: a return to a coherent and stable concept of an *integral expressive work*—meaning, an integrated aesthetic object/experience—as copyright’s basic unit of analysis. Copyright achieves its purpose through market exploitation of expressive creations, under conditions constituted by the law. In conceptual sync with this institutional frame, the work is the core expressive package or form constituting “the good” in the main market for such expressive material. The challenges to this stabilizing concept are many, both practical and conceptual. They are generated by the directive of maximizing value in all potential markets for all possible expressive forms. Nonetheless, these challenges should be resisted and a concept of an integrated expressive work, one that is both coherent without being wooden, must be adhered to. The alternatives involve a heavy policy toll and, equally troubling, conceptual disintegration.

The two deleterious effects are related. Copyright’s fundamental concepts, because they are anchored in copyright’s core purposes, have boundaries built into them. When these concepts collapse, what enters the vacuum is the drive toward full internalization of value. Thus, conceptual integrity—in this case of copyright’s most fundamental unit of analysis—is important both for its own sake and as a shield against unwarranted outward and inward growth of the rights.

 This Article analyzes the process of destabilizing the work, the serious policy harms, and even more serious conceptual dangers it creates. It then proposes as a solution a return to a coherent and stable understanding of the work. It does so in four Parts. Part I introduces the problem and diagnoses it as a symptom of a deeper cause. The problem is the instability of copyright’s concept of the work and a willingness to extend it to various fragments of expressive works. The cause is a little recognized feature (actually a bug) of copyright’s market-based strategy for supporting creativity. Market value extraction through exclusionary rights brings with it constant pressure to increase extraction. The result is rent-seeking, namely, a pressure to extend copyright’s reach. And this extension tends to undermine copyright’s fundamental constitutive concepts. Part II explains the unfortunate policy implications and equally worrying harms of conceptual disintegration that are brought about by fragmentation of the work. Part III critically examines several alternative reactions to the problem of conceptualizing the work in copyright. It rejects two competing doctrinal approaches to the problem: ad hoc setting of the unit of protection according to a list of factors and institutions; or trying to “optimize” the size of this unit, either per case or per doctrine, to track relevant policies. Part IV argues that the way forward is to restore a stable and coherent conception of the work as a fixed expressive bundle. It develops this conception and defends it from various challenges, both theoretical and practical.

# The Problem

## *The Symptom: The Mirror House of the “Work”*

Take, for example, the *Garden of Earthily Delights* by Hieronymus Bosch and hypothetically assume that it is under copyright.[[17]](#footnote-17) What exactly, is the object of copyright’s property right here? What, in other words, is the work of authorship? “What do you mean?” answer the uninitiated, “clearly it is the ‘painting’”—by which is meant the entire pictorial work with all its expressive details. What else could it be?



But this is far too simple for the cognoscenti. “It all depends,” they would say, “on exactly why you are asking.” And also perhaps (especially if you hired them as your lawyers): “Well, what do you *want* it to be?” There is no reason, according to this line of thinking, why each of the three panels of the painting should not be defined as being a work in its own right. At least so long as each independently satisfies the threshold requirements of copyrightability (which are generally quite easy to satisfy). And if that’s true of each panel, why not the following famous detail of the right panel?



After all, many museum shops sell postcards that are roughly cropped and zoomed in pictorial versions of this segment. And if this segment can be a work, why not a further smaller detail of it? And so on and so forth. Far from being restricted to visual expressions, this maneuver can be replicated with respect to any copyrightable subject matter. If Beethoven’s *Fifth* may (potentially) be a copyrighted work, then why not its opening sequence of four notes? If *To Kill a Mocking Bird* is a work, why not its opening paragraph? And to fully leave behind any idea that the conceptual slicing and dicing involved is constrained by physical space dimensions, why not simply the character of Atticus Finch? And so forth.

 What started as a coherent and fairly obvious concept, now appears to be an endlessly adjustable house of mirrors. Although one can engage in this exercise for the pure intellectual exhilaration (or distress) of “deconstruction,” in copyright its deployment is usually more motivated. The work, recall, is copyright’s orienting unit of analysis. As a result, what we end up assuming to be the work will likely have significant implications on the substantive analysis of the legal question being taken up. Assume, for example, that I incorporate a copy of the small, long-beaked figure in the smaller segment of the painting, who is marching on the flat oval surface and leading a naked human by the hand. I reproduce that figure on tiles that I sell individually. Is there even a colorable argument of copyright infringement? Since the heart of copyright’s infringement test is substantial similarity between the copyrighted and allegedly infringing work,[[18]](#footnote-18) the answer is… “it all depends.” And what it depends on is what we take to be the copyrighted work. If the work is the *Garden of Earthily Delights* in its entirety, the argument of the substantial similarity to my tiles never takes off. If, on the other hand, the protected work is our little beaked friend, the argument for substantial similarity and infringement is quite strong. Now, if the cognoscenti are right and the work is (almost) anything you want it to be, or perhaps—a slightly more plausible version—what is the work is open to manipulation by the context of the case or legal question—then the outcomes of the legal analysis may vary greatly accordingly. Call it “sophistication.”

## *The Cause: The Market Directive to Maximize Exchange-Value and Copyright’s Political Economy*

The apparently endless malleability of the work is a symptom of a deeper condition afflicting modern copyright, namely: the conceptually disintegrative effect of commodification. This effect is one, usually little noticed, feature of copyright’s property rights strategy for supporting creativity. It operates in the interface of copyright’s political economy, rules, conceptual structure, and underlying ideology.

The purpose of modern copyright is to support creativity, by empowering rights holders to charge higher prices for their expressive works than they otherwise could in the face of competition from copiers, fueled by the low cost of copying and the difficulty of excluding others from published works.[[19]](#footnote-19) Copyright achieves this pricing power by conferring on owners limited rights to exclude others from certain profit-generating uses of the work. The legal power to exclude depresses competition from copiers and results in a measure of pricing power, which, in turn, enables creators to recoup their investment. Thus, unlike alternative mechanisms for supporting creation and alleviating the corrosive effect of copying,[[20]](#footnote-20) copyright achieves its creativity-supporting function through the market. More precisely, it achieves its purpose through value extraction from users in market transactions, under conditions shaped by the law (rights to exclude) to enable such extraction. There are well-known relative advantages and disadvantages to this strategy.

What is standardly seen as the most important advantage of copyright is the informational-generating function of markets and prices.[[21]](#footnote-21) Market prices, shaped by supply and demand, generate in a decentralized fashion “signals” about the value of specific expressive works to members of society. Creators, in turn, pick up on these signals and respond to them in their production decisions. This mechanism, the argument runs, is often superior to alternative (typically more centralized) mechanisms for generating information and making decisions on how to allocate resources in the production of expressive works.[[22]](#footnote-22) In short: we want public “demand” channeled through prices, rather than a committee of experts allocating subsidies or prizes, to decide what expression is produced and how much resources are invested in its production.

There are also serious disadvantages to the market strategy. The most well-known is that the pricing power on which it depends inevitably excludes many—both consumers and secondary creators—from access to the work.[[23]](#footnote-23) This is known as “deadweight loss.”[[24]](#footnote-24)

Another drawback, deadweight loss aside, is that market prices, being based on willingness and *ability* to pay, will necessarily exclude those who might have a distributive equity claim for *access*, and even worse, may bias *production* or development decisions against the interest of the have nots.[[25]](#footnote-25) This is true so long as the apt distributive function is any other than efficiency’s wealth maximization. A more general statement of this problem is that supporting creation through the market involves a failure whenever the market price mechanism results in “miscalculation” of production and access decisions. This may happen in two distinct ways. One is various “market failures” in the technical sense: market structures and interactions, traceable to “transactions costs,” that lead to undesirable allocation and distribution results. The second and more fundamental miscalculation occurs not due to a technical failure of the market, but rather because of a disconnect between its logic (short-term wealth maximization) and some superior normative criterion for allocation and distribution. In short: market signals may either be jammed or, more troublingly and systematically, be received loud and clear while conveying the normatively wrong information.

Finally, there is a third, less commonly noticed, disadvantage to the market-based strategy for supporting creation. This disadvantage operates at the level of political economy: the logic of the economic structure as a set of social relations, the individual behavior it induces, and the dynamic ways in which this behavior ends up shaping the legal rules and the economic structure embedded in them. Competitive market activity has one prime directive: maximization of profits from all potential sources. This logic drives rights owners to seek, cultivate, and capture any source of demand for the expressive work. And to capture these sources, potential rights holders engage in rent-seeking: they invest in getting lawmakers to extend the property rights that enable value extraction to every imaginable corner where such value exists.

Some of the other strategies for supporting creativity are also, of course, not free from rent-seeking. Recipients of prizes or government grants have an interest in lobbying for increased amounts.[[26]](#footnote-26) However, with the market-based copyright strategy the pecuniary drive comes with a powerful ideological corollary. Market practice, the constant drive to maximize profit from all sources, leads to market consciousness: the assumption that profit-maximization is “natural” and therefore the “natural” function of copyright is to allow such maximal value extraction from expressive works. This, in turn, tends to harden into ideology: the powerful but implausible idea that the ideal of copyright is to allow the owner to internalize the full social value of the work, on grounds of either incentives or desert.[[27]](#footnote-27) Once crystallized, this idea becomes a powerful catalyst in law-making, legislative or judicial, in the direction of constant extension of copyright’s exclusionary rights.

Outward expansion and inward fragmentation of copyright are different facets of the same political economy process. Expansion reshapes copyright to enable exclusion from and therefore the extraction of value from external dimensions, such as duration, level of expressive similarity, or the specific kinds of activity or use of the expressive work that are involved. Inward fragmentation enables exclusion and therefore value extraction from uses of sub-elements of works. Just as profit-maximization drives the pressure for outward expansion, it results in constant pressure for inward fragmentation.[[28]](#footnote-28)

The crucial point for present purposes is that the effect of the pressure to adapt copyright to capture all value is not only the growth of copyright, whether by way of outward expansion or inward fragmentation, but also its conceptual disintegration. The pressure to increase the reach of exclusionary rights to catch every drop of exchange-value tends to have a destabilizing effect on the fundamental conceptual building blocks of copyright. These concepts were initially forged in a way that reflected an understanding of copyright’s purposes, and thus had meaningful boundaries baked into them. The pressure to increase exclusionary rights aims to break or bend these boundaries and thus destabilizes the concepts into which they are built.

With respect to the outward expansion of copyright’s scope, one major effect of this process has been undermining the central concept governing the question of infringement. The complaints that copyright’s infringement test of “improper appropriation” or “substantial similarity” is vague, unpredictable, or even mystifying are near universal.[[29]](#footnote-29) What the complaints miss, however, is the fact that it is the constant pressure to expand copyright’s scope that has gradually destabilized a coherent concept grounded in specific purpose—that of a market substitute for the primary audience of the work—and has reduced the infringement test to the baffling, elusive mass that “substantial similarity” often is today.

While with respect to outward expansion destabilization worked on the concept of relevant similarity between two works, in the context of inward fragmentation, the main victim has been the concept of an expressive work itself. The culprit, again, is the drive to extend copyright’s reach by removing any limitation on it. In this case the targeted limitations are built into the very concept of what it is that copyright creates exclusive rights in. To the extent that the objection to copying of a fragment of a work (say, a painting) is “but this is hardly a copying of anything substantially similar to the ‘work,’” the response is: “who’s to say that the work is not the fragment?” The result of such arguments gaining traction is the destabilization of the concept of the work.

And the consequences of such a destabilization are far-reaching. The work serves as the basic conceptual unit or building block of copyright analysis. It is the fundamental hinge around which the entire doctrinal structure of copyright pivots. From its front-end requirements of eligibility (“work of authorship”), substantive copyrightability requirements (“originality,” “fixation”) and joint authorship, to back end inquiries into the scope of the reproduction and derivative-work rights and their possible infringement, few of the core doctrines of copyright do not require, in their application, reference (implicit or explicit) to the object of the rights: i.e., the work.

# What’s Wrong?

What, if anything, is wrong with the conceptual disintegration of the work? Is there any reason why copyright owners should not be free on the conceptual level to zoom in and out as they wish in defining the object of protection, and on the practical level to claim protection in any aspect or fragment of a work? There are two aspects to the deleterious effects of disintegration of a stable concept of the work: one pertains to the basic policies copyright is designed to serve, the other to the ability of copyright to serve these policies through a coherent and workable conceptual structure. This Part explains each of these dimensions and then exemplifies the unfortunate effects on both via the cases of copyright in fictional characters and universes.

## *The Full Internalization Fallacy*

Copyright should not protect work fragments for the same reason it does not protect all valuable uses of a work along other dimensions. Copyright has never been about absolute control. Its fundamental design principle is a right to exclude that is strictly limited with respect to the dimensions of scope, variety of uses, and time. Owners cannot exclude others who produce copies of their work that are not sufficiently similar,[[30]](#footnote-30) privately perform the work,[[31]](#footnote-31) resell an authorized copy of it,[[32]](#footnote-32) or use it in any way after the limited term of protection has expired.[[33]](#footnote-33) The same rationale that underlies a restricted right to exclude with respect to those dimensions applies to fragmentation. This rationale is traced to the fact that no plausible purpose of copyright supports anything remotely close to full internalization of the social value of the work by its creator. And this is rooted, in turn, in the basic dynamic of producing and using information goods. To explain, it is useful to briefly restate the case for copyright as based on this production/use dynamic.

Expressive goods are public goods.[[34]](#footnote-34) As such they are marked by two features: high levels of inexcludability and nonrivalry. Inexculdability means that it is hard to exclude others from the expressive good, at least once it is published.[[35]](#footnote-35) Nonrivalry means that one person’s use of the good does not lessen the ability of others to use it and enjoy its value.[[36]](#footnote-36) Copyright is a remedy for an appropriability problem that originates in inexludability and the gap between the cost of creating and the cost of copying.[[37]](#footnote-37) Once a creator publishes their expressive work, others are likely to copy it. Competition causes the price to drop. And since copying is typically much less costly than creating, the price may plumet to a level that does not allow the creator to appropriate enough of the value of the work to recoup their creation cost. Two unfortunate results follow: many creators may forgo creation altogether resulting in the loss of the social value of their works, and those creators who do not refrain from creating, enjoy an unfairly low fraction of this value.

One possible solution to this problem, known as copyright, is giving creators a legal right to exclude others from certain competing uses of their works. The result of the right to exclude is a measure of pricing power that allows creators to internalize a greater share of the value of their work, thereby alleviating the appropriability problem.[[38]](#footnote-38) Unfortunately, the lunch is not free. Pricing power achieved by the right to exclude results in a new negative effect: those who are unwilling or unable to pay the marked-up price are denied access to the expression.[[39]](#footnote-39) The result: copyright’s deadweight loss—its infelicitous restriction on both consumption of the work and its downstream use to engage in further creation.[[40]](#footnote-40)

At this stage it is important to emphasize a point that is often left unspoken: copyright’s access cost is particularly troubling because of the nonrivalry of expression. Copyright compromises the attractive quality of nonrivalry, namely that *once an expressive good exists* there is no need to restrict or coordinate its use. If anybody can use the work without lessening the ability of others to do so, there is no use-related reason to restrict or prioritize access.[[41]](#footnote-41) The governance function of property as a decentralized system for regulating and coordinating the use of resources is entirely unnecessary.[[42]](#footnote-42) Put differently, there is no static justification—one relating to the use of the work—for copyright. The only function of copyright is dynamic—relating to the production of the work. And the dynamic benefit of copyright always comes with an access cost, that operates both on the static-use side (limiting use of existing works) and dynamic-production one (burdening downstream production).

This account highlights why full internalization of the work’s value by its creator is a non-starter as a purpose of copyright. The argument for full internalization originates in the context of rival resources. While claims for “absolute” property rights are neither attractive nor coherent, with respect to rival resources, there is some initial plausibility to the idea of full internalization of value by the owner.[[43]](#footnote-43) In that context, private property plays an important static role as a governance mechanism for resources to avoid a “tragedy of the commons.”[[44]](#footnote-44) Full internalization of value (and cost) is a corollary to this governance function. Its purpose is to assure that coordination of use decisions by owners accurately reflects the social value of relevant actions. However, in the context of nonrival resources, such as expressive works, there is no tragedy of the commons and no need for governance.[[45]](#footnote-45) The upshot is that the right to exclude serves a limited function: its benefit is strictly restricted to dynamic production.[[46]](#footnote-46) And being so restricted, the benefit is subject to a cap. Once a level of internalization of the work’s value sufficient to support creation and fairly compensate creators is reached, any further effect of the right to exclude is purely negative: it imposes additional access cost for no further dynamic benefit. In economic theory sufficient support for creation means a level of internalization that allows the creator to recoup the cost of creation and not one iota more.[[47]](#footnote-47) Just desert considerations can plausibly justify higher levels of compensation to creators, but these too run out of steam well before full internalization.[[48]](#footnote-48)

Two fundamental institutional design principles for copyright follow from this analysis. First, copyright is not meant to let owners control all valuable uses of their works. And this is true on the level of the primary purpose of the regime, not as an unfortunate side effect of transaction costs barriers or pragmatic administrability constraints. Second, this principle of limited internalization together with the concern of minimizing the access cost of exclusion issues in a general structural feature of limited control. A general regime of copyright law is meant to achieve a rate of value internalization by creators, that is high enough *overall* to support a robust level of creation and fairly compensate creators, at an acceptable level of access cost.[[49]](#footnote-49) This directive is translated into law through structural limitations on the right to exclude in every relevant dimension: limited term with respect to time;[[50]](#footnote-50) an enumerated, exhaustive list of entitlements with respect to the variety of uses covered[[51]](#footnote-51); and copyright’s infringement test and its heart—the requirement of substantial similarity—with respect to the scope of controlling covered uses.[[52]](#footnote-52) Because it emanates from the basic dynamics of production and use of information goods, this framework of a structurally limited right to exclude holds irrespective of one’s specific normative or policy commitments.[[53]](#footnote-53) The structural principle is valid under any plausible normative justification of copyright, whether it is grounded in efficiency[[54]](#footnote-54), more nuanced utilitarianism,[[55]](#footnote-55) democratic theory,[[56]](#footnote-56) labor-desert theory,[[57]](#footnote-57) or something else.[[58]](#footnote-58)

The principle of limited control supports a stable conception of the copyrighted work, for the exact same reasons for the structural restrictions in other dimensions of copyright. The key point is that conceptual fragmentation of the work is simply another dimension in which the array of valuable uses of an expressive good can be parsed. Correspondingly, an owner’s unlimited ability to slice and dice the work to protectable subunits is an instrument for asserting absolute control within this dimension. The Garden of Earthly delights has market value as a complete expressive package known as the painting. However, its various fragments have further value. Small visual details could be sold as postcards, the fictional creatures appearing in it could be marketed as sculptures, and many of them could also be licensed for various downstream uses as standalone fictional characters. Just as owners can increase their internalization of the painting’s value by extending their control across time, variety of uses, and the scope of similarity, they can achieve the same end by fragmentation of the utilized units. And just as extraction of value in those other dimensions requires extension of the property right to enable market transactions at marked-up prices, the same is required with respect to fragmentation. The same applies to musical compositions or sound recordings that treasure hidden value as bits that could be sampled; films that could be sliced into valuable scenes or characters; a literary work that could be squeezed like a lemon for the value of individual passages; and any other expressive work.

And the same rationale that counsels against full internalization with respect to other dimensions applies with equal force to the dimension of fragmentation. Just as owners should not have the right to exclude others forever, with respect to any use, and at any degree of similarity, their ability to extend exclusion by fragmentation should be limited. The structural mechanism that achieves this purpose in copyright is the concept of the work. The work as a constitutive concept sets the level of the protected expressive unit and limits the owner’s ability to exclude by fragmentation. It serves the same function as, for example, limited duration with respect to the dimension of time.

To restate the analysis in the standard terms of copyright’s cost/benefit framework: protecting endless fragments of works serves no useful incentive function, while resulting in substantial costs. On the benefit side, any beneficial effect of extending the right to fragments runs out once a rate of internalization sufficient to cover cost and ensure fair compensation is achieved.

On the cost side, any increment of protection beyond the level of recoupment and fair compensation accumulates negative effects. Statically—with respect to consumptive access to fragments—users are excluded for no good reason.[[59]](#footnote-59) Dynamically—with respect to further downstream creation—the negative effect is particularly troublesome. Fragment of works are typically the kind of subject matter that is likely to be used downstream for creating new works that, rather than being duplicative, contribute new significant social value. Sampling of music bits, incorporation of short film scenes, creative reuse of characters, recycling of image fragments, and appropriation of portions of texts, are exactly the building blocks for new and valuable creation. Furthermore, with respect to fragments, downstream creators are particularly likely to encounter “anti-commons” problems.[[60]](#footnote-60) Transaction costs associated with having to clear rights in multiple building blocks is likely to accumulate and frustrate any mitigating effect of licensing transactions on copyright’s burden on creation.[[61]](#footnote-61) In the words of J.H. Reichman: a multitude of fragmentary rights produces “a tangled web of property and quasi-property rights that in itself constitutes a barrier to entry and disincentive to further small-scale innovation.”[[62]](#footnote-62)

In short, endless fragmentation of the work results in steadily declining benefits of supporting creativity and steeply climbing costs on access and downstream creation. The legal concept of the work is copyright’s structural mechanism for operationalizing this cost/benefit structure within the dimension of the object of protection. Its purpose is to allow creators protection at a level that is sufficient for many works, but no more. The concept draws a clear line where exclusionary power stops, lest its accumulated costs outweigh the benefit.

## *Conceptual Disintegration*

The work plays another fundamental role in copyright, one that is conceptual rather than purely policy oriented. In this hat, the work is copyright’s basic unit of analysis.[[63]](#footnote-63) Virtually any analytical question in copyright requires an assumption about the object to which the right applies. Before we can begin to intelligibly analyze questions such as what degree of similarity constitutes infringement, what kind of uses are within the right to exclude, or even more technical question such as what acts count as copyright registration or notice with attendant legal implications, we must know the unit of analysis. We must know or assume what it is to which reproduction must be sufficiently similar and certain uses of which count as infringing. We must know or assume what it is that is being registered or with respect to which notice is given. This is true throughout the law of copyright. To have minimal conceptual coherence, copyright must have a unit of analysis. This is, of course, precisely the function of the concept of the work. The work is copyright’s conceptual atom. It is the field’s most basic unit that is essential for structuring any further and more complex conceptual elements.

The distinct conceptual role of the work uncovers a distinct harm in disintegrating it. With no stable concept of the work copyright has no stable unit of analysis. When one destabilizes the atom all further structures that are made of it are destabilized. Margot Kaminski and Guy Rub provide a striking account of how the instability of the concept of the work reverberates throughout copyright, leaving almost no corner of it unshaken.[[64]](#footnote-64) Numerous elements of copyright—anything from infringement analysis to statutory damage —are seemingly thrown up in the air once the concept of the work loses stability. On each of those doctrinal issues results and analysis differ markedly, depending on our assumption about what the work is. Kaminski and Rub describe the exercise of manipulating the unit of analysis as zooming in or out.[[65]](#footnote-65) Legal actors sometimes engage in this maneuver openly, by directly identifying a desired level of the unit of analysis. Often, however, the maneuver takes place sub rosa: the lawyer or the judge simply silently assumes the “correct” unit that inevitably shapes the analysis and often leads to a particular result. Given the breadth of application of such tactics, copyright’s conceptual basis seems to be shaking under our feet. Almost anything in copyright becomes debatable and manipulable by kneading the concept of the work.

At first, the effect of manipulating the work may seem erratic. One may observe that the exercise can be pursued in similar ways for opposite purposes.[[66]](#footnote-66) Sometimes zooming-in and taking small expressive fragments as the unit of analysis serves the interest of owners in expanded protection.[[67]](#footnote-67) At other times, zooming-in seems to serve the opposite purpose of limiting protection and allowing certain users to escape.[[68]](#footnote-68) In yet other cases, it might seem hard to even decide whether a specific maneuver involves zooming in or out. Is applying copyright to expressive universes—to a corpus of expressive elements strewn across multiple related literary and visual works rather than specific novels or films—fragmenting the work or inflating it?[[69]](#footnote-69) One may almost be tempted to say that the manipulability of the work renders copyright strategically indeterminate: a malleable playground where one can deploy zoom in and zoom out arguments in different directions in the service of conflicting agendas.

The above conclusions are wrong. Once understood in light of the political economy dynamic that drives it and copyright‘s purpose, destabilizing the work is neither indeterminate nor erratic. To be sure, once the basic unit of analysis is undermined, conceptual instability ensues. And in specific cases this instability can be strategically used in various directions. Yet the overall logic and effect of the process remain crystal clear. The attack on a stable concept of the work is fueled by the basic political economy of property rights: the drive to expand exclusion to every possible use of the protected resource in order to enable capturing of every drop of its market value. While this drive has no grounding in any plausible purpose of copyright, it is aided by a strong ideological support: experiencing the market’s profit maximizing logic as natural and therefore misconceiving it as a proper goal for copyright.[[70]](#footnote-70)

This constant pressure by rights owners to extend property to exploitation of work’s fragments erodes and may ultimately sweep away altogether the main structural mechanism that safeguard’s copyright’s main purpose in this area, namely: the concept of the work as a limiting device. Once the conceptual dam is breached the pressure to remove it altogether by a continuing torrent of claims in various sub-elements of works intensifies. There may be local subcurrents swirling in various directions, but the general course of the expansion stream is clear and predictable. This dynamic is powerfully illustrated by two examples of how it unfolds in copyright: the law’s treatment of protecting expressive characters and universes.

1. *An Example: Characters and Universes*

It is too easy to assume that the problem of the disintegration of the work is limited to a set of exotic cases. The examples that instinctively come to mind are those of quasi-physical or literal fragments of works, such as splinters of larger texts or small visual extracts from pictorial works.[[71]](#footnote-71) However, the process of disintegration cuts much deeper, both conceptually and practically. It is not merely a “short phrases” problem. Expressive works can be sliced and reworked along many dimensions. And it is the less literal dimensions that are likely more significant. Perhaps the most important cases are those of copyright protection applied, not to specific works, but to fictional characters (for example Batman or Freddy Kruger’s glove) and universes (for example the Harry Potter universe). Nothing conveys better than these cases how the disintegration of the work as a stable unit of analysis has been normalized and how this process was driven by the political economy of copyright.

[describe the rise of characters and universe copyrights here] …

# Some Problematic Solutions

Concluding that anything-goes-style, limitless fragmentation of the work is pernicious on both the policy and conceptual level, still leaves the question open: what is the alternative? Before proceeding to outlining the sound way forward, two other alternatives must be discussed and laid aside: free-wheeling setting of the level of the work under an open list of factors, and fine-grained optimization by doctrinal context or category of work.

## *Contextual Ad Hocery: Intuitions and Factors*

Some may be tempted to remedy the work’s problem by a technique that is all too familiar in copyright law: a list of relevant “factors” accompanied by an edict to decisionmakers to consider these factors and apply their “intuitions” in specific contexts. This route may be tempting not only because it offers the apparently attractive qualities of a judgment based on a pluralistic set of considerations, but also because of the range of application. Because the work is the basic unit of copyright’s analysis, questions about its proper calibration are likely to appear in multiple doctrinal contexts and with respect to a broad variance of subject matter.[[72]](#footnote-72) As a result, one may suspect the adequacy of one size fits all solutions and embrace the flexibility of factor-based judgments.[[73]](#footnote-73)

 In his important study of “microworks” Justin Hughes proposes a “minimum size principle” for the work operationalized as “a multifactor analysis that appeals to (a) commercial activities such as investment decisions and marketing valuations; (b) our intuitive sense of ‘composition;’ and (c) the registration practices of copyright owners.”[[74]](#footnote-74) These factors, we are told, “hardly exhaust the candidate criteria for a multifactor minimum size analysis” that is doomed to “remain resistant to ex ante formulae.”[[75]](#footnote-75) The result: “the only guidance to be offered is a rough frameworks of considerations.”[[76]](#footnote-76) While the proposal points at some correct elements, we believe it does not offer an attractive route, for two distinct reasons.[[77]](#footnote-77)

First, the problem to be addressed is not accurately captured by the notion of “microworks.” Accordingly, the remedy cannot be restricted to a minimum size threshold. The problem is the disintegration of the work, not simply that certain expressive bundles that are too small to be recognized by copyright sometimes get protection. The latter formulation gives the impression that the concern is restricted to a limited range of cases of small expressive fragments, with the paradigmatic case being trying to protect a work’s title or a short slogan. This “I Like Ike” problem is roughly what is dealt with today by copyright’s rule against protecting “short phrases.”[[78]](#footnote-78) Framing the problem this way leads to the conclusion that the needed solution is restricted to a more sophisticated version 2.0 of the short phrases rule.[[79]](#footnote-79)

Yet, the problem is much broader and different in kind. It consists not merely in too small expressive fragments slipping in, but in the limitless ability of copyright owners to reformulate the same expressive bundle on multiple levels in order to squeeze every bit of market value from it. Once the concept of the work is destabilized, the object of protection can be reworked in every possible direction. Fragments could be pointed at as the work, including, as in the case of fictional characters, fragments much larger than are likely to be captured by any minimal size threshold. At the same time, fragments from different expressive bundles could be joined together into a sprawling nebula of an expressive universe. There is no inherent reason why the left panel of The Garden of Earthly Delights, or indeed a much smaller section of it, is too small to be a standalone pictorial work. One must proceed a long way down the fragmentation rabbit hole before they reach the visual equivalent of a very short textual phrase. The real problem is that, in the absence of a stable concept of the work, The Garden of Earthly Delights becomes a vast repository of endless variants of different works. Each of these variants of what the work is can be strategically pulled out of the magician’s hat to manipulate copyright’s doctrine and control a broad variety of market uses of elements of the same expressive bundle. Conceptual disintegration and subversion of copyright’s policy flows not from too small units, but from endlessly malleable units.

Because it addresses minimal size rather than endless malleability, a minimal size rule is not responsive to the problem at hand. At most, such a rule can serve as a limited ancillary measure. A revamped version of the ineligibility of small phrases rule could serve as a proper de minimis threshold.[[80]](#footnote-80) It could exclude from copyright’s purview units that are too small to be cognizable.[[81]](#footnote-81) This function would be served with respect to both standalone works and fragments of larger expressive bundles. However, fully addressing the disintegration of the work requires a different rule that directly targets the problem of mailability rather than minimum size.

Second and more importantly, the allure of context specific judgment notwithstanding, a multifactor rule based on “weighing” an open list of considerations and intuitions is sure to yield poor results. The main problem: such a framework supplies the appearance of guidance for analysis with no guidance at all. It provides no disciplined way for analyzing cases in a way that is structurally tied to the underlying dual purpose of the norm: a reasonable limit on value internalization by fragmentation and conceptual stability.

Adopting such a framework is particularly dangerous for several interlocking reasons. First, the combination of the conceptually challenging nature of the question of the work together with an invitation for pseudo-analysis promises to be combustible. The predictable result is a temptation to engage in loose reasoning and rationalization of intuitions under cover of weighing factors.[[82]](#footnote-82) Second, the political economy dynamics that drives the disintegration of the work in the first place assures that the results of such intuitive judgments will not be random. Fueled by market rents, pressures to slice and dice the work are sure to persist and are unlikely to be repelled by the feeble barrier of intuition. Third and closely related, intuition can be relied on to backfire here. What is likely to enter the conceptual vacuum left by non-analysis is the siren song of full internalization of value. Factor-based reasoning may then provide a post hoc rationalization to this erroneous but powerful ideal. Fourth and most importantly, ad-hoc loose judgments are a poor remedy to the conceptual disintegration side of the problem. Copyright needs a stable basic unit of analysis on which to build. Ad hoc decisions by factor-based intuitions offer a foundation made of shifting sand. One that is sure to fuel conceptual disintegration, rather than stabilize it.

## *The Mirage of Optimization*

The twin of the allure of intuition-based judgments is the temptation of optimization. The ideal here is to set the concept of the work at the level which is “just right” given underlying policies. In an extreme version of this position the ambition is to find the optimal marginal point. Just as there is a supposedly optimal level of copyright’s scope or duration—a point where the access cost overtakes the incentive benefits—there is an optimal extent to which copyright owners should be allowed to reframe their works.[[83]](#footnote-83) Perhaps it is the point where any additional incentive benefit (attributable to further internalization of value from exploitation of reframed works) is outweighed by added access cost.[[84]](#footnote-84) The law’s task is to accurately capture this point in its definition of the work. Furthermore, since the optimal point is likely to vary by context, the legal definition should be variable enough to reflect these variations, like a sensitive seismograph needle. Perhaps the optimal concept of the work should be optimized to the specific policy balance required by the relevant doctrinal context, or perhaps it should be calibrated by reference to the kind of work involved.

The approach offered by Kaminski and Rub for addressing what they refer to as the “framing problem” is more modest in its claim for precision, but it bears clear traces of the optimization framework. After perceptively identifying the “existential hole at the center of the copyright system,” the authors observe that “a completely unified test not only does not work in practice, but is normatively questionable.”[[85]](#footnote-85) What is to be done then? “The law,” they suggest, can “develop to tackle the framing question on a case-by-case, or maybe a doctrine-by-doctrine, basis.”[[86]](#footnote-86) This ability to “tweak individual aspects of copyright doctrine” promises to provide “the necessary flexibility to analyze a work against the backdrop of policy considerations specific to a particular area of copyright doctrine.”[[87]](#footnote-87) All of which comes down to a directive to optimize: “A court attempting to achieve the same incentive-access balance across copyright law will likely need to frame the work differently in different contexts.”[[88]](#footnote-88)

 Again, there are two reasons why this specific proposal and the more general optimization framework it reflects fall flat.

First, the suggestion that the minimal framing of the work by one doctrine, *for reasons of its own internal purpose*, may be inadequate for different doctrines with different purposes, misses the mark. The point is not that whatever minimal size threshold is imposed by one doctrine, for its specific internal reason, should also be imposed by others. To be sure: the concern of originality doctrine with a minimal degree of creativity may be satisfied by rather small fragments of works; the rationale of a de minims floor for trivial cases may be served by an even lower size floor; and the scope concerns of the infringement test may require a higher quantitative bar. The point is that there is a separate general concern, namely: restricting the ability to reshape the unit of analysis. This concern serves the twin purpose of limiting value internalization and conceptual stability. Originality, de minimis, the infringement test, and other doctrines may require different minimal thresholds of protectability that follow from their internal purposes (“creativity,” filtering out trivial cases, and setting the right’s scope). Those different thresholds may be reflected differently within the dimension of the work’s size. But there is a separate purpose that supports an overall stable unit of analysis and applies across doctrinal contexts. Setting a minimal size floor by the internal concerns of each doctrine simply misses and fails to address this distinct purpose served by an overall stable concept of the work. To take one example, the Batmobile may be a sufficiently delineated expressive entity to satisfy the creativity requirement of the originality threshold.[[89]](#footnote-89) That, however, is an entirely distinct matter from whether the copyright owner of a particular Batman film should be able to single out this expressive fragment for treatment as an independent work.

Second and more importantly, optimization is a mirage. For starters, modern copyright does not operate on the level of single works. While the exact degree of tailoring of the regime is open for question, no one seems to suggest that such tailoring take place on the individual work level.[[90]](#footnote-90) Copyright’s incentive/access tradeoff is not tailored per work, but rather operates across works.[[91]](#footnote-91) The reason is that the information and administrability barriers to per-work tailoring that meaningfully tracks underlying policies are insurmountable. This applies to all copyright doctrines.

The concept of the work, however, is a particularly bad candidate for attempts of per-work or even per-doctrinal-context optimization. Attempting to use the concept of the work for case specific calibration that tracks an optimal incentive/access ratio is like using a pitchfork to patch a sock. The question involved—what level of ability to reframe one expressive bundle as multiple objects of copyright protection would achieve an optimal incentive/access ratio—is too intricate. The amount and granularity of information necessary, the dynamic character of expressive works and their markets, and the bluntness of the doctrinal tool, all assure that such an attempt would be a fool’s errand. Attempting such a task promises to end in the familiar mix of an unmanageable ex post administrative burden, the ex ante ills of uncertainty and chilling effects, and overall poor tracking of the desired policy goals. Instead of trying to calibrate in specific cases or doctrines for an optimal level of work fragmentation, all that copyright can realistically do is aim at roughly “good enough” results. Copyright should set a general and uniform way of defining its basic level of analysis, one that ensures, across all cases, an overall robust ability to internalize a substantial value from a given expressive bundle, while limiting over-internalization and avoiding conceptual disintegration.

Finally, like its sibling intuition-based judgment, and for similar reasons, the mirage of optimization is likely to backfire. The uncertain and unmanageable attempt to locally optimize the level of the work promises to be an easy target for market-rents-induced attempts to manipulate the concept. And the vacuum left by the inability to meaningfully track policy via work-size calibration is likely to be filled by pressures to maximize value extraction and the ideology of full internalization.

 The problem of the work can be adequately ameliorated by neither free-wheeling “weighing” of factors nor by precise optimization.[[92]](#footnote-92) What is necessary is a well formulated, stable norm (not a mechanical “rule”) that is tied to the underlying purposes. Only such a norm can structure and meaningfully guide analysis, safeguard the underlying policies, erect a dam against the swirling currents of full value internalization, and stabilize the concept of the work.

# Stabilizing Copyright’s Atom

The solution to the woes of the conceptual disintegration of the work is taking the concept seriously: having a coherent and structured criterion to what a work is and holding copyright owners to it. This part develops such a stable doctrine of the work and addresses the various objections it is likely to attract.

## *Taking Works Seriously*

What is to be done? The goal is to have a workable basic unit of protection for copyright. On the substantive side the aspiration is neither for optimization nor for implementation of per-case intuitions, but rather for a roughly “good enough” norm; a norm that allows owners an overall robust level of compensation for their works, but also blocks attempts for endless expansion by reframing. Conceptually, the aim is to have a stable unit of analysis on which to build all copyright doctrine rather than ever-shifting sands.

A brief look at how patent law handles parallel issues is a good starting point. Patent law’s mechanism to handle the substantive and conceptual difficulties wrapped with the issue of the basic unit of analysis is claiming. Patents are based on a system of express peripheral claiming.[[93]](#footnote-93) Patentees must expressly define in written language the invention in which they claim protection.[[94]](#footnote-94) This language is understood to describe the outer bounds of the right’s scope.[[95]](#footnote-95) Since claims are seen as the equivalent of “metes and bounds” of the patent, they are broadly associated with the function of setting the right’s scope, namely, defining in a clear way the levels of identity covered by the rights to exclude others.[[96]](#footnote-96) However, claims serve another and much less noticed function: that of generating a stable unit of protection. This function is exercised in such a seamless way that it is easy to lose sight of it. The answer to the question of what the unit of protection is in patent law appears to be so self-evident that it is hardly worth asking the question: obviously it is whatever is defined in a claim. But the issue may appear moot, exactly because we have the claim mechanism.

Patent claims force owners to expressly identify the object of their rights and then hold them that choice. To be sure, a patentee is not limited to one claim. Having multiple claims for related subject matter in a single patent is a common practice. Nonetheless the power to reformulate the unit of protection is greatly limited in several ways. First, each claim is examined on its own and must satisfy the demanding patentability requirements, most importantly those of novelty, non-obviousness, and enablement.[[97]](#footnote-97) Second, patent’s written description requirement demands that the patentee’s written disclosure of the invention demonstrate that at the time of issuing the patent they already “possessed” whatever subject matter appears in a specific claim.[[98]](#footnote-98) Third, a patentee is held to whatever they claimed at the critical moment of issuance.[[99]](#footnote-99) The result is twofold. The ability to opportunistically reframe the unit of protection after the moment in which the rights take effect is greatly limited. Furthermore, when multiple claims are made, each stands on its own two feet identifying a well-defined object of protection that is separately analyzed for purposes of validity and infringement. This undercuts the possibility of loose or sub rosa shifting of frames.

 Copyright has no claims.[[100]](#footnote-100) Nor does registration, or even any accompanying deposit, serve a similar function to patent claims.[[101]](#footnote-101) Registration merely requires loose identification of the object of protection, but does not in itself prevent the later conceptual maneuvering of reframing the work.[[102]](#footnote-102) Moreover, in modern American copyright law, as constrained by the Berne Convention, registration is optional and therefore cannot be the basis of any field-wide general norm.[[103]](#footnote-103)

Is there any alternative moment or a constitutive act, that could be the basis for holding copyright owners to choices about the object of their rights, in a manner somewhat similar to patent claims? The natural candidate is fixation. Since 1976 fixation of the work in a tangible medium of expression—embedding the intangible expression in a stable physical object—is a focal point of the regime.[[104]](#footnote-104) Fixation is critical in two related ways: it is the moment that the work is created and it is also the moment when the right takes effect and the limited duration clock starts running.[[105]](#footnote-105) By constituting this critical moment, fixation is the equivalent of issuing a patent: a definite point in time at which owners make their decision and commit to the unit of protection.

So much for timing. But what about claiming? Copyright has no claims. There is no meta-language that describes the object of protection. The work, so to speak, claims itself. If so, whence comes the owner’s representation of the unit of protection to which they are to be held? Perhaps surprisingly, the answer is again: fixation. The act of embedding a specific expressive bundle in a physical object is also the act of designating the unit of protection as well as its scope. The latter function is well understood. Copyright law regularly treats the fixed version of the work as the basis for establishing its scope. In the absence of claims, copyright’s scope is established centrally by exemplar.[[106]](#footnote-106) This means that a particular version of the work—the one fixed—is treated as the hardcore by reference to which the scope is determined. The outer boundaries—the degree of identity required to infringe—are then determined by reference to this central core under copyright’s infringement test and its requirement of substantial similarity.[[107]](#footnote-107) Indeed the ability to establish scope in a manageable and tractable manner is often cited as why we have a fixation requirement.[[108]](#footnote-108)

Fixation can and should play the same role with respect not only to establishing the work’s scope, but also determining what the work is in the first place. The act of fixing a work is the act of claiming legal protection. By embodying a specific expressive bundle in a tangible form creators represent that this is the object in which they claim protection, that this is, in other words, the fundamental unit of analysis to which all rights attach. And just as in patent law, the owner should be held to this choice for all relevant purposes, including both validity and scope of the legal claim.

Stabilizing copyright’s atom, taking works seriously, should be done by taking fixation seriously. The act of fixation should be treated as the moment of claiming for purposes of both scope and unit of analysis. The latter simply means that, in a way analogous to patent claims, copyright owners should be strictly held to the specific expressive bundle that was embedded as the relevant fixed version. This will result in the same two desirable effects as in patent claiming. First, owners will no longer have an unlimited ability to reframe the unit of protection, espcially not in an opportunistic after the fact manner. Instead, owners will be limited to protecting a specific expressive unit—the one they claimed via fixation. Second, a clear claiming norm will force conceptual stability and clarity. Courts and litigants would no longer be able to shift frames for the unit of analysis thereby manipulating the analysis and its outcome. Instead, all issues with respect to validity, infringement, or anything else, will have to be analyzed with respect to a specific stable unit.

…

## *Objections and End Runs*

1. Existing Practice
2. Low Margin Works
3. Owners’ Gaming
4. Users’ Gaming

# Conclusion

1. \* UT Austin and UC Berkeley. Thanks to Bob Bone, Terry Fisher, John Golden, Ruth Okediji … [↑](#footnote-ref-1)
2. 17 U.S.C. § 102(a). [↑](#footnote-ref-2)
3. J.R.R. Tolkien, The Fellowship of the Ring (1954). [↑](#footnote-ref-3)
4. *See* Lionel Bently, *R. v The Author: From Death Penalty to Community Service*, 32 Colum. J.L. & Arts 1 (2008-2009). [↑](#footnote-ref-4)
5. Jessica Litman, *Billowing White Goo*, 31 Colum. J.L. & Arts 587, 596 (2008). [↑](#footnote-ref-5)
6. The lesser attention devoted to inner-expansion is only relative. In important works scholars have identified and analyzed the process of fragmentation of the work in copyright. See Justin Hughes, *Size Matters (Or Should) in Copyright Law*, 74 Fordham L. Rev. 575 (2005); Margot E. Kaminski and Guy A. Rub, *Copyright’s Framing Problem*, 64 UCLA L. Rev. 1102 (2017). Other scholars have discussed fragmentation more generally in intellectual property rights. See e.g., Reichman, Boyle Eisenberg. These foundational and important works tend, however, not to highlight the extent to which fragmentation is simply another version of expansion. [↑](#footnote-ref-6)
7. *See* Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 Cardozo L. Rev. 769, 783-787 (2013) (discussing the development of and various tests for copyright in fictional characters);  Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 Wis. L. Rev. 429, 439-474; (same); Jani McCutcheon, *Works of Fiction: The Misconception of Literary Characters as Copyright Works*, 66 J. Copyright Soc’y U.S.A. 115 (2019) (arguing that characters cannot be independently copyrightable because they are not works). [↑](#footnote-ref-7)
8. Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?* 58 UCLA L. Rev. 1175 (2011). [↑](#footnote-ref-8)
9. Hughes supra note , at 576. [↑](#footnote-ref-9)
10. Kaminski and Rub supra note , at 00. [↑](#footnote-ref-10)
11. 8 Ann. c. 21 § II; Copyright Act of 1790, § 2. [↑](#footnote-ref-11)
12. *See* Oren Bracha, Owning Ideas: The Intellectual Origins of American Intellectual Property Law, 1790-1909 (2016). [↑](#footnote-ref-12)
13. Justin Hughes sharply diagnoses how copyright’s basic unit of analysis was destabilized by the historical shift from a stable organizing concept—the book—to a potentially malleable one—the work. Hughes 600-604. [↑](#footnote-ref-13)
14. Oren Bracha, *Before an Image Was Worth a Thousand Words:* Ben-Hur *and Copyright’s Right of Derivatives*, *in* Circulation and Control: Artistic Culture and Intellectual Property in the Nineteenth Century 196 (Marie-Stéphanie Delamaire and Will Slauter, eds. 2021). [↑](#footnote-ref-14)
15. *See, e.g.,* Paul Goldstein, Copyright’s Highway 178-179 (1994). [↑](#footnote-ref-15)
16. A tradeoff that takes place *across* different works rather *within* any given covered work. *See* Oren Bracha and Talha Syed, *Beyond the Incentive/Access Paradigm? Product Differentiation and Copyright Revisited*, 92 Texas L. Rev. 1841, 1855-1856 (2014). [↑](#footnote-ref-16)
17. This strategy for explaining the issue is borrowed from Kaminski and Rub, *supra* note 11. [↑](#footnote-ref-17)
18. *See* Peter S. Menell, Mark A. Lemley, and Robert P. Merges, 2 Intellectual Property in the New Technological Age 632-633, 640-644 (2018) (collecting cases formulating and applying the “substantial similarity” test for the “improper appropriation” prong of infringement). [↑](#footnote-ref-18)
19. For discussion of how this rationale relates to both economic and non-economic philosophical theories of copyright, see Oren Bracha and Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 Berk. Tech. L. J. 229 (2014). [↑](#footnote-ref-19)
20. Traditionally, these alternatives included patronage, prizes, government production, and publicly-funded peer (academic) production. More recently, they include commons-based peer production. [↑](#footnote-ref-20)
21. *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint,* 12 J. L. & Econ. 1, 11-14 (1969). In offering his highly influential comparative-institutional defense of IP rights, in reply to Kenneth Arrow’s critique and alternative case for public funding, Demsetz is of course building on the work of Hayek. *See* F. A. von Hayek, *Economics and Knowledge*, 4 Economica 33 (1937); F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* The Rate and Direction of Inventive Activity: Economic and Social Factors (Nat’l Bureau of Econ. Research ed., 1962). [↑](#footnote-ref-21)
22. *See* references in *id.* [↑](#footnote-ref-22)
23. In pure economic efficiency terms, they should get access when they are willing and able to pay marginal cost. Under other normative frameworks this criterion may be adjusted, often in a way that increases the case for access and therefore increases “normative deadweight loss” from exclusionary rights. [↑](#footnote-ref-23)
24. Alongside deadweight loss, there is also another disadvantage common to property rights and strategies based on conferral of a benefit on creators by government. This is the waste of duplicative activity or “rent dissipation” generated by races of actors competing to capture the benefit. [↑](#footnote-ref-24)
25. *See* Bracha and Syed, *Beyond Efficiency*, *supra* note 19 at Part IV; Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. Rev. 970 (2012). [↑](#footnote-ref-25)
26. Specifically, public prizes and subsidies. The question is one of relative severity and in that respect non-market strategies do have one advantage: the rent-seeking is more readily visible as what it is, rather than limitations to IP being seen as artificial “interventions” in a “natural” market process. [↑](#footnote-ref-26)
27. See Drone. For explanation of why the ideal of copyright as a means for full value internalization is dubious, from any plausible normative perspective, *see* *infra* II.A. [↑](#footnote-ref-27)
28. See Hughes 576 (Observing that “enterprising lawyers continually try to produce ‘fine-grained’ protection of their client’s interests.”) [↑](#footnote-ref-28)
29. *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir.1960) (noting that the test for infringement of a copyright is necessarily “vague” and determinations must be made “ad hoc”). *See also* Amy B. Cohen, *Masking Copyright Decision-making: The Meaninglessness of Substantial Similarity*, 20 U.C. Davis L. Rev. 719, 731–32 (1987); Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity down to Earth*, 98 Dick. L. Rev. 181, 189–94 (1994); Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. Copyright Soc’y U.S.A. 719, 720, 733, 738-740 (2010); Jarrod M. Mohler, *Comment: Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. Cin. L. Rev. 971, 988–89 (2000); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683, 716–17 (2012). [↑](#footnote-ref-29)
30. [↑](#footnote-ref-30)
31. [↑](#footnote-ref-31)
32. [↑](#footnote-ref-32)
33. [↑](#footnote-ref-33)
34. [↑](#footnote-ref-34)
35. [↑](#footnote-ref-35)
36. [↑](#footnote-ref-36)
37. [↑](#footnote-ref-37)
38. [↑](#footnote-ref-38)
39. This is always the case in the absence of perfect price discrimination. This theoretical possibility is just that: in reality perfect price discrimination is never achievable. [↑](#footnote-ref-39)
40. [↑](#footnote-ref-40)
41. [↑](#footnote-ref-41)
42. [↑](#footnote-ref-42)
43. [↑](#footnote-ref-43)
44. [↑](#footnote-ref-44)
45. [↑](#footnote-ref-45)
46. This is so notwithstanding objections from so called “ex post” justifications of copyright. Designed exactly to deny the distinctive feature of nonrival information and relocate it within traditional property theory and its governing use static function. Fail because either confused or implausible. [↑](#footnote-ref-46)
47. [↑](#footnote-ref-47)
48. [↑](#footnote-ref-48)
49. “Overall” is a crucial qualifier here because in a modern standardized copyright regime, the incentive/access policy tradeoff operates among different works, rather than with respect to each work. [↑](#footnote-ref-49)
50. [↑](#footnote-ref-50)
51. [↑](#footnote-ref-51)
52. [↑](#footnote-ref-52)
53. To be sure, the lower-resolution decisions on how and to what extent to limit the rights will vary on the basis of one’s specific normative commitments. [↑](#footnote-ref-53)
54. [↑](#footnote-ref-54)
55. [↑](#footnote-ref-55)
56. [↑](#footnote-ref-56)
57. [↑](#footnote-ref-57)
58. [↑](#footnote-ref-58)
59. [↑](#footnote-ref-59)
60. See Eisenberg and Heller supra note , at 698-701. [↑](#footnote-ref-60)
61. Hughes supra note , at ; Kaminsky and Rub, at 614-616. [↑](#footnote-ref-61)
62. Reichman supra note , at 1776. [↑](#footnote-ref-62)
63. The work is the basic unit of analysis because it is the object of the property right, meaning, it is our concept of the resource with respect to which the interpersonal relation of property operates. See Hughes supra note , at 579 (Referring to the work as copyright’s “res.”). [↑](#footnote-ref-63)
64. Kaminski and Rub [↑](#footnote-ref-64)
65. Id. [↑](#footnote-ref-65)
66. [↑](#footnote-ref-66)
67. [↑](#footnote-ref-67)
68. [↑](#footnote-ref-68)
69. [↑](#footnote-ref-69)
70. Either through “incentives” or desert. [↑](#footnote-ref-70)
71. see Hughes 581-600 discussion focused on short phrases. [↑](#footnote-ref-71)
72. [↑](#footnote-ref-72)
73. See Hughes supra note 0, at 578 (Asking “How can we formulate a minimum size principle in a one size fits copyright doctrine that embracers everything from simple portraiture to massive architectural works, from Emily Dickenson’s poems to computer operating systems?”). [↑](#footnote-ref-73)
74. Id., at 621. [↑](#footnote-ref-74)
75. Id., at 634, 580. [↑](#footnote-ref-75)
76. Id., at 580. [↑](#footnote-ref-76)
77. Specifically, the suggestion to consider “commercial activities” is close to our suggestion to limit the work to the expressive package offered in the main market for the relevant expression. See infra. In some cases, owners’ registration decisions can offer some ancillary guidance in locating the main market for the expression. See infra. [↑](#footnote-ref-77)
78. [↑](#footnote-ref-78)
79. Hughes explains why the existing version of the short phrases rule is inadequate for dealing even with the limited problem of microworks. Huges supra note 0, at. [↑](#footnote-ref-79)
80. We say de minimis proper because the concept of de minimis is applied in different contexts in copyright law, with different meanings, and often in a confusing or obscure way. [↑](#footnote-ref-80)
81. Not on grounds of originality as the current rule is often understood, but simply as to small in value to justify the incentive function in light o alternative support and associated costs including administrative ones. [↑](#footnote-ref-81)
82. See statutory damages. [↑](#footnote-ref-82)
83. [↑](#footnote-ref-83)
84. [↑](#footnote-ref-84)
85. Kaminskin and Rub supra note 0, at 1173-1174. [↑](#footnote-ref-85)
86. 1176 [↑](#footnote-ref-86)
87. 1177, 1178. [↑](#footnote-ref-87)
88. 1178 [↑](#footnote-ref-88)
89. [↑](#footnote-ref-89)
90. Michael Carroll, [↑](#footnote-ref-90)
91. [↑](#footnote-ref-91)
92. None of this is to say that a uniform concept of the work should be applied in a wooden rigid matter, or even that the possibility of some doctrinal variation is inconceivable. As for the former, a uniform concept of the work, while structurally coherent and stable, should be internally flexible enough to allow dynamic application that remains in touch with its purpose. As for the latter, it is impossible to determine s-priori that there is no doctrinal context where adjusting the unit of analysis may be justified. What is clear is that there are very strong reasons for having a stable and uniform concept across doctrines. The burden of showing otherwise in a specific case should be on those arguing for such a conclusion. [↑](#footnote-ref-92)
93. [↑](#footnote-ref-93)
94. [↑](#footnote-ref-94)
95. Subject to the limited doctrine of equivalents [↑](#footnote-ref-95)
96. It is easy to miss the unit-setting function of claims because under peripheral claiming identifying the unit of protection and establishing its outer scope are, mostly, one and the same. [↑](#footnote-ref-96)
97. [↑](#footnote-ref-97)
98. [↑](#footnote-ref-98)
99. Subject to limited technical ability to reissue within two years due to “error without deceptive intention” [↑](#footnote-ref-99)
100. It is sometimes said that copyright has an alternative claiming system based on central claiming by exemplar. [↑](#footnote-ref-100)
101. Although registration likely had some informal stabilizing role. See Hughes. [↑](#footnote-ref-101)
102. [↑](#footnote-ref-102)
103. [↑](#footnote-ref-103)
104. Prior to 1976 the critical dividing line was publication. Federal, statutory protection started at the moment of publication. Prior to publication works were protected by common law copyright. [↑](#footnote-ref-104)
105. See [↑](#footnote-ref-105)
106. [↑](#footnote-ref-106)
107. [↑](#footnote-ref-107)
108. [↑](#footnote-ref-108)