

2019

## Rights Accretion Redux

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### Recommended Citation

James Gibson, *Rights Accretion Redux*, 60 IDEA 45 (2019).

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## RIGHTS ACCRETION REDUX

JAMES GIBSON\*

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When the Intellectual Property Redux conference was first announced two or so years ago, I remember having both a positive and negative reaction. The positive reaction was, “Wow, what a great idea for a conference.” The negative reaction was, “Oh man, why didn’t I think of it first?” But now that I have been included, all negative thoughts have washed away.

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\* Professor of Law and Austin Owen Research Scholar, University of Richmond School of Law. I would like to thank Ann Bartow for including me in the Intellectual Property Redux conference, Corinna Lain for editing this essay (and just about everything else I’ve ever written), and Jane Savoca for being my own Fortuna Redux.

The article I am here to revisit is *Risk Aversion and Rights Accretion in Intellectual Property Law*,<sup>1</sup> which was published in 2007. I'm going to give a brief recap of the thesis and then turn to a few things I got wrong, some subsequent scholarship, various developments in practice, and the airing of grievances.

## I. RECAP OF ARGUMENT

First, the recap. If I had to sum up the article's thesis in one sentence, it would be this: licensing is not only an output of the system of entitlements that intellectual property law creates, but an input into that system as well—and current law skews that input in ways that lead to the expansion of intellectual property entitlements in copyright and trademark over time.

I was hardly the first scholar to observe that intellectual property entitlements had expanded, or that much of the expansion was unwarranted. But most of the prior commentary had focused on legislative capture and court decisions. In other words, it portrayed a purposeful expansion, fueled by rightsholders and manifested in the positive law.

In contrast, I focused on a more inadvertent, organic expansion that could be found in both copyright and trademark. My thesis was that in certain vital contexts, the expansion had more to do with the structural indeterminacy of important intellectual property doctrines than with conscious policy or political decisions by legislators and judges. That is, even if the statutes were left unamended for years on end and no cases made it to court, copyright and trademark rights would expand over time through an

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<sup>1</sup> James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 *YALE L.J.* 882 (2007).

incremental and mostly inadvertent process of accretion. The term “accretion” was important; the expansion happens over time, small piece by small piece, like a coral reef. Indeed, looking back, I wish I’d called the article *Rights Accretion and Risk Aversion in Intellectual Property Law*, not *Risk Aversion and Rights Accretion in Intellectual Property Law*, because I think the rights accretion part was more important and that I made some mistakes in my discussion of the role of risk.

I’ll get to my mistakes later, but first back to the recap. It’s easiest to understand my idea using copyright law. My premises, which at the time were pretty uncontroversial, were as follows.

First, important doctrines in copyright law are notoriously indeterminate. These include substantial similarity, the idea/expression dichotomy, and (most important) fair use.<sup>2</sup> As a result, it can be very difficult to determine ahead of time whether a given act of copying is infringing. Gray areas abound.

Second, for the user of copyrighted material, the mere threat of an infringement case can be daunting. The strong possibility of injunctive relief, including preliminary injunctions, could halt a project in its tracks, very expensively, creating holdup power. And the specter of statutory damages also gave rightsholders a lot of leverage.<sup>3</sup>

Finally, there are often multiple players on the copyright-user side of a licensing transaction. For example, a documentary filmmaker who wants to use a copyrighted

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<sup>2</sup> *Id.* at 888–91.

<sup>3</sup> *Id.* at 890, 942–45.

photograph in her film must consider not only the copyright holder, but also the film’s errors and omissions insurer, her producers, future distributors, downstream broadcasters, and so on. These parties tend to approach legal issues very conservatively, particularly when the legal issue has the potential to destroy or delay the entire project. This brings us to the risk aversion part of the thesis: all these constituents would pressure copyright users like our filmmaker to pay a little now rather than risk paying a lot later.<sup>4</sup>

In combination, these premises led to the conclusion (also uncontroversial) that when copyright users incorporate existing copyrighted material into their new project, they usually get permission and pay a licensing fee rather than risk litigation over substantial similarity, fair use, etc. and face the threat of an injunction and statutory damages.<sup>5</sup> It’s called a “clearance culture.”<sup>6</sup> License, don’t litigate. Better safe than sued.

The final ingredient in my argument, which I called “doctrinal feedback,” emerged from the fair use doctrine. The most important fair use factor is the effect of the defendant’s use on the rightsholder’s market.<sup>7</sup> But this

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<sup>4</sup> *Id.* at 890–94.

<sup>5</sup> *Id.* at 894–95.

<sup>6</sup> *See, e.g.*, PATRICIA AUFDERHEIDE & PETER JASZI, *CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2005).

<sup>7</sup> This factor is found at 17 U.S.C. § 107(4) (2012). For proof of its importance, see, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–67 (1985); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996); *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980); 4 MELVILLE B. NIMMER & DAVID NIMMER, *COPYRIGHT* § 13.05[A][4] (2019) (“If one looks to the fair use cases, if not always to their stated rationale, this emerges as the most important,

factor is subject to circular reasoning: until we decide whether the defendant's use is fair, it's impossible to say that the plaintiff has any right to exploit the market that the defendant's use represents. Copyright law tries to avoid this circularity by focusing only on real markets—e.g., markets that already exist or that the copyright owner is likely to develop.<sup>8</sup>

If you put this all together, you can see the problem. It works like this. In Year One, I want to make use of your copyrighted work. There is no established licensing market for my use, so although I'm in a gray area, I figure that I have a good shot—we'll peg it at eighty percent—at a fair use defense. But that still leaves a twenty percent chance the use might be ruled infringing. With all the dire consequences that come with infringement, and with all the pressure I am feeling from my insurer, distributor, etc., I decide not to take that chance; I get a license from you instead. Over time, other similarly situated actors follow suit. So by Year Three, bit by bit, there has emerged a widespread, active licensing market for the kind of use in which I engaged. This means that in Year Four, the chances of winning a fair use argument for that use have

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and indeed, central fair use factor.” (footnotes omitted)); Barton Beebe, *An Empirical Study of the U.S. Copyright Fair Use Cases, 1978-2005*, 156 U. PENN. L. REV. 549, 617 (2008) (showing empirically that winning the fourth-factor argument corresponds highly to winning the entire fair use argument and arguing that it “essentially constitutes a metafactor under which courts integrate their analyses of the other three factors and, in doing so, arrive at the outcome not simply of the fourth factor, but of the overall test.”).

<sup>8</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (suggesting that courts focus on markets “that creators of original works would in general develop or license others to develop”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (suggesting that courts focus on markets that are “traditional, reasonable, or likely to be developed”).

dropped considerably (because the existence of the licensing market militates against a fair use finding). So now the use that was eighty percent/twenty percent in favor of fair use is more like twenty percent/eighty percent against. The risk-averse preference for licensing has fed back around into the doctrinal analysis and the reach of copyright rights has expanded. And because fair use has narrowed, a use that would have been a one hundred percent slam dunk for fair use five years earlier is now more like eighty percent/twenty percent, and the user may now start thinking about a license, and the whole cycle starts again.<sup>9</sup> Again, licensing is both an input and an output in the copyright system.

The same input/output dynamic is present in trademark law, although it's a little more situational, so I'll run through it quickly. Trademark's consumer confusion standard can be very hard to apply in nontraditional contexts, like the appearance of a trademarked good in a video or film. It does not help that courts use a wide variety of terminology when articulating the kind of confusion that's actionable, from the Lanham Act's "sponsorship" and "approval" terminology, to whether the relationship between the parties is one of endorsement, affiliation, association, connection, authorization, permission, or license, to whether the use produced confusion "of any kind." Attached to these descriptors comes a host of catch-all modifiers, selected precisely for their imprecision: Was there confusion as to whether the mark owner "otherwise" approved or was "in some other way" connected? Was there a relationship "of some sort" or a suggestion that the defendant's product emanated "in

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<sup>9</sup> Gibson, *supra* note 1, at 898–900.

some way” from the mark owner? Will consumers “in some fashion” associate the plaintiff and defendant?<sup>10</sup>

As those terms suggest, consumer confusion will largely be a function of consumer understandings of when a license is needed. And consumers do indeed become aware of these licensing practices in subtle ways. For example, everyone has seen reality shows and music videos that routinely “blur out” certain logos and other trademarks, presumably because the producers were unable to get the relevant license. The absence of any “blurring out” thus becomes more significant—it implies at the very least that permission has been given, and it is a short hop from permission to affiliation or endorsement. The increasing incidence of merchandising and product placement may play a role here too: as consumers come to understand that a brand often appears in a toy or movie because of a financial deal between the filmmaker and the brand owner (e.g., James Bond doesn’t drive a BMW by coincidence), they will start to assume that any such appearance represents a deal with, and thus a tacit endorsement by, the brand owner. This in turn allows the brand owner to sue filmmakers who use brands without permission under a consumer confusion theory, which in turn causes more conservative licensing practices, and so on.<sup>11</sup> Thus we see doctrinal feedback of the trademark variety.

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<sup>10</sup> *Id.* at 908–12.

<sup>11</sup> *Id.* at 915–23. The behavioral sciences have a name for consumers’ understanding of the promotional nature of the marketing efforts that bombard them and their ability to appreciate and manage their own reactions thereto. It is called “persuasion knowledge,” and my article went into it in some detail. *See id.* Indeed, in an early draft of the article, I claimed to be the first to use the concept of persuasion knowledge in legal scholarship. Barton Beebe saved me from including this claim in the final version by pointing me to an earlier article: Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020 (2005). I was embarrassed to have missed that



## II. ERRORS

So that’s the basic argument of the article. I went on to suggest some possible solutions, but here I’d like to focus instead on things I got wrong.

### A. *Accounting for Risk*

I can think of two errors I made in the way the article accounted for risk. The first is that I completely ignored the insights from prospect theory and other sources about how risk is perceived and addressed in the real world.<sup>12</sup> In short, I oversimplified by assuming risk aversion on the part of users of copyrighted works and trademarked goods. As Steven Horowitz and Andres Sawicki later pointed out, copyright users may in fact be more risk-seeking than the rest of the population.<sup>13</sup>

The second mistake I made about risk may have inadvertently fixed the first mistake: I overemphasized the importance of risk aversion in the doctrinal feedback dynamic.<sup>14</sup> Most of what I proposed worked perfectly fine even when the user was not risk-averse. After all, there are lots of costs to litigating that would push a perfectly

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piece in my research, but I would have been more embarrassed to have published the claim, so I remain grateful to Barton for this tip, which he delivered more graciously and diplomatically than I deserved.

<sup>12</sup> The foundational article is Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *ECONOMETRICA* 263 (1979).

<sup>13</sup> Steven J. Horowitz, *Copyright’s Asymmetric Uncertainty*, 79 *U. CHI. L. REV.* 331 (2012); Andres Sawicki, *Risky IP*, 48 *LOY. U. CHI. L.J.* 81 (2016).

<sup>14</sup> I claim no credit for making one mistake that balances out another. As a very wise man once said, “The designer of such a system looks more like Rube Goldberg than Vilfredo Pareto.” See James Gibson, *Doctrinal Feedback and (Un)reasonable Care*, 94 *VA. L. REV.* 1641, 1699 (2008).

rational decisionmaker toward licensing. First, of course, there are the litigation costs themselves; I don't know of any empirical studies that show how often attorney's fees are awarded to the prevailing party, but from an ex ante perspective I would not be confident in predicting such an outcome for a client that was considering litigating one of these indeterminate doctrines. So even a successful defense would probably cost the defendant its attorney's fees. Second, the holdup power that comes with an injunction (especially a preliminary injunction) can be significant, whether you're risk-averse, risk-neutral, or risk-seeking. Third, in many copyright cases statutory damages would be available, which will usually increase the exposure for losing the case by an order of magnitude or two above licensing costs.<sup>15</sup> Finally, when someone wins a fair use case, he or she externalizes a lot of the benefits<sup>16</sup>—which I like as an academic, but which would push me toward licensing as a user. Faced with these considerations, even a risk-neutral or risk-seeking party might lean toward licensing.

I said as much in the article,<sup>17</sup> but I breezed by it and moved quickly to focus on risk-averse parties. And

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<sup>15</sup> This is not to say that statutory damages would always be awarded; Ben Depoorter has recently done some excellent empirical work that shows this is not the case. See Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. REV. 400 (2019). But because statutory damages are supracompensatory, even a low risk of an award will matter to a risk-neutral defendant.

<sup>16</sup> These externalities can take many forms, one of which is that a fair use ruling provides value to third parties who may have their own fair use questions in the future. Gibson, *supra* note 1, at 940–41. Another is that fair use exists in part to allow a user to proceed with a use that confers benefits on third parties. See Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1, 49–53 (1997).

<sup>17</sup> Gibson, *supra* note 1, at 890–901 (copyright), 925 (trademark).

putting “risk aversion” in the article’s title naturally suggested that it was a necessary part of the equation rather than something that would exacerbate an already existing tendency. (Here, years later, I’ve left “Risk Aversion” out of the title of this article. There—all fixed!)

### *B. Collective Action Solutions*

The other major error I made in the article is something I am happy to have gotten wrong. My article described what is essentially a prisoner’s dilemma. In theory, to stop rights accretion, all similarly situated users could get together and agree not to seek licenses for a given kind of use.<sup>18</sup> In practice, I thought this presented an intractable collective action problem, especially when one considers that they’d not only have to agree with each other, but also convince the other interested parties on their sides of the transaction—insurers, distributors, broadcasters, etc.—to buy into the decision not to license.<sup>19</sup>

I was mistaken. Certain groups of copyright users have indeed managed to get together and solve these challenges, under the leadership of Patricia Aufderheide at American University (with help from Peter Jaszi). It started with documentary filmmakers, who created a very detailed and very reasonable *Documentary Filmmakers’ Statement of Best Practices in Fair Use*.<sup>20</sup> That was not too significant in and of itself, but they also got the other interested parties, such as their insurers, to buy into the statement. Pat and friends then followed with similar codes

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<sup>18</sup> *Id.* at 903.

<sup>19</sup> *Id.*

<sup>20</sup> ASS’N OF INDEPENDENT VIDEO & FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE (2005), <https://cmsimpact.org/code/documentary-filmmakers-statement-of-best-practices-in-fair-use> [<https://perma.cc/GML7-KAWE>].

for journalism, online video, course syllabi, museums, visual arts, media literacy education, and academic and research libraries.<sup>21</sup> I don't know whether each of these codes has fully penetrated the corresponding industry, but at least in the documentary world they seem to have had a real impact.

If I'm talking about collective action solutions, I should do another shout-out. Around the time that I wrote my article, Wendy Seltzer (now at the World Wide Web Consortium) was doing some interesting work on takedown practices.<sup>22</sup> The site she founded (originally known as Chilling Effects, now known as Lumen)<sup>23</sup> has been a great resource for those who want to push back against overreaching rightsholders—which is one way of combating the doctrinal feedback that would come from giving in to overreach and licensing uses that don't need to be licensed. I'm not sure the site is a comprehensive solution to the rights accretion problem, but the first step in solving a collective action problem is collection, and the site is excellent at collection.

### III. SUBSEQUENT SCHOLARSHIP

So those are some things I got wrong. I am sure there are more, but I want to shift to talking about subsequent scholarship related to the article, which I don't

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<sup>21</sup> See *Codes*, CENTER FOR MEDIA & SOCIAL IMPACT, <https://cmsimpact.org/resources/codes> [<https://perma.cc/R3A-J-LKRD>] (last visited July 14, 2019).

<sup>22</sup> See, e.g., Wendy Seltzer, *The Politics of Internet Control and Delegated Censorship* (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1496056](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496056) [<https://perma.cc/9J-YT-4QXB>] (last visited July 14, 2019).

<sup>23</sup> See LUMEN, <https://www.lumendatabase.org> [<https://perma.cc/GER-9-NH74>] (last visited July 14, 2019).

think has proved me wrong, but which has introduced some things to think about that I didn't fully address.

### A. *Pushback*

A number of scholars, in commenting on the article itself or in related work, have pushed back on some of my assumptions and conclusions. When my article was published, Rebecca Tushnet was kind enough to write a short accompanying piece, in which she pointed out several doctrines in trademark law (like functionality and descriptive fair use) that help combat the rights accretion problem that I identified.<sup>24</sup> And I think she is correct that trademark law has more readily available tools to fight rights accretion than copyright does—which may be one reason why rights accretion is less evident in trademark than in copyright—although whether either area of law has been effectively using those tools is a more troubling question. Certainly, the most recent development in copyright's functionality doctrine is not encouraging.<sup>25</sup>

Wendy Gordon also wrote a response, in which she pointed out (among other things) that there are circumstances in which the market is simply not the place we look for appropriateness of licensing, even in the absence of risk aversion and doctrinal feedback.<sup>26</sup> Take the Sony Betamax case.<sup>27</sup> If that's a market failure case, then

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<sup>24</sup> Rebecca Tushnet, *Why the Customer Isn't Always Right: Producer-Based Limits on Rights Accretion in Trademark*, 116 YALE L.J. POCKET PART 352 (2007).

<sup>25</sup> See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1013 n.2 (2017) (holding that anything you can imagine can be copyrighted unless it's a shovel).

<sup>26</sup> Wendy J. Gordon, *The "Why" of Markets: Fair Use and Circularity*, 116 YALE L.J. POCKET PART 358 (2007).

<sup>27</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

maybe it's not good law anymore; in a world of Hulu and Netflix, the transaction costs of authorized home viewing are much lower than they were when the case was decided. But if it's a case about values that aren't market-determined, like the right to do as you please in the privacy of your own home, then it's probably still good law.<sup>28</sup> Wendy should know, having written the foundational article on fair use as market failure and its application to the Betamax case,<sup>29</sup> and I think she was right in her commentary on my article. I was focused on the way the licensing market creates the feedback loop, so I didn't attend as much to non-market values. In my defense, I did acknowledge those values when I reviewed possible solutions to rights accretion,<sup>30</sup> but I was looking for a solution that was more normatively neutral—one that would solve the problem without assuming any particular view of, say, privacy rights—so I dismissed them.

The most sustained pushback against my thesis, however, came from a number of scholars, such as Pam Samuelson, Neil Netanel, and Matt Sag, who argue both theoretically and empirically that fair use is not so unpredictable.<sup>31</sup> They do so by categorizing fair use cases.

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<sup>28</sup> See Gordon, *supra* note 26, at 360–61 (recognizing the argument that the Sony case was about “privacy and proper behavior” rather than pure economics).

<sup>29</sup> Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

<sup>30</sup> Gibson, *supra* note 1, at 946 (recognizing that “some copyright commentators prize fair use because it protects certain ideals (e.g., privacy, free speech) that resist all market valuation, externalized or not.”).

<sup>31</sup> Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011).

I think that work is very interesting and illuminates the changing nature of fair use, and particularly the way that transformative use has become one of the most important battles to win as a fair use litigant. But in the end, even after reading all those studies, I don't think fair use is more *predictable*. Take Matt's study, for example. We have to have a transformative use (itself a contested issue), plus partial copying, plus an individual as a defendant before we get to an eighty-seven percent chance to win—and we're still within a standard deviation of the seventies, which would give even a risk-neutral user pause.<sup>32</sup> And that's ignoring the selection bias that arises from looking at published cases only.

In short, I think that Larry Lessig's quip from fifteen years ago—that the fair use right is so indeterminate that it's really just “the right to hire a lawyer”—is still correct today.<sup>33</sup> And even when you hire a lawyer, that lawyer is likely to advise you to license rather than litigate. In fact, I do some consulting work, and even with clients whose fair use cases I am pretty confident I could win in court, I have consistently advised them to get a license instead. I do this knowing full well that I am fueling the very dynamic that I complained about in my scholarship. The fact that I can confidently classify the case as transformative, or categorize it within a group of fair use cases involving similar factors, has not significantly affected the decision calculus that I use as a lawyer with my clients' interests in mind.

Remember also that fair use is just one of the doctrines that leads to unpredictability about the need for a license. Substantial similarity is a moving target, as is

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<sup>32</sup> Sag, *supra* note 31, at 79–80.

<sup>33</sup> LAWRENCE LESSIG, *FREE CULTURE* 187 (2004) (“[F]air use . . . simply means the right to hire a lawyer to defend your right to create.”).

idea/expression—consider the recent *Blurred Lines* and *Led Zeppelin* cases.<sup>34</sup> The feedback loop *closes* in fair use and its fourth-factor discussion of markets. But it does not necessarily *begin* in fair use; the uncertainty that prompts the license can originate in other indeterminate doctrines too.

### B. *Follow-On Scholarship*

Now, about scholarship that expanded, rather than pushed back against, my central thesis. I only wrote one such article myself.<sup>35</sup> In retrospect, it might have been better for my career if I had written a slew of follow-on articles that flogged the same horse. But honestly, after one or two articles on the same subject, I get bored. I want to learn about something new rather than become more expert in something familiar. So, true to form, I wrote one more article about doctrinal feedback and then went off to write about boilerplate contracts,<sup>36</sup> the death penalty,<sup>37</sup> and online platforms.<sup>38</sup> (Not all in the same article.)

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<sup>34</sup> *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018) (*Blurred Lines* case); *Skidmore v. Led Zeppelin*, 905 F.3d 1116 (9th Cir. 2018), *reh'g en banc granted*, 925 F.3d 999 (9th Cir. 2019).

<sup>35</sup> James Gibson, *Doctrinal Feedback and (Un)Reasonable Care*, 94 VA. L. REV. 1641 (2008).

<sup>36</sup> James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249 (2018); James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161 (2013).

<sup>37</sup> James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215 (2015).

<sup>38</sup> Christopher A. Cotropia & James Gibson, *Higher Education and the DMCA*, 25 RICH. J.L. & TECH. 1 (2018); Christopher A. Cotropia & James Gibson, *Convergence and Conflation in Online Copyright*, 105 IOWA L. REV. (forthcoming 2019). Indeed, the only other intellectual property scholarship I have published since the *Rights Accretion* article is Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921 (2010), and Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical*



That said, one of the most gratifying things from my career as a law professor has been to see other scholars take my observations from the article and deploy them further—sometimes in ways that I’d foreseen, but often in ways that I hadn’t. It’s a really nice example of how scholarship is supposed to work. All professors sometimes publish articles that seem to disappear into the ether, for reasons that may have nothing to do with the merits of the piece. So, when that doesn’t happen, it’s really rewarding—it restores one’s faith in the weird “venture capital” system that is modern legal scholarship.

I’ve already referred to some of this subsequent scholarship when I was discussing mistakes that I made and the people that identified and corrected those mistakes. When that happens, it’s not quite as gratifying as seeing others elaborate on one’s research, but it too is an important part of how we develop knowledge in the academy. And as I’ve already mentioned, the criticisms were mostly spot on, and in some cases solved problems that I wanted solved but didn’t think could so easily be solved, so I was more than happy to be proved wrong.

But back to the scholarship that has built off of the article in various ways. There have been articles that get at some of the moving parts of doctrinal feedback by trying to cabin overreaching rightsholders in various ways, like by imposing penalties for overreaching and regulating cease-and-desist practices.<sup>39</sup> There have been articles that apply the theory to other areas of intellectual property, such as hot news, technological implementation of notice-and-

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*Study of Copyright Litigation*, 92 TEX. L. REV. 1981 (2014), neither of which dealt with the doctrinal feedback phenomenon.

<sup>39</sup> E.g., Stacey Dogan, *Bullying and Opportunism in Trademark and Right-of-Publicity Law*, 96 B.U. L. REV. 1293 (2016).

takedown, and the right of publicity.<sup>40</sup> I think the fit with the right of publicity is particularly good, as I mentioned in an aside in the article.<sup>41</sup> That right has always been both amorphous and very dependent on public perceptions of what sort of uses of a person's persona require a license. I don't think it's any accident that Jennifer Rothman, who was doing similar work about the role of custom in intellectual property back when I wrote the article,<sup>42</sup> ended up as one of our premier experts on the right of publicity.<sup>43</sup> There are very similar dynamics at play.

I think there are also applications beyond intellectual property law that have mostly been unexplored. As I mentioned, I wrote one follow-on article myself, but it was not about intellectual property; it was on tort law.<sup>44</sup> The idea was that negligence standards often draw on the custom in the relevant industry. Think medical malpractice. But if doctors are risk-averse, or are simply operating near the reasonable care line, there's a natural tendency to pile on more care so as to distance oneself from potential liability. That added care then becomes the custom that defines negligence, which means the line shifts and even more care is needed to stay clear of it.<sup>45</sup> Voila: doctrinal feedback.

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<sup>40</sup> Shyamkrishna Balganesch, "Hot News": *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 434–35 (2011) (hot news); Noa Dreyman, *John Doe's Right of Publicity*, 32 BERKELEY TECH. L.J. 673, 703 (2017) (right of publicity); Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 563 (2017) (notice-and-takedown).

<sup>41</sup> Gibson, *supra* note 1, at 914 n.126.

<sup>42</sup> See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

<sup>43</sup> See JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018).

<sup>44</sup> Gibson, *supra* note 35.

<sup>45</sup> *Id.* at 1644–45.

Speaking of tort law, I've wondered if there is scholarly potential in a related issue. I have read of a box of nails that says—and I swear I did not make this up—“CAUTION! Do NOT swallow nails! May cause irritation!”<sup>46</sup> If that sort of idiocy becomes prevalent, does it form a new custom and thus a new standard of reasonable care that exposes the nail-maker who fails to include the warning to tort liability? If the dry cleaner has a sign that says, “Not responsible for lost shirts,” is that the final word on the matter? Is it even relevant to determining liability if they lose your shirt? One of my favorite examples of this sort of thing is a sign on the back of a truck that was transporting small rocks and gravel.<sup>47</sup> It says, “Not responsible for broken windshield,” and “Caution—stay back over 100 feet—not responsible for road objects.” Setting aside the fact that you have to be much closer than one hundred feet to even read the sign, what is the legal effect of this assertion?

We see this same declarative overreach in intellectual property too. I've wondered for a long time whether another contributor to rights accretion is the ridiculously broad public statements that rightsholders make about their rights. The most familiar may be the one that closes NFL broadcasts: “*This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or of any pictures, descriptions, or accounts of the game without the NFL's consent is prohibited.*” (A very similar statement comes at the end of every CBS broadcast of March Madness.) To which I say, seriously? I am prohibited from publicly describing the game, or giving an account of what happened? It's a moronic

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<sup>46</sup> Jane Easter Bahls, *Better Safe . . .*, ENTREPRENEUR, July 1, 2003, at 76.

<sup>47</sup> Photo on file with the author. I promise that I was not driving when I took the picture.

statement on its face, but its repetition probably has an effect on viewers and helps them form overbroad impressions of the reach of copyright.

These overbroad public claims were something I mentioned in a footnote,<sup>48</sup> but I think it might be worth an article all on its own, one that goes beyond intellectual property but uses intellectual property as an example. Maybe call it *Public Declarations of Private Law*.<sup>49</sup> Now, one might argue that these are contractual provisions, which is the kind of argument that led me to start writing about boilerplate; all the careful incentive/access balancing done in intellectual property law could be undone if courts have unrealistic views of what constitutes an enforceable contractual term. But the contracts rationale involves some tricky questions about assent, so it's an issue worth exploring.

The other potential application I've wondered about is in Fourth Amendment doctrine. Since 1967's *United States v. Katz* case, Fourth Amendment jurisprudence has used as its lodestar our "reasonable expectations of privacy."<sup>50</sup> But this invites circularity, as our privacy

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<sup>48</sup> Gibson, *supra* note 1, at 951 n.262; *see also id.* at 920 n.151 ("As one court reluctantly concluded, 'Apparently, in this day and age when professional sports teams franchise pennants, teeshirts, helmets, drinking glasses and a wide range of other products, a substantial number of people believe, if not told otherwise, that one cannot conduct [a state lottery based on NFL games] without NFL approval.' *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1381 (D. Del. 1977)."). For an article that focuses on this issue, see Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026 (2006).

<sup>49</sup> In fact, let me try it out right now: "I hereby declare that *Public Declarations of Private Law* is my idea and that any use of it or any pictures, descriptions, or accounts of it without my consent is prohibited."

<sup>50</sup> *See United States v. Katz*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Although the "reasonable expectations" language

expectations are formed, at least in part, by what intrusions on privacy the law does and does not allow. The circularity is particularly evident when technology makes possible some new intrusion on privacy; when these intrusions first emerge, we may have no expectations one way or the other with regard to them—or we might view them as unreasonable because they are not an intrusion we’ve encountered before.

This means that our expectations could essentially be manipulated (inadvertently, or not so inadvertently): the public starts using a new technology, and does so long enough and broadly enough that by the time the government uses it to spy on us, we’ve gotten used to it and view it as reasonable, and thus constitutional. For example, it would be hard to have gone in one fell swoop from a world in which your home was your castle to a world in which the police could hover four hundred feet over your property and peer through your window, as the government was authorized to do in *Florida v. Riley*.<sup>51</sup> But when the privacy intrusions accrete bit by bit, we adjust to them, as do our expectations: before *Florida v. Riley* there was *California v. Ciraolo*, which held that an airplane flyover at one thousand feet, which looked directly down at the property, was okay.<sup>52</sup>

Indeed, after enough of these sorts of cases, the Supreme Court essentially ratified the feedback effect in 2001, in *Kyllo v. United States*.<sup>53</sup> In that case, the police suspected that Kyllo was using heat lamps to grow marijuana indoors, so they used thermal imaging

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originated in a concurrence, it has become the prevailing standard. *See, e.g.,* *Carpenter v. United States*, 138 S. Ct. 2206, 2214–15 (2018).

<sup>51</sup> *Florida v. Riley*, 488 U.S. 445 (1989).

<sup>52</sup> *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>53</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

technology to peer through the walls of his house and see if there were suspiciously high levels of heat anywhere.<sup>54</sup> At first, one might think that this case shows a Fourth Amendment resistance to the erosion of privacy via newfangled technologies, because *Kyllo* won the case—the Court held that the use of the thermal imaging technology was a search and required a warrant.<sup>55</sup> But in fact the Court’s reasoning buttresses the feedback argument:

[O]btaining by sense-enhancing technology any information regarding the home’s interior that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area” constitutes a search—at least where (as here) the technology in question is not in general public use.<sup>56</sup>

So the problem was not the privacy violation inherent in the government’s peering through our walls with some newfangled technology. The problem was that the case had hit the courts too soon—not enough time had passed for the public to get used to and widely adopt thermal imaging equipment. “Don’t worry,” the Court was saying, “if you wait long enough, your rights will erode.” Once we get used to Amazon’s drones coming to our doorstep and taking pictures of it, will it really violate our expectations of privacy to have the government do the same? Oy.

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<sup>54</sup> *Id.* at 29–31.

<sup>55</sup> *Id.* at 40.

<sup>56</sup> *Id.* at 34 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

#### IV. DEVELOPMENTS IN PRACTICE

That covers developments—real and imagined—in scholarship. Now back to intellectual property and some related developments in practice, by which I mean not just litigation but in licensing. It’s a mixed bag. Certainly, the Copyright Clearance Center was given a huge boost by the *American Geophysical* case, which held that a market for personal archiving by academic researchers was likely to be developed,<sup>57</sup> thereby making development of such a market the only option—transaction costs be damned.<sup>58</sup> And although I have described doctrinal feedback as an organic, inadvertent process, there’s no doubt that it could be proactively manipulated by a strategically minded rightsholder: offer users sweetheart deals to establish a licensing market and then ramp up fees later when it’s too late to make a plausible fair use claim. I have not delved into it, but I suspect that the significant ramp-up in digital licensing costs for academic libraries may have originated in that kind of strategy.<sup>59</sup>

I think we came perilously close to a really bad licensing market in the litigation over the Google Books

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<sup>57</sup> *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930–31 (2d Cir. 1994).

<sup>58</sup> I agree with the dissent in this case that the majority was engaging in the very circular reasoning it sought to avoid. *See id.* at 937 (Jacobs, J., dissenting) (“There is a circularity to the problem: the market will not crystallize unless courts reject the fair use argument that Texaco presents; but, under the statutory test, we cannot declare a use to be an infringement unless (assuming other factors also weigh in favor of the secondary user) there is a market to be harmed.”).

<sup>59</sup> *See* Stephen Bosch et al., *Deal or No Deal: Periodicals Price Survey 2019*, LIBRARY J. (Apr. 4, 2019), <https://www.libraryjournal.com/?detailStory=Deal-or-No-Deal-Periodicals-Price-Survey-2019> [<https://perma.cc/AX79-ZP8V>] (reporting average price increase of six percent annually since 2012).

project. We now think of the resulting case law as having created more space for fair use, and that's true.<sup>60</sup> But that was a second-best solution from Google's perspective. Long before Google won its fair use cases, it tried to convince the court to adopt a settlement that provided for licensing—which the court rejected because it would have gone beyond the rights at dispute in the case.<sup>61</sup> Had the settlement happened, it might have been impossible for any other defendant to argue fair use, and equally impossible for any other defendant to strike such a licensing deal itself.<sup>62</sup> Thankfully, the settlement did not happen, and now others can take advantage of the fair use rights that the litigation established.

Fortunately, there are some occasional mavericks that push back against the licensing tendency. Right around the time the article was published there was the *Bill Graham Archives v. Dorling Kindersley Ltd.* case, in which the Second Circuit noted that “a copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational or other transformative uses.’”<sup>63</sup> We've also seen pushback against expansive substantial similarity holdings in cases like *VMG Salsoul* (the Madonna case out of the Ninth Circuit),<sup>64</sup> which split from

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<sup>60</sup> See *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

<sup>61</sup> *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

<sup>62</sup> I addressed this issue in James Gibson, *Accidental Rights*, 116 YALE L.J. POCKET PART 348 (2007) and James Gibson, *Opinion, Google's New Monopoly*, WASH. POST, Nov. 3, 2008.

<sup>63</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006) (quoting *Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998)).

<sup>64</sup> *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016).



the Sixth Circuit’s crazy *Bridgeport Music* decision.<sup>65</sup> So I may have been too pessimistic about the fate of such mavericks, although I think they are probably few and far between, and I suspect that the shadow of the clearance culture hides a lot of potential mavericks who end up caving.

One might also hope that rights accretion would also be tempered by a friendlier judicial attitude toward liability rules, instead of property rules, bled over from patent law. After all, the patent remedies case of *eBay v. MercExchange* cited copyright cases for its holding.<sup>66</sup> But empirical work suggests that has not happened,<sup>67</sup> and as I warned in the paper, it’s not clear that that would lead to less rights accretion anyway.<sup>68</sup>

## V. AIRING OF GRIEVANCES

Finally, the airing of grievances. I don’t really have anything serious here, except maybe a lesson for younger scholars. My article has been cited a lot in other scholarship and in briefs—so cry me a river, right?—but it’s never been cited by a court, as far as I know. It would be nice to be cited by a court. So, if you have a piece of scholarship that you think might be of use to courts, and you would like to be cited, consider authoring amicus briefs.

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<sup>65</sup> See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (inexplicably reading 17 U.S.C. § 114(a)—a statute that explicitly limits the reach of sound recording copyrights—as expanding that reach by doing away with the substantial similarity analysis).

<sup>66</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006).

<sup>67</sup> See Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 LEWIS & CLARK L. REV. 215 (2012).

<sup>68</sup> Gibson, *supra* note 1, at 945–46.

Other than that, my only whinging is that I think the article had something to say about trademark that has been mostly overlooked—or maybe overtaken is the better word. The most normatively neutral of the solutions I offered for rights accretion was for courts to delve into the why, not just the whether, of the relevant markets.<sup>69</sup> In trademark, this translates into requiring rightsholders to prove that consumer confusion is material to purchasing decisions before liability is imposed.<sup>70</sup> No one goes to see a movie because of the trademarked products in it—so even if moviegoers are confused about whether licensing is needed in that context, it shouldn't matter. In contrast, when it comes to traditional uses of traditional marks, like logos on packaging, I think we can assume materiality. Or at least the burden should be on the defendant to disprove it.

In the years since the article was published, this notion has worked its way into a number of excellent articles.<sup>71</sup> And I've usually been cited, but maybe not with the acknowledgement that it was an essential moving part in my trademark solution for the rights accretion problem. Indeed, a recent post on trademark materiality on the usually dependable Written Description blog summarized all the trademark scholars who had worked on materiality.<sup>72</sup>

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<sup>69</sup> *Id.* at 947–50.

<sup>70</sup> *Id.* at 949–50.

<sup>71</sup> *E.g.*, Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 881 (2018); Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305 (2011); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 436–46 (2010).

<sup>72</sup> Camilla Hrdy, *Recent Critiques of Post-Sale Confusion: Is Materiality the Answer?*, WRITTEN DESCRIPTION BLOG (Nov. 11, 2018, 12:50 PM), <https://writtendescription.blogspot.com/2018/11/recent-critiques-of-post-sale-confusion.html> [<https://perma.cc/43A5-BPNC>].

Except one. Sigh. (To be fair, my article was not as recent as the others, and every scholar probably thinks that his or her work is more inspirational to others than it really is.)

So maybe that's a takeaway for younger scholars: if you think you have a good idea, flog it. Get it in print early and often, and don't worry about writing narrower scholarship if that's what it takes to stake a claim and expand on an idea that you have theretofore only mentioned in passing. I have always tended to wait until I have a magnum opus (or what I think is one) before I publish, which probably is not the best way to build a career. But who am I to complain? I got picked for the Intellectual Property Redux.