

# ESSAY

## HATCH-WAXMANIZING COPYRIGHT

*Michal Shur-Ofry\**

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*This Essay presents a novel proposal for counterbalancing “copyright over spills.” In the background of the discussion is the common reality of users succumbing to rights holders’ attempts to license uses which are most likely fair uses or completely free of copyright protection. These practices have attracted considerable attention in recent literature. Most scholarly proposals in this context emphasize the need to clarify the contours of the fair use doctrine and to remove doctrinal ambiguities. Yet these initiatives are probably insufficient to overcome users’ risk aversion in copyright markets due to an inherent structural imbalance within copyright law. While the law is designed around the prevailing narrative of providing an incentive for innovation, it is quite oblivious to providing an incentive to challenge copyright over spills. The Essay argues, then, that users should be provided with an actual incentive to challenge undue attempts to broaden the scope of copyright.*

*The proposal draws on the experience acquired in other branches of intellectual property. More specifically, it is inspired by the unique system of incentives created under the Hatch-Waxman Act in order to encourage generic pharmaceutical companies to challenge pharmaceutical patents. These incentives have led to a significant rise in the number of patent challenges in the pharmaceutical field. In the spirit of the Hatch-Waxman regime, the Essay discusses the introduction of an incentive to challenge into copyright law to offset copyright over spills. It then proposes to develop an affirmative copyright misuse doctrine, which would entitle successful challengers of copyright over spills to statutory damages. Beyond the doctrinal proposals, the Essay’s more fundamental conclusion is that, in order to achieve the desired access-incentive equilibrium, copyright law should not be concerned merely*

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*with providing an optimal degree of incentive to innovate but also with providing users with an adequate incentive to challenge.*

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## INTRODUCTION

Recent copyright scholarship correctly identifies that copyright protection produces a chilling effect on legitimate and permitted uses.<sup>1</sup> The principal cause for this phenomenon is the unpredictability of the fair use doctrine coupled with general risk aversion by users.<sup>2</sup> The combination of the two discourages users from challenging rights holders' payment requirements and encourages users to seek licenses even for permitted and fair uses.<sup>3</sup> This practice, which Jennifer Rothman has termed "the clearance culture,"<sup>4</sup> leads to the *de facto* broadening of copyright law beyond its *de jure* limits and to the corresponding shrinking of the public domain. Numerous proposals have been made to deal with this phenomenon, most of which aim to increase the clarity and certainty in the application of copyright law's exceptions, particularly the fair use doctrine.<sup>5</sup>

This Essay shares the above concerns but proposes a different conceptual approach for addressing them. This approach is inspired by one field of intellectual property where rights are constantly being challenged by prospective users to the benefit of the public domain and the public in general. This is the field of pharmaceuticals, governed by the Drug Price Competition and Patent Term Restoration Act of 1984, also known as the

1. See generally Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271 (2008); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007); Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) [hereinafter Rothman, *Custom*].

2. Cotter, *supra* note 1, at 1284–88; Gibson, *supra* note 1, at 891–94. As demonstrated below, risk aversion characterizes particularly those users whose use of copyrighted works is scattered and incidental. See *infra* text accompanying notes 13–14, 28–29.

3. Gibson, *supra* note 1, at 884; Rothman, *Custom*, *supra* note 1, at 1911.

4. Jennifer Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 75 J. COPYRIGHT SOC'Y 371, 371 (2010) [hereinafter Rothman, *Best Intentions*]; Rothman, *Custom*, *supra* note 1, at 1911.

5. See, e.g., Gibson, *supra* note 1, at 935–47; *infra* notes 18–19.

“Hatch-Waxman Act.”<sup>6</sup> The Act contains a complex set of provisions, among them the provision commonly known as “Paragraph IV.”<sup>7</sup> “Paragraph IV” creates a detailed intellectual property challenging mechanism by granting a 180-day generic exclusivity to the first company that files a generic drug for approval and successfully challenges the patents protecting the innovator’s (“brand-name”) drug. This substantial incentive has led to the development of vibrant patent-challenging litigation in the pharmaceutical field, which narrows patent over spills by striking out weak patents or by accelerating entry of generic substitutes into the market, to the benefit of the public.<sup>8</sup>

Without being oblivious to the difficulties entailed in the implementation of the Hatch-Waxman Act, nor to proposals for various amendments to the Act on the part of many scholars, I believe this regime carries an important conceptual lesson for copyright law: copyright’s prevailing narrative should not be concerned merely with providing an incentive for innovation. In order to counter-balance copyright over spills and maintain the desired incentive-access equilibrium, copyright law should also provide users with an adequate incentive to challenge.

The Essay, then, proceeds as follows: Part I describes the need for an incentive to challenge in copyright law. Building on existing literature discussing copyright’s expansion beyond its statutory scope, it argues that most current proposals to remedy this phenomenon are likely to be insufficient to overcome users’ risk aversion. The analysis further demonstrates that in order to counterbalance copyright over spills, the law should provide users with an affirmative incentive to challenge. Part II briefly describes the incentive to challenge regime in the field of pharmaceutical patents as established under the Hatch-Waxman Act and considers its conceptual significance for copyright law. Part III explores how an incentive to challenge regime can be incorporated in copyright doctrine, particularly the development of an affirmative copyright misuse doctrine and the introduction of a statutory damages remedy for copyright misuse. Concluding remarks follow.

## I. THE NEED FOR AN INCENTIVE TO CHALLENGE IN COPYRIGHT LAW

### A. Copyright’s Overspill Externalities

This Essay was sparked by a personal experience. I was about to publish an academic book entitled “Popularity and Networks in Copyright

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6. The current version is codified at 21 U.S.C. § 355 (2006). Previous codification was scattered among sections of 15, 21, 35 and 42 U.S.C. The differences between the versions are immaterial for our purposes here.

7. 21 U.S.C. § 355 (j)(5)(B)(iv) (2010).

8. See discussion of the Hatch-Waxman scheme *infra* Part II.

Law,”<sup>9</sup> and was discussing the exciting issue of the front cover with a colleague. He proposed that the cover present several famous cartoon characters, as these popular works are, after all, the subject of the book. “I don’t have the budget for licensing these images,” I told him. “It’s probably fair use,” he observed, “you don’t actually need a license.” “You’re right,” I replied. “Still, I cannot risk being sued by the studios.” The idea was thus abandoned.

This anecdote is merely a small example of copyright’s chilling effect. As James Gibson recently observed, copyright markets are characterized by a “license-don’t-litigate” policy: a tendency to license each and every use of underlying works, even when there is a strong fair use case or other defense against infringement.<sup>10</sup> Several prominent factors can explain this overly conservative policy. First, the doctrinal ambiguities in the law itself, particularly in the fair use doctrine, make the *ex ante* prediction of the prospects of a fair use argument largely uncertain, which in turn directs users towards seeking a clearance.<sup>11</sup> A second, related factor is users’ risk aversion: as highlighted by James Gibson and Thomas Cotter, the risks of being sued, which entail litigation costs and may also have insurance implications, often outweigh the perceived advantage of a free use.<sup>12</sup> Furthermore, while rights holders often have a clear incentive to enforce copyright protection in an overly expansive manner, the costs of individual licenses for uses which are *de jure* permitted may be relatively modest, and the overall damage resulting from over-expansive copyright is often dispersed over a large number of users. Each user therefore lacks a clear incentive to object to such overspill.<sup>13</sup> Thus, some users may well decide to abandon a desired use, despite its actual legality, as illustrated by the famous example of director John Else. Else attempted to use a very short segment from *The Simpsons* in the background of a documentary film. He abandoned the idea after rights holders requested he pay thousands of dollars, despite receiving legal advice that his use was in fact a fair use.<sup>14</sup> In other instances where the requested fee is relatively modest, seeking a clearance is often the rational choice even for repeat, sophisticated players in the media industry who are acquainted with the intricacies of copyright law’s limitations. The result is that copyright protec-

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9. MICHAL SHUR-OFRY, POPULARITY AND NETWORKS IN COPYRIGHT LAW (2011).

10. Gibson, *supra* note 1, at 891.

11. *Id.* See Cotter, *supra* note 1, at 1284 (highlighting the inherent uncertainty of the fair use doctrine); Rothman, *Custom*, *supra* note 1, at 1910–11 (criticizing the ambiguity in the application of fair use by courts).

12. Cotter, *supra* note 1, at 1284–88; Gibson, *supra* note 1, at 893–94.

13. See Cotter, *supra* note 1, at 1274 (making a similar observation); Alexander Peukert, *A European Public Domain Supervisor*, INT’L REV. INTELL. PROP. & COMPETITION L. (forthcoming 2011), available at <http://ssrn.com/abstract=1711745> (highlighting the asymmetry between users’ and owners’ incentives).

14. For a detailed account of this affair, see NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 15–17 (2008); *Staking Claims in Cyberspace*, DUKE MAG., Sept.–Oct. 2003, available at <http://www.dukemagazine.duke.edu/dukemag/issues/091003/claims1.html>.

tion spills over to deter uses beyond the scope of the rights granted under the Copyright Act.

Moreover, scholars correctly indicate that this “clearance culture” further influences the fair use doctrine in a circular manner, since courts often consider non-conformity with industry practices as a factor weighing against fair use.<sup>15</sup> This circular feedback, then, results in further shrinking of the public domain.

Copyright overspills are further enhanced by additional market circumstances and rights holders’ practices. For example, Joseph Liu has recently highlighted the tendency of copyright intermediaries to disable or prohibit certain otherwise-permitted uses by end-users for fear of incurring liability due to their enablement.<sup>16</sup> Jason Mazzone discussed the similarly problematic practice of rights holders making unfounded allegations as to the subsistence of copyright in certain copyright-free contents—such as court cases, legislative materials, or materials in which copyright has long expired—and the conditioning of use upon unjustified conditions.<sup>17</sup>

### B. *Overcoming Overspills and the Balance of Incentives*

Against this background, copyright scholars are currently engaged in a thriving discussion of possible solutions to the overspill phenomenon. A series of proposals have been put forward in this context. Most of them aim to increase the clarity of the fair use doctrine and other copyright standards in hopes that greater certainty will encourage users to object to copyright overspills.<sup>18</sup> These efforts have led to the establishment of “fair use best practices” in various fields that strive to represent the understandings and practices of various industries as to permitted uses.<sup>19</sup> Others suggest further

15. See Gibson, *supra* note 1, at 897 (describing the “doctrinal feedback” of overly conservative licensing practices); Rothman, *Custom*, *supra* note 1, at 1902 (highlighting that courts consider non-conformity with industry practices as a basis for rejecting fair use).

16. Joseph P. Liu, *Toward a Defense of Fair Use Enablement, or How U.S. Copyright Law Is Hurting My Daughter*, 75 J. COPYRIGHT SOC’Y 101, 103–04 (2010) (analyzing this tendency and further proposing a defense of “fair use enablement” to intermediaries).

17. See Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1027–99 (2006) (describing varieties of such practices, which he terms “copyfrauds”); Cory Tadlock, *Copyright Misuses, Fair Use, and Abuse: How Sports and Media Companies Are Overreaching Their Copyright Protections*, 7 J. MARSHALL REV. INTELL. PROP. L. 621, 640–45 (2008) (describing the practices of overly broad copyright warnings employed by entities in the sports and media industry).

18. See Gibson, *supra* note 1, at 934–42 (admitting though that this solution is far from simple); cf. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1497–1503 (2007) (advocating the introduction of “harbors” that define minimum levels of uses as “fair”).

19. See, e.g., Niva Elkin-Koren et al., *Fair Use Best Practices for Higher Education Institutions: The Israeli Experience*, J. COPYRIGHT SOC’Y (forthcoming), available at <http://ssrn.com/abstract=1648408> (describing an initiative to establish “fair use best practices” for Israeli academic institutions); Rothman, *Best Intentions*, *supra* note 4, at 1909–65 (describing the spreading phenomenon of fair use practices). For a specific example of a practice

expanding educational measures, such as law clinics, aimed at educating and encouraging the public to exercise its fair use rights.<sup>20</sup> An additional proposal calls for the establishment of a “public domain supervisor” that will represent the interests of the public in public and political fora that are frequently influenced more by stakeholders than by users.<sup>21</sup>

A critical analysis of these proposals is beyond the scope of this Essay. Briefly, however, “fair use best practices” have been criticized for being designed without the involvement of stakeholders and for being more wishful thinking than an actual representation of the law.<sup>22</sup> On the other hand, the related proposal to establish statutory fair use “safe harbors” may eliminate the inherent flexibility of the current fair use doctrine, and may also prove to be a double-edged sword if statutorily permitted uses intended as minimums instead become *de facto* maximums when interpreted by courts.<sup>23</sup>

The concern I wish to highlight here, however, is of a more general nature. Most of the measures proposed in recent scholarly discussion, even if presumably desirable and even if implemented in their entirety, may be insufficient to significantly decrease users’ risk aversion and their lack of incentive to challenge stakeholders’ demands.<sup>24</sup> A simple economic calculation indicates that in many instances, paying a modest clearance fee to stakeholders may be the rational choice, even for sophisticated users who are repeat players in the media industry. Consider the following (hypothetical) example: a newspaper wishes to quote several lines of Martin Luther King’s “I Have a Dream” speech. Now, imagine that King’s estate requires a fee of \$400 for this use.<sup>25</sup> The newspaper receives legal advice that the

that was established by several organizations, see *Fair Use Principles for User-Generated Content*, ELECTRONIC FRONTIER FOUND., available at [http://www.eff.org/files/UGC\\_Fair\\_Use\\_Best\\_Practices\\_0.pdf](http://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf) (last visited Nov. 16, 2011). *But see infra* note 22 and accompanying text (describing Rothman’s criticism of these practices).

20. Rothman, *Best Intentions*, *supra* note 4, at 386.

21. See Peukert, *supra* note 13. See also Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 430–47 (2009) (proposing the establishment of a public agency to regulate and administer fair use). Other ideas raised in this context are the establishment of a public domain registry to minimize “copyfrauds” and the formation of a “fair use enablement” defense for intermediaries that facilitate fair use by third parties. See Liu, *supra* note 16, at 119–22; Mazzone, *supra* note 17, at 1090–91.

22. See, e.g., Rothman, *Best Intentions*, *supra* note 4, at 376.

23. Gibson, *supra* note 1, at 884–85, 938; cf. Parchomovsky & Goldman, *supra* note 18, at 1524–28 (acknowledging these objections but estimating that the concerns are exaggerated).

24. For a similar observation see Cotter, *supra* note 1, at 1312–18 (noting that “tinkering” with fair use may be an ineffective means for overcoming the problem of over-enforcement).

25. Although the example is hypothetical, it does not seem completely farfetched. Cf. KEMBLEW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 33 (2005) (describing how the author was asked to pay over \$200 to the copyright holders for quoting four sentences from the “I Have a Dream” speech,

quote is probably a fair use and the consent of the rights holders is therefore unnecessary. Yet, from an *ex ante* perspective, the newspaper must also take into account the potential costs of challenging the rights holder's position. These include the low chances that the fair use argument will eventually be rejected and the newspaper will have to pay a substantial amount of statutory damages for copyright infringement.<sup>26</sup> Often, these also include the costs of litigation [ $L_c$ ] and the possible increase in the costs of insurance [ $I_c$ ] resulting from the mere filing of the suit.<sup>27</sup> Thus, when the *ex post* statutory damages may amount to \$150,000 for willful infringement or \$30,000 for a "regular" infringement, and the *ex ante* clearance fee is relatively modest (\$400 in our example), the rational and risk-averse user is likely to pay the fee rather than challenge the rights holder's demand, even when the prospect of succeeding in a fair use argument is as high as 80%.<sup>28</sup> Another rational alternative would be to avoid using the content in question altogether, assuming that such use is not critical for the user's project.<sup>29</sup> This option may be particularly attractive for incidental, non-industry users whose familiarity with the subtleties of permitted uses may be more limited.<sup>30</sup>

This analysis reveals an inherent structural imbalance within copyright law. Indeed, it is widely acknowledged that copyright law is not only concerned with the incentive to innovate, but also seeks to achieve an (ever elusive) equilibrium between incentivizing innovation and additional values which necessitate access to copyrighted works.<sup>31</sup> *De jure*, this balance is

and further detailing how USA Today, which in 1993 reprinted the speech in its entirety to mark its thirtieth anniversary, was sued by the estate of Martin Luther King, Jr.).

26. See 17 U.S.C. § 504(c)(2) (2006) (providing that willful copyright infringement may entitle the copyright owner to statutory damages up to a maximum amount of \$150,000). Under subsection (1) of this provision, the amount of statutory damages in the absence of willful infringement can reach \$30,000. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law*, 51 WM. & MARY L. REV. 439, 441 (2009) (noting that the "willfulness" requirement has been interpreted quite broadly by courts).

27. See *supra* text accompanying note 12.

28. Roughly, the calculation is: \$400 [Clearance Fee] < \$30,000 / \$6,000 [claim's estimated prospects of 20% x maximum statutory damages of \$150,000 or \$30,000, respectively] +  $L_c$  +  $I_c$ . True, this is a very rough illustration, as the amount of statutory damages awarded in a certain case may be lower than the maximum amount and the *ex ante* prospects of a claim cannot be accurately evaluated. However, the illustration does serve to demonstrate the distorted "balance of incentives" under the present regime.

29. Consider, again, the example of John Else, who renounced using a segment of *The Simpsons* as a background in his documentary. See NETANEL, *supra* note 14 and accompanying text.

30. Joseph Liu colorfully illustrates this point by describing his daughter's decision to refrain from drawing "famous" characters altogether. See Liu, *supra* note 16, at 104–05.

31. The latter statement is of course oversimplified, since copyright law can and does promote additional interests besides creating incentives, such as personality interests or Lockean values. See, e.g., ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY 9–10, 140 (2011) (arguing for pluralism regarding the normative foundations of IP while emphasizing

achieved by the introduction of limitations to the scope of copyright. Yet, as demonstrated above, the law's current structure results in the *de facto* expansion of copyright beyond its intended scope. In other words, while copyright law is designed around the prevailing narrative of providing an incentive to innovate, it is quite oblivious to providing an incentive to challenge copyright overspills. Decreasing the law's ambiguity may improve the situation in some cases, but would not significantly affect this imbalance in many others. As Thomas Cotter recently observed in the context of fair use, the doctrine "relies on individuals to champion the public interest . . . without providing them with sufficient incentive to do so."<sup>32</sup> Protecting the equilibrium envisioned by the legislature, then, requires forming a regime to incentivize users to affirmatively challenge the scope of copyright.

Interestingly, a look beyond the contours of copyright law reveals that such a mechanism has already been introduced in another area of intellectual property law. I am referring to the field of pharmaceutical generic litigation under the Drug Price Competition and Patent Term Restoration Act, commonly known as the "Hatch-Waxman Act."<sup>33</sup> Before taking a closer look at the incentive to challenge regime under the Hatch-Waxman Act, a caveat is in order. Indeed, the Act regulates a different subject matter, and its provisions cannot be copied and pasted into copyright law in a verbatim manner for numerous reasons that are discussed below.<sup>34</sup> Yet, despite this caveat, the incentive to challenge regime under the Hatch-Waxman Act is an important example that can inspire the establishment of a market-based incentive to challenge mechanism within copyright law. The following Part takes a closer look at this scheme.

## II. INCENTIVE TO CHALLENGE: THE HATCH-WAXMAN REGIME

The Hatch-Waxman Act introduced a complex web of provisions concerning both patent law and drug-approval processes by the Food and Drug Administration ("FDA"). A complete review of these terms is beyond the scope of this Essay.<sup>35</sup> Rather, for our purposes it is sufficient to describe the unique incentive to challenge system the Act created.

The legislation was motivated, at least in part, by the notion that innovative ("brand-name") drug companies sometimes succeed in registering weak

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that these foundations cannot be limited to utilitarian concepts); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

32. Cotter, *supra* note 1, at 1274.

33. 21 U.S.C. 355 (2006).

34. See *infra* text accompanying notes 58–61.

35. For a more comprehensive review of the Act's provisions, see Michael Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37 (2009); Gregory Dolin, *Reverse Settlements as Patent Invalidity Signals*, 24 HARV. J.L. & TECH. 282 (2011); Alfred Engelberg, *Special Patent Provisions for Pharmaceuticals: Have They Outlived Their Usefulness?*, 39 IDEA 389 (1999).



and low-quality patents whose validity is questionable.<sup>36</sup> These patents extend the *de facto* protection granted to certain drugs and may block the market entry of generic competitors for many years beyond the life of the initial patent that often protects the novel component of the drug.<sup>37</sup>

Indeed, patents are open to challenge even after their registration, and defendants can raise invalidity arguments during infringement litigation. Yet, despite these mechanisms, in the arena of pharmaceutical patents too, risk aversion often prevailed. The inherent *ex ante* uncertainty of litigation outcomes<sup>38</sup> combined with the substantial litigation costs in this field, which can easily reach millions of dollars,<sup>39</sup> hindered the challenging of patents that protect “brand-name” pharmaceuticals. An additional burden to such challenges was other players’ ability to immediately take advantage of holdings of invalidity obtained by a generic company.<sup>40</sup> Much like in copyright law, then, “patent over spills” prevailed: patents that did not actually reflect non-obvious advancement over prior art were under-challenged, to the detriment of the public and the public domain.<sup>41</sup>

Against this background, the Hatch-Waxman Act introduced a sophisticated set of provisions designed to increase generic manufacturers’ incentive to challenge, with the ultimate purpose of targeting the high prices of pharmaceuticals. First, it introduced a process of Abbreviated New Drug Application (“ANDA”), which enables the FDA to approve generic versions of innovative pharmaceutical drugs on the basis of demonstrated bioequivalence to an already approved drug.<sup>42</sup> When the innovator’s drug is patent-protected, the generic firm may challenge such protection by filing an ANDA containing a “Paragraph IV” certification. By so doing, the generic firm alleges that the patents that are listed with the FDA database (commonly

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36. C. Scott Hemphill & Bhaven N. Sampat, *When Do Generics Challenge Drug Patents?*, 8 J. EMPIRICAL LEGAL STUD. 613 (forthcoming Dec. 2011) (manuscript at 25–26), available at <http://ssrn.com/abstract=1640512>.

37. *Id.* manuscript at 6.

38. See Mark Lemley & Carl Shapiro, *Probabilistic Patents* 38 J. ECON. PERSP. 75 (2005) (analyzing patents in terms of a right to attempt to exclude alleged infringers and emphasizing that litigation outcomes are uncertain from an *ex ante* perspective).

39. See Dolin, *supra* note 35, at 14; Hemphill & Sampat, *supra* note 36, manuscript at 9; see also Matthew Higgins & Stuart Graham, *Balancing Innovation and Access: Patent Challenges Tip the Scale*, 326 SCIENCE 370 (2009).

40. See Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won’t Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 BERKELEY TECH. L.J. 1, 9–10 (2004) (analyzing the “public good” problem which creates a disincentive to challenge patents); see also Hemphill & Sampat, *supra* note 36, manuscript at 9.

41. See Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 113–39 (2006) (referring mainly to patents whose subject matter is not covered by the Hatch-Waxman Act).

42. 21 U.S.C. § 355(j)(8)(B)(2)(A) (2010). The bioequivalence requirement replaced the need to conduct independent clinical trials to demonstrate the safety and efficacy of the generic pharmaceutical. See Dolin, *supra* note 35, at 9; Hemphill & Sampat, *supra* note 36, manuscript at 8.

known as “the Orange Book”) as protecting the innovator’s drug are invalid or not infringed by its own generic product.<sup>43</sup> Such a “Paragraph IV” filing normally triggers a patent infringement suit by the innovator in which the questions of patent validity and infringement are litigated.<sup>44</sup> In addition, and most important for our purpose, the Act further provides that the first generic filer of an ANDA under “Paragraph IV” is entitled, under certain conditions, to a 180-day period of generic exclusivity to sell its own generic product.<sup>45</sup> In other words, during the generic exclusivity period, the first filer can market and sell its generic product, while other filers of ANDAs with respect to the same drug must wait at least until the expiration of the generic exclusivity period before they can enter the market. When the drug in question enjoys substantial sales, such “Paragraph IV” exclusivity may be extremely valuable.<sup>46</sup>

Recent empirical research conducted by Scott Hemphill and Bhaven Sampat demonstrates that this set of provisions, particularly the quasi-intellectual property right set up by the “Paragraph IV” mechanism,<sup>47</sup> was indeed successful in establishing an environment that encourages patent challenging among generic pharmaceutical firms.<sup>48</sup> The number of patent challenges following its introduction has dramatically increased.<sup>49</sup> Moreover, as may be expected, patent quality is one of the significant factors which influences the decision to challenge, and patent challenges under the Hatch-Waxman regime indeed seek to target those weaker patents that are more likely to create “patent over spills.”<sup>50</sup>

Admittedly, the provisions of the Hatch-Waxman Act in this context and their implementation are not immune from difficulties and criticism. Most of the criticism focuses on the practice of “reverse payment settlements” which developed under the Act. Under these practices, the parties settle the “Paragraph IV” litigation without obtaining a decision as to the validity (or non-infringement) of the challenged patent. Under a typical settlement agreement, generic entrance to the market is somewhat delayed in return for a certain payment or other benefits from the innovator com-

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43. 21 U.S.C. § 355(j)(5)(B)(iv).

44. For a detailed review of this mechanism, see Dolin, *supra* note 35, at 12–14.

45. 21 U.S.C. § 355(j)(5)(B)(iv). The detailed conditions triggering the Paragraph IV exclusivity are immaterial to our purpose.

46. Higgins & Graham, *supra* note 39, at 370 (noting that the average potential payoff of the Paragraph IV challenge is \$60 million in the first 180 days); see also C. Scott Hemphill & Mark A. Lemley, *Earning Exclusivity: Generic Drug Incentives and the Hatch-Waxman Act*, ANTITRUST L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1736822> (analyzing the value of the exclusivity period under the Act).

47. The right was termed “a mini-patent” by Hemphill & Lemley. See Hemphill & Sampat, *supra* note 46, at 8.

48. Hemphill & Sampat, *supra* note 36, manuscript at 14–15.

49. Higgins & Graham, *supra* note 39, at 370; see also Hemphill & Sampat, *supra* note 36, manuscript at 3.

50. See Hemphill & Sampat, *supra* note 36, manuscript at 18–26.

pany.<sup>51</sup> Current scholarship raises concerns that such settlements might deprive the public of at least some of the benefits resulting from patent challenges.<sup>52</sup>

A detailed review and evaluation of that criticism is certainly beyond the scope of this Essay. As already emphasized, my aim is not to propose a *verbatim* import of the Hatch-Waxman mechanism into copyright law. For reasons discussed in Part III, such a measure would be both impractical and undesirable.<sup>53</sup> I do suggest, however, a more general insight that can be drawn from the experience accumulated with respect to pharmaceutical patents during the last few decades. The regime established under the Hatch-Waxman Act carries an important *conceptual* lesson for copyright law: it demonstrates that *ex post* market scrutiny of intellectual property overspills is an obtainable task if the appropriate set of incentives is embedded in the relevant law. It further demonstrates that providing a significant incentive to challenge helps to overcome risk aversion and makes a significant difference in the willingness of private actors to embark upon the challenging of intellectual property rights.

This is a lesson that copyright law should seek to embrace. Like patent law in the pharmaceutical field, copyright law cannot be confined to the prevailing narrative of providing an incentive to create. Rather, in order to counterbalance its overspill externalities, copyright, too, must concern itself with providing an affirmative incentive to challenge. In the following Part, I turn to explore possible manners of incorporating an incentive to challenge regime within copyright law.

### III. APPLICATION TO COPYRIGHT

#### A. *The Conceptual Framework*

In light of the previous analysis, several issues should be considered while searching for an incentive to challenge regime that is suitable for copyright law. First, the need to use private parties as effective guardians of the public domain, by providing them with an adequate set of incentives, may be even more crucial in the field of copyright than in the area of patents. The registration requirement that applies to patents entails an *ex ante* examination of

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51. See, e.g., Michael A. Carrier, *2025: Reverse-Payment Settlements Unleashed*, CPI ANTITRUST J., Dec. 2010 (2) (criticizing the practice of reverse payment settlements from an antitrust perspective); Dolin, *supra* note 35 (calling for a patent reexamination in cases of reverse payment settlement); Hemphill & Lemley, *supra* note 46 (arguing that in order to achieve the goals of the Hatch-Waxman Act, the exclusivity under the Act should be granted to the first generic company that *actually* enters the market).

52. See *supra* note 51 and accompanying text. For a discussion on strategies for delaying generic entry developed by "brand-name" companies pursuant to the Hatch-Waxman legislation, see Hemphill & Lemley, *supra* note 46, at 16–24.

53. See *infra* notes 58–61 and accompanying text.

patent applications prior to their grant. Despite its imperfections, the registration system does provide a certain level of administrative filtering of patent overspills.<sup>54</sup> Such an administrative system does not exist with respect to copyright subject matter, whose protection does not depend on any formal registration. Indeed, several commentators have recently suggested establishing various administrative measures in order to inhibit copyright overspills.<sup>55</sup> Yet the Hatch-Waxman experience suggests that a market-based system that encourages *ex post* review and challenge by private parties is feasible. Indeed, with an appropriate set of incentives, such a scheme can be more efficient than administrative scrutiny.<sup>56</sup> Furthermore, this market-based approach may be more consistent with the current structure and operation of copyright law, and also with international agreements that do not allow subjecting copyright to formalities.<sup>57</sup> In addition, it does not involve the costs entailed in establishing new regulatory mechanisms.

On the other hand, including an exact parallel of Hatch-Waxman exclusivity in copyright law is neither desirable nor realistic. The differences between the subject matter of copyright overspills and the overspills with which the Hatch-Waxman Act is concerned are important and cannot be ignored. An early market entry by a generic producer of a life-saving pharmaceutical can be of vast significance to the public, which may justify an incentive in the form of a generic marketing exclusivity, whose potential value to the generic producer may be immense.<sup>58</sup> The fair use of books, articles, films, or other copyright-protected works, while undoubtedly significant from both economic and democratic perspectives, does not warrant such a powerful measure. Furthermore, successfully challenging the validity of a pharmaceutical patent carries immediate general benefits to other pharmaceutical players and to the public at large because the invalid patent is erased from the registry. These benefits may justify the particular incentive provided under the Hatch-Waxman Act to the first filer. On the other hand, asserting that a particular use of a copyrighted work is a permitted or a fair use is context-specific. Although such holdings may have certain precedential value, their effect is less general.

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54. *But cf.* Farrell & Merges, *supra* note 40 (arguing that the *ex ante* administrative scrutiny of patent applications by the Patent Office is limited and should be strengthened).

55. *See, e.g.*, Mazzone, *Administering Fair Use*, *supra* note 21 (making various proposals for regulating fair use through an administrative agency); Peukert, *supra* note 13 (suggesting the establishment of a European public domain supervisor); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L. J. 1175, 1198 (2011) (proposing to reinvigorate the copyright registration requirement).

56. *See* Hemphill & Sampat, *supra* note 36.

57. *See* Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, 1161 U.N.T.S. 30. The provision is incorporated by reference in Article 9(1) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement (1994) as well as in Article 3 of the World Intellectual Property Organization (WIPO) Copyright Treaty (1996).

58. *See supra* note 46.

Moreover, in light of the differences in subject matter and in market structure, providing a limited exclusive right to users is unlikely to create any substantial incentive to challenge overspills in the copyright arena. Let us consider, again, the hypothetical “I Have a Dream” example.<sup>59</sup> Imagine that the newspaper seeking to use the segment from the speech successfully challenges the rights holder’s position and succeeds in litigating its fair use argument. In return, it is granted a 180-day exclusivity in utilizing and licensing that segment. However, due to the modest license fee requested for this use<sup>60</sup> and the dispersed and incidental nature of potential licensees,<sup>61</sup> the value of such an exclusive right is likely to be rather limited. It is unlikely to counterbalance the *ex ante* anticipated cost of challenging the scope of copyright nor would it create a real incentive to challenge.

The interim conclusion, then, is that—despite the inspiration provided by the field of pharmaceutical patents—creating an incentive to challenge regime in copyright law cannot be based upon providing exclusive rights with respect to the challenged material. Rather, an incentive to challenge has to be integrated into copyright law in a manner that would suit both the structure of copyright markets and the nature of copyright subject matter. This is where I turn in the following Section.

### B. Incentive to Challenge and Copyright Misuse

My proposal is rather simple. Copyright law should employ the copyright misuse principle as a vehicle for introducing an incentive to challenge regime into copyright doctrine.<sup>62</sup> The proposal is twofold: the first is the introduction of statutory damages equal to the statutory damages for willful copyright infringement as a potential remedy for copyright misuse. The second is the recognition of copyright misuse as an affirmative doctrine that entitles users to initiate legal proceedings against rights holders. Under this proposed scheme, unduly objecting to a legitimate use (such as a fair use or a use of a work in which the copyright has expired) would constitute copyright misuse on the part of the rights holder.<sup>63</sup> Moreover, a decision that copyright was

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59. See *supra* notes 25–28 and accompanying text.

60. In our example, \$400 per use.

61. See *supra* notes 11–13 and accompanying text.

62. For the doctrine of copyright misuse in general, see, e.g., PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT (3rd. ed. 2008); Tom Bell, *Codifying Copyright’s Misuse Defense*, 2007 UTAH L. REV. 573 (2007); Brett Frischmann & Dan Moylan, *The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software*, 15 BERKELEY TECH. L.J. 865, 901–02 (2000); Ramsey Hanna, *Misusing Antitrust: The Search for Functional Copyright Misuse Standards*, 46 STAN. L. REV. 401 (1994); Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901 (2004).

63. The term “unduly” implies that not every objection to a permitted use would be deemed copyright misuse on the part of the rights holders. See *infra* note 71 and accompanying text.

indeed misused would give rise to a variety of remedies, including a right to statutory damages for users whose rights were prejudiced.

Notably, the introduction of statutory damages as a remedy for copyright misuse would most likely necessitate legislative intervention: the current statutory damages provision in the Copyright Act concerns copyright infringement, not copyright misuse. Moreover, the entire misuse doctrine is judge-made and still relatively unformed, and the consequences of misusing copyright are not entirely clear.<sup>64</sup> It is already apparent, however, that the misuse doctrine can apply in a range of different circumstances and can yield a range of potential outcomes, and that a holding of misuse does not result in the complete elimination of copyright.<sup>65</sup> This state of affairs constitutes a rather convenient background for implementing the current proposal.

This Essay does not intend to draw a complete set of statutory provisions applying the principles suggested above. Rather, I merely aim to sketch a general structure for a proposed solution, which reflects the conclusions of the discussion in the previous sections. This structure warrants a few words of explanation.

First, employing copyright misuse in order to create an incentive to challenge copyright over spills is theoretically consistent with the *raison d'être* of the misuse doctrine. The fundamental problem that this Essay seeks to address is the undue (and often successful) attempts on the part of rights holders to expand copyright beyond its statutory scope. Preventing copyright's expansion beyond the monopoly granted under the Copyright Act is also the underlying rationale of the copyright misuse principle, as acknowledged by several courts.<sup>66</sup> Moreover, the principle of copyright misuse possesses inherent flexibility and can thus accommodate the doctrinal analysis proposed in the previous sections.<sup>67</sup>

In addition, the proposed structure conceptualizes copyright misuse as an affirmative right of users rather than merely a defense against infringement. This perspective is consistent with recent scholarship that calls for recognizing various copyright doctrines as users' rights rather than mere defenses.<sup>68</sup> Joseph Liu recently observed that this approach recognizes that

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64. See references cited *supra* note 62.

65. 2 GOLDSTEIN, *supra* note 62, at § 11.6.

66. For prominent case law recognizing the principle and its underlying rationale, see, e.g., *Alcatel USA Inc. v. DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir. 1999); *Lasercomb Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997).

67. *But cf.* Tadlock, *supra* note 17, at 644–45 (acknowledging the current limitations of copyright misuse and proposing its expansion by courts in order to encompass overly broad “copyright warnings” by sports and media companies).

68. See Niva Elkin-Koren, *Users' Rights*, in *AUTHORING RIGHTS: READING THE NEW ISRAELI COPYRIGHT ACT* (Michael Birnhack & Guy Pessach eds., 2009) (arguing that the Israeli Copyright Act of 2007 should be read as establishing users' rights rather than mere defenses); Liu, *supra* note 16, at 113 (proposing to regard fair use as an affirmative right); cf. Guy Pessach, *Reverse Exclusion in Copyright Law—Reconfiguring Users' Rights* (Apr. 17,

certain permitted uses have intrinsic value and should thus be encouraged.<sup>69</sup> Challenging copyright overspills is, I believe, an effective method to encourage uses possessing such an inherent value.

I do not imply, however, that each failed attempt to enforce copyright should be considered copyright misuse on the part of rights holders.<sup>70</sup> Rather, the proposed mechanism will only be triggered by an *undue* objection to a certain permitted use. Thus, for example, a good faith objection to a certain use whose *ex ante* permissibility is doubtful would not be considered “undue,” while a bad faith attempt to prevent a use whose *ex ante* permissibility as a “fair use” is apparent, or to prevent a use of a work in which copyright protection has already expired,<sup>71</sup> may well give rise to a misuse claim. This restriction is supported not only by intuitive notions of fairness stemming from copyright’s ethical core;<sup>72</sup> it is also consistent with the need to avoid over-deterrence of copyright owners seeking to enforce valid rights and minimize abuse on the part of users.<sup>73</sup> Admittedly, the “undue” requirement would warrant further development, and I do not attempt to fully explore it in the framework of this Essay. Nor do I purport to sketch an exhaustive set of circumstances that would be deemed “undue” objections by rights holders. The inherent flexibility of the misuse doctrine would enable the development of such circumstances on a case-by-case basis.

My proposal, then, envisages the following scenarios: unduly objecting to a fair use or to other permitted uses would constitute copyright misuse. A user would be able to raise a misuse allegation in response to a rights holder’s claim, but also to initiate independent proceedings against a rights holder, alleging misuse of copyright.<sup>74</sup> Notably, the latter strategy, in which the user is the plaintiff rather than a defendant, may minimize the implications of the proceedings on the costs of insurance. A decision that copyright was misused could give rise to a variety of remedies, among them a right to statutory damages to the user whose rights were prejudiced, in a maximum

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2001) (unpublished manuscript), available at <http://ssrn.com/abstract=1813082> (proposing to conceptualize users’ rights as “rights to exclude”).

69. Liu, *supra* note 16, at 113 (making this observation in the context of fair use).

70. Nor do I argue that each and every contractual restriction of the rights of users of copyright works should automatically be considered misuse of copyright. For a discussion of this complex question, which is beyond the scope of this Essay, see Julie Cohen, *Copyright and the Jurisprudence of Self Help*, 13 BERKELEY TECH. L.J. 1089 (1998); Niva Elkin-Koren, *Copyright in Cyberspace—Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155 (1998); Mark Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111 (1999); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999); Maureen O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995).

71. For examples of the latter practices, see Mazzone, *Copyfraud*, *supra*, note 17.

72. For a discussion of copyright’s ethical foundations, see MERGES, *supra* note 31, at 145, 291, 307; Hughes, *supra* note 31.

73. For more details, see *infra* notes 82–83 and accompanying text.

74. Cf. Judge, *supra* note 62, at 932 (suggesting that copyright misuse should not be confined to a mere defense, but could serve as a basis for requesting declaratory judgment).

amount equivalent to the amount set out in the Copyright Act for willful copyright infringement.<sup>75</sup>

Let us return for a moment to the “I Have a Dream” example discussed above<sup>76</sup> and consider it under the proposed regime. Imagine now that the newspaper decides to challenge the rights holder’s position and object to its attempt to limit the alleged fair use, either by filing a misuse claim or by filing a counterclaim in response to the rights holder. From an *ex ante* perspective, the newspaper is now facing an 80% prospect of being awarded statutory damages of up to \$150,000. The economic balance of incentives may shift in favor of copyright challenging.<sup>77</sup> The rights holder’s *ex ante* “incentive to over-enforce,” on the other hand, decreases respectively. This shift in the balance of incentives may cause the rights holder to act with more restraint and to consent *ex ante* to the requested use of the short segment of the speech.

On a more general level, decisions that copyright was misused (by undue objection to permitted uses) will have a certain precedential value, which is likely to affect other rights holders. Over time, then, creating an incentive to challenge in the manner proposed here may encourage greater self-restraint *ab initio* on the part of copyright owners.<sup>78</sup>

An objection that is likely to be raised in this context is that providing an incentive to challenge would harm the incentive to create and disseminate copyright-protected works.<sup>79</sup> This objection raises a much broader question—namely, whether the rights provided under the Copyright Act are indeed required to incentivize the creation of copyright-protected subject matter. This question is certainly beyond the scope of this Essay, which takes the current copyright legislation as its baseline.<sup>80</sup> Even under the current framework, however, the objection seems normatively flawed: copyright law is not designed to afford copyright owners a right to prevent permitted uses or rights that are broader than those granted under the Copy-

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75. 17 U.S.C. § 504(c)(2) (2006).

76. See *supra* notes 25–29 and accompanying text.

77. Compare this to the situation in the absence of an incentive. See *supra* note 28.

78. Cf. Michal Shur-Ofry, *Popularity as a Factor in Copyright Law*, 59 U. TORONTO L.J. 525, 576 (2009) (arguing, in a different context, that the development of the copyright misuse doctrine is likely to increase self-restraint on part of rights holders in comparison to reliance on fair use alone).

79. Cf. Higgins & Graham, *supra* note 39 (arguing that the Paragraph IV incentive under the Hatch-Waxman Act has damaged the incentive of innovative pharmaceutical companies to develop new drugs).

80. For an interesting discussion see Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011) (highlighting the existence of multiple motivations for creation, including the significance of intrinsic factors). For additional broad questions which arise in this context pertaining to copyright’s underlying rationales, see *supra* note 31.



right Act, and incentivizing innovation should not be performed by allowing copyright overspills.<sup>81</sup>

An additional, related argument that may be raised is the concern of over-deterrence, or “misuse overspills.” To a certain extent, this argument mirrors the concerns of copyright overspills discussed earlier: an incentive to challenge regime may deter copyright owners from enforcing valid rights due to legal uncertainty coupled with risk aversion. Indeed, this is a concern that should not be ignored. Embedding an incentive to challenge in copyright law should be performed carefully so as to correct the current structural imbalance without producing another (opposite) imbalance. In the context of the present doctrinal proposal, this concern is addressed by confining misuse to “*undue*” objections to permitted uses on part of rights holders.<sup>82</sup> Such a requirement would minimize potential abuse on the part of users and would reduce the risk of over-deterrence.<sup>83</sup> A cautious introduction of an incentive to challenge would indeed help to minimize the gap between the *de jure* scope of rights and their *de facto* expansion, and to calibrate the scope of copyright to the level actually intended by the legislature.

### CONCLUSION

Copyright law is designed around the prevailing narrative of providing an incentive for innovation. It is quite oblivious to providing users with an incentive to challenge undue attempts to broaden copyright’s scope. Recent proposals raised in literature—particularly those concerned with clarifying the fair use doctrine—are insufficient to resolve the copyright overspills problem rooted in users’ risk aversion. Yet the problems of overspills and of under-challenging are not unique to copyright law but exist in other areas of intellectual property as well. Looking beyond the contours of copyright reveals the dynamic relationship between copyright and other branches of intellectual property law. More specifically, it demonstrates that in one area—the field of pharmaceutical patents—an effective intellectual property challenging mechanism already exists under the Hatch-Waxman Act.

The regime established under the Hatch-Waxman Act carries an important *conceptual* lesson for copyright law: it indicates that an *ex post* market scrutiny of intellectual property overspills is an obtainable task if the

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81. Cf. Hemphill & Sampat, *supra* note 36, manuscript at 28 (discussing a similar argument raised in the context of the Hatch-Waxman Act, and further noting that granting patents that do not meet the United States Patent and Trademark Office (PTO)’s patentability standards is not an adequate way to incentivize).

82. See *supra* notes 71–74 and accompanying text.

83. Interestingly, similar concerns have also arisen in the context of the Hatch-Waxman regime. The legislation was amended by the Medicare Prescription Drug, Improvement and Modernization Act of 2003, which contained certain provisions designed to prevent generic drug companies from abusing the incentive granted to them. See generally Stephanie Greene, *A Prescription for Change: How the Medicare Act Revises Hatch-Waxman to Speed Market Entry of Generic Drugs*, 30 J. CORP. L. 309 (2005).

appropriate set of incentives is embedded in the relevant law. It further demonstrates that providing a significant incentive to challenge helps to overcome users' risk aversion and makes a significant difference in the willingness of private actors to challenge intellectual property rights.

Inspired by the Hatch-Waxman solution, copyright scholarship should explore how an incentive to challenge can be inserted into the law in a manner that would suit both copyright markets and copyright subject matter. While not attempting to present a complete, detailed solution, this Essay proposes to create such an incentive by developing an affirmative copyright misuse doctrine that would entitle successful challengers to statutory damages. Developing this incentive to challenge scheme in further detail is a challenge that remains for future research.

On a more general note, the analysis in this Essay reveals an interesting interrelation between copyright and other branches of intellectual property law. Although we sometime tend to regard different fields of intellectual property as quite distinct, they may be more related than they appear at first sight. The dynamic interrelations between the branches of intellectual property and the potential lessons they carry for each other indeed deserve further thought and research.