

# **The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy**

draft v. 2008.02.20

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# **The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy**

## **Abstract**

Technological advances, because they have radically lowered the costs of creating and distributing expressive works, have shaken the foundations of copyright policy. Once, those who held copyrights in sound recordings, movies, television shows, magazines, and the like could safely assume that the public would do little more than passively consume. Now, though, the masses have seized (peacefully acquired, really) the means of reproducing copyright works, making infringement cheap, easy, and, notwithstanding the law's dictates, widespread. Copyright holders thus understandably fear that their customers have begun to treat expressive works like common property, free for all to use. That, the specter of copyism, does risk upsetting copyright policy, leading to a market failure in the production of expressive works. Even as we recognize that threat, however, we should also appreciate that technological advances have greatly reduced the costs of creating and distributing new works of authorship. Thanks to those savings, we can increasingly count on authors who care little about the lucre of copyright—"blockheads," as Samuel Johnson called them—to supply us with original expressive works. This paper describes the economic push and pull between distributed infringement and distributed authorship—between copyism and blockhead-created content, we might say—and how copyright policy should mediate between those forces.

# **The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy**

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# The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy

## Introduction

Technological advances, because they have radically lowered the costs of creating and distributing expressive works, have shaken the foundations of copyright policy. Once, those who held copyrights in sound recordings, movies, television shows, magazines, and the like could safely assume that the public would do little more than passively consume their expressive works. Now, though, the masses have won the means of reproducing copyright works, making infringement cheap, easy, and, notwithstanding the law's dictates, widespread. Copyright infringement has thus increased.

Copyright holders understandably fear that their customers have begun, in practice if not theory, to treat expressive works like common property, free for all to use. That, the "specter of copyism," does pose some risk of upsetting copyright policy, leading to a market failure in the production of expressive works. Even as we confront that specter, however, we should also appreciate that technological advances have greatly reduced the costs of creating and distributing new works of authorship. Thanks to those savings, we can increasingly count on authors who care little about the lucre of copyright—"blockheads," as Samuel Johnson called them—to supply us with original expressive works. This paper describes the economic push and pull between distributed infringement and distributed authorship—between copyism and blockhead-created content, we might say—and how copyright policy should mediate those economic forces.

Part I offers a modestly revised version of the standard economic model of copyright. That groundwork prepares us for Part II, which paints the specter of copyism. Part III introduces copyright blockheads—authors who do not require remuneration-by-copyright to stimulate them to produce and distribute expressive works. Part IV explains how copyright policy should adapt, in theory, at least, to the combined effects of copyism's distributed infringement and blockheaded authors' distributed authorship.

## I. An Economic View of Copyright

Copyright, Justice Holmes explained, "restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as they saw fit";<sup>1</sup> namely,

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<sup>1</sup> *White Smith Music Publ. Co. v. Apollo Co.*, 209 U.S. 1, 19 (Holmes, J., concurring) (1908). See also Jane C. Ginsburg, *Copyright Without Walls*, 42 REPRESENTATIONS 53, 59 (1993) (Copyright law "has traditionally presumed a world in which, but for copyright, unauthorized reproductions would be pervasive and unremediable.").

freely copying others' expressions. How can we justify that limitation? Courts and commentators explain copyright as a response to market failure.<sup>2</sup> This part elaborates on that explanation, first offering the standard economic model of copyright and then amending it to describe the effects of copyright infringement.

Creating a work often costs an author a lot, whereas copying a work usually costs others very little.<sup>3</sup> Absent copyright, then, authors might find it discouragingly difficult to recoup the expense of creating fixed expressive works. Authors might then underproduce expressive works and, in consequence, the public might suffer a poverty of expression.

To avoid that policy tragedy, the Copyright Act empowers authors to control the reuse of their fixed expressive works.<sup>4</sup> By selling those special statutory privileges, authors can offset their production costs. Thus does copyright arguably do what the common law allegedly cannot: ensure that the public enjoys an adequate supply of expressive works.<sup>5</sup>

The benefits of copyright policy come at a price, however. Although it may cost a great deal to make the first copy of a fixed expression, it usually costs very little to make and distribute subsequent copies. Absent copyright protection, those works would constitute public goods.<sup>6</sup> Ironically, copyright bars the public from freely enjoying the very goods labeled "public."<sup>7</sup> Instead, the Act vests copyright holders with the power to charge whatever the market will bear to escape liability for infringement. Though the monopoly rents that copyright holders thereby win allegedly provide a necessary stimulus to create, non-holders suffer the opportunity costs of losing freer access to fixed expressive works.<sup>8</sup> Most commentators thus understand copyright policy to aim at

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<sup>2</sup> See Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 758-59 (2001) (collecting citations).

<sup>3</sup> See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989). This admittedly explains *post hoc* legislators' often confused and impenetrable motives. Rather than deflating the dubious notion that the Copyright Act embodies a natural rights view of copyright, however, it suffices here to observe that free rider problems explain legislators' desire to protect even copyrights *qua* natural rights, and that a natural rights view of copyright would, at any rate, leave even less room for fair use.

<sup>4</sup> See 17 U.S.C.A. § 106.

<sup>5</sup> The Copyright Act protects only *fixed* expressive works, granted. See 17 U.S.C.A. § 102(a). It doubtless stimulates the protection of unfixed works indirectly, however, as when a jazz musician extemporizes during a performance in order to convince listeners to buy a recorded version of the unfixed work.

<sup>6</sup> See Landes & Posner, *supra* note [[cite]] at 327.

<sup>7</sup> That label hardly suffices to establish the proper scope of copyright, of course; it here serves only wry humor.

<sup>8</sup> Commentators often refer to this a "deadweight loss." See, e.g., William W. Fisher III, *Property and Contract on the Internet*, 3 CHI.-KENT L. REV. 1203, 1236 (1998); Julie E.

striking a balance between giving authors sufficient incentives to create expressive works and providing the public with adequate access to the works thereby created.<sup>9</sup> Figure 1<sup>10</sup> illustrates that, the standard economic model of copyright policy.<sup>11</sup>

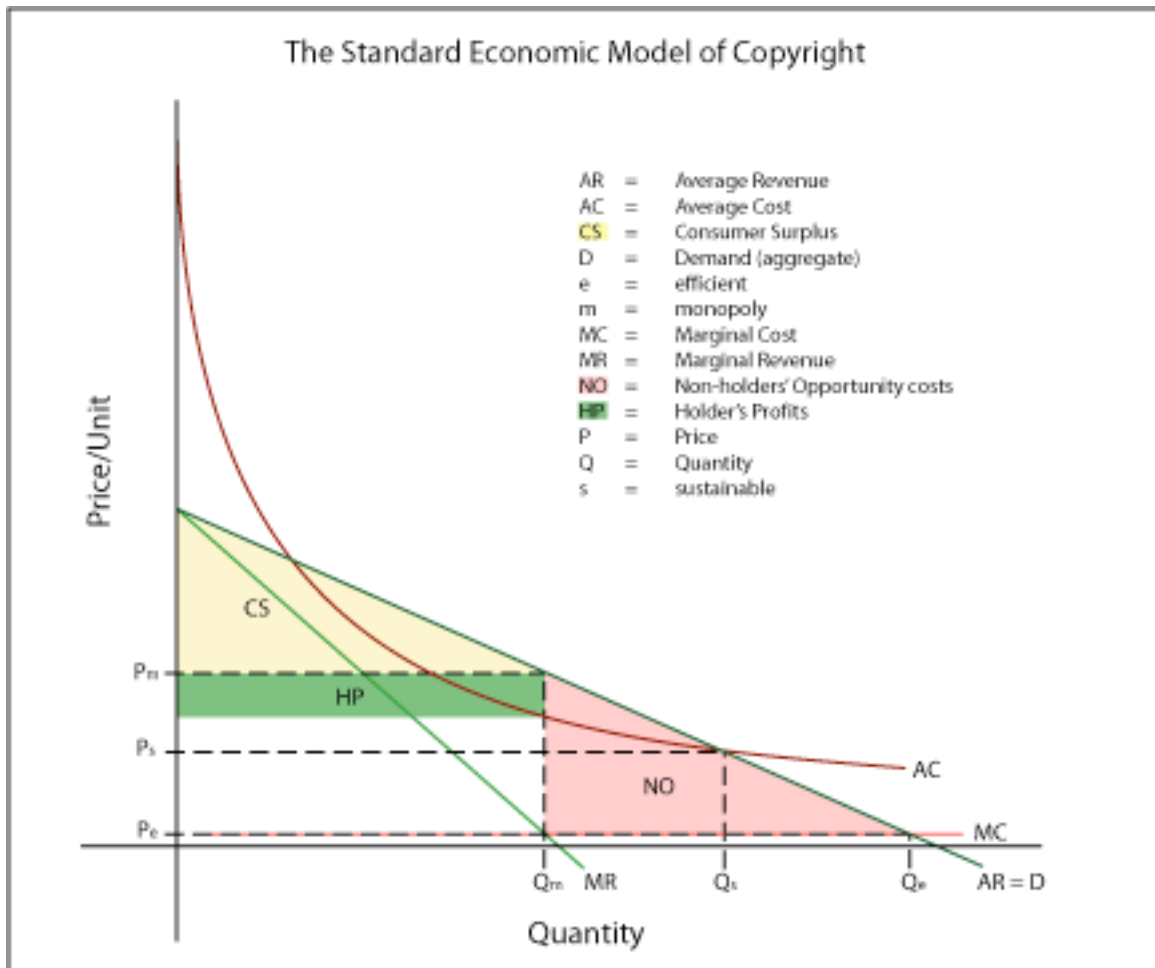
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Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1801 (2000). To clarify the cause of that loss, I prefer the label, "non-holders' opportunity costs."

<sup>9</sup> See, e.g., Landes & Posner, *supra* note [[cite]], at 326 (characterizing this as "the central problem of copyright law."). *But see infra*, chapter [[cite]] (arguing that copyright policy cannot strike a delicate balance between public and private interests); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. LAW REV. 212 (2004) (arguing the economics of product differentiation suggest that the access-incentives tradeoff is not so intractable as generally believed).

<sup>10</sup> Readers accessing this paper via a database that does not include the figures can find figure 1 at <<http://www.tomwbell.com/graphics/StandardEconModel.gif>>.

<sup>11</sup> This portrayal of the standard model comes largely from Yoo, *supra* note [[cite]], at 227 fig. 1, which both sums up the traditional view among legal academics of the economics of copyrights and corrects it by setting the proper bounds for measuring profit. The chart here differs from Yoo's, however, in showing average costs to exceed average revenue at low levels of production. That assumption, while not strictly necessary, doubtless describes most copyrighted works more accurately.

**Figure 1**

As portrayed in figure 1, an author incurs large costs upon creating a fixed work but very low marginal costs of production (MC) thereafter. The author's average costs of production (AC) thus drop with each additional copy he—or, more likely, the party to whom he sells his copyrighted work—produces. He faces the usual sort of downward-sloping aggregate demand curve (D), which also marks the average revenue (AR) he can make by selling any given number of copies.

How many copies should an author sell? Were social efficiency the test, he would sell the quantity ( $Q_e$ ) corresponding to the point where his marginal cost curve crosses the demand curve, earning the corresponding price ( $P_e$ ). But that would discourage him (and other would-be authors) from creating fixed expressive works, as it would not allow him to recover his average costs. For the author to break even in the authorship business, he would need to sell at least the quantity corresponding to the point where his average cost curve crosses the demand curve ( $Q_s$ ), thereby earning a sustaining price ( $P_s$ ). Happily for the author, though, the monopoly privilege afforded by copyright law allows him, at least in theory, to sell even fewer copies ( $Q_m$ ), and at a higher price ( $P_m$ ). Specifically, he will want to sell a quantity that corresponds to the point where his

marginal revenue (MR) curve crosses his marginal cost curve. At higher quantities his marginal costs would exceed his marginal revenues, resulting in marginal losses.

If our hypothetical author manages to sell at the monopoly quantity and price that maximizes his benefits, he will earn profits (HP) equal to the amount his revenue exceeds the amount necessary to recoup his average costs. In that event, consumers to whom he sells will enjoy a surplus (CS) representing the difference between what they pay and how much they value his work. Non-holders unwilling to pay what he demands, however, will suffer opportunity costs (NO) equal to how much they would have paid for the uses barred by his asserted copyright.

We could doubtless say more about the standard economic model of copyright, adding complications,<sup>12</sup> quibbles,<sup>13</sup> and criticisms.<sup>14</sup> I will do so below when I argue for separating copyright's aggregate demand and average revenue curves.<sup>15</sup> For now, though, let us assume that Figure 1 offers a conventional and useful economic model of copyright.

## II. The Specter of Copyism Looms

"Seize the means of reproduction!" Feminists adopted that cry to rouse women to claim their rights to their bodies, and to demand a fair say in how child-bearing and rearing institutions work.<sup>16</sup> We might hear the same cry, voiced with a different aim, in the battle now raging over the means of reproducing expressive works. Copyright holders claim the right to control whether and how non-holders can use copyrighted works. The people, having won access to photocopying machines, computers, network communications and other means of copying and distributing expressive works, largely ignore the demands of copyright. In that social movement—one driven not by ideology but by technological and market forces, copyright holders see the specter of copyism. This Part describes that phantom and explains why it haunts copyright policy.

On the standard economic view of copyrights, as on the economic view of other monopolies, average revenue equals demand. Those two measures trace one and the same line. Why? Because for most products and services, consumption closely matches supply at the market-clearing price. Sales reveal consumer demand and, in the case of copyright and other supposed monopolies, only one seller reaps revenue from those sales.

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<sup>12</sup> We might, for instance, add a variety of average cost curves to illustrate how works with different production costs fare under a given level of copyright protection.

<sup>13</sup> See, e.g., William W. Fisher III, *Property and Contract on the Internet*, 3 CHI.-KENT L. REV. 1203, 1238-39 (1998) (arguing that price discrimination can both increase copyright holders' profits and decrease non-holders' opportunity costs).

<sup>14</sup> See, e.g., Yoo, *supra* note [[cite]], at 231-35 (criticizing the standard model as deficient on a number of grounds).

<sup>15</sup> See *infra*, Part [[cite]].

<sup>16</sup> See, JENNY CHAPMAN, *POLITICS, FEMINISM AND THE REFORMATION OF GENDER* 207 (Routledge 1993) (analyzing views of feminist scholar, Shulamith Firestone).



For that reason, for instance, the average revenues generated by a utility's sales faithfully track aggregate consumer demand for electric power.

Even a so-called monopolist might face competition, however. An electrical utility might, for example, suffer losses such as unauthorized taps on power lines, competition from home-generated electricity, and consumers switching to gas appliances. So, too, might the sole authorized seller of hard liquor fail to capture the entire market of drinkers, losing some customers to the resale of stolen goods and other customers to moonshine.

The caveats to "monopoly" prove especially strong in the case of copyright, which permits some uses of protected works, such as fair uses, that copyright holders do not authorize, and which fails to prevent other unauthorized uses that qualify as copyright infringements. We might fairly say that the former category of uses, because copyright holders have no statutory power to bar them, do not really cut into the market share for a copyrighted work. Copyright holders cannot lose what they never had, on that view. I here thus focus on infringing uses. The general point stands, however: whether due to permitted or forbidden uses, a copyright holder never commands all of the market for an expressive work.

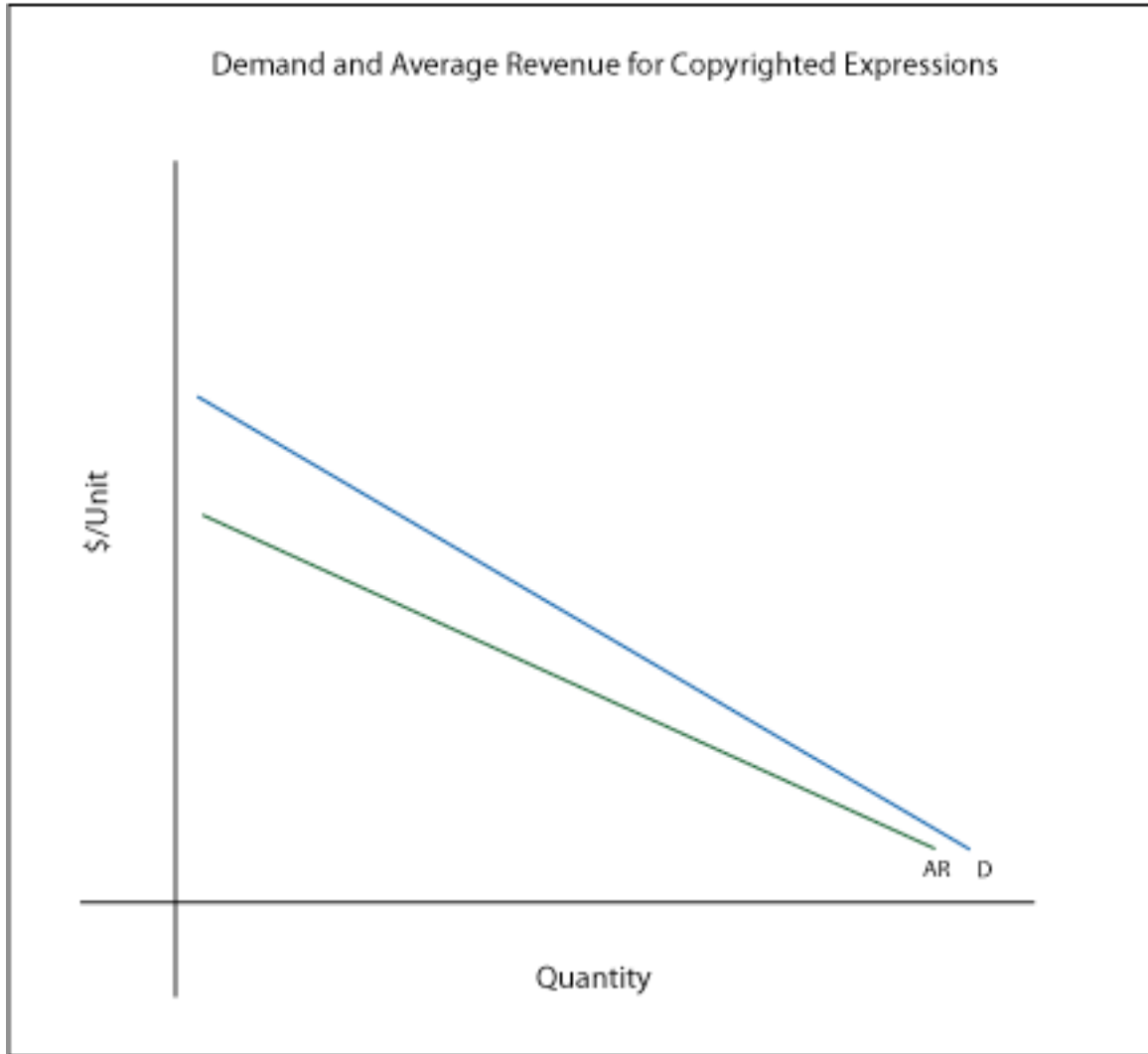
That conflict between theory and facts shows why we should perhaps avoid speaking of "the copyright monopoly" and instead discuss copyright in terms of market power.<sup>17</sup> Whether or not it hands out *monopolies*, after all, the Copyright Act *does* give a powerful subsidy to those it protects: the privilege of invoking State power to inhibit infringing uses of expressive works. The standard economic model of copyright usefully captures that effect, but somewhat exaggerates it. We can get a more accurate picture of copyright by separating consumer demand from average revenue.

The consumption of an expressive work—and thus the revealed demand for it—may greatly exceed the supply legally permitted under copyright law. Effectively, some consumers treat copyrighted works like public goods, paying only the very low marginal costs that they must bear to enjoy each unauthorized use. That payment typically comes not in cash but in the opportunity costs, expended through time and effort, of copying. In any event, none of it goes to copyright holders, leaving them aggrieved and, sometimes, litigious. But copyright holders seldom find it worthwhile, or even possible, to fully defend their rights under the Act. Many infringing acts go undetected or for other reasons elude enforcement. Figure 2<sup>18</sup> illustrates that phenomenon by showing how, in the case of a given copyrighted work, aggregate consumer demand,  $D$ , measured in terms of consumer use, might diverge from  $AR$ , the average revenue generated by the work's copyright.

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<sup>17</sup> See DAVID D. FRIEDMAN, PRICE THEORY: AN INTERMEDIARY TEXT 244-45 (South-Western Publ. Co. 1986) (explaining the ubiquity of monopolistic competition).

<sup>18</sup> Readers accessing this paper via a database that does not include the figures can find figure 2 at <[http://www.tomwbell.com/graphics/D\\_v\\_AR\\_for\\_\(C\).gif](http://www.tomwbell.com/graphics/D_v_AR_for_(C).gif)>.



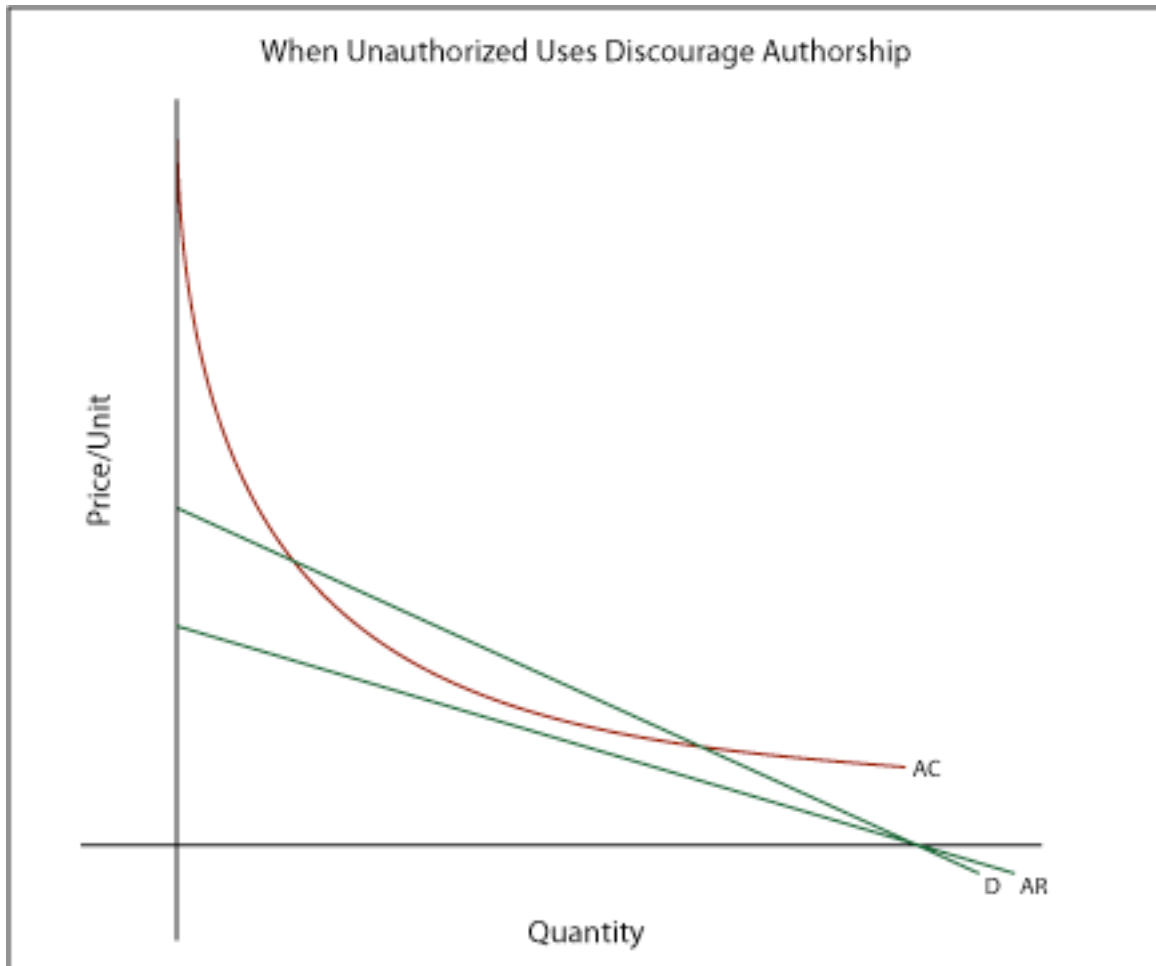
**Figure 2**

Copyright holders understandably object when, due to infringement, they earn less revenue than the law entitles them to. But why should the rest of us care? Recall that copyright aims to cure a looming market failure: we will suffer an undersupply of expressive works if authors cannot recoup their production costs. Copyright aims to cure that failure by giving authors the privilege of controlling, and thus profiting from, certain uses of their works. Infringement threatens to upset that statutory mechanism, depriving authors and their transferees of revenue that might otherwise stimulate the production and distribution of expressive works.

We might call that threat, after Marx and Engels, "the specter of copyism."<sup>19</sup> And, as the allusion to communism suggests, we should all worry that poverty will follow

<sup>19</sup> See KARL MARX & FRIEDRICH ENGELS, *Manifesto of the Communist Party* (1848), reprinted in THE MARX-ENGELS READER 469, 473 (Robert C. Tucker ed., 1978).

if production does not pay. In the case of copyright policy, in other words, we should worry that infringement will decrease copyright holders' revenues below the level necessary to sustain authorship. As figure 3<sup>20</sup> illustrates, such a development would threaten to deprive the public of new expressive works.



**Figure 3**

As figure 3 indicates, infringement threatens to drive a wedge between aggregate consumer demand for a work,  $D$ , and the average copyright revenue generated by the work,  $AR$ . Depending on the work's average cost curve,  $AC$ , infringement might thereby stymie the production of original expressive works. A copyright holder might not find it worthwhile to produce a work absent the prospect of recovering at least her average costs. A profit-seeking copyright holder would thus avoid the market pictured in figure

<sup>20</sup> Readers accessing this paper via a database that does not include the figures can find figure 3 at <<http://www.tomwbell.com/graphics/Specter.gif>>.

3—even though consumers would willingly expend more than the work's average cost to have it. Thus might the specter of copyism curse us with market failure.

### III. Copyright Blockheads, to the Rescue

Samuel Johnson claimed, "No man but a blockhead ever wrote, except for money."<sup>21</sup> He would doubtless have said the same about the other media—music, painting, motion pictures, computer software, and so forth—that copyright law later came to cover. Regardless of how they express themselves, savvy authors demand remuneration for their creative labors. Copyright helps to ensure that they get it.

Yet, "blockheaded" authors exist. Some percentage of authors will, at least sometimes, share their expressive works for very little or no pay. In rare cases, an author, eager for attention or burning with artistic passion, may even pay others to hear her message.<sup>22</sup> We need not specify what motivates such authors (though we should call them "blockheads" with affection, only; they are seldom fools). We need only observe that, as Johnson himself impliedly recognized, non-monetary incentives sometimes suffice to inspire authorship.

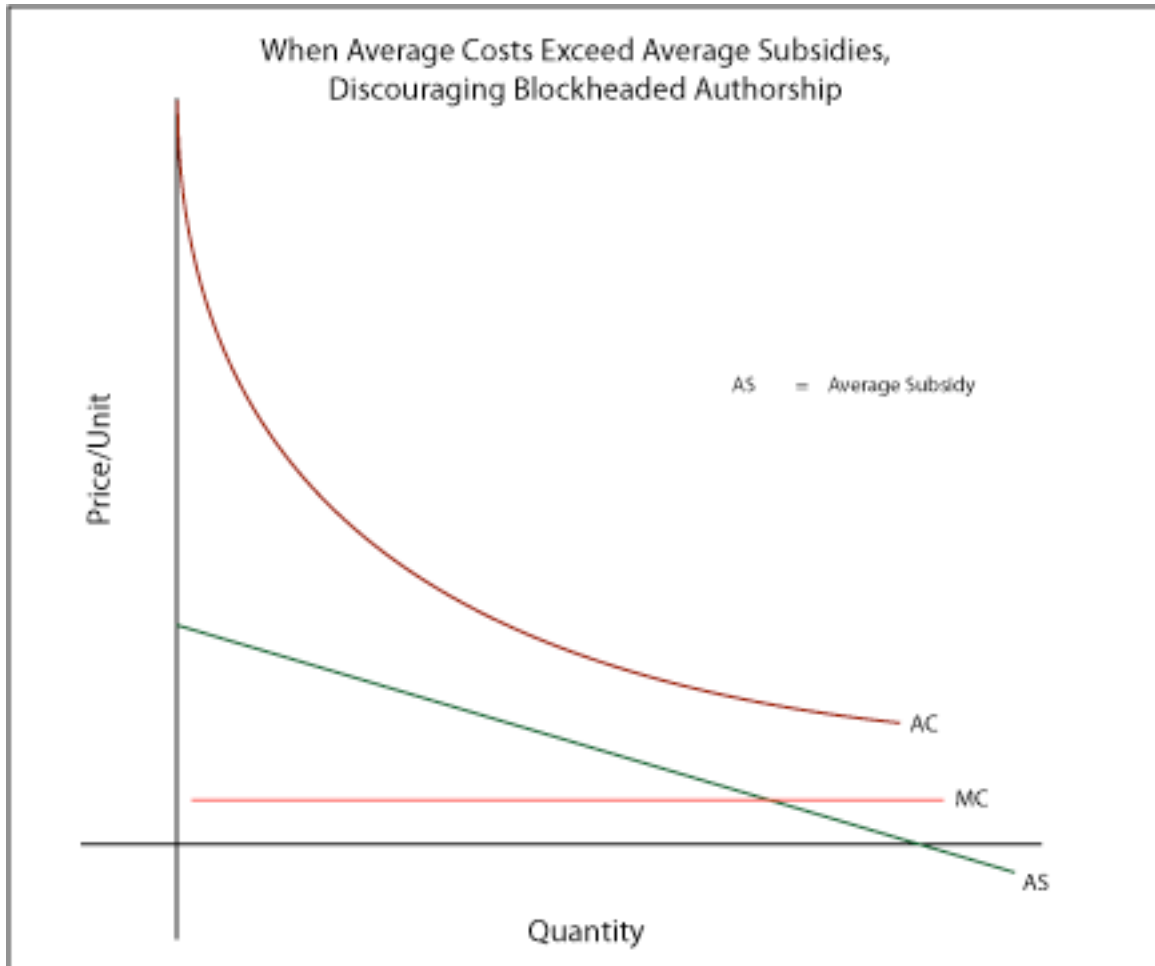
Blockheaded authors, like any authors, face fixed and marginal costs. Blockheaded authors do not rely on copyright law to recoup those expenses, however. Instead, they subsidize the costs of creating and distributing their works, paying for them out-of-pocket and then, typically, releasing them to the public. Blockheaded authors effectively pay to satisfy their own demand for their own works, in other words, solipsistically supplying a market comprising a single consumer. Rather than tracking the average revenue generated by blockheaded authors' works, therefore, we should track the average subsidy for blockheadedness. Figure 4<sup>23</sup> does so with curve marked "AS," for "aggregate subsidy," showing how it might relate to a blockheaded author's production and distribution costs.

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<sup>21</sup> JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 641 (Everyman's Library 1993) (1791).

<sup>22</sup> Much more commonly, advertisers and other patrons will pay an author and ask for nothing but attention from the public.

<sup>23</sup> Readers accessing this paper via a database that does not include the figures can find figure 4 at <<http://www.tomwbell.com/graphics/NoBlockheads.gif>>.



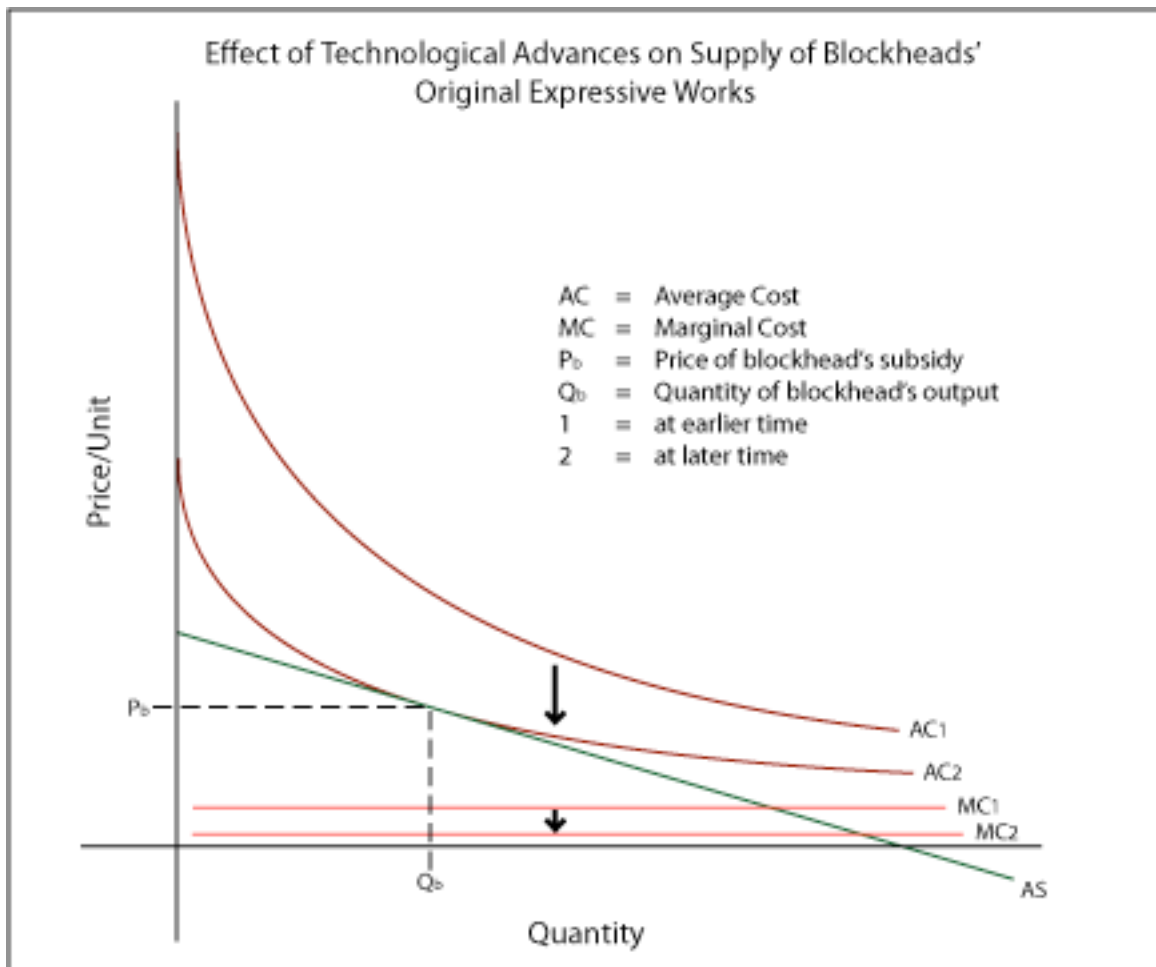
**Figure 4**

As did figure 3, figure 4 portrays a sort of tragedy. Here, though, the costs of creating and distributing a fixed work exceed the subsidy that its blockheaded author would have paid. Thus, for instance, has many a wannabe rock star lacked sufficient funds to cut a single. The tragedy extends beyond mere artistic frustration, however. Assuming that a blockheaded author's creations would have found some willing audience, no matter how small, that author's silence represents a lost opportunity to increase social wealth.

More and more often, non-monetary incentives suffice to stimulate authorship. Thanks to the same technological magic blamed for summoning the specter of copyism, authors find it increasingly cheap—in terms of money, time, and effort—to produce and distribute expressive works. Whereas it once took many thousands of dollars to record and nationally distribute a new song, for instance, it now takes only a couple of thousand dollars to get a computer, music production software, and an internet connection.<sup>24</sup> Now,

<sup>24</sup> See David Byrne, *The Fall and Rise of Music*, WIRED, Jan. 2008, at 124, 127.

almost anybody with a dream and guitar can get a clean shot at the world's ear.<sup>25</sup> Figure 5<sup>26</sup> illustrates that effect, charting how technological progress has lowered the average and marginal costs of supplying the market with original expressive works.



**Figure 5**

Figure 5 also illustrates how reductions in the costs of producing and distributing original expressive works encourage blockheaded authors to create. A blockheaded author with an average subsidy curve, AS, that passes above the author's average cost curve, AC, will find it worthwhile to pay the subsidy price, P<sub>b</sub>, to produce a quantity of the work equal to Q<sub>b</sub>. Overall welfare increases because the blockheaded author relishes self-expression and non-authors get an original expressive work. Figure 5 does not

<sup>25</sup> It offers an attractive target; even I admit to drawing a bead on it. See <<http://www.tomwbell.com/music.html>> (offering some of the author's original musical compositions and sound recordings).

<sup>26</sup> Readers accessing this paper via a database that does not include the figures can find figure 5 at <<http://www.tomwbell.com/graphics/Tech4Blockheads.gif>>.

include a demand curve illustrating how much those non-authors would pay, in currency, time, or effort, to access the blockhead's work. You could draw that sort of curve almost anywhere on the graph. So long as it somewhere exceeds their very low marginal costs of accessing the work, consumers will enjoy a surplus.

So understood, and holding all else equal, the willingness of blockheaded authors to subsidize the production and distribution of expressive works will tend to render copyright's legal restrictions inefficiently over-protective. In a relatively primitive world, such as the United States in the late 1700s, we might find that non-monetary incentives do not stimulate an adequate supply of expressive works. Copyright, by helping to ensure that authors get paid for their expressions, can help to remedy that market failure. So, at least, the Founders evidently thought.<sup>27</sup> As technology advances, however, and the costs of supplying original expressive works drops, so too does the number of authors for whom the lucre of copyright proves a necessary stimulus drop.<sup>28</sup> Thanks to decreases in the costs of creating original expressive works, authorship need not entail crushing debts. Thanks to the very low marginal costs of reproducing and distributing such works, moreover, a relatively few blockheaded authors can entertain very large market.

Those technological and economic trends tend, over time, to cure the same market failure targeted by copyright policy. They ensure that non-monetary incentives will suffice to stimulate an increasing amount of authorship, and that blockheaded authors will thus supply more and more of the market's demand for expressive works. At some limit, for some works, copyright law will eventually prove superfluous, and its burdens exceed its benefits. Volunteer programmers might, for instance, supply computer operating system software free of charge.<sup>29</sup> Generally, then, as methods for producing and distributing expressive works grow increasingly efficient, they tend to tip copyright policy into inefficiency, making it more restrictive than necessary or proper for promoting the general welfare.

#### **IV. How Copyright Policy Should Adapt**

While rightly shuddering at the specter of copyism, we should also recognize that the unauthorized use of copyrighted works can, if it does not go so far as to undercut authors' incentives, increase social welfare. Consider, for instance, an impoverished entrepreneur relying on pirated software to start her business. Supposing that she could not afford to buy an authorized copy, and that her unauthorized use would not depress software production, her infringement would generate a welcome consumer surplus. The same would hold true of, say, someone who enjoys an infringing copy of a CD despite

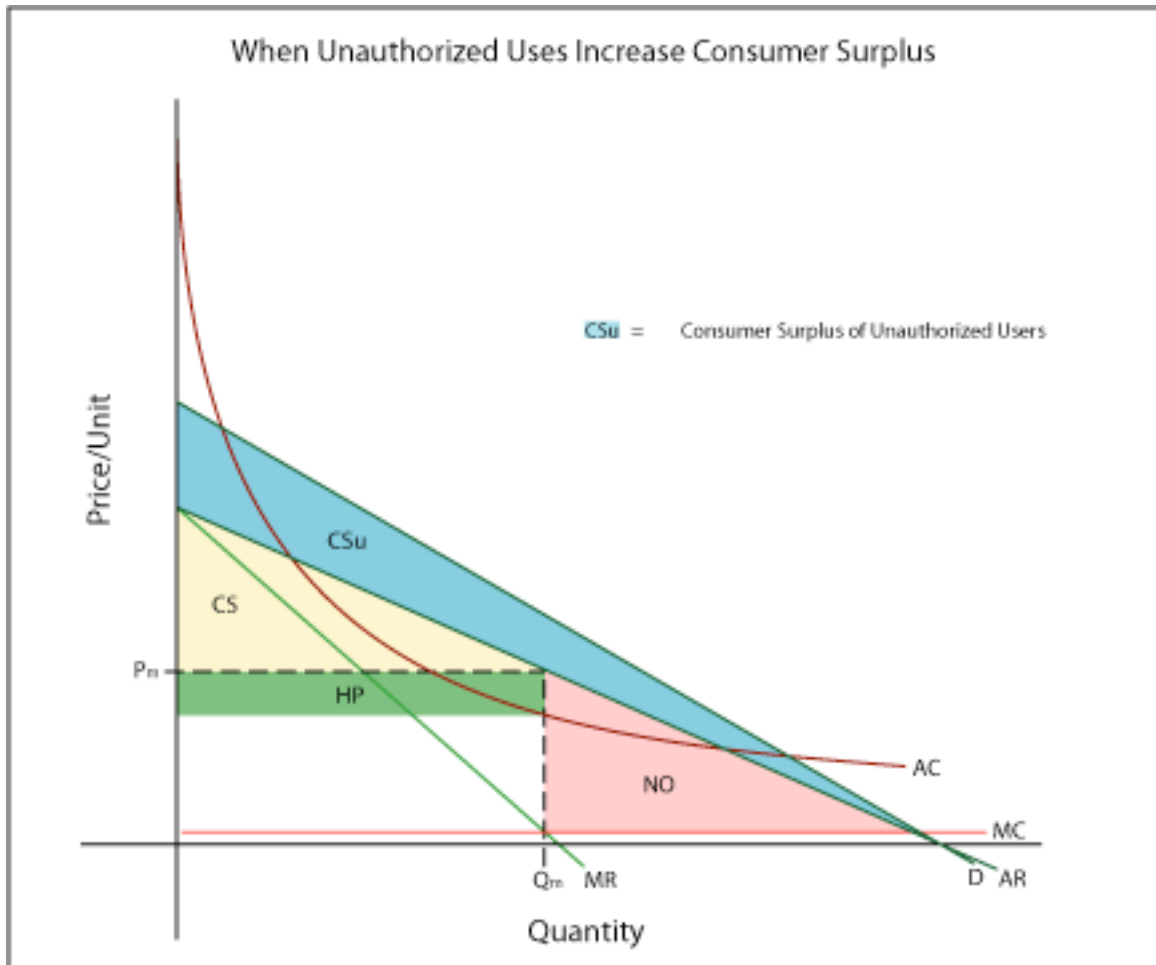
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<sup>27</sup> See U.S. CONST., art I, § 8, cl. 8.

<sup>28</sup> That is not to say that copyright has nothing to offer authors driven by non-monetary incentives. Authors who seek fame may, in particular, find copyright useful. It is only to say that, even for such authors, copyright may offer more protection than necessary.

<sup>29</sup> With regard to Linux operating system software, of course, they already have. See, e.g., Jem Matzan, *The Gift Economy and Free Software*, June 05, 2004, at <<http://www.linux.com/articles/36554>>.

being unwilling to pay its retail price.<sup>30</sup> As figure 6<sup>31</sup> illustrates, those exceptions to the strict enforcement of copyright law could in theory benefit us all without discouraging the production and distribution of expressive works.



**Figure 6**

In Figure 6, we see unauthorized and unpaying uses effectively competing with revenue-generating uses that respect copyright. Authorized users of the work pay the copyright holder price  $P_m$  to enjoy the work. That price some law-abiding customers out of the market—those non-holders who forego the work rather than infringe it. They suffer the opportunity costs marked by area NO. Those sorts of economic and legal constraints do not trouble unauthorized users, however. They pay for the work not via copyright's toll, but rather by taking a path around the law. Those unauthorized users

<sup>30</sup> Both examples assume that the copyright holder does not price discriminate sufficiently well to offer a market for such unpaying uses.

<sup>31</sup> Readers accessing this paper via a database that does not include the figures can find figure 6 at <<http://www.tomwbell.com/graphics/BonusPts.gif>>.



typically do not have notable fixed start-up costs; they basically pay only their marginal costs, MC, to access copyrighted works. Those outlaws typically do not pay in coin, but rather in terms of time, effort, and risk. The surplus gains of such unauthorized uses thus fill the area below the aggregate demand curve, D, and above the average revenue curve, AR, all the way down to where D crosses MC.

The large consumer surpluses in figure 6 look appealing, especially since they co-exist with copyright holders' monopoly profits. Figure 6 surely offers too sanguine a view of the effects of copyright infringement, however. Without the limitations imposed by copyright law, some consumers who would otherwise willingly pay for *authorized* uses might instead opt to save their money by joining the unpaying masses of *unauthorized* users. The market would thus not continue to support the monopoly price, P<sub>m</sub>, for the monopoly quantity, Q<sub>m</sub>. Under competitive pressure, the demand curve for the authorized uses of the work would sink. If any copyright holders remained in such an unremunerative market, they would eventually find that they could sell their works only at their marginal costs. Consumer migration from respecting copyright to infringing it thus risks triggering the policy tragedy portrayed in figure 5.

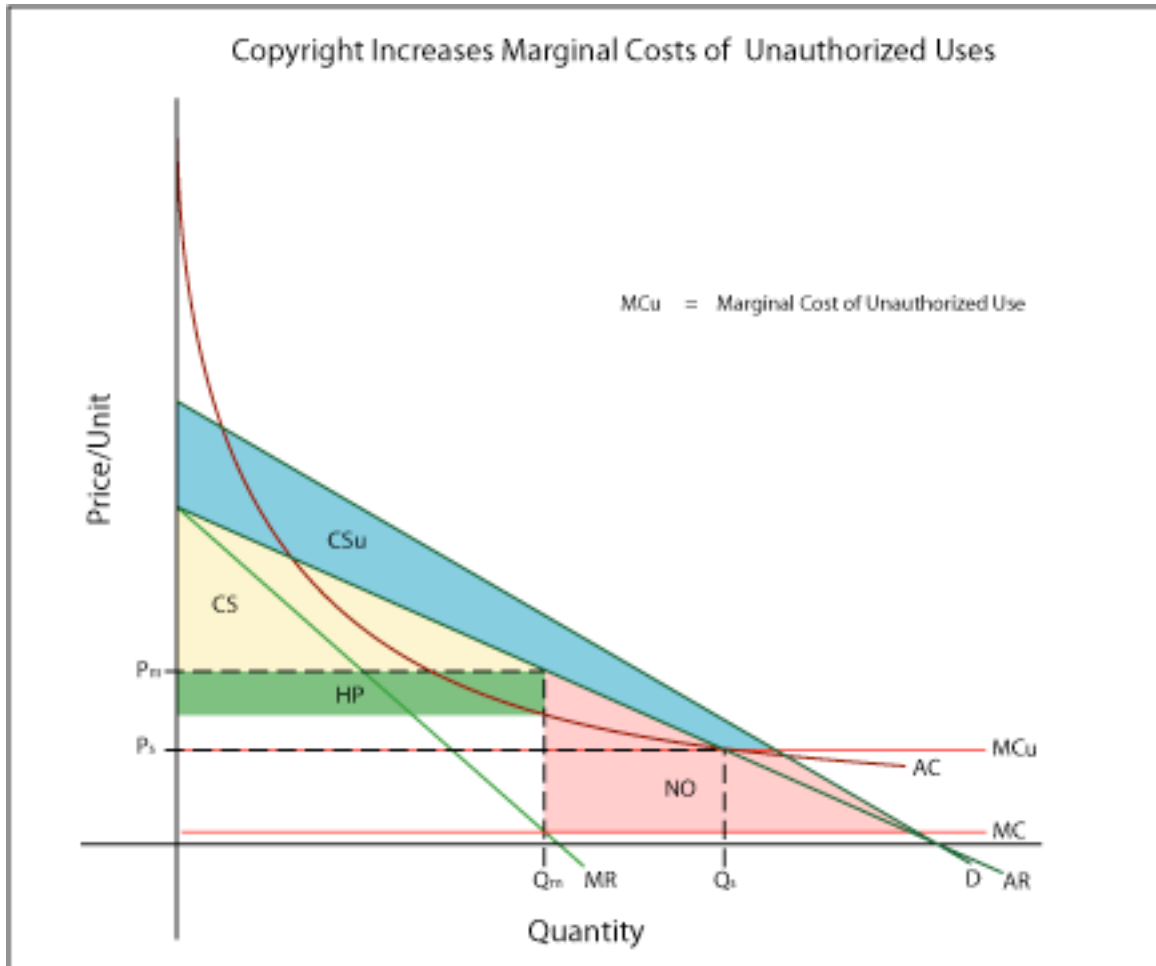
How does copyright law dispel that, the specter of copyism? By imposing high marginal costs on infringing uses of protected works. Absent the Copyright Act, and especially in digital works, an infringer would generally face only the same low marginal reproduction costs as a copyright holder.<sup>32</sup> Under to the Copyright Act, in contrast, an infringer might have to pay actual or statutory damages, lost profits, costs, and/or attorney's fees to a copyright holder for every unauthorized use.

How high should lawmakers set the marginal costs of infringement? We would not want them to under-deter it, lest the specter of copyism become all too real. Nor would we want them to overdo the job, given that a modest level of infringement can deliver social gains. Theory suggests that lawmakers should set the marginal costs of infringement, taking into account that only some infringing uses get caught and litigated, just high enough to ensure that authorized users will have no incentive to opt for paying less than enough to sustain authorship. MC<sub>u</sub> should thus equal P<sub>s</sub>. Figure 7<sup>33</sup> illustrates.

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<sup>32</sup> That holds especially true of digital works. Works in other media may prove more difficult to copy without authorization. Now-justice Breyer described such an effect in the book publishing industry. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

<sup>33</sup> Readers accessing this paper via a database that does not include the figures can find figure 7 at <<http://www.tomwbell.com/graphics/MCuOriginal.gif>>.

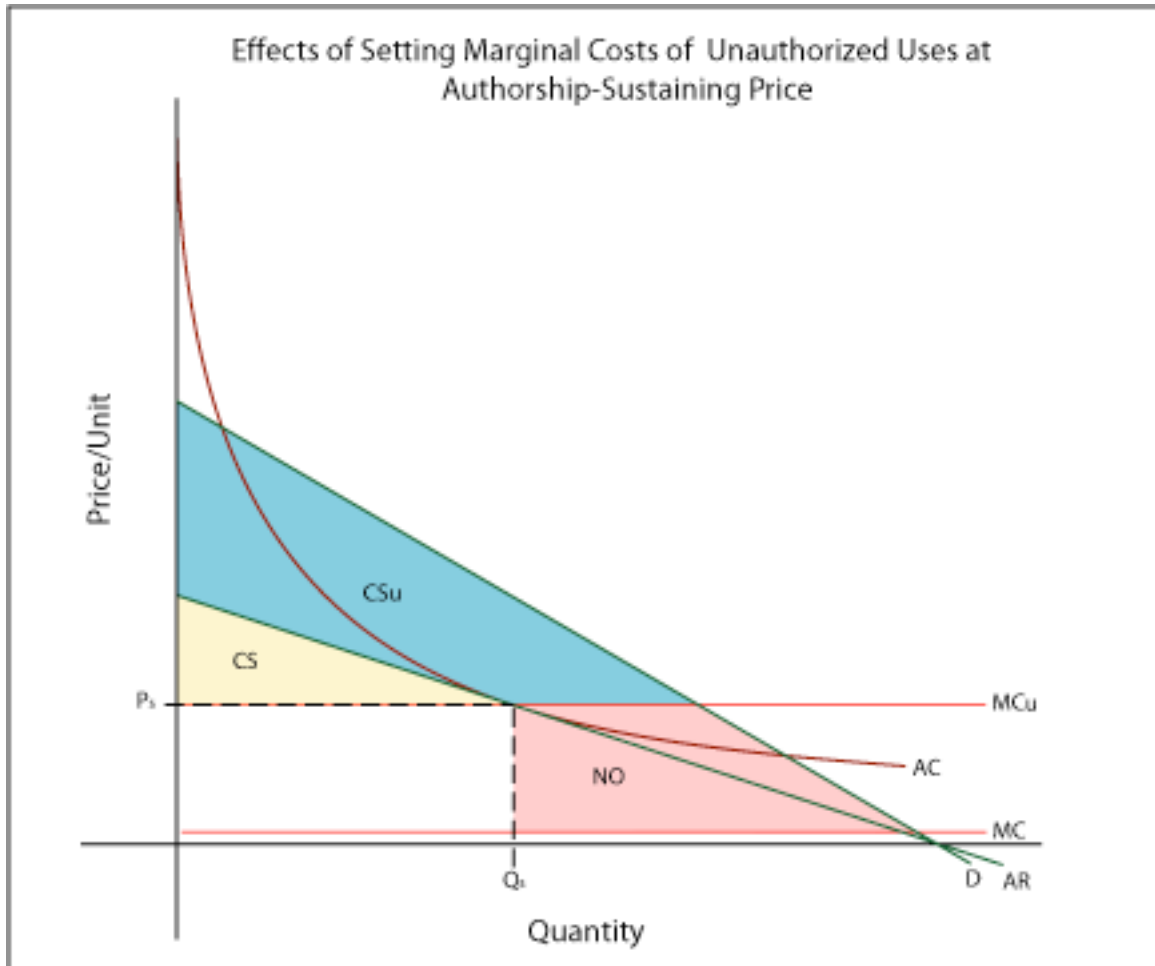


**Figure 7**

The story does not end with figure 7, however. Even after the law artificially inflates the marginal costs of infringing copyrighted works, we would still see consumers migrate from authorized uses to unauthorized ones. The market clearing price for a work would thus tend to settle very close to the marginal cost of infringing the work. Authorized and unauthorized uses of the work effectively compete, after all. Where the law sets the costs of infringement determines how much copyright holders stand to earn by enforcing their statutory rights and, indeed, whether enforcing those rights offers any net gain at all. Where, then, should lawmakers set  $MC_u$ ?

Copyright policy should not aim to price all unauthorized uses out of the market. The unauthorized uses that it does allow will, granted, decrease copyright holders' profits. Copyright policy rightly aims at affording copyright holders only just enough revenue to cover their average costs, however. Any amount above that level unjustifiably sacrifices the public good. Pricing the marginal costs of unauthorized use at a level sufficient to allow copyright holders to recoup their average costs will tend to encourage consumers at the margin of refusing to pay for a permitted use to exit the legal market and enter into

unauthorized use. Over time, in the main, and holding all else equal, we should expect copyright holders' revenues to drop. Eventually, copyright holders would enjoy no monopoly rents; they could sell their goods only at sustainable prices. Figure 8<sup>34</sup> illustrates.



**Figure 8**

Comparing Figure 7 with Figure 8, we see that competition from unauthorized uses of the copyrighted work in question has pushed the average revenue (AR) curve backwards and down. In figure 8, where consumer demand (D) exceeds the marginal cost that copyright law imposes on unauthorized uses of the work (MCu), consumers rationally disregard copyright law. By instead opting to engage in unauthorized uses of the work, consumers enjoy large surpluses (CSu). Consumers who respect copyright law, but who value the work at greater than its market price, also enjoy surpluses (CS). Copyright holders caught in the world portrayed by Figure 8 no longer extract monopoly

<sup>34</sup> Readers accessing this paper via a database that does not include the figures can find figure 8 at <<http://www.tomwbell.com/graphics/MCuFinal.gif>>.

profits; instead, they find that the market supports sales at a quantity (Qs) and price (Ps) only just sufficient to recoup the average costs (AC) of producing the work. Even at that low price, copyright enforcement still imposes opportunity costs (NO) on consumers who would have paid less for the work. That constitutes a necessary evil, however, given that a lower price would leave copyright holders unable to recoup their costs and, thus, unwilling to supply the market for expressive works.

So, at least, goes copyright in theory. In practice, as I have emphasized elsewhere, lawmakers lack both the information and incentives to calibrate copyright policy so precisely or so well.<sup>35</sup> Figure 8 thus illustrates only how copyright law *should* work—not how it *does* work. And, given how copyright policy does work—as a necessary evil, at best—we would best serve the general welfare by encouraging the development of alternative mechanisms, based not in statutory law but in common law, for promoting the production and distribution of original expressive works.<sup>36</sup> We should, in other words, try to escape copyright.<sup>37</sup>

## Conclusion

Copyright blockheads open the door to a world that will have no need for copyright's burdensome restrictions. Encouraged by reductions in the costs of producing and distributing their expressive works, more and more blockheaded authors will come out of the woodwork. Thanks to general growth in wealth, moreover, all authors will win the means of indulging their creative whims. That steadily-increasing flow of effectively, and sometimes legally,<sup>38</sup> uncopyrighted works will join a growing ocean of older works, well-preserved, widely distributed, and relatively inexpensive to enjoy. Consumers will find it easier than ever before to satisfy their demand for works of authorship. Infringement will increase, granted, but copyism will not haunt the market in expressive works with failure. We will have outgrown the need for copyright, a well-intended but clumsy, and ultimately superfluous, policy hack.

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<sup>35</sup> See BELL, *supra* note \*, at ch. 4.

<sup>36</sup> See BELL, *supra* note \*, at ch. 7.

<sup>37</sup> Given that the prevailing defense of copyright casts it as a response to market failure, common law generally stands accused of doing too little to promote authorship. Perhaps, though, we should worry that common law might do its job too well, over-protecting intangible goods and so decreasing the public good. So far, at least, it does not appear that the Supreme Court thinks that problem looms. See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979) (holding that enforcement of a contract requiring royalty payments for unpatented invention did not contravene federal policy).

<sup>38</sup> See BELL, *supra* note \*, at ch. 8.A.