

On Posner on Copyright

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INTRODUCTION

The judiciary are different than you and me, not just because they have life tenure, but because they spend years being petitioned by real people. A judge therefore does not face problems as a logistician or an academic does but instead faces a demand to *do* something for someone, based on events preceding. The resulting posture of decision tends to bring something out, something Justice Oliver Wendell Holmes once described as “the secret root from which the law draws all the juices of life.”¹

We can learn more about this “secret root” of the common law decision-making from Richard Posner’s career, for he made his calling the addressing of hard problems from both an academic and judicial posture. When it came to copyright law (the subject of this Essay), he was a leading advocate of an economic approach to the law and even specified what he thought with some doctrinal specificity. Hence the natural experiment: What would happen when Posner came to face decades of actual cases? What might be the effect, if any, of judging?

In 1981, the year Posner was confirmed, it would have been easy to predict how he would decide copyright cases. The economic approach had suggested a straightforward, even formulaic approach. Recognize a clear property right; and then make sure it is well protected, easy to transfer, and ideally in the hands of whoever might use it best. This prescription, to be sure, was one Posner was willing to follow in some cases. But as a prediction, it failed. For over the arc of his career it cannot be denied that Posner’s copyright decisions came, over time, to be strongly influenced not just by the questions presented but the posture of the cases and, most of all, what he was being asked to do and for whom.

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¹ Oliver Wendell Holmes Jr, *The Common Law* 34 (Belknap 2009) (originally published 1881).

Maybe we can put it this way. If Posner never fully lost his faith in economics, he did seem to lose faith in humanity's capacity to behave itself. In other words, as a judge he increasingly rejected any Coasian presumption as to how private parties behave—namely, efficiently—in exchange for a view suspicious of litigants as overreaching, misbehaving creatures who, left alone, would have the law defeat its own purposes. When it came to copyright, that perspective led to the unlikely emergence of Richard Posner as one of the nation's leading policemen of the parasites, overreachers, and self-enrichers that he saw as a plague on the copyright system and intellectual property more generally.

In this sense, his copyright decisions seem far less driven by any doctrinal theory as opposed to a teleological mindset. He was dedicated to achieving the goals of the law—in this case, rewarding legitimate creators and leaving space for others. And as he tacked toward that goal, trimming and adjusting the law along the way, it became clear that he ultimately put his faith in Justice Holmes or perhaps Aristotle rather than Professors Ronald Coase or H.L.A. Hart. Stated another way, he clearly believed that a great judge ought to rely on that internal, unconscious divining rod comprising his own judgment, evolving and learning from experience, gradually moving the law closer to its stated aspirations.

To witness Posner's evolution and the development of his copyright jurisprudence provides an opportunity (or an excuse) for broader comment. For I hope that this Symposium on Posner's judicial work product will help us understand his particular contribution to the common law tradition. It is striking that even for matters on which he had opined as an academic, he remained committed to the judicial approach and its slow progress toward the law's goals, even if it meant throwing away what he had said earlier in an academic setting. He took Emerson's quip about "foolish consistency"² and made it into a judicial philosophy. When Posner was at his best, he saw the job as an opportunity to work on interesting or amusing problems in the law in an effort to improve it. He trusted that internal divining rod, accepting and even embracing an evolving jurisprudence as a sign of learning and wisdom.

² Ralph Waldo Emerson, *Self-Reliance*, in Edna H.L. Turpin, ed, *Essays of Ralph Waldo Emerson* 79, 89 (Charles E. Merrill 1907).

Understanding Posner as a great common law judge is important in an age when that ideal has been all but replaced with something different. The newer ideal takes dogmatism as a virtue, positing the judge as more of a soldier, who primarily earns honor by striking blows for his or her side. He or she is less celebrated for evolution or wisdom as opposed to steadfast refusal to change his or her views. It embraces a thin ideal of individuality: one that allows a judge a taste for baseball or bluegrass but forbids individuality when it comes to actual judging, at least for important cases.

The rise of the soldier judge gives reason to fear that Posner's judicial writing may be wasted on our tedious and tententious times. For activists on the left and right, proponents and opponents of doctrine, Posner was always dissatisfying, for he rarely delivered the goods in a manner that either side found fully acceptable. Nor was he particularly popular with practicing lawyers, most of whom have long discarded the pretense of being part of a learned profession in the historic sense. The lawyer's jammed schedule creates an appetite for opinions that are easy to read, announce neat formulas for future decisions, and combine the trappings of respectability with the depth of a children's textbook.

It is a pity, for while a judiciary comprised entirely of Posners would not be ideal, we have gone too far in the opposite direction.³ We need more judges who rely on their judgment, especially on the courts of appeals, and who try hard to improve the law and prevent its misuse. What is hard to admit is that there seems to be very little possibility of the next Richard Posner becoming a member of the federal judiciary at this point, which is a harsh verdict on the state of the Republic. For, especially in the law, we live in a time in which we celebrate the individual but recoil from any real instantiation of individuality. And that may be why, by the very end, Posner was a common law coelacanth, the last fish surviving from the Jurassic period, largely swimming alone.

³ See Frank B. Cross and Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 Nw U L Rev 1437, 1439–40 (2001) (noting that law schools teach a naïve legal model that does not acknowledge a role for judicial individuality).

I. COPYRIGHT, ACCORDING TO POSNER THE ACADEMIC AND
POSNER THE JUDGE

A. Posner the Academic

As an academic, Posner was and is an influential writer in the copyright field. He is the author of two books on the topic (including his popular title *The Little Book of Plagiarism*⁴), along with several articles and some blog posts. While copyright was certainly not his sole focus (nothing was; he was also like Justice Holmes in this regard), his works, most of which were coauthored with Professor William Landes, immediately became standard citations for the economic analysis of copyright law.⁵ The theme of his early work was unsurprising: it was to stress the economic, as opposed to the moral, function of copyright. As he and Landes put it, they were interested in whether “copyright law can be explained as a means for promoting efficient allocation of resources.”⁶

In Posner’s first paper on copyright, published in 1989, he and Landes presented a more sophisticated take on what is now a standard idea: that copyright grants legal protections to encourage the creation of expressive works.⁷ As they put it, “Copyright protection—the right of the copyright’s owner to prevent others from making copies—trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place.”⁸ But from the beginning, Posner also agreed that the task was complex: “For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”⁹

⁴ Richard A. Posner, *The Little Book of Plagiarism* (Pantheon 2007).

⁵ See, for example, William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J Legal Stud 325, 325–33, 344–53 (1989); William M. Landes and Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U Chi L Rev 471, 473–75 (2003); William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* 37 (Belknap 2003); William M. Landes and Richard A. Posner, *The Political Economy of Intellectual Property Law* 8 (AEI-Brookings 2004). See also William F. Patry and Richard A. Posner, *Fair Use and Statutory Reform in the Wake of Eldred*, 92 Cal L Rev 1639, 1643 (2004).

⁶ Landes and Posner, 18 J Legal Stud at 325 (cited in note 5).

⁷ Id at 332.

⁸ Id at 326.

⁹ Id.

Of course, by the late 1980s, the central economic paradox created by copyright was not unrecognized. It was implicit in Lord Thomas Babington Macaulay's 1841 speech that described copyright as a form of monopoly—"a tax on readers for the purpose of giving a bounty to writers."¹⁰ But with a few exceptions (among them a famous paper by then-Professor Stephen Breyer that questioned the very existence of copyright¹¹), most of the writings began and ended with Macaulay's analysis. Posner and Landes's contribution was to be far more precise about what they took to be the various costs associated with both the reproduction of expressive works and their creation.¹² And they also thought copyright protection could go too far, for "beyond some level copyright protection may actually be counterproductive by raising the cost of expression."¹³ However, consistent with Posner's earlier tendency to find an efficiency rationale lurking behind most of positive law, in his examination of copyright doctrine, he did not suggest that the rules were random or interest group driven but rather that they reflected some inchoate yearning for efficient outcomes.¹⁴

This academic writing set the stage for Posner's judicial career, to which I now turn.

B. Posner the Judge

Posner the academic had presented a flat, almost purposely dry account of copyright's function in the economy. But Posner the judge was another story. Perhaps it was the cases, or the way he thought about things, but his judicial copyright career was far more colorful. And while it is hard to summarize twenty-six-odd cases, his most prominent contributions dwelt on a key

¹⁰ *A Speech Delivered in the House of Commons on the 5th of February, 1841*, in *The Miscellaneous Writings and Speeches of Lord Macaulay* 609, 613 (Longmans, Green, Reader & Dyer 1871).

¹¹ Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv L Rev 281, 321 (1970).

¹² Landes and Posner, 18 J Legal Stud at 332 (cited in note 5).

¹³ *Id.*

¹⁴ Richard A. Posner, *Economic Analysis of Law* 98 (Little, Brown 1973) ("The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value, or, what amounts to the same thing, minimize the joint cost of the activities."). By 2004, Posner had begun to suggest that the expansion of copyright was a function of interest group behavior, an assertion in tension with the older suggestions of efficiency. See Landes and Posner, *Political Economy of Intellectual Property* at 8 (cited in note 5).

relationship: that between primary and secondary authors, or what can be described as the problem of “follow-on” works.

To understand this problem, consider that any successful work—a play, a sculpture, a novel—is likely to yield follow-on works, such as movie versions, reviews, sequels that use the same characters, guides, translations, parodies, and so on. That fact yields a challenging question for copyright law—namely, which follow-ons should belong to the original author and which should be free to secondary authors to create without permission? Anyone is free to stage *Hamlet*, but what about writing a new Sherlock Holmes story? These cases put the judge in the difficult position of weighing the interests of two intended beneficiaries of the law.

Copyright law handles this area imperfectly and inconsistently with a mixture of doctrines. One is the “idea-expression” dichotomy, which allows authors to borrow any “ideas” from existing works but not the “expression.”¹⁵ Posner the academic described it this way: “If an economist reprints Ronald Coase’s article on social cost without permission, he is an infringer; but if he expounds the Coase Theorem in his own words, he is not.”¹⁶ Another doctrine, important for fictional works, is the granting of copyright in characters, which allows an author to control the franchise and merchandizing.¹⁷ A third doctrine is the adaptation or derivative work right, which gives the original author the right to any adaptation of the original (like a film version of a novel)¹⁸ or any other way that it might be “recast, transformed, or adapted.”¹⁹ The fourth and final doctrine is the fair use doctrine, which creates an affirmative defense for certain types of follow-ons, such as reviews or parodies.²⁰ Hence a critic is free, under the fair use doctrine, to write a lengthy review of a nonfiction book and even to quote liberally from it, even though there

¹⁵ See 17 USC § 102(a)–(b).

¹⁶ Landes and Posner, *Economic Structure of Intellectual Property Law* at 91 (cited in note 5).

¹⁷ See, for example, Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv L Rev 683, 742–50 (2012) (discussing character copyright and a notable Posner opinion on the topic).

¹⁸ See generally Amy B. Cohen, *When Does a Work Infringe the Derivative Works Right of a Copyright Owner?*, 17 Cardozo Arts & Enter L J 623 (1999) (delving into the intricacies of the doctrine).

¹⁹ 17 USC § 101.

²⁰ See, for example, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L J 283, 304 (1996).

could be no review without the book and even though the original author hates the review and wishes it did not exist.

Posner the judge would go on to make important contributions to the character copyright doctrine, primarily through his writing on characters, derivative works, and fair use.

II. CHARACTER COPYRIGHTS

Sherlock Holmes, Dorothy (from *The Wizard of Oz*), and Medieval Hellspawn are the featured characters in Posner's most important copyright opinions, which center on the role of character copyrights.²¹

Copyright is designed to encourage the creation of "works," which was originally understood as "maps, charts, and books."²² But at some point, possibly in the 1920s, it became clear that the characters in a fictional work might enjoy their own copyrights.²³ That is to say, it became clear that a character might enjoy a legal life separate from the work it was found in.²⁴ That idea was most evident in an opinion by Judge Learned Hand, who, by declining to protect stock characters, implied that others might be protected.²⁵

If once trivial, character copyrights have grown in value and become perhaps the most valuable class of copyright. No one remembers the plot of the first comic to feature Superman, but everyone knows "The Man of Steel." A film like *The Avengers*, has a value that owes little to the originality of its setting or plot (a villain is plotting to take over the world) as opposed to the inclusion of luminous heroes like Thor, Iron Man, the Hulk, and Black Widow.

Over his tenure, Posner assigned himself or was assigned just about every character copyright case to come before the Seventh Circuit. His decisions are a good place to witness the

²¹ *Klinger v Conan Doyle Estate, Ltd*, 755 F3d 496 (7th Cir 2014) (*Klinger I*); *Gracen v Bradford Exchange*, 698 F2d 300 (7th Cir 1983); *Gaiman v McFarlane*, 360 F3d 644 (7th Cir 2004).

²² Copyright Act of 1790, 1 Stat 124, 124.

²³ See, for example, *King Features Syndicate v Fleischer*, 299 F 533, 535 (2d Cir 1924) (holding that a doll version of a cartoon horse violated copyright protection, and noting that taking the substance of a work or an idea and producing it in a different medium still violated copyright protection).

²⁴ For an explanation that relies on the role played by characters in infringement analysis, see Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 *Cardozo L Rev* 769, 776–80 (2013).

²⁵ See *Nichols v Universal Pictures Corp*, 45 F2d 119, 121 (1930).

effect of judging, for the decisions, while reflecting the competitive and economic consequences of granting character copyright, are driven also by insights about the process of authorship itself and rumination on just what a character is. Ultimately, the judgments cannot seem to be divorced from the justice of the situation—who was trying to get what and how entitled to relief they seemed.

Posner's first character-related copyright decision came very early in his career and centered on Dorothy from *The Wizard of Oz*.²⁶ The case revolved around a woman named Jorie Gracen, who had won a contest to paint Dorothy as portrayed by Judy Garland for a series of collectors' plates.²⁷ Gracen could not reach an agreement to reproduce her painting with the manufacturer that MGM had licensed to make the plates, so the manufacturer hired another artist to copy Gracen's painting, reasoning that Gracen did not hold any enforceable rights anyhow.²⁸ She felt differently and sued for infringement.²⁹

But had Gracen actually copied the character of Dorothy? Posner might have decided the case by holding that Dorothy was nothing more than a stock character, a courageous but otherwise unremarkable little girl from Kansas whose taste for shiny shoes did not distinguish her. But he presumed that the character was copyrighted because, foreshadowing Posner's later work on visual characters, she was depicted in a still photograph of Judy Garland as Dorothy from the MGM film.³⁰

But this, as Posner might say, was an aside. Posner's far more important and influential character opinion was a tricky case centered on the *Spawn* comic book series, the famous author Neil Gaiman, and the artist/publisher Todd McFarlane.³¹ It is both an important case and also one in which the line between

²⁶ See *Gracen*, 698 F2d at 305.

²⁷ *Id.* at 301.

²⁸ *Id.*

²⁹ *Id.* at 301–02.

³⁰ The *Gracen* opinion is also important for its elevation of problems of evidence and proof in copyright law. In adopting a Second Circuit rule demanding greater originality in derivative works, Posner noticed that such requirements kept at bay what might otherwise become difficult problems of proof. *Gracen*, 698 F2d at 301–02. And this way of thinking about the law, implicit perhaps in other opinions, was novel as a rationale for a copyright rule. Professor Douglas Lichtman would later elevate it to a more general theory of copyright law, suggesting that the evidentiary function helped judges understand many otherwise puzzling parts of copyright doctrine. Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 *Duke L J* 683, 708–10 (2003).

³¹ *Gaiman*, 360 F3d at 648–49.

Posner's economic and pragmatic instincts seems particularly sharp.

Comic author and illustrator McFarlane, who made his name through his work on Spider-Man in the late 1980s, had by the 1990s left the majors (DC and Marvel) to become an independent comic book publisher.³² In 1992, he launched a new series centered on a character named Spawn, whose life story, Judge Posner tells us, "is an affecting one."³³ Spawn (whose given name was Al) was a member of an elite military unit who was betrayed and killed after uncovering a dark conspiracy.³⁴ However, Spawn made a literal deal with the devil to return to Earth and became a "handpicked Hellspawn . . . remade (a full makeover, as we'll see) and infused with Hell-born energy."³⁵

Spawn the character clearly belonged to McFarlane, who conceived him and first drew him. (In his first appearance, he had long spiky fingernails, wore a red cape and chains, and manipulated green energy fields.) The complications began in 1992, when McFarlane invited Gaiman to write an issue of the *Spawn* series based on only an oral promise to treat him better than the "big guys."³⁶ Gaiman immediately added three new characters to the comic, naming them Medieval Spawn, Angela, and Count Nicholas Cogliostro, and wrote dialogue for them.³⁷ Medieval Spawn was an earlier incarnation of the main character described above—like the original, he also wore a red cape and chains, but carried gigantic medieval weapons and rode a horse.³⁸ Angela was a new villain, a "warrior angel and villain" who wore a dominatrix outfit and carried a lance.³⁹ Cogliostro was a "wisened [*sic*] sage."⁴⁰ To complicate matters, while the characters were thought up by Gaiman, they were actually drawn by McFarlane.⁴¹ All of the new characters, particularly Angela, were popular and became valuable, and over time the Gaiman-McFarlane team began to argue over who actually owned copyright in the newly created characters. McFarlane

³² Id at 649.

³³ Id.

³⁴ Id.

³⁵ *Gaiman*, 360 F3d at 649.

³⁶ Id.

³⁷ Id at 650.

³⁸ Id at 657.

³⁹ *Gaiman*, 360 F3d at 657.

⁴⁰ Id.

⁴¹ Id at 658.

conceded that Gaiman was a joint owner of Angela but not the other two.⁴² They could not agree, ultimately leading to litigation.

One way that a simple law-and-economics analysis might be used to approach this problem is simply as one of asset allocation. Consider that the three characters—Medieval Spawn, Angela, and Cogliostro—can be seen as little more than new assets spawned by the original work, like three calves born of the same cow.⁴³ It is a typical dictate in the economic analysis of law to suggest simple rules, clear to the parties *ex ante*, that allocate the assets to whoever might most easily put them to productive use.⁴⁴ In this case, the party who would put the assets to the most productive use was clearly McFarlane, the publisher and also the originator of the *Spawn* series. Another approach is to create rights around which private bargains could be struck, in Coasian fashion. Professor Harold Demsetz argued that the economic function of property was to grant rights so as to internalize any externalities⁴⁵—well, what else was Gaiman’s effort to grab the characters for himself? Hence the case for leaving the assets with the original rights holder and allowing parties to contract around that reality if they wished.

Following these principles, Posner could have just reversed the jury verdict and told Gaiman that he should have gotten a signed contract and to not bother the court with his pleas for *ex post* justice. That outcome might have reflected a classic Coasian refrain: having strengthened the rights, the lesson would be learned, and future parties would surely understand the necessity of bargaining in advance to reach a Pareto optimal outcome.⁴⁶

But Posner declined to write that opinion. Instead, he took the occasion for a detailed dive into the nuances of creative collaboration and the challenging common law question of what might make a character distinct enough to merit copyright protection. The opinion took Gaiman’s side, in part because

⁴² *Id.* at 650.

⁴³ See Randall G. Holcombe, *The Coase Theorem, Applied to Markets and Government*, 23 *Indep Rev* 249, 250–51 (2018) (discussing asset allocation as applied to markets).

⁴⁴ See *id.*

⁴⁵ Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am Econ Rev* 347, 350 (1967).

⁴⁶ Pareto optimality refers to a situation of asset allocation in which it is impossible to move resources around to make any one individual better off without making another worse off. See, for example, Landes and Posner, 18 *J Legal Stud* at 348–49 (cited in note 5).

Posner seemed to take him seriously as a creator who deserved the rewards of the law.⁴⁷ In short, Posner discarded any “[s]imple rules for a complex world”⁴⁸ in favor of who anyone could see was a meritorious author, the actual subject of the copyright laws.

Finding that Gaiman was the copyright owner required several doctrinal innovations (and also giving Gaiman a pass on a tricky statute of limitations challenge⁴⁹). One doctrinal innovation concerned the joint ownership of copyright. Other circuits, including the Second, had created a simple rule suggesting that one could not be a joint author without making a contribution that was separately copyrightable and, in fact, Posner himself had stated a version of that rule in an earlier case.⁵⁰ It is a rule meant to prevent more minor figures—copy editors, fact-checkers, and others—from claiming to be joint authors of the works to which they contribute.⁵¹ It therefore left an easy way to knock Gaiman out and send a message of tough love: next time, get a contract.

But Posner, himself a frequent coauthor, was not willing to accept a rule that took so narrow a view of what counted as an authorial contribution (one that would deny his own coauthor, Professor Landes, joint copyright). So Posner held that, whatever the merits of that rule in other contexts, it went too far if it denied joint copyright when combined efforts were necessary to produce one work—for that would be “peeling the onion until it disappeared.”⁵² He suggested:

Here is a typical case from academe. One professor has brilliant ideas but can’t write; another is an excellent writer, but his ideas are commonplace. So they collaborate on an academic article, one contributing the ideas, which are not copyrightable, and the other the prose envelope. . . . Their intent to be the joint owners of the copyright in the article would be plain, and that should be enough to constitute them joint authors.⁵³

⁴⁷ See *Gaiman*, 360 F3d at 654–55.

⁴⁸ Richard A. Epstein, *Simple Rules for a Complex World* 21 (Harvard 1995).

⁴⁹ See *Gaiman*, 360 F3d at 652–53.

⁵⁰ *Seshadri v Kasraian*, 130 F3d 798, 803 (7th Cir 1997), citing *Childress v Taylor*, 945 F2d 500, 507 (2d Cir 1991).

⁵¹ See *Thomson v Larson*, 147 F3d 195, 200 (2d Cir 1998).

⁵² *Gaiman*, 360 F3d at 658–59.

⁵³ *Id* at 659.

This ruling made Gaiman a joint owner of Medieval Spawn.⁵⁴ But Posner also faced the assertion that Cogliostro, “the wisened [*sic*] sage,” was merely a stock figure and therefore not subject to ownership by anyone.⁵⁵ I have already discussed the fact that in some works, such as *The Avengers* or, for that matter, the James Bond films, the characters are “the story being told,” meaning that the stories amount to little more than the characters in them.⁵⁶ But there are also successful works that have no memorable or copyrightable characters. *Jurassic Park* was a popular film, but the only characters of note were the dinosaurs, who could not be copyrighted as such. *Pulp Fiction* was among the most acclaimed films of the 1990s, but, as the title suggests, every one of its characters was stock or, more accurately, did not go much beyond the actors who played them.

Posner took the opportunity to follow Judge Learned Hand’s lead and put his own gloss on the standard that a character be distinctive.⁵⁷ Judge Hand wrote that there could be no copyright in “a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress.”⁵⁸ Posner took the opportunity to extend Judge Hand’s Shakespeare-centered list of unprotectable characters by adding “a drunken suburban housewife, a gesticulating Frenchman, a fire-breathing dragon, a talking cat, a Prussian officer who wears a monocle and clicks his heels, [or] a masked magician.”⁵⁹

But then what of Cogliostro, a stock character if there ever was one? Here’s how Gaiman conceived of him: “[Y]ou think he’s a drunken bum,” but “[h]e’s some kind of mysterious stranger who knows things.”⁶⁰ There was some visual description too: “[A] really old bum, a skinny, balding old man, with a grubby greyish-yellow beard, like a skinny santa claus.”⁶¹ Even with all of that, we don’t have much, almost certainly not enough to protect. The “unexpectedly knowledgeable old wino” would, on its

⁵⁴ Id at 661–62.

⁵⁵ Id at 657, 660.

⁵⁶ *Warner Brothers Pictures, Inc, v Columbia Broadcasting System, Inc*, 216 F2d 945, 950 (9th Cir 1954).

⁵⁷ See *Nichols*, 45 F2d at 121.

⁵⁸ Id.

⁵⁹ *Gaiman*, 360 F3d at 660.

⁶⁰ Id at 658.

⁶¹ Id.

face, seem to be a good addition to Judge Hand's and Posner's list of stock characters.⁶²

But instead of reversing on *Cogliostro*, Posner made yet another innovative doctrinal move. He decided that McFarlane, in the process of giving *Cogliostro* a specific and distinct appearance (when drawing him), crossed the line and made *Cogliostro* into a copyrightable character, of which Gaiman was now the joint owner.⁶³ Along the way, Posner made explicit and implicit distinctions between the copyrightability of visual and literary characters.⁶⁴

Posner seemed to be driven by the subtle differences between a visual and written medium that were also implicit in the *Dorothy/Wizard of Oz* case and were also captured by what I call the "King Lear/Grimace paradox."⁶⁵ Most of us would consider King Lear a more interesting and well-developed character than, say, Grimace, the purple McDonald's mascot. But to copyright law, Grimace's depiction makes him the more distinct character, and the easier one to gain protection for, as compared with Lear, who might be described as "a wealthy but angry old father with a weakness for flattery." Here is how Posner put the point: "A reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive."⁶⁶ He added a public service message: "That is why kids lose a lot when they don't read fiction, even when the movies and television that they watch are aesthetically superior."⁶⁷

The *Cogliostro* decision might have been wrong and was surely a close call. It seems to create the risk of encouraging actors to claim copyright in characters that they visually embody (consider Mark Hamill claiming ownership in Luke Skywalker).⁶⁸ It also might seem to overcredit Gaiman, who, after all, hadn't really done much besides give the description above and write some dialogue. Yet it certainly marked, for

⁶² Id at 660.

⁶³ *Gaiman*, 360 F3d at 661.

⁶⁴ The distinction was arguably implicit in decisions such as *Walt Disney Productions v Air Pirates*, 581 F2d 751, 753–55 (9th Cir 1978).

⁶⁵ The paradox is one that I use in my copyright class.

⁶⁶ *Gaiman*, 360 F3d at 661.

⁶⁷ Id.

⁶⁸ But see *Garcia v Google, Inc*, 786 F3d 733, 737 (9th Cir 2015) (en banc) (affirming the district court's decision to deny relief to an actress seeking to copyright her performance in a film).

Posner, a decidedly more nuanced and sophisticated approach to follow-on authorship cases, echoed in his academic writing.

It might be worth noting that, at around the same time as the Hellspawn opinion, Posner released a book, *The Economic Structure of Intellectual Property Law*,⁶⁹ and a monograph, *The Political Economy of Intellectual Property Law*.⁷⁰ In the latter, implicitly breaking with the earlier premise that the law was efficient, he dwelt on public choice explanations for copyright's expansion and the "inherent asymmetry" between the primary and secondary authors, based on the difference between "the value that creators of intellectual property place on having property rights and the value that would-be copiers place on the freedom to copy without having to obtain a license."⁷¹ So perhaps he was beginning to have his suspicions.

Posner's latent concerns about the conduct of copyright owners played out most dramatically in the 2014 case of *Sherlock Holmes*, the famous detective, in an opinion with particularly important implications for so-called fan fiction and other follow-on authorship.⁷² Sir Arthur Conan Doyle, in the late nineteenth and early twentieth century, wrote some sixty *Sherlock Holmes* stories.⁷³ By the 2010s, copyright in all but ten of the stories had expired.⁷⁴ Nonetheless, when other authors sought to use those characters, the estate demanded royalties, claiming that it still owned copyright in the characters of *Sherlock Holmes* and *John Watson*, his sidekick.⁷⁵ An editor of a series of new *Sherlock Holmes* stories sued Doyle's estate, asking the court to declare *Sherlock* and *Watson* to be in the public domain.⁷⁶

You might wonder: If the copyrights had expired, how could the estate possibly claim copyright in the characters? The estate posited that the characters had fully developed only in the last ten stories—the ones in which copyright still subsisted—because in these last stories, the characters had become "round," unlike

⁶⁹ See generally Landes and Posner, *Economic Structure of Intellectual Property Law* (cited in note 5).

⁷⁰ See generally Landes and Posner, *Political Economy of Intellectual Property* (cited in note 5).

⁷¹ *Id.* at 14.

⁷² *Klinger I*, 755 F3d at 498.

⁷³ *Id.* at 497.

⁷⁴ *Id.*

⁷⁵ *Id.* at 497–98.

⁷⁶ *Klinger I*, 755 F3d at 498.

the “flatter” Holmes and Watson who were in the first fifty.⁷⁷ “Repeatedly at the oral argument,” Posner wrote, “the estate’s lawyer dramatized the concept of a ‘round’ character by describing large circles with his arms.”⁷⁸ Hence, according to the estate, the further delineation of the characters in the last ten stories either kept them in copyright or created copyright in them for the first time. This argument suggested that further development might even do so indefinitely should the estate continue to write new Sherlock Holmes stories every so often.⁷⁹

While that might sound like overreaching, the estate’s strongest policy arguments could be found in a 2003 paper by none other than Posner himself and coauthor Landes.⁸⁰ The two made the novel argument—blasphemous to the copyright academy—that there might be good economic reason to allow certain copyrights, such as those of famous characters, to subsist indefinitely.⁸¹ Using the example of Mickey Mouse, Posner and Landes argued that a valuable character thrown into the public domain might become “overgrazed” and lose all commercial value.⁸²

If because copyright had expired anyone were free to incorporate the Mickey Mouse character in a book, movie, song, etc., the value of the character might plummet. Not only would the public rapidly tire of Mickey Mouse, but his image would be blurred, as some authors portrayed him as a Casanova, others as catmeat, others as an animal-rights advocate, still others as the henpecked husband of Minnie. In effect, there would be both a movement along and shift downward in the demand curve . . . until Mickey Mouse’s commercial value was zero.⁸³

It is no stretch to suggest that such overgrazing might ruin Sherlock Holmes; hence Posner’s paper clearly counsels for deciding in the estate’s favor. But Posner the judge effectively decided against Posner the academic. He ruled against the estate, suggesting that its defense “border[ed] on the quixotic”⁸⁴ and even forced it to pay attorneys’ fees.

⁷⁷ Id at 501–02.

⁷⁸ Id.

⁷⁹ Id at 503.

⁸⁰ Landes and Posner, 70 U Chi L Rev at 474–75 (cited in note 5).

⁸¹ Id.

⁸² Id at 484.

⁸³ Id at 487–88.

⁸⁴ See *Klinger I*, 755 F3d at 503.

Facing a choice between legitimate follow-on authors wishing to put Sherlock Holmes in new adventures and an estate demanding money that would not go to Doyle himself, who was long dead, Posner the judge did not see it as a hard case. Instead, it was outrageous overreaching—copyright trolling.⁸⁵ (In his award of attorney fees, he went on at some length about the problem of copyright trolls extorting money on the basis of nothing.⁸⁶)

But what about the argument made by Posner the academic?⁸⁷ Perhaps out of a sense of duty, Posner raised his own theory, without citation,⁸⁸ as an argument against his own opinion that the estate could have argued but didn't.

We can imagine the Doyle estate being concerned that a modern author might write a story in which Sherlock Holmes was disparaged (perhaps by being depicted as a drug dealer—he was of course a cocaine user—or as an idiot detective like Inspector Clouseau of the *Pink Panther* movies).⁸⁹

But Posner the judge summarily dismissed the arguments of Posner the academic by pointing out that the argument lacked legal support and, in any case, that the estate was not actually concerned about disparaging uses. Whether this is the only time Posner the judge dismissed the arguments of Posner the academic I do not know, but it was certainly among the clearer examples.

III. DERIVATIVE WORKS AND FAIR USE

A second way that the line between the first and later authors is divided is through the twin doctrines of derivative works and fair use.⁹⁰ The former is an exceptionally broad right that gives the original author the exclusive rights over any adaptation of the original work—any way it might be “recast, transformed, or adapted.”⁹¹ The classic examples were the play based

⁸⁵ See *id.* (noting that a lengthy copyright protection period would result in massive payments to the Doyle estate in licensing fees).

⁸⁶ See *Klinger v Conan Doyle Estate, Ltd.*, 761 F3d 789, 791–92 (7th Cir 2014) (*Klinger II*).

⁸⁷ Landes and Posner, 70 U Chi L Rev at 475 (cited in note 5).

⁸⁸ Posner did not include citations to his academic writing in his judicial opinions.

⁸⁹ *Klinger I*, 755 F3d at 503.

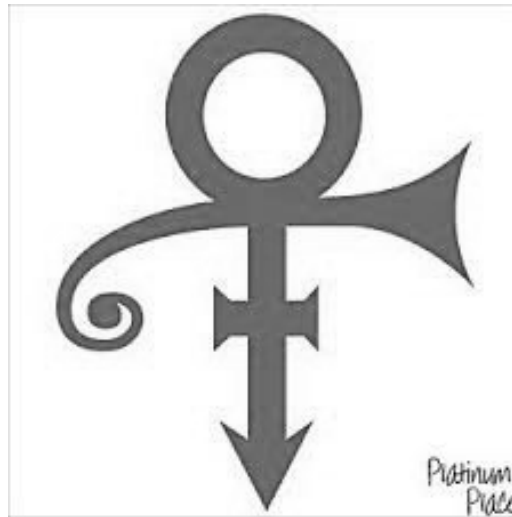
⁹⁰ 17 USC §§ 106(2), 107.

⁹¹ 17 USC § 101.

on the novel, the translation, the new musical arrangement, and the abridgment.⁹² But that right can be in tension, and even sometimes at war, with the fair use doctrine, which suggests that a secondary author may adapt the work into follow-on works, such as book reviews, news reporting, parodies, and, more recently, so-called remix art.⁹³ As this brief discussion might suggest, what counts as an adaptation, and what is fair use, is not exactly a straightforward matter.

Posner's second major derivative work case was a 2000 case involving the singer Prince (or, as he was then known, "the Artist Formerly Known as Prince") and the symbol that he used to represent himself, which is unpronounceable but resembles an ankh.⁹⁴

FIGURE 1: SYMBOL CHOSEN BY PRINCE TO REPRESENT HIMSELF



⁹² 17 USC § 101.

⁹³ 17 USC § 107.

⁹⁴ See generally *Pickett v Prince*, 207 F3d 402 (7th Cir 2000).

FIGURE 2: GUITAR RESEMBLING PRINCE'S CHOSEN SYMBOL



In that case, a man named Ferdinand Pickett, inspired by the symbol, created a guitar in the shape of it.⁹⁵ According to Pickett, he managed to show his guitar to Prince. To his surprise and anger, not long thereafter, Prince appeared in public with just such a guitar, which suggested to Pickett that his brilliant idea had been stolen.⁹⁶

Despite the fact that the second man was himself a creator in a way, Posner held for Prince without much difficulty.⁹⁷ The law supported such an outcome, but Posner grounded the decision on a premise drawn from his academic writing: it was sensible to concentrate all rights in Prince, for “[c]oncentrating the right to make derivative works in the owner of the original work prevents what might otherwise be an endless series of infringement suits posing insoluble difficulties of proof.”⁹⁸ It was an echo of the Dorothy opinion, and the case became a lesson in the importance of preventing opportunistic litigation by those who (often in earnest) imagine that they really were the first to come

⁹⁵ *Id.* at 404.

⁹⁶ *Id.*

⁹⁷ *Id.* at 407.

⁹⁸ *Pickett*, 207 F3d at 406. See also *id.*:

Consider two translations into English of a book originally published in French. The two translations are bound to be very similar and it will be difficult to establish whether they are very similar because one is a copy of the other or because both are copies of the same foreign-language original. Whether Prince's guitar is a copy of his copyrighted symbol or a copy of Pickett's guitar is likewise not a question that the methods of litigation can readily answer with confidence.

up with, say, the idea that *Pygmalion* might make a really good play.

But by following that narrative (one stressed in his academic writing⁹⁹), the opinion avoids several important questions. Was the guitar version clearly an adaptation of Prince's copyrighted symbol and therefore actually even actionable at all, whether by Pickett or by Prince? The statute does not so decree,¹⁰⁰ and the functional nature of guitars might seem to caution against it. Might the better answer be to disarm everyone who might want to make guitars out of unpronounceable symbols—and just leave copyright out of it?

It is hard to escape the conclusion that the posture of the lawsuit helped drive the result. Famous creators always attract a certain class of followers who come to believe that they played an overlooked role in the creative process and have been shafted by “the powers that be.” J.K. Rowling, the author of the *Harry Potter* series, has been sued repeatedly by authors who believe that they, in fact, were the first to invent the concept of schoolchildren who practice magic. (Among the plaintiffs are the authors of *Willy the Wizard* and *The Legend of Rah and Muggles*.¹⁰¹) Like a conspiracy theory, the idea that one is the “real” inventor of something famous and successful, once embedded in the psyche, seems impossible to dislodge. And while we do not know Pickett's full story, his narrative suggests a man who was dangerously close to this category. If given rights, he might become like the dog in Justice Holmes's *The Common Law*, who “will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again.”¹⁰²

Things might have been different were Pickett a harmless hobbyist, a designer of curio guitars who had been hunted down by Prince or, even worse, the Prince estate. And this difference helps explain the famous Beanie Baby case, *Ty, Inc v Publications International, Ltd (Ty II)*,¹⁰³ decided three years later. Beanie Babies are small stuffed animals that, in the

⁹⁹ See, for example, Landes and Posner, *Economic Structure of Intellectual Property Law* at 109–11 (cited in note 5).

¹⁰⁰ 17 USC § 103(a).

¹⁰¹ See, for example, *Harry Potter Author Sued for Plagiarism* (The Guardian, Mar 17, 2000), archived at <http://perma.cc/U4GC-MWAZ>; *J.K. Rowling Sued for Plagiarism* (The Star, Feb 18, 2010), archived at <http://perma.cc/X3AC-HLYY>.

¹⁰² Holmes, *The Common Law* at 192 (cited in note 1).

¹⁰³ 292 F3d 512 (7th Cir 2002).

1990s, became popular collectors' items.¹⁰⁴ They are manufactured by Ty, Inc and, in an earlier case, Posner had upheld copyright of one of Ty's pigs, named "Squealer," as a "soft sculpture."¹⁰⁵ Publications International, Ltd (PIL), a publisher, produced a series of independent guides to the Beanie Babies collection, which included the *Beanie Babies Collector's Guide* and *For the Love of Beanie Babies*.¹⁰⁶ But Ty didn't like PIL's unlicensed guides, for it granted copyright licenses to publishers for a competing set of guides, in which criticism of the Beanie Babies was forbidden; and Ty sued PIL for copyright infringement.¹⁰⁷

The Beanie Baby case is Posner's most important contribution to the problem of follow-on authorship. It works one economic concept to great advantage: the idea that some follow-ons are complements to the original work—that is, they make it more valuable. Consider, for example, Internet recaps of television shows or a layman's guide to Professor Martin Heidegger's *Being and Time*—both add value to the original work as opposed to substituting for it. Posner took the view that follow-ons that make the original more valuable, as opposed to substituting for it, ought to be permitted. In fact, in *Ty II*, Posner casually elevated the distinction between complement and substitute into a controlling theory for fair use. "[W]e may say," and Posner does, "that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws) . . . is not fair use."¹⁰⁸

Posner's complement/substitute line is an elegant formulation that, in a sentence or two, would create a new order for a doctrine that is widely regarded as unpredictable and chaotic. Unfortunately, it is only barely consistent with what other courts (including the Supreme Court) have prescribed for fair use cases—namely, a methodical working through of four factors specified in the statute.¹⁰⁹ Posner, who hates nothing more than an incoherent balancing test in which factors are said to "point" one way or another (like a lawyer's Ouija board), dealt with that

¹⁰⁴ *Id.* at 515.

¹⁰⁵ *Ty, Inc v GMA Accessories, Inc*, 132 F3d 1167, 1169 (7th Cir 1997) (*Ty I*).

¹⁰⁶ *Ty II*, 292 F3d at 515.

¹⁰⁷ *Id.* at 520.

¹⁰⁸ *Id.* at 517.

¹⁰⁹ See 17 USC § 107; *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 577 (1994).

problem by announcing that “the four factors are a checklist of things to be considered rather than a formula for decision.”¹¹⁰

Whether other circuits will be bold enough to accept Posner’s complement/substitute approach remains to be seen, as the four-factor analysis he hated has an almost magnetic appeal for some judges and academics. And there’s also another problem with Posner’s complement/substitute approach. Many of the adaptation or derivative work rights—granted to the original creator by the statute—are *also* complements to the original work. But if complements are supposed to be fair use, how can they also be derivative works? (Consider that a translation of *Harry Potter* into Japanese also makes the original more valuable because more people can read it—but the law clearly makes translations a derivative work.)

Posner addresses this by saying that works that substitute for derivative works of the original are *also* not usually to be regarded as fair use either. But it leaves open the question of what counts as a derivative work in the first place—a matter that Posner, along with Judge Frank Easterbrook, has been among the few judges to really think hard about.¹¹¹

That leads us to Posner’s second innovation in *Ty II*: a narrowing of the derivative works doctrine from what at least some courts had taken it to be. He achieves this by a categorical holding that a collector’s guide to a series of copyrighted works are not derivative works at all, a matter important to the world of follow-on writing. Posner seems to have forced this concession on Ty’s lawyers, for he seemed to take it as obvious, comparing the collector’s guide to a book review.¹¹² Posner said, relying on the statutory language:

A guide to Parisian restaurants is not a recasting, transforming, or adapting of Parisian restaurants. Indeed, a collectors’ guide is very much like a book review, which is a guide to a book and which no one supposes is a derivative work. Both the book review and the collectors’ guide are critical and evaluative as well as purely informational; and ownership of a copyright does not confer a legal right to control public evaluation of the copyrighted work.¹¹³

¹¹⁰ *Ty II*, 292 F3d at 522.

¹¹¹ See, for example, *Lee v A.R.T. Co.*, 125 F3d 580, 581 (7th Cir 1997) (Easterbrook).

¹¹² *Ty II*, 292 F3d at 520.

¹¹³ *Id.* at 520–21.

This way of thinking breaks from other courts, which have sometimes been willing to blithely assume that anything associated with the original work belongs to the original author, even though the statutory language doesn't say so. The Second Circuit held a trivia game based on the television show *Seinfeld* to be infringing,¹¹⁴ even though a trivia game is not mentioned in the statute and it is hard to see it as “recast[ing], transform[ing], or adapt[ing]”¹¹⁵ the original show. It is hard, if not impossible, to see how the game hurts the creators of the show and easy to see that it might add to the enjoyment of die-hard fans. The same court also held a guidebook to the *Twin Peaks* television show, which was popular in the early 1990s, to be a derivative work,¹¹⁶ and a New York district court held an answer book to a mathematics textbook to be a derivative work.¹¹⁷

But Posner broke hard with all of these decisions by holding guides not to be derivatives of the original work, a view that has had an influence over prominent cases.¹¹⁸ This, the better view of the derivative work doctrine, remains important for the various online encyclopedias that now seem to follow every popular novel, film, or television show, and also for the Internet recaps that are beloved by some television fans.

And so a victory for the collector's guide but a loss for the guitar maker. As they say in law school, how can these cases be distinguished? It ought not be overlooked that, in the Prince case, Pickett wasn't the defendant—rather, he was trying to get money out of Prince for purportedly stealing his design for the guitar. In contrast, Ty's campaign against PIL was unsympathetic in numerous ways. Ty is revealed to be the overreaching

¹¹⁴ *Castle Rock Entertainment, Inc v Carol Publishing Group, Inc*, 150 F3d 132, 139 (2d Cir 1998). Posner's effort to distinguish the case is tortured because he struggles to understand why the Second Circuit viewed the trivia game at issue in that case as frivolous.

¹¹⁵ 17 USC § 101.

¹¹⁶ *Twin Peaks Productions, Inc v Publications International, Ltd*, 996 F2d 1366, 1373 (2d Cir 1993).

¹¹⁷ *Addison-Wesley Publishing Co v Brown*, 223 F Supp 219, 220 (EDNY 1963). See also *Worlds of Wonder, Inc v Vector Intercontinental, Inc*, 653 F Supp 135, 139–40 (ND Ohio 1986); *Worlds of Wonder, Inc v Veritel Learning Systems, Inc*, 658 F Supp 351, 355–56 (ND Tex 1986).

¹¹⁸ His approach to derivative works would later be followed over circuit precedent in the Second Circuit in a well-publicized case centered on *The Lexicon*, a fan-written guidebook about the world of Harry Potter. See *Warner Brothers Entertainment Inc v RDR Books*, 575 F Supp 2d 513, 519–22, 538–39 (SDNY 2008), quoting *Ty II*, 292 F3d at 521. See also Tim Wu, *Fan Feud* (New Yorker, May 12, 2008), archived at <http://perma.cc/5RWN-SYZR>.

villain, the monopolist of the micro–teddy bear market, silencing its critics and eliminating its competitors, its steel fist obscured by velvet and stuffing.

“Ty doesn’t like criticism,” Posner said at one point,¹¹⁹ and he also took pains to point out that while Ty does license guides, it retains veto rights over the text and requires its licensees to print a misleading statement on their guides that indicates that the publication is not affiliated with Ty.¹²⁰ Such deception, which might be a minor violation of consumer protection laws,¹²¹ prompted Posner to mention the doctrine of copyright misuse and the threat of stripping Ty’s copyrights altogether.¹²²

These criticisms of Ty’s behavior are of a piece with other copyright opinions and a later Posner theme: the punishment and shaming of overreaching rights holders. The Sherlock Holmes opinions discussed earlier put the estate in a very unflattering light by portraying it as trolling for dollars on the back of an expired copyright. The same can be found in Posner’s later patent decisions and, notably, in the case of *Apple, Inc v Motorola, Inc*.¹²³ In that case, sitting as a district judge, Posner dismissed all of the patent claims with prejudice in an opinion that chastised both parties and questioned the patent system itself.¹²⁴ And in another copyright case, Posner heaped scorn on a firm named Assessment Technologies, which had tried to use a software copyright to control valuable data that was not copyrightable.¹²⁵ It was nothing, he wrote, but a situation in which an “owner is trying to secrete the data in its copyrighted program,” and “[i]t would be appalling if such an attempt could succeed.”¹²⁶

CONCLUSION

So there we have it. Posner’s earlier copyright opinions are marked by a sensitivity to some of the subtler costs in the copyright system. In his later opinions, Posner slowly grew into a

¹¹⁹ *Ty II*, 292 F3d at 520.

¹²⁰ *Id.*

¹²¹ See Federal Trade Commission Act, 38 Stat 717, 719 (1914), codified as amended at 15 USC § 45(a)(1).

¹²² *Ty II*, 292 F3d at 520.

¹²³ 869 F Supp 2d 901 (ND Ill 2012).

¹²⁴ *Id.* at 908–10, 916–20.

¹²⁵ *Assessment Technologies of WI, LLC v WIREdata, Inc*, 350 F3d 640, 641–42 (7th Cir 2003).

¹²⁶ *Id.*

policeman of the public domain and an enemy of copyright trolls and lazy estates. But even as he became a critic of the way in which intellectual property was being used, it remains that Richard Posner never came to lose his basic faith in granting property rights to authors, based on the basic economic arguments that favor propertization. Instead, what his exposure to the cases seemed to destroy was any faith that Coasian bargaining in this context would inevitably yield efficient outcomes.

To the author Posner once said (speaking of a well known academic figure), “He’s not very smart—but he does know a lot.” That grudging respect captures something both about Posner and the effects of judging on him. For despite his intelligence and capacity for abstract reasoning, he grew to gain respect for the kind of knowledge that is the product of lengthy immersion in something, and judging, for him, was just such an immersion in the unusual world of American litigation. In time, he felt he began to know more about why people brought lawsuits, and thereby gained a different and more nuanced sense of who was deserving of judicial solicitude and who deserved a dressing down. As for the latter, Posner always held a special kind of disdain for those who combined their self-interest with claims of an infallibility more common in religious settings. That is what made inevitable the collision between himself and certain holders of intellectual property.