

THE RACE TO THE BOX OFFICE LEADS TO CINEMATIC DÉJÀ VU: MODIFYING COPYRIGHT LAW TO MINIMIZE RENT DISSIPATION AND COPYRIGHT REDUNDANCY AT THE MOVIES

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I have seen your movie and much like it.¹

I. THE PREVIEW

A. *A DAY IN THE LIFE OF A MOVIEGOER*

Cast your mind back to the warm days of last summer when, escaping the heat, you find yourself in the halls of that great American institution—the movie theatre. Popcorn and candy flow to the rhythm

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1. *Cf.* Moses Hadas (1900-1966) (a play on the classic quote by Hadas, “I have read your book and much like it.”) (available at <http://www.quotationspage.com/quote/26970.html> (last accessed Nov. 15, 2007)).

of Coke waterfalls as you anxiously await, lazing yourself into a chair and enjoying your escape from everyday reality. A world of fantasy, action, horror, love, or whatever else the movie studios have sent your way for the blockbuster summer season awaits you—the possibilities are endless . . . or are they?

As you look around the twenty-screen movie theatre billboards you find similarly themed, indifferently plotted, analogously characterized movies glaring at you from movie posters. Is it *déjà vu* or a glitch in the matrix? Screens one through five are playing *Armageddon*,² but you just saw a movie last month about an asteroid hitting the Earth—*Deep Impact*.³ Screens six through ten are showing *The Black Dahlia*,⁴ but just the other week you saw a movie about detectives investigating the murder of a Hollywood star—*Hollywoodland*.⁵ Screens eleven through fifteen are running *Dante's Peak*,⁶—but just a month ago you saw a cleverly named movie about an erupting volcano in Los Angeles—*Volcano*.⁷ Screens sixteen through twenty are playing *The Wild*,⁸ yet last year's animated *Madagascar*⁹ also detailed the trip of a lion, and three of his animal

2. *Armageddon* (Touchstone Pictures 1998) (motion picture) (“When an asteroid the size of Texas is headed for Earth[,] the world’s best deep core drilling team is sent to nuke the rock from the inside.”). (To remain objective, all movie descriptions were taken in part or in whole from The Internet Movie Database at www.imdb.com, a website dedicated to providing extensive information for a wide variety of feature films and television shows.)

3. *Deep Impact* (Paramount Pictures 1998) (motion picture) (“Unless a comet can be destroyed before colliding with Earth, only those allowed into shelters will survive.”).

4. *The Black Dahlia* (Millennium Films 2006) (motion picture) (“[T]wo 1940s L.A. cops [] head up the hunt for the killer of starlet Elizabeth Short.”).

5. *Hollywoodland* (Back Lot Pictures 2006) (motion picture) (“A detective examines the mysterious death of George Reeves, TV’s Superman.”).

6. *Dante's Peak* (P.W. 1997) (motion picture) (A doctor discovers that a city “is being threatened by a volcano that hasn't been live for years.”).

7. *Volcano* (Donner/Shuler-Donner Prods. 1997) (motion picture) (“A volcano erupts in downtown L.A., threatening to destroy the city.”).

8. *The Wild* (C.O.R.E. Feature Animation 2006) (motion picture) (“When [a lion] gets himself shipped to Africa, his zoo friends [(a giraffe, a snake, a koala, and a squirrel) and his dad] work together to bring him back. When they get to Africa, however, the animals find themselves in a pile of danger.”).

9. *Madagascar* (DreamWorks SKG 2005) (motion picture) (A lion and his zoo animal friends (a giraffe, a zebra, and a hippo) are best friends. But when the lion “goes missing from [his] cage the other three break free to look for him, only to find themselves reunited...on a ship en route to Africa. When their vessel is hijacked,

friends escaping the zoo to Africa. At least it has been a while since you saw an animated movie about a lion, and four of his animal friends escaping the zoo to Africa. Maybe the next time you get an urge to check out some new releases, you should go watch *Groundhog Day*¹⁰ . . . or its nearly simultaneously-released counterpart, *12:01*.¹¹

B. FEATURE PRESENTATION

In the movie business, studios race to the box office to obtain a first mover advantage. Films are often very similar to those of other studios and a movie copyright seldom provides anything resembling a monopoly.¹² Rivaling movies can be directed at the same audience, have the same genre, use the same basic plot lines, engage in the same kinds of special effects, and employ the same types of characters. The winner of the race often receives the laurels while the loser is relegated to the dust of obscurity. As MGM's distribution president Larry Gleason stated: " 'There's only one rule to remember when you have competing films in production: Get finished and on screens first.' "¹³

Movies that lose the box office race suffer a time-dependent externality from their first-released counterparts. On the one hand, consumers experience a diminishing marginal return from nearly similar products—a viewer who sees a movie today is not going to watch a nearly identical movie tomorrow. On the other hand, consumer choices about the later-released movie are negatively and often incorrectly influenced by the value of the first movie. A movie that would have done well on its own may do significantly worse

however, the friends, who have all been raised in captivity, learn first-hand what life can be like in the [dangerous] wild.”).

10. *Groundhog Day* (Columbia Pictures Corp. 1993) (motion picture) (“A weatherman finds himself living the same day over and over again.”).

11. *12:01* (Chanticleer Films 1993) (motion picture) (“Barry Thomas is the average office worker [who finds himself living the same day over and over again].” At night, “Barry gets a shock from a lamp's faulty power wire at exactly 12:01 am. The next morning, he realizes that everything is happening exactly as it did the previous day. The next morning the day is repeated again.”).

12. See Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 Vand. L. Rev. 1727, 1730 (2000).

13. Leonard Klady, *Gross Behavior: Pic Duels Often Destined for Double Trouble* [¶ 4], *Variety* (May 7, 1997) (available at http://www.variety.com/index.asp?layout=print_story&articleid=VR1117341708&categoryid=38). It is worth noting that although this is a general rule, it does have exceptions, which will be discussed later in the article.

because its *déjà vu* predecessor was a snoozer.¹⁴ Like a younger sister who lives in the shadow of her older sister's accomplishments or disappointments, this "shadow" externality often affects the secondary work. Such an externality arises from an overexploitation of an idea and bears some resemblance to both the congestion externality in copyrights,¹⁵ and the dilution externality of trademarks.¹⁶

Broadening copyright protection for novel movies for a short time after their release, followed by returning to narrow copyright protection for the rest of the copyright's life, would eliminate this externality. Such a change would also reduce various inefficiencies including: (1) copyright redundancy; (2) rent dissipation; and (3) demand diversion. Further, it would provide higher protection to authors, thereby increasing consumer welfare, producer welfare, and incentives for new works. Granting broad copyright protection for six months from a movie's release date and then a narrow copyright for fifty years would accomplish this goal. Varying the breadth and length of protection to coincide with specific product life cycles and social welfare has already

14. A similar problem occurs in the physical realm, where for example a consumer purchases rotten meat from a shoddy butcher and turns vegetarian as a result. Government regulations seek to prevent such problems (in addition to the consumer harm) by imposing regulations on the quality of the product. Government regulation in the area of copyright, however, is a troubling thought as government censorship contradicts the First Amendment, and is also colored by all of the economic inefficiencies associated with government regulation. *See e.g. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 732-33 (1996); *see also* Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. Rev. 212, 230-31 (2004).

15. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471, 487-88 (2003) (William Landes and Richard Posner have theorized that if a copyrighted work is released into unrestricted use, then various versions of the work will be produced and the work will be overused. For example, twenty versions of Mickey Mouse, one as butchered meat, one as a superhero, and one as a lab experiment would negatively affect the value of the real mouse.) *See also* Michael Abramowicz, *Copyright Redundancy* 90-94 (Geo. Mason U. Sch. of L., L. and Econ. Working Paper Series, Jan. 31, 2003) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=374580).

16. In trademark law, symbols and words provide a source of identification to prevent consumer confusion. Unrestricted use of the symbols would hurt consumers and producers—consumers could not tell the true source of the product in question, and producers would lose sales. *See e.g. Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 461, 464 (7th Cir. 2000).

been done in other facets of intellectual property, and their experience can be used to build a more efficient movie copyright system.¹⁷

Since such a change can work within the current copyright system, redesign out of whole cloth is unnecessary and little loss of administrative efficiency and nullification of precedent would result. Additionally, the broader copyright would not extend to movies dealing with recent events. This would allow movies to capture the time-limited increased consumer demand associated with a recent event, and would preserve the amount of speech content concerning important issues.

Part II of this paper describes the creative and legal landscape that surrounds movie production and release—how similar movies arise and what scope of protection ideas, scripts, and finished movies generally have. Part III of this paper provides a background about why we should care that similar movies constantly arise. This part describes races that occur in different fields of intellectual property, how such races affect movie studios and consumers, the economic landscape that fosters and encourages such races, and the resulting economic ramifications. Part IV delves into why private ordering under current market and legal conditions has not been able to solve the resulting externality. To discover whether precedent exists for modifying the breadth of protection within a specific medium, Part V analyzes other areas of intellectual property where traditional intellectual property rights have been broadened or lengthened to fit a specific product. These first five parts provide intuitive and qualitative data and arguments as to the specific “shadow” externality existing between similar movies released within a short time of each other.¹⁸

Part VI then conducts an empirical and statistical analysis on a group of forty-eight pairs of movies released “simultaneously” over an eighteen-year period. Using release dates, costs, revenues, and normalizing for other parameters, Part VI systematically analyzes the shadow effect between “*déjà vu* double headers” and derives a formula for the refractory period required for a second-released movie to regain its inherent consumer value.

Part VII proposes that a time-dependent strengthening in copyright protection for movies can lead to higher economic efficiency

17. See *infra* Part V.

18. The term *shadow* (eclipse) is used by the author to refer to the value diminution that a release of one movie may have on a similar movie released a short time later.

in movie production and consumption. In Part VII, a detailed plan is proposed to adjust novel movie copyright breadth to account for the time-dependent externality qualitatively developed in Parts II-V and statistically derived in Part VI. This should be done by providing an initially broad copyright, which is then narrowed after a specifically-defined period. As a result of an increased incentive that results for authors (higher initial profits) the length of the copyright can be reduced from its current term. Part VII also addresses possible issues with the proposal and provides solutions to those issues. Part VIII concludes the paper.

II. THE CREATIVE AND LEGAL LANDSCAPE

“[O]ut of any two rival films, one of them usually sucks. The trouble is remembering which one that is, so you don’t get stuck watching that ‘other’ movie.”¹⁹

Often similar movies originate from the same script or idea being shopped around multiple studios at the same time (Section A).²⁰ To overcome the copyright that protects a motion picture, the rival must only have a movie that the rival itself conceived and that has a minimum degree of originality (Section B).²¹ In legal theory this means that the motion picture must be just different enough to negate an inference of copying.²² In actual practice, similar movies are so close as to be near perfect market substitutes—yet they do not constitute copyright infringement (Section C).²³

19. Cammila Albertson, *All Movie, Didn't I Just See That? The Hollywood Philosophy That Good Movies Come in Twos* [¶ 1], <http://www.allmovie.com/cg/avg.dll?p=avg&sql=61::6:C> (last accessed Nov. 15, 2007).

20. See Klady, *supra* n. 13, at [¶¶ 6-7].

21. See 17 U.S.C. § 102(a) (2006); see also *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346, 348 (1991).

22. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) (Judge Frank describing this as “[a]ll that is needed to satisfy both the Constitution and the statute is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’ ”).

23. See Kitch, *supra* n. 12, at 1730.

A. HOW SIMILAR MOVIES ARISE

Movies arise from scripts, scripts arise from ideas, and while ideas, as Justice Brandeis noted, are “free as the air,”²⁴ they must be nurtured by authors to present any real value.²⁵ Once an author gives birth to an idea for a story or movie, he develops it and then attempts to sell it to a movie studio.²⁶ If the author can secure a meeting with a studio executive, he presents his idea at an “idea-man” presentation.²⁷ Alternatively, the movie script can be submitted to a studio via mail or a third person.²⁸

On the average, movie executives receive over 20,000 movie and TV show ideas per year, but only review 6,000 of these, many of them over meals with executives from other networks.²⁹ Movie ideas come from various sources including Sunset Boulevard, network executives, the studios themselves, stars and their agents, independent producers, writers, word of mouth, trade papers, and magazines.³⁰ Lacking time to review all the submissions and fearful of copyright lawsuits, more than 20,000 unsolicited manuscripts submitted each year by the public are routinely returned unread.³¹ Only about 200 sample scripts are commissioned per year, and seldom are more than twenty of those ordered.³²

Sometimes the person who conceived the idea for a movie script will win a meeting with studio executives, only to have the idea rejected and then rewritten and developed by the executives without paying any copyright royalties to the original author.³³ What happens

24. *Intl. News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

25. See David M. McGovern, Student Author, *What Is Your Pitch?: Idea Protection Is Nothing But Curveballs*, 15 Loy. L.A. Ent. L.J. 475, 480 (1995).

26. *Id.* at 475.

27. See *id.*; see generally Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 19D.01 (Lexis 1978); see also *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (finding that only an idea and not the expression of that idea had been borrowed).

28. See McGovern, *supra* n. 25, at 475.

29. See Benjamin A. Goldberger, *How the “Summer of the Spinoff” Came To Be: The Branding Of Characters In American Mass Media*, 23 Loy. L.A. Ent. L. Rev. 301, 333 (2003); see also McGovern, *supra* n. 25, at 475.

30. Goldberger, *supra* n. 29, at 333.

31. *Id.*

32. *Id.*

33. See e.g. McGovern, *supra* n. 25, at 475-78; *Smith v. Weinstein*, 578 F. Supp.

even more often is that a script author will shop the same idea at numerous movie studios, or movie studio executives at different companies will discuss with each other ideas for movies they are thinking of putting into production.³⁴ These same ideas will then be developed into movies by two or more competing studios.³⁵ At the box office these similar movies will come out like *déjà vu*, within a few weeks or months of each other.³⁶ This often ensures the spoils to the first movie to reach the box office, relegating the second movie into relative obscurity.³⁷

One example of two movies emanating from the same plot, characters, and setting³⁸ was the animated movies *Antz*³⁹ and *A Bug's Life*.⁴⁰ In the history of moviemaking there had never even been a movie made about maggots, so when two animated comedic children's movies about bugs came out within two months of each other, more than coincidence was at play.⁴¹

A movie studio executive had pitched the idea for an insect-based animated movie to both Disney and DreamWorks in 1994.⁴² In addition, the co-founder of DreamWorks, an ex-executive at Disney, was told all about Disney's *Bugs* when he dropped by for a friendly

1297, 1299 (S.D.N.Y. 1984) (idea-man sued producer for hiring another writer to pen a script based on ideas from plaintiff's script); *see also* *Midas Prods., Inc. v. Baer*, 437 F. Supp. 1388, 1389 (C.D. Cal. 1977) (plaintiff sued for defendant's use of a script that had seven plot similarities and three scenes common to plaintiff's script).

34. *See e.g.* Klady, *supra* n. 13, at [¶ 7].

35. *Id.*

36. For example, *Christopher Columbus: The Discovery* (Warner Bros. Pictures 1992) (motion picture) and *1492: Conquest of Paradise* (Touchstone Pictures 1992) (motion picture) came out within seven weeks of each other, both depicting Christopher Columbus' discovery of the Americas.

37. *See infra* Part VI (a quantitative analysis of the impact of the first movie's release on the second movie); *see* Klady, *supra* n. 13, at [¶ 4] (a qualitative description). Once again, however, exceptions to this general trend do occur and will be discussed.

38. For an excellent discussion of legal literary theory and what constitutes characters, settings, themes, and the similarity between them *see* Goldberger, *supra* n. 29, at 303-10.

39. *Antz* (DreamWorks SKG 1998) (motion picture).

40. *A Bug's Life* (Pixar Animation Studios 1998) (motion picture).

41. Peter Burrows, Business Week Online, *Antz vs. Bugs* [¶ 1] (Nov. 23, 1998), <http://www.businessweek.com/1998/47/b3605013.htm>.

42. *Id.* at [¶¶ 4-5].

visit to Disney in 1995.⁴³ Neither Disney nor DreamWorks were pleased when two almost identical, animated bug movies came out in 1998.⁴⁴

B. SCOPE OF COPYRIGHT PROTECTION

Copyright law serves as an incentive to authors by granting to them exclusive rights to their works.⁴⁵ Copyright is a two dimensional protection—term length and scope breadth (strength).⁴⁶ As such, it protects authors for: (1) a limited time from; (2) copying of original protected elements of their work.⁴⁷ By broadening the scope while shortening the length of the current copyright protection for movies, the total volume of the incentive balloon can be kept fixed.

The term of the copyright depends on who produces it. For a work registered to an author, the copyright term lasts seventy years after the author's death.⁴⁸ For a work registered to an entity such as a movie studio, the copyright length is ninety-five years from the date of its publication or 120 years from the date of its creation, whichever expires first.⁴⁹ The impact of the length of a copyright term for movies on the incentive to produce is questionable and hotly disputed.

Copyright length has steadily increased from 1909, and in 1998 it was once again debated and increased by twenty years to the current term.⁵⁰ On the one hand, a twenty-year boost would provide a small increase in the incentive to produce.⁵¹ Since the majority of books

43. *Id.* at [¶ 7].

44. *Id.* at [¶¶ 9-11].

45. *Eldred v. Ashcroft*, 537 U.S. 186, 192-93 (2003) (“The Copyright and Patent Clause of the Constitution [(U.S. Const. art. I, § 8, cl. 8)] provides [that] ‘Congress shall have Power ... [t]o promote the Progress of Science ... by securing [to Authors] for limited Times ... the exclusive Right to their ... Writings.’ ”).

46. 17 U.S.C. § 106 (2006); 17 U.S.C. § 302 (2006).

47. 17 U.S.C. § 302; 17 U.S.C. § 106; *see also Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

48. 17 U.S.C. § 302(a).

49. *Id.* at § 302(c).

50. *Eldred*, 537 U.S. at 193-94.

51. George A. Akerlof et. al., *The Copyright Term Extension Act of 1998: An Economic Analysis 5-7* (AEI-Brookings Jt. Ctr. for Reg. Stud. 2002) (available at http://aei-brookings.org/admin/authorpdfs/redirectsafely.php?fname=../pdffiles/brief_02_01.pdf (last accessed Nov. 15, 2007)).

produced in the 1920s (before the 1998 extension applied) are still in print today and growing, no further increase in the incentive to create seems necessary.⁵² On the other hand: (1) extension of the period may lead to more inefficient management of resources that otherwise have no one with enough incentive to manage them; and (2) even though the additional discounted value for the authors of the twenty-year reward may be small, it may still have a large impact on overall creation of works.⁵³

Additionally, the longer copyright term may be necessary to compensate authors for income lost due to cheaper and improved copying technologies.⁵⁴ Most recently, an intense and detailed empirical study of twenty-six countries over the period of 1991-2002 found that a twenty-year copyright extension for movies was associated with an increase in movie production between 8.5-percent and 10.4-percent.⁵⁵

The breadth of copyright, unlike the duration, has generally remained constant and narrow throughout the years. “First, copyright protection does not extend to the ideas, facts, or functional elements of a work, but only [protects] the author’s original expression of those ideas or elements.”⁵⁶ Hence, with few exceptions described in Section C below, copyright owners cannot currently protect the basic idea of their movie or script.⁵⁷ Second, a competitor’s activities are deemed infringing only if the competitor actually took or copied the plaintiff’s

52. Paul J. Heald, *Property Rights and the Efficient Exploitation of Copyrighted Works: An Empirical Analysis of Public Domain (1906-1922) and Proprietary (1923-32) Fiction Best Sellers*, 92 Minn. L. Rev. ____ (forthcoming 2007) (copy on file with Author) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955954#PaperDownload).

53. Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh In On Copyright: The Role of Theory, Empirics, and Network Effects*, 18 Harv. J.L. & Tech. 435, 443 (2005).

54. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Leg. Stud. 325, 330 (1989).

55. I.P.L. Png & Qiu-hong Wang, *Copyright Duration and the Supply of Creative Work: Evidence from the Movies 2* (UCLA Dept. of Econ. Working Paper, Levine’s Working Paper Archive, Sept. 2006) (available at <http://ideas.repec.org/p/clal/levarc/32130700000000478.html> (last accessed Nov. 15, 2007)).

56. Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 Tex. L. Rev. 989, 1014 (1997); see also 17 U.S.C. § 102(b) (2006).

57. See e.g. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

work.⁵⁸ Proof of independent creation serves to rebut a presumption of copyright infringement.⁵⁹ Relative to other areas of intellectual property protection, such as patents for example, copyright protection is longer in time but narrower in scope.⁶⁰

C. IDEA PROTECTION FOR MOVIE SCRIPTS

1. General

When similar movies reach the box office, it is more than likely that the same idea presented to different studios was the root cause. This section describes what protection movie script ideas currently receive.

To prove a charge of copyright infringement the alleging party has to show “ (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁶¹ To show copying, the plaintiff must demonstrate both that the defendant had access to plaintiff’s work and that defendant’s work is substantially similar.⁶² Substantial similarity has been interpreted by the courts to mean that the works compared in their totality (both protectible and non-protectible aspects) are substantially similar and that the defendant copied plaintiff’s protectible expression of an idea.⁶³

Indeed, certain elements of a creative work (e.g., incidents, characters, and settings) are outside the scope of infringement, when these elements are standard or customary to the genre—the so-called “scenes a faire” doctrine.⁶⁴ For example, a police movie is expected to have elements such as “drunks, prostitutes, vermin and derelict cars.”⁶⁵ As the courts have noted, the “use of such stock . . . merely reminds us

58. *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97, 108 (1st Cir. 2006).

59. *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 967 (8th Cir. 2005).

60. *Cf.* 35 U.S.C. § 102 (2006).

61. Nimmer, *supra* n. 27, at § 13.01 (footnotes omitted); Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 Lewis & Clark L. Rev. 313, 320 (2006) (quoting *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)).

62. Nimmer, *supra* n. 27, at §13.01B; *see also* Harkins, *supra* n. 61, at 320.

63. *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1358 (N.D. Ill. 1989).

64. *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1251 (11th Cir. 2007).

65. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).

that in Hollywood, as in the life of men generally, there is only rarely anything new under the sun.”⁶⁶ The point, however, is not that football movies have underdog teams⁶⁷ or even that seduction movies have dangerous liaisons.⁶⁸ The point is that after decades of complete absence of certain themes and characters from the big screen, two very similar movies suddenly butt heads at the box office. More than an accident must be at work.

2. *Original Idea Protection*

Courts have crafted limited protection for novel ideas depending on what stage of development the idea is in and the established relationship between the author and the movie studio.⁶⁹ Novel ideas can be protected by a claim of idea misappropriation.⁷⁰ For such protection, the idea or its expression must be: (1) novel; (2) concrete; and (3) there must be a legal relationship between the parties whether by an express contract, a contract implied-in-fact, a quasi-contract, or a fiduciary relationship.⁷¹

“[D]epending on the jurisdiction, [the] novelty [constraint] requires either that the idea ha[d] never existed before or that [it] be original to the idea-man [the idea-man did not copy it from another source].”⁷² These two different evaluations reflect different theories of protection. The former, more stringent, novelty requirement assumes that ideas in the public domain should remain there for public use.⁷³ Conversely, courts choosing the latter, less stringent standard (original to the idea-man), reflect a property theory deciding that, “like other intellectual creations, [ideas] should be protected as property of the creator”⁷⁴

66. *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 1985).

67. *Cf. Gridiron Gang* (Columbia Pictures 2006) (motion picture) and *Facing the Giants* (Sherwood Pictures 2006) (motion picture).

68. *Cf. Valmont* (Burrill Productions 1989) (motion picture) and *Dangerous Liaisons* (Lorimar Film Ent. 1988) (motion picture).

69. *See generally* Nimmer, *supra* n. 27, at § 19D.02.

70. *See id.* at § 19D.06(A)(2)(d).

71. *Id.* at § 19D.06, 19D.02(A)(2)(b)(3).

72. McGovern, *supra* n. 25, at 482-83 (footnotes omitted).

73. *Id.* at 483.

74. *Id.*

The concreteness requirement in court, ironically, varies in strength from butter to steel. On the soft end, an idea is concrete when it is fixed in tangible form.⁷⁵ Higher on the hardness scale, an idea is concrete when the plaintiff and defendant can reduce it to a usable form within twenty-four hours.⁷⁶ On the steel end, an idea is concrete when “it is ready for immediate use without any additional embellishment.”⁷⁷

The concreteness requirement reflects wide-ranging differences between courts, and has received various criticisms from commentators. For example, it has been argued that an idea developed for use is no longer an idea, and therefore such a requirement does not protect the idea itself anyway.⁷⁸ Instead, it is just another way of requiring that the idea is sufficiently developed so as to constitute “property.”⁷⁹

The legal relationship requirement can take various forms. Few authors are able to negotiate for a contract, but courts do recognize an express contract for the use of a submitted idea.⁸⁰ This theory is liberally used because it does not face federal preemption concerns and may benefit both the purchaser and the seller, while leaving society free to use the idea later.⁸¹ Some courts also recognize an “implied-in-fact” contract where the meeting of the minds of the parties is demonstrated through conduct, not words.⁸² For example, where an author submitted a script about the high stakes of underground poker and two years later a strikingly similar movie, *Rounders*,⁸³ was

75. *See id.*; *see also O'Brien v. RKO Radio Pictures, Inc.*, 68 F. Supp. 13, 14 (S.D.N.Y. 1946).

76. McGovern, *supra* n. 25, at 483 (citing *Jones v. Ulrich*, 95 N.E.2d 113, 120 (Ill. App. 3d Dist. 1950)).

77. *Id.* (quoting *Smith v. Recrion Corp.*, 541 P.2d 663, 665 (Nev. 1975)) (internal quotations omitted).

78. Nimmer, *supra* n. 27, at § 19D.06(A)(1).

79. *See id.*

80. *See id.* at § 19D.06(B)(2)(a).

81. McGovern, *supra* n. 25, at 491. For example, a purchaser who is interested in the idea for a movie about a spider super hero can contract with the author, leaving Superman and the Invisible Woman available to materialize later.

82. Courts have analogized this to doctors or lawyers who sometimes provide the service, at the request of the patient or client, without an express contract. Here the law infers a promise to compensate, reasoning that one who solicits a valuable idea knowing that it is tendered at a price should not be allowed to escape liability just because he did not sign a piece of paper.

83. *Rounders* (Miramax Films 1998) (motion picture).

released, the court allowed the author to proceed on an implicit contract claim.⁸⁴ However, courts rarely find a contract in such cases because of the lack of explicit consent. Courts have thus not found an implied-in-fact contract where the idea-man simply gives the idea to another party, or where no industry custom existed for transfer of ideas without a contract.⁸⁵

A third type of contract is a “quasi-contract” or “unjust enrichment” theory, which a few courts recognize.⁸⁶ Here, an obligation is created by law for reasons of justice if the plaintiff can show that: “(1) the defendant [was] enriched, (2) at the plaintiff’s expense, (3) under circumstances that, in equity and good conscience, call for an accounting by the wrong-doer, and (4) that the defendant knowingly and voluntarily accept[ed] the plaintiff’s services and the concomitant benefit.”⁸⁷ The typical movie case under this theory is one where a prospective purchaser solicits the movie idea or sets up a future meeting to hear the idea, and then knowingly and voluntarily accepts the idea-man’s idea without remuneration.⁸⁸

A final type of a legal relationship theory is one of a confidential relationship, such as between a priest and penitent or a lawyer and a client, and sometimes courts have recognized it between an idea-man and the studio executive.⁸⁹ However, if the plaintiff cannot show he established a confidential relationship with the studio executive (and most negotiations *are* done at arms-length), this theory will be struck down.⁹⁰

What this amounts to in the scope of copyright redundancy is that Hollywood customs, paired with weak legal protections for idea-men, lead to the same idea being shopped at a number of studios.⁹¹ In a patent world, this would not present a redundancy problem because

84. *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004) (The plaintiff alleged that defendant used the ideas, characters, and dialogue from his script under an implied contract theory. The court rejected his copyright claim, but extraordinarily, allowed him to proceed on his “implicit contract claim.”).

85. *See* McGovern, *supra* n. 25, at 489-90.

86. Jonathan S. Katz, Student Author, *Expanded Notions of Copyright Protection: Idea Protection Within the Copyright Act*, 77 B.U. L. Rev. 873, 876 (1997).

87. McGovern, *supra* n. 25, at 488-89.

88. *Id.* at 491.

89. *Id.* at 498.

90. *See id.* at 498-99.

91. *See e.g.* Katz, *supra* n. 86, at 873.

only one studio could ultimately exploit the patented idea being shopped around.⁹² However, in a world of weak or no protection, many potential buyers interact with the idea, and either one or all of them can develop the idea into a movie, often with none or at a maximum one studio remunerating the idea-man author.

In the end, two movies may come out based on the same idea, using the same plot lines and character types, and with many dissatisfied people. These include the idea-man wondering just how he got bamboozled from his just deserts,⁹³ each movie studio wondering who let the cat out of the bag during production, and of course consumers experiencing *déjà vu* in the theatres and skulking at Hollywood for once again copying each other and having run out of ideas.⁹⁴

III. THE RACE AND THE ECONOMIC LANDSCAPE

“ ‘There’s virtually nothing more frightening for a writer than hearing someone say, “Now we’re in a race.” Your work becomes about speed, and issues of quality get subsumed.’ ”⁹⁵

Section A describes the race to the box office by looking at races within tangible property and intellectual property, then looking at products in the copyright medium, and in light of these trends analyzing the movie copyright race. Part 1 begins by looking at the general economic causes and results for races in physical and intellectual property races. Part 2 then looks at races in the patent sphere to determine whether a broader copyright would experience some of these same issues. Part 3 then analyzes whether all works in the current copyright experience these issues. Section B examines the oligopoly market structure of the movie industry and Section C looks at how movies behave as products within the industry. Section D

92. See McGovern, *supra* n. 25, at 480.

93. Sandy Cohen, ‘Stolen’ Ideas Big Business in Hollywood [¶ 29], Intl. Bus. Times, <http://www.ibtimes.com/articles/20061110/stolen-ideas-hollywood.htm> (Nov. 15, 2006) (quoting attorney John Marder, who specializes in representing aggrieved writers). Many successful films have been challenged by lawsuits claiming “idea theft” such as *The Matrix*, *Pirates of the Caribbean*, *The Last Samurai*, *Broken Flowers*, and *Amistad*. *Id.* at [¶ 1].

94. See e.g. Dave White, *Talking-Animal Movies Are Ruining My Life* [¶¶ 11,13], MSNBC Interactive, <http://www.msnbc.msn.com/id/15501053/> (Nov. 1, 2006).

95. Klady, *supra* n. 13, at [¶ 5] (quoting famous movie screenwriter John Fasano, who ran this race three times).

concludes by analyzing the shadow externality as part of a greater economic “demand diversion” phenomenon.

A. *RACING TO THE BOX OFFICE*

1. *Rent Dissipation In Intellectual Property Races*

In markets where monopoly profits are available, multiple parties will enter to capture such profits, oftentimes dissipating the potential profits in the process.⁹⁶ Intellectual property markets present a vivid example of such profit races because the winner secures a government-granted and enforced monopoly.⁹⁷

As an example of such races in the physical realm, a gold rush can lead to just such a dissipation of economic rents.⁹⁸ Imagine that a person finds a gold mine worth \$1,000,000, but because no one has property rights in the mine, anyone willing to pay \$10,000 for equipment can dig an equal share of the gold.⁹⁹ Then people will enter the market until the marginal cost of entrance just equals the marginal benefit.¹⁰⁰ One hundred people will enter the market, with a total fixed cost of \$1,000,000 and zero profits to each of the entrants.¹⁰¹ Then society is “no better off than [had] the gold mine [] never been found,” because the rents that the first person would have earned if he were able to remove all the gold himself have now been dissipated away and money spent on extra shovels could have been better allocated.¹⁰² In fact, unless the finder of the mine could keep it secret at least for a little while, no one would have any incentive to search or develop a mine.

In a real world setting, the rent dissipation may be incomplete for several reasons.¹⁰³ First, information and transaction costs are

96. See Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807, 809 (1975).

97. See Yoo, *supra* n. 14, at 217-18. It must be noted, however, that the exclusivity that intellectual property protection creates has real monopoly power only where no substitutes are available and entry barriers prevent their emergence. *Id.*

98. See Abramowicz, *supra* n. 15, at 10.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 12.

generally high.¹⁰⁴ The first person to find a gold mine can usually keep it secret for awhile before being found out by competitors. In the meantime, he can reap non-dissipated profits. Another reason is that participants may have a different preference for risk.¹⁰⁵ For example, where some participants in the market are risk-averse, the total investment into the search will be less than the profit—in other words, the risk of the venture will dissuade some of the potential gold-diggers.¹⁰⁶ A third reason is that participants will have different opportunity costs.¹⁰⁷ A rent will only be fully dissipated if every participant is indifferent between entering that activity to make higher than zero profits and doing some other activity.¹⁰⁸ Since this is not the case (people have other jobs that pay them higher than zero salaries), rent dissipation will not be full. Also, participants are differently situated with respect to one another, and those participants with higher capabilities may deter followers.¹⁰⁹ For example, if Company X, because of its large size, is perceived by market participants to inevitably discover the gold mine, Company Y might not bother entering the race. Another reason is that because races can lead to earlier discoveries, the early end to the race prevents full rent dissipation.¹¹⁰ In other words, if a person can excavate all the gold out before 100 participants join the dig, not all rents are dissipated. Additionally, races, even with rent dissipation, have third-party benefits—the California Gold Rush built towns and vitalized areas; discovery of a new drug cure saves lives.¹¹¹

The most powerful reason why rent dissipation is incomplete, however, is the presence of property rights.¹¹² For example, if only

104. Clarisa Long, *Information Costs in Patent and Copyright*, 90 Va. L. Rev. 465, 474-85 (2004).

105. Abramowicz, *supra* n. 15, at 11.

106. *See id.* Behavioral economics predicts that people will be risk-averse when they are seeking a gain, rather than avoiding a loss. Thus, those people who are the least risk-averse (risk-seekers) will be the first ones in the race for the prize, and thus will achieve profits before the people with lower risk-seeking. Arye L. Hillman & Eliakim Katz, *Risk-Averse Rent Seekers and the Social Cost of Monopoly Power*, 94 Econ. J. 104, 104-05 (1984).

107. Abramowicz, *supra* n. 15, at 11.

108. *Id.* (footnote omitted).

109. *Id.* (footnote omitted).

110. *Id.* (footnote omitted).

111. *Id.* (footnote omitted).

112. *Id.* at 12.

one person is granted the right to dig up the gold mine (perhaps by an auction), then he will do so when the costs outweigh the benefits, yielding \$990,000 in net profits.¹¹³ In fact, he may even wait to begin extraction until the technology for gold digging becomes cheaper if the value of time is outweighed by the savings.¹¹⁴ Similarly, unless one person is granted the right to “dig up” an idea, rent dissipation is likely to occur in intellectual property races.¹¹⁵

2. Patent Races

As described above, the ability of property rights to counter rent dissipation effects embodies the “prospecting” theory of patent law.¹¹⁶ Research and development of an invention without a patent right would dissipate the potential profits much like in the mine scenario.¹¹⁷ One company would develop a widget at some cost, only to have the potential profits dissipated immediately by competitors copying the widget, leaving everyone reaping zero profits at the end and no one with an incentive to do the initial investment to find the proverbial gold mine.¹¹⁸ The patent system eliminates some of the rent dissipation in the invention field by providing an incentive (in the form of a property right) to invent without fear of second movie free-riders.¹¹⁹

Yet patents do not eliminate rent dissipation wholly; instead they may push the rent-dissipating behavior to an earlier stage in the invention.¹²⁰ Rather than competing for improvements for an invention, private parties will compete to be the first to obtain the patent, resulting in a patent race.¹²¹ Such patent races may lead to

113. *Id.* Note that in economic efficiency calculations, the concern is with developing value and surplus, not who ultimately receives this value.

114. *Id.*

115. *Id.*

116. See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. 265, 266 (1977).

117. Abramowicz, *supra* n. 15, at 12.

118. *Id.* at 12-13; see e.g. Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. Chi. L. Rev. 129, 133-34 (2004) (stating the justifications forwarded for the *Sonny Bono Copyright Term Extension Act*).

119. Abramowicz, *supra* n. 15, at 13.

120. Donald G. McFetridge & Douglas A. Smith, *Patents, Prospects, and Economic Surplus: A Comment*, 23 J.L. & Econ. 197, 198 (1980).

121. Abramowicz, *supra* n. 15, at 13.

redundancy and an overinvestment of resources.¹²² The resulting rent dissipation is similar to what would happen if mining prospectors were guaranteed a right to the first discoverer of the gold mine—the gold prospectors would invest as much time and money, multiplied by the possibility of being the first to find the gold mine, as would be justified from the resulting exclusive profits. Thus, if there is \$1,000,000 to be made from the gold mine and ten possible prospectors with similar capabilities (each with a 10-percent chance of finding the gold mine), each will invest up to \$100,000 to find the gold mine (or more if they overestimate their chances), once again dissipating the potential profits.

While all participants invest heavily in research in the hopes of the supra-competitive monopoly profit from the invention, only one of them will actually receive such profits. The rest may have gone down blind alleys or similar visionary avenues only to lose the race and have to discard the research.¹²³

Other issues also arise with patents. One problem is that a company may begin developing its invention earlier than optimal and it may also release the invention to the market too early in order to obtain patent protection.¹²⁴ For example, it may be more efficient to wait to develop a new computer chip when new silicone technology comes out, thus maximizing the profits by developing the product when initial costs have fallen. However, if multiple companies are making the same calculation, then each will try to develop it just a little bit earlier than the other to capitalize on the profits (since whoever gets it first gets all the profits). With each company pursuing this course of action, development will be pushed back until costs just equal revenues (i.e., zero profits). A second issue is that even once a patent is secured, the possibility that it can be invalidated or narrowed through the court systems leads to rent-seeking by competitors spending large sums to challenge the patent in court and thus reduced predictability for companies' long term planning.¹²⁵

122. *Id.*

123. Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 *Minn. L. Rev.* 317, 353 (2005).

124. Michael Abramowicz, *Perfecting Patent Prizes*, 56 *Vand. L. Rev.* 115, 183 (2003).

125. See generally F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules* 56 (Harv. L. Sch. Center for L., Econ., & Bus., Discussion Paper No. 415, April 1, 2003) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=392202).

The patent race is, however, an example of rent dissipation that has benefits for third parties—consumers who then receive the surplus from the invention. Additionally, earlier invention of products and side benefits from research (e.g., finding a new drug while pursuing a different one) accrue to consumers and producers.¹²⁶ Finally, the monopoly granted by a patent is far from a “winner take all” monopoly—the market is usually filled with substitutes, and competitors are very crafty at “designing around” patents.¹²⁷ Thus, an owner of a monopoly can seldom achieve actual, or even anything close to, monopoly profits and thus causes little welfare deadweight loss.¹²⁸ Thus, the rent dissipation may be worthwhile if the net benefit exceeds what it would have been without patents.¹²⁹

As a result, patent law provides strong protection to an invention for a limited amount of time (currently, twenty years), allowing the inventor to exclude others from making or selling his invention.¹³⁰ It is a broad protection in that it not only allows one to exclude the exact version of the invention, but extends to similar and functionally equivalent versions of the idea.¹³¹ Such broad protection prevents free-riding and encourages innovation by providing a powerful production incentive to the inventor.¹³² However, this broad protection results in decreased consumer surplus by preventing the sale of equivalent products—the familiar monopoly deadweight loss—and by preventing others from making improvements on the idea.¹³³ Thus,

126. Ulrich Doraszelski, *An R&D Race with Knowledge Accumulation*, 34 *Rand J. of Econ.* 20, 26-28 (2003).

127. Ulrich Doraszelski, *Rent Dissipation in R&D Races* 1, 8 (Hoover Instn., Stan. U. Working Paper, Sept. 2002) (available at <http://www.economics.harvard.edu/faculty/doraszelski/papers/rent.pdf>); see also John F. Duffy & Michael Abramowitz, *Intellectual Property for Market Innovation* 21-22 (Berkeley L. & Econ. Workshop Paper No. 10, 2006) (available at http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1161&context=berkeley_law_econ).

128. Abramowicz, *supra* n. 15, at 16-17.

129. *Id.* at 13-14.

130. 35 U.S.C. § 271 (2000).

131. See 35 U.S.C. § 112 (2000); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 723 (2002) (citations omitted).

132. See e.g. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *Tex. L. Rev.* 1031, 1037-41 (2005).

133. Doraszelski, *supra* n. 127, at 5.

broad patent rights can lead to patent races, but their benefits may outweigh the rent dissipated in the process.

3. *Do Copyright Races Go to the Swiftest?*

Until quite recently, academic literature did not consider copyrights as being the subject of a race.¹³⁴ After all, how can people race for a right that is so weak that anyone with a modicum of creativity can overcome it? Copyright law, unlike patent law, does not prevent follow-on innovation; instead it encourages other authors, with a minimum of originality, to improve upon the work.¹³⁵ If copyright was designed solely to prevent rent dissipation, it would be a strong right, similar to patents. It could for example allow the first author in a particular genre the right to that specific genre for a limited time.¹³⁶ Thus, Ray Bradbury may have to pay royalties to Isaac Asimov, or the television show *America's Got Talent*¹³⁷ may have to pay a license fee to *American Idol*.¹³⁸

Such a copyright may or may not be attractive depending on the medium and duration of the strong copyright. On the one hand, it would lead to reduced redundancy. If a person were to create the first TV show where a contestant answers questions for a chance to be a millionaire, that person may refuse to allow similar shows to be made.¹³⁹ However, that person would have strong incentives to negotiate licenses to shows that are somewhat different (encompassing a slightly different market), for example where a team competes with

134. See Abramowicz, *supra* n. 15, at 12-14.

135. See e.g., *Baker v. Selden*, 101 U.S. 99, 102 (1879) (“To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made . . . is the province of letters-patent, not of copyright.”). This is separate from derivative works which copyright law does protect. An author could, for example, write a movie script about an American boxer who challenges and fights a Russian fighter, but he could not use the actual *Rocky* characters or prevent *Rocky's* author from making a sequel to his own *Rocky* series. Cf. *Anderson v. Stallone*, 11 U.S.P.Q. 2d 1161 (C.D. Cal. 1989). The exclusive right to make derivative works ensures efficient management of existing intellectual works, while allowing other authors to expand on the idea itself. Cf. Lemley, *supra* n. 132, at 1041.

136. Abramowicz, *supra* n. 15, at 15.

137. *America's Got Talent* (NBC 2006) (TV series).

138. *American Idol: The Search for a Superstar* (Fox Network 2002) (TV series).

139. Cf. *Who Wants to Be a Millionaire* (ABC 1999) (TV series) and *Twenty One* (NBC 2000) (TV series).

each other to answer a series of questions for a chance to become millionaires.¹⁴⁰ Thus, fewer works result, but there is still a large “range of works [that] appeal to a [wide] range of consumers.”¹⁴¹ Just like a broad patent right encourages improvement of existing products (through incentives to the producer and licensing possibilities), but not different designs of the same product, a broad copyright would encourage new but non-redundant works.

Thus, like the patent system, a broad copyright regime would set up high spoils to the first movers. Those who are first to produce a copyrighted work get the prize, those who are second negotiate licenses. A full examination of how a broad copyright would work for the movie sector will be conducted in Section VII. However, even the current narrow copyright regime has high profits to be reaped in a race where the spoils go to the swiftest, but the size of the profits for mavericks depends on the type of copyrighted medium.

a. Books and Art: Permeation of the Market

The theory of high profits to the first mover may not necessarily hold for books or art. Generally, books and art permeate the culture slower than movies. Books require high consumer investment (they take weeks/months/years to read). Similarly, art has a long distribution pattern (requiring the viewing of the original work, which may take years to circumnavigate the world) and has a corollary comprehension requirement (explanations of what the artwork is, in book or audiotape form, is sometimes required for consumer understanding). Thus, the demand for books and art after initial publication has a much more significant time lag than movies.

As a result, the exact time of publication of a book or artwork generally has less influence on the overall value of the book or an earlier released book’s influence on a corollary. Additionally, the presence of many producers, low entry barriers, lower production times, and high publication rates (122,000 books are published annually)¹⁴² lead towards a competitive market which reduces the

140. See *The Weakest Link* (BBC 2000) (TV series); see also *Greed* (Fox Network 1999) (TV series).

141. Abramowicz, *supra* n. 15, at 15-16.

142. Andrew Grabois, R.R. Bowker, *American Book Production, 1999-2001*, <http://www.bookwire.com/bookwire/americanbookproduction.htm> (last accessed Nov. 7, 2007).

likelihood of obtaining monopoly profits due to rapid publication velocity.¹⁴³ The first person to the publishing house may not be the first to the bank to collect royalties. As a result of these demand and production trends, the demand graph for books has a long tail that accounts for much of the expected sales.¹⁴⁴

b. Movies

Such is not the case with movies. Movies are a field where “glory does not stay.”¹⁴⁵ Movies have their highest revenues starting on opening weekend and “early though the laurel grows/ [i]t withers quicker than the rose.”¹⁴⁶ In 1947, theatres accounted for 100 percent of a movie’s total lifetime gross.¹⁴⁷ In 2000, theatre sales accounted for approximately 26 percent of a movie’s lifetime profits.¹⁴⁸ In 2006, for example, domestic box office revenues totaled \$9.49 billion.¹⁴⁹

More importantly, how a movie does during its opening weekend is a direct predictor of how it will do in the long-run.¹⁵⁰ A film’s

143. See generally *id.*

144. See Chris Anderson, *The Long Tail: Why the Future of Business is Selling Less of More* 10, 22-23, 47-49, 137-38 (Hyperion 2006) (describing book sale trends, the Long Tail phenomenon, and the connection between the two).

145. *The Poems of A.E. Housman* 20 (Archie Burnett ed., Clarendon Press 1997) (quoting the poem *To An Athlete Dying Young*).

146. *Id.*

147. Jonathan Yardley, *The Big Picture: The New Logic of Money and Power in Hollywood*, Wash. Post T02 (Feb. 27, 2005) (available at <http://pqasb.pqarchiver.com/washingtonpost/access/799007961.html?dids=799007961:799007961&FMT=ABS&FMTS=ABS:FT&date=Feb+27%2C+2005&author=Jonathan+Yardley&pub=The+Washington+Post&edition=&startpage=T.02&desc=Edward+Jay+Epstein+is+here+to+...>) (In the years following World War Two, movie theater sales accounted for 100 percent of the profits).

148. Joyce Julius & Assocs., Inc., *Exposure Analysis and Projection of Motion Picture Product Placement for The Ross Group: Sony Pictures’ Maid in Manhattan* 5, http://www.thereelrossgroup.com/MIM_ALIVE_PROJECTION.pdf (Jan. 21, 2003). By some estimates, this percentage dropped to 18% by 2003, but a movie’s gross at the box office continues to set the future for the movie’s total worth. Yardley, *supra* n. 147.

149. Motion Picture Assn. of Am., *MPA Snapshot Report: 2006 U.S. Theatrical Market*, <http://www.mpa.org/US%20theatrical%20snapshot.pdf> (last accessed Nov. 7, 2007).

150. Jeffrey S. Simonoff & Ilana R. Sparrow, *Predicting Movie Grosses: Winners and Losers, Blockbusters and Sleepers* 14-15, <http://pages.stern.nyu.edu/~jsimonof/movies/movies.pdf> (last accessed Nov. 15, 2007).

opening weekend and resulting theatre run establishes its future value on screens and in ancillary markets.¹⁵¹ Many movies only run for several weeks, and for others the release ends a few months later at most.¹⁵² Thus, the value of a movie is highly time-dependent and between two similar movies, the box office hare often beats out the studio tortoise because of timing. The copyright race to the box office that occurs here resembles in many respects the patent research and development races described earlier.

The movie market also differs from the book market in the required cognitive and time investment by a consumer. The 393-page book *The Lost World*¹⁵³ may take an average reader a month to read, while the *Jurassic Park*¹⁵⁴ movie only takes two hours of a person's day to watch. Interested consumers can thus purchase and consume the movie without trouble almost immediately, squeezing it into a Saturday night date. Conversely, a book reader may put the consumption off until she has time, and even then space it out between beach, airplane flights, and a few pages before bed.

The movie market also differs from the art market in the availability of the product and the required level of comprehension. An art consumer may have to wait until the art exhibition is in town; a movie-goer only has to wait until a movie hits the theatres. Art is generally geared towards an educated public, or someone willing to read about the art; most movies are made for the general public and are comprehensible without the need for high-brow explanations. Additionally, movies, unlike many other copyright mediums, present a social outlet encouraging immediate viewing, rather than deferred gratification, and make a great topic of conversation the next day (a positive network externality). Therefore, the movie demand market is much more time-front saturated than most other copyright markets.

Movies are also a unique medium in copyright because of their extremely high production costs. On average, major motion picture movies cost nearly \$100 million to produce and market; only one in ten movies actually recovers its investment from domestic showings—six

151. *Id.*; Andrew Ainslie, Xavier Dreze & Fred Zufryden, *Modeling Movie Life Cycles and Market Share*, 24 *Mktg. Sci.* 508, 508 (2005).

152. Simonoff & Sparrow, *supra* n. 150, at 17.

153. Michael Crichton, *The Lost World* (Alfred A. Knopf 1995).

154. *Jurassic Park* (Universal Pictures 1993) (motion picture).

out of ten movies never recoup the original investment.¹⁵⁵ Even a small percentage loss due to the negative externality caused by the first movie may thus lead to serious economic inefficiencies.

There may also be other mediums that mirror this kind of consumer demand behavior. Popular culture mediums such as television movies and shows experience a similar front-loaded demand behavior.¹⁵⁶ It is also likely that segments of the popular music industry requiring high investment costs, having rapid distribution patterns (radio and clubs), and having a short front-loaded demand curve (such as for fad-music requiring high marketing costs) would mirror this market behavior.

B. THE MOVIE MARKET OLIGOPOLY

Moreover, the movie segment of the copyright market represents a special type of market. It is an oligopoly market having few competitors, with interdependent decision-making, high entry barriers, and long product production time.¹⁵⁷ The eight major movie studios control around eighty percent of the United States movie business.¹⁵⁸ High movie production prices¹⁵⁹ present very high entry barriers for new firms. Long movie production times (averaging from two to six

155. Motion Picture Assn. of Am., *Making A Summer Blockbuster: Jobs, Investment, Risks* 1, http://mpaa.org/press_releases/mpaa%20summer06newsletter.pdf (last accessed Nov. 7, 2007).

156. See Marco Gambaro, *The Relationship Between Different Distribution Channels for Movies: Some Lessons from the Case of Free Television* 5-6 (University of Milan Working Paper Series, Paper No. 24, 2004) (available at <http://www.economia.unimi.it/uploads/wp/wp204.pdf> (last accessed Nov. 15, 2007)).

157. See generally Francesco Parisi & Ben Depoorter, *The Market for Intellectual Property: The Case of Complementary Oligopoly*, in *The Economics of Copyright: Developments in Research and Analysis* 162 (Wendy Gordon & Richard Watt, eds., Edward Elgar Publg. 2003) (An oligopoly market is characterized by a small number of firms, having interdependent decision-making (a decision of one firm influences the decisions and profits of the other firms), and possessing high entry barriers); see also Richard Watt, *Copyright and Economic Theory: Friends or Foes?* 39-50, 177-90 (Edward Elgar Publg. 2000) (offering a *Cournot* model of copyright).

158. For a 2005 market share breakdown, see Table 1 *infra*. These studios collectively release a little over 150 films each year. Goldberger, *supra* n. 29, at 327-28 (Other studios comprise less than twenty percent of the movie market and release approximately 100 films yearly.).

159. See Motion Picture Assn. of Am., *supra* n. 149, at 1 (major studios invest an average of \$96.2 million to make and market a movie).

years) also present credible commitments that deter new entrants.¹⁶⁰ While the movie theatres are prohibited from colluding on pricing and what movies to play,¹⁶¹ their inventory is dictated by economics. A theatre will not show a movie unless it can attract a minimum of 1,500 people over a two week run (the rent for a screen)¹⁶² and it will stock its screens with the most profitable movies.¹⁶³

C. *SUBSTITUTES V. COMPLEMENTS IN COPYRIGHT MARKETS*

Copyright works subsisting in similar markets may be either substitutes or complements to each other.¹⁶⁴ Thus, they may have both positive and negative effects on surrounding markets and what must be considered is whether a second-released movie compensates what it lost due to the shadow externality. For example, two dictionaries may be near perfect substitutes for one another—when the price of Webster’s dictionary goes up, the quantity demanded of the American Heritage dictionary increases. On the other hand, two software packages may be complements of one another—when the price of Microsoft Windows® goes down, the quantity of Microsoft Word® demanded goes up.¹⁶⁵

In closely related works, one product’s substitutability for another is the *most important* factor in evaluating whether an alleged infringer’s use of copyright material is fair and therefore legal.¹⁶⁶ Fair

160. A credible commitment by one party deters the entry of other parties into the market. For example, building a coal power plant to serve expanding market demand will deter new entrants who would have otherwise entered and built their own power plants. *See U. S. v. Aluminum Co. of Am.*, 377 U.S. 271, 280 (1964).

161. *See Interstate Cir., Inc. v. U.S.*, 306 U.S. 208, 220, 228 (1939).

162. Anderson, *supra* n. 144, at 17.

163. *Id.* This is, of course, not a necessarily bad thing. Where an industry has naturally funneled to an oligopoly market; one should think long and hard before advocating for any change in the market structure itself. *See* Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. of Econ. Persps. 57, 68-69 (2005) (describing a difference in approaching an oligopoly market rather than a monopoly market).

164. Lemley, *supra* n. 118, at 135-36.

165. *See* Kenneth C. Baseman, Frederick R. Warren-Boulton & Glenn A. Woroch, *The Economics of Intellectual Property Protection for Software: The Proper Role for Copyright* 4 (EconWPA Indus. Org. Series Paper No. 9411004, April 1995) (available at <http://elsa.berkeley.edu/~woroch/softcopy.pdf>).

166. *See e.g. Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565-66 (1985) (citations omitted).

use is an exception to the general rule of exclusivity of copyrights.¹⁶⁷ This doctrine allows limited use of a copyrighted work without permission from the copyright holder.¹⁶⁸ For example, a *Time* magazine movie on the assassination of President Kennedy could not enjoin the reproduction of stills from the film in a history book on the subject.¹⁶⁹ The main factor in the fair use test is whether the secondary work serves as a market substitute for the original products or licensed derivative works.¹⁷⁰ Where one work serves as a substitute for another, the fair use defense generally fails.¹⁷¹

In the movie sector, most similar genre movies serve as market substitutes for one another to some degree.¹⁷² As the plot, theme, characters, and depicted locations of the movies move closer together, their ability to substitute for each other increases. On the other hand, movies also have complementary ancillary markets. As one commentator noted, “[o]ur movies were once television shows, our television shows were once video games, our video games were once books, and our books were once movies.”¹⁷³ For example, one derivative market—video games—increased movie sales of *Star Wars*¹⁷⁴ and led to an increase in the purchasing of the *Star Wars* computer games.¹⁷⁵ Another such market is branding and advertising. For instance, higher sales of the film *Shrek*¹⁷⁶ led to a deal with McDonalds to include *Shrek* toys inside their kids’ meals.¹⁷⁷ Some

167. 17 U.S.C. § 107 (2000).

168. *Id.*

169. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 131-32, 146 (1968).

170. *Harper & Row Publishers, Inc.*, 471 U.S. at 566-67 (citations omitted).

171. *See e.g. Time Inc.*, 293 F. Supp. at 146.

172. *See Kitch, supra* n. 12, at 1734 (2000) (arguing that because so many works are substitutes for each other, and functional characteristics are not protected, copyrights do not provide a real monopoly) (citing *Lemley, supra* n. 56, at 994 n. 12); *see also* Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 Wm. & Mary L. Rev. 33, 37 (2004).

173. Goldberger, *supra* n. 29, at 301.

174. *Star Wars: Episode III—Revenge of the Sith* (Lucasfilm 2005) (motion picture).

175. Mike Musgrove, *Sadness in ‘Star Wars’ World*, Wash. Post D1 [¶5] (Feb. 2, 2006) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/01/AR2006020102341.html>) (describing the success of *Star Wars* in the video game market).

176. *Shrek* (DreamWorks Animation 2001) (motion picture).

177. MovieWeb, *Shrek Goes to McDonald’s*, <http://www.movieweb.com/news/95/8695.php> (last accessed Nov. 15, 2007).

movies also complement each other, for example sequels, or similar movies spaced out over time. For example, the release of *Terminator 2: Judgment Day*¹⁷⁸ led to an increase in demand for *The Terminator*.¹⁷⁹

Thus, similar movies may have both positive and negative demand effects on the surrounding markets. At the fringes of intellectual property, however, where the demand for one more work is marginal, the rent dissipation of resources may outweigh the benefits gained from having another similar movie.¹⁸⁰

A movie may or may not make a large impact in complementary markets. A movie does, however, divert the demand from its rival movies in the substitute market.¹⁸¹ Such demand diversion results because a marginal entry by a competitor is less likely to expand the number of consumers served.¹⁸² After seeing a movie about a *Mission to Mars*,¹⁸³ few will want to go see another movie about the *Red Planet*¹⁸⁴ immediately after, but the costs for the *Red Planet* are already invested. Thus, a marginal reduction in the production of similar works—or rather delaying the release of the marginal work to the market and redirecting copying to creativity—may actually enhance overall welfare by reducing rent dissipation.

D. DEMAND DIVERSION

When a market is saturated by a number of choices, introduction of another similar choice adds relatively little social value, while diverting demand from already established providers.¹⁸⁵ This phenomenon is known as “demand diversion” or “business stealing.”¹⁸⁶ For example, if there are five dictionaries on the market, and a sixth similar dictionary comes to the market, to the extent that this new product sells, it will divert demand from its established

178. *Terminator 2: Judgment Day* (Carolco Pictures 1991) (motion picture).

179. *The Terminator* (Hemdale Film 1984) (motion picture).

180. See Abramowicz, *supra* n. 15, at 5 (using cookbooks as an example for “demand diversion”).

181. *Id.*

182. *Id.*

183. *Mission to Mars* (Touchstone Pictures 2000) (motion picture).

184. *Red Planet* (Warner Bros. Pictures 2000) (motion picture).

185. Abramowicz, *supra* n. 15, at 5.

186. *Id.*

counterparts rather than significantly bringing a new demand to the market. Since the product caters to virtually the same demand market as its counterparts, any gain in demand to one product results in the loss of demand for another. Thus, the increased sales to Producer Six result in a nearly equivalent decrease in sales to Producers One through Five. This is especially true for oligopoly markets where few producers service a constant demand market and the introduction of one more producer does not significantly increase demand or reduce price.¹⁸⁷

In markets requiring firms to incur high entry costs and having homogenous products, excessive entry may result.¹⁸⁸ Generally, competition and free entry are desirable from the point of view of a consumer. The more choices a consumer has, the higher his benefit from having another similar product to choose from and the lower the market price. Also, entry is profitable to the extra producer as he can reap profits from selling the product. However, “the marginal entrant’s contribution to social surplus is . . . equal to his profits *less* the social value of the output lost owing to the output restriction he engenders in other firms” in the market.¹⁸⁹ Oligopolies are highly susceptible to such a “demand diversion” effect, as each firm caters to a similar market and the increase in the output of one firm results in a decrease in output of another firm. In such a market, it has been theorized a more efficient outcome may be achieved by raising the private cost of entry through an entry fee (e.g., a licensing fee).¹⁹⁰

For example, if the automobile market is at equilibrium and another car manufacturer—X—begins selling regular automobiles in a previously unavailable color—orange—any sales it makes will be at the cost of sales lost by GM, Ford, Toyota, etc. The entry is profitable for X, and the entry may give a benefit to consumers who now have a slightly higher number of choices (and a few more consumers may have entered the market for orange cars—though their numbers would likely be very small), but in the grand calculus of societal welfare, societal profit may likely be negative—the increased consumer benefit

187. N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 *Rand J. Econ.* 48, 49 (1986).

188. *Id.*

189. *Id.* (emphasis in original).

190. *Id.* at 53 (Conversely, if private entry barriers already exist in the market, their removal may lead to welfare loss.).

and demand minus the entry costs for Car Manufacturer X.¹⁹¹ In a sense, the profit to manufacturer X is transferred from the lost profits of Toyota, Ford, and the other manufacturers combined.

In the movie context, this demand diversion beast similarly occurs though it is of a slightly different species because it is time constrained. In fact, it is a double demand diversion because in addition to diverting demand from the first-released movie, the new entrant is also, in essence, stealing business from itself by not waiting to release the movie later. *The Black Dahlia*,¹⁹² for example, diverted movie sales from *Hollywoodland*¹⁹³ when it came out a week later. Movies overlapping in release time in theatres divert demand from each other (an extra movie ticket bought to *The Black Dahlia* is one not bought to *Hollywoodland*). Additionally, *The Black Dahlia* also lost sales because even after *Hollywoodland* was off the screens, consumers who had gone to see *Hollywoodland* (which grossed \$14.5 million on an investment of \$14 million)¹⁹⁴ did not then want to go see another movie about Hollywood murders, at least for a while. (*The Black Dahlia* only gathered \$22 million at the box office with an investment of \$50 million).¹⁹⁵ If *The Black Dahlia* had not been preceded by its rival, it would have served a higher demand market.

As a first approximation then, the market for Hollywood murder movies set in the 1950s during September of 2006 was \$36.5 million and the sales lost from one movie were gained by the other. Of course, there was an expansion of the demand market when the second movie came out (the products are not completely homogenous). Just as some people may have wanted an orange-colored car, some people went to see Ben Affleck and the death of television's Superman (*Hollywoodland*) when they wouldn't have gone to see Josh Hartnett and the death of an aspiring actress (*The Black Dahlia*).

191. It is important to note that this calculation does not take into effect the surplus received from increased innovation resulting from increased competition.

192. *The Black Dahlia*, *supra* n. 4.

193. *Hollywoodland*, *supra* n. 5.

194. Internet Movie Database, *Hollywoodland*, <http://www.imdb.com/title/tt0427969/business> (last accessed Nov. 15, 2007) (revenue and cost data for *Hollywoodland*).

195. Internet Movie Database, *The Black Dahlia*, <http://www.imdb.com/title/tt0387877/business> (last accessed Nov. 15, 2007) (revenue and cost data for *The Black Dahlia*).

More importantly, though, was the time factor involved. Most people who saw *Hollywoodland* on Saturday would not have gone to see *The Black Dahlia* on Sunday. However, the movies were slightly spaced out in release time. Thus, the more time that had passed, the more people who liked Hollywood murder movies and whose demand for one had rebounded to the point of seeing another Hollywood murder movie were interested in seeing the later released movie. In essence, this was a “new” market and not one from which demand was diverted. The question for demand diversion inefficiency analysis is then: Was the cost of the second-released movie (\$50,000,000) higher than the resulting increased consumer benefit (welfare of consumers whose demand rebounded plus consumers who went to the theatre because of product differentiation—Ben Affleck v. Josh Hartnett or the movie’s victim being an L.A. starlet v. the actor playing TV’s Superman)?

Thus, in addition to diverting business from *Hollywoodland*, *The Black Dahlia* was opening to a demand market that had dipped overall. The longer the later-released movie waited to debut, the higher the new market would have been (the market of consumers once again willing to see a Hollywood murder movie). From this point, pushing the release date back would have allowed the later movie not to divert demand from *Hollywoodland* and would have allowed consumer demand to rebound, thus conducting a more efficient market entry and increasing consumer welfare.¹⁹⁶

IV. WHY PRIVATE ORDERING UNDER CURRENT CONDITIONS DOES NOT SOLVE THE INEFFICIENCY

“I’m in television now. It’s my job to be repetitive. My job. Repetitiveness is my job.”¹⁹⁷

The logical question then is why did *The Black Dahlia*, or movies in a similar situation, come out prematurely? If movie studio executives are aware of the time dependency of consumer demand,

196. A complication may arise as the first movie may have also created a time sensitive increase in demand—a fad. This time-based increase in demand (separate from the decrease in demand due to the movies being similar) may or may not have been present if *The Black Dahlia* had opened later.

197. *The Simpsons*, “Bart Gets Famous” (20th Cent. Fox TV Feb. 3, 1994) (TV series) (quotation available at <http://www.snpp.com/episodes/1F11.html> (last accessed Nov. 7, 2007)).

why do they not wait to release their movies when they could make more profits? In other words, why does private ordering under current legal and market conditions not solve this inefficiency? Why do similar movies continue to come out within weeks or months of each other and what do movie studios do about it?

A. GENERAL

When similar movies are released in close sequence of each other, the first movie usually makes the most profit, while the second movie is influenced directly by the success or failure of the first movie. When the first movie is a hit, the second movie becomes a “collateral beneficiary,”¹⁹⁸ benefiting from the awakened interest in the genre. At the same time, the second movie suffers from a decreased demand from those consumers who no longer wish to see the same movie. On the other hand, if the first movie bombed at the box office, the second movie suffers from a completely negative effect. Consumers do not want to see a repeat of a similarly bad movie that they have already seen and the interest in the genre as a whole decreases. This is often the result even if the second movie, by itself, is actually much better than the viewers assume after seeing the first movie. Generally though, the negative effects outweigh the positive. As one commentator described “ . . . [i]f the first [movie] is bad why make another? If the first is good, why make another?”¹⁹⁹

B. STUDIO RESPONSES TO SUCH COMPETITION

There are three major variations of this *déjà vu* “simultaneous release” phenomenon and the responses by the movie studios. These

198. Seminar, *A Conversation with the Judiciary* (DePaul U. College of L. Ctr. for Intell. Prop. L. & Info. Tech., Spring 2007) (This was a term offered by the Hon. Alex Kozinski, United States Court of Appeals for the 9th Circuit, to describe a similar phenomenon in trademark competition. Judge Kozinski described a “collateral beneficiary” as a product that benefits from an awakened interest in the genre due to a first product’s success.).

199. Jim Gilchrist, *Adventures on an Epic Scale*, *The Scotsman* [¶ 5] (Dec. 18, 2004) (available at <http://thescotsmen.scotsmen.com/critique.cfm?id=1442742004&format=print> (last accessed Nov. 15, 2007) (Dr. Valerio Manfredi, who acted as a consultant to Oliver Stone in the production of the movie *Alexander*, discussing a possible second film by director Baz Luhrmann).

vary depending on when the competing studios hear of each other's developing projects.

One such variation is the early solution—when a studio finds out early enough that a nearly identical movie is in production, and time constraints will not allow the studio to win the race, producers and directors back off production for a number of years or throw in the towel and scrap the movie in progress.²⁰⁰ No studio wants to be a runner whom the race has outran.

For example, the movie *Alexander*²⁰¹ was started by director Oliver Stone at Warner Bros. in late 2001, and a similar movie about Alexander the Great was begun by Australian director Baz Luhrmann at Universal in early 2002.²⁰² When Luhrmann and Universal discovered that Stone had put his version of Alexander into production first, and it was apparent that they could not beat him to the box office, Luhrmann pushed back the release date of the film several times, ultimately opting to keep the film in development indefinitely.²⁰³

A second variation is a midstream solution—when the movie studios find out about each other's projects too late to cancel the already-started production or movie release.²⁰⁴ If the studio knows that it will lose the race to the box office, it may then release its movie straight to television or DVD when it originally planned to send it to the theatres. This, the studio hopes, will save on marketing, movie theatre screen rental, and advertising costs—averaging \$36.2 million

200. Klady, *supra* n. 13, at ¶ 6 (describing a conflict between studios for the rights to film a storyline of a deadly virus threatening Washington, D.C.).

201. *Alexander* (Warner Bros. Pictures 2004) (motion picture).

202. IanNathan, Times Online, *One Battle Too Far* ¶ 4, http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/film/article1078161.ece (Jan. 1, 2005). In an interview with the *Times*, Oliver Stone noted that when Baz Luhrmann decided to develop his version of *Alexander*, Stone felt like he was suddenly in a race that he had been running alone. “ ‘It focused me. I had to work harder.’ ” *Id.* at ¶ 4.

203. Stephen Galloway, *Great Expectations*, Hollywood Rptr. ¶ 3 (Aug. 3, 2004) (available at http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1000591984). Moritz Borman, Stone's film's principal financier noted that “ ‘([t]he rival pictures) would have hurt us, but all you can do is keep your eyes on the prize.’ ” with Stone adding “ ‘[w]e were in a race against time with everybody else out there.’ ” *Id.* at ¶ 24.

204. Klady, *supra* n. 13, at ¶¶ 2, 4, 5].

per movie²⁰⁵—and, perhaps allow the movie to recoup some of its production costs from DVD and television sales alone. For example, *The Librarian: Quest for the Spear*²⁰⁶ was released straight to DVD, when *National Treasure*²⁰⁷ was released a month before it in theaters.

A variation of this midstream solution is what producers of small budget films have done. Not having a large audience to begin with, they can generally disregard any negative externality and instead ride the wave of their bigger-budgeted counterpart. When *Jurassic Park*²⁰⁸ was being released to the box office, a small (less than \$1 million) budget movie was also being released—*Carnosaur*.²⁰⁹ *Carnosaur* went to the box office a week before *Jurassic Park*, just so it could ride the wave. The director of *Carnosaur* acknowledged in an interview that “We were playing the old game. We deliberately wanted to be in [the box office] one week ahead [of *Jurassic Park*].”²¹⁰

In fact, some low budget studios actually make this their business model, releasing such movies as *Snakes on a Train*²¹¹ and *The DaVinci Treasure*,²¹² just a few weeks before their more expensive counterparts *Snakes on a Plane*²¹³ and *The Da Vinci Code*,²¹⁴ to ride the wave of popularity. Thus, when the positive externality is large, and the negative externality is small—as for example for low cost movies whose expected audience and profit is small to begin with—studios will try to increase profits by catering to the increased demand created by the first-released movie.

A final variation is a late solution—when a studio knows that it will lose the race, but it has already invested money into theatre

205. Wayne Friedman, MediaPost, *TV's Upfront Advertising Drug: Movie Marketing Dollars* [¶¶ 3, 9], http://publications.mediapost.com/index.cfm?fuseaction=articles.showarticle&art_aid=4 (Mar. 10, 2006).

206. *The Librarian: Quest for the Spear* (Apollo ProScreen Filmproduktion 2004) (TV movie).

207. *National Treasure* (Walt Disney Pictures 2004) (motion picture).

208. *Jurassic Park*, *supra* n. 154.

209. *Carnosaur* (New Horizon Picture Corp. 1993) (motion picture).

210. Keith Phipps, The A.V. Club, *Roger Corman* 3, <http://www.avclub.com/content/node/22696> (Mar. 31, 1999).

211. *Snakes on a Train* (Asylum 2006) (motion picture).

212. *The Da Vinci Treasure* (Asylum Home Ent. 2006) (motion picture).

213. *Snakes on a Plane* (New Line Cinema 2006) (motion picture).

214. *The Da Vinci Code* (Columbia Pictures 2006) (motion picture).

advertising and marketing.²¹⁵ The studio may push back the release date of a film to allow the market demand to rebound and avoid head to head competition with the competitor.²¹⁶ For example, the film *Wyatt Earp*²¹⁷ pushed back its release date by three months after it realized that it could not beat *Tombstone*²¹⁸ to the box office. However, the delay cannot be too long as the longer the release date is set off, the less the payoff from the initial advertising.²¹⁹

However, the above-described private ordering responses occur in a minority of cases. Usually the studios will release their movie to the theatres as planned, hoping that they can still capture a high enough market segment and hoping that the arisen interest in the genre as a whole will outweigh its secondary staleness.²²⁰ Sometimes they can get lucky, many times they do not. Sometimes this leads to two volcano movies dueling at the screens with one erupting and the other oozing at the box office.²²¹ Sometimes it leads to a quintuplet of body-switching movies butting heads within a year of each other with one going big and the other four wishing they could take its place.²²² At other times, five nearly identical “underwater” movies come out within

215. See e.g. Charles B. Weinberg, *Marketing Models Improve Profit Picture: It's About Time* 92 (Bus. and Econ. Scholars Workshop in Motion Picture Ind. Stud. Paper, Jul. 19, 2000) (describing the situation of the films *Hoffa* and *A Few Good Men* coming out at the same time).

216. *Id.*

217. *Wyatt Earp* (Warner Bros. Pictures 1994) (motion picture).

218. *Tombstone* (Cinergi Pictures Ent., Inc. 1993) (motion picture); see also Ainslie, Dreze & Zufryden, *supra* n. 151, at 508 (describing how release dates of movies “are pushed back, or brought forward, to avoid coming out simultaneously with competing movies that may be stronger players”).

219. Weinberg, *supra* n. 215, at 91-92. Advertising is a time-sensitive investment. It must be aired close to the release or sale of the product.

220. See e.g. Klady, *supra* n. 13, at [¶¶ 9-10] (describing how the movie *Big* came out only ten months after the similar film *Like Father, Like Son*, and still made \$200 million worldwide).

221. See e.g. *Dante's Peak*, *supra* n. 6 (released in February of 1997, costing \$104 million and grossing \$168 million worldwide); *Volcano*, *supra* n. 7 (its \$100 million-plus counterpart, released two months later, barely covered its costs in the worldwide box office).

222. Between 1987 and 1989, five movies about a magical switch of bodies between a child and an adult were released: *Vice Versa* (Columbia Pictures Corp. 1988) (motion picture); *Like Father, Like Son* (TriStar Pictures 1987) (motion picture); *Big* (20th Cent. Fox 1988) (motion picture); *18 Again* (New World Pictures 1988) (motion picture); and *Dream a Little Dream* (Lightning Pictures 1989) (motion picture).

one year of each other—four of them quickly sinking to the “sale item” bin.²²³

C. NARROW COPYRIGHT PROTECTION SERVES AS AN INCENTIVE TO
COPYRIGHT REDUNDANCY

Idea-men, writers, and network executives all lead to a dissemination of the same idea among many studios. A movie has a narrow copyright protection, which prevents studios from suing each other, even if the ideas and the resulting products are strikingly similar. Seeing that another studio is working on the project boosts the probability that the movie will be a success and places the studios in a “chicken” race. Both studios invest more money, time, and effort into their movies, hoping to display a credible threat of their commitment to win the race. Often though, neither studio flinches. As described above, sometimes this works, often times it does not, with two similar movies being released. The real victims, of course, are the movie studios who saw an overcrowded market and said, “me too!”²²⁴

V. BROAD COPYRIGHTS: A DOUBLE HEADER IN THEMSELVES?
PRECEDENTS FROM *SUI GENERIS* PROTECTION IN OTHER IP MEDIUMS

Not all types of intellectual property protection are created equal. Trademarks, patents, and copyrights all have different breadth and length of protection. But even within these different regimes of intellectual property different mediums have varied breadth and length of protection. An analysis of where such differentiation occurs and the underlying policy reasons for these distinctions will help explain why a broader copyright protection for movies is justified.

223. In 1989, five thrillers about underwater explorers discovering strange new (and in most of the movies hostile) creatures in the ocean were released: *The Abyss* (20th Cent. Fox 1989) (motion picture); *Deepstar Six* (TriStar Pictures 1989) (motion picture); *Leviathan* (Gordon Co. Prods. 1989) (motion picture); *The Evil Below* (Legend Film Prods. 1989) (motion picture); and *Lords of the Deep* (Concorde Prods. 1989) (motion picture).

224. A play on the quote: “We’ve all thought about counterfeiting jeans at one time or another, but what about the victims? Hard-working designers like Calvin Klein, Gloria Vanderbilt, or Antoine Bugle Boy. These are the people who saw an overcrowded marketplace and said, ‘Me too!’ ” *The Simpsons*, “The Springfield Connection” (20th Cent. Fox TV May 7, 1995) (TV series) (quotation available at <http://www.snpp.com/episodes/2F21.html> (last accessed Nov. 15, 2007)).

Section A looks at the heightened protection that works in the copyright sphere receive. Section B describes the increased protection for works requiring high investments. Section C looks at the heightened protection for patent products that have a smaller consumer demand. Section D analyzes the broader protection given to trademarks having higher investments and higher consumer demands. Section E takes a bird-eye view of these four areas of existing heightened protection to derive the principles underlying Congress' and courts' extension of heightened rights within an intellectual property area.

A. COPYRIGHTS

1. Fashion Designs

In the copyright sphere, various mediums are already protected by different terms. For example, a currently pending bill, the *Design Piracy Prohibition Act*, would extend three years of copyright protection for fashion designs.²²⁵ This would allow a subsection of copyrights, one that would have to be specifically defined²²⁶ and previously only narrowly guarded, to receive different protection. These designer clothing items would be shielded for a shorter period of time than other copyrights, have a pre-disclosure registration requirement unlike other copyrights, and most importantly have a broader protection than regular copyright.²²⁷

The explicit policy for this intra-scope modification is to encourage the growth of the fashion design industry in the United States by providing protection for the product, and to reduce the amount of knock-offs, thereby increasing consumer welfare by reducing information costs.²²⁸ The limited protection time is based

225. H.R. 5055, 109th Cong. § 1(c)(a)(2) (Mar. 30, 2006).

226. For example, unique Gucci fashion designs would probably be protected, while generic Wal-Mart designs would not.

227. The bill would amend 17 U.S.C. § 1301 to define "fashion design" as "the appearance as a whole of an article of apparel, including its ornamentation." H.R. 5055, 109th Cong. § 1(a)(7) (Mar. 30, 2006).

228. Congressman Bob Goodlatte, Press Release, *Goodlatte Introduces Legislation to Combat Design Piracy*, <http://www.house.gov/goodlatte/dppress109.htm> (last accessed Nov. 15, 2007) (introducing the *Design Piracy Prohibition Act*)

upon the short market cycles of designer clothes, which only last a few years at most.²²⁹

2. Photographs

Another area of copyright that enjoys varying protection is photographs. For example, under the *Berne Convention*, photographs are only protected by mandate for 25 years, whereas the rest of copyrightable works are protected for 50 years plus the life of the author.²³⁰ The policy underlying this limited timeframe is that photographs require less inventiveness and investment, and thus the producers a) need a smaller incentive to produce, and b) should be rewarded less for intellectual property that requires less ingenuity.

B. WORKS IN PUBLIC DOMAIN REQUIRING HIGH INVESTMENT COSTS

Another area where proposals have been made to alter the scope of protection is for copyrighted works that are underexploited.²³¹ This, it is theorized, occurs in works that require significant investments to remake or restore the work (e.g., a restoration of a 1910 movie).²³² These works may not be restored or disseminated because of free-rider problems—one company invests resources to restore a work in the

Fashion design is a \$350 billion American industry. It is the only growth area in apparel manufacturing In addition to the jobs directly related to the manufacturing of apparel, it creates jobs in many sectors: printing, trucking, distribution, advertising, publicity, merchandising, and retail. By protecting a designer's original work we are also protecting the many jobs that support that design.

Id. at [¶ 6].

According to United States Customs and Border Protection (CBP), counterfeiting merchandise, as a whole, is responsible for the loss of 750,000 American jobs and American companies lose between \$200 and \$250 billion in sales because of these counterfeit goods. Of the total worth of counterfeited domestic items commodities seized by the CBP in 2005, fashion items accounted for 38 percent.

Id. at [¶ 5].

229. *Id.* at [¶ 4].

230. *Berne Convention for the Protection of Literary and Artistic Works*, art. 7(1), 7(4) (July 24, 1971) (available at <http://www.law.cornell.edu/treaties/berne/7.html>). Note that movies are similarly given a separate timeframe of protection—fifty years from the date of being made available to the public. *Id.* at art. 7(2).

231. See generally Landes & Posner, *supra* n. 15, at 474-75.

232. See *id.*

public domain, only to have the restored work immediately copied by its competitors who do not have to incur the fixed restoration costs.²³³ For such works “an absence of copyright protection . . . may lead to inefficiencies because . . . of impaired incentives . . . [of] maintaining and exploiting these works.”²³⁴ In fact, in extending copyright length by twenty years in 1998, Congress used a similar rationale, reasoning that extension would “provide copyright owners generally with the incentive to restore older works and further disseminate them to the public.”²³⁵

C. PATENTS: ORPHAN DRUGS

In the patent sphere, United States inventions are broadly protected for twenty years from the date of the filing of the patent application.²³⁶ After twenty years, the public is free to utilize the idea to its heart’s delight since society has repaid the inventor its quid pro quo.²³⁷ But this is not always the case; one exception is in the field of orphan drugs. Congress found that drug manufacturers were not developing drugs for rare diseases (affecting less than 200,000 individuals) because the possible revenues did not justify the investment costs.²³⁸ This was precisely the public domain high investment cost problem identified in Section V(B), applied to the patent sphere.²³⁹ To provide an incentive to pharmaceutical companies to develop such drugs, Congress passed the *Orphan Drug Act*.²⁴⁰

The largest incentive given by this act was to provide seven years exclusive marketing protection for orphan drugs that are *otherwise*

233. *See id.* at 475-76.

234. *Id.* at 475.

235. H.R. Rpt. 105-452 at 4 (Mar. 18, 1998).

236. 35 U.S.C. § 154(a)(2) (2006).

237. *See generally* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1162-63 (2000).

238. *Orphan Drug Act*, Pub L. No. 97-414, § 1(b)(1)-(5), 96 Stat. 2049 (1983); *see also* Li-Hsien Rin-Laures & Diane Janofsky, Student Authors, *Recent Developments Concerning the Orphan Drug Act*, 4 Harv. J.L. & Tech. 269, 272-73 (1991).

239. Rin-Laures & Janofsky, *supra* n. 238, at 282-87.

240. Pub L. No. 97-414 at § 1(b)(1)-(5); *see also* 21 U.S.C. § 360(a)-(p) (2006).

unpatentable.²⁴¹ This protection is in effect the same as a patent protection (and was meant as such), but does not require the lengthy application process and rests in the FDA (rather than the courts).²⁴² Thus, companies do not have to battle over competing claims in the courts since the FDA is barred from approving another drug with the same active ingredient “unless it is proven clinically superior for that disease.”²⁴³

Thus, inventions that are otherwise unpatentable—lack novelty, non-obviousness, etc.—receive broad patent protection because of public policy reasons. This incentive essentially provides a subsidy (through an exclusivity grant) to help producers meet market demand, in what Congress saw as a market insufficiency.²⁴⁴

D. TRADEMARKS

Even trademarks have a varying breadth in protection depending on how famous the mark. Trademark protection is unlimited in terms of length of time, but it is limited in breadth.²⁴⁵ For regular trademark infringement, the plaintiff has to prove that “such use is likely to cause confusion” between its mark and the infringing mark.²⁴⁶ However, famous and distinctive trademarks only require the plaintiff to show that use of a “famous” mark by a third party caused the dilution of the “distinctive quality” of the mark.²⁴⁷

Lowering the burden of proof broadens protection for those goods having high producer investment and high consumer demand. Thus, companies investing heavily into development of goodwill reap their rewards (thereby encouraging similar future investment). On the consumer side, trademarks ensure that a consumer is able to identify the source of the good. Since famous marks are generally found on

241. Pub L. No. 97-414 at § 2(a); see also C. Scott Hemphill, *Paying For Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1607-11 (2006).

242. See Geeta Anand, *Lucrative Niches: How Drugs for Rare Diseases Became Lifeline for Companies*, Wall St. J. A1 [¶ 6] (Nov. 15, 2005) (available at <http://online.wsj.com/article/SB113202332063297223.html>).

243. *Id.* at [¶ 7].

244. *Id.* at [¶ 4].

245. 15 U.S.C. § 1058(a) (2006) (prescribing ten year time limit for registration).

246. 15 U.S.C. § 1114(1)(a) (2006).

247. 15 U.S.C. § 1125(c)(1) (2006).

goods produced in high quantities—a reduction in information costs for these goods leads to many happy consumers.

E. SUMMARY

Three principles emerge on which Congress has based and granted a broader or longer protection for sectors of intellectual property. The first is consumer welfare maximization. In areas where information costs need to be lowered (famous trademarks), or consumer products need to be developed (orphan patents), Congress has expanded the breadth of protection. The second principle is producer welfare maximization. Where investment costs are high and Congress is interested in supporting industry growth or product growth (fashion designs and orphan drugs), broader rights are granted. The third principle is novelty. Where a product or idea is more innovative (books unlike photos) it gets a longer or broader protection. Therefore, based on these three principles, various intellectual property mediums are already split into slices of different protection. Just as price discrimination may lead to higher overall welfare (people who wouldn't be able to buy a product at a regular price are able to buy it at the discriminated price), parsing intellectual property with the presence of novelty, product life cycles, consumer demand, producer benefits, industry growth, and business practices can lead to higher overall efficiency.

VI. SUMMARY OF ANALYSIS OF MOVIES²⁴⁸

A. DATA

To analyze how the shadow externalities play out for similar movies (*déjà vu* double headers) and to determine the refractory period for consumer demand, a detailed statistical study was conducted on forty-eight pairs of similar movies. These movies were released to the box office in the eighteen-year period from 1988-2006.

The movies were evaluated based on their similarity in plot, structure, characters, setting, and literary themes. The movies were randomly chosen and the difference between two similar movies in release dates was anywhere from one week to two years. The main and

248. For full analysis *see infra* Appendix.

most relevant data points included the theatre end date, the theatre finish date, cost, and gross revenue at the United States box office.²⁴⁹ Factors such as the presence or absence of famous actors was not a variable because most pairs of movies were large productions and thus both movies had famous actors and were similar in other cinematic contents. Movies that were sequels, re-releases, spin-offs, straight to television/DVD releases, or for which no cost data was available were eliminated from the sample. Most movie genres were sampled with the exception of pornographies (which share a common lack of a plot).

B. RESULTS

1. On the average, first-released movies have a much higher “return on investment” (ROI) than second-released movies: first-released movies earn a 2755-percent ROI, whereas second-released movies earn a 20-percent ROI.

2. For movies that were released within two weeks of each other, the first-released only had a 20-percent higher return on investment than the second-released. These movies essentially went head to head at the box office.

3. Pairs of movies that were released more than two weeks apart had their highest difference in return on investments between 3 weeks and 2.5 months differences. At six months the difference for return on investment between the first-released and second-released decreased to 20-percent. At one year and more, the difference was negligible.

4. The logarithmic decay formula for the refractory period:

$$\text{ROI} = -0.4369\text{Ln}(t) + 0.8225$$

where t was the difference in time between *déjà vu* double headers, showed a very high correlation to the data—0.9425.

C. DISCUSSION

The shadow externality can thus be approximated by a logarithmic formula for *déjà vu* double features, with a very high correlation to the data. Intuitive predictions were, therefore, completely in line with statistical results. On average, movies released second will obtain much lower return on investment. Furthermore, the

249. Other data points included opening weekend gross, season of release, holiday weekend v. regular weekend, opening number of screens, market share of each movie during box office release.

refractory period between movies drops significantly at six months, and drops to negligible levels after a year.

VII. PROPOSAL

“And here we tinker with metal, to try to give it a kind of life”²⁵⁰

A. GENERAL

We have seen how the creative, legal, and economic landscapes encourage intellectual property races and facilitate the release of similar *déjà vu* movies. Low protection for ideas and a narrow copyright to the finished product lead to the statistical results found in Part VI's statistical analysis. This Part brings together all of the previous sections to weave a systematic framework for movie protection that would eliminate the shadow externality. Section B examines the policies underlying Congress' extensions of extra protection to certain mediums within an intellectual property sector (identified in Section V) to determine whether movies are justified in receiving broader protection. Section C delineates how broadly extra protection should be afforded to movies. Section D outlines the requirements that a movie would have to meet to opt-into the broader copyright regime and the exceptions to such protection. Section E explores the limitations and possible issues with this proposal. Section F concludes by outlining goals for future research and development in this area.

B. POLICY: HERE WE FIND THE MOTIVE FOR THE LAW'S CHANGE

Thus, we have seen how the current narrow protection in movie copyrights leads to races to the box office with oftentimes severe consequences for second place. Authors' ideas are often stolen whole cloth or taken by pieces, consumers are tired of seeing the same movie twice, and producers cannot maximize their investment. To propose a broadening of copyright in the movie sector this article analyzed, in Section V, where and how Congress has mandated differentiated protection within copyright law itself and its intellectual property siblings.

250. *Sid Meier's Alpha Centauri* (Firaxis Games 1999) (video game).

Three principles emerged from this analysis where separate protection within patents, copyrights, and trademarks has been justified due to consumer and producer welfare maximization. First, under the consumer welfare theory, sub-sections receive heightened protection where the possible negative effect on consumers is large if no heightened protection is given (increase in information costs—famous trademarks—or no incentive for consumer product development— orphan patents). Second, under the producer welfare motive, heightened protection is given where producer investment costs are high and the industry is important (fashion designs, famous trademarks, and orphan patents). Third, under the novelty theory, a novel product or idea receives broader protection (books but not photos). This is both a utilitarian justification—as a society we want to encourage the production of novel ideas more than run-of-the-mill ideas—and a Lockean one—novel ideas are worth more than non-novel ones so we want to give higher restitution to those who have seen farther than others, both of which courts have acknowledged.²⁵¹

Parsing intellectual property by the presence of novelty, product life cycles, consumer demand, producer benefits, industry growth, and business practices can therefore lead to higher overall efficiency and reward creativity more equitably. Armed with these three principles in our quiver, we embark to define the structure of a broader copyright system for the movie sector of copyright.

C. BROAD PROTECTION

To reduce rent-seeking behavior, copyrights for movies released to theatres should be broadened initially for a short time approximating all or part of the refractory period. As the empirical data and analysis of Part VI have shown, the refractory period for the shadow externality drops considerably at six months and is gone within a year. General movie life-cycles in the theatres are under six months, and most movies are on DVDs within six months as well. Thus the initial broad copyright for a movie should subsist for the first six months, followed

251. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”).

by a return to the current narrow right. This would prevent demand diversion and allow the second movie to benefit from a consumer refractory period, essentially restoring its value.

Additionally, the broad copyright would only prevent similar movies from entering, or being released into, the box office at the same time. It would not prevent a rivaling studio from releasing straight to television or DVD at the same time, instead of releasing to the screens. The box office and the TV screens are different mediums and the shadow externality is significantly dampened between two movies releasing to the different mediums. This would also maintain the ability of small studios to ride the wave of popularity associated with big movies. Readjusting the breadth of initial copyright protection in such a fashion would allow the length of the copyright to be decreased to maintain similar production incentives for the authors. For movies that either do not qualify or choose not to obtain broader protection, the regular current copyright regime would apply.

The breadth of protection should be narrower than genre, but broader than identical expression of an idea. The courts could accomplish this by: (1) not requiring proof of copying of an idea, since it is presumed that two movies releasing at the same time emanate from the same idea; and (2) narrowing the “scenes a faire” doctrine for movies. The court could then evaluate the similar movies and scripts to see if they are based on the same plot, characters, scenes, settings, and the like. If this is so and the requirements of Section D are met, the court would enjoin the second-released movie from the box office for the six-month period.

D. REQUIREMENTS: HOW THE PROCESS WOULD WORK

1. Studio Shows Original/Novel Script Idea

In granting the broader copyright protection to a movie, it would in a sense shift protection to an earlier stage of production—at the idea stage instead of the produced movie stage. Looking at a movie on a continuum from conception to box office release, this would move copyright protection to the start. Thus, the author would receive a traditional copyright in the basic idea of the script and any studio producing a movie that is based on this idea would be liable for copyright infringement. Additionally, the movie would have an overall protection, rather than just its elements. This would be similar to the

Design Piracy Prohibition Act, where fashion designs are defined as “the appearance as a whole of an article of apparel, including its ornamentation.”²⁵²

This is a large shift, and in order to: (1) grant the right only on the specific idea; and (2) maintain other ideas in the public domain, such protection should only be granted to ideas original to and owned by the idea-man or studio (the author did not copy it from another source). The studio would then have to show the date of conception of the idea, and provide proof of such conception (e.g., a finished manuscript, drafts of screenplays, etc.). Hence, only those ideas to which a studio could show ownership and original basis would be protected.

There is no doubt that idea-men would support a less restrictive requirement for idea protection, giving them more degrees of freedom to shop their idea to various studios without fear of it being stolen. However, it is also likely that movie studios themselves would actually provide idea protection for authors, if the copyright itself was broader. A clear ownership of an idea (such as would be secured by being able to point to an author and a distinctive script) and the ensuing broad exclusive copyright would then ensure a monopoly to the studio. This would be similar to companies buying patents rather than stealing the underlying idea from a naïve inventor.

2. Registration (Opt-In System) From Copyright Office

This system should be a voluntary opt-in system rather than a mandatory or opt-out system, and only available for movies releasing to the big screen. Movie studios are best fitted to evaluate their own incentives and know when they want an initial broad protection rather than a longer narrow protection. The studios who want this initial copyright would register the movie with the Copyright Office.

The registration application would not require claims like a patent application, nor would it be examined in high detail, like patent examinations. Instead it would be a copyright application, but with a higher burden to show dates and proofs of conception and ownership. This application could only be filed once the final version of the movie was available. The application would also state a date of release to the theatres. The date of the broader copyright would begin on that date, or on the date of release, whichever would be earlier. If two competing

252. H.R. 5055, 109th Cong. § 1(a) (Mar. 30, 2006).

applications were submitted, the Copyright Office would have to investigate who was first to conceive and reduce the idea to practice. The “first to invent” by a preponderance of the evidence would then receive the broad copyright. Where no clear first inventor existed, narrow copyright for both works would default. In a sense, this would be a combination of a “first-to-file” and a “first-to-invent” found in patent law.

3. *Exceptions*

There would be two main exceptions that would arise from the non-novelty of the idea and the interest in the availability of free speech. First, the broader copyright would not extend to remakes, sequels, or similar types of movies, as these are not original, but rather reach back to other ideas. Second, broad protection would not extend to ideas dealing with recent events. For example, *United 93*²⁵³ and *World Trade Center*²⁵⁴ would not receive the broad right, even though no other movie had ever been made about the 9/11 tragedy. Similarly, if Mount Vesuvius had erupted in 1997, neither *Volcano*²⁵⁵ nor *Dante’s Peak*²⁵⁶ would have received broad protection. This exception would maintain the level of free speech on important topics, and prevent one studio from claiming that its idea is original when it comes from a popular/recent event.

E. *LIMITATIONS AND POSSIBLE ISSUES*

A broad copyright for original works would substantially prevent box office races. One concern, however, with changing copyright to look more like patent law is the possibility of inheriting the races that come with them. Yet, unlike patent law, movies should not experience a shift in the race to the conception stage. In patent law two companies may know what they want to invent, but cannot obtain a patent until they work out how to actually do it. In copyright law, knowing what you want to invent is but a stone throw away from inventing it. The time from “conception” and “reduction to practice” is thus very narrow. Also, unlike patent law, where spontaneous generation of

253. *United 93* (Universal Pictures Distrib. 2006) (motion picture).

254. *World Trade Center* (Paramount Pictures 2006) (motion picture).

255. *Volcano*, *supra* n. 7.

256. *Dante’s Peak*, *supra* n. 6.

ideas by two inventors may be prevalent because they both deal with the same problems in technology, movie ideas do not arise as responses to problems, but rather as creative conceptions.

Another concern may be that a broad copyright would lead to rent-seeking behavior by competitors. Two companies producing similar movies, in an attempt to secure monopoly profits for six months, may expend resources to convince the copyright office or the courts that their idea came out first. On the one hand, just like other mediums, it is likely that these issues will be settled between studios themselves, rather than the courts. On the other hand, forcing studios to prove that they were the first-to-conceive by clear and convincing evidence would substantially decrease this issue. Because the idea for both movies emanates from a single source, in most cases only one studio could prove early conception, and rent-seeking where the losing party still retains a narrow copyright would be much less profitable.

Finally, one possibility for companies that know they are engaged in movie races could be to obtain insurance that would protect them in case they lose the race. While this may cause movie costs to increase, it would also secure higher profits to both the winners of the race (who no longer have to worry about the business diversion effect) and to the losers (who now release the movie after the refractory period to a higher demand market).

F. GOALS FOR FUTURE RESEARCH

This paper has identified and conducted legal and empirical analysis of the shadow externality associated with movies released to the box office at nearly the same time. Much, of course, remains to be investigated. Future studies should focus on analyzing four key areas of study. First, they should look at similarities and differences between movies and movie ideas to determine how to precisely draw the line between “similar” and “different.” Secondly, they should focus on a detailed study of how movie ideas get developed into scripts by various studios and the amount of originality and creativity, as well as resources that go into such development. Third, a statistical analysis of similar movies and release dates should be conducted, using a larger data set and using more parameters, including market share, number of screens, season of release, and presence of famous actors and directors. Finally, studies should focus on how sales of similar movies released

straight to television or DVD affect the market and performance for the box office of similar movies.

VIII. CONCLUSION

Since current copyright law only narrowly protects the expression of an idea, two very similar movies, based on the same idea, may be released at the same time. This redundancy leads to a negative effect on consumer demand for the later-released movie. Such a shadow externality can be alleviated by broadening the copyright protection in the early period of the movie's release. A subsequent reduction of the length of protection for the copyrighted movie then becomes possible. Such a change, structured as an opt-in system, would increase earlier placement of the movie into the public domain, while maintaining or increasing the production incentives for movie studios. It would also provide a strong incentive for studios to increase remuneration to movie authors.

This paper has set out an introductory framework for a broad, opt-in, copyright system for movies by analyzing the economic and legal environment surrounding intellectual property races. Statistical analysis conducted on a large group of similar movies released at nearly the same time verifies the intuitive idea that the later-released movie suffers a negative effect from the first-released. The negative effect decays at an exponential rate and drops significantly at six months, dissipating completely at around one year. The outlined time-based broad copyright system would eliminate such copyright redundancy while preserving free speech and promoting novel idea creation.

IX. APPENDIX

TABLE 1
2005 MARKET SHARE AND # OF MOVIE RELEASES BY STUDIO²⁵⁷

Company	Studios	% share of market	# of releases
Time-Warner	Warner Brothers, New Line, Warner Independent	20.4	29
News Corp.	20th Century Fox, Fox Searchlight	15.3	18
Paramount (was Viacom)	Paramount, DreamWorks, Paramount Classics	15.1	25
Sony	Sony, Columbia, Screen Gems, MGM, Sony Classics	12.5	32
Disney	Buena Vista, Miramax, Touchstone, Hollywood Pictures, Pixar	12.5	11.4
Universal (General Electric)	Universal, Focus	11.4	19

257. BoxOfficeMojo, *Studio Market Share*, <http://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2005dp=.htm> (last accessed Nov. 15, 2007).

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THE RACE TO THE BOX OFFICE

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TABLE 2

RETURN ON INVESTMENT DIFFERENCES FOR DÉJÀ VU DOUBLE HEADERS

Month	Return on Investment for First-Releases	Return on Investment for Second-Releases
0	-8%	-26%
1-2	1247%	26%
3-4	325%	-13%
5-6	27%	-34%
7-8	-48%	-37%
9-10	-12%	-9%
11-12	1224%	66%
Total	2755%	20%

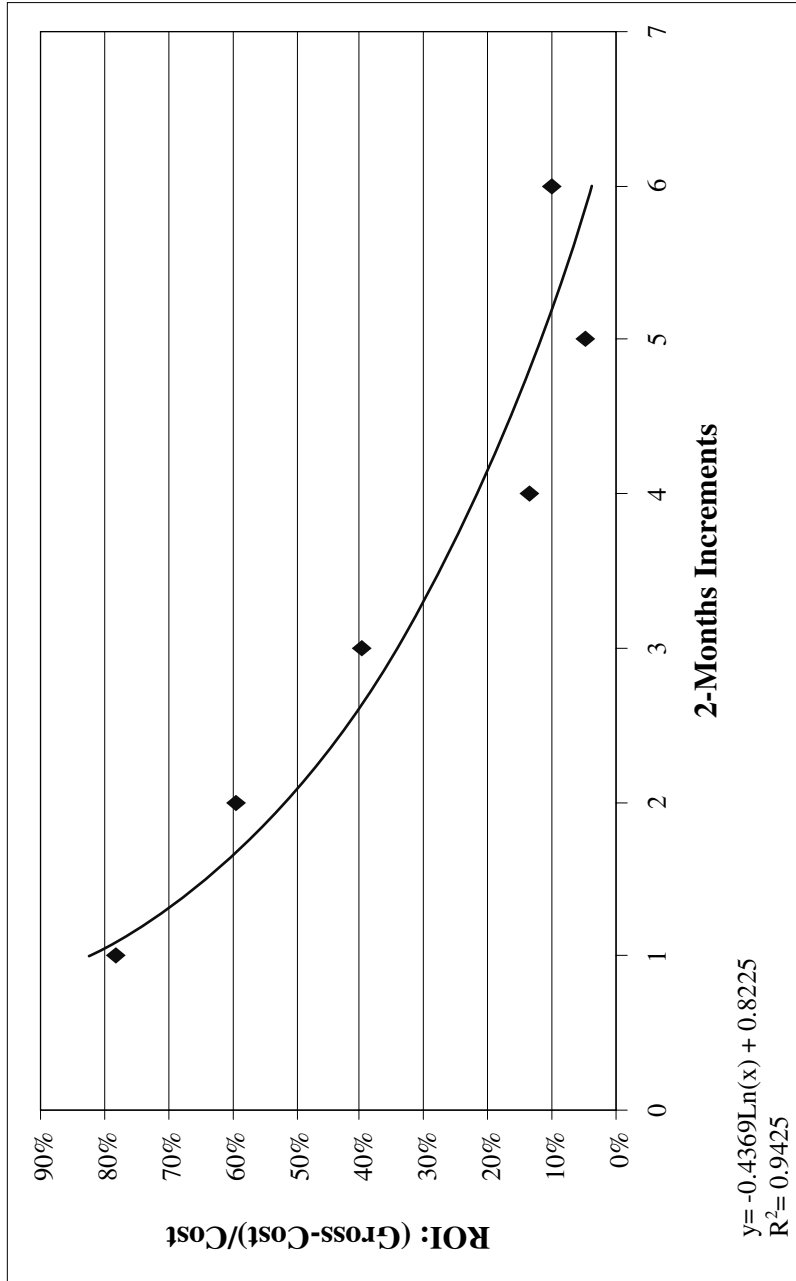
TABLE 3
SIMILAR RELEASED MOVIES (UNEDITED)

<u>Movie 1</u>	<u>U.S.A. Release Date</u>	<u>Movie 2</u>	<u>U.S.A. Release Date</u>
Platoon	12/19/86	Full Metal Jacket	6/26/87
Dangerous Liaisons	12/16/88	Valmont	11/17/89
Basic Instinct	3/20/92	Body of Evidence	1/15/93
Christopher Columbus	8/21/92	1492	10/9/92
Tombstone	12/25/93	Wyatt Earp	6/24/94
Rob Roy	4/7/95	Braveheart	5/24/95
Se7en	9/22/95	Copycat	10/27/95
Prefontaine	1/24/97	Without Limits	9/11/98
The Relic	1/10/97	Mimic	8/22/97
Dante's Peak	2/7/97	Volcano	4/25/97
Anaconda	4/11/97	Lake Placid	7/16/99
Deep Rising	1/30/98	The Virus	1/15/99
Dark City	2/27/98	The Matrix	4/2/99
Sliding Doors	4/24/98	Run Lola Run	6/18/99
Deep Impact	5/8/98	Armageddon	7/1/98
Truman Show	6/5/98	EdTV	3/26/99
Toy Story	7/19/96	Small Soldiers	7/10/98
There's Something About Mary	7/15/98	Lost and Found	4/23/99
Saving Private Ryan	7/24/98	The Thin Red Line	1/8/99
Antz	10/2/98	A Bug's Life	11/25/98
Elizabeth	11/6/98	Shakespeare in Love	1/8/99

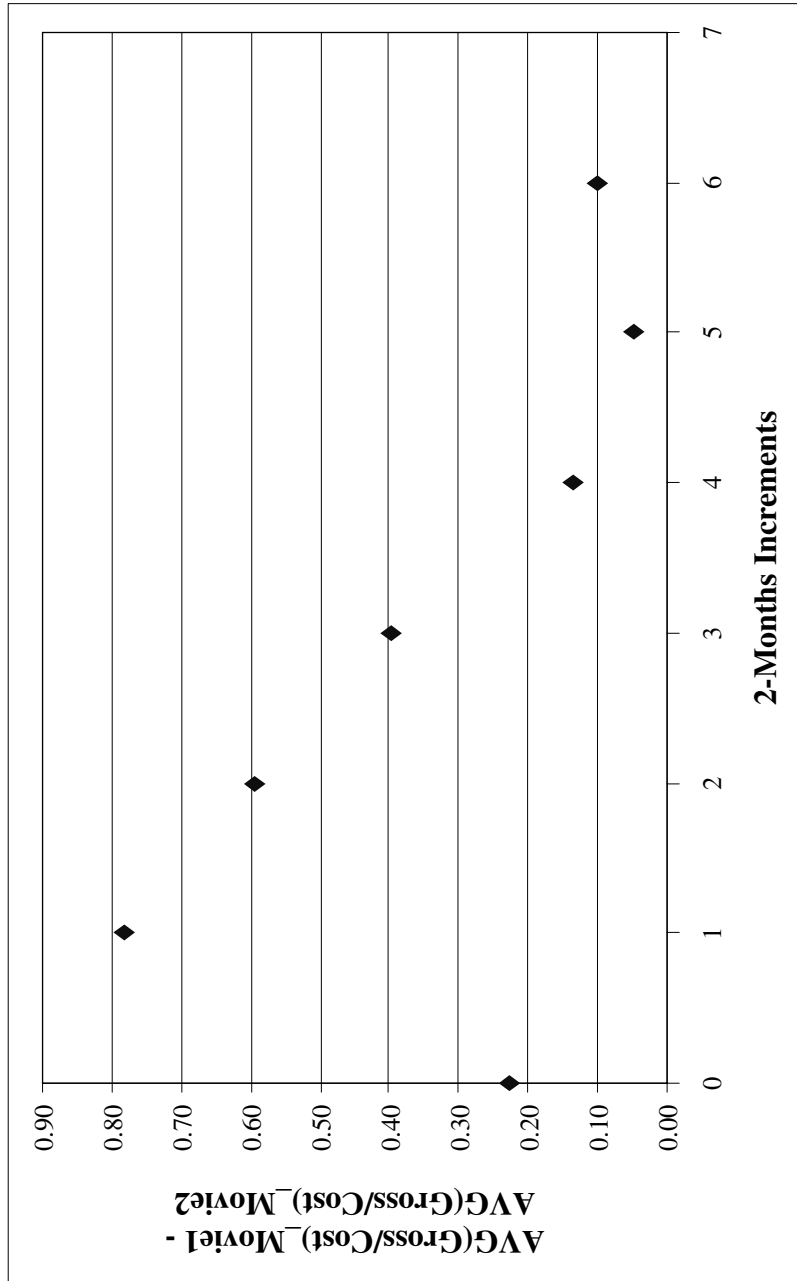
She's All That	1/29/99	10 Things I Hate About You	4/2/99
The Matrix	4/2/99	Thirteenth Floor	5/28/99
The Matrix	4/2/99	Existenz	4/19/99
Entrapment	4/30/99	Thomas Crown Affair	8/6/99
The Sixth Sense	8/6/99	The Others	8/10/01
Wonder Boys	2/22/00	Finding Forrester	12/19/00
Mission to Mars	3/6/00	Red Planet	10/10/00
Memento	3/16/01	Mulholland Drive	10/12/01
Space Cowboys	8/4/00	The Crew	8/25/00
The Score	7/13/01	Heist	11/9/01
Bicentennial Man	12/17/99	Artificial Intelligence	6/29/01
Impostor	1/4/02	Minority Report	6/17/02
Road to Perdition	7/12/02	Gangs of New York	12/20/02
Gods and Generals	2/21/03	Cold Mountain	12/26/03
Finding Nemo	5/30/03	Shark Tale	10/1/04
Freaky Friday	8/6/03	13 Going on 30	4/23/04
Chasing Liberty	1/9/04	First Daughter	11/23/04
Twisted	2/27/04	Taking Lives	3/19/04
Hellboy	4/2/04	The Punisher	4/16/04
Home on the Range	4/2/04	Barnyard	8/4/06
Troy	5/14/04	Alexander	11/24/04
Catwoman	7/23/04	Elektra	1/14/05
Garden State	7/30/04	Elizabethtown	10/14/05
National Treasure	11/19/04	Sahara	4/8/05
Madagascar	5/27/05	The Wild	4/14/06
Herbie Fully Loaded	6/22/05	Cars	6/9/06
Rebound	7/1/05	Bad News Bears	7/22/05
Hustle and Flow	7/22/05	Get Rich or Die Tryin'	11/9/05

Sky High	7/29/05	Zoom	8/11/06
The Cave	8/26/05	Descent	8/4/06
Cheaper By the Dozen	12/25/03	Yours Mine & Ours	11/23/05
Aeon Flux	12/2/05	Ultraviolet	3/3/06
Capote	2/3/06	Infamous	10/13/06
United 93	4/28/06	World Trade Center	8/9/06
Over the Hedge	5/19/06	Open Season	9/29/06
The Illusionist	9/1/06	The Prestige	10/20/06
Hollywoodland	9/8/06	The Black Dahlia	9/15/06
Gridiron Gang	9/15/06	Facing the Giants	9/29/06

GRAPH 1
RETURN ON INVESTMENT BETWEEN DÉJÀ VU DOUBLE HEADERS



GRAPH 2
DÉJÀ VU DOUBLE HEADERS DATA POINTS



X. ANALYSIS OF MOVIES

A. DATA

To analyze how the shadow externality plays out for similar movies (*déjà vu* double headers) and to determine the refractory period for consumer demand, this article conducts an extensively researched statistical study.

Forty-eight pairs of similar movies that were released to the box office in the eighteen-year period from 1988-2006 were analyzed. The 1988 date was selected because theatre vs. home rental patterns had stabilized around this time.²⁵⁸ At this point video cassette players were ubiquitous in the households and thus movie profit patterns at the box office had settled.

The movies were evaluated based on their similarity in plot, structure, characters, setting, and literary themes. The movies were randomly chosen and the difference between two similar movies in release dates was anywhere from one week to two years.

The forty-eight pairs of “*déjà vu* double features” varied in success and failure of both the first and second released movies. Movies that were released within a year of each other were considered “simultaneously released.” Conversely, movies released between one year and 2.5 years of each other were controls—these movies should show no difference from their first-released counterparts in return on investment.

The main and most relevant data points included the theatre release date, the theatre finish date, cost, and gross revenue at the United States box office.²⁵⁹ Movies that were sequels, re-releases, spin-offs, straight to television/DVD releases, or for which no cost data was available were eliminated from the sample. Most movie genres

258. Sangin Park, *Quantitative Analysis of Network Externalities in Competing Technologies: The VCR Case*, 86 Rev. of Econ. & Statistics 937, 942 (2004).

259. Other data points included opening weekend gross, season of release, holiday weekend v. regular weekend, opening number of screens, market share of each movie during box office release.

were sampled with the exception of pornographies (which share a common lack of a plot).

B. ASSUMPTIONS

1. Movie production times from acceptance of a script to the release date on the movie are generally two-six years. To avoid the sampling of any movies that began production as a result of seeing the success of the first-released movie, the sample was limited to movies coming out within 2.5 years of each other. These pairs are, thus, movies that emanated from the same idea or from one studio hearing that the competing movie studio has a certain project underway, rather than those that copied or spun-off each other.²⁶⁰

2. A movie's production budget directly reflects its employment of famous actors, directors, producers, visual effects, etc. The average budgets for movies in each set (first-released and second-released) were similar. Thus, any deviations in total gross that result from more famous actors or directors should be accounted for in the cost of production.

3. Movie revenues in the box office experience an exponential decay, i.e., they start at their highest point, and then drop to a minimum at the close date, at an exponential rate.²⁶¹ Generally, movies earn 50.1-percent or more of their total theatre gross in the first two weeks of release.²⁶²

4. The source used for data was the website Internet Movie Database ("IMDB"),²⁶³ maintained by Amazon.com.²⁶⁴ It is self-described as the largest movie database on earth.²⁶⁵ The data was cross-confirmed through the website BoxOfficeMojo, the second largest independent movie database, and the correlation was ninety-nine percent.²⁶⁶ The data was also confirmed through TheNumbers.com, the third largest independent movie web database.²⁶⁷

260. This happens in the movie production, but the time frame is more than two years. This happens more often in TV show productions. *Cf. supra* Part II(a).

261. Simonoff & Sparrow, *supra* n. 150, at 16.

262. *Id.* at 16-17.

263. The Internet Movie Database, www.imdb.com (last accessed Nov. 2, 2007).

264. Amazon.com, www.amazon.com (last accessed Nov. 2, 2007).

265. The Internet Movie Database, *supra* n. 263.

266. *Box Office Mojo*, www.boxofficemojo.com (last accessed Nov. 2, 2007).

267. *TheNumbers.com*: www.thenumbers.com (last accessed Nov. 2, 2007).

The differences between the three were negligible (dollar differences were less than .005-percent and release date differences were two days or less). An independent study found the databases to have a ninety-eight-percent correlation for data.²⁶⁸

5. On average, movies earn twenty-six-percent of their total life profits in the movie theatres and the performance in the movie theatres is a direct predictor of how a movie's revenues will perform over its lifetime.²⁶⁹ The total theatre gross was used rather than opening weekend gross or total lifetime gross (including DVD/VHS/television sales) for the following reasons:

Opening weekend data was considered, but not used, as movies have different patterns (different decay constants) from their box office release weekend. Some movies open to a large gross only to plummet quickly in the next weekend, while others start at a medium gross, but decline slowly for the whole time they are in the theatres.²⁷⁰ Since all movies have different box office release patterns and spend different times in the theatres, total revenues in the theatres serves as a much better evaluation of the total gross of a movie.

The movie's total gross (including television and DVD sales) was also considered, but rejected because this would allow for a deviation for those movies that have amassed a higher gross simply because they have been out on DVD longer. Additionally, a movie's box office performance sets the precise tone and taint of how the movie will perform in its total lifetime.²⁷¹ Therefore, total theatre sales were the best indicator.

C. METHOD

1. Preparation of Data

1. Raw data of forty-right *déjà vu* movie pairs were organized by dates of the first released movie and divided into groups according

268. See e.g. Kamel Jedidi, Robert E. Krider & Charles B. Weinberg, *Clustering at the Movies*, 9:4 Marketing Letters 393, 395 tbl. 1 (1998).

269. Joyce Julius & Assocs., Inc., *supra* n. 148, at 5. By some estimates, this percentage dropped to 18% by 2003, but a movie's gross at the box office continues to set the future for the movie's total worth. Yardley, *supra* n. 147, at 1.

270. See Simonoff & Sparrow, *supra* n. 150, at 17.

271. See Leonard Klady, *Gross Behavior: 80/10 Rule No Guarantee of Film Success* 27 [¶ 16] Daily Variety (Jun. 18, 1997) (available at <http://www.variety.com/article/VR1116679250.html?categoryid=13&cs=1>).

to the differences in release dates between the first movie and the second movie. The groups were divided by months elapsed between the release date of the first movie and its follow-on second movie (t).

Thus, if the first movie (A) came out on October 6, 2001 and its counterpart (B) came out on November 5, 2001 the second released movie was placed into the “one month apart” category ($t=1$). Release dates were rounded normally (two weeks was rounded into the $t = 0$ category, while three weeks was rounded into the one month category).

2. Because of the relatively small number of data points, the groups were then merged into two-month groups for a more accurate analysis. This created seven groups of movie pairs, wherein each group contained two subgroups—first released movies and second-released movies:

Group 0— $t = 0$ —movies released within two weeks of each other;

Group 1— $t = 1$ —movies released within more than two weeks but less than 2.5 months of each other;

Group 2— $t = 2$ —movies released within more than 2.5 months of each other but less than 4.5 months of each other;

Group 3— $t = 3$ —movies released within more than 4.5 months of each other but less than 6.5 months of each other;

Group 4— $t = 4$ —movies released within more than 6.5 months of each other but less than 8.5 months of each other;

Group 5— $t = 5$ —movies released within more than 8.5 months of each other but less than 10.5 months of each other;

Group 6— $t = 6$ —movies released within more than 10.5 months of each other.

3. Each group had between 2-15 pairs of movies in it.

4. Each movie was then analyzed by its “profit ratio” (πR). A profit ratio is the ratio of the movie theatre revenue (TR) divided by the movie cost (TC):

$$\pi R = TR/TC$$

5. Profit ratios were designated by subscripts to refer to the order of the movie and the difference in release dates. The first profit ratio subscript refers to the movie type (1st released (A) or 2nd released (B)); the second subscript refers to the difference in group release dates for the pair. Thus, e.g., $\pi RA3$ refers to the profit ratio of the first-released movie in a pair in group three (the second movie was released between 4.5 to 6.5 months after the first one).

2. *Experiment 1 (Verifying that Second-Released Movies Do Worse on Average Than First-Released Movies)*

1. The profit ratios of all forty-eight first released movies were averaged and compared to the averaged profit ratios of all forty-eight second released movies. [π_{RA} v. π_{RB}].

Prediction: The averaged profit ratios of first-released movies, as a group, should be significantly higher than the average profit ratios of second-released movies, as a group:

$$\pi_{RA} \gg \pi_{RB}$$

3. *Experiment 2 (Verifying That the Shadow Externality Is Time-based and Follows A Consumer Demand Refractory Period)*

1. For each group, the profit ratios (πR) were averaged across the group, to yield a group profit ratio (πR). Thus, we have:

$$\pi_{RA1}, \pi_{RB1}, \pi_{RA2}, \pi_{RB2}, \dots, \pi_{RA6}, \pi_{RB6}$$

2. Subtracting the profit ratios for each time-group for first released movies from second released movies yielded the average profit ratio differences $\Delta\pi R_t$:

$$\pi_{RA1} - \pi_{RB1} = \Delta\pi R_1; \pi_{RA2} - \pi_{RB2} = \Delta\pi R_2; \dots; \pi_{RA6} - \pi_{RB6} = \Delta\pi R_6$$

Absent a shadow externality, similar movies should have the same profit ratios and thus the difference in profit ratios ($\Delta\pi R$) should be zero. (On average, the more a studio invests the more it expects to collect in revenues, otherwise why invest more money into a movie?)

With an externality, however, a first-released movie should have a higher profit ratio than its follower.²⁷² Thus, where the externality is high, $\Delta\pi R_t$ should also be high. Where there is no externality $\Delta\pi R_t$ should be zero.

3. Prediction: The difference in the profit ratios should be highest in the first group (when a maverick precedes the follower by one month). It should be negligible after a refractory period—consumer demand should rebound to regular levels within a set time.

272. Note that revenues may easily be larger for the second-released movie, if that movie's costs are larger. Using a profit ratio changes the parameter to profit on investment, rather than absolute revenue.

Additionally, it should be relatively low in the zero group when movies go head to head.

When movies are released within two weeks of each other they are essentially going head to head, and while one movie is technically first, there may not be a clear maverick and a clear follower; instead both are vying for consumer attention on a somewhat equal footing. Thus, there should be a difference, but not as large as immediately after they are not going head to head.

4. Each averaged profit ratio difference $\Delta\pi R_t$ was then plotted against its time group. Thus, $\Delta\pi R_0$ was plotted at $t=0$, $\Delta\pi R_1$ was plotted at $t=1$, . . . , $\Delta\pi R_6$ was plotted at $t=6$.

5. The $\Delta\pi R$ were plotted onto a graph and a least squares fit analysis was conducted to determine an appropriate formula. Because group 0 (directly competing movies) were expected to have a low $\Delta\pi R$, whereas groups 1-6 should have high, and subsequently decaying $\Delta\pi R$, group zero was excluded from the least squares fit analysis.

6. Prediction: $\Delta\pi R_t$ should start above zero, but relatively low, for movies that are in the zero group, i.e., competing head to head with each other. Movies make fifty-percent of their box office gross in the first two weeks. Thus, for movies competing in the first two weeks period, the first movie's profit ratio should still be higher than the second-released movie's profit ratio, but since both are competing directly, the difference in profit ratios should be low relative to group 1.

For movies that are in group 1 (between 3 weeks and 2.5 months) we would expect to see the highest difference in profit ratios between the first and second-released movies. This is the time when consumers have just seen the first movie and are much less interested in seeing the same movie again just a month or two afterwards.

For movies in subsequent groups, we should see the difference in average profit ratios ($\Delta\pi R_t$) drop, until the refractory period ends, and the ($\Delta\pi R_t$) is equal to zero. Thus where $\Delta\pi R_t = 0$ shows the end of the rebound period, and a consumer is just as likely to see the second-released movie as she would have if the first movie had never been released. After $\Delta\pi R_t = 0$, any movies in subsequent groups (coming out with a longer difference in time between each other than the prior group) should similarly display a zero difference: $\Delta\pi R_{t+1} = 0$

Cognitive theory predicts that memory retention is exponential. Similarly, economic theory states that there is a diminishing marginal utility from consumption of another unit of a product—generally at an

exponential rate. Consumer demand for the second-released movie should thus rebound at an exponential rate. This means that from the time a person sees *Armageddon*, there is an exponential increase in his readiness/willingness to see *Deep Impact*. Thus, I expect the refractory period to have a logarithmic decay formula approximating:

$$\Delta\pi R(t) = -A\ln(t) + B$$

Where A and B are constants. At the point where $\Delta\pi R(t) = 0$ the refractory period has terminated and there is no difference between the profit ratios of movies and the consumers are once again ready to be dazzled by a similar movie.²⁷³

C. RESULTS

Experiment 1:

On average, second-released movies have a more than 100 times lower profit ratio than first-released movies. First-released movies, on average, achieved a 2755-percent return on investment, whereas second-released movies, on average, achieved a 20-percent profit ratio.

Experiment 2:

As can be seen in Graph 2 when $t = 0$ (when similar movies come out within two weeks of each other), the average profit ratio difference $\Delta\pi R_0$ is .23 (First-released movies make 23-percent more on their investments than second-released movies). However, when $t = 1$ (when similar movies come out within more than 2 weeks but less than 2.5 months of each other) first-released movies earn 91-percent more than their second-released counterparts (nearly 4 times as much as when they are going head to head). $\Delta\pi R$ decays to the $t=0$ equivalent of .23 at $t=3.79$ (approximately seven months time gap between releases). It continues its decay to $\Delta\pi R = 0$ at approximately $t=5.764$, approximately at 11 months.

273. If this analysis is correct and movie studios understand these time schedules, then in addition to spacing out their *déjà vu* features, we may see a similar spacing in sequels for movies. Sequels would compete with themselves for demand, so if the movie and its sequel are shot together, they should still be released some time apart to allow demand to rebound (e.g., the *Lord of the Rings* trilogy, the second and third *Matrix* duology). This appears to be right on the money. *The Lord of the Rings* (New Line Cinema 2001, 2002, 2003) (motion picture) movies were released exactly one year apart, while the *Matrix* duology was released exactly six months apart (Warner Bros. 2003) (motion picture).

Using the least squares fit analysis yields a formula:

$$\Delta\pi R(t) = -0.5512\text{Ln}(t) + 0.9655; R^2 = 0.9456$$

A. DISCUSSION

Thus, the shadow externality can be approximated by the logarithmic formula for *déjà vu* double features:

$$\Delta\pi R(t) = -0.5512\text{Ln}(t) + 0.9655$$

Where $\Delta\pi R(t)$ is the difference in profit ratios between the first and second released movies and (t) is the time group 1-6. Time group zero is excluded from this formula because the two movies in this group do not follow one another, but rather compete head to head.

Table 2 delineates the return on investment for each movie time group. As can be seen in group 0, which has *déjà vu* movies released within 2 weeks of each other, movies going head to head obtain similar ROIs: -8-percent and -26-percent. Because there is no clear first movie in these cases, the result meets with the qualitative prediction: no serious difference.

The major difference in ROIs is first seen in group 1, which has *déjà vu* movies released between 2.5 weeks and 2.5 months of each other. This group has the highest ROI difference between first- and second released movies: 1247-percent and 26-percent respectively.

As time between movie release dates increases the ROI difference decreases steadily until it gets to the 11+ months period. Here the difference in ROIs increases significantly with the first-released movie performing significantly better. This could be due to various factors; most importantly that this group encompasses movies from within 10.5 months to up to two years of each other. Thus, the time difference between movies, compared to the rest of the sample, is significantly larger. This could skew the sample considerably as movies here are fairly far apart in time to affect one another's performance.

Overall, movie group Return on Investments performed as expected. Head to head movies had a small difference, and in the next groups first-released movies did better than second-released movies, with that difference in ROI decreasing as more time passed. Moreover, on the average, second released movies had a negative ROI from 2.5 months through 10.5 months difference in release. The quantitative

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analysis confirmed many of the qualitative predictions and calls for a more in-depth analysis of a larger data sample.