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To Promote the Progress: Incentives, Exclusives, and Values to Build a More Perfect Creative Culture

JON M. GARON*

ABSTRACT

Significant academic and judicial focus has emphasized the copyright and patent clause to the Constitution as reward and incentive. Much of this analysis, however, highlights a utilitarian focus on efficiency rather than either the Framers' philosophy or a relationship to actual market conditions and incentives. Authorship today reflects competition between traditionally incentive-funded content and free content as moderated on Napster, YouTube, Wikipedia, Facebook, Massive Open Online Courses ("MOOCs"), and open source software sites.

The growth of both commercial and non-commercial creativity suggests that utility and efficiency models are largely inaccurate. Instead, other incentives regarding attribution, expressional interests, and paternity may be more promotive of creativity. Moreover, consumer behaviors and the growing experience with open creativity platforms require a reexamination of the assumptions underlying the statutory incentives and constitutional limitations at the heart of copyright policy.

This article analyzes the judicial history of assumptions about incentives and contrasts those with the economic and psychological approach to incentives to suggest a better balance for creative culture and the benefit of society.

"The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others No other has the right to publish his productions in any form, without his consent."

— Warren & Brandeis, *The Right to Privacy* (1890)

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“Sometimes creativity is a compulsion, not an ambition.”

— Edward Norton

I. INTRODUCTION

In 1860, Charles Selden published *Selden’s Condensed Ledger*, which “combines the Journal, Ledger, and Balance-Sheet, so as to present numerous Accounts at a glance; and is peculiarly adapted to Governmental or Corporate Company Transactions.”¹ The book was created as part of a five-monograph set in which Selden redesigned the plodding and error-prone methods of traditional journal bookkeeping into a simple, double-entry accounting method.²

As if anticipating the importance his work would serve on the future of copyright law, he introduced his text as a work dedicated to promoting progress: “[b]elieving that the useful art of [b]ook-keeping is simplified and facilitated by my Condensed Memorandum Book and Forms of Record or original entry, and my Condensed Ledger, they with my Forms of Report, are cheerfully submitted to the scrutiny and patronage of all interested.”³ Selden had tremendous hopes for his new system, but it was not to be.⁴ Even his meeting with Salmon P. Chase in 1965 was a full five years after publication of the book, and a year after Chase had resigned as Secretary of Treasury.⁵

Selden never achieved the success that the benefits of double entry bookkeeping suggest.⁶ Instead, W.C.M. Baker won the market.⁷ He published his method at a lower price and added modest variation to provide a bit more flexibility for the user.⁸ While Selden had the transformative breakthrough, it was Baker’s refinements and pricing that commanded the market.⁹ Selden died deeply in debt.¹⁰ In order to recover from Selden’s

1. CHARLES SELDEN, *SELDEN’S CONDENSED LEDGER AND CONDENSED MEMORANDUM BOOK; AND FORMS OF RECORD, CONDENSED LEDGER, REPORTS, AND CONDENSED MEMORANDUM BOOK* (1861).

2. *See id.*

3. *Id.*

4. Pamela Samuelson, *The Story of Baker v. Selden: Sharpening the Distinction Between Authorship and Invention*, in *INTELLECTUAL PROPERTY STORIES* 159 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2005).

5. *See SELDEN supra* note 1; Samuelson, *supra* note 4, at 159 (citing 1 THE SALMON P. CHASE PAPERS 356 (John Niven ed., 1993)).

6. Samuelson, *supra* note 4, at 160.

7. *Id.* at 161.

8. *Id.* at 161-62.

9. *Id.*

10. *Id.* at 162.

indebtedness, his widow brought legal action against Baker for copyright infringement, successfully establishing his copying and convincing the trial court of the infringement.¹¹

Legal success did not last for Mrs. Selden. The Supreme Court reversed, holding that Selden's copyright in his book did not grant him a monopoly over the method.¹²

Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account-books arranged on substantially the same system; but the proof fails to show that he has violated the copyright of Selden's book, regarding the latter merely as an explanatory work; or that he has infringed Selden's right in any way, unless the latter became entitled to an exclusive right in the system.¹³

Selden himself had anticipated this when he recognized that his method improved the useful art of bookkeeping.¹⁴ This seminal Supreme Court decision on the scope of the Copyright Act, now statutorily embodied in section 102(b) of the current act, emphasizes the balance between the copyrightable expression and the public idea which is developed thereby.¹⁵

*Baker v. Selden*¹⁶ established the foundational limit on copyright by making it clear that copyright did not extend to the ideas, facts, or methods described in the author's works.¹⁷ The limitation on copyright remains essential to separate the powerful negative right of patent with the more limited right in copyright.¹⁸ "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains."¹⁹ The public received the benefit of the book

11. *Baker v. Selden*, 101 U.S. 99, 100 (1879) ("A decree was rendered for the complainant, and the defendant appealed.")

12. *Id.* at 107.

13. *Id.* at 100-01

14. *See id.* at 103.

15. *See id.* at 100-01; 17 U.S.C. § 102(b) (2012).

16. *Baker*, 101 U.S. 99.

17. *See* Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. REV. 604, 607 (1998) ("Baker carried forward a legacy which provided a universal point of demarcation for separating unprotectable ideas and protectable expression.")

18. *See* *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.")

19. *Baker*, 101 U.S. at 103.

upon its publication and the author cannot make claim on the ideas or use to which that work is put.²⁰

The world of nineteenth century publishing that *Baker v. Selden* highlighted may help reorient the modern discussion regarding the appropriate role and scope of copyright jurisprudence involving incentives to create new works. Throughout the latter part of the twentieth century, however, theories of law and economics sought to predict the optimal incentives for creative output and suggest judicial interpretations of the law to comport with these theoretical models.²¹ Those models hardly predicted what was to come.²² The theories of the twentieth century have given way to an era defined by free creative content as moderated on YouTube, Wikipedia, Facebook, Pinterest, and open source software sites.²³ Non-commercial alternatives to creative output suggest that the assumptions about incentives and rewards may have been wrong.²⁴ Other incentives regarding attribution, integrity, expressional interests, and paternity may promote creativity more than the exclusive rights emphasized in the 1976 Copyright Act.²⁵

This article reviews the history of copyright to identify the historical basis for the copyright incentive.²⁶ Then it turns to modern economic and psychological theories of incentive to determine whether there is an optimal balance for copyright that requires legislative action or judicial interpretation.²⁷

20. See *Donaldson v. Beckett*, (1774) 2 Brown's Parl. Cases 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257; 17 Cobbett's Parl. Hist. 953 (1813) (Lord Camden) ("Knowledge has no value or use for the solitary owner: to be enjoyed it must be communicated.")

21. See Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1151-52 (2007).

22. See *infra* note 23 and accompanying text.

23. See, e.g., Len Glickman & Jessica Fingerhut, *User-Generated Content: Recent Developments in Canada and the United States*, 30 ENT. & SPORTS LAW. 3 (2012).

UGC exists in a variety of forms, including blogs; micro-blogs (such as those uploaded to Twitter); user reviews (such as product reviews made on Amazon.com); content uploaded to social networking sites (such as Facebook, LinkedIn, and Google+); photographs and videos uploaded to file-sharing sites (such as Flickr, Snapfish, and YouTube); information uploaded to wikis (such as Wikipedia and Wetpaint); content uploaded to virtual world websites (such as Second Life); and images and videos "pinned" to content-sharing sites (such as Pinterest).

Id. (internal citations omitted).

24. See Cohen, *supra* note 21, at 1203-05.

25. See *id.*

26. See *infra* Part II-III.

27. See *infra* Part IV-VIII.

II. THE SILENCE SURROUNDING COPYRIGHT FEDERALISM

The Constitution provides the federal government power to grant copyright and patent rights.²⁸ Relatively little was written about the ideas that those who promoted copyright at the dawn of the United States of America held.²⁹ “Many early colonial copyright statutes, patterned after the Statute of Anne, also stated that copyright’s objective was to encourage authors to produce new works and thereby improve learning.”³⁰

The Constitutional Convention has no recorded debate on the subject and the Federalist Papers contain only one reference to the power.³¹ Professor Justin Hughes provides an extended review of the variations on the language for federal power over copyright and patent, but how the Articles of Confederation and perpetual Union³² used the history will forever be shrouded in conjecture.³³ Bruce Bugbee describes correspondence between Joel Barlow and Elias Boudinot, president of Congress and member of the New Jersey delegation, respectively.³⁴ Among the correspondence is Barlow’s statement urging Congress to take up copyright legislation.³⁵ Barlow wrote “[t]here is certainly no kind of property, in the nature of things, so much his own, as the works which a person originates from his own creative imagination”³⁶ The interest in securing to the author the output of his creativity was essential to the new nation.³⁷

Nonetheless, the framers were not drafting on a clean slate.³⁸ As early as 1873, Connecticut and Massachusetts had enacted a state copyright statute.³⁹ The preamble of that act may be quite enlightening as to the purpose by which copyright was understood:

28. U.S. CONST. art. 1, § 8, cl. 8.

29. *See* Golan v. Holder, 132 S. Ct. 873, 901 (2012) (Breyer, J., dissenting).

30. *Id.*

31. *See, e.g.,* Justin Hughes, *Copyright and Incomplete Historiographies: of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1000 (2006); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 977-78 (2007); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 39 (2001).

32. ARTICLES OF CONFEDERATION of 1781, art. XII, para. 2.

33. Hughes, *supra* note 31, at 1008-09.

34. BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 111 (1967).

35. *Id.*

36. *Id.* (quoting Joel Barlow in NATIONAL ARCHIVES, PAPERS OF THE CONTINENTAL CONGRESS, No. 78, IV folios 69-373).

37. *See id.*

38. *See id.* at 108-11.

39. BUGBEE, *supra* note 34, at 108-11.

“Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man’s own than that which is produced by the labor of his mind: therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind, Be it enacted,”⁴⁰

In the jurisprudence of Massachusetts, both the understanding that copyright was based on natural rights and the fact that copyright was a property right were expressly granted.⁴¹ Connecticut law featured a similar sentiment: “every author should be secured in receiving the profits that may arise from the sale of his works; and such security may encourage men of learning and genius to publish their writings, which may do honor to their country and service to mankind.”⁴² James Madison wrote the resolution before the Congress of 1783, operating under the Articles of Confederation, recommending that states enact copyright laws.⁴³ All but one state had done so prior to the ratification of the Constitution, so perhaps it is not surprising that there was little need for discussion or debate as to the scope of a right under the Constitution when the Articles of Confederation had already enacted that right.⁴⁴

This history provides a context for Madison’s only reference in the Federalist Papers.

A power “to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries.” The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of

40. GEORGE TICKNOR CURTIS, TREATISE ON THE LAW OF COPYRIGHT 77 (1847) (quoting 1 Mass. Laws 94 (1801)).

41. See 1 MASS. ACTS 94.

42. CURTIS, *supra* note 40, at 78 n.1 (quoting 8 Peters S.C.R. 683).

43. *Id.*

44. See *supra* note 31 and accompanying text.

common law. The right to useful inventions seems with equal reason to belong to the inventors.⁴⁵

The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.⁴⁶

Madison, it seems, is building on his earlier legislation of copyright among the states to make the extended case for patent rights.⁴⁷ The negative implication of his recognition that copyright was a common law right in Great Britain reminds the readers that such rights were extended by the acts of the States throughout the United States.⁴⁸

The silence in the constitutional debate and the single paragraph extolling copyright in the new Constitution were built upon states' laws that acknowledged natural rights, property rights, and a vesting of exclusive rights in an author's writings to promote publication, and; therefore, benefit the greater society.⁴⁹

The first federal copyright statute built upon this tradition under the name "An Act for the encouragement of learning" ⁵⁰ The authors crafting the U.S. copyright fully understood natural rights as well as economic interests.⁵¹ However, the balance and debate over the length and purpose of copyright was not possible to settle.⁵² An 1848 treatise on U.S. and British copyright law describes the term of copyright "as a compromise."⁵³ The exclusive right in copyright will not apply "any farther than [society] finds such a course beneficial to its own interests, in the broadest sense of the term."⁵⁴

45. THE FEDERALIST N. 43 (James Madison).

46. *Id.*

47. See BUGBEE, *supra* note 34, at 130-31.

48. Whether this formulation treated the right to an unpublished work as a common law natural right, a property right in one's manuscript, or a privacy right in one's correspondence and papers is not addressed, since all such laws focused on the exclusive statutory rights vesting upon publication. Compare *Wheaton v. Peters*, 33 U.S. 591, 591 (1834) ("That an author at common law has a property in *his manuscript*, and may obtain redress against any one who deprives him of it, or by obtaining a copy endeavours to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world."), with *Donaldson*, *supra* note 20 (holding that Statute of Anne divested common law right of author was divested upon publication); *Hinton v. Donaldson*, 1 Hailes Dec. 535 (Sess. Cas. 1773) (Scotland recognized no copyright except by statute).

49. See *supra* notes 30-48 and accompanying text.

50. Copyright Act of 1790, 1 Stat. 124 (1790).

51. See CURTIS, *supra* note 40, at 77-78.

52. See *id.* at 23.

53. *Id.*

54. *Id.* at 77-78.

The view that copyright was a balance found its historical roots in many sources, including the position of Lord Mansfield, one of Britain's most influential jurists on copyright.⁵⁵

'[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.'⁵⁶

The particular balance has been debated, and will continue to be debated.⁵⁷ The ongoing discussion, however, highlights the constant balancing and counterbalancing between these two societal goals rather than any suggestion that there was an historical presumption that this balance had been established immutably for all time.⁵⁸

United States courts have also debated the scope of the purpose underlying copyright throughout its jurisprudential history.⁵⁹ In the historic decision of *Folsom v. Marsh*,⁶⁰ the foundation of fair use,⁶¹ the correspondence of George Washington became the subject of a copyright

A perpetuity in literary property involves some inconveniences, which may come to be serious; one of which is, that the text of an author, after two or three generations . . . belongs to so many [descendants], that disputes must arise as to the right to publish, which are very likely to prevent publication altogether.

Id. at 24.

55. Glynn S. Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485 n.2 (1996) (quoting *Cary v. Longmen*, 1 East 361 n.b, 102 Eng. Rep. 139 n.b (K.B. 1801)).

56. *Id.*

57. See, e.g., Liam Seamus O'Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 U. CIN. L. REV. 143, 152 (2007) ("History cannot easily be pressed into the service of the intellectual property revolution. The supporters of the revolution stand on the ground of individual entitlement, but they will not find its roots in the past. The origins of copyright disclose that it was supremely public in nature at its inception."); Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 20-21 (2005) ("[T]he case for treating copyright and other forms of intellectual property under the natural rights framework is more attractive than this brief account suggests. . . . Does a person own his own labor, and what happens when that labor is mixed with resources that are owned in common?").

58. See, e.g., *Golan*, 132 S. Ct. at 894 (upholding Congressional authority for copyright protection of works in the public domain); *Eldred v. Ashcroft*, 537 U.S. 186, 192-94 (2003) (upholding the Sony Bono Copyright Term Extension Act in both its prospective and retrospective application).

59. See *infra* notes 60-70 and accompanying text.

60. *Folsom v. Marsh*, 9 F. Cas. 342 (Mass. Dist. Ct. 1841).

61. See *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 550 (1985) ("[T]he fair use doctrine has always precluded a use that 'supersede[s] the use of the original.'" (quoting *Folsom*, 9 F. Cas. at 344-45)).

dispute regarding the unauthorized reproduction of his newly published letters.⁶²

The defendant publisher asserted a number of reasons he was free to publish the letters.⁶³ The list of the ineffective defenses helps understand the judicial understanding of copyright at the time:

It is objected, in the first place, on behalf of the defendants, that the letters of Washington are not, in the sense of the law, proper subjects of copyright, for several reasons: (1) Because they are the manuscripts of a deceased person, not injured by the publication thereof; (2) because they are not literary compositions, and, therefore, not susceptible of being literary property, nor esteemed of value by the author; (3) because they are, in their nature and character, either public or official letters, or private letters of business; and (4) because they were designed by the author for public use, and not for copyright, or private property.⁶⁴

The suggestion that copyright is entirely a personal, inchoate right incapable of surviving the death of the rights holder would make copyright a personal interest like a person's right to be free of defamation or invasions of privacy.⁶⁵ This was never the construction of the property right inherent in authorship and the court quickly rejected it.⁶⁶ "The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business."⁶⁷ While recognizing some inconsistency in copyright texts on the issue of letters, the court cites a long history of protecting private letters, regardless of the reason under which the letters were initially penned.⁶⁸ It also rejects any constitutional infirmity in copyrighting the public letters of governmental officials or waiver of copyright because of Washington's public life.⁶⁹

62. *Folsom*, 9 F. Cas. at 345.

63. *Id.*

64. *Id.*

65. *See id.*

66. *See Folsom*, 9 F. Cas. at 345.

67. *Id.* at 346.

68. *Id.* at 346-47 (discussing possible contrary authority and rejecting it as "a great discouragement" of the collection and preservation of historical materials).

69. *Id.* at 347. Congress can waive copyright in governmental works and has chosen to do so. *See* 17 U.S.C. § 105 (2012) (noting that strong public policy and constitutional grounds exist for precluding copyright in laws and statutes, but the same basis does not necessarily extend to the correspondence of officials).

Rather than reject the ability of the letters to be copyrighted, the decision crafts a careful balancing test between the copyright owner's interest in the work, and others' interest in copying from that work.⁷⁰ "In short, we must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."⁷¹ This formulation served as the common law of copyright until finally codified in the 1976 Copyright Act.⁷² Having formulated what is now the fair use doctrine, the court applied this balancing test to find that the taking was excessive, resulting in "an invasion of the plaintiff's copyright."⁷³ "[T]he work of the defendants is mainly founded upon these letters, constituting more than one third of their work, and imparting to it its greatest, nay, its essential value."⁷⁴

The Supreme Court continued in this vein when it upheld the copyrightability of a mere circus poster, despite the lack of an independent economic need to incentivize the publication of advertisements.⁷⁵ The Court also dismissed the notion that copyright only protected worthy works, holding that works depicting a populist pastime, like the circus, were also protected.⁷⁶

Judicial decisions throughout much of the twentieth century continued along this same path. In *Mazer v. Stein*,⁷⁷ the Supreme Court explained that the benefit of copyright is the encouragement of creating new works, so that the public can benefit from those works.⁷⁸ "The economic philosophy behind . . . 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 Sacrificial days devoted to such

70. *Folsom*, 9 F. Cas. at 348.

71. *Id.*

72. See 17 U.S.C. § 107; *Harper & Row*, 471 U.S. at 552.

73. *Folsom*, 9 F. Cas. at 349.

74. *Id.*

75. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

76. *Id.* at 251.

A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.

Id.

77. 347 U.S. 201 (1954).

78. *Id.* at 219.

creative activities deserve rewards commensurate with the services rendered.⁷⁹

III. THE PUBLIC BENEFIT IS THE EXPRESSION

The public benefit identified in *Mazer v. Stein* is the creation of the works, which redound to the benefit of the public.⁸⁰ There is no discussion of the work's eventual demise when it falls into the public domain as a necessary, rather than added, benefit.⁸¹ This conception that the public benefits from the creation of the work and the exposure of the ideas that work disclosed harkens back to *Folsom v. Marsh*, and the public benefit provided by double-entry bookkeeping.⁸² The societal goal is to foster what became known in another setting as the marketplace of ideas.⁸³ The market grows because new voices add new ideas through their expression.⁸⁴ It is peripatetic and may be wildly inefficient, but each market participant bears the risk.⁸⁵

79. *Id.*

The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. However, it is intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world.

Id. (internal quotes and citations omitted).

80. *See id.* at 219.

81. *See* Berne Convention Implementation Act of 1988, H.R. REP. NO. 100-609, at 7 (1988), reprinted in 1988 U.S.C.A.N. 1037 ("By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and second when the limited term of protection expires and the creation is added to the public domain.").

82. *Mazer*, 347 U.S. at 219; *Folsom*, 9 F. Cas. at 345-46.

83. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, dissenting).

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id.

84. *See id.*

85. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 13 (2004).

Perhaps the imagery that we should take from Holmes's figure of speech is not that of a highly structured price-determining *market* such as a stock exchange, a mechanism designed to achieve plebiscitary and transactional precision, but rather a choice-proliferating *marketplace*, a site for spontaneous and promiscuous browsing, comparing, tasting, and wishing, a paean to peripatetic subjectivity amid abundance.

Id. at 14.

The essential balance of copyright and free speech rests on this accommodation of ideas and expression.⁸⁶ Copyright creates no prior restraint or limitation on free speech because in such restraints “the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein.”⁸⁷ Facts, formulas, processes, and algorithms receive no copyright protection.⁸⁸ “And the copyright laws, of course, protect only the form of expression and not the ideas expressed.”⁸⁹ Copyrighted works create the market and the competition flows from the ideas expressed therein.⁹⁰ “[C]opyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’”⁹¹

The language of the Court reinforced the suggestion that a copyrighted work achieves public benefit through its publication rather than its eventual demise into the public domain.⁹² “The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”⁹³ The Supreme Court further analogizes to the patent right, saying “[a] copyright, like a patent, is ‘at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.’”⁹⁴

86. See *Harper & Row*, 471 U.S. at 556.

87. *New York Times Co. v. United States*, 403 U.S. 713, 727 n.* (1971).

88. 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”); *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“Originality remains the *sine qua non* of copyright Others may copy the underlying facts from the publication, but not the precise words used to present them.”); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990) (“Thus, in principle, no matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking; the copyright may cover only the facts and ideas *as they are presented by the author.*”).

89. *New York Times*, 403 U.S. at 726 n.*.

90. See *Harper & Row*, 471 U.S. at 556.

91. *Id.*; *Harper & Row Publishers, Inc. v. Nation Enter.*, 723 F.2d 195, 202 (2d Cir. 1983) *rev’d*, 471 U.S. 539 (1985) (“The [Copyright] Act is thus able to protect authors without impeding the public’s access to that information which gives meaning to our society’s highly valued freedom of expression.”); see also Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990) (“Commentary on the public domain has tended to portray it either as the public’s toll for conferring private property rights in works of authorship or as the realm of material undeserving of property rights.”).

92. *Golan*, 132 S. Ct. at 888.

93. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor.”).

94. *Fox Film Corp.*, 286 U.S. at 127-28 (quoting *Kendall v. Winsor*, 62 U.S. 322, 328 (1858)).

This is not to suggest that the public domain does not play an important social function.⁹⁵ The public domain is comprised of far more than merely those works for which copyright has expired,⁹⁶ and it continues to expand in importance with the growth of Internet repositories of human expression.⁹⁷ Professor Jessica Litman suggests that *scènes à faire* and other notions of originality are embodied in the broader conceptualization of the public domain.⁹⁸ Access to public domain materials also serves as the creative toolbox for new authors and artists seeking to transform works endemic to society and culture, or looking to find cost-effective materials for low-cost, low-margin creative works.⁹⁹

Until the law started looking to values of utilitarianism and efficiency, there was no need to find such practice in copyright.¹⁰⁰ Through a utilitarian lens,¹⁰¹ however, liability rules,¹⁰² property rules,¹⁰³ and

95. The importance of the public domain does not, however, change copyright's constitutional character. See *Golan*, 132 S. Ct. at 891 (“[N]othing in the historical record, congressional practice, or our own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain.”); Liam Seamus O’Melinn, *The Recording Industry v. James Madison, aka “Publius”: The Inversion of Culture and Copyright*, 35 SEATTLE U. L. REV. 75, 79 (2011) (“[P]ublic domain has an equivocal status, and that to the American legal mind, the public domain stands a distant second to the private domain of copyright.”).

96. See Litman, *supra* note 91, at 1018-23 (the public domain provides a crucial service “by reserving the raw material of authorship to the commons, thus leaving that raw material available for other authors to use. The public domain thus permits the law of copyright to avoid a confrontation with the poverty of some of the assumptions on which it is based”).

97. Randal C. Picker, *Access and the Public Domain*, 49 SAN DIEGO L. REV. 1183, 1194-95 (2012).

98. See Litman, *supra* note 91, at 1018.

99. See *id.* at 1019 (“[T]o the extent that the idea of originality embodies things that we would like to believe, the presence of the public domain has made it possible for us to do so.”).

100. See generally Darren Bush, *The “Marketplace of Ideas”: Is Judge Posner Chasing Don Quixote’s Windmills?*, 32 ARIZ. ST. L.J. 1107, 1107-12 (2000).

101. See, e.g., Bush, *supra* note 100, at 1107 (“Economics has permeated a variety of disciplines, including family and consumer studies, psychology, and law.”).

102. See, e.g., Donald A. Dripps, *Rehabilitating Bentham’s Theory of Excuses*, 42 TEX. TECH L. REV. 383, 384 (2009) (“Jeremy Bentham argues that excuses follow logically from the principle of frugality in punishment. The frugality principle holds that punishment, which entails the deliberate infliction of pain on fellow creatures, is always an evil and can only be justified by countervailing benefits.”); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 738 (2006) (“Risk is a real cost, in the sense of disutility, to anyone who is risk averse.”); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1293 (1996).

103. See, e.g., Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN. ST. L. REV. 641, 645 (2011) (“There are a number of justifications for property rights, including legal recognition of ‘labor, its cousin first possession, individual self-definition and autonomy, stewardship, divine right, utility, collective good, need, and power.’” (quoting Vincent Chiappetta, *The (Practical) Meaning of Property*, 46 WILLAMETTE L. REV. 297, 303-04 (2009))); David V. DeRosa, Note, *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?*, 12 QUINNIPIAC PROB. L.J. 153, 187 (1997) (Bentham “wanted to insure that all property not used for a public purpose return to the private sector as soon as possible. Bentham justified this policy position by stating, ‘the government is

monopoly rules,¹⁰⁴ all can be reinterpreted, making copyright a prime target for analysis under a law and economics approach.¹⁰⁵

The courts generally continued to respect the role of copyright in fostering creativity; however, there was a shift in emphasis toward the utilitarian aspects of copyrights coinciding with the conceptual growth of “law and economics” as an approach to the law’s role in society.¹⁰⁶ The shift in focus developed through the sixties and seventies, as Professor (and now Associate Supreme Court Justice) Stephen Breyer exemplified in his 1970 work, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*.¹⁰⁷ Professor Breyer’s work captures the essence of the utilitarian approach.¹⁰⁸

What may lie at the root of this intuition [that copyright is property] is a notion that property rights are often created for reasons of efficiency Such a justification supports copyright protection, however, only if copyright is a more efficient way than other feasible institutional arrangements to satisfy the human want for writings.¹⁰⁹

The academic approach began to influence opinions of the Court.¹¹⁰

incapable of managing specific property to advantage.” (internal citations omitted)); J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 747 (1996) (“[E]ither the right to abandon a thing, or the right to license others to use a thing, can be elaborated to show that the right to transfer property is an inherent feature of property rights. I shall describe the abandonment route first.”); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

104. See, e.g., Alan Devlin & Neel Sukhatme, *Self-Realizing Inventions and the Utilitarian Foundation of Patent Law*, 51 WM. & MARY L. REV. 897, 917 (2009); Joseph Gregory Sidak, Comment, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329 (1981) (“[T]he Supreme Court’s recent acceptance of consumer welfare as the goal of antitrust law underscores a growing judicial inclination to construe antitrust liability rules to encourage efficient production and efficient resource allocation.” (internal citations omitted)); see RICHARD A. POSNER & FRANK H. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 393-95 (2d ed. 1981).

105. See *supra* notes 101-103 and accompanying text.

106. Alain Marciano, *Guido Calabresi’s Economic Analysis of Law, Coase and the Coase Theorem*, 32 INT’L REV. L. & ECON. 110, 110 (2012) (field of law and economics that Ronald Coase and Guido Calabresi demarcated); see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 58 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-18 (1961).

107. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 281 (1970) (framing the debate with the Macaulay’s quote that copyrights are “a tax on readers for the purpose of giving a bounty to writers’ reveal[ing] the conflict of interest between the reader and the book producer that underlies much of the discussion about copyright law.” (internal citations omitted)); T. MACAULAY, *SPEECHES ON COPYRIGHT* 25 (C. Gaston ed. 1914).

108. See Breyer, *supra* note 107, at 289.

109. *Id.*

110. See *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966).

This judicial shift may have begun in the parallel discussion of patent law, which *Graham v. John Deere Co.* triggered,¹¹¹ decided not long after the Ronald Coase published his seminal work on social cost.¹¹² In *Graham*, the Supreme Court interpreted the correspondence of Thomas Jefferson, and “rejected a natural-rights theory in intellectual property rights and clearly recognized the social and economic rationale of the patent system.”¹¹³ Here, the Court focused squarely on patent law rather than sweeping both copyright and patent law into the discussion.¹¹⁴ “The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge.”¹¹⁵ The Court concluded, “[t]he grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given.”¹¹⁶

Foundationally, authors of copyrighted works and inventors of patented works have profoundly different exclusive grants and operate with different incentives to create.¹¹⁷ Yet despite this language, which could be understood to distinguish copyright from patent in the discourse, the reference to intellectual property rights preceding the patent discussion opened the door to a conflation of purpose between copyright and patent law.¹¹⁸ This lack of discrimination between copyright and patent was furthered by then-Associate Professor Richard Posner when he used copyrights and patents as examples of price-maximizing monopolies “highly unpopular with purchasers, government agencies, and society at large.”¹¹⁹

111. *Id.*

112. *See, e.g.*, Coase, *supra* note 106, at 1.

113. *Graham*, 383 U.S. at 7-9.

114. *Id.* at 6.

115. *Id.* at 9.

116. *Id.*

117. *See, e.g.*, O’Melinn, *The Recording Industry v. James Madison*, *supra* note 95, at 88 (describing “the weakness of the natural law position in patent law. . . . Evans spoke a language of inventors’ property rights very similar to the modern language of authors and ownership, while Jefferson spoke the language of public benefit.”); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1013 (1997) (“While the basic incentive structure of copyright law is the same as patent law—a limited grant of exclusive rights to creators in order to encourage both more creation and the dissemination of existing works—there are substantial differences between the two doctrines.”). For the economics of patent law, *see* Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 908 (1990).

118. Richard A. Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 554 (1969).

119. *Id.* (“We know, for example, that patent and copyright holders and other monopolists commonly practice price discrimination. As we shall soon see, discrimination is the profit-maximizing strategy of a monopolist.”).

The 1975 decision of *Twentieth Century Music Corp. v. Aiken*¹²⁰ highlights the purpose of copyright and its utilitarian limitations.¹²¹ Rather than citing to *Graham* and its utilitarian analysis, the Court cites a much earlier patent law case in support of the proposition that copyright benefits the public by granting monopoly to its authors.¹²² The Court, however, places a limit on the copyright monopoly.¹²³ Copyright “reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”¹²⁴ As law and economics grew in importance as a jurisprudential framework, courts began to entertain notions of a utilitarian, economically efficient copyright as if copyright’s origins were the same as those of patent rights.¹²⁵

*Sony Corp. of America v. Universal City Studios, Inc.*¹²⁶ reflects the Court’s willingness to overlap copyright and patent even further, utilizing a statutory patent provision to develop a common law copyright doctrine for fair use involving substantially non-infringing uses for goods sold in commerce.¹²⁷ The Court addressed the intellectual property monopoly explicitly for the first time:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.¹²⁸

Here, the Court rejects the characterization of *Mazer v. Stein* and all the Supreme Court decisions that went before it, treating the scope and limitations of copyright and patent law as substantially identical.¹²⁹ While

120. 422 U.S. 151.

121. *Id.* at 156.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 442 (1984).

126. *Id.*

127. *Id.* (invoking the staple article of commerce defense to patent infringement as a copyright fair use analysis).

128. *Id.* at 429.

129. *Id.*

the Court was correct that copyright and patent law share secondary liability doctrines in common, such that defenses to those doctrines can appropriately coincide, the decision to prescribe copyright with the utilitarian purpose of patent emphasizes a utilitarian economic rationale unwarranted by history, original intent, or precedent.¹³⁰

Fortunately, in *Harper & Row Publishers, Inc. v. Nation Enterprises*¹³¹ and in *Golan v. Holder*,¹³² the Supreme Court returns to a more foundational understanding of copyright.¹³³ “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”¹³⁴ The problem with focusing on the economics of copyright was not copyright effectiveness but instead the misguided effort to make utility and efficiency the focus of the marketplace.¹³⁵

The Supreme Court has correctly stated the relationship of copyright incentives as secondary consideration to foster the creation of new works for the benefit of the public.¹³⁶ The statement, however, begs the essential question of how this relationship best operates.¹³⁷ Law and economics theory has many adherents.¹³⁸ Believers in law and economics posit, “[c]opyright demands tailoring, both judicially and legislatively, because of its broad rights and even broader potential application.”¹³⁹ As discussed earlier, however, a copyright owner has exclusive control only over his or her own expression.¹⁴⁰ If the application of those rights appears broad for a given work, it is because the public values that author’s work; the rights do not extend to the ideas or to independent creation.¹⁴¹

The corollary of the statement that ownership interests demand tailoring because of broad rights and broader potential application can be applied universally to any ownership interest—real property, commercial leases,

130. *Sony Corp.*, 464 U.S. at 429.

131. 471 U.S. 539.

132. 132 S. Ct. 873.

133. *Id.* at 889-90.

134. *Harper & Row*, 471 U.S. at 558; *see also Golan*, 132 S. Ct. at 889-90.

135. *See, e.g.,* Matthew J. Sag, *Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency*, 81 TUL. L. REV. 187, 192-93 (2006).

136. *Golan*, 132 S.Ct. at 889-90.

137. *Id.*; Samuel J. Levine, *Richard Posner Meets Reb Chaim of Brisk: A Comparative Study in the Founding of Intellectual Legal Movements*, 8 SAN DIEGO INT’L L.J. 95, 97 (2006).

138. Levine, *supra* note 138, at 96 (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* xix (2003) (“declaring that law and economics is the ‘foremost interdisciplinary field of legal studies.’”)).

139. Sag, *supra* note 135, at 191.

140. *Harper & Row*, 471 U.S. at 556, 558.

141. 17 U.S.C. § 102; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”).

financial instruments, testamentary estates, or any other right that an individual could hold and that the State could use its power to dispossess and redistribute.¹⁴² Copyrighted works may have a shorter lifespan than real property or trademarks.¹⁴³ That copyright can be retailed—unlike real property—arguably is based on the false conception that intangible property is less “real” than tangible property.¹⁴⁴

The first argument assumes that “[i]n its pure form, information is a public good, meaning that it is both nonexcludable and nonrivalrous.”¹⁴⁵ Nonpublic goods are those without these attributes such as property.¹⁴⁶ Property’s attributes of physical control and the ability to exclude omit private property from the category of public good.¹⁴⁷ For example, shoreline may lose the ability to statutorily exclude and thus becomes a public good.¹⁴⁸

Copyrighted works, unlike the concept of pure information, subsist in tangible works.¹⁴⁹ They have the legal right of excludability, *i.e.*, possession and the right to exclude, as do other intangible property interests such as “reversions, remainders, executory interests, powers of termination, and possibilities of reverter”¹⁵⁰ Real property, similarly, has these attributes only as a matter of positive law.

When Blackstone described property as exclusive dominion . . . [his] axiom put aside the earlier medieval traditions in which property ownership had been hemmed in by intricate webs of military and other obligations; it ignored the family ties encapsulated in such devices as the entailed fee; and it ignored as well the general neighborly responsibilities of riparian and nuisance

142. See generally *Sag*, *supra* note 135, at 191.

143. Richard E. Halperin, *Vehicles for Artists’ Holding and Transferring Copyrights*, 22 COLUM. VLA J.L. & ARTS 435, 450 (1998).

144. Cf. Breyer, *supra* note 107, at 288 (“The second claim for special consideration for authors rests upon an intuitive, unanalyzed feeling that an author’s book is his ‘property.’ But why do we have such a feeling?”).

145. *Sag*, *supra* note 135, at 193; see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 14 (2003).

146. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 43 (4th ed. 1992).

147. *Id.*

148. See *e.g.*, Cal. Pub. Res. Code § 30214(b) (West 2013).

149. See 17 U.S.C. § 102.

150. Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1288 (2003) (citing RESTATEMENT (FIRST) OF PROP. § 9 cmt. b (1936)).

law. Blackstone himself was thoroughly aware of these pervasive and serious qualifications on exclusive dominion.¹⁵¹

Copyrights are not conceptually different from other forms of property for they have all been something less than absolute.¹⁵² This debate began conceptually with the discourse between Thomas Hobbes and John Locke.¹⁵³ To the extent Hobbes suggested the rights of property were dependent on the mere whim of the government enforcing those rights, Locke rejoined that natural law gave man a property interest in the fruits of his labor.¹⁵⁴ For Locke, advancement beyond the commons created value. “The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.”¹⁵⁵ Hobbes advocated that all property belonged to the State, and was within the power of the State to redistribute.¹⁵⁶ Note that even Hobbes contrasted “a naturall property in some usefull art” with “propriety in a portion of Land,”¹⁵⁷ suggesting that Hobbes did not dispute the nature of labor so much as the power of God and the sovereign to exercise authority over those natural rights. Under his view, the natural rights of man must inevitably bow down to the power of the sovereign,¹⁵⁸ which is their source and sustenance.¹⁵⁹

Copyright fails the public good test for a second reason. Unlike the commons or the sea, copyrighted works only exist to the extent that authors, artists, and creators create the work.¹⁶⁰ While the creative spark essential for copyright is axiomatic in their legal protection, the characterization of their property rights should not be overlooked.¹⁶¹

151. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603 (1998).

152. See Kevin Smith, *How “Real” is Intellectual Property?*, DUKE UNIV. SCHOLARLY COMM. BLOG (July 3, 2008), <https://blogs.library.duke.edu/scholcomm/2008/07/03/how-real-is-ip-2/>.

153. See RONALD A. CASS & KEITH N. HYLTON, *LAW OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS* 19-21 (2013).

154. See *id.* at 17 (citing JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 20 (1986)).

155. LOCKE, *supra* note 154, at 20.

156. THOMAS HOBBS, *The Laws of Transferring Property Belong Also to the Sovereign*, in *LEVIATHAN* 108 (1651) (Gutenberg ed., 2002).

157. *Id.*

158. *Id.* at 80 (“[B]ecause every Subject is by this Institution Author of all the Actions, and Judgements of the Sovereign Instituted; it followes, that whatsoever he doth, it can be no injury to any of his Subjects; nor ought he to be by any of them accused of Injustice.”).

159. *Id.* at 55 (“God is King of all the Earth by his Power: but of his chosen people, he is King by Covenant.”). Earlier in the text Hobbes discusses speech and letters, noting, “[t]he first author of Speech was GOD himselfe, that instructed Adam how to name such creatures as he presented to his sight.” *Id.* at Chapter IV.

160. See 17 U.S.C. § 102.

161. Breyer, *supra* note 107, at 288-89 (rejecting the treatment of copyright as property, Breyer actually discusses the nonrivalrous nature of ideas instead: “Since ideas are infinitely divisible, property

Finally, despite the suggestion of many law and economic theorists,¹⁶² copyright may be only partially nonrivalrous. “A nonrivalrous resource can’t be exhausted.”¹⁶³ Yet live public performances of theatrical productions have finite audiences and even more limited opening night seats; only one person at a time can read a book; only those with physical access to the work and the ability to move to the front of the queue can view fine art; and even music can become old, stale, and out of fashion. While the theoretical copyright that subsists in a work may indeed be immune to exhaustion; the exploitation of the copyright typically has a declining economic value and represents a depreciable asset.¹⁶⁴

David Simon suggests that “[n]onrivalrous property is property that, when used, does not decrease the amount of property remaining.”¹⁶⁵ Other authors’ re-use is physically nonrivalrous, though it might affect the value of the copied work in an economically rivalrous manner.¹⁶⁶ Whether through re-use by others or exploitation by the copyright holder, the market for copyrights and copyrighted works often does decrease with use.¹⁶⁷ Licensees pay significant premiums for exclusive rights to copyrighted works, highlighting the economic reality of copyright’s rivalrous economic

rights are not needed to prevent congestion, interference, or strife. Nor does the fact that the book is the author’s *creation* seem a sufficient reason for making it his *property*”).

162. See, e.g., *Klay v. All Defendants*, 425 F.3d 977, 985 (11th Cir. 2005) (“If the property is nonrivalrous—i.e., one party’s use of the property ‘does not necessarily diminish the use and enjoyment of other . . .’” (quoting *Ala. Power Co. v. F.C.C.*, 311 F.3d 1357, 1369 (11th Cir. 2002))); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 21 (2002); LANDES & POSNER, *supra* note 145 at 14.

163. LESSIG, *supra* note 162, at 21.

164. See, e.g., Halperin, *supra* note 143, at 450 (“The method generally used for the depreciation of copyrights is the ‘income forecast’ method. The IRS has taken the position that this is the correct method for depreciating television films, movie films, book manuscripts, patents and master recordings, and copyright interests in musical compositions.”) (internal citations omitted); Dana Shilling, § 4.06 TREATMENT OF CAPITAL EXPENDITURES, *LAW’S DESK BOOK* (2014) (“The Taxpayer Relief Act of 1997 created a new 15-year amortization provision (enacted as § 197) for certain intangibles acquired by the taxpayer (e.g., goodwill; patents, copyrights, and designs; customer- and supplier-based intangibles; franchises, trademarks, and trade names).”).

165. David A. Simon, *In Search of (Maintaining) the Truth: The Use of Copyright Law by Religious Organizations*, 16 MICH. TELECOMM. & TECH. L. REV. 355, 388 (2010).

166. See Picker, *supra* note 97, at 1194 (“The fact that use of the works is nonrivalrous means that from the perspective of creators, without more, they will capture only a fraction of the value that they create, and much of the value will spill over to third parties.”).

167. See *id.* (“We know that spillovers—positive externalities—are an important feature of intellectual property works.”).

nature.¹⁶⁸ Copyrighted books, films, and records physically erode with use, and their value generally wanes over time.¹⁶⁹

Some manifestations of copyrighted works are more nonrivalrous than others.¹⁷⁰ Live events and physical copies are rivalrous.¹⁷¹ Broadcast television and digital copies, in contrast, illustrate the general notions of nonrivalrous consumption.¹⁷² Each viewer can watch a television show or download a song file or digital book without affecting the enjoyment by others.¹⁷³ Even here, however, existing price discrimination models suggest the economic theory does not properly coincide with the market reality.¹⁷⁴ The cable broadcast of a live event can sell for a significant premium over that same broadcast sold a day later.¹⁷⁵ When its timeliness erodes, the value of the broadcast economically diminishes.

Characterizing copyright as a public good is a tautological shift suggesting that an author has taken something from the public when she insists on enforcing the right to exclude.¹⁷⁶ Society should pay only the minimal costs necessary to make the service provider whole.¹⁷⁷ Public utilities, for example, should earn a regulated amount since what they charge raises the cost for all of society.¹⁷⁸ This view has its roots in the tautological approach to utility theory itself rather than to copyright.¹⁷⁹

In contrast to copyright, ideas are the quintessential public good. “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine receives light without darkening me.”¹⁸⁰ Thomas Jefferson has famously been quoted for rejecting the natural rights theories generally and singling out inventors.¹⁸¹

168. See Katie Idzik, Note, *No More Drama? The Past, Present, and Potential Future of Retroactive Transfers of Copyright Ownership*, 18 DEPAUL J. ART, TECH, & INTELL. PROP. L. 127,129 (2007).

169. See *Purchaser's Depreciation Rights in Property to a Lease*, 82 MICH. L. REV. 572, 579 (1983).

170. See William W. Fisher et al., *Copyright & Privacy—Through the Political Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 306, 321 (2005).

171. *Id.*

172. *See id.*

173. *See id.*

174. *See id.* at 320.

175. David Bauder, *Live Events Prove Increasingly Lucrative for TV Networks*, ASSOC. PRESS (Oct. 20, 2013, 7:29 AM), <http://www.standard.net/stories/2013/10/18/live-events-prove-increasingly-lucrative-tv-network>.

176. See Shane D. Valenzi, *Rereading a Canonical Copyright Case: the Nonexistent Right to Hoard in Fox Film v. Doyal*, 36 HASTINGS COMM. & ENT L.J. 89, 117-20 (2013).

177. *See id.*

178. *See id.*

179. *See id.*

180. Letter from Thomas Jefferson to Isaac McPherson, (Aug. 13, 1813), available at http://press-pubs.uchicago.edu/founders/documents/a1_8_8s12.html.

However, by ignoring the idea/expression dichotomy in copyright and conflating these policies with patent law, a public good approach to copyright has made efficiency the goal where it never properly existed.¹⁸² Patent law, unlike copyright, grants a right to exclude over the independent creation of an invention or the use of that invention.¹⁸³ Consequently, for the duration of the patent, the patent holder controls both the embodiment of the ideas contained in the patent, and the ideas themselves.¹⁸⁴ The ideas cannot fuel the fire for others when so constrained, and patents illustrate the societal burden that exclusivity creates.¹⁸⁵ Jefferson is similarly dismissive of claims to real property rights based on rights other than “occupation.”¹⁸⁶ The idea/expression dichotomy allows authors to light the lamps of knowledge through their works without ever giving up copyright of the expression in those works.¹⁸⁷ To the extent economic theories focus on intellectual property rather than the distinct rights for authors, inventors, owners of trademarks, and holders of trade secrets, those theories drop the essentiality of copyright.¹⁸⁸

This approach is understandable given the historical emphasis of utility theory.¹⁸⁹ Rather than looking back from Locke to Hobbes, it may be more instructive to look forward to Jeremy Bentham and David Hume, who are among the forerunners of the utilitarian economic approach.¹⁹⁰ Bentham

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.

Id.

181. Thomas F. Poche, Note, *The Clinical Trial Exemption from Patent Infringement Judicial Interpretation of Section 271(E)(1)*, 74 B.U. L. REV. 903, n. 12 (1994).

182. Valenzi, *supra* note 176, at 117-20.

183. 35 U.S.C. § 154(a)(1) (2012); *Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1379 (Fed. Cir. 2000) (“A patent represents the legal right to exclude others from making, using, selling, or offering to sell a patented invention in the United States, and from importing the invention into the United States.”).

184. *See* 35 U.S.C § 154(a)(1).

185. *See* Daniel R. Cahoy, *An Incrementalist Approach to Patent Reform Policy*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 587, 602 (2006).

186. Jefferson, *supra* note 180.

187. *See id.*

188. *See* Brian A. Dahl, Comment, *Originality and Creativity in Reporter Pagination: A Contradiction in Terms?*, 74 IOWA L. REV. 713 n.21 (1989).

189. *See* Valenzi, *supra* note 176, at 117-20.

190. CASS & HYLTON, *supra* note 153, at 20; *see, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 23 (Kitchener: Batoche Books 2000) (1781) (“Among

champions utility as the only true tautology for the State, rejecting natural law as spurious.¹⁹¹ “The corn which has gone to constitute your body formerly grew in my field: can it be that you are not my slave?”¹⁹² He further rejects any claim that there are preferences that society can make, whether antipathies against certain actors or behaviors or sympathies to promote certain agendas.¹⁹³ “It is this . . . principle of sympathy which leads us to speak of an action as ‘deserving’ reward. Now, this word ‘deserve’ simply involves us in confusion and angry disputes; it is the ‘effects,’ good or bad, which alone we ought to consider.”¹⁹⁴

Bentham invites a discussion of effects public policy created on various interests, stripped of any natural law origins or moral judgments.¹⁹⁵ Modern law and economics may start with Bentham, but it does not rest there. The second axiom is based on the efficiency thesis. “The efficiency thesis simply says that in the absence of transaction costs and externalities, two bargainers will achieve a Pareto efficient result.”¹⁹⁶

The Coase Theorem has been described as “[p]erhaps the single greatest intellectual event in the modern law & economics movement . . . a rare article that has become a landmark in the disciplines of both law and economics.”¹⁹⁷ The theorem can be described as follows: “When bargaining costs are zero, the initial assignment of legal entitlements does not affect the efficiency of the resulting allocation of resources.”¹⁹⁸ The

principles adverse to that of utility, that which at this day seems to have most influence in matters of government, is what may be called the principle of sympathy and antipathy.”)

191. JEREMY BENTHAM, *THEORY OF LEGISLATION* 99 (Charles Milner Atkinson trans., Oxford Press 1914).

192. *Id.*

193. *Id.* at 100.

194. *Id.*

195. *But see* James Oldham, *From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth-Century Britain*, 89 MICH. L. REV. 1637, 1639 (1991).

Bentham thought the “high incidence of legislative miscarriage” avoidable, and because he believed an all-encompassing legislative code to be feasible, its construction was imperative; a prescriptive code built around principles of utility would be vastly more efficient and effective than sporadic punishments meted out by common law courts against defendants who did wrong.

Id.

196. Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783, 785 (1990).

197. *Id.* at 783.

198. *Id.* at 783 (citing R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 27 (1959) (“[T]he delimitation of rights is an essential prelude to market transactions; but the ultimate result (which maximizes the value of production) is independent of the legal decision.”)).

Coase Theorem assumes there are no transaction costs or bargaining costs, and it further assumes efficient allocation as the outcome.¹⁹⁹

Efficiency theory introduces the second tautological failing caused by conflating ideas with expression, treating all intellectual property as public goods, and assuming away differences among and between authors, inventors, and other creators.²⁰⁰ The assumptions begin to pile up. Ignoring the implausibility of economic models that do without transaction costs or bargaining costs, the Coase Theorem posits that an efficient bargain benefits society, regardless of the values the parties to the bargain achieved.²⁰¹ Specifically, the Coase Theorem accepts and therefore asserts Pareto optimality as a beneficial goal.²⁰² Pareto optimality represents a party-neutral economic efficiency model.²⁰³

Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved . . . further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.²⁰⁴

What this requires is that all parties accept purely economically rational behavior. “[T]o do something that is not profit-maximizing for the strategist but that imposes losses on the opponent as well, such as walking away from a profitable bargain . . .” is outside the model.²⁰⁵

It should quickly become obvious that such an economic model is not merely irrelevant but actually counterproductive for copyright marketplaces. Take fine art, for example. Prices, values, and even categories are highly volatile and controversial.²⁰⁶ Courts are reluctant to even categorize and

199. Hovenkamp, *supra* note 196, at 785.

200. *See, e.g.*, Posner, *supra* note 118, at 554 (“[P]atent and copyright holders and other monopolists commonly practice price discrimination.”).

201. Hovenkamp, *supra* note 196, at 875.

202. *Id.*

203. *Id.*; Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 J. CORP. L. 519, 521 (2002) (“A market is Coasian rather than neoclassical if it contains value that cannot be created without the cooperation of *all* buyers and sellers of that particular entitlement in that market.”).

204. Calabresi & Melamed, *supra* note 103, at 1093-94.

205. Hovenkamp, *supra* note 196, at 790 (“But, once again, the theorem assumes both perfect information and profit-maximizing participants.”).

206. David Brancaccio, *A Painting That Gets Better as Art if it Sells for \$100 Million*, MARKETPLACE BUS. (Nov. 13, 2013), <http://www.marketplace.org/topics/business/painting-gets-better-art-if-it-sells-100-million> (David Brancaccio’s interview with art critic Blake Gopnik).

label a particular work as an aesthetically fine artwork.²⁰⁷ More simply put, “judges can make fools of themselves pronouncing on aesthetic matters.”²⁰⁸ How can one achieve Pareto optimality when the parties have not even a common conception of the definition of a work? How can the parties bargain efficiently or create value appropriate for society? Professor Christine Haight Farley notes that “[f]or a court to weigh in on questions of art, or to discriminate aesthetically, would result in anointing a particular interpretation of art above others.”²⁰⁹ It inexorably follows that for a court to favor economic efficiency in a dispute involving art is to discriminate against the aesthetic value of art.²¹⁰

Judges know better than to use aesthetics. “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”²¹¹ The same should be said of economics. By diminishing the role of aesthetic value and enhancing the role of efficiency, the Court is placing a thumb on the scales of the dispute.²¹² Worse, if the utilitarian efficiency goals informing law and economic jurisprudence form the background construct, then the decision to avoid aesthetic decision making is an intentional limitation on the court, and judges may not even discern the bias embedded in their analysis.²¹³

Another example flows from the importance that authors and artists place on receiving credit for their work.²¹⁴ There is a widely recognized, but hard to monetize, reputational value associated with attribution.²¹⁵

‘The whole point of this picture is about the way we love commodities in this country, the way America’s all about high prices—objects you want to buy,’ Gopnik says. ‘So if I was a billionaire buying this picture, I’d want to spend at least a hundred million bucks on it, because that’s what Damien Hirst sold his diamond studded skull for. So, it seems to me, you want to match that magical price tag—and I might even bid myself up to \$250 million, which is what a Cezanne sold for to the royal family in Doha.’

Id. (internal links omitted).

207. See *Mazer*, 347 U.S. at 214 (“Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.”); Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 812-13 (2005) (“Determinations about art, it is argued, are inherently subjective and therefore particularly ill-suited for judicial resolution.”).

208. *Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983).

209. Farley, *supra* note 207, at 813.

210. See *id.* at 811-13.

211. *Bleistein*, 188 U.S. at 251.

212. See Farley, *supra* note 207, at 827.

213. See *id.*

214. Jeannette Gunderson, Comment, *An Unaccountable Familiarity: A Dual Solution to the Problem of Theft in Theatrical Productions*, 31 SEATTLE U. L. REV. 667, 696 (2008).

215. Christopher Jon Sprigman et al., *What’s A Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389, 1391-92 (2013).

Credit for one's contribution has an economic impact, predominantly on future employment, which makes valuation even more speculative.²¹⁶ An efficiency approach to the law would tend to ignore that which is speculative.²¹⁷ Although the court may not award speculative damages, the parties to a transaction *ex ante* can certainly agree to allocate value to speculative benefits of a transaction and value the arrangement accordingly.²¹⁸ Public policy that ignores anything not efficient systematically strips authors of their real, but speculative, rights in their works.²¹⁹

As Professor Mark Lemley correctly suggests, rationales for copyright protection that are inconsistent with market realities do not serve to further discussions regarding the appropriate scope of copyright protection.²²⁰ Market realities, however, vary considerably among different copyright industries, over time, and by perspective.²²¹ Perhaps the best the law can do is to strip away the rationales for copyright policy and lay bare the distribution preferences among authors, industries built upon copyright consumption, and the public's broader interest.²²²

IV. BEYOND EFFICIENCY

Appropriate copyright policy need not reject efficiency and utilitarian goals, but should understand these goals for the normative societal preference they represent.

All societies have wealth distribution preferences. They are, nonetheless, harder to talk about than are efficiency goals. For efficiency goals can be discussed in terms of a general concept like Pareto optimality to which exceptions — like paternalism — can be noted. Distributional preferences, on the other hand, cannot usefully be discussed in a single conceptual framework. There are

216. Gunderson, *supra* note 214, at 696 (“While receiving credit for one’s work is often more a matter of recognition than an issue about compensation, one of the main reasons that receiving that credit is so critical is because of the importance of one’s professional reputation in a performance-based industry such as theatre.”).

217. Sprigman, *supra* note 215, at 1393.

218. *Id.* at 1393.

219. Jane C. Ginsburg, *No “Sweat”? Copyright and other Protection of Works of Information after Feist v. Rural Telephone*, 92 COLUM. L. REV. 338, 373 (1992).

220. See Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 135 (2004) (rejecting *ex post* market justifications as not reflective of the actual markets in copyright and in other areas of intellectual property law).

221. See Alufunmilayo B. Arewa, *Youtube, Ugc, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 440 (2010).

222. See Valenzi, *supra* note 176, at 117-20.

some fairly broadly accepted preferences — caste preferences in one society, more rather than less equality in another society. There are also preferences which are linked to dynamic efficiency concepts — producers ought to be rewarded since they will cause everyone to be better off in the end. Finally, there are a myriad of highly individualized preferences as to who should be richer and who poorer which need not have anything to do with either equality or efficiency — silence lovers should be richer than noise lovers because they are worthier.²²³

As the discussion of fine art suggests, many of these distribution preferences may also suggest additional societal preference embedded in U.S. culture but never articulated.²²⁴ The narrowly decided *Sony Corp. of America v. Universal City Studios, Inc.*²²⁵ may reflect a bias toward consumer protection and a value decision that leaky copyright enforcement²²⁶ creates a healthier balance between copyright owners and consumers than does a rigidly interpreted law.²²⁷

The decision may instead, or additionally, reflect a preference for a more comprehensive informatics infrastructure, which limits interests of copyright holders when contrasted with manufacturers and telecommunications companies that serve the U.S. economy more broadly.²²⁸ Statutory preferences suggest this.²²⁹ The Online Copyright Infringement Liability Limitation Act²³⁰ provides a broad safe harbor for Internet service providers and other content hosts from copyright liability.²³¹ The Fairness in Music Licensing Act provided broad exemptions from

223. Calabresi & Melamed, *supra* note 103, at 1098.

224. See *supra* note 209 and accompanying text.

225. *Sony Corp.*, 464 U.S. at 454.

226. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33, 43 (2003) (“A large, leaky market may actually provide more revenue than a small one over which one’s control is much stronger”); Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 369 (1989) (“[I]nformation is inherently ‘leaky.’ It may be shared readily by many people through virtually limitless forms of communication. Consequently, information is very difficult to maintain in any exclusive manner unless kept secret by its discoverer or possessor.”).

227. *Sony Corp.*, 464 U.S. at 454 (“The audience benefits from the time-shifting capability have already been discussed. It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts.”) (quoting *Univ. City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 457 (1979)).

228. See Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 CREIGHTON L. REV. 859, 876-77 (2004).

229. See 17 U.S.C. § 512 (2012).

230. *Id.* (enacted as part of the 1998 Digital Millennium Copyright Act).

231. *Id.*

copyright liability for public performances and transmissions in stores and restaurants.²³²

Such distributional preferences are within the ambit of Congress to determine.²³³ In *Eldred* and *Golan*, the Supreme Court deferred almost absolutely to this congressional authority.²³⁴ While not suggesting that additional distributional preferences are constitutional mandates, this article emphasizes two important distributional preferences in understanding the scope of existing copyright law and in crafting any future legislative changes.

V. TO PROMOTE THE PROFESSIONAL AUTHOR

The first suggested preference underlying copyright law reflects its earliest origins in the United States and perhaps its most important role.²³⁵ The 1873 Massachusetts copyright law focused on a number of purposes behind the law, specifically “the efforts of learned and ingenious persons in the various arts and sciences”²³⁶ were to be rewarded in order to improve knowledge, promote progress of civilization, and advance human happiness.²³⁷ The law recited that “such persons can have to make great and beneficial exertions of this nature.”²³⁸

The public benefit of a creative class has been identified as an engine of economic development.²³⁹ “[K]nowledge’ and ‘information’ are the tools and materials of creativity. ‘Innovation,’ whether in the form of a new technological artifact or a new business model or method, is its product.”²⁴⁰ The demand for knowledge to build a nation was understood,²⁴¹ and the economic analysis was that which informed the heart of *Baker v. Selden*.²⁴²

232. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 110 (2012) (providing two provisions that can be understood to represent Congress’s economic quid pro quo between copyright term length and scope).

233. See *Eldred*, 537 U.S. at 192-94; *Golan*, 132 S. Ct. at 877-78.

234. See *Eldred*, 537 U.S. at 192-94; *Golan*, 132 S. Ct. at 877-78.

235. See, e.g., 1 Mass. Acts 94.

236. CURTIS, *supra* note 40, at 77 (quoting 1 Mass. Acts 94).

237. *Id.*

238. *Id.*

239. See RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE 28-30 (2004).

240. *Id.* at 44; see generally JASON POTTS, CREATIVE INDUSTRIES AND ECONOMIC EVOLUTION 17 (2011) (internal quotation marks omitted).

241. See STEVEN MINTZ, MORALISTS AND MODERNIZERS: AMERICA’S PRE-CIVIL WAR REFORMERS 114-115 (1995) (discussing the lack of meaningful higher education in the new United States. “At the end of the American Revolution, the nation had thirteen colleges.” Noah Webster noted, “[o]ur learning is superficial in shameful degree . . . our colleges are disgracefully destitute of books and philosophical apparatus.”).

242. See *id.* at 114-15; *Baker*, 101 U.S. at 103-04.

The goal is not merely the quantity of works, but the voice of the author.²⁴³ The philosopher Immanuel Kant believed “[i]n a book as a writing the author speaks to his reader.”²⁴⁴ The relationship is unique and deserves extraordinary protection.²⁴⁵

In *Napster*, the defendants claimed as much as ninety-eight percent of the music on the system was music lawfully placed there (or at least music not published on the plaintiff’s record labels).²⁴⁶ Yet at least seventy percent of the music actually available was that of the plaintiffs.²⁴⁷ The public does not demand access to content; it demands access to content created by professional artists who develop their craft, invest in their skills, and build an audience over time.²⁴⁸ The professional makes a transformative commitment; the very best deserve the rewards protected through copyright.²⁴⁹

Since the public ultimately benefits most from those works that develop the critical new ideas most effectively and those that influence the aesthetics of their age most powerfully, the focus should be on the professional authors who can invest the time and effort to hone their crafts and build a powerful body of work.²⁵⁰

The policy supporting an economic incentive to create the creative class can be found across a number of different economic and sociological

243. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 106-07 (Mary Gregor trans., Cambridge Univ. Press 1991).

244. Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 *CARDOZO ARTS & ENT. L.J.* 1059, 1076 (2008).

245. KANT, *supra* note 243, at 106-07.

246. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 917 (N.D. Cal. 2000), *aff’d in part, rev’d in part sub nom.*, 239 F.3d 1004 (“Defendant claims that it engages in the authorized promotion of independent artists, ninety-eight percent of whom are not represented by the record company plaintiffs.”)

247. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (“The record supports the district court’s determination that ‘as much as eighty-seven percent of the files available on Napster may be copyrighted and more than seventy percent may be owned or administered by plaintiffs.’” (quoting *A & M Records*, 114 F.Supp.2d at 911)).

248. See, e.g., GILLI MOON, *I AM A PROFESSIONAL ARTIST: THE KEY TO SURVIVAL AND SUCCESS IN THE WORLD OF THE ARTS* 22-23 (2nd ed. 2003) (discussing how an artist might distinguish himself from other artists by creating a competitive advantage). There are exceptions, of course. But even the overnight success stories are often required to work very hard to stay at the top of their craft. *Id.*

249. *Id.* at 23.

It can be quite disheartening when you come out of school being the most talented, shining star, and realizing in the big wide professional world of the Arts that you are just a small fish in the huge ocean of talented artists. . . . Going for the gold is highly competitive because there are so many talented Artists and so little opportunity in comparison.

Id.

250. See Feder, *supra* note 228, at 861.

fronts.²⁵¹ In global economics, for example, there are concerns that the U.S. economy suffers from a double “brain drain.”²⁵² The first brain drain stems from U.S. educated graduate students leaving the United States for their homelands.²⁵³ “The booming economies and improved research and development of countries such as China and India, along with the prospects of living near family have led many of America’s top college graduates to return home, bringing their skills and ideas with them.”²⁵⁴ This trend may, in fact, coincide with the expanded intellectual property protections in the home countries of these U.S. educated Ph.D.s returning home.²⁵⁵ “Teaching, scholarship, and research are three of the six favored uses in the preamble to §107. Congress thus considered learning as one of the societal purposes that fair use was intended to promote.”²⁵⁶ Promoting teaching, scholarship, and research through incentives to create is equally consistent with the Copyright Act.²⁵⁷

The modern knowledge economy, anticipated in the development of the 1976 Copyright Act and revisions thereafter,²⁵⁸ require what Daniel Bell described as new knowledge.²⁵⁹ “Knowledge consists of new judgments (research and scholarship) or new presentations of older judgments (textbook and teaching).”²⁶⁰ The knowledge of the postindustrial society was understood to shape the economic future of the nation.²⁶¹ “Forces of economic and technological development are leading to . . . a society in which the source of wealth lies not only in the production and distribution of goods but also in the creation and dissemination of information.”²⁶²

251. Jack Hodapp, *America’s Two “Brain Drains,”* NORTHWESTERN BUS. REVIEW (Nov. 13, 2011), <http://northwesternbusinessreview.org/america’s-two-’brain-drains’/>; see also VIVEK WADHWA ET. AL., INTELLECTUAL PROPERTY, THE IMMIGRATION BACKLOG, AND A REVERSE BRAIN-DRAIN: AMERICA’S NEW IMMIGRANT ENTREPRENEURS PART III 31 (2007), available at <http://ssrn.com/abstract=1008366>.

252. Hodapp, *supra* note 251.

253. *Id.*

254. *Id.*

255. See generally FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGY USES OF COPYRIGHTED WORKS 75-77 (1978), available at <http://people.ischool.berkeley.edu/~bcarver/mediawiki/images/8/89/CONTU.pdf> [hereinafter CONTU]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 299, 324-25, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS].

256. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2580 (2009).

257. *Id.* at 2580-81.

258. See CONTU, *supra* note 255, at 3.

259. See DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 174-75 (1976); CONTU, *supra* note 255, at 3.

260. BELL, *supra* note 259, at 175.

261. See CONTU, *supra* note 255, at 3.

262. *Id.*

Incentives to educate and retain those who are most successful creating postindustrial wealth, jobs, and knowledge serve a fundamental societal goal.²⁶³ That was true in Massachusetts during the founding of the nation and remains even more potent today.²⁶⁴ Retaining the best and brightest global minds as part of U.S. economic policy—including copyright, immigration policy, and other related legislative agenda—represents an important congressional agenda.²⁶⁵

This same agenda informs many nations regarding their intellectual property regimes.²⁶⁶ Nelson Mandela has been quoted directly on the disparities of information.²⁶⁷ “Eliminating the distinction between the information-rich and information-poor is . . . critical to eliminating economic and other inequalities between North and South, and to improving the life of all humanity.”²⁶⁸ Competing for leadership in a knowledge-rich economy requires strong incentives to reward those who invest time and effort to lead their economies.²⁶⁹

This need to incentivize the creative class leadership reflects the second brain drain concern, namely a concern that other incentives are drawing away those most capable of creating new knowledge.²⁷⁰ Much of this concern has focused on the lure of top-paying jobs in the financial services sector, rather than jobs in education or creative industries.²⁷¹ “[T]he country

263. See Hodapp, *supra* note 251.

264. See MINTZ, *supra* note 241, at 114; Hodapp, *supra* note 251.

265. See Hodapp, *supra* note 251.

266. See Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries*, 10 TUL. J. TECH. & INTELL. PROP. 1, 2-3 (2007).

267. ERNST J. WILSON, III, *THE INFORMATION REVOLUTION AND DEVELOPING COUNTRIES* 1 (2004).

268. Douglas L. Rogers, *Increasing Access to Knowledge through Fair Use: Analyzing the Google Litigation to Unleash Developing Countries*, 10 TUL. J. TECH. & INTELL. PROP. 1, 2-3 (2007) (citing WILSON, *supra* note 267, at 1.)

269. See Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1585-87 (1989) (arguing that a work’s effect on the market should be taken into account when deciding whether a copyright should be granted).

270. See COMM. ON DEV. AND INTELL. PROP., *INTELLECTUAL PROPERTY (IP) AND BRAIN DRAIN*, WORLD INTELL. PROP. ORG., (CDIP) CDIP/7/4 Annex (May 2-6, 2011), available at http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_4.pdf.

Quite conceivably, there is a relationship between IP and the brain drain phenomenon, with two-way causality. IP protection may affect the decisions of scientists, engineers, information technology specialists and related professionals about where to exercise their profession, with consequences for a country’s innovative capacity and the availability of knowledge. Vice-versa, outward migration of skilled workers can impact on the effectiveness of the IP system in reaching its goals of promoting innovation and technology transfer.

Id.

271. See Hodapp, *supra* note 251.

is in desperate need of more entrepreneurs, inventors, scientists and other professionals, a complaint regularly made by non-Wall Street business leaders and members of both major political parties.”²⁷²

The two brain drain influences illustrate the market explanation for high author incentives.²⁷³ First, the start-up costs for creative innovators reflected in higher education costs and potentially lower earnings requires a larger back-end reward for the risk and the delay associated with years of education and, in many arts and science industries, years of apprenticeship.²⁷⁴

Second, there is competition for the same creative innovators.²⁷⁵ U.S. creative and research industries compete with the same industries overseas, and they compete for talent with other economic sectors.²⁷⁶ Keeping the top talent working in these fields requires providing market incentives for choice of location and industry.²⁷⁷ Strong copyright protections for their output places the risk of overpaying for these rights on the shoulders of the innovators rather than creating ex-ante costs on educational institutions,

272. Amanda Terkel, *America's 'Brain Drain': Best and Brightest College Grads Head for Wall Street*, HUFFINGTON POST (Nov. 15, 2011), http://www.huffingtonpost.com/2011/11/15/brain-drain-college-grads-wall-street_n_1069424.html; see also Hodapp, *supra* note 251 (“Stop the Brain Drain . . . criticizes the ‘monopoly’ that Wall Street holds on top young talent, arising from large donations to college career centers to obtain preferred access to recruitment. Instead of Wall Street, Stop The Brain Drain promotes careers as entrepreneurs, scientists, and public servants.”).

273. See JAMES L. W. WEST III, *AMERICAN AUTHORS AND THE LITERARY MARKETPLACE SINCE 1900* 20 (1988); WADHWA, *supra* note 251.

274. See generally FOSTERING FLEXIBILITY IN THE ENGINEERING WORK FORCE, NAT’L ACAD. PRESS, COMM. ON SKILL TRANSFERABILITY IN ENGINEERING LABOR MARKETS 55-59 (1990) (“Industry recruiters . . . emphasize tuition-reimbursed degree programs as a benefit of employment. The high cost of a graduate education and the lack of enough funding to support large numbers of graduate students in research associate positions makes these company-sponsored degree programs very attractive to B.S. graduates.”); SALLY O’REILLY, *HOW TO BE A WRITER* 4 (2011) (“Traditionally, most writers have earned relatively little for their work, and authors who earn vast sums have always been the exception, not the rule. Indeed, one reason that writing has remained a middle-class occupation is that it has paid very poorly.”); WEST, *supra* note 273, at 20.

275. See WADHWA, *supra* note 251.

276. See generally *id.*

277. See Deidré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 542-43 (2012) (explaining that one theoretical purpose of copyright law is to benefit the greater market within which it is located).

government or research facilities.²⁷⁸ Copyright rewards work much like an athlete's reward system.²⁷⁹

The margin at which incentives operate is in nudging potential creators toward a life of creativity, rather than in eliciting investment in any particular novel or symphony. The length and breadth of the intellectual property right, together with the fair uses that are granted, determine how profitable these creations are, and influence how many people become creators of copyrighted works.²⁸⁰

There may very well be an optimal societal investment in culture after which there is less economic return,²⁸¹ but that simply does not account for the variation among the works, the value to society of a creative, inquisitive professional culture, or the opportunities such professionals make for the next generation of potential creative innovators who have mentors able to enlighten, encourage, and modulate the challenges so that new entrants are pulled along a creative path.²⁸² Optimal is not that important.

The economic question is whether the works taken as a whole outweigh the societal costs to foster them.²⁸³ Generations of economic growth and a flourishing information age suggest the answer to this unknowable calculus must be yes. The economic costs for this promotion are also quite high.²⁸⁴ A recent empirical study suggests that authors value their own work significantly higher than any rational economic model would suggest.²⁸⁵ Professors Christopher Jon Sprigman, Christopher Buccafusco, and Zachary Burns have conducted empirical studies illustrating how authors value their

278. *See id.*

Understanding why copyright is protected is necessary to understand the appropriate parameters of copyright protection. The reasons for protecting copyright are multifaceted and nuanced. . . . In addition to utilitarianism and personhood theory, the theory that copyright serves to reward authors for their labor is still occasionally referenced by courts.

Id.

279. *Cf.* SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 98 (2004) (describing incentives as leading to life of creativity rather than the creation of one work. In athletics the prospect of success leads the athlete to train for overall success rather than success in one event specifically).

280. *Id.*

281. *See id.* at 99-100.

282. *See id.*

283. *See* Feder, *supra* note 228, at 861 (arguing a balancing test must be used to determine whether file sharing takes away the incentive to create music).

284. *See* Sprigman, *supra* note 215, at 1424.

285. *Id.*

works.²⁸⁶ They describe this overvaluation as the “creativity effect,” which they distinguish from an overvaluation related to pride in ownership by non-creative owners.²⁸⁷ “Authorship, our study suggests, produces a tendency to value creativity more highly than does mere ownership.”²⁸⁸ Whether optimal or not, professional authors value their works quite highly, so the value of incentives must be high enough to influence their behavior.²⁸⁹ It may be less than economically efficient from a pure utilitarian standpoint, but it reflects the behavioral psychology of the market.²⁹⁰ Strong incentives to inculcate professional authors, however, do not necessarily come at the cost of other benefits of copyright.²⁹¹ One natural consequence of copyright incentives for professional authors is a congruent view of fair use that highly values teaching, scholarship, and research.²⁹² While section 107 expressly states this, the underlying incentive structure reinforces it further.²⁹³ Outside of works designed for sale specifically in the educational marketplace, proper balancing of strong incentives should weigh heavily in favor of fair use for these purposes.²⁹⁴ A strong pro-education fair use bias should counterbalance whatever concerns strong pro-professional author bias raises regarding this balancing’s non-utilitarian, inefficient, and unapologetic emphasis promoting the creative economy.

VI. TO ENCOURAGE MOTIVATION

The second explicit purpose of copyright is to encourage authorship as a surrogate to enhance the public good.²⁹⁵ While efficiency and utilitarianism scholarship suggest that copyright should be limited, modern scholarship on motivation may shed light on how best to shape copyright to encourage authorship.²⁹⁶ Moreover, to the extent copyright policies refine the scope of

286. Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31, 31-32 (2011) [hereinafter *Creativity Effect*]; Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 4-5 (2010) [hereinafter *Valuing IP*]; Sprigman, *supra* note 215, at 1434-35.

287. *Creativity Effect*, *supra* note 286, at 40 (“When internally motivated and engaged in considerable creative effort, creators seem to value their works substantially more than do potential buyers or mere owners.”).

288. Sprigman, *supra* note 215, at 1397.

289. *See id.* at 1424.

290. *Id.*

291. *See, e.g.*, Samuelson, *supra* note 256, at 2580-81.

292. *See* Lacey, *supra* note 269, at 1585-88 (comparing fair use and externalities)

293. Samuelson, *supra* note 256, at 2580.

294. SCOTCHMER, *supra* note 279, at 98.

295. Keller, *supra* note 277, at 542-43.

296. *See* EDWARD L. DECI & RICHARD M. RYAN, INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR 5 (1985).

copyright to promote motivational efforts, those efforts should lead to a more efficient copyright strategy.²⁹⁷

The cognitive psychological theories focusing on motivation for creative works are creatures of the twentieth century.²⁹⁸ Sigmund Freud focused primarily on motivational drives of sexuality and aggression with little account for creativity.²⁹⁹ Hull formalized drive theory as an approach to psychology, viewing the person as a machine in need of equilibrium.³⁰⁰ Whether driven by Freud's motivations or Hull's more mechanistic drives, however, these early approaches did not account for intrinsic motivations.³⁰¹

Psychologists began to understand something that authors and artists had long expressed—the intrinsic motivation to create.³⁰² These theories attempted to explain “activities such as novelty and fantasy and biological mechanisms such as play instincts, curiosity, and need for stimulation.”³⁰³ In 1959, Robert White proposed a new explanation of motivation which “could account for play, exploration, and a variety of other behaviors that do not require reinforcements for their maintenance”³⁰⁴ White identified his approach as “*effectance motivation*.”³⁰⁵ He “proposed a need for effectance as a basic motivational propensity that energizes a wide range of non-drive-based behaviors.”³⁰⁶ Effectance motivation captured the “inherent satisfaction in exercising and extending one’s capabilities.”³⁰⁷

While these theories did not explicitly extend from curiosity, play, and creative drives to more formal drives of authorship and artistry, they strongly suggest the connection.³⁰⁸ The relationship is explicitly part of the

297. *See id.*

298. *See* DON H. HOCKENBURY & SANDRA E. HOCKENBURY, *PSYCHOLOGY* 336 (5th ed. 2008).

299. *See* FRED PINE, *DEVELOPMENTAL THEORY AND CLINICAL PROCESS* 56-57 (1985) (“The first wave, drive psychology, was initiated by Freud’s . . . articulation of the theory of infantile sexuality (1905) and led to the early mushrooming of writing on drives, their manifold transformations, and their role in psychopathology.”); *See generally* WAYNE WEITEN, *PSYCHOLOGY: THEMES AND VARIATIONS* 396-97 (8th ed. 2010).

300. *METAPHORS IN THE HISTORY OF PSYCHOLOGY* 90-95 (David E. Leary ed. 1992).

301. *See* Avi Kaplan, *Intrinsic and Extrinsic Motivation*, *EDUCATION.COM* (July 20, 2010), <http://www.education.com/reference/article/intrinsic-and-extrinsic-motivation/> (“[D]uring the middle of the 20th century, several theorists challenged the mechanistic models of the drive and behaviorist perspectives. These theorists relied on observations indicating that sometimes people (and animals) engage in behavior without an apparent reward.”).

302. *See id.*

303. *Id.*

304. DECI & RYAN, *supra* note 296, at 5.

305. *Id.*

306. *Id.*

307. *Id.* at 27.

308. *See generally* CHARLES ELLIOT PEARLMAN, *THE RELATIONSHIP OF EFFECTANCE MOTIVATION TO CREATIVITY AND THE EFFECTS OF A PENALTY/REWARD VERSUS NO PENALTY/REWARD SITUATION ON THE DEMONSTRATION OF EFFECTANCE MOTIVATION* 5 (1979); *see also* Paul Tough, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* 64 (2012) (discussing

Aristotelian understanding of human development.³⁰⁹ According to this view, “[e]ndowed with an innate striving to exercise and elaborate their interests, individuals tend naturally to seek challenges, to discover new perspectives, and to actively internalize and transform cultural practices.”³¹⁰

The Aristotelian view actually fits neatly with the utilitarian view of copyright, where it bases motivation on self-actualization rather than any economic encouragement to create.³¹¹ Under this approach, copyright operates as an external motivation, and therefore is unnecessary for Aristotelian internal motivation and self-expression.³¹² The field of psychology, however, “is quite widely divided on the issues of inherent tendencies toward psychological growth, a unified self, and autonomous, responsible behavior.”³¹³

Those theories on internal motivation, however, are insufficient to explain perseverance.³¹⁴ Among the limits on the Aristotelian model are the barriers to success which include rejection, hard work, the need for specialized training, and other limits an individual must overcome to achieve self-actualization.³¹⁵ Efforts that are too simple fail to motivate, but neither do goals that prove too hard.³¹⁶

To help contextualize this tension regarding the limits of motivation, self-determination theory provides a model that marries the necessary internal motivation of the creative individual with the external resources and rewards that enable success.³¹⁷ Self-determination theory establishes a distinction between the autonomous and controlled motivations that affect

components of motivation to achieve and volition or willpower and self-control as both being essential requirements).

309. EDWARD L. DECI & RICHARD M. RYAN, HANDBOOK OF SELF DETERMINATION RESEARCH 3 (2004) [hereinafter HANDBOOK].

310. *Id.* at 3 (“By stretching their capacities and expressing their talents and propensities, people actualize their human potentials.”).

311. *Id.*

312. *See id.*

313. *Id.* at 4.

314. *See, e.g.*, JÜRGEN SCHMIDHUBER, FORMAL THEORY OF CREATIVITY, FUN, AND INTRINSIC MOTIVATION (1990-2010), 2 IEEE TRANSACTIONS ON AUTONOMOUS MENTAL DEV. 230-31 (2010) (“The growing infant quickly gets bored by things it already understands well, but also by those it does not understand at all, always searching for new effects exhibiting some yet unexplained but *easily learnable* regularity. It acquires more and more complex behaviors building on previously acquired, simpler behaviors.”); TOUGH, *supra* note 309, at 105-07 (discussing the need to train students on perseverance and resilience).

315. *See, e.g.*, SCHMIDHUBER, *supra* note 314, at 230.

316. *Id.* at 231.

317. Edward L. Deci & Richard M. Ryan, *Self-Determination Theory: A Macrotheory of Human Motivation, Development, and Health*, 49 CANADIAN PSYCHOL. 182, 182-85 (2008) [hereinafter *Self-Determination Theory*].

individual's behavior, and help explain why some rewards are counterproductive.³¹⁸

Autonomous motivation comprises both intrinsic motivation and the types of extrinsic motivation in which people have identified with an activity's value and ideally will have integrated it into their sense of self. When people are autonomously motivated, they experience volition, or a self-endorsement of their actions. *Controlled motivation*, in contrast, consists of both external regulation, in which one's behavior is a function of external contingencies of reward or punishment, and introjected regulation, in which the regulation of action has been partially internalized and is energized by factors such as an approval motive, avoidance of shame, contingent self-esteem, and ego-involvements. When people are controlled, they experience pressure to think, feel, or behave in particular ways. Both autonomous and controlled motivation energize and direct behavior, and they stand in contrast to a motivation, which refers to a lack of intention and motivation.³¹⁹

The essence of self-determination theory provides that the correct form of external motivations will enhance one's internal motivation, creating a positive feedback loop whereby the individual improves and internalizes the external motivations, increasing capacity for new creativity, etc.³²⁰ It belies the Samuel Johnson quip “[n]o man but a blockhead ever wrote except for money”³²¹ because Johnson knew the difference between laborious works and those dashed off. Johnson's view of writers was qualified by his thought “[w]hat is written without effort is in general read without pleasure.”³²² Thomas Alva Edison said much the same thing when he remarked “[g]enius is one percent inspiration and ninety-nine percent perspiration.”³²³ Accordingly, a ‘genius’ is often merely a talented person who has done all of his or her homework.

318. *Id.*

319. *Id.* at 182 (emphasis in original).

320. *Id.*

321. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 55 (Charles Grosvenor Osgood ed., Project Gutenberg 2006) (1791) (Boswell adds: “[n]umerous instances to refute this will occur to all who are versed in the history of literature.”).

322. Suzanne E. Rowe, *The Difficulties of Writing Painful Prose*, 71 OR. ST. B. BULL. 11, 11-12 (2011).

323. Thomas Alva Edison, quoted in JEFFREY WEBER, I.D.E.A. TO EXIT: AN ENTREPRENEURIAL JOURNEY 56 (2010). The source of original quote not clear. See Martin André Rosanoff, *Edison in His Laboratory*, HARPER'S MONTHLY 402, 406 (1932).

As with the role of copyright policy encouraging professional authors and artists, self-determination theory and related theories³²⁴ balance internal and external motivational theories, and emphasize the need to reward authors in a manner consistent with their personal behavioral views.³²⁵ The incentive structure of copyright provides the full bundle of exclusive rights as the external reward.³²⁶

Authors may choose to select the copyright regime, adjusting their behavior by fixing their works in a tangible form, registering the copyright of published works,³²⁷ and affixing copyright notice.³²⁸ Or authors may choose a different path, posting their works on content-sharing websites, writing content for open access communities such as open source software, creative commons publishing, freely distributed music, YouTube videos, community theatre, freely distributable academic scholarship, or a myriad of other choices.³²⁹ Millions of authors vote with their feet, demonstrating that economic reward is not required, certainly not all the time.³³⁰

The economic realities for each work created, along with the self-determination theory factors, explain the choice made by authors to opt into copyright's economic system or to opt into an alternative distribution

324. See Mihály Csíkszentmihályi, *The Flow Experience and its Significance for Human Psychology*, in OPTIMAL EXPERIENCE: PSYCHOLOGICAL STUDIES OF FLOW IN CONSCIOUSNESS 25-30 (Mihály Csíkszentmihályi & Isabella Selega Csíkszentmihályi eds. 1988) (discussing a variety of theories and emphasizing Flow theory. "The universal precondition for flow is that a person should perceive that there is something for him or her to do, and that he or she is capable of doing it").

325. *Self-Determination Theory*, *supra* note 317, at 182.

326. *Id.* at 183.

327. Registration is not a requirement for copyright protection, however, only for standing for a U.S. author to bring suit. See 107 U.S.C. §§ 408, 411 (2012).

328. See 17 U.S.C. §§ 408(c)(3), 411(a).

329. See, e.g., Maria Lilla Montagnani, *A New Interface Between Copyright Law and Technology: How User-Generated Content Will Shape the Future of Online Distribution*, 26 CARDOZO ARTS & ENT. L.J. 719, 762 (2009) ("[A] characteristic feature of the market for online distribution is the simultaneous coexistence of different systems of distribution . . . within which it is difficult to draw a line between proprietary and open distribution . . ."); Laura N. Gasaway, *The New Access Right and its Impact on Libraries and Library Users*, 10 J. INTEL. PROP. L. 269, 304-05 (2003) ("The idea is to establish some alternative approaches to licensing that will produce income for the copyright holder but will encourage contributions to the public domain. The assumption is that there are many creators who will welcome the exposure and benefits they will gain . . ."); Jon M. Garon, *What If DRM Fails?: Seeking Patronage in the Iwasteland and the Virtual O*, 2008 MICH. ST. L. REV. 103, 148 (2008) (discussing whether "the wooden stage has given way to a limitless arena, bounded only by the flights of fancy imagined by the programmers, illustrators, and participants in the online world. Can these worlds also sustain a professional class of participants . . .?").

330. See Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1517 (2008) ("[M]ost major content owners today want to see fans fully engage with their favorite content and are working hard to provide legitimate ways to do that."); Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV J. SPORTS & ENT. L. 95, 97-99 (2010) [hereinafter *Wiki Authorship*].

system³³¹ If Jeremy Bentham is correct, then these choices reflect the utility of copyright and the utility of the alternatives.³³² Rather than focus on efficiency within copyright, the foundational economic questions should focus on copyright as one of many possible idea generation and dissemination regimes.³³³ The market can determine which such regime best creates new ideas for the benefit of the public.³³⁴

VII. A POSSIBLE CONSENSUS ON ATTRIBUTION AND OTHER COPYRIGHT REFORMS

While this may be economic, workplace studies suggest that noneconomic rewards may have strong behavioral incentives.³³⁵ Positive peer reviews, control of one's work, attribution, and other non-economic rewards provide the stimulus needed for continued efforts as an author.³³⁶

Non-economic rewards fit nicely into open source software movements, wiki authorship projects, and free licenses that academic authors give of their works.³³⁷ In all these cases, the reward comes from attribution and peer recognition.³³⁸ These reinforcements are precisely the “approval motive, avoidance of shame, contingent self-esteem, and ego-involvements”³³⁹ anticipated by the external, controlled motivation underlying self-determination theory.³⁴⁰

The most obvious of these noneconomic rights are the moral rights available to authors outside the United States,³⁴¹ and to authors of certain works of visual arts within the United States.³⁴² Outside of visual works,

331. See Montagnani, *supra* note 329, at 771 (explaining economic incentives with alternate models).

332. See, e.g., George Loewenstein, *Emotions in Economic Theory and Economic Behavior*, 90 AM. ECON. REV. 426, 426 (2000).

333. See Montagnani, *supra* note 329, at 771 (explaining economic incentives with alternate models).

334. See *id.* at 755.

335. See Susanne Neckermann et al., *What is an Award Worth? An Econometric Assessment of the Impact of Awards on Employee Performance* (CESifo, Working Paper No. 2657, 2009), available at <http://ssrn.com/abstract=1407003>.

336. See Neckermann, *supra* note 335, at 3.

337. *Id.* (discussing the publicity authors obtain through free licensing).

338. *Id.*

339. *Self-Determination Theory*, *supra* note 317, at 182.

340. See *Wiki Authorship*, *supra* note 330, at 124-25 (“[T]he attribution information provides similar rules of engagement for the page editors and curators—a form of engagement that is not provided to the casual users of the wikis.”).

341. Berne Convention for the Protection of Literary and Artistic Works, art. 6^{bis}, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221, 235 [hereinafter *Berne*].

342. See 17 U.S.C. § 106A (2012) (“[T]he author of a work of visual art— (1) shall have the right— (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create.”).

contract law and industry norms generally provide the context for protection of an author's right of attribution.³⁴³ "Attribution is foundational to the modern economy Credit is instrumentally beneficial in establishing a reputation and intrinsically valuable simply for the pleasure of being acknowledged. Indeed, credit is itself a form of human capital."³⁴⁴

Broadening rights of attribution fit squarely within the self-determination theory of copyright because the noneconomic control of an author's name may be the primary motivation involved in copyright contracting.³⁴⁵ It is possible that granting attribution rights would be sufficient for many authors, enabling them to relinquish other exclusive rights, if a form other than a positive license could protect the rights.³⁴⁶

Authors' ability to protect rights of attribution outside of contract law has worsened considerably since the U.S. Supreme Court decided *Dastar Corp. v. Twentieth Century Fox Film Corp.*³⁴⁷ In *Dastar*, the Supreme Court used copyright to preempt trademark law and the unlimited rights of publishers to exploit materials in the public domain to all works, whether protected by copyright or not.³⁴⁸ The Court started with an accurate explanation of the public domain.³⁴⁹ "The right to copy, and to copy without attribution, once a copyright has expired, like 'the right to make [an article whose patent has expired]—including the right to make it in precisely the shape it carried when patented—passes to the public.'"³⁵⁰ The Court also made clear that trademark law could not be used to limit the public domain or to require attribution for public domain works³⁵¹

Unfortunately, the decision took an additional step, excluding trademark protection for copyrighted works more generally.³⁵²

343. Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 51 (2006).

344. *Id.* at 50.

345. See *Wiki Authorship*, *supra* note 330, at 108 (discussing an attribution default norm in the creative commons license beginning in 2004). As the creative commons website explained, "[o]ur web stats indicate that 97-98% of you choose Attribution, so we decided to drop Attribution as a choice from our license menu - it's now standard." Glenn Otis Brown, *Announcing (and Explaining) Our New 2.0 Licenses*, COMMONS NEWS (May 25, 2004), <http://creativecommons.org/weblog/entry/4216>.

346. *Wiki Authorship*, *supra* note 330, at 108-09.

347. See generally *Dastar Corp. v. Twentieth Cent. Fox Film Corp.*, 539 U.S. 23, 33 (2003).

348. *Id.* at 34.

349. See *id.* at 25-26 (providing a factual background of the case and how copyright law influences the public domain).

350. *Id.* at 33 (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964)).

351. *Id.* at 33-34 ("[O]nce the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution. Thus, in construing the Lanham Act, we have been 'careful to caution against misuse or over-extension' of trademark and related protections into areas traditionally occupied by patent or copyright." (quoting *Trafax Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 29 (2001))).

352. See *Dastar*, 539 U.S. at 37.

In sum, reading the phrase “origin of goods” in the Lanham Act in accordance with the [Trademark] Act’s common-law foundations (which were *not* designed to protect originality or creativity), and in light of the copyright and patent laws (which *were*), we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.³⁵³

There was no need to reach beyond public domain works to reach the rights of an author to claim she was the “origin of the goods” embodied in communicative works protected by copyright.³⁵⁴ Nonetheless, decisions following *Dastar* have not focused on the facts of the decision but rather the sweeping rhetoric, which suggests that trademark rights are unavailable to authors.³⁵⁵

The decision to remove trademark protection from authors causes an international concern, as well.³⁵⁶ The U.S. admission into the Berne Convention relied, at least in part, on the patchwork of non-copyright protections available to authors³⁵⁷ to protect rights of attribution and integrity required under Article 6^{bis} of the treaty.³⁵⁸ To eliminate the ability to protect from unauthorized third party non-attribution or misattribution is inconsistent with both U.S. treaty obligations³⁵⁹ and self-determination theory.³⁶⁰

353. *See id.*

354. *See, e.g.,* Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 268 (2004).

355. *See, e.g.,* Williams v. UMG Recordings, Inc., 281 F. Supp. 2d 1177, 1185 (C.D. Cal. 2003) (“[T]he Supreme Court’s holding did not depend on whether the works were copyrighted or not Rather . . . the Court noted that protection for communicative products was available through copyright claims.”).

356. *Viet Nam or Bust: Why Trademark Pirates are Leaving for Better Opportunities in Viet Nam*, 14 DICK. J. INT’L L. 291, 293 (1996).

357. WILLIAM STRAUSS, *THE MORAL RIGHT OF THE AUTHOR* 115 (1959), *reprinted in* 2 STUDIES ON COPYRIGHT 963, 965-76 (Arthur Fisher ed. 1963).

358. Berne, *supra* note 342, at 235. *See also* Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap”*, 2007 UTAH L. REV. 659, 714 (2007).

359. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1803-04 (2012) (calling for statutory changes to add a right of attribution); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 84-85 (2007); Laura A. Heymann, *The Birth of Authorship: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1445-46 (2005); Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 988 (2002).

360. *See, e.g.,* Deci & Ryan, *supra* note 309, at 3 (providing why it will likely be more difficult to be one’s “self” of third party intruders without authorization are prevalent).

Moreover, there is little utilitarian value in misinformation, so the duty to provide proper attribution comes at little expense.³⁶¹ For example, “[t]he United Kingdom provides authors of certain copyrightable works with a waivable right to be named as the author of their works in a clear and reasonably prominent manner.”³⁶² A non-utilitarian cost may arise if the right of attribution were neither waivable nor assignable.³⁶³

Publication likely has a disproportionate benefit for professional creators.³⁶⁴ A recent empirical study trying to determine the economic value of publication and attribution suggests that while all authors overvalue their works, attribution will not interfere with the valuation.³⁶⁵ There is some empirical support for even the utilitarian value of attribution rights.³⁶⁶ Much stronger, however, is the evidence of the value placed on attribution rights, particularly the value professionals place on them.³⁶⁷ Attribution, therefore, clearly benefits both the desire to promote professional authors as a goal for promoting higher quality works, and, as a strong controlled motivation, enhances interjected regulation that marries the intrinsic goal for authors with the global default norms for authors.³⁶⁸

An economic consideration that may help alleviate concerns about over-enforcement and other transaction costs arising from default rights of attribution could be the adoption of an express standard for *de minimis non curat lex*.³⁶⁹ “[D]e minimis can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”³⁷⁰ Of course, no copyright claim exists if there is nothing protected by copyright, so the *de minimis* threshold goes to the trivial amount copied.³⁷¹

In *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*,³⁷² the Second Circuit applied the *de minimis* doctrine to dismiss a case of a photograph of the copyright holder’s product incorporated into a display

361. See, e.g., Sprigman et al., *supra* note 215, at 1402 (citing Copyright, Designs and Patents Act, 1988, c. 48, §§ 77-78 (U.K.)).

362. *Id.*

363. *Cf. id.* at 1402.

364. *See id.* at 1411

365. *See id.*

366. See Sprigman et al., *supra* note 215, at 1427 (“For those scholars who promote attribution rights from a utilitarian perspective, the significant positive value that creators attach to attribution may seem to support provision of such rights.”).

367. *See id.*

368. *See id.*

369. *Ringgold v. Black Ent. TV, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (“[T]he law does not concern itself with trifles.”).

370. *Id.* See also *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998).

371. *Ringgold*, 126 F.3d at 74.

372. *Knickerbocker Toy Co. v. Azrak-Hamway Int’l, Inc.*, 668 F.2d 699, 702 (2d Cir. 1982).

card, since the display card was not used.³⁷³ *Knickerbocker* involved significant copying and public display.³⁷⁴ The consequence of the copying proved *de minimis*.³⁷⁵ Today, that discussion would likely warrant a complex fair use analysis to get to the same result.³⁷⁶

Particularly in the area of expanded rights of attribution, *de minimis* failures to attribute should not result in judgments.³⁷⁷ Copyright law can set the appropriate normative rule, but like other loose aspects of copyright, there can be space between the normative expectation and the legally enforced obligations.³⁷⁸

VIII. CONCLUSION

At the heart of the copyright debate remains a fundamental disagreement over whether an exclusive right provides authors a utilitarian tool to incentivize authors or whether it represents societies' investment in authors to keep them committed to producing the best works they can.³⁷⁹ Economic theories cannot overcome the reality that authors are not economically rational.³⁸⁰ Authors believe the work they invest their time, souls, and effort in can change the world.³⁸¹ They prize it far more highly than any statistical model.³⁸² The works they create have fueled the creative economy and the information age.³⁸³

Rather than seeking an optimal economic ideal that risks economically undermining this growth, use of self-determination theory can aid copyright policy makers to focus on those attributes of copyright that promote the well-recognized internal drives to create and focus the external incentives on those that promote professional authorship.³⁸⁴ Since those works which most effectively develop critical new ideas and those works that best influence the aesthetics of their age stand as the most beneficial to the

373. *Id.*

374. *Id.* The public display included putting the product in question in catalogues.

375. *Id.* at 702-03. The product in question actually had significantly different characteristics than the product it was allegedly copied from.

376. *See, e.g.,* Hughes, *supra* note 358, at 703.

377. *Id.*

378. *Accord* Garon, *supra* note 150, at 1353 (“Rather than suggesting that the law should become stronger to protect copyright, then, it seems more appropriate that the shapers of the law recognize the dissonance between current law and society.”); *Information as Property*, *supra* note 226, at 369 (discussing nature of leaky copyright).

379. *See* Sprigman et al., *supra* note 215, at 1427.

380. *See id.* at 1392.

381. *See id.*

382. *See id.*

383. *See id.*

384. *See, e.g.,* Fromer, *supra* note 359, at 1754.

public, the focus should be on the professional authors who can invest the time and effort to hone their craft and build a powerful body of work.³⁸⁵

Nurturing professional authors and incentivizing the creative drive more generally suggests a change to U.S. law to restore rights of attribution through copyright and trademark doctrine so that the highly valued right to credit or attribution can be protected through a mechanism other than contract law.³⁸⁶

Along with recommendations that this understanding of copyright should dictate broader attribution rights, it also suggests strong support for a broad understanding of fair use.³⁸⁷ Particularly as applied to education, comment, and criticism, fair use enables copyright policy to nurture and support the creative incentive and help inculcate the creative professional class.³⁸⁸ Similarly, to ensure that copyright enforcement does not get in the way of copyright's purpose, the doctrine of *de minimis* should be recognized more broadly.³⁸⁹

This approach fits nicely within the modern science of psychology, as well as the founding understanding of copyright.³⁹⁰ From the time of the American Revolution, copyright was understood to achieve twin purposes of encouraging the innate creativity within our new nation and promoting a professional cadre of authors who would share the light the lamps of knowledge throughout the world.³⁹¹ This goal has not changed.³⁹² The lamp remains brighter than ever.

385. *See id.* at 1762.

386. *See id.* at 1805.

387. *See id.* at 1819.

388. *See id.*

389. *See, e.g., Knickerbocker*, 668 F.2d at 702-03. The product in question actually had significantly different characteristics than the product it was allegedly copied from, and; therefore, the *Knickerbocker* Court correctly applied the *de minimis* standard.

390. *See Hughes, supra* note 358, at 662 (explaining that various copyright views refer to economic incentives and moral rights).

391. *See id.*

392. *See Fromer, supra* note 359, at 1777.