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## A. THE THEORETICAL UNDERPINNINGS OF COPYRIGHT LAW

Many people believe that the reason copyright exists is to protect those who create works from those who would pilfer them. While this is, in many ways, the effect of copyright law, and indeed it is copyright law's intended effect, it is not *why* copyright law exists. As stated in the Constitution's Intellectual Property Clause, the fundamental purpose of the U.S. copyright system is to "promote… Progress. . . ." Simply pointing to the constitutional language, however, masks the complexity of the values that animate copyright law. What did the Framers mean by "Progress"? How should "Progress" be measured? Why do other countries, not guided by the language of the U.S. Constitution, grant copyright protection?

### 1. Incentives for Authors and Publishers

To understand why copyright might be necessary, consider a world in which no copyright protection exists. An author may spend months or even years writing a novel that she hopes will earn her a comfortable income as recompense for her efforts. Imagine that the author's publisher decides to sell copies of her novel for a modest $20. That price will allow the publisher to recover the costs of reproduction, distribution, marketing, and, of course, the author's compensation. In a world without copyright, once the novel is publicly available, no legal rule would prevent others from freely copying it. In fact, another publisher could take our hypothetical author's novel, reproduce copies of it, and sell them for less than $20, say $16. Sales at $16 still would be profitable because this publisher need not pay the author. Who would buy the $20 copies from the author's publisher when the exact same novel is available elsewhere for $16? Next, another company could begin selling copies for even less than $16, and so on, until the price approached the cost of the cheapest way to make and distribute the copies (in economic terms, the marginal cost).[1]

While the copyists might be able to recover their full costs of production, in this hypothetical world, the author will not receive anywhere near the same level of compensation that she would receive in a world with copyright. She will receive payments from her publisher, but the amount will decrease toward zero over time as copyists make cheaper versions of her work available. The total she receives may no longer provide her with sufficient incentive to write the novel in the first place. While at first glance the public might seem to benefit from lower prices in a world without copyright, in fact it might be harmed if, on the whole, fewer works were produced.

The example above highlights the social costs of insufficient legal protection for creative labor and illustrates what economists call the public goods problem in intangibles. The cost of creating new works is often high, but the cost of reproducing them is low and, once the work is created, reproducing it in no way depletes the original. This latter characteristic is referred to as "nonrivalrous" consumption: One party's use of the good does not interfere with another party's use. Intangible goods, including copyrighted works, are not like tangible

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[1] Marginal cost is the additional cost to produce one more unit of output. In the case of copyrighted works, the marginal cost is the expense to produce and distribute one more unit of the medium embodying the work. Standard economic theory holds that in a competitive market, sellers will price their products at marginal cost. Pricing at marginal cost, however, does not permit the creator of the work to recoup the fixed costs incurred in creating the work initially. Copyright gives the rightholder some market power to enable pricing above marginal cost. It thereby also produces some amount of deadweight loss (i.e., the loss associated with above-marginal-cost pricing). Note that the grant of copyright protection will not necessarily result in the rightholder obtaining an economic monopoly, because market substitutes for the work may exist. The deadweight losses associated with above-marginal-cost pricing will increase as the rightholder's market power increases.

goods with rivalrous consumption characteristics. For example, if one person eats an apple, it interferes with another person's ability to eat the same apple. In contrast, if one person sings a song, it does not interfere with another person's ability to sing the same song. Similarly, one person reading a novel does not interfere with another person's ability to read the same novel. The second person may not be able to use the same *copy* of the book at the same time, but once the work has been released to the public, an unlimited number of people may consume the work without depleting it.

Public goods also have the characteristic of nonexcludability. Once the good is produced, there is no way to exclude others from enjoying its benefits. The classic example of national defense best illustrates the nonexcludability principle. When a country's citizens' tax dollars pay for the national defense, there is no way to exclude non-taxpaying citizens from the benefits of that defense system. Similarly, once a copyrightable song is released to the public, it is impossible to exclude non-paying members of the public from hearing and enjoying it. And unless the manuscript of a novel is kept under lock and key, it is impossible to restrict appreciation of its plot, characters, and wording only to those who have paid for a copy.

One explanation for copyright protection is that it is necessary to solve the public goods problem. The copyright bundle of rights confers on the author a legal entitlement to exclude others from enjoying certain benefits of the work. This enables an author to recoup her investment in its creation. Legal protection also encourages disclosure and dissemination of the work because the author no longer needs to fear the copyist; the law will provide a remedy to stop unauthorized copying and to compensate for the harm it causes. By solving the public goods problem, copyright law furnishes incentives to creators and publishers to invest in creative activities and thereby prevents underproduction of creative works.

As thus described, copyright's purpose is purely utilitarian. Copyright law exists to provide a marketable right for the creators and distributors of copyrighted works, which in turn creates an incentive for production and dissemination of new works. . . . The Framers of the U.S. Constitution embraced this utilitarian rationale for copyright protection when they granted Congress the power to enact copyright laws. Granting a limited monopoly to the authors of creative works provided a means for the fledgling country to encourage progress in knowledge and learning.

This is not to suggest that the only (or primary) reason authors create is the promise of a monetary reward. To the contrary, creators report a wide variety of motivations, including passion and dedication to their craft. *See, e.g.,* Jessica Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (2014). Even so, there are economic costs associated with creative activity (e.g., materials and promotion costs) as well as opportunity costs that arise when authors choose to invest time in creative endeavors rather than pursuing other, more immediately lucrative, activities. Copyright establishes a baseline set of rights that authors may choose to exercise.

Focusing solely on incentives to create works of authorship, moreover, neglects the role that copyright plays in encouraging dissemination of those works. Many creators, whether motivated by the prospect of monetary compensation or not, seek an audience for their works. Before creators had the ability to self-publish on the Internet, they needed the assistance of third parties to disseminate their works. These third party intermediaries are often profit-motivated entities. Because copyright law provides remedies to stop unauthorized copying and compensate for the monetary harm it has caused, it furnishes incentives for publishers

and other production intermediaries to invest in cultural production. Viewed this way, copyright "creates a foundation for predictability in the organization of cultural production, something particularly important in capital-intensive industries like film production, but important for many other industries as well." Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 Wisc. L. Rev. 141, 143.

As you will learn, utilitarian thinking about copyright law must carefully consider the appropriate scope of the rights to be granted. Granting copyright may solve the public goods problem, but only if the rights are tailored in ways that respect other social interests. Keep in mind that no work is truly original. Rather, all works build to some extent on earlier creations: Would Suzanne Collins have written *The Hunger Games*, or Merian C. Cooper *The Most Dangerous Game*, if not for the Greek myth of Theseus? Exclusionary rights that are too strong may result in robust levels of production initially and less than optimal production of subsequent-generation works.

The state of technology for copying and distributing works also affects the optimal scope of copyright protection because technology determines the ease with which copyrights may be enforced or infringed. The development of networked digital technologies has affected—and, according to some, jeopardized—the efficacy of the exclusive rights afforded by copyright. Paradoxically, at the same time such technologies have caused some to question the assumptions that lead to the conclusion that copyright protection is necessary for progress. Consider the following excerpt.

***Trotter Hardy, Property (and Copyright) in Cyberspace***

***1996 U. Chi. Legal F. 217, 220-28.***

We can find the typical incentives that face most information producers by asking what information producers need to overcome their fears of cheap copying. The general answer is not "copyright law," because that reflects too narrow a conception. The better answer is that would-be producers of information need *some assurance that copying will be limited.* The notion of "some assurance" rather than "complete assurance" reflects the fact that 100 percent assurance of anything—or zero risk—has never been a requirement of any business. Similarly, I use the deliberately vague notion of "limited" copying rather than "no copying" because the exact amount of copying that an information producer will tolerate will vary widely depending on the type of information being produced, the goals of the producer, and so on.…

Given, then, that producers of information products need some assurance that copying will be limited, the next question is how producers obtain that assurance. In other words, how do they "limit" copying? This question is best answered by looking at the aggregate combination of four factors: 1) entitlement-like protection; 2) contract-like protection; 3) state-of-the-art limitations; and 4) special-purpose technical limitations. Other factors also could be listed; I do not mean that these four are exclusive, but rather that they seem intuitively important enough to merit particular attention. In any event, nothing will be lost by a simplified analysis because my essential points do not depend on the exact number of factors.

…The first factor is "entitlement-like protection." By this I mean the wide recognition that informational products have an "owner" and that this owner has some "rights" that would

be violated by unauthorized copying of the product. Such rights inhere in the product or the owner and are binding on the world in general; they are not a matter of contract.…

The second limitation on copying arises from contract. In contrast to the entitlement regime, a contract regime protects information only because two or more parties have agreed to treat the product as protected. Those who are not a party to any such contract are not bound by its terms.…

…This happens, for example, when users of an information service such as Lexis or Westlaw sign an access agreement. Much of the information on these services consists of public-domain material: cases and statutes. Without a contract limiting the practice, the user of such a service could copy and resell the material. Contracts with the services provide otherwise, of course, and these contracts are based not on any entitlement to the public-domain information, but rather on the consideration of allowing access to the service.…

After entitlements and contracts comes a third form of limitation on copying—the state-of-the-copying art. For any medium of expression, making a copy entails costs, yet obviously different media entail very different copying costs. Technological changes affect this cost. For example, if a manuscript must be written out by hand to make a copy, the cost of doing so—in time, money, and "trouble"—imposes a natural limit on how many copies one will make of the manuscript. Similarly, a glossy magazine like the *National Geographic* can be photocopied on a photocopier, but this fact seems almost irrelevant to the *National Geographic*'s plans for distribution. Readily accessible, inexpensive copy machines only produce black and white copies on poor quality paper. Photographs reproduce especially poorly.…

Finally, special-purpose technological restrictions can limit copying. A typical example of such self-help measures is the use by cable companies of signal "scrambling." For a home viewer to have access to certain channels, the viewer must pay the cable company for a piece of electronic equipment that will "descramble" the signal and render it viewable. This has nothing to do with the state-of-the-cable art: cable companies are able with present technology to send a signal down the cable wire for viewing. Rather, it is the result of individual effort by the information owner (or transmitter) to overcome what otherwise might be too little limitation from entitlement-like rules, unenforceable contracts, or a state-of-the-art that permits ready copying.…

It is helpful to think of this four-part "aggregate assurance" of limited copying in the form of a pie chart. One slice of the "pie" represents the limitations inhering in the "state-of-the-copying art," another represents "entitlement-like" protection, and so on. The overall size of the pie—the sum of all four factors—is what matters to information producers, because the overall size determines how limited the unauthorized copying of their product will be.

…The taxonomy implies that if one of the "slices" of the pie grows or shrinks, other slices must shrink or grow proportionally if the producer is to preserve the same overall assurance of limited copying.…

### 2. Authors' Rights

The utilitarian justification for copyright protection is not the only possible rationale for granting exclusive rights to authors of creative works. Some argue that such rights are

morally required. The countries of continental Europe generally subscribe to the notion that an author's natural right in her creation is the principal justification for copyright protection. For example, Professor Jane Ginsburg explains the French understanding of authors' rights as follows:

> …[P]ost-revolutionary French laws and theorists portray the existence of an intimate and almost sacred bond between authors and their works as the source of a strong literary and artistic property right. Thus, France's leading modern exponent of copyright theory, the late Henri Desbois, grandly proclaimed: "The author is protected as an author, in his status as a creator, because a bond unites him to the object of his creation. In the French tradition, Parliament has repudiated the utilitarian concept of protecting works of authorship in order to stimulate literary and artistic activity."

Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 Tul. L. Rev. 991, 992 (1990).

Other strands of continental European thinking about copyright derive from the works of the philosophers Immanuel Kant and G. W. F. Hegel, who argued that literary works were external embodiments of authorial personality or will. Particularly under Hegelian thought, literary and artistic productions can be the subject of economic transactions, but the relationship between the author and the work remains specially deserving of protection. Professor Margaret Jane Radin supplies this explanation of a Hegelian approach in the context of tangible property:

> A person cannot be fully a person without a sense of continuity of self over time. To maintain that sense of continuity over time and to exercise one's liberty or autonomy, one must have an ongoing relationship with the external environment, consisting of both "things" and other people.…One's expectations crystallize around certain "things," the loss of which causes more disruption and disorientation than does a simple decrease in aggregate wealth. For example, if someone returns home to find her sofa has disappeared, that is more disorienting than to discover that her house has decreased in market value by 5%.

Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 1004 (1982). According to Professor Radin, this view of the origin of property rights justifies stronger property rights in the objects that are most closely bound up with one's sense of personhood.

The European authors' rights approach to copyright includes a concept called moral rights that protects certain non-economic interests of authors. Authors have rights to prevent distortion, destruction, or even misattribution of a work. Despite global harmonization efforts, U.S. copyright law with its utilitarian underpinnings affords only limited protection for moral rights.

Even in the United States where the utilitarian justification for copyright predominates, one can detect in copyright law strands of the idea that authors have certain natural rights in their works. Unlike continental Europe's conception of an almost sacred bond of personality between an author and her work, to the extent that American law incorporates a natural rights

theory, it relies in large measure on premises derived from the writings of John Locke, particularly his *Two Treatises on Government*.

***John Locke, Two Treatises on Government***

***Book II, ch. V (1690)***

God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life, and convenience.…[Y]et being given for the use of Men, there must of necessity be a means *to appropriate* [the earth and its contents] some way or other before they can be of any use.…

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsover he then removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.…[I]t hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.

He that is nourished by the Acorns he pickt up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself.…I ask then, When did they begin to be his?…And ‘tis plain, if the first gathering made them not his, nothing else could. That *labour* put a distinction between them and common.…And will any one say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? Was it a Robbery thus to assume to himself what belonged to all in Common? If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him.…

It will perhaps be objected to this, That if gathering the Acorns, or other Fruits of the Earth, &c. makes a right to them, then any one may *ingross* as much as he will. To which I Answer, Not so. The same Law of Nature, that does by this means give us Property, does also *bound* that *Property* too.…As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.…

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Professor Wendy Gordon supplies this explanation of how Locke's arguments translate into our time and, specifically, to the intellectual property context:

> Locke’s property theory has many strands, some of which are overtly utilitarian and others of which draw on varying notions of desert. To the extent that his theory purports to state a nonconsequentialist natural right in property, it is most firmly based on the most fundamental law of nature, the “no-harm principle.” The essential logic is simple: Labor is mine and when I appropriate objects from the common I join my labor to them. If you take the

> objects I have gathered you have also taken my labor, since I have attached my labor to the objects in question. This harms me, and you should not harm me. You therefore have a duty to leave these objects alone. Therefore I have property in the objects.
>
> Similarly, if I use the public domain to create a new intangible work of authorship or invention, you should not harm me by copying it and interfering with my plans for it. I therefore have property in the intangible as well.…

Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1544-45 (1993).

### NOTES AND QUESTIONS

**1.** How might the difference between tangible objects and intangible "labors of the mind" affect the types of rights that society should grant to a laborer? In general, copyright law does not ask how hard someone worked in creating a particular work and then assign rights commensurate with that effort. In fact, some creative works that are afforded copyright protection are the result of mere fortuity. *See, e.g.*, *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (acknowledging copyright protection for a home movie of the presidential motorcade during which JFK was shot). Other works are not granted protection despite painstaking effort exerted in their creation. *See, e.g.*, *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987) (refusing to recognize copyright protection in reproduction of public domain art prints completed through an exacting and time-consuming process). Is this consistent with Lockean labor theory? Is it more consistent with the utilitarian justification for copyright?

**2.** Does the European authors' rights approach supply a more plausible justification for copyright in works of authorship than the Lockean labor theory approach? Why, or why not?

**3.** Growing demand by indigenous people and local communities, including Native American tribes, for protection of their creative works has generated deep tensions in copyright law. Traditional Cultural Expressions (TCEs) such as designs, paintings, music, and three-dimensional art forms are often associated with sacred rituals and are deeply linked with indigenous land claims. Ownership interests in TCEs are usually held collectively by the group. Does the authors' rights approach supply a justification for recognition of rights in TCEs within the modern copyright framework, or are the interests different? What limits on the protection of TCEs might be necessary from the utilitarian perspective?

**4.** As you study copyright law, consider how differences in theoretical justifications for copyright might influence matters such as subject matter eligibility, scope of protection, copyright duration, and the use of limiting doctrines.

### 3. A Robust Public Domain

The existence of the public domain is a foundational principle of the U.S. copyright system. Unfortunately, the term "public domain" is not amenable to a simple definition. Certainly, it includes works for which copyright protection has expired. Recall that the Intellectual Property Clause expressly states that rights may be granted to authors only for

"limited Times." Passage into the public domain is thus mandated by the Constitution itself. But what else does the public domain include, and what purposes does it serve?

***Jessica Litman, The Public Domain***

***39 Emory L.J. 965, 965-67, 975-77 (1990)***

Our copyright law is based on the charming notion that authors create something from nothing, that works owe their origin to the authors who produce them. Arguments for strengthening copyright protection, whether predicated on a theory of moral deserts or expressed in terms of economic incentives, often begin with the premise that copyright should adjust the balance between the creative individuals who bring new works into being and the greedy public who would steal the fruits of their genius.

The process of authorship, however, is more equivocal than that romantic model admits. To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined. But the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already "out there" in some other form. This is not parasitism: it is the essence of authorship.…

The lay understanding of the public domain in the copyright context is that it contains works free from copyright. Works created before the enactment of copyright statutes, such as Shakespeare's *Macbeth* or Pach[el]bel's *Canon*, are available for fourth grade classes across the nation to use for school assemblies without permission from any publisher or payment of any royalties. Another class of old works in the public domain are works once subject to copyright, but created so long ago that the copyright has since expired, such as Mark Twain's *Huckleberry Finn*.…

But the class of works not subject to copyright is, in some senses, the least significant portion of the public domain. The most important part of the public domain is a part we usually speak of only obliquely: the realm comprising aspects of copyrighted works that copyright does not protect. Judge Learned Hand discussed this facet of the public domain in connection with an infringement suit involving a play entitled *Abie's Irish Rose*:

> We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so far as it has been anticipated by earlier plays of which she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain.

The concept that portions of works protected by copyright are owned by no one and are available for any member of the public to use is such a fundamental one that it receives attention only when something seems to have gone awry. Although the public domain is

implicit in all commentary on intellectual property, it rarely takes center stage. Most of the writing on the public domain focuses on other issues: Should the duration of copyright be extended? Should we recognize new species of intellectual property rights? Should federal intellectual property law cut a broad preemptive swathe or a narrow one? Copyright commentary emphasizes that which is protected more than it discusses that which is not. But a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all.…

### 4. An Uncensored Marketplace of Ideas

Those who emphasize the importance of the public domain in copyright law seek to understand copyright in the context of the creative practices that occur within society. A different approach to the social context of copyright law views copyright as effectuating purposes more commonly associated with the modern First Amendment. This approach draws on the fact that the constitutional grant of authority to enact copyright protection is the only part of the original Constitution to address the issue of freedom of expression. Remember that the Bill of Rights, including the First Amendment, came later.

Professor Neil Netanel argues that copyright is best understood as a system intended to support our democratic civil society. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283 (1996). He argues that copyright fulfills both a "production function" and a "structural function" that together create a marketplace characterized by a diversity of expression. Such diversity supports and, indeed, is a necessary condition of, a democratic regime.

According to Professor Netanel, copyright law's production function "encourages creative expression on a wide array of political, social, and aesthetic issues. The activity of creating and communicating such expression and the expression itself constitute vital components of a democratic civil society." *Id.* at 347. He stresses that by encouraging production and dissemination of works, copyright law helps to ensure that the body politic has the information it needs to participate in democratic processes. His reasoning applies not only to factual works but also to creative ones, on the ground that "[m]any creative works have broad political and social implications even if they do not appear or even seek to convey an explicit ideological message." *Id.* at 350.

In Professor Netanel's model, copyright law also performs a structural function by encouraging the creation of copyright industries that are independent of government control:

> Prior to the first modern copyright statutes in the eighteenth century, writers and artists were heavily dependent on royal, feudal, and church patronage for their livelihoods. This dependency undermined expressive autonomy and thwarted the development of a vital, freethinking intelligentsia.…
>
> When the Framers drafted the Copyright Clause and the Copyright Act of 1790, they took as self-evident that the diffusion of knowledge and exchange of view through a market for printed matter was a pillar of public liberty.…

> Part and parcel of this vision was an understanding that democratic governance requires not simply the diffusion of knowledge per se, but also an autonomous sphere of print-mediated citizen deliberation and public education.…It was only by maintaining their fiscal independence that authors and publishers could continue to guard public liberty.…

*Id.* at 353, 356-58.

**NOTES AND QUESTIONS**

**1.** Do you read Professor Netanel to be arguing that the Framers originally conceived copyright as a means for social engineering or that the modern state should use copyright that way to effectuate the Framers' more general purpose? Do you agree with either argument?

**2.** Do modern government grant programs that subsidize the production of creative works pose structural risks to freedom of expression similar to those identified by Professor Netanel? Does public university funding of various creative endeavours pose such risks?

Some countries and many states in the U.S. have dedicated tax revenue to support their film industries. For example, the Canada Feature Film Fund, administered by Telefilm Canada, provides assistance for screenwriting, production, marketing, and promotion of feature films. Do you think government film industry subsidies threaten or encourage expressive freedoms?

**3.** Professor Netanel makes the following observations regarding the private-sector copyright industries:

> Our public discourse is far more dissonant and eclectic than that envisioned by the Framers. The political elite of the early Republic abhorred expressions of ideological faction and generally disdained fiction and "light" entertainment. Such works, however, form a major part of our copyright-supported discursive universe. From our perspective, the Framers' watchdog view of literature and the press also seems somewhat simplistic. Today's media conglomerates have attained an agenda-setting power that rivals that of state officials and, in the view of some commentators, undermines the democratic character of public discourse by skewing it towards those with the financial wherewithal to obtain access or buy advertised products.

Netanel, *supra* at 358. He concludes that, on balance, the copyright market continues to function as the Framers envisioned:

> But the copyright market also contains room for highly innovative and provocative expression, as well as that targeted for specialized or minority audiences. Significantly, copyright's fundamental capacity to support expressive diversity will likely grow dramatically in the digital age. The ease and low cost of digital production and dissemination has the potential of enabling authors, for the first time, to communicate directly with audiences throughout the world. As a result, many authors will be able to bypass media conglomerates, creating a copyright market characterized by an even greater multiplicity of view.

*Id.* at 360-61. As you continue through the book, consider whether you agree. Consider also what effects different copyright doctrines have on expressive freedoms.

### 5. A Theory of Users' Rights?

Within the traditional framework of copyright regulation, the law is addressed either to authors on whom the law confers protection or to users whose activities the law purports to constrain. In today's networked information economy, the central role of users in the production and exchange of creative materials has given rise to a theory of users' rights as an important justification for copyright law. Professor Jessica Litman observes:

> We sometimes talk and write about copyright law as if encouraging the creation and dissemination of works of authorship were the ultimate goal, with nothing further required to "promote the Progress of Science." We have focused so narrowly on the production half of the copyright equation that we have seemed to think that the Progress of Science is nothing more than a giant warehouse filled with works of authorship. When we do this, we miss, or forget, an essential step. In order for the creation and dissemination of a work of authorship to mean anything at all, someone needs to read the book, view the art, hear the music, watch the film, listen to the CD, run the computer program, and build and inhabit the architecture.…
>
> Copyright law is intended to create a legal ecology that encourages the creation and dissemination of works of authorship, and thereby "promote the Progress of Science."…[L]aws that discourage book reading end up being bad for book authors. Thus, it isn't difficult to frame an argument that copyright law cannot properly encourage authors to create new works if it imposes undue burdens on readers.…[C]opyright law encourages authorship at least as much for the benefit of the people who will read, view, listen to, and experience the works that authors create, as for the advantage of those authors and their distributors.

Jessica Litman, *Lawful Personal Use*, 85 Tex. L. Rev. 1871, 1879-82 (2007).

Other scholars have argued for a more accurate representation of users and their interests in copyright law. According to Professor Julie Cohen, "users play two important roles within the copyright system: Users receive copyrighted works, and (some) users become authors. Both roles further the copyright system's larger project to promote the progress of knowledge." Julie E. Cohen, *The Place of the User in Copyright Law*, 74 Fordham L. Rev. 347, 348 (2007). Professor Cohen identifies three models of the user in copyright jurisprudence and in the academic literature:

> [T]he economic user, who enters the market with a given set of tastes in search of the best deal; the "postmodern" user, who exercises limited and vaguely oppositional agency in a world in which all meaning is uncertain and all knowledge relative; and the romantic user, whose life is an endless cycle of sophisticated debates about current events, discerning quests for the most freedom-enhancing media technologies, and home production of high-quality music, movies, and open-source software.

*Id.*

Characterizing these models of the user as artificial, she advances a fourth model, the "situated user," who "deserves copyright law's solicitude precisely because neither her tastes nor her talents are…well formed." *Id.* at 349. According to Professor Cohen:

> [T]his imperfect being requires our attention because she must nevertheless become the vehicle by and through which copyright's collective project is advanced. The situated user engages cultural goods and artifacts found within the context of her culture through a variety of activities, ranging from consumption to creative play. The cumulative effect of these activities, and the unexpected cultural juxtapositions and interconnections that they both exploit and produce, yield what the copyright system names, and prizes, as "progress." This model of the situated user suggests that the success of a system of copyright depends on both the extent to which its rules permit individuals to engage in creative play and the extent to which they enable contextual play, or degrees of freedom, within the system of culture more generally.…[For the situated user, b]oth her patterns of consumption and the extent and direction of her own authorship will be shaped and continually reshaped by the artifacts, conventions and institutions that make up her cultural environment.…

*Id.* She argues that "[s]cholars and policymakers should ask how much latitude the situated user needs to perform her functions most effectively, and how the current entitlement structure of copyright law might change to accommodate that need." *Id.* at 374.

Other scholars, however, assert that users of networked digital services exert powerful influence on accepted practice with respect to copyrighted works. According to Professor Edward Lee:

> The most significant copyright development . . . has come from the unorganized, informal practices of various, unrelated users of copyrighted works, many of whom probably know next to nothing about copyright law.…
>
> …Whether in blogs, fan fiction, videos, music, or other mashups, many users freely use the copyrighted works of others without prior permission and even beyond our conventional understandings of fair use. Yet, often, as in the case of noncommercial uses of copyrighted works on blogs or in fan fiction, the copyright holders do not seem to care, and, in some cases, publicly condone the general practice. Moreover, the mass practices of many users of . . . sites, like YouTube, of ignoring the need to obtain permission before using someone else's copyrighted work have even prompted the securing of commercial licenses between Web . . . sites and the copyright holders in order to ratify the mass practices of users. Thus, instead of being condemned as infringement, the unauthorized mass practices of users may have, in some instances, turned out to be the catalyst for subsequent ratification of those practices, albeit in some bargained-for exchange not even involving the users themselves.

> Put simply, copyright law as we know it "on the books" is not exactly how copyright law operates in practice. Instead of being defined a priori by statute or at a single snapshot in time, the contours of an author's exclusive rights . . . are being defined by a much messier and more complex process involving a loose, unorganized "give and take" of sorts among users, copyright holders, and intermediaries.…

Edward Lee, *Warming Up to User-Generated Content*, 2008 U. Ill. L. Rev. 1459, 1460-62.

**NOTES AND QUESTIONS**

**1.** Is developing a theory of users' rights a credible constitutional exercise? To the modern eye, the Intellectual Property Clause makes no mention of users at all, yet among the eighteenth-century meanings of the word "progress" was the idea of dissemination. *See* Malla Pollack, *What Is Congress Supposed to Promote? Defining "Progress" in Article I, Section 8, Clause 8 of the U.S. Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754 (2002).

**2.** Can users' rights be conceptualized using other theories of copyright discussed in this section? Can you articulate a theory of users' rights using the tools of economic analysis, the Lockean proviso, or Professor Netanel's argument about the role of copyright in a democratic civil society? Should a theory of the user inform the rights that copyright confers on authors, or should it merely inform defenses to claims of copyright infringement?

**3.** What do you make of the four models of the copyright user outlined by Professor Cohen? Do you think the models are mutually exclusive? Into which model(s) do you fit?

**4.** Is the difference between Professor Lee and Professor Cohen simply one of form? If users have as much freedom within the interstices of copyright law as Professor Lee argues, is a theory of users' rights needed?

### 6. What Progress, and Whose Welfare?

Although the authors quoted above offer different views about exactly how copyright law should be structured, all would agree that copyright law is intended to promote the general public welfare. But is copyright law *necessary* to promote general welfare? "Public welfare" is a slippery concept, and particularly so when one adopts a global perspective. As the following excerpt explores, western-style copyright systems do not fully account for some other cultures' understandings of what "progress" and "welfare" mean. The pronounced influence of the U.S. in international copyright law-making has engendered persistent tensions based on differing national views of these two concepts and how best to pursue them.

***William P. Alford, To Steal a Book Is an Elegant Offense***

***28-29 (1995)***

[Professor Alford describes the cultural acceptance of copying in China prior to the imposition of western notions of intellectual property protection in the late nineteenth and early twentieth centuries. Chinese culture develops with significant reference to the past. The importance of this interaction with the past for further cultural development makes copying of earlier works a culturally valuable activity.]

…Nor, as was often the case in the West, was such use accepted grudgingly and then only because it served as a vehicle through which apprentices and students developed their technical expertise, demonstrated erudition, or even endorsed particular values, although each of these phenomena also existed in imperial China. On the contrary, in the Chinese context, such use was at once both more affirmative and more essential. It evidenced the user's comprehension of and devotion to the core of civilization itself, while offering individuals the possibility of demonstrating originality within the context of those forms and so distinguishing their present from the past.

In view of the foregoing, there was what Wen Fong has termed a "general attitude of tolerance, or indeed receptivity, shown on the part of the great Chinese painters towards the forging of their own works." Such copying, in effect, bore witness to the quality of the work copied and to its creator's degree of understanding and civility. Thus Shen Zhou (1427-1509) is reported to have responded to the suggestions that he put a stop to the forging of his work by remarking, in comments that were not considered exceptional, "if my poems and painting, which are only small efforts to me, should prove to be of some aid to the forgers, what is there for me to grudge about?" Much the same might be said of literature, where the Confucian disdain for commerce fostered an ideal, even if not always realized in practice, that true scholars wrote for edification and moral renewal rather than profit. Or, as it was expressed so compactly in a famed Chinese aphorism, "Genuine scholars let the later world discover their work [rather than promulgate and profit from it themselves]."

**NOTES AND QUESTIONS**

**1.** As the excerpt from Professor Alford's book demonstrates, perspectives on the legitimacy and social value of copying others' creations can vary significantly. During the many centuries in which China fully ascribed to the views described by Professor Alford, Chinese civilization produced a rich bounty of scientific, technical, and artistic creations. Can that reality be squared with the utilitarian justification for copyright protection? With justifications for copyright protection based on authors' rights?

**2.** How much do you think a society's culture and political system affect its view of the legitimacy of copying? Do you think modern China, with the second largest economy in the world, should be able to invoke its history and culture to resist U.S. demands for strong protection of creative works?

**3.** Article 27(2) of the Universal Declaration of Human Rights ("UDHR") (1948) recognizes the right of an individual to the "protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Article 27(1), however, provides that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." UDHR art. 27. If copyright protection and cultural participation are both considered human rights, how should copyright rights be tailored? For analysis of the implications flowing from a human rights conception of intellectual property, see Laurence R. Helfer, *Towards a Human*

*Rights Framework for Intellectual Property*, 40 U.C. Davis L. Rev. 971 (2007). Professor Okediji has criticized conventional human rights discourse, suggesting that it supports strengthening intellectual property rights—even at the expense of social welfare and cultural participation—by privileging liberty claims and deemphasizing economic, social and cultural claims. See Ruth L. Okediji, *Does Intellectual Property Need Human Rights?*, 51 N.Y.U. J. Int'l L. & Pol. 1 (2018).