Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics

Jon M. Garon

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NORMATIVE COPYRIGHT: A CONCEPTUAL FRAMEWORK FOR COPYRIGHT PHILOSOPHY AND ETHICS

Jon M. Garon†

This Article explores the theoretical underpinnings of copyright to determine which theories provide an appropriate basis for copyright. The Article first critiques the leading conceptual underpinnings, including natural law, copyright's intangible nature, economic balancing and copyright's role in creating incentives for new authorship. The Article then addresses each of the three core elements in normative justice—the social contract, the legal rules, and the mechanisms of enforcement—to develop a schema for reestablishing a normatively valid copyright policy.

The research presented demonstrates that the intangible nature of copyright does not govern the public's attitude toward copyright. Instead, norms associated with plagiarism illustrate society's ability to accept intangible property rules, while comparison with shoplifting indicates a strong corollary to piracy involving physical goods. Similarly, the natural rights approach to copyright used in Europe, while a sound basis for copyright protection, provides no additional guidance on how copyright policy should develop.

The Article endorses the constitutional incentive of copyright to promote the progress of science and the useful arts. The Article rejects a modern, narrow, economic interpretation of this mandate and instead endorses the approach consistently articulated by the Supreme Court since Baker v. Selden in 1879, that expression is protected so that authors will develop new facts and ideas for the betterment of the public. The Article concludes by illustrating the consequence of this construction on issues involving the promotion of authorship, while highlighting needed expansion of fair use, protection of reverse engineering, limitations on clickwrap agreements, and cautious constraints on peer-to-peer file sharing.

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† Dean and Professor of Law, Hamline University School of Law. J.D., Columbia Law School; B.A., University of Minnesota. Special thanks to Stacy Blumberg Garon, Professor Sophie Sparrow, and my former colleagues at Franklin Pierce Law Center. This Article may be republished without any additional permission for all non-commercial, educational uses upon the condition that the copyright notice and author attribution are included. The materials may be condensed as necessary for such use, but no other alterations are permitted under this authorization. As a courtesy (but not as a condition of republication and distribution) I would appreciate being informed of the proposed use and forwarded a copy of the final materials as distributed. Additional publications (and those of my former colleagues at Franklin Pierce Law Center) may be found at http://www.ipmall.piercelaw.edu/hosted_resources/publications.asp.

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"How many of you have heard of the Napster System?"
   All the hands shot up.
"And how many of you have used the Napster System?"
   All the hands remained up...
"How many of you engage in rampant shoplifting at the store?"
   All the hands crept down.
The speaker pointed out to the [law] students their moral obtuseness in failing to appreciate that the one activity was equivalent to the other.¹

INTRODUCTION

"Thou shalt not steal"² is an axiomatic rule of both law and morality for all societies. Nonetheless, over 200 million users have downloaded peer-to-peer file sharing software,³ despite the Ninth Circuit's ruling that Napster and similar services constitute theft rather than fair use. The unauthorized downloading of MP3 files is just a small part of the larger problem.

The numbers are sometimes overwhelming. "In 2001, the United States suffered a staggering 111,000 job losses, $5.6 billion in lost wages and $1.5 billion in lost tax revenue due to pirated software."⁴ The motion picture industry estimates an additional $3 billion in lost revenue annually as of 2000.⁵ Add to this an additional $3 billion in the video game industry, and a five percent decline in music sales—which may be worth an additional $4 billion—and the numbers start adding up.⁶

These figures help illustrate the magnitude of the problem. The public does not appear to equate the moral imperative against stealing with the unauthorized downloading of music or piracy of software. Despite statutory authority prohibiting copyright violation,⁷ and supporting case law,⁸ the perception is that no law has been violated, or if it has that the infraction was a mere technicality. Or it may be that the Internet remains an essentially unregulated back alley where traditional notions of law, ethics, and justice have yet to take root.

² Exodus 20:15. See Nimmer, supra note 1, at 24 (commenting on the different numbering systems between the Jewish and Catholic versions of the Ten Commandments).
⁶ See Kathryn Balint, Quite a Reach: The Battle over Control of Copyrighted Material on the Internet Includes Works from the Common to the Arcane, SAN DIEGO UNION-TRIB., July 8, 2002, at E1.
Indeed, the very nature of the Web is what makes it such a playground for hoodlums. . . . Fraudsters can tap into an international audience from anywhere in the world and—thanks to the Net’s anonymity—hide their activities for months, years, forever. . . . That has spawned a bustling Underground Web that’s growing at an alarming rate. Black-market activity conducted online will reach an estimated $36.5 billion this year—about the same as the $39.3 billion U.S. consumers will spend on the legitimate Internet this year, according to researcher comScore Media Metrix.9

An explanation for the incongruity of the public’s perception of right and wrong on the Internet has yet to be fully documented. Anonymity, lack of legal consequences, and fewer social constraints may all play a part.10 For intellectual property more generally, and copyrighted works in particular, this perception may stem from our underlying notions of property and the uneasy coexistence between the tangible and intangible within traditional property schemes. Taking a can from a soda machine is theft because the can has been removed from the machine. Conversely, listening to a jukebox without paying for the privilege leaves the jukebox intact. Closely aligned with the corporeal nature of copyrighted works is the philosophical nature of the property interest most generally associated with the natural rights of an author to own that which he or she creates.

Furthermore, the moral ambivalence towards copyrighted works may stem from a distrust of the basis for copyright protection. If the sole basis for protecting copyright is the economic incentive to create, then as soon as a work is minimally compensated, it should fall into the public domain. Emphasis on the incentive theory may weaken the legitimacy of copyright holders’ claims.

A third rationalization for violating copyright may stem from the sense that copyright should serve as a shield, but never a sword; it should protect authors and artists, but not be used against the creative community to limit creative authorship. Within this framework, those who decry the erosion of the public domain, those who value reverse engineering, and those who fear an expansion of contract law to supplant copyright coalesce around the concern that copyright has become inherently onerous and by extension dangerous, rather than a concern that the proper balance must be restored. Perhaps one of the most troubling aspects of fair use is that it is often used to separate permissible borrowing from infringement within this category.11

The fourth significant norm limiting copyright adherence flows from the industrial use of the copyrighted work, rather than the copy-

10 See id.
right itself. Many consumers who would never “steal” from the object of adulation feel that the record or movie business is exploiting their icon’s work. They may rationalize that “the rich record labels, uncaring publishers, and multinational mega-corporations are getting rich unfairly and will never miss my money or are impotent to stop me from taking what I want.” This rationalization supports everything from the home taping validated by Sony Corp. of America v. Universal City Studios, Inc.,12 to peer-to-peer file sharing,13 to educators who are unwilling to conduct copyright clearance for their student course packs.

The combination of copyright’s intangible nature, an accepted norm rejecting corporate greed, the perception that copyright should not constrain legitimate unauthorized users, and the overstatement of copyright’s economic reward create a normative culture where theft of intellectual property is no longer regarded as an illegal, unethical, or antisocial act. Piracy has been incorporated into the economic culture, buoying the consumer electronic market through the sale and promotion of products that exploit copyright infringing activities.14 Only after copyright holders identify the root sources of the cultural attitudes toward piracy can they begin to fashion a meaningful response. To the extent that the norms reflect flaws within the legal regime of copyright itself, Congress must address those concerns to eliminate the erosion of copyright.

Certainly these cultural justifications are not an exclusive list. Youth needs to rebel and the online community has developed a counterculture of software piracy motivated by the ability to tweak the system or break the laws.15 This youthful rebellion, however, validates copyright in that the very act of rebellion is futile without something to rebel against. There is no act of rebellion in taping a football game off the air. Despite the unethically broad warning used by the NFL,16 taping a game for private reuse falls well within the accepted fair use

13 See Napster, 239 F.3d at 1012, 1016–17.
15 “[O]ne high-tech executive . . . described illegal pirate content as a ‘killer application’ that will drive consumer demand for broadband,” said Eisner, chief executive of Walt Disney, in testimony before a Senate hearing . . .

16 “Unfortunately, other high-tech companies have simply lectured us that they have no obligation to help solve what they describe as ‘our problem.’”

16 The scope of suggested prohibition seems significantly broader than the rights ascribed to the copyright owner. See Sony, 464 U.S. at 429; NBA v. Motorola, Inc., 105 F.3d 841, 846–47 (2d Cir. 1997).
home taping exception authorized under Sony.\textsuperscript{17} Some copyright violations are pure economic theft motivated by easy money and low risk.\textsuperscript{18} But the public's loss of faith in copyright protection threatens copyright far more than core criminal activity.

Central to the question of copyright ethics, morality, and normative modeling, is the very legitimacy of copyright itself. Unless there is a valid conceptual basis for copyright laws, there can be no fundamental immorality in refusing to be bound by them. The ethics of the law must be grounded in fundamental notions of justice and fairness, for without this, the rules devolve into conveniences which will be obeyed only when punishment is close at hand. If the only reason to respect copyright is to avoid being caught, it has outlived its purpose.

The need to conceptualize and articulate the law is hardly novel. William Blackstone explained the importance of analyzing the basis of the laws of property:

It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.\textsuperscript{19}

The rational science of intellectual property law must similarly be scrutinized to identify and bolster the positive constitutions of society.

As noted Professor Pamela Samuelson has commented, "[c]opyright should be accounted a great success at modeling author and reader behavior, for the basic framework of this law has lasted nearly three hundred years. . . . [C]opyright industries have flourished and copyright law has broadened to include a wide variety of intellectual products besides those manufactured by printing presses."\textsuperscript{20} The achievement to date has been breathtaking.

Nonetheless, if the law-abiding public is to continue to follow copyright, it will not merely be as a result of existing laws on the books. Copyright must be rooted in some deeper understanding of society's regard for creativity, property, economic efficiency, or fundamental justice. The core of copyright's value must be identified, its central principles articulated, and the public reminded of its self-evident truths. Finally, the many modern ornamentations must be reevaluated in light of its fundamental purpose.

\textsuperscript{17} Sony, 464 U.S. at 454–55.
\textsuperscript{19} 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 393 (William Draper Lewis ed., 1900).
The normative acceptance of and adherence to the law is essential to its continued viability. If copyright law retains its normative role-shaping behavior, then the industries that rely on its protection will succeed. Copyright will not succeed if it relies on punishment to motivate compliance. The three centuries of success have been largely built on public acquiescence to the need for copyright payments and rules. If copyright becomes broadly ignored, then the economic, educational, and social models that rely upon copyrighted works would be forced to change.

This is not merely an acknowledgment that copyright piracy is a significant cultural as well as economic problem. In both the United States and abroad, the disregard of copyright’s normative role undermines the development of creative artists and communities. As one commentator put it, “it is particularly detrimental to the cultural life of developing countries. National production of books, audio-visual works and phonograms can be suffocated at birth.”

The shape of copyright, however, is not merely dictated by legal rules. Society had little need for copyright prior to the general adoption of the printing press, and throughout the past four centuries, most of copyright’s growth has been fostered by technological innovation in the creation, production, and distribution of copyrighted works. Balancing technology and law is the role of social acceptance and observance of copyright’s norms. If the public believed an infringing activity was appropriate, then copyright owners could not afford to fight it on either the financial or political front. Social acceptance of copyright’s legitimacy is as critical to its infrastructure as are the relevant laws and technology.

The future development of copyright culture will flow from technological innovation, legal constraints, and social norms. Increasingly, however, journalists, analysts, teachers, parents, and others are beginning to realize that it is neither the technology nor the law at the center of the controversy, but the ethical and social norms of U.S.

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22 See Sony, 464 U.S. at 430 n.12. The Court noted that “[c]opyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other.”

Id. (quoting B. Kaplan, An Unhurried View of Copyright vii–viii (1967)).

23 See generally Jon M. Garon, Entertainment Law, 76 Tul. L. Rev. 559 (2002) (tracking the changes to copyright law spurred by the introduction of various media, including theatre, photography, music, and motion pictures).

24 See Sony, 464 U.S. at 446.
society. Forbes columnist Stephen Manes noted that "the most important issues regarding the protection of intellectual property may not be technological or legal but social."²⁵

As copyright issues have moved towards the forefront of popular culture, trade, and the Supreme Court docket, society has lost sight of the first principles that should be driving copyright's development. This Article attempts to return us to those early principles, providing a solid footing for legislative and public policy debates.

Parts I–III of this Article explore various theoretical underpinnings of copyright to determine which theories provide an appropriate basis for copyright protection. Part I critiques the more recent approaches to copyright, assessing copyright as both an intangible and a natural right. Part II reviews the traditional economic and incentive-based rationales for copyright. Part III analyzes the conceptual philosophical framework that shapes the policies underlying copyright. Part IV builds on the core fundamentals identified in the earlier parts and suggests some necessary steps to reorient each of the three primary building blocks—social contract, technology, and law—for normative acceptance of copyright.

The outcome of the research indicates that the intangible nature of copyright does not govern the public's respect—or lack thereof—for copyright. Similarly, the natural rights approach to copyright used in Europe, while a sound basis for copyright protection, does not provide any guidance on how copyright laws should be drafted. Instead, this Article returns to the constitutional incentive of copyright which requires the granting of copyright because it is necessary to promote progress of science and the useful arts.²⁶ Rather than interpreting this in a narrow, economic fashion, however, the more proper balance to be used is that which the Supreme Court has articulated since Baker v. Selden²⁷ in 1879—expression is protected so that authors will develop new facts and ideas for the betterment of the public. The Article concludes by illustrating the consequences of this construction on issues involving shrinkwrap and clickwrap agreements, fair use, reverse engineering, and peer-to-peer file sharing.

²⁶ See U.S. Const. art. I, § 8, cl. 8.
²⁷ 101 U.S. 99 (1879).
A. Copyright as Property—The Intangible Attributes

To better understand why copyright works or fails as a legal regime, the first step is to analyze that which it seeks to protect. At various times, copyright has been characterized as protecting the property interests in the author or copyright holder of the work, as embodying legal recognition for the fruits of a person’s industry, or as providing an economic incentive for a work to be created. Each of these general approaches may individually or in the aggregate describe the property regime upon which copyright is based. The most apparent basis, however, is the intangible nature of a copyright.

1. The Attributes of Traditional Property

According to Blackstone, the traditional view of property was not particularly well defined. Rather, it was simply recognized, first by its application to land and estates, and only much later as to movable chattel. In defining real property, a possessory interest in land requires “a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.” These twin attributes, physical control and the ability to exclude, are the central aspects of the possessory interest in property. Judge Posner introduces property rights as the “rights to the exclusive use of valuable resources.”

David Nimmer noted that the difference between the tangible and intangible world may be one of the difficulties inherent in teaching the public the immorality of theft of copyrighted works. This observation encompasses a number of differing issues underlying the nature of the work. Most fundamentally, something that cannot be physically felt cannot be physically taken away. This dichotomy provides a simple but insufficient rationalization to explain why otherwise honest people are willing to steal copyrighted works by purchasing pirated copies, downloading music and films, and making copies of software for friends.

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31 BLACKSTONE, supra note 19, at 385.
32 RESTATEMENT (FIRST) OF PROPERTY § 7(a) (1936).
34 See Nimmer, supra note 1, at 24.
Throughout history, intangibility-based complaints have been made against copyright. For example, dissenting in 1834, Justice Thompson raised this common criticism of copyright by explaining that “it is a well established maxim, that nothing can be an object of property which has not a corporal substance.” Justice Yeates, writing in the eighteenth century, is credited with putting forth the most articulate view of this position:

The property claimed is all ideal; a set of ideas which have no bounds or marks whatever—nothing that is capable of a visible possession—nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone. Incapable of any other modes of acquisition or enjoyment than by mental possession or apprehension; safe and invulnerable from their own immateriality, no trespass can reach them, no tort affect them; no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of.

He asks, can sentiments themselves (apart from the paper on which they are contained) be taken in execution for a debt; or if the author commits treason or felony, or is outlawed, can the ideas be forfeited? Can sentiments be seized; or, by any act whatever be vested in the crown? If they cannot be seized, the sole right of publishing them cannot be confined to the author. How strange and singular, says he, must this extraordinary kind of property be, which cannot be visibly possessed, forfeited or seized, nor is susceptible of any external injury, nor, consequently, of any specific or possible remedy.

Yeates captures the essence of the incorporeal concern, but in fact many of these issues have been answered. Article 9 of the Uniform Commercial Code specifically provides for securitization of intangible assets, so there is a method of seizing them as necessary to satisfy a debt. Although Yeates is correct that ideas are ultimately incapable of political control or coercion, the expressions in books declared treasonous can be banned or burned, and it is the expression rather than the idea which gives rise to property rights.

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35 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 672-73 (1834) (Thompson, J., dissenting). The quote was intended to show both the rhetoric and the folly of the position. As the dissent continued, "this view of [copyright] would hardly deserve a serious notice, had it not been taken by a distinguished judge." Id. at 673.

36 Id.

37 See generally Steven O. Weise, The Financing of Intellectual Property Under Revised UCC Article 9, 74 CH.-KENT L. Rev. 1077 (1999) (noting that Revised Article 9 covers intellectual assets, but copyrights may still be subject to federal preemption); see also In re Peregrine Entm't, Ltd., 116 B.R. 194, 199 (C.D. Cal. 1990) (holding that a creditor with an unperfected interest has lesser priority); In re Avalon Software Inc., 209 B.R. 517, 521 (Bankr. D. Ariz. 1997) (discussing the perfection of a security interest in software).
Unlike Yeates, and despite Nimmer's misgivings, Judge Posner notes that "the economist experiences no sense of discontinuity in moving from physical to intellectual property."\textsuperscript{38} The need to prevent non-owners from exploiting the value of the property is closely aligned with the notion that farmers need to protect their crops from being stolen as they mature in the fields.\textsuperscript{39} Arguably, the analogy breaks down somewhat because the crop is a rivalous or limited resource, while the copyrighted work, like an idea, is nonrivalous in that it can be shared with an unlimited number of people without diminishing its value to any others who enjoy it.\textsuperscript{40}

In describing information within the framework of property, Professor Samuelson describes it as "inherently 'leaky'" because it can be "shared readily by many people through virtually limitless forms of communication."\textsuperscript{41} The same can be said today of copyrighted works passing along a peer-to-peer communications network (first popularized by Napster), or downloaded from bulletin boards and websites. Nonetheless, copyrighted works, and as Samuelson points out, even information, may satisfy three primary attributes of property: the right to exclude others, the right to transfer the property, and the right to possess, use, and enjoy the property.\textsuperscript{42}

If property is anything, whether tangible or intangible, that has these basic attributes, then copyright fits nicely into the framework. This should not be particularly surprising. Many of the traditional property interests do not include physical or present possession and are therefore intangible.\textsuperscript{43} The twin attributes of possession and the right to exclude identified by the Restatement of Property do not define all property interests, only those that are possessory. Property "estates" may include reversions, remainders, executory interests, powers of termination, and possibilities of reverter, all of which may or may not become possessory, but all are unquestionably property interests.\textsuperscript{44} Such interests are rivalous, because the rights vested in one person divest or displace other interests. Each such interest is exclu-

\textsuperscript{38} ECONOMIC ANALYSIS, supra note 33, at 38.
\textsuperscript{39} See id. at 32–33.
\textsuperscript{40} In practice, this is less true than theory would indicate. Sneak previews, premieres, exclusive engagements, and limited releases are all business practices which suggest that limiting the size of the audience enhances the work's value to those who participate. The corollary is the concept that a work can be "overexposed" to an audience, removing all scarcity and thereby diluting or destroying its value to the audience.
\textsuperscript{42} See id. at 370 (citing R. POSNER, ECONOMIC ANALYSIS OF LAW 39–41 (3d ed. 1986)).
\textsuperscript{43} BLACKSTONE, supra note 19, at 163 ("Estates... may either be in possession, or in expectancy: and of expectancies there are two sorts; one created by the act of the parties, called a remainder; the other by act of law, and called a reversion.") (emphasis omitted).
\textsuperscript{44} RESTATEMENT (FIRST) OF PROPERTY § 9 cmt. b (1936).
sive to the holder, even if the present existence of a different possessor of the physical property limits its enjoyment. Thus the notion that the intangible nature of the intellectual property makes it a *sui generis* creature of property law is inapt. This while intellectual property may have attributes unique among the categories of property, its intangible nature is not one of them.

Nonetheless, despite the fact that intellectual property’s intangible nature does not distinguish it from real property or from the economic basis of property, consumers may still infer value or legitimacy from this quality. As one commentator put it, “I would suggest that there’s been a historical presumption that software—and by software I mean everything from computer programs to radio programs, from stock quotes to Stephen King novels—is something that, because of its intangible nature, should be cheap or free.”

This possibility cannot be definitively refuted and some consumers may believe that it is true. As described below, however, this concept is more likely conflated with the public goods proposition that unauthorized copying only has an indirect impact on the copyright owner’s ability to continue exploiting her own rights.

The assumption is that many of the participants do not accept their actions as stealing because they have “taken nothing” or more accurately, they have not prevented others from still obtaining something. Thomas Jefferson expressed this approach early in the development of U.S. copyright policy:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it . . . . He who receives an idea from me, receives instruction

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46 Manes, *infra* note 25, at 129.


48 Hardy, *supra* note 45, at 222.

[W]ithout the ability to exclude others from obtaining their farm output, farmers would involuntarily confer external benefits on others, which in turn would mean that farmers would have too little incentive to produce crops in the first place, just as authors would have too little incentive to produce works of authorship.

Id.
himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. 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 . . . .

Of course, it is easy to limit the impact of Jefferson's statement to unframed general ideas, and indeed copyright has embraced this distinction. The idea-expression dichotomy provides legal protection only for the copyright, while leaving the ideas as free as Jefferson described. "[C]opyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality." Expression makes the idea unique, specific, and therefore the property of its creator. The ideas are free and protected from monopoly. Nonetheless, this distinction arises, at least in part, from the nature of the property interest one can obtain in the idea one originates and the expression of that idea one creates. It is the lack of exclusivity rather than the intangible nature of the idea that makes it ripe for both replication and loss of control.

2. Plagiarism: The Other Intangible Interest

To understand copyright's intangible nature it helps to compare copyright with its conceptual cousin, plagiarism which both share many of the same attributes. "Plagiarism means intentionally taking the literary property of another without attribution and passing it off as one's own, having failed to add anything of value to the copied material and having reaped from its use an unearned benefit." Copyright piracy is the taking of literary property of another, having failed to add anything of value to the copied material and having reaped from its use an unearned benefit. Plagiarism, unlike piracy,
is purely intangible, without limitations on expression or reference to the particular tangible copies.57

According to admittedly anecdotal reports, plagiarism appears to have the same attraction to the youth demographic as does the illegal sharing of copyrighted MP3 files.58 Donald McCabe, founding president of the Center for Academic Integrity at Rutgers University, suggests that "academic integrity" is fast becoming an oxymoron.59 According to McCabe, 74% of high school students surveyed admitted to cheating on a "big test" and 72% reported cheating on written work.60 Even more alarming, while approximately 33% admitted to systemic cheating, a staggering 97% admitted to some "questionable activity, like copying someone else's homework or peeking at someone else's test."61

The Internet provides a premiere environment for the distribution of academic and pseudo-academic material.62 Like online music copying and software piracy, academic cheating is easy, anonymous, and bears few consequences.63 While the Internet is a favorite source of plagiarized content, many of the high school students use books and magazines as well as the Web.64 It is not the availability of sources, but the consequences that propel many students. "At some colleges, students who plagiarize are expelled. But a high school student caught plagiarizing may just get a zero for that particular assignment."65 In addition, the culture of plagiarism reinforces the need and self-justification for the actions. Since everyone is doing it, students believe that either it is not so bad or that to refuse to cheat is to put oneself at a disadvantage.66

The pervasiveness of plagiarism suggests that intangible offenses are the problem. What remains unclear, however, is whether plagiarism's intangible nature or a continual lowering of ethical standards causes plagiarism. The impression of educators is that "competition

57 See 17 U.S.C. § 101 (defining "copies" as "material objects . . .").
59 Id.
60 Id.
61 Id.
63 Shulte, supra note 58, at A4 ("McCabe says, 'I can't tell you how many high school students say they cheat because others do it and it goes unpunished.'").
64 Id.
65 Id.
66 Id.
in the classroom . . . wanting to get into the best colleges . . . peer pressure . . . and a message from parents that you have to be successful at any cost” cause plagiarism. If these are the causes, then the suggestion that students are unaware of the misconduct seems misplaced. John Barrie, founder of www.plagiarism.org, comments “[i]t’s usually ‘the higher achievers who cheat, and not the boneheads.’”

The relationship of such behavior to Napster and the Internet is not lost on these students. “‘It’s sort of like Napster,’ said Joseph Huffman, 22, a graduate student at the University at Buffalo. ‘The general attitude is, if you see something on the Net, it’s not so much that you own it, but it’s there for you to use.’” These admittedly anecdotal comments suggest the problem is not the intangible nature of the interest, but rather the ease with which the theft can occur.

Unfortunately, other anecdotal examples exist. These include the need to chain pens to counters at banks and grocery stores, theft of refills at self-serve soda machines, and the more serious threat of shoplifting. Crimes of theft are common and unrelated to any notion that the property stolen is intangible. The perception that either file sharing of copyrighted material or plagiarism is treated differently than physical theft may be more imagined than real. Shoplifting and employee theft accounted for ten billion dollars in lost revenue in 2001, typically in highly tangible retail goods. This theft is often committed by teens, the same demographic that has popularized Napster and file sharing.

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68 Id.
69 Id.
72 See Zalud Report: Outsiders, Insiders and Theft, SECURITY, July-Aug. 2002, at 62. (“For example, just 30 U.S. retail companies lost over $5 billion to shoplifting and employee theft . . . [in 2001].”)
73 Nissman, supra note 71, at 31 (“U.S. retailers lost more than $10 billion last year to shoplifters, 38 percent of whom were teenagers, according to the 2001 National Retail Security Survey. With the sour economy and kids’ increasing desire to compete with their peers, thieves are becoming younger and younger.”).
74 Erik Lacitis, Technology Sparks a College “Copying” Problem, SEATTLE TIMES, Jan. 29, 2002, at D1 (“Millions of people—let’s be accurate, most of them teens and college kids—[have used] Napster.”).
This does not suggest that consumers are more likely to shoplift than to download software, merely that the categorical distinctions may be overstated. Nimmer's experiment with his class of law students reflects this reality.\(^{75}\) What the survey does not capture, however, are the underlying reasons that plagiarism, music file sharing, and unauthorized copying may be more generally accepted than other forms of theft.

Comparing copyright piracy to plagiarism, shoplifting, and other crimes suggests that copyright piracy is not categorically different. Like plagiarism and shoplifting, copyright piracy offers ubiquitous opportunities to commit the act, a low risk of being caught, minimal, infrequent punishment, and the social phenomena that large numbers of individuals are committing similar acts. The physical nature of the property stolen does not materially alter these factors.

Nor is copyright conceptually different from other forms of property. Real property includes both tangible fees and intangible estates.\(^{76}\) The economic basis of property does not rely on any tangible measure. Finally, legal regimes involving intangible property such as plagiarism remain widely recognized despite the lack of a tangible nature.\(^{77}\) These other legal doctrines strongly suggest that the intangible nature of the property may be overstated as a meaningful distinction and has little to do with the public's conduct. Although the intangible nature of the interest plays a role, it is minor or tangential, rather than the central framework of the philosophical and ethical debate.

B. The Moral Touchstone of Natural Rights

If the intangible nature of intellectual property does not provide significant insight into copyright's normative acceptance, then perhaps the philosophical nature of the legal protection will provide some guidance. Copyright law finds its basis in one of two discrete philosophies: the natural rights inherent in the law or the economic rights recognized by statute.\(^{78}\) Each of these alternative theories (or their combination) provides the philosophical framework for copyright protection. By extension, the limits of each theory may explain

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\(^{75}\) See Nimmer, supra note 1. I have asked a similar question in each semester of my Copyright Law and Entertainment Law classes. At the height of Napster's popularity, virtually every student in each of my classes was aware of Napster and the significant majority had used it. With Napster's demise, the usage among my students of other file sharing programs has dropped to less than one-third. See infra Part IV for discussion of the possible cause of this drop in usage.

\(^{76}\) See supra notes 43-45 and accompanying text.

\(^{77}\) See supra notes 55-57 and accompanying text.

\(^{78}\) See Richard Watt, Copyright and Economic Theory 20–21 (2000).
the limits of copyright protection, both as a matter of positive law and as a normative guide for social conduct.

In his thoughtful review of the subject, Professor Fred Yen develops the Lockean nature of property interest and its impact on intellectual property from the early Roman development of natural law.\textsuperscript{79} At its inception, Roman law provided a simple axiom of ownership: "'Natural reason admits the title of the first occupant to that which previously had no owner.'"\textsuperscript{80} From this basis of first occupation developed the notion that the occupier of land was the owner of that land. That which could not be occupied, such as running water, sea and air, was not subject to ownership.\textsuperscript{81}

Seventeenth-century Europe was a somewhat different place than either ancient Rome or the burgeoning American colonies. In worlds of continuing political expansion, the notion that occupancy could result in real property ownership held out some hope that property ownership would expand.\textsuperscript{82} In Europe, however, the idea of physical expansion was remote and the law of occupancy became more of a rationalization for upholding the feudal legal system than an inherent natural law.\textsuperscript{83} Against this political backdrop, Locke's philosophy of property stands for a sweeping reexamination of man and government.\textsuperscript{84}

\footnotesize{\textsuperscript{79} See Alfred C. Yen, Restoring the Natural Law: Copyright as Labor and Possession, 51 OHIO ST. L.J. 517, 522 (1990).}
\footnotesize{\textsuperscript{80} Id. Roman law's natural law tradition was not aspirational, but instead attempted to reflect the laws of nature as generally known, for codification. See id.}
\footnotesize{\textsuperscript{81} Id. at 522-23.}
\footnotesize{For example, the doctrine of \textit{res communes} held that "the following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore." Similarly, under the doctrine of \textit{ferae naturae}, wild animals were inherently free, and were considered property only so long as the owner maintained actual physical possession. If a wild animal escaped, it regained its inherent liberty. Id. (citations omitted).}
\footnotesize{\textsuperscript{82} In both instances, the preexisting property ownership of the indigenous people was excluded from these notions of ownership. Neither the peoples of the Ancient World nor the American Indians were considered to be rightful landowners who could stand on their rights of primacy in physical ownership. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II §§ 36-37 (Peter Laslett ed., 1988); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 171 (1988).}
\footnotesize{\textsuperscript{83} Cf. BLACKSTONE, supra note 19, at 44-53 (reviewing the origins of the feudal system from its basis of military expansion to that of a legal fiction which granted the king ownership of all lands).}
\footnotesize{\textsuperscript{84} See LOCKE, supra note 82, bk. II §§ 2-3. It may be of some note that the difficulties in creating the published version of the original book coincide with the collapse of the printer's monopoly and the enactment of the Statute of Anne. Locke was unhappy with all the published versions created during his lifetime and that the work which created the definitive version was completed prior to his death in 1704, but not published until 1713, three years after the Statute of Anne vested copyright protection in the author for the first time. See generally id. bk. II §§ 10-11 (introduction by Peter Laslett).}
1. The Lockean Framework: Labor as the Basis of Property Ownership


Locke disclaims a divine right as an introduction to his theory of property, basing it instead on general principles of mankind's interest. Locke starts with the proposition that property ownership must originate with that which separates the property from its natural state, so that the fruits which grow untended and the animals hunted in the wild give no right to any person of ownership.

In response to Filmer's divine rights approach to property and to distinguish owned property from that which exists in nature, Locke developed his famous statement on property:

> [E]very 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. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned [sic] to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature placed it in, it 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 [sic] to, at least where there is enough, and as good left in common for others.

From this statement, it is a short step to infer that the same respect for labor would value not only the agrarian life of wheat, corn, and berries, but also the intellectual fruit that Locke himself valued as a published author. But it was others who extended the notion of

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85 See id. bk. I § 1.
86 See id. bk. I §§ 1–3.
87 See id. bk. I §§ 1–169.
88 See id. bk. II § 25.
89 See id. bk. II § 26.
90 Id. bk. II § 27 (italics omitted).
labor-derived ownership to writings. By 1725, the booksellers' and printers' association in Paris endorsed and expanded Locke's theme. In their report, the Parisian booksellers urged that "the work produced by an author is 'the fruit of a labour that is personal to him, which he must have the liberty to dispose of at will.'" This natural right matured into full legal debate over the rights of an author separate and distinct from the statutory, economic rights provided under the Statute of Anne. As the American Revolution neared, the natural rights approach to copyright had reached its zenith in England. "'Labour gives a man a natural right of property in that which he produces[.] [L]iterary compositions are the effect of labour; authors have therefore a natural right of property in their works.'"

The statement that an author's labor created a natural right in the property of her works, however, begs the question rather than answers it. Were this the property interest as described by Locke, restrictions would necessarily be implicit in such an axiom. The nature of Locke's system assumed continuing labor as the limitation on excessive property ownership. His model of labor was one of continual nurturing of the land.

For as a Man had a Right to all he could employ [sic] his Labour upon, so he had no temptation to labour for more than he could make use of. This left no room for Controversie [sic] about the Title, nor for Incroachment [sic] on the Right of others; what Portion a Man carved to himself, was easily seen; and it was useless as well as dishonest to carve himself too much, or take more than he needed.

This explanation of Locke's view of property, as well as his earlier limiting statement that "no Man but he can have a right to what that is once joyned [sic] to, at least where there is enough, and as good left in common for others," suggest that Locke was not the father of natural rights in copyright. Locke never extended his model beyond the issue in question: the source for sovereign authority over property and workers. His model served as a touchstone for the

91 See Chartier, supra note 29, at 13.
92 Id. at 13–14 (citation omitted).
94 Id. at 33 (quoting William Enfield, Observations on Literary Property 21 (1774)).
95 See Locke, supra note 82, bk. II § 51.
96 Id.
97 Id.
American Revolution, including Jefferson's rhetoric regarding the rights of mankind, but Locke's own writings were outside the controversies that formed the basis of modern copyright.

Further, Locke's view of natural rights would hardly have provided answers in difficult cases. Certainly, that authors were entitled to payment for their work provided a benefit to the common good. Locke himself adopted precisely this economic rationale for his natural right: "he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind." The corollary of Locke's view of progress and property was that man should be given limited exclusivity of his property for the benefit of all mankind. Rather than serving as a counterpoint to the economic based model of U.S. constitutional rights, Locke could well be cited for the proposition that copyright should exist "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." If Locke can serve as the basis for promoting copyright under both the natural law rationale and the economic incentive rationale, then natural rights provides no deontological framework for understanding the modern copyright paradigm.

It is also ironic that the English printers and booksellers, who were seeking an alternative to the perpetual monopoly they had enjoyed under the Stationers' Company and the Licensing Act (which had lapsed and then been replaced with the relatively short copyright terms of the Statute of Anne), championed the natural rights ap-

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100 See generally Barbara Friedman, Note, From Deontology to Dialogue: The Cultural Consequences of Copyright, 13 Cardozo Arts & Ent. L.J. 157 (1994) (arguing that the basis of modern copyright law is a "consequentialist" theory, which asserts that the purpose of copyright is to create incentives for artist creativity).
101 Locke, supra note 82, bk. II § 37.
102 U.S. Const. art. I, § 8, cl. 8.
103 Justin Hughes describes Locke's theory as providing an incomplete basis and instead ascribes a more "personality" based theory to Georg Wilhelm Friedrich Hegel. See Justin Hughes, The Philosophy of Intellectual Property, 77 Geo. L.J. 287, 329-30 (1988). Despite Professor Hughes's suggestion, Hegel's individualist or "Wirklichkeit" theory provides an even shallower basis for copyright. At the heart of the individualist theory is the personality right "to claim that external world as its own." Id. at 331 (citation omitted). While authorship and the creation of expression certainly fit this mold, so does the act of adapting other authors' works or even the simple act of observing someone else's work. At its extreme, the phrase "they're playing our song" takes on a personality-based meaning because the possession or interaction with the object creates a personality imprint for the audience member. Copyright based on such a model provides no guidance regarding the interests of the author, publisher, consumer, adaptor, or performer—each has an equal share such that no copyright regime based on such a model can arise. But cf. Margaret Jane Radin, Property and Personhood, 94 Stan. L. Rev. 957 (1982) (endorsing a personality-based approach).
The practice was to transfer the copyright to the publisher or bookseller, so the length of copyright protection aided the author only to the extent that the author received a larger advance payment. There is no empirical evidence, but it is quite likely that the fees paid to authors did not go down when Donaldson v. Beckett established that once the statutory period expired a work became part of the public domain. Transfer of the copyright allowed the parties to effect by two steps what had been prohibited by one; had the House of Lords come to an opposite conclusion in Donaldson, the practical result would have been to reestablish the Stationers’ Company Act.

Whatever the source of interest in Donaldson, the result was to limit the ultimate term of copyright in any work published under the Statute of Anne, putting a cap on the natural rights assertion of ownership in a work. This does not reduce the importance of Locke as the theoretical fount from which the natural rights approach developed; this line of support was simply subject to limitation by statute in England and later in the United States.

This was the approach taken by the United States in Wheaton v. Peters. In a decision closely paralleling Donaldson, the Supreme Court had to determine whether a natural right to copyright existed in the United States, and to frame the scope of that right. The Court readily recognized the natural right in an author’s work, but further held that the statute divested the right upon publication, in favor of the statutory scheme, just as the House of Lords determined in Donaldson:

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 improperly 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.

The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the

\[104\] See Rose, supra note 93, at 25.
\[105\] Id. at 31.
\[107\] The practice of the London Booksellers was to purchase the copyright outright rather than to pay an ongoing royalty or percentage. The Statute of Anne therefore provided for two estates, the second of which was available “if, at the end of [the initial fourteen year] term, the author himself be living, the right shall then return to him for another term of the same duration.” Blackstone, supra note 19, at ii 407.
\[109\] 33 U.S. (8 Pet.) 591 (1834).
transfer of his manuscripts, or in the sale of his works, when first published.\textsuperscript{110}

In this way, the Court acknowledged both the basis of the Lockean natural rights underpinning in U.S. constitutional and statutory law, as well as its statutory limitations. "That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general."\textsuperscript{111} The Court certainly does not fully embrace natural rights. This becomes clear in light of the stirring dissent by Justice Thompson who chides the Court for failing to see the "right and wrong" in the common law that it has rejected.\textsuperscript{112} Despite the dissent's call for embracing natural rights, however, the language of the opinion does not paint an absolute rejection of natural rights. The direct consequence of \textit{Wheaton} should not be to reject the natural rights approach from U.S. copyright jurisprudence, but rather to recognize that these rights can be statutorily reframed, though not extinguished. As a result of \textit{Wheaton}, the relationship between natural and economic theory can be articulated.

One view ascribing the origins of copyright to natural rights gains its legitimacy from Locke's fertile soil. Having come this far, however, the jurisprudential question provides little normative guidance. Natural rights suggest an absolute right to first publication, as did the \textit{Wheaton} divestiture of common law copyright upon publication.\textsuperscript{113} Beyond the point of first publication, there is less guidance. Professor Yen and Professor Jessica Litman each suggest that natural rights create a justification for a strong public domain.\textsuperscript{114} Yen points out that the iterative process of authorship and creativity require that little is gleaned from the field so that each generation of authors has ample space in which to labor.\textsuperscript{115}

Natural rights may thus provide the basis for limiting copyright by emphasizing the limitation in Locke's original statement that an author "can have a right to what that is once joyned [sic] to, at least where there is enough, and as good left in common for others"\textsuperscript{116} but that "it was useless as well as dishonest to carve himself too much, or

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\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 657.
\item \textsuperscript{111} \textit{Id.} at 658.
\item \textsuperscript{112} \textit{Id.} at 671 (Thompson, J., dissenting).
\item \textsuperscript{113} \textit{See id.} at 657.
\item \textsuperscript{114} \textit{See Yen, supra} note 79, at 552–53 (citing Jessica Litman, \textit{The Public Domain}, 39 Emory L.J. 965 (1990)).
\item \textsuperscript{115} \textit{See id.} at 554 ("Unlike Locke's gatherer of acorns, authors do not truly labor alone. . . . No author has lived an entire life on a proverbial desert island. Instead, authors live and work as members of an artistic community and a broader society whose creations, values and experiences form an integral part of the author's creative vision.").
\item \textsuperscript{116} \textit{Locke, supra} note 82, bk. II § 27.
\end{itemize}
take more than he needed." If natural rights were thought of as a limitation on statutory rights, this might provide some popular support, but it provides guidance no less vague than any economic theory or other rationalization of copyright's contours.

The expansion of an author's natural rights is less clear in the modern context. The initial concern regarding natural rights was the term of the copyright. Those espousing natural rights advocated a perpetual copyright. Nonetheless, the European nations that more explicitly adopted the natural rights philosophy never granted such a right and have adopted the Berne Convention requirement that the copyright term last for fifty years following the life of the author.

2. The Unnecessary Extension of Moral Rights into Natural Law

Natural rights might suggest that moral rights such as droit moral and droit de suite are inherent in all copyrights and a necessity under the law. The rights of attribution and integrity are embodied in article 6bis of the Berne Convention and are often treated as an axiomatic component of the natural rights regimes provided to authors. Despite the traditional relationship between natural rights and these so-called moral rights, however, nothing dictates that the latter be provided in any specific manner. Whether the natural rights were subject to negotiations between author and publisher, or whether the law treated them as inextinguishable and nontransferable, has more to do with the relationship between the state and its citizens than with the natural or economic rights of its citizens. According to William Pa-

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117 Id. bk. II § 51.
119 See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 7, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) (hereinafter Berne Convention). Germany's extension to life plus seventy was motivated more to compensate the authors who lost economic opportunities as a result of the two world wars prompted by Germany in the twentieth century. See Richard Morrison, The Rights that Don't Smell Quite Right, London Times, Oct. 23, 1998, at 41 ("While most of the world set its copyright term at life plus 50 years, the Germans opted for 70—apparently to compensate their authors for 'loss of earnings' during the two world wars (well, whose fault was that?)").
122 Berne Convention, supra note 119, art. 6bis.
123 The Berne Convention, however, mandates an inalienable, personal right. Such rights are granted "[i]ndependently of the author's economic rights, and even after transfer of the said rights, [the author retains] the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action . . . which would be prejudicial to his honor or reputation." William Belanger, U.S. Compliance
try, "[t]hese type of restrictions (coupled with droits moral) stem from civil law's highly protective policy toward individual authors, in contrast with the laissez faire approach of common law countries."124 Another characterization makes a similar point:

Accordingly, the U.S. Copyright Act is geared towards promoting innovation and a healthy information industry by providing sufficient incentives to potential creators, while at the same time preserving a "robust" public domain. Perceived from this constitutional perspective, copyright law may be seen as an instrument of information policy, both by protecting and "unprotecting" certain subject matter within the domain of literature, science and art. . . .

Unlike the United States, continental-European "authors' rights" are based primarily on notions of natural justice: "authors' rights are not created by law but always existed in the legal consciousness of man." In the pure droit d'auteur philosophy, copyright is an essentially unrestricted natural right reflecting the "sacred" bond between the author and his personal creation.125

If this is a fair characterization of natural rights, then the idea that natural rights would embrace a robust public domain is fundamentally misplaced. The sacrilege of fair use, parody, and the public domain would tear at this sacred bond between author and work. Anointing the author's relationship with his work as essential and unrestricted stands in diametric opposition to the open marketplace of ideas idealized in the United States. Because moral rights are not assignable and in many instances not contractually waivable, natural rights are inconsistent with copyright rules permitting unauthorized copying or adaptation.

Nor are the contours of natural law self-evident. Though natural rights theory suggests that all copyrights are perpetual, this notion has been universally rejected. Although Professors Yen and Litman suggest the public domain would expand under a theory of natural rights,126 the inalienable moral rights implicitly granted by the natural rights approach serve to limit rather than expand unauthorized uses of copyrighted works. The inconsistencies in the length and scope of copyright protection further illustrate how little guidance the natural

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126 See supra note 113 and accompanying text.
rights philosophy provides in determining the contours of copyright policy.\textsuperscript{127}

Furthermore, while the rights of attribution to the author and integrity of an author's work find recognition in a combination of unfair competition and copyright laws in the United States,\textsuperscript{128} other examples of moral rights may be more controversial. The natural rights included can range widely and typically encompass:

[T]he right to be known as the author of one's work; the right to prevent others from being named author of one's work; the right to prevent others from deforming or defacing one's work; the right to prevent others from falsely claiming authorship of a work; the right to withdraw a published work; and the right to prevent others from using the work or the author's name in a manner which would violate the author's good name or professional standing.\textsuperscript{129}

There is likely little controversy that the author or artist of a work is entitled to the public attribution of that work, which includes both the power to be named as author and the power to insist that others not be given that designation. On the other hand, the right to prevent deforming and defacing may run afoul of the importance in U.S. culture of parody and satire as forms of commentary and criticism.\textsuperscript{130}

\textsuperscript{127} The same failure to provide guidance was noted by Professor Patry with regards to the copyright extension. See William Patry, The Failure of the American Copyright System: Protecting the Idle Rich, 72 NOTRE DAME L. REV. 907, 913-14 (1997).

[\textit{W}hile the two rationales (instrumental and natural rights) are frequently complementary, on occasion if viewed as independent objectives they may lead policy-makers in different directions. A strictly instrumental approach would probably deny copyright protection to works of architecture—the actual, built three-dimensional structure—because it is highly unlikely that the carrot of copyright will encourage architects to build. A natural rights approach, based on recognizing genius, would grant protection because the architect's creative efforts are on an equal par with many other works protected by copyright, and thus the architect is equally entitled to recognition. Whether a natural rights theory can withstand rigorous analysis apart from an instrumental purpose fortunately need not be resolved here, since the grant of an additional period of copyright protection in preexisting works to entities or individuals who do not create works of authorship fails under either rationale.

\textsuperscript{128} See, e.g., Rey v. Lafferty, 990 F.2d 1379, 1393 (1st Cir. 1993) (applying contract principles to reputational interest of licensor); Lamothe v. Atl. Recording Corp., 847 F.2d 1403, 1407 (9th Cir. 1988) (stating that naming fewer than all the joint authors could result in an unfair competition cause of action); Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976) ("[C]ourts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law . . . "); Granz v. Harris, 198 F.2d 585 (2d Cir. 1952) (stating that shortening of recorded performance constituted unfair competition by mis-attributing endorsement of concert promoter); Prouty v. Nat'l Broad. Co., 26 F. Supp. 265 (D. Mass. 1939) (discussing unfair competition).

\textsuperscript{129} Belanger, \textit{supra} note 123, at 383.

The need for parody is part of the U.S. cultural demand that certain works be "unprotected" against certain uses. With regard to the right to withdraw a copyrighted work from the marketplace, however, the rift between economic rights and natural rights would prove absolute.

In the U.S., the First Sale doctrine provides the right to display and to resell a particular copy of a work. In some countries, such as England, the authors of work enjoy income from a public statutory lending right. The United States has never seriously considered providing such income protection. To the extent any consideration has been given to the U.S. adoption of a public lending right, the following provides an illustrative response:

There are several different ways to structure [a public lending right] to fit the existing limitations and requirements of copyright. However, such a course goes against the primary purpose of copyright protection, benefiting the public . . .

[A public lending right] maintains the illusion that authors are in fact entitled to such payments, rather than receiving them because Congress has decided support for authors is a worthwhile social goal.

Supporting authors, and the arts in general, is indeed worthwhile and necessary, and there is no need to hide such support behind the facade of "payments to compensate for library usage." The true goal should be to assist those who are engaged in culturally beneficial activities, and that goal standing alone is sufficient justification for any support scheme. [A public lending right], with its conceptual and practical problems, is not the way to proceed.

Recharacterizing a public lending right as a public welfare program rather than a natural property right for the author turns the rationalization for such a moral right on its head. Given the central role of the First Sale doctrine, however, such an approach is not terribly surprising.

Even more suspect is any claim of a right to withdraw a work from the public. When one valid copyright holder attempted to withdraw

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131 See Hugenholtz, supra note 125, at 81.
134 See Jennifer M. Schneck, Note, Closing the Book on the Public Lending Right, 65 N.Y.U. L. Rev. 878, 880-82 (1988) (arguing that a public lending right is economically unjustified and deserves no place within U.S. copyright law).
135 Id. at 910.
the works he owned, the courts held that the public had a First Amendment right to access and to make fair use of those works.\textsuperscript{137} Howard Hughes, the famous inventor, aviator, and recluse, attempted to gain control over biographies written about him by purchasing the copyrights. As copyright owner, he challenged other uses of those works.\textsuperscript{138} The court gave little credence to his claims as copyright holder, emphasizing instead the importance of disseminating the copyrighted material.\textsuperscript{139} "To Promote the Progress of Science and the Useful Arts"... 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.'\textsuperscript{140} The values of free speech and access of content to the public outweigh any authorial interest in control of once-published works.

Thus, neither natural rights nor moral rights serve as the underlying ethical imperative governing the public response to copyright. Neither the lending right nor the right to withdraw fit within the social or legal framework accepted within the United States. Rights of attribution and integrity are more consistent with existing U.S. copyright protection, whether explicitly recognized for works of visual art\textsuperscript{141} or more generally through the exclusive control afforded to authors and copyright owners.\textsuperscript{142}

\section{Natural Law's Necessary Application—The Right of First Publication}

Perhaps the only clear expansion of copyright that can be attributed to natural rights is that of the first publication right.\textsuperscript{143} Black-
stone articulated the first publication right as the common law of England. “When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right.”

Greater protection of the first publication right would put the author in a better position to extract economic reward as well as to negotiate for moral rights from the publisher, if they were valued by the author.

The critical aspect of the first publication right is that it puts each author in charge of his or her own priorities, allowing authors to maximize their own incentives, thus maximizing efficiency and reward. This was the original tradeoff articulated by the Supreme Court in *Wheaton*, and despite the congressional removal of publication as the basis for copyright protection, the *Wheaton* reasoning continues to provide sound guidance.

Congress has been ambivalent regarding the scope for any such first publication right, amending the Fair Use section as a result of controversies surrounding fair use and unpublished works. As modified, § 107 now adds the proviso that “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” This ambiguous addition to fair use is not consistent with a natural rights view that the pre-publication rights of an author are almost absolute. It does not, however, seem to significantly change the judicial approach to unpublished works in any meaningful manner. Even under this expanded definition of rights to protect first publication, the natural rights view may have only marginal impact. To the extent that the “natural” right and use protected is specifically that of first publication, the remaining possible fair uses contemplated in § 107, such as commentary and criticism, should not be automatically circumscribed. The Fourth Circuit recently reviewed an unauthorized copying of a 1928 unpublished book manuscript, finding that the rights of first publication were not implicated when only two copies were made, one for authen-

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144 BLACKSTONE, supra note 19, at ii 405.
149 “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107 (2000).
tication and the other for archival purposes. The two copies were fair use. As this illustrates, greater respect for first publication rights does not automatically eliminate all claims of fair use for unpublished works.

Ultimately, the question is whether the natural rights approach provides any normative guidance to the public, industry, and the courts. If there is no right and wrong in copyright protection so that only statutory construction sets the norms, then Congress should have a free hand in adjusting the law to match the interests of the stakeholders. If instead natural law dictates certain outcomes, then the public will accept those principles. By extension, Congress must respect those natural rights as should the courts.

Based on the foregoing analysis, at its core, natural rights protect two aspects of copyright. First is the Lockean notion that authors are entitled to possess and enjoy the fruits of their labors. Second, until divested by first publication in exchange for statutory benefits, authors enjoy sovereignty over their works. Unfortunately, similar to the analysis of copyright's intangible nature, the philosophical framework of natural rights provides little normative guidance towards the shape of copyright or its continued development.

II

ECONOMIC COPYRIGHT, PROMOTING PROGRESS, AND THE ROLE OF INCENTIVES

The economic rationale is widely viewed as the primary philosophical underpinning for U.S. copyright law and policy. This policy is conceptually simple: "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." The policy "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."

The power to create a balance between the author and the public may be the most significant philosophical distinction between a natural rights theory of copyright and an economic rationale. Under the natural rights theory, the power over one's writings is a "sacred" liberty that cannot be limited for the public good, whereas the eco-

151 Id.
153 Id. (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).
154 Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW, supra note 29, at 151. The
nominal rationale allows for a balancing between the interests of the public in accessing the good and the right of the author to receive an economic reward.\textsuperscript{155}

Professor Jane Ginsburg has provided groundbreaking historical research suggesting that during the inception of U.S. and French copyright law, the economic and natural rights approaches were not particularly distinct.\textsuperscript{156} Indeed, as noted earlier, Locke's own rhetoric suggests that the basis for protecting copyright is to promote progress and the useful arts.\textsuperscript{157} Nonetheless, the economic rationale for copyright serves as the central guiding theme for U.S. jurisprudence, which both expands and limits copyright.

A. The Economic Balance

The economic balance assumes that an incentive or reward must be placed before the authors so that they will continue to pursue their interest and create works of public value.\textsuperscript{158} On the other side of the balance is the concern that any monopoly or exclusionary right too strongly ensconced will unfairly enrich the author at the expense of the public. Such cost will create a barrier to public dissemination and use, thereby limiting the value of the work to the public.

This balance was articulated by Lord Mansfield in 1801:

"[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."\textsuperscript{159}

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\textsuperscript{155} See Harper & Row, 471 U.S. at 558.
\textsuperscript{156} See Ginsburg, supra note 154, at 136-39.
\textsuperscript{157} See Locke, supra note 82, bk. II § 37; cf. Paul Edward Geller, Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?, in Of Authors and Origins: Essays on Copyright Law, supra note 29, at 174 (noting that Locke provided the "initial premise" for the marketplace theory, which holds that "copyright provides market incentives for creating and communicating works").
\textsuperscript{158} Professor Hardy questions why this is the introductory question: Why is it that "Congress" must draw the appropriate balance? We do not, after all, say that Congress should draw the appropriate balance between the interests of "toothbrush producers" and "toothbrush consumers." . . . Congress makes copyright law as a matter of positive law, not natural rights. If authors have no natural rights, and Congress makes copyright law, then Congress can establish or terminate, expand or contract, those rights in whatever ways and for whatever reasons it sees fit . . . .
\textsuperscript{159} Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 n.6 (1975) (quoting Sayre v. Moore, 102 Eng. Rep. 138, 140 n.(b) (1801) (Mansfield, J.).
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This balance was first sought in the Statute of Anne, whereby the lord archbishop of Canterbury and certain other offices had the power to regulate the cost of the books if any person brought forth a complaint.\footnote{See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), art. IV 1710 http://www.wikipedia.org/wiki/Statute_of_Anne (last visited Apr. 21, 2005).}

The natural rights theory provides for an inherent property and paternity interest in an author's works. Assuming that this approach to copyright differs philosophically from a social utility approach, the two theoretical starting points do not necessarily serve to shape the power of balancing in any practical manner. Both share a common basis in authorship as property. Landes and Posner explain the economic nature of a property right as follows:

A property right is an exclusive right to the use, control, and enjoyment of some resource—that is, a right to exclude anyone else in the world from using the resource without the consent of the owner of the right, irrespective of any argument that the general welfare, whether defined in economic or any other terms, would be increased by transferring the right to someone else.\footnote{WILLIAM M. LANDES \& RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 29 (1987).}
Despite the exclusivity described above, Landes and Posner acknowledge that “[p]roperty rights in law, however, are never so absolute. . . .”\textsuperscript{162} Eminent domain laws, easements, and other legal doctrines limit the absolutist nature that exclusivity suggests.\textsuperscript{163} In contrast, liability rules provide no right to exclude but create a claim to damages when the resource is damaged in certain ways.\textsuperscript{164} Importantly, these complement each other. “Often property rights and liability rules coexist in the same resource . . . . [A] person has a property right against someone who strikes him deliberately and without justification, but he enjoys only the protection of a liability rule against someone who strikes him accidentally.”\textsuperscript{165}

In his attempt to debunk the need for an extended copyright term, Professor (now Supreme Court Justice) Breyer suggested that non-economic interests in copyright could be protected with other regimes, such as tort law.\textsuperscript{166} What this suggestion ignored, however, was precisely Landes and Posner’s point: the same item may be protected by both property and tort rules, with the appropriate rule utilized depending on the efficiency as measured by the transaction costs involved.\textsuperscript{167} In the same manner, property interests can be expanded or contracted to meet social and economic needs without denying the property interest created.

The role of the common law and legislature is to balance property and liability interests. This is true of real property, as Landes and Posner point out with their examples of crop damage caused by railroad sparks.\textsuperscript{168} Property may be protected only with liability rules—or may lose legal protection in full—if the social and economic interests are deemed to demand it. This does not mean it is no longer property, only that exclusivity may be limited.

If all property is subject to the legal balance between the exclusive owner and the public, then intellectual property is merely the realm in which the balancing is most explicitly acknowledged. The constitutional phrase “to promote the Progress of Science and useful Arts . . .”\textsuperscript{169} has been characterized as necessitating the balance be-

\textsuperscript{162} Id.
\textsuperscript{163} Id. at 29–31. The Landes and Posner example of farms and trains serves as a good analogy. Tort law rather than property law is used to benefit the railroads (when trains shoot sparks into neighboring fields) because of the public benefit of railroad transportation. Id. at 31–38.
\textsuperscript{164} See id. at 30.
\textsuperscript{165} Id.
\textsuperscript{168} See id. at 36–37.
\textsuperscript{169} U.S. Const. art. I, § 8, cl. 8.
between copyright or property owners and those that would seek to use the copyrighted works.\textsuperscript{170}

The Supreme Court has repeatedly recognized the power of Congress to adjust the balance of rights between authors, publishers, and the public. As the Court explained, “Congress’[s] adjustment of the author/publisher balance is a permissible expression of the ‘economic philosophy behind the [Copyright Clause],’ i.e., ‘the conviction that encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare.’”\textsuperscript{171}

The normative question is not whether such balancing can take place, but how to create a reasoned framework for setting or shifting the balance.\textsuperscript{172} As Landes and Posner have stated, “[s]triking the correct balance between access and incentives is the central problem in copyright law.”\textsuperscript{173} Where normative copyright may separate itself from the economic copyright espoused by Landes and Posner, Justice Stephen Breyer,\textsuperscript{174} Professor Pamela Samuelson,\textsuperscript{175} and many others,\textsuperscript{176} is the need to take more than production incentives into account in fashioning the balance between the rights of copyright owners and the public. This balance needs to account for the effect that natural rights interests of authors, the intangible attributes of intellectual property, and the normative impact shifts in copyright policy have on other regimes of property protection (as evidenced in arenas such as plagiarism and, possibly, shoplifting).

B. Promoting Progress Beyond Economics

The economic approach, although typically ascribed to the constitutional phrase “to promote the Progress of Science and useful Arts,” is not necessarily coextensive. Many copyright exclusive rights are non-economic and yet serve to promote progress in a meaningful

\textsuperscript{170} See Campbell v. Acuff-Rose Music, 510 U.S. 569, 575 (1994) (Story, J.) ("[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." (citing Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436))).


\textsuperscript{172} See Eldred v. Ashcroft, 123 S. Ct. 769, 782 (2003).

\textsuperscript{173} Landes & Posner, supra note 28, at 326.

\textsuperscript{174} Breyer, supra note 166, at 291–93.

\textsuperscript{175} Samuelson & Glushko, supra note 20, at 237–38.

and efficient manner.  

While broader public economic efficiency may have been implicit in the constitutional text, no such suggestion appeared when contemporary courts were framing the nature of copyright and fair use.  

The Supreme Court gave a very different explanation of the promotion of progress in 1879. In *Baker v. Selden*, the Court explained the quid pro quo between author and public: "[T]he teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them."  

By protecting the expression, the public gets the benefit of the underlying ideas; economics may be wholly irrelevant.

1.  *The Incentive to Choose Creativity*

Without discrediting all economic theory, one can imagine alternatives that complement abstract economic models. For example, in the music industry, the copyright holder of a song composition is typically paid at or below the statutory royalty rate for the initial sound recording of the composition.  

As a result, the payments do not increase because the statute limits payments to subsequent productions of the sound recording. Nonetheless, Congress has provided that only subsequent reproductions of the song are subject to a statutory royalty.

Economic theory dictates that no distinction need be made between the first recording and all subsequent recordings because the payments remain the same with or without the exception for the first recording. Furthermore, physical access to the composition makes the distinction almost superfluous, adding complexity and transaction costs. Thus, the economic model would eliminate any distinction between the first recording and subsequent recordings of the composition.

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177 See Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 262 (1997) ("Copyright's essential strategy is to manipulate directly an aspect of the legal system—securing exclusive rights to authors—to accomplish a goal that cannot be achieved by direct manipulation—increasing the quantity and quality of the works to which the public has access.").


179 101 U.S. 99 (1879).

180 Id. at 104.


Yet the importance of controlling the first publication transcends both the economic issues and the limited risk of premature access. Congress recognized how critical the musician's first exposure could be to the success or failure of the artist. Success in the marketplace may be economic, associated with the number of copies sold, or it may be aesthetic, captured in music reviews, critical acclaim, and professional reputation within the industry. These aesthetic successes may someday translate into economics, but it is equally possible that they will not. Economics cannot be the basis for valuing the marketplace of ideas. "Deciding which works are worthy of copyright, and, therefore, which authors deserve remuneration, is rife with potential for oppression of unpopular persons and suppression of unpopular ideas."

The relationship between critical success and commercial success is not well known. Nonetheless, the ability of an author or artist to control the timing and distribution of projects may be critical to the success or failure of her career, not just the particular work. This reputational control may also be achieved by Congress and the courts outside of the copyright statute. Section 43(a) of the Lanham Act, the unfair competition provision of the U.S. Trademark Law, provides for significant relief for misuse of an author's identity and may extend to protect the integrity of the work as well.

Before trying to explain why the scope of copyright should not be expanded beyond that afforded by the 1909 Copyright Act, Professor Breyer attempted to dismiss the non-economic aspects of copyright protection because such interests would undermine his economic analysis. Citing the Register of Copyrights, what states that "the law 'has an important secondary purpose: To give authors the reward due

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184 Schaumann, supra note 177, at 261.
185 Some filmmakers, such as Woody Allen, are considered to be critical successes despite limited commercial appeal. See Allen to Attend Cannes, SAN DIEGO UNION-TRIB., Apr. 9, 2002, at E3. Many examples of the opposite are also recognized, with films, books, and CDs often defying critics' predictions about audience acclaim. See also Schaumann, supra note 177, at 261 & n.51 (discussing such works).
187 See Aalmuhammed v. Lee, 202 F.3d 1227, 1237 (9th Cir. 2000); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403-05 (9th Cir. 1997); Cleary v. News Corp., 30 F.3d 1255, 1259-62 (9th Cir. 1994); Lamothe v. Atl. Recording Corp., 847 F.2d 1403, 1405-08 (9th Cir. 1988); Smith v. Montoro, 648 F.2d 602, 605 (9th Cir. 1981).
188 Cf. Shaw v. Lindheim, 919 F.2d 1353, 1364 (9th Cir. 1990) (finding no Lanham Act infringement because the two works in question were not sufficiently similar).
189 See Breyer, supra note 166, at 284-91.
them for their contribution to society,'” Breyer questions the nature of copyright’s reward system. He suggests that the reward cannot be merely the "amount of money needed to persuade a man to write a book." Instead, he suggests that it must be “the ‘value’ of [the author’s] work to society—a value that might be measured in terms of what those who benefit from the book would be willing to pay rather than do without it.” This reward, Breyer asserts, is not one society currently offers.

Instead of attempting to assess the incalculable value to society, Breyer should have discussed whether the then Register of Copyrights sought to address the opportunity costs which face the most gifted of authors and artists. Success in any of the copyright industries is fickle and often short-lived. Most novelists could make a good living writing business copy and most composers would be successful writing advertising jingles. Gainfully employed teachers need never write books, celebrities would shun autobiographies, and in general, Breyer’s mechanistically efficient version of copyright would produce a poorer body of work for the public’s education and enjoyment. Breyer reached this result because he emphasized the publisher’s ability to control the market through contract rather than the author’s ability to exploit all her exclusive rights.

Work within the traditional employment settings might provide ample and far more secure economic incentives to create. To overcome the risks of authorship and production in the copyright industries, the Register of Copyrights correctly identified that both successful and unsuccessful authors may have elected to forego more predictable rewards for the incentives that arise from copyright’s protection of exclusive rights. Because the alternative opportunities are presumably more rewarding and lucrative for those who are more ca-

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190 Id. at 285 (quoting HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (Comm. Print 1961)).
191 Id.
192 Id. In the accompanying footnote, he admits that such a measure is incalculable. See id. n.19.
193 Breyer ignores the fact that non-commercial materials are financed using models other than direct sales. Academic journals have the costs absorbed by charitable, tax exempt educational institutions; and religious publications are also typically nonprofit and tax exempt, receiving both the tax advantage and charitable donations. In addition, other models generate pay for the distribution of content. For example, commercial radio and television use sponsorships and advertising, and computer programs and software come bundled with hardware and equipment. As a result, an analysis of distribution is not particularly relevant to the underlying economic value of copyright itself.
194 See Breyer, supra note 166, at 293–94 (focusing his economic analysis exclusively on book production rather than authorship).
195 The work-made-for-hire provisions in the Copyright Act address these, vesting the employer as copyright owner of the work. See 17 U.S.C. §§ 101, 201(b) (2000).
pable, copyright's incentive is particularly important to entice those who have the most to give.\textsuperscript{196}

The need to create incentives to encourage authorship is not an outgrowth of natural rights, but an economic reality—the risks borne by the author are often greater than those felt by the publishers or producers.\textsuperscript{197} Breyer's analysis fails to provide any meaningful models because he dismisses all costs other than the marginal costs of the publishers and producers. The Landes and Posner economic analysis, on the other hand, provides a more useful economic guide because it focuses on the costs to the creators of the work at both the author and publisher level.\textsuperscript{198}

Another variation on this theme focuses on the avoidance cost associated with the activity of creating intellectual property. Under this theory, reward commensurate with the endeavor is necessary to motivate authors and inventors.\textsuperscript{199} But the problem with the avoidance approach is self-evident. "If we believe that an avoidance theory of labor justifies intellectual property, we are left with two categories of ideas: those whose production required unpleasant labor and those produced by enjoyable labor. Are the latter to be denied protection? This strange result applies to all fruits of labor, not just intellectual property."\textsuperscript{200} There is no meaningful societal value to the unpleasant works, and this was never considered important. The two goals of incentives are to allow for a sufficient return on investment (so that it is economically rewarding to produce works) and to value the works highly enough that valuable works are created. The first of these goals is based on notions of market efficiency for publishers; the second on

\textsuperscript{196} To model the argument, assume the income of an author would be $50,000 as a college professor. Further, assume that approximately twenty percent of published novels are financially successful. A risk-neutral individual would anticipate $250,000 in royalties for a successful book to reflect the one-in-five chance of recouping the foregone salary. This formula does not take into account the percentage of novel manuscripts that are not accepted for publication. For a more detailed discussion in the context of fine art, see Daniel J. Gifford, \textit{Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright}, 18 Cardozo Arts & Ent. L.J. 569 (2000).

\textsuperscript{197} See \textit{Watt}, supra note 78, at 4 ("[I]f all consumers were to free ride, then it is likely that creative members of society will dedicate their efforts to other better paid activities, with the corresponding loss of important cultural assets, of considerable social value, that would otherwise have existed.").

\textsuperscript{198} Breyer, Landes and Posner come closest to agreement on the issue of copyright term. This makes sense because, as Landes and Posner point out, there is little economic value to the author of the extended copyright term. "[E]ven in the unlikely event that [a] work will still generate a substantial income in [its] one hundredth year, the present value of that expectation will be virtually zero." Landes & Posner, supra note 28, at 363. \textit{See also} Eldred v. Ashcroft, 123 S. Ct. 769, 807 (2003) (Breyer, J., dissenting) ("It seems fair to say that, for example, a 1% likelihood of earning $100 annually for 20 years, starting \textit{75 years into the future}, is worth less than seven cents today.").

\textsuperscript{199} See Hughes, supra note 103, at 302-04.

\textsuperscript{200} Id. at 305.
the economic need to make the activity competitive with other lucrative endeavors.

Beginning in 1709, England singled out intellectual property from other areas of law, distinctly from other forms of labor. The United States and even France took similar approaches. The underlying basis was a recognition that intellectual enterprise serves the public in a manner fundamentally different from other forms of labor, and thus needs to be clothed with sufficient reward for the most capable to serve society in this capacity. The alternative system, based on "evils of an authorship dependent upon private or public patronage," would put the incentive system in the hands of the government or self-appointed arbiters of culture. This was part of the fundamental shift away from a patronage system where such works were dependent on elite property owners. To transcend the comfort of the patron system, the reward had to be quite significant.

Therefore, a more pragmatic philosophy of copyright requires that authors and artists be rewarded for sticking with their chosen profession. The preferred alternative is to let the marketplace determine which of the pugnacious creators should be rewarded. As a result, copyright must protect economic incentives for authors without regard to the theoretical social utility of a particular work.

2. Promoting Progress Through the Public Domain

Congress exercises its authority and obligation to promote progress not merely by providing copyright owners with exclusive rights, but by generally shaping the marketplace for copyrighted works. This

203 See Chartier, supra note 29, at 14 ("In France, the decree of the King's Council of August 1777 implicitly linked the perpetuity of the privileges accorded to authors and the specificity of their 'labour.'").
204 Copyright Law Revision, 1965: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary, 89th Cong. (1965), reprinted in 8 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 65 (2d ed. 2001) (statement of Abraham L. Kaminstein, Register of Copyrights: "The basic purpose of copyright protection is the public interest, to make sure that the wellsprings of creation do not dry up through lack of incentive, and to provide an alternative to the evils of an authorship dependent upon private or public patronage.").
205 See Gifford, supra note 196, at 586-87 ("[P]atronage remained the principal economic base for the arts from the Renaissance through the nineteenth century . . .").
206 See id. at 588-90.
207 Other reward systems are used in addition to the marketplace. Research is subsidized though academic institutions. Similarly, classical music, dance, theatre, and other art forms are supported through tax exempt charitable centers. Finally, some works are supported by the government through the National Endowment for the Arts and the National Endowment for the Humanities, as well as through similar state organizations. See id.
is Congress's inherent task in managing copyright policy. "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."\(^{208}\) To effectuate marketplace management, Congress must recognize the sometimes conflicting needs of existing authors, future authors, publishers, and the general public.\(^{209}\) Congress has been engaged in this task throughout the history of copyright, as the 1909 Act legislative hearings make clear:

"In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly."\(^{210}\)

In the debate over the evolution of copyright law and the correct fulcrum for the balance, one of the key issues has been the role of the public domain.\(^{211}\) Professor Jaszi captures the essence of the public domain well by describing it as "the priceless repository of works that are ineligible for copyright, were created before copyright law existed, have had their copyrights expire, or have been freely given to the public by their authors."\(^{212}\) This priceless repository is of significant value to the public because it enables many works, such as the King James Bible, to be made available for less cost.\(^{213}\)

Elimination of royalties, however, is only one of the important aspects of the public domain’s priceless role. A second, largely ignored role of the public domain is freeing a work from its attributive rights.\(^{214}\) Simply put, contractual licensing arrangements for some


\(^{210}\) Sony, 464 U.S. at 430 n.10 (citing H.R. Rep. No. 2222-60, at 7 (1909)).


works develop into an intractable morass of ownership interests and licensing obligations.\textsuperscript{215} For works that have fallen prey to intricate licensing arrangements, ownership bankruptcies, and other fissures in the chain of copyright title, the public domain provides the freedom for any publisher or exhibitor to reintroduce the work. Once a work can no longer benefit its owners because of unsolvable ownership problems, it may as well benefit the public through its general availability in the public domain. Once the legal costs associated with curing the problems with copyright title exceed the value of work when exploited, it will cease to be publicly available. Such works only reemerge for new uses once they fall into the public domain.

The third role of the public domain is to serve as the creative grist for the new authorial mill. Popular culture often works best by recasting accepted truths in a new light.\textsuperscript{216} Just as Shakespeare built many of his fictional works on the well-known stories of Plutarch, modern playwrights and filmmakers build their works on his.\textsuperscript{217} While fair use allows for limited comment, criticism, and creative allusion to existing copyrighted works, only works in the public domain can be freely adapted, revised, and retold. The repeated return to this public well has a profound effect on society, creating a “lingua culture,” which serves to create a social bond throughout society. This recasting function of the public domain also serves a central purpose: “[B]y limiting the scope of [copyright’s] proprietary entitlement, copyright constrains owner control over expression, seeking to preserve rich possibilities for critical exchange and diverse reformulation of existing works.”\textsuperscript{218} The reformulation central to this role can only occur when all copyright ownership ties have been cut off.

The recasting is often in part rather than in whole. Music, clips, photographs, characters, poetry, and other building blocks of larger copyrighted works can be manipulated by newer authors as part of the ongoing creative process. Without these building blocks, the barriers to entry in the creative marketplace become much higher. To the extent that only some authors have the financial ability to license these building blocks, the actual and transaction costs of licensing disproportionately disadvantage those artists without funds and access to legal services.\textsuperscript{219} To put the point more bluntly, African American

\textsuperscript{215} See Jon M. Garon, Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas, 17 Cardozo Arts & Ent. L.J. 491, 520 (1999).

\textsuperscript{216} See Lemley, supra note 209, at 124–26.

\textsuperscript{217} For example, the musical \textit{Kiss Me Kate} is a retelling of \textit{Taming of the Shrew}, \textit{Boys from Syracuse} is a retelling of \textit{Comedy of Errors} (which was itself a retelling of Plutarch’s \textit{The Twin Mechmi}), and \textit{West Side Story} derives from \textit{Romeo & Juliet}.

\textsuperscript{218} Netanel, supra note 211, at 347.

artists may find that a shrinking public domain reduces access to works and perpetuates the racial bias inherent in the commercial licensing transactions rampant throughout the early growth of the entertainment industries. Thus, a subtle but insidious side effect of the dwindling public domain is to reinforce the status quo in the development of new schools of expression, art, media, and other works.

The public domain also exemplifies the purest form of public goods works in copyright. Without any legal constraints, the inherently nonrivalrous nature of all copyrights combines with its nonexclusivity through low marginal costs of copying or free receipt of broadcast works to model perfectly public goods. Despite this public goods nature, however, technology and contract law can combine to reestablish exclusivity.

Perhaps the greatest blow to the perceived equity of copyright law has been the use of consumer contracts to reshape the public domain. In *ProCD, Inc. v. Zeidenberg*, the Seventh Circuit established the proposition that shrinkwrap agreements are binding to limit a consumer's right to extract public domain data from a computer CD or waive other significant rights. Since then, other courts have struggled to address the proper place for such contracts. Shrinkwrap contracts do not reflect careful congressional balancing but rather ill-

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220 See id. at 356–57.
In practice, Blacks as a class received less protection for artistic musical works due to (1) inequalities of bargaining power (2) the clash between the structural elements of copyright law and the oral predicate of Black culture, and (3) broad and pervasive social discrimination which both devalued Black contributions to the arts and created greater vulnerability to exploitation and appropriation of creative works.

221 The economic consequences caused by the costs of licensing may closely correlate with issues of race and culture. To the extent that the minority communities are less affluent and have been traditionally underserved by the legal community, the artists struggling to emerge within these communities have fewer licensed component elements with which to create their works. This concern has multiple parts. For example, increasing evidence that racial minorities have less access to computers, the Internet, and other technologies has fueled fears that minority communities will be on the wrong side of a growing "digital divide." See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1133 (2000) ("Many worry that racial minorities will be left behind in the technological backwater.").

222 A nonrivalrous good is one which a person can possess and enjoy without precluding or interfering with the identical possession and enjoyment by another person. A nonexclusive good is one from the consumption of which potential consumers cannot be excluded. See Adam R. Fox, *The Economics of Expression and the Future of Copyright Law*, 25 OHIO N.U. L. REV. 5, 10 (1999).

223 86 F.3d 1447 (7th Cir. 1996).

224 Id. at 1449.

illustrate the ability to alter fundamentally the manner of copyright delivery by combining changes in both law and technology. The CD producer can foreclose all access to formulae and processes embedded in its content while contractually precluding fair use or use of facts and public domain materials.\textsuperscript{226}

So long as significant legal rights can be waived in non-negotiable, mass-market transactions,\textsuperscript{227} critics will consider the balance between copyright holders and the public to be heavily tipped towards the copyright holders.\textsuperscript{228} The irony here is that these materials may not necessarily have anything to do with the previous copyright owners of the public domain works, or the industrious discoverers of the facts. Instead, the power of shrinkwrap and clickwrap agreements is to vest control of the product in the packager of the content. According to the logic of \textit{ProCD}, any DVD distributor with access to public domain motion picture masters could use these contracts to control copying of the DVD.\textsuperscript{229}

The potential for contract law to close the public domain is far greater than the potential for copyright to do the same.\textsuperscript{230} It also

\textsuperscript{226} Compare \textit{ProCD}, 86 F.3d at 1449 (foreclosing access to formulatnes and processes through a shrinkwrap) with 17 U.S.C. § 102(b) (1999) ("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.").

\textsuperscript{227} Mass-market consumer transactions differ from negotiated contracts among participants of roughly equal bargaining power. Particularly during those stages prior to the public distribution of a product, protection of trade secrets and other confidential information may be critical to its development, but such protection is less compelling and outweighed by the value of public dissemination once the work has been completed and generally published to the public. \textit{See} Ryan J. Casamiquela, \textit{Contractual Assent and Enforceability in Cyberspace}, 17 BERKELEY TECH. L.J. 475 (2002).

\textsuperscript{228} \textit{See id.} at 492 ("Because producers use shrinkwrap and clickwrap licenses in mass-market transactions, courts would be giving producers the opportunity to re-write copyright law if federal law did not preempt private contracts.") (footnotes omitted); Garon, \textit{supra} note 215, at 550 ("Properly' drafted, the clickwrap license will cover every instance of the software's use. For all practical purposes, such a construction of the shrinkwrap provisions could effectively end the right to the public domain for material that is commercially sold.").

\textsuperscript{229} \textit{See Michael J. Madison, Legal-Ware: Contract and Copyright in the Digital Age,} 67 FORDHAM L. REV. 1025, 1111 (1998). Although not presently used in the marketplace, DVD players incorporate a menu system that could readily be used to require a click-through license of the type upheld in \textit{ProCD}. Shrinkwrap licenses which incorporate a manifestation of assent demonstrated by the opening of the packaging can be applied to any product and are not legally restricted to software. Presumably, public pressure has stemmed the expansion of this form of contract creation.

\textsuperscript{230} This concern is exacerbated by the proposed development of the Uniform Computer Information Transaction Act (UCITA), formerly known as draft Article 2B to the Uniform Commercial Code. UCITA specifically validates such shrinkwrap and clickwrap agreements without providing safeguards to protect public interests from overreaching in areas such as reverse engineering, public domain access, and fair use. \textit{See} James S. Heller,
reaches beyond the public domain to facts and ideas that share many of the attributes of public domain materials, but were never before limited from public consumption.\textsuperscript{231} Facts, formulae, ideas, and other works outside of copyright may still be contractually bound up in shrinkwrap and clickwrap agreements.\textsuperscript{232}

Unfortunately, the impact of shrinkwrap and clickwrap agreements has left a strong distaste in the public's mouth, rendering dislike of the modern law's application to free information and the public domain undifferentiated between copyright and contract law.\textsuperscript{233} In the context of mass-market consumer transactions, \textit{ProCD} and its progeny change the legal balance and the social relationship between the law and the public, adopting an absolutist approach in favor of the content distributor.

The decision vests legal control over copyright policy in the content packager's private hands and undermines the consumer's respect for equitable contracts and meaningful assent.\textsuperscript{234} Because it is ethically inconsistent with legal notions of fair play, \textit{ProCD} represents an example of the law overasserting the rights of a party so blatantly that any enforcement impugns the validity of law itself.\textsuperscript{235} The \textit{ProCD} decision is so far outside the normative acceptance of copyright that it is untied from its ethical and normative moorings.

A similar, but seldom discussed phenomenon, occurs with public domain materials donated to libraries and museums. As part of the donation agreement, the donor may impose significant restrictions on the institution. In \textit{Salinger v. Random House, Inc.},\textsuperscript{236} the libraries provided the improperly published letters to Ian Hamilton, the infringing biographer, as part of the research he conducted at Harvard, Princeton, and the University of Texas.\textsuperscript{237} These institutions had restrictions typical of the use restrictions imposed on libraries and uni-


\textsuperscript{231} See, e.g., Madison, \textit{supra} note 229, at 1029; \textit{ProCD}, 86 F.3d at 1447.

\textsuperscript{232} \textit{ProCD}, 86 F.3d at 1447.

\textsuperscript{233} Madison, \textit{supra} note 229, at 1029 ("[B]y affirming and proclaiming the validity of shrinkwrap practice, \textit{ProCD} encourages norms of information use that depress the development of a coherent understanding of what I call 'open space.' Open space is shorthand for the combination of material and information that lies in the public domain and the fair use of copyrighted works.").

\textsuperscript{234} Heller, \textit{supra} note 230, at 58.

\textsuperscript{235} As applied to public domain content, facts, underlying ideas, fair use research or criticism, and other types of content use, the clickwrap structure suggests a form of practice closer to copyright misuse or illegal tying arrangements than to bona fide commercial transactions.

\textsuperscript{236} 811 F.2d 90 (2d Cir. 1987), \textit{cert. denied}, 484 U.S. 890 (1987).

\textsuperscript{237} \textit{Id.} at 93.
versities, making copyrighted and even public domain works unavailable for republication or for other, non-archival uses. Language quoted from such contracts, such as the Princeton agreement "not to copy, reproduce, circulate or publish" material available in the collection, goes much further than does copyright law. In the wake of ProCD and the current trend to immunize contract law from copyright limitations, these provisions may well prove to reduce the public domain more directly than congressional legislation on copyright policy.

3. The Power of Congress to Play Favorites

Although Congress has the power to adjust the balance of copyright policy among its various constituencies, it does not necessarily seek to maximize the copyright owner's economic return. More often than not, Congress provides less copyright protection than that which economic analyses suggest is optimal. "Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly."

When Congress limits copyright, it serves to promote some public interest other than economic reward for the author. If the power to promote progress provides noneconomic incentives as well as economic incentives, then Congress should have the ability to achieve this goal through economically inefficient limitations on, as well as economically sound expansions of, copyright. Section 110 of the Copyright Act codifies many noneconomic limitations.

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238 See id. As the Salinger court explained:
Ian Hamilton located most, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives. Prior to examining the letters at the university libraries, Hamilton signed form agreements furnished by the libraries, restricting the use he could make of the letters without permission of the library and the owner of the literary property rights. The Harvard form required permission "to publish the contents of the manuscript or any excerpt therefrom." The Princeton form obliged the signer "not to copy, reproduce, circulate or publish" inspected manuscripts without permission.

239 Id.

240 See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.").

241 See id.

242 Id.

Section 110 provides examples of balancing that are clearly intended to promote public interests at the expense of authors and artists. For example, the public performance and display of a work shown as part of face-to-face education illustrates Congress's desire that schools be relieved of the expense of purchasing the rights to show copies in the classroom. Congress has a similar policy to protect churches from having to pay performance fees. These provisions of the law limit the scope of the copyright holder's interest. In real property language, these §110 provisions create an easement over the copyright owner's interest. In tort terms, these provisions provide limited immunity from suit.

The property shifting conducted by Congress in these instances has little to do with economics; rather, congressional exemptions may reflect the societal dislike of tort claims, which waste the assets of charitable organizations. In this area, Congress continues to extend the limited immunity it has long recognized.

Perhaps the best example of this noneconomic balance is §110(4). This cumbersome provision permits public performances of copyrighted works, so long as the performances are provided by

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244 See id. § 110(1); Jon Garon, The Electronic Jungle: The Application of Intellectual Property Law to Distance Education, 4 VAND. J. ENT. L. & PRACT. 146, 156-57 (2002) (discussing the classroom performance exceptions to public performance risks as applied to classroom and distance education).

245 See 17 U.S.C. § 110(3). Cf. Syn, supra note 213, at 10-15 (reviewing the lack of copyright protection for the King James Bible in the United Kingdom). Whether the religious accommodation of §110 would survive constitutional challenge remains an interesting but untested question. The statute is not neutral toward religion, but rather is directly singling out religious content ("a dramatico-musical work of a religious nature") for less protection than other forms of dramatico-musical works and religious services and assemblies for benefits not afforded to other public gatherings. As such, the law is not neutral, therefore failing Lemon v. Kurtzman, 403 U.S. 602, 619-20 (1971). Selectively stripping the copyright owner of the power to protect the property interest in this one instance may also violate the right not to be compelled to speak. See Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974). Unlike fair use, which requires the amount taken to be appropriate and the usage to be limited to the types of fair uses recognized by courts and the statute, §110(3) has no such limitation. On the other hand, the performance must be substantially accurate. If there is significant alteration of the script that would most likely be considered the creation of a derivative work, it is an exclusive right not covered by the statute.

246 The tort analogy may be more appropriate. Sovereign immunity would have reached state schools and colleges, unless waived. Similarly, many states recognized charitable immunity at one time to protect nonprofit organizations such as schools and churches from tort liability. Congress's choice of exemptions may reflect the societal dislike of tort claims wasting the assets of such charitable activities. See also 17 U.S.C. § 121 (1999) (exempting from copyright protection works created for use by "blind people and other people with disabilities").

247 These provisions all predate the 1976 Copyright Act. See 17 U.S.C. § 1(c) (1909) (repealed 1978). The 1909 Act included a specific requirement that public performances were "for profit" rather than exempting specific nonprofit activities. Id.

volunteers, \(^{249}\) and there is either no admission charge or the charges inure to a bona fide, tax exempt purpose. \(^{250}\) Such use, however, can be precluded if the copyright owner timely objects to the use of the copyrighted work. \(^{251}\) The statute does not actually shift the statutory "property" rights of the author, although it does change the tort presumptions. Further, its notice provision shifts the informational and enforcement burden under the statute. Congress has shifted the duty to police the marketplace from the consumer to the copyright owner for those nonprofit performances staged without charging admission fees or put on for the benefit of nonprofit, tax exempt activities. \(^{252}\) It has also dramatically truncated the timeframe of enforcement, from three years following infringement \(^{253}\) to one week prior to infringement. \(^{254}\) Thus, a copyright owner cannot take timely steps to block infringement performances unless the copyright somehow encounters advance marketing materials or otherwise learns of the performance.

The shift acknowledges that the real issue in many of these situations is not the economics of copyright, but the transaction costs associated with permission and enforcement. \(^{255}\) If a nonprofit must ask permission to use copyrighted material, the costs and burdens of finding the copyright holder, the time delay involved in asking permission, and the fear of rejection will generally outweigh the benefits of seeking a license, even if the license itself is without cost. \(^{256}\) Under § 110(4)(B), the copyright owner has the same power to accept or reject the performance as before. However, she bears the costs and burdens of finding the nonprofit and making a timely objection. \(^{257}\) The net effect is to make the nonprofit performances far easier to conduct without technically stripping the copyright owner of any property or economic interests.

Where for-profit activities are involved, Landes and Posner recommend construing fair use narrowly so that performing rights societies such as the American Society for Composers, Authors, and Publishers (ASCAP) and similar "innovative market mechanisms that

\(^{249}\) Id. (requiring no payment to "performance promoters or organizers"). More accurately, the protection is limited to volunteers, but the meaning is to protect amateur, unpaid performances. Professional volunteers are also permitted so long as other conditions of the statute are met.

\(^{250}\) Id.

\(^{251}\) Id. § 110(4)(B).

\(^{252}\) See id.

\(^{253}\) See id. § 507(b) (2000).

\(^{254}\) See id. § 110(4)(B).


\(^{256}\) See id. at 2354.

\(^{257}\) See 17 U.S.C. § 110(5).
reduce transactions costs” continue to develop. One could speculate that Congress may be concerned that the limited benefit of these performing rights society licenses and the impracticality of licensing nonmusical works would result in underutilization of the copyrighted works, increased violations of copyright law, and little benefit to the copyright owners. In this situation, both the economic and progress rationales support an extension of the exception to copyright. The theoretical power to stop these performances is a nod to the natural rights interests, though it hardly provides meaningful protection in most instances.

These three different approaches diverge most dramatically in their treatment of the next exemption in § 110 of the Copyright Act. Section 110(5) exempts retail businesses and restaurants from copyright owners’ exclusive rights to public performances of their works under certain situations. To be eligible for the exemption, the store or restaurant must only be playing a television or radio program that is otherwise licensed for broadcast and meet some combination of equipment and space limitations.

\[258\] Landes & Posner, supra note 28, at 358.
\[259\] See 17 U.S.C. § 110(5).
\[260\] See id. The Act states:

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays . . .

(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless-

(i) a direct charge is made to see or hear the transmission; or
(ii) the transmission thus received is further transmitted to the public;

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual
Unlike the previously discussed exemptions in § 110, § 110(5) is not limited to charitable activities, nor does it suffer from significant transaction costs because the performing rights societies are already successfully licensing similar establishments which fall outside the fair use safe harbor created by the equipment and square footage provisions of the law.\textsuperscript{261} Instead, Congress intended that this provision provide economic relief to small businesses and restaurateurs from the payment demands of the copyright owners represented by the performing rights societies.\textsuperscript{262}

From a natural rights perspective, such congressional balancing is unfathomable because it directly interferes with the power, vested immutably with the author, to control the nature of her work. Although such a position ignores the practical reality that the author ceded control to the broadcasting company, which transmitted the program to each store or restaurant, it still interferes with this right. In fact, ab-

\begin{quote}
devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii) no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed . . .
\end{quote}

\textit{Id.} \textsuperscript{261} See \textit{id.} § 110.

\textsuperscript{262} See Garon, \textit{supra} note 215, at 526–27.
sent this congressional action, it was possible for copyright owners, such as the National Basketball Association or National Football League, to seek legal remedy against stores and restaurants that were publicly broadcasting their games without league consent. Nothing inherent in the balancing of natural rights suggests that the right could be limited for the convenience of shopkeepers.

Similarly, from a purely economic perspective, Landes and Posner explicitly address the issues regarding the availability of the blanket licenses to broadcasters and state that the role of the performing rights societies provides adequate efficiency so that a fair use provision is unnecessary for the small business owner. Simply put, the transaction costs involved do not provide the basis for denying copyright protection. Further, although not discussed in this instance by Landes and Posner, the small business trade associations provide a potential vehicle for private negotiations. In this regard, even the fear that some copyright owners would refuse to license could have been addressed. If a trade association for all restaurants and sports bars entered into a blanket licensing agreement, then it could have assured every bar in the country that by payment of its required fee, the copyright owners could not single out one bar for refusal to negotiate. As a result, there was no strong economic argument to provide for protectionist legislation.

This legislation can only be justified from the progress perspective. Congress presumably reasoned that the copyright owners would do far more harm to themselves by negotiating with restaurants and shopkeepers. Although copyright owners had an economic and natural interest in the works available in the stores and restaurants, their interest was subservient to the interests of the stores and restaurants in being absolved from royalty payments. Some commentators have argued that the codification of the copyright exemptions in § 110 simply prevented a greedy industry from alienating its core audience, while others have suggested that the legislature merely valued the interests of the restaurant lobby more than those of the copyright lobby. In any case, Congress evidently determined that allowing private negotiations for these licenses did not further progress.

This legislation sends a strong signal that Congress has the legislative authority to tip the balance in favor of copyright owners or towards the public on a case-by-case basis. Except for possible

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264 See id.
constitutional limitations, Congress can shape the balance across a wide spectrum of issues. In any given debate, economic efficiency may or may not be among the concerns Congress chooses to address.

III
PUBLIC GOODS AND WHAT IS GOOD FOR THE PUBLIC

The nature of intellectual property requires congressional balancing between copyright holders' interests and other societal interests. Economic considerations, promotion of progress in other forms, and the natural rights of authors may set parameters for a debate on optimal balancing. The intangible nature of the property makes rules, rather than mere possession, the primary mechanism for this shift in interests, but as described in Parts I and II, none of these theories individually serve to explain or predict the nature of copyright or help identify the normative and ethical underpinnings which shape cultural acceptance of copyright norms. While each copyright theory describes a part of copyright, only copyright's perceived status as a public good fully frames the modern debate.

The conception of public goods and ideas as nonrivalous and nonexclusive echoes the words of Thomas Jefferson: "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." The concept of public goods is consistent with Roman property models. Air, sea, and free-flowing water are nonrivalous in that no user generally reduces the enjoyment of others. None of these types of property can be held exclusively.

Those properties which are both nonrivalous and nonexclusive can be diminished by no one and therefore society does not respect any claims of ownership. Regardless of legal construct, social justice dictates that public goods are not subject to ownership and control.

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267 See supra note 78, at 3 ("A public good is [characterized] by admitting more than one user, with no user's consumption requiring any less consumption by any other user."); Fox, supra note 222, at 10.
269 See supra note 79, at 522. The potential for pollution provides a limiting value on natural public goods. Overuse may diminish the value of the air, sea, or water, but it does not diminish the relative interests of one individual over another.
270 Id. Of course the coastline can be held exclusively, so that access to the public good may be privately controlled.
A. Misconceptions of Copyright as a Public Good

Landes and Posner suggest that intellectual property is a public good because of its delivery aspects.\(^{271}\)

While the cost of creating a work subject to copyright protection—for example, a book, movie, song, ballet, lithograph, map, business directory, or computer software program—is often high, the cost of reproducing the work, whether by the creator or by those to whom he has made it available, is often low. And once copies are available to others, it is often inexpensive for these users to make additional copies.\(^{272}\)

A perfect model for public goods is the over-the-air broadcasting of radio and television signals. Reception of AM, FM and broadcast television is nonrivalous. The addition of more television sets and radio receivers does not diminish the broadcast signal in any manner. The broadcasters also recognize that the signal is nonexclusive, meaning that the broadcaster has only general control over the ability to select signal recipients.\(^{273}\) As a result, over-the-air broadcasting is a public good.

The problem with this description of over-the-air broadcasting is that it suggests that radio and television programming—the content being distributed—is a public good as well. The public good nature of the distribution model does not transform the underlying work's property attributes. Traditionally, people treated the delivery of some copyrighted works such as books and phonorecords as public goods because the manufacturing costs were low while the development costs were high.\(^{274}\) These were not true public goods, since each copy of the work was exclusive, but they approximated public goods because of the ability of either the copyright owner or the pirate to inexpensively expand the number of copies. Each additional copy does have some costs, however, and legal regimes such as copyright retain the exclusivity to stop pirates and keep the copyrighted works from becoming public goods. Unlike over-the-air broadcasting, newspapers, CDs, and other distribution methods are not truly public goods.

Similarly, live indoor public performances in movie theaters and stage theatres are exclusive because each seat for the performance is sold individually. As a result, indoor public performances of copyrighted works have never been public goods. Nonetheless, the preem-

\(^{271}\) See Landes & Posner, supra note 28, at 326.

\(^{272}\) Id. With the use of peer-to-peer networks and other computer wonders, the costs of reproduction have dropped from low to virtually zero. There is an overhead cost for the purchase of the computer, but it need be taken into account only if the consumer purchased the computer exclusively for the reproduction of copyrighted works.

\(^{273}\) The broadcasters may have a limited ability to control the outlaying audience by choice of signal strength and through placement of the transmitting tower.

\(^{274}\) See Landes & Posner, supra note 28, at 326.
inence of over-the-air broadcasting as an entertainment and communications medium has influenced the public's perception that copyright protects public goods.

1. The Television Cases

The television cases illustrate how technological advances require economic and normative models to differentiate between the delivery mechanism and the underlying interest. In the early cases of Fortnightly Corp. v. United Artists Television, Inc.\textsuperscript{275} and Sony Corp. of America v. Universal City Studios, Inc.\textsuperscript{276} the Court was swayed, at least in part, by the public good nature of the delivery mechanism—television.

In Fortnightly, a local community antenna television (CATV)\textsuperscript{277} system retransmitted broadcast signals from the local over-the-air broadcasters to subscribers' homes using coaxial cable.\textsuperscript{278} United Artists sued, claiming that the rebroadcasts of its copyrighted motion pictures to Fortnightly's paying subscribers was a public performance engaged in for profit by the CATV system.\textsuperscript{279} The Court refused to find liability, explaining that "a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals.... It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas."\textsuperscript{280} By providing to the broadcaster's public the same content as that delivered through a similar vehicle, the Court found that no performance had taken place.\textsuperscript{281} This was heavily disputed by the dissent, which pointed out that more than forty years of case law supported the notion that retransmission was a public performance.\textsuperscript{282} The dissent cited Buck v. Jezell-LaSalle Realty Corp.,\textsuperscript{283} which the majority limited to its facts.\textsuperscript{284} The significant distinction, according to the majority opin-

\textsuperscript{275} 392 U.S. 390 (1968); see also Teleprompter Corp. v. CBS, 415 U.S. 394 (1974) (ruling that regulation of the communications industry must be left to Congress).
\textsuperscript{277} This was the precursor of modern cable broadcasting.
\textsuperscript{278} Fortnightly, 392 U.S. at 391–93.
\textsuperscript{279} Id. at 395. See 17 U.S.C. § 1(c) (superseded) (providing for the copyright owner's exclusive right to "perform . . . in public for profit").
\textsuperscript{280} Fortnightly, 392 U.S. at 399.
\textsuperscript{281} See id. at 400–02.
\textsuperscript{282} See id. at 405 (Fortas, J., dissenting).
\textsuperscript{283} 283 U.S. 191 (1931).
\textsuperscript{284} See Fortnightly, 392 U.S. at 396 n.18.

But in Jewell-LaSalle, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement[,] but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. The Jewell-LaSalle decision must be understood as limited to its own facts.

\textit{Id.} (citations omitted).
ion, was that the original broadcast had been unauthorized, suggesting that had the original broadcast been a lawful one, rebroadcasting the signals to the public in the nonexclusive audience could not be a copyright violation. The outcome in *Fortnightly* is inconsistent with most, if not all case law addressing public performance, because the unauthorized person has no legal right to expand, enhance, modify, or alter the public performance offered by the copyright owner, even if the target audience would not otherwise have changed.

Although the Court never discussed the public good nature of the broadcast, it strongly suggested that if a member of the public has access to a signal, then the intermediate actions to provide that same signal cannot violate the copyright owner's interest, even when conducted by an unauthorized third party. The result can best be explained as reflecting the understanding that a broadcast is essentially a public good, for which no copyright injury can be compensated by a court.

Such an approach is also consistent with the awkward decision announced by the Court in *Sony*. The *Sony* Court, in discussing whether the unauthorized, temporary copying of broadcast programming, known as time-shifting, could be deemed a fair use, invoked a variation of the public goods analysis:

Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Time-shifting does not even remotely entail comparable consequences to the copyright owner. Moreover, the time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter. Indeed, no live viewer would buy a prerecorded videotape if he did not have access to a VTR.

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285 See id.
287 See *Fortnightly*, 392 U.S. 397-401.
288 See PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 149-58 (1994) (detailing reversal of majority of court from a finding of infringement to a finding of fair use); JAMES LARDNER, FAST FORWARD: A MACHINE AND THE COMMOTION IT CAUSED (2d ed. 2002).
The public goods approach to time-shifting was a central part of the thin majority's analysis.\(^{290}\) According to the evidence relied upon by the Court, time-shifting accounted for as much as 96% of the Betamax use, according to defendants, and at least 75.4% according to plaintiffs' evidence.\(^{291}\) Attorneys presented no significant evidence providing a percentage balance between authorized and unauthorized time-shifting, though some anecdotal evidence suggested that 20% to 58% would have been authorized, at least in part.\(^{292}\) As a result, the fair use determination was critical to the outcome that Sony was not contributorily liable for the unauthorized time shifting of its consumers.\(^{293}\) Had the Court found unauthorized time-shifting infringement, it would have had a much more difficult time determining that the Betamax machine was non-infringing. The explanation that time-shifting was not comparable to the theft of property undermined the important fair use factors, enabling the Court to find fair use for Sony.\(^{294}\)

If copyrighted works are public goods, it stands to reason that they can be treated as nonrivalous and nonexclusive by both the copyright owner and the copyright consumers. After all, retransmission of a broadcast signal can cause no harm if the copyright owner was broadcasting the signal to that area anyway, and time-shifting only increases the potential viewing audience. Put another way, the logical assumption is that copying a nonrivalous, nonexclusive work can cause no harm since the copied work is, by definition, already fully available to every potential audience member in a manner that does not diminish the value to either the copyright holder or the consumers of the work. The problem with this logical extension of the public goods approach to copyrighted works is that the copyrighted works are not public goods—only select delivery mechanisms are.

The role of the Sony decision was to further conflate delivery mechanisms with the underlying copyrighted works. Whether or not the controversial Sony decision was initially correct, it has been widely accepted, coming to represent the popular understanding of home taping. As such, the Court established a normative balance between the consumer's interest and the copyright owner's expectation by differentiating between time-shifting and librarying.

The Court endorsed the district court's finding that "the time-shifting without librarying would result in 'not a great deal of

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\(^{290}\) See id. at 442-47, 456.

\(^{291}\) See id. at 424 n.4.

\(^{292}\) See id.

\(^{293}\) See id. at 442.

\(^{294}\) See id. at 450 (comparing infringement to jewelry theft).
harm.' "  

As a result, *Sony* has established an acceptable norm for home copying. The distinction between time-shifting and librarying is a legal nicety that has been beyond the copyright owner's ability to challenge—or stomach. Although not documented, this was not unexpected. During the trial, Universal cautioned about the long term consequences of this new norm. As the district court phrased it, "[p]laintiffs' greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.' "

2. *Losing Control, Gaining Technology*

Universal's fear that the philosophy of home taping would change the public's relationship with copyright owners has come to fruition. The public goods attributes of ideas and broadcasting have been extended in the public's mind to copyrighted works more generally. Steward Brand's empathic declaration that "[i]nformation wants to be free" elevated the public goods imprimatur of copyright law into a philosophical agenda in 1987. This burgeoning approach exploded with the allegedly unregulable Internet that developed thereafter. The very phrase "information wants to be free" suggests that information is presently imprisoned, both in its physical trappings of books, celluloid, and polymer as well as legally imprisoned in copyright's ever expanding straightjacket.

295 *Id.* at 451 (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 467 (C.D. Cal. 1979)).

296 *See id.*

297 *Id.*


299 *See id.*

This mesmerizing, utopian call [Brand's statement] has had a powerful impact, leading otherwise law-abiding citizens to declare that copyright law—the hackers' most hated legal regime—was dead, that national boundaries are ephemeral, and that privacy was impossible. They have treated the collection of new technologies we have dubbed an "era" as the path to democracy, the path to free creative products, and the path to radical egalitarianism.

*Id.*

300 *See id.* Hamilton frames the anarchistic approach as follows:

The hackers who initiated the Information Era have touted an anti-government, anti-law, and anti-big business mentality that challenges the fundamentals of the modern legal, creative culture. The fertile ground of their radical posture has generated arguments against any regulation of the Web (even including child pornography regulations), arguments against sales taxes on the Web as though sales that happen to occur via the Web are categorically different from other types of sales, and, most vociferously of all, arguments that copyright laws are simply obsolete.
The effect of the marriage between the free information anthem and the unbridled expansion of the Internet has been to transform the norm of copyright protection for many consumers, particularly the teens and younger adults who developed their ethical standards during the “irrational exuberance” of the new economy’s early days.301

Ironically, the very same technology that has made this philosophical transformation possible also provides a mechanism for effectively removing most copyrighted works from the delivery impediments that make broadcasting a public good. For example, the television industry has witnessed a significant market share shift from over-the-air broadcasters to cable systems—the very market first protected by the Court in *Fortnightly*. For the first time, a premier cable television show, “The Sopranos,” had the highest weekly rating of any television show among the key 18 to 49 age demographic.302

The success of the individual show with an audience in which each household pays for both cable service and the premium HBO programming undercuts the public good nature of broadcasting. The popularity of “The Sopranos” is part of an ongoing larger trend. “The challenges to the [broadcast television] industry’s future remain intense. [April 2001] marked a negative milestone, when more than half of all homes watching TV in prime time were watching basic cable—the first time that had ever happened during an entire month of a regular broadcast season . . . .”303

The changing power of the marketplace between cable and broadcast television suggests that there is nothing inherent in the delivery mechanisms indicating whether a copyrighted work is a public good or property subject to commercial sales.304 Television can be delivered as a public good, as a subscription, or as an individual episode through pay-per-view.305 The copyrighted work does not change

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302 See Josef Adalian, *Bada Bing Stings Networks*, Variety, Sept. 23–29, 2002, at 17 (“Even though HBO reaches fewer than one-third of the nation’s TV homes, more than 15 million viewers tuned in for the return of Tony Soprano and his clan. Among the advertiser-friendly adults 18–49 demo, the show was the No. 1 rated program of the week.”).


304 See, e.g., U.S. v. Playboy Entm’t Group, Inc., 529 U.S. 803 (2000) (describing premium scrambling technology and finding existing technology sufficiently exclusive as to preclude additional regulation necessary to protect minors from signal leakage of adult-oriented content).

305 See id. at 806 (“Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs.”).
despite the change in the delivery mechanism. As a result, it is the delivery mechanism that may or may not have the public good attributes of nonexclusivity and nonrivalousness.

The public good characterization ascribed to copyrighted works may also help to explain the congressional balancing regarding §110(5) and the rights granted to stores and restaurants to publicly perform these broadcasts, so long as space and equipment limitations are met. Congress implicitly chose to acknowledge that broadcasting is a public good. No market inefficiencies required Congress to provide this balance in favor of the stores and restaurants. The performing-rights organizations, ASCAP and BMI, are quite efficient at licensing such uses. Congress also treated broadcasting separately from live public performances, limiting the scope of §110(5) to broadcast rights only.

This example is not intended to analyze whether the particular balance was appropriate to promote progress or whether the decision merely recognized the political clout of restaurateurs and shopkeepers. Instead, the illustration suggests that where Congress and the courts provide statutory exemptions or fair use defenses for activities delivered under a regime of nonrivalous, nonexclusive use, the regulations will result in the lowest impact on the copyright owner. Where the exemptions and defenses impinge on exclusively controlled activities, the copyright owner’s economic and natural interests are more highly taxed. When the copyright owner cannot control the use of the work, congressional authorization of that conduct has only marginal impact. When Congress bars the copyright owner from exploiting an exclusive right which she can control, however, the cost to the copyright owner is much greater. This practical reality may allow Congress and the copyright owners to agree on new rules that cost copyright owners relatively little, but may serve to redraw the line that the Court crossed in Sony.

307 Congress did not go so far as to declare over-the-air broadcasting a public good, but instead provided a safe harbor for certain types of uses. See id. §110(5), supra note 260 and accompanying text.
308 See Landes & Posner, supra note 28, at 358.
B. The Internet Effect

Scholars have described the Internet as "a unique and wholly new medium of worldwide human communication." The Internet can facilitate an ever expanding range of information flow and entertainment activities that include passive listening and viewing of music, film, and audiovisual works, interactive gaming, instant messaging, file sharing, collaborative authoring, and a host of other activities. As a delivery mechanism, the Internet (or "Net") was founded as a free, noncommercial, academic enterprise. Initially, an acceptable use policy restricted the Internet to academic uses, such as research and education. The growth increased so tremendously with the entrance of private institutions and for-profit enterprises entering the market that by 1995, the academic uses had been overcome by individual and commercial activity.

The Internet uses digital transmission of data, which has inherent attributes that shape both the technology and the perception of the activity. Digital encoding allows for many types of materials—images, words, music, and software—to be captured in the same work, so that the conceptual separation of information from its copyrighted work

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310 "The Internet is an international network of computers and computer networks connected to each other through routers using the IP protocol and sharing a common name and address space. . . . [I]t is a method for connecting computer systems, and the phenomenon of very widespread adherence to that method." HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 6 (2d ed. 2001).

311 See id. at 851 for a description of online activities from 1997:

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail (e-mail), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium—known to its users as "cyberspace"—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

Id. All these activities continue to exist, augmented by the activities mentioned in the text.

313 Id. at 849–50.

It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world.

Id. 314 PERRITT, supra note 310, at 7.

315 See id.
disappears inside the computer's memory. Digital storage and transmission also allow for virtually perfect reproduction of a digital file, with the ability to copy and transmit each file having essentially no reproduction cost, and a transmission cost related only to access to the Internet, rather than access to the digital file.

The format of the digital file results in a conflation of ideas, information, and the copyrighted expression, as the "computer file" becomes the unitary metaphor for all three attributes of the work. The file metaphor and the unlimited copying combine to transform all copyrighted works into public goods. Absent additional technological innovation, computer files on the Internet are purely nonrivalous and virtually noneclusive. The technological and historical development of the Internet shaped the perception that because information was free, "copyright . . . was dead." This perception was in keeping with the noncommercialization required under the early public use policy adopted for the Internet. People often believe that the Internet heralded the end of the separation between the expression and the ideas and information embodied in the computer file. To put the final nail in copyright's coffin, the anonymity and international scope of the Internet has raised questions about whether legal constraints can serve any meaningful role on the Internet. "Not only does the Net promise perfect copies of digital originals at practically no cost, but it also threatens to impose an almost impossible task on law enforcers: tracing and punishing copyright violators."

1. Three Codes of the Net—Social Code, Software Code, and Legal Code

Assuming that social convention, physical convenience, and legal constraints establish a copyright user's normative expectations, then the Internet successfully undermined nearly three hundred years of copyright. Culture, lack of legal enforcement, and technological innovation have turned the building blocks of copyright into crumbling sand.

At the philosophical level, the tensions between the Internet ethic and the copyright ethic are best captured in a 1996 essay by Professor Peter Jaszi, who first quotes from the White Paper:

"Certain core concepts should be introduced at the elementary school level—at least during initial instructions on computers or the Internet, but perhaps even before such instruction. For example,

316 See id. at 28.
317 See id.
318 LAWRENCE LESSIG, CODE 125 (1999).
319 Id. (footnote omitted).
320 See Peter Jaszi, Caught in the Net of Copyright, 75 OR. L. REV. 299 (1996).
the concepts of property and ownership are easily explained to children because they can relate to the underlying notions of property—what is 'mine' versus what is 'not mine,' just as they do for a jacket, a ball, or a pencil.321

When I first read this passage, I realized that there was something deeply skewed... this recommended description of intellectual property for beginners was not one I recognized. The message is profoundly different from the ordinary Net user’s understanding of rights and duties, grounded as that understanding is in an ethic of information sharing.322

Jaszi articulated the rejection of the property notion of copyright in favor of the early Internet ethic of sharing information.323 He did not distinguish among copyrighted expression and ideas, facts, and unprotected information that he desired to continue sharing. Instead, copyright law itself was antagonistic to the notion of free information.324 Closely tied to the philosophical issues identified by Jaszi are the developments of the technological tools needed to retain some exclusiveness in the copyrighted work. Constitutional law scholar Lawrence Lessig notes that technological adoption comes from the ability to obtain a result and the communal will to implement that result.325 Only when both will and skills align can a new technology be implemented.

Professor Lessig correctly anticipated that the technological description of the early Internet was not inherent in its development, but merely an early norm adopted by its first users.326 Despite the overwhelming rates of present copyright infringement, he suggests that a new dawn is breaking:

We are... entering a time when copyright is more effectively protected than at any time since Gutenberg. The power to regulate

321 Id. at 299-300 (quoting INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 205 (1995) [hereinafter WHITE PAPER]).
322 Id. at 300.
323 See id.
324 See id. at 300-01.
325 LESSIG, supra note 318, at 82. Lessig states:
[T]he places of cyberspace have many different “natures.” These natures are not given, they are made. They are set (in part at least) by the architectures that constitute these different spaces, . . . .

In some places there is community—that is, a set of norms that are self-enforcing within the group. . . .

In places where community is not fully self-enforcing, norms are supplemented either by rules imposed through code or by rules recognized through democratic procedures. These supplements may further some normative end, but at times they are in tension with the goal of community building.

Id.
326 See id. at 125-27.
access to and use of copyrighted material is about to be perfected. Whatever the mavens of the mid-1990s may have thought, cyberspace is about to give holders of copyrighted property the biggest gift of protection they have ever known.\textsuperscript{327}

Through encryption technology, digital rights management tools, and authentication software, Lessig's prediction could well materialize.\textsuperscript{328} Nonetheless, despite the potential for such stringent technological control, copyright piracy and plagiarism remain epidemic. Nor does Lessig's efficiency model seem as pernicious when applied to cellular telephone service and cable television where similar technology is implemented. While Lessig is right that the Internet could take on this persona, there has yet to be any acceptance of such an environment. The net effect, then, is that norms, not tools, are shaping the technology.

Along with technology and social norms, the third component of Internet regulation flows from the legal constructs that determine questions of property rights and liability rules. Perhaps ironically or perhaps in reaction to the failure of communal will and technology, Congress has reacted by providing an ever increasing amount of control to the copyright owner.\textsuperscript{329} Jaszi noted the cumulative effect of the 1992 Copyright Renewal Act, which provided automatic renewal of copyrighted works originally published under the 1909 Act,\textsuperscript{330} the Uruguay Round Agreement Act (URAA) implementing the Agreement on Trade-Related Aspects of Intellectual Property Rights,\textsuperscript{331} and the Sonny Bono Copyright Term Extension Act.\textsuperscript{332} Others, including this author, raised significant concerns over the Digital Millennium Copyright Act because of both the anticircumvention provision and the copyright term extension.\textsuperscript{333} In response to these and similar concerns, Lessig suggested that "the real question for law is not, how can

\textsuperscript{327} Id. at 127.
\textsuperscript{329} See Samuelson, supra note 41, at 397-98 (tracing a shift in the information-property relationship).
\textsuperscript{330} Jaszi, supra note 320, at 301.
\textsuperscript{332} See Jaszi, supra note 320, at 303 (referencing Senate Bill 483 and House Resolution 989, the Copyright Term Extension Act of 1995).
\textsuperscript{333} See Bell, supra note 209, at 780; Garon, supra note 215, at 498 (discussing the present-day parallels between monopolization and oligopoly in the media industries); Richard B. Graves III, Private Rights, Public Uses, and the Future of the Copyright Clause, 80 Neb. L. REV. 64, 68 (2001). See generally Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised, 14 BERKELEY TECH. L.J. 519 (1999) (arguing that the Digital Millennium Copyright Act of 1998 is overbroad and that its provi-
law aid in [copyright] protection? but rather, is the protection too great?"\textsuperscript{334} The divergence between the legal protections and the social expectations are what drive the worst of the modern Internet piracy rhetoric and further alienate the Internet users from the copyright owners.

2. A False Dichotomy

The introduction to Jaszi’s essay separated out the ethic of property ownership from the ethic of information sharing.\textsuperscript{335} Unfortunately, the central dichotomy, which continues to frame the Internet debate, is fundamentally flawed. An Internet user can ethically provide information to the Internet without limitations, or with limitations that are consistent with this underlying notion of communal sharing, and should expect such ethical conduct in return. This normative assumption regarding the role of each Internet user is a reasonable social contract. On the other hand, authors, artists, software developers, and other copyright owners place their works into the marketplace in an expectation that they will receive economic rewards consistent with the price they demand. In the literary community, the shared expectation is respect for property and commerce.

Neither of these two realities is more moral or just than the other; they are merely inconsistent. More specifically, the Internet ethic of unbridled information being freely shared cannot be invoked to strip a property holder of her property without violating property laws and preexisting ethical norms of property rights. This central legal standard does not change merely because the property is intangible intellectual property, nor has this legal standard been challenged since the Statute of Anne in 1709.

The free information shared by the Internet user should be that information created by the Internet user herself. To give away another person’s property without permission still begins with the theft of that person’s property. It may be popular in the eyes of the recipients, but it cannot be moral, just, or fair.\textsuperscript{336}

To further exacerbate this divide, the rhetoric has taken on an us-versus-them tone, which further undermines the communal ability to develop reasoned norms. As Professor Samuelson framed the debate, “[i]t would oversimplify the facts—although not by much—to say that

\textsuperscript{334} Lessig, supra note 318, at 127.
\textsuperscript{335} See Jaszi, supra note 320, at 300–01.
\textsuperscript{336} See Gurnsey, supra note 21, at 1 ("For every pirate, there are literally thousands of users who, out of greed, ignorance or desperation, are prepared to buy material they know is illegal. It is these individuals who create the market[,] but it is too trite to say that if their attitude changed copyright theft would vanish.").
the battle in Congress over the anti-circumvention provisions of the DMCA was a battle between Hollywood and Silicon Valley."\(^3\) In this battle, Silicon Valley has been joined by the "free information" crowd, which is led by the hacker community.\(^3\) This rather incongruent alliance joins those who wish to sell the tools of music piracy with those who wish to validate all piracy. Until the tools are turned on the assets of Silicon Valley, the alliance will hold. By the time Silicon Valley realizes the true nature of its allies, it may be too late for it to recover, ultimately rendering the battle one which no one can win.

IV
BRIDGING THE GAP TO REBUILD A NORMATIVE, ETHICAL COPYRIGHT

The good news for copyright's future is that the divide between the Internet citizens' anthem that information should be free and the author's expectation that each has a right to control her own works is not inherently unbridgeable. So long as the news of copyright's death remains premature, there may be room for compromise, which continues to promote progress and build an ethical, robust, online community. To accomplish the reconstruction, each of the three aspects of the Internet's regulation—the social compact, the technological implementation, and the legal rules—must be reassessed to reinforce the underlying principles central to the common goal of fostering a growing, healthy marketplace of ideas founded on the rule of law and progress in the useful arts.

A. The New Social Pact—Towards Ethical Coexistence

To save the Internet, if not society, the Internet culture must return to valuing the marketplace of ideas rather than conceptualizing the Internet as a lawless Wild West without boundaries. Such a change implicates the problems of copyright piracy, but the change must sweep more broadly to also include rampant academic plagiarism and the more than thirty-six billion dollars in illegal activity.\(^3\)

To accomplish this, the Internet culture of shared information and the copyright culture of authorial and artistic integrity must be reconciled. Fortunately, the divide is narrower than it first appears. The task of bridging the divide has three discrete aspects: reestablishing the distinction between ideas and expression; encouraging the voluntary sharing of copyrighted works without trampling the rights of those who do not volunteer; and educating the public so that copy-

\(^3\) Samuelson, supra note 333, at 522.
\(^3\) See Hamilton, supra note 298, at 260–62.
\(^3\) See supra note 9 and accompanying text.
right once again plays its central balancing role of promoting progress. Each of these three tasks will be essential for establishing a socially and economically sustainable Internet culture.

1. A Fair Use Return to the Idea-Expression Dichotomy

The first step in any plan must be to reestablish the distinction between ideas and expression. As Professor Lessig points out, there is nothing inherent in the code or architecture of the Internet that makes the delivery of copyrighted content a public good.\footnote{See Lessig, supra note 318, at 125–27.} Although delivery is inherently nonrivalous, encryption technology, payment systems, subscriptions, and other technological solutions can return the delivery of copyrighted works to an equilibrium comparable to that which existed prior to the advent of the Internet, but not to absolute control by the copyright owner. Copyright's inception was a response to piracy, so the problem of copying and leakage has an inexorable link with the scope of copyright protection. Nonetheless, the ability to create exclusive delivery of copyrighted works allows the copyright holder to avoid treating the work as a public good.

The key to reasserting that copyrighted works are not inherently public goods is starting with the social contract among the works' users. While a few commentators would assert that private intellectual property is inherently unjust or immoral,\footnote{Cf. Ronald V. Bettig, Copyrighting Culture: The Political Economy of Intellectual Property 235 (1996). Bettig explains that the primary critique of intellectual property concentration is a species of the Marxist, "systematic critique of capitalism." Id. As he explains, "beginning with the origins of capital . . . the law of intellectual property follows the expansionary logic of capital. The domain of private intellectual property continues to expand but not without struggles and resistance." Id.} most want to develop a balance between the creators and consumers of intellectual property. To accomplish this goal, systematic education, debate and dialogue must continue between the creators and consumers of intellectual property, which includes the audience and the creative community (itself a primary exploiter of others' creative works). The distinction between ideas, information, and copyrighted expression are not necessarily easy to recognize; only through ongoing dialogue can these distinctions become meaningful. Unless the education is successful, consumers will continue to copy whole works, believing they have a right to copy everything in order to access the ideas contained therein. As the Court once commented in another context, it is an example of "burn[ing] down the house to roast the pig."\footnote{Ohio ex rel. Eaton v. Price, 364 U.S. 263, 273 (1960).}

The lesson is simple: Take the idea from a song, book, or movie; copy facts; research thoroughly. This is socially beneficial and entirely consistent with copyright, as was true of the balancing test established.
by the Supreme Court in 1879.343 Distributing the complete works of
others is socially, artistically, and economically damaging; however,
copying the facts and ideas of others promotes progress.344

The lesson dovetails well with the similar lesson that must be
taught regarding plagiarism. When one takes an idea, a fact, or a
phrase, the social contract in academic circles requires that the source
of the work receive appropriate credit.345 This does not require per-
mission or increase transaction costs significantly, but it remains a
threshold requirement of U.S. academic standards. Unfortunately, as
simple as the lesson may appear, the lesson plan will take a great deal
of work. "'Copyrights approach, nearer than any other class of cases
belonging to forensic discussions, to what may be called the metaphys-
ics of the law, where the distinctions are, or at least may be, very subtle
and refined, and, sometimes, almost evanescent.'"346 The difficulty in
accomplishing the lesson makes it all the more important to develop
and implement an effective educational process.

To help create a meaningful lesson plan, concepts of fair use
must be included to add gradation between all-or-nothing results of
the idea-expression dichotomy.347 Given the difficulty of line drawing
which often occurs in this context of distinguishing idea from expres-
sion, fair use provides a particularly important accommodation.
Justice Story's early formulation provides a continuing guide: "[L]ook
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."348 The preamble to the 1976 Copyright Act's codi-
fication of the fair use doctrine further identifies the types of uses for
which fair use is appropriate, including use "for purposes such as criti-

344 Private copying may have become normatively accepted, despite the Court's refusal
to allow librarying in Sony. Backup copies of computer programs are accepted as a neces-
ary business practice. Whether such archival copies of entertainment works legally qualify
as fair use remains to be seen, but the practice of copying music CDs, making mixes of
favorite songs and transferring formats for playback have become ubiquitous. See
www.ripburrespect.com (an information website housed by Gateway computers) (last vis-
serious study depends in part on works that have preceded it . . . . Quoting . . . [is] a very
sophisticated act, peculiar to a civilization that uses printed books, believes in evidence,
and makes a point of assigning credit or blame in a detailed, verifiable way.") (quoting
JACQUES BARZUN & HENRY F. GRAFF, THE MODERN RESEARCHER (5th ed. 1952))).
346 GOLDSTEIN, supra note 288, at 9 (quoting Justice Story).
348 See, e.g., Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936) (hold-
ing that a movie infringed a play although both were based on public domain true story);
Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (holding that there is
no liability for movie based on trite race-based play).
cism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. ...\textsuperscript{350}

For nonprofit educational uses, the idea-expression dichotomy is augmented by the Classroom Use Policy incorporated into the legislative history of the 1976 Copyright Act.\textsuperscript{351} This set of guidelines provides significant additional flexibility for teachers and can serve as an illustrative guide, representing the balance between the interests of academics, publishers, and authors. Teachers, however, are not always aware whether or not the uses they make of copyrighted materials are consistent with these guidelines or their school’s intellectual property policies. While some teachers intentionally ignore such policies, many more are simply ignorant of them. Without knowing what is reasonable and lawful, teachers may fail to provide students with lawful available resources as often as they violate copyright laws. Further, the lack of understanding leads to poor education for the students in those classrooms, particularly if the teacher suggests that copying done in class is breaking the rules, but acceptable anyway. Such a message undermines copyright policy far more than the copying itself and if the message accompanies an underutilization of copyrighted materials, the students will also wonder why the law is so inflexible or unjust.

Outside the academic setting, fair use serves an equally important function. To retain respect for copyright as an important social rule, fair use should not be construed too narrowly and courts should not be too generous to copyright owners.\textsuperscript{352} Instead the goals of promoting progress should be carefully weighed as part of the balancing test when determining fair use.

2. Respecting the Voluntary Sharing of Copyrighted Works

The second key to coexistence between the Internet’s free-information culture and the copyright culture is to make the choice to share one’s work voluntary, rather than coerced by theft, technologi-


\textsuperscript{351} See H.R. Rep. No. 1476-94, at 68 (1976) (promulgating the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, which resulted from an agreement among the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, Inc. and the Association of American Publishers); see also U.S. Copyright Office, Copyright Circular 21: Reproduction of Copyrighted Works by Educators and Librarians, at http://www.loc.gov/copyright/circs/circ21.pdf (last visited Apr. 22, 2003).

\textsuperscript{352} See, e.g., Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (finding copyright infringement by defendant’s “Cat NOT in the Hat!” of famous Dr. Seuss children’s book “The Cat in the Hat”). In contrast, the courts are not consistently overgenerous. See Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002) (denying liability for use of references to the Barbie trademark in a song).
cal failure, or impotent legal systems. As noted in the Napster litigation, thousands of songs have been made available for free by their authors and copyright holders of the sound recordings. The Napster district court further stated that the New Artist Program available on Napster would not be enjoined, nor would discussion groups, chat boards, or other uses. The Ninth Circuit further narrowed the scope of the Napster injunction to allow greater file sharing of noninfringing works and, more specifically, to identify the works barred from the system.

Under the proposal offered by the Ninth Circuit in Napster, the potential balance between Internet culture and copyright culture is theoretically available. Music files are available for copying and sharing so long as the copyright holders wish to share them. Every Internet musician—those that share the Net ethic—would be socially required to make his or her songs freely available on the system. This is not merely free information, but free copyrighted expression provided by the authorized copyright holder.

In addition to the music files posted by the copyright owners on Napster, Morpheus, KaZaA, and other peer-to-peer networks, there have been other, more readily embraced examples. Motion picture short works (shorts) are not readily distributed on either broadcast or cable television. Nonetheless, shorts provide an excellent medium for both developing talent and exploring subject matter that does not warrant feature film length coverage. A number of Internet websites have been developed to provide a distribution mechanism for such works and to create a community for the expansion of such filmmaking. This same approach applies to most academic institutions on the Internet. Virtually every academic institution has a website, most with free content available for research and education, fulfilling


See A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 917 (N.D. Cal. 2000), aff'd in part, 239 F.3d 1004 (9th Cir. 2001) (“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.”).

See id. at 922.

Napster, 239 F.3d at 1027.

As stated, we place the burden on plaintiffs to provide notice to Napster of copyrighted works and files containing such works available on the Napster system before Napster has the duty to disable access to the offending content. Napster, however, also bears the burden of policing the system within the limits of the system.

Id.


Id. at 224.
the original mission of the Internet as a robust environment for the dissemination of academic knowledge.\textsuperscript{359}

Perhaps Open Source software development provides the best example of the proper use of the free information approach, by requiring that all rights to the software, including any innovations, be transferred to future users.\textsuperscript{360} Open Source software encourages development of computer software on a communal basis. Each improvement to the software is made available to the community for use and further refinement by the community. It is collaborative and communal rather than competitive and commercial.\textsuperscript{361} Like other authors, the Open Source software community relies on the combination of technological choices, legal protection through contract, and community social pressures to achieve its goals.

Without the legal recognition of its license agreement, there would be no ability to stop a free rider from using the Open Source software to make and sell a proprietary product that captured the best of the Open Source expression by adding only trivial variations. Similarly, the software programmer must provide access to the community to read, adapt, and utilize the code, and the social contract requires a sufficient community to support the growth and development of each project.

In all of the above examples—Open Source software, motion picture shorts, music sharing, and educational websites—the key is that the consensual, free exchange, communal market and the commercial, fee exchange market coexist side by side. Neither model directly

\textsuperscript{359} See, e.g., http://www.ipmall.piercelaw.edu. The Franklin Pierce Law Center IP Mall demonstrates an ideal example of free ideas, information, and content provided for communal use by an academic institution and its faculty members. As a faculty member, I and most of my colleagues try to assure that our work can be posted to the IP Mall without restrictions by our publishers or others.

\textsuperscript{360} For more information on Open Source software, see FREE SOFTWARE FOUNDATION, INC., GNU GENERAL PUBLIC LICENSE (1989), at http://www.gnu.org/copyleft/gpl.html (last visited Apr. 22, 2003). The preamble to the License Agreement provides the following explanation:

To protect your rights, we need to make restrictions that forbid anyone to deny you these rights or to ask you to surrender the rights. These restrictions translate to certain responsibilities for you if you distribute copies of the software, or if you modify it.

For example, if you distribute copies of such a program, whether gratis or for a fee, you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights.

We protect your rights with two steps: (1) copyright the software, and (2) offer you this license which gives you legal permission to copy, distribute and/or modify the software.

\textsuperscript{361} Id. The contract does not restrict sales of the software, however, so that a licensee-participant may still package and sell the software in a form that is freely available elsewhere.
threatens the other. The technology, law, and social ethic can support both in harmony and, so long as the participants in each market respect the existence of the other, the public benefits the most from the offerings of both.

3. The Nature of the Education

Third and perhaps most significantly, public education remains necessary to distinguish between dichotomies inherent in the Internet and the convergence of technologies. A new public understanding must convey that copyrighted works are not automatically public goods, free for everyone whether that person is a free rider or a fully paying participant. This education must both separate and validate the free-sharing culture of the Internet from the fee charging culture of commercial copyright and must reinforce the importance of promoting progress through an ethos that values creative works. Each of these underlying objectives is necessary to create a twenty-first century copyright culture as foresighted as its eighteenth century counterpart.

These are not simple tasks. The Report of the Working Group on Intellectual Property Rights (NII Workgroup) anticipated in 1995 that as "the convergence of computer and communications technology brings the capability of high speed computers and communications networks into our homes, we all have the possibility to become not only authors and users of copyrighted works, but printers, publishers, exhibitors and distributors as well." This convergence has conflated, confused, and combined the roles of copyright creators and copyright consumers. The creator of a highly innovative website may not be the copyright owner of the photographs, graphic images, or sound recordings on that website. The website creator's innovative website design, does not translate into ownership of those materials used or limit the copyright interests of any authors whose unauthorized work appears on her website.

To respond to this confusion, public education and the copyright industries must join together to provide a pervasive program of education. This educational campaign should start with a positive tone,
not just because it may be a stronger marketing approach and peda-
gogical message, but because the campaign should center first on the
value of copyright to each citizen as author, then to the public gener-
ally and society as a whole. 364 "A point raised in the first meeting of
the [NII Workgroup] was that copyright education should not be a
series of 'thou shall nots.' Instead, education should carry a 'just say
yes' message—that works may be accessed and used, and that seeking
permission is not an insurmountable barrier." 365 Even this message
starts too late.

Every grade school student is a copyrighted author, having cre-
ated essays, drawings, and innumerable objects. For an author, the
importance of copyright is much more central than for a consumer.
As the 2002 Copyright Awareness Week materials suggest, these young
authors can viscerally grasp the importance of the author's right to
control the use of one's work. 366 Unlike the "just say yes" message in
the NII Workgroup's version, the Copyright Awareness Week lesson
plan focuses on the participant as the author.

Everyone is now an author because federal copyright vests at fixa-
tion of the work and Internet publishing opportunities exist in every
school and the majority of homes. Every student has become a pub-
lished author and most have the chance to serve as editors, publishers,
producers, programmers, or in other roles in copyright industries.
The authorship convergence caused by the 1976 Copyright Act's vest-
ing of copyright at fixation and the invention of the Internet has fun-
damentally altered the authorial role for the public. Authors can be
expected to care more about their rights and responsibilities, so it is
the authors who should be educated.

Others have suggested that education is not a sufficient answer.
"Education, however valuable, does little with respect to conscious dis-
regard of or disrespect for the law, particularly the disregard that is
fostered by a technology that makes infringing activity so easy and
painless as to leave no mark on the conscience." 367 The fear that re-
spect for copyright ownership cannot be taught undervalues the inter-
play between the social compact, technology, and the law. Without
respect for copyright, society will increasingly devalue copyright inter-
ests and technologies will be crafted that minimize and disregard it.
On the other hand, even grudging respect for copyright concepts will

364 Id. at 227.
365 Id.
366 See Lori Hecker, Copyright Society of the U.S.A., Copyright Awareness Week: April 22-
28, 2002 Lesson Plan for Elementary School Classes, at http://www.law.duke.edu/copyright/
html/events/curriculummaterials.html; see generally Copyright Society of the U.S.A., Copy-
367 Sheldon W. Halpern, The Digital Threat to the Normative Role of Copyright Law, 62
foster greater technological accommodation and improve legal enforcement.

Education is clearly insufficient unless coupled with other tools, but change will be iterative. Gradual increases in understanding should be accompanied by more copyright sensitive choices regarding the technological structure of computer code and consumer electronics. These increases will result in judicial and legislative changes that better reflect the need to promote progress through economic and other principles, as well as the need to protect the free flow of ideas and information. The development of the technology and the law in this fashion will enable educators to better articulate copyright's role in society and each individual's role as an author.

B. Technological Evolution

Ongoing technological change will create new opportunities for both copyright enforcement and copyright piracy, but most changes will benefit copyright owners. Professor Lessig correctly anticipated that the unregulated nature of the Internet was a function of the code being utilized and that the code could be changed to affect different methods of regulation. Because the shape of the technology is so closely aligned with the policies adopted by the law, the two are easily entangled. Nonetheless, a number of changes have occurred in recent years—for good and for bad—that may signal significant shifts in the technology. In particular, digital rights management systems, the encryption technology used to protect digital data from theft or unauthorized use, has improved even though the various standards still remain vulnerable to tampering.

The law directly affects the creation of software code. In an attempt to avoid classification as a contributory or vicarious copyright infringer, there have been significant changes to the peer-to-peer software models. These technological changes reduce or eliminate any actual file traffic or the appearance of the file name on the defendant's servers. These changes, by companies such as KaZaA, currently the leader in music file swapping, result from reactions to the

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368 Lawrence Lessig, The Limits in Open Code: Regulatory Standards and the Future of the Net, 14 BERKELEY TECH. L.J. 759, 762 (1999) ("Everyone now gets how the architecture of cyberspace is, in effect, a regulator. Everyone now understands that the freedom or control that one knows in cyberspace is a function of its code.").

369 See Doherty, supra note 328, at 65; see also Darin Stewart, The Digital-Rights Debate, ELECTRONIC MUSICIAN, July 2002, at 118.

370 See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022-23 (9th Cir. 2001); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).

371 See Duffy Hayes, Peering into the Future of Content Delivery, CED, April 2002, at 22.
legal standards of copyright law. This has created an "anti-law" paradigm where the strictures of the legal definitions have resulted in corresponding technological growth designed to thwart traditional legal definitions. In the short run, the tactic may work, and the ability of infringers and pirates to stay ahead of the law and digital rights management will continue.

Systematic change, however, draws near. The use of digital information in banking and health care has placed tremendously valuable and sensitive data into the same digital format as that used for books, songs, movies, and software. Public reaction to the theft of hospital records or insurance documents will not be met with the disdain that the music industry has faced, and there will be strong law enforcement reaction to such breaches. Companies involved in data storage, transfer, and retrieval also recognize the potential legal liability for breaches of privacy and security for these sensitive computer files. As a result, respect for data security is now part of the contrac-

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An example of why it is so important to give copyright owners the ability to defend themselves with the same technological measures used by pirates to encourage theft came just this week when KaZaA announced that it was giving its users "better options and more tools than ever before . . . includ[ing] a filter to help users avoid . . . mismarked or incomplete files that may have been uploaded by record labels and copyright owners trying to frustrate file sharing." It is truly ironic that we can be stopped from trying to protect ourselves against unlawful copying by technology, but using technology to prevent unlawful use is met with a firestorm of controversy. It is also ironic that KaZaA can employ a filter to avoid spoofed files, but not to filter out copyrighted works to which they have no right.

Id. at 22.


tual obligations of ISPs and other participants in the Internet economy in a manner that had not previously existed. \textsuperscript{375}

In addition, as convergence continues, the trend has moved beyond Hollywood's content providers and Silicon Valley's content distributors. Traditional industries such as television and computing are moving towards this convergence as well. \textsuperscript{376} The cable television industry has successfully fought piracy since its inception and may be in a better position as a content delivery industry to demand effective antipiracy implementation. Hollywood, merely a content provider, never had the bargaining clout or contractual relations to make sufficiently strong demands.

The combination of ongoing convergence and the influence of banking and health care are beginning to change the code and the technological environment under which the code is created. Secure, highly managed, constantly authenticated data will eventually become the norm. Such data is already demanded for prototype health care transactions. As this technology unfolds, it could pervasively change the Internet's architecture. \textsuperscript{377}

The change in the technological landscape will not take place quickly. The coming transformation of the Internet's architecture is a paradigm shift as radical as the shift from nonprofit use to the e-commerce boom. The movement towards the Internet as a primary communications medium for business, health, and financial data will bring with it yet another Internet culture. The Internet will replace the paper file and the fax as the document repository and transfer

\textsuperscript{375} See U.S. Department of Health and Human Services, \textit{Frequently Asked Questions About Security and Electronic Signature Standards}, at http://aspe.hhs.gov/admsnsimp/faqsec.htm (last visited Apr. 22, 2003) ("8. Do security requirements apply only to the transactions adopted under HIPAA? No. The security standard applies to individual health information that is maintained or transmitted. This is a much broader reach than the specific transactions defined in the law."). As a result of these changes, courts no longer tolerate many of the "as is" clauses in computer contracts. Business-to-business transactions now require meaningful warranties and indemnities as part of the contractual bargain.


\textsuperscript{377} Another significant area affected by these changes will be the privacy rights of the individuals using the Internet and participating in electronic commerce, health care or other activities. The early code provided little privacy because of the open nature of the Internet, however, it did provide for a lack of authentication and resulting anonymity. The commercialization of the Internet has added authentication, eroding anonymity and privacy. The HIPAA regulations use statutory and regulatory authorities to reassert privacy, but there is public resistance to these regulations, and thus they seem likely to create less statutory protection. Architectural changes through the P3P initiative provide another potential solution, but privacy—like copyright—will take the confluence of social change, technological support, and legal infrastructure to achieve meaningful protection in the online environment. See Lessig, supra note 368, at 762–63; see also Joel R. Reidenberg, \textit{Restoring Americans' Privacy in Electronic Commerce}, 14 BERKELEY TECH. L.J. 771, 787–88 (1999) (stating that "effective privacy does not end with a legislative enactment").
mechanism. Offices will not be paperless, but most official files will be stored in digital archives.

The change from unsecure to secure data delivery does not foreshadow the end of peer-to-peer software or other distributed computing models. Instead, these technologies will incorporate authentication and validity components, rendering them more commercially viable, more secure, and less avant garde. The law may also respond to the technology, reinforcing the need to adopt these changes. If the technology becomes conducive to adding security, the courts will eventually treat the intentional choice to create an unsecure environment as one that satisfies the material contribution requirement of contributory infringement, creating legal liability for failure to protect the copyright owners. Like landlords and others with legal authority, it will only be a matter of time until the relationship carries with it an affirmative duty to act, turning the failure to provide sufficient minimum security into tortious conduct.

The material participation may come from failure to undertake an affirmative duty as well as from failure to take affirmative actions. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022–23 (9th Cir. 2001).

Admittedly, the present Copyright Act provides federal safe harbor provisions designed to limit the reach of tort liability. See 17 U.S.C. § 512 (2000) (limiting remedies to injunctive relief for copyright infringement actions initiated by third parties). Nonetheless, in the event ISPs and similar companies stop assisting third parties in protecting their copyrighted materials, privacy interest, and security of their data, Congress may withdraw such protection and leave these companies to the mercy of the common law. Already the Restatement (Second) of Torts provides potential theories for an obligation of security:

If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 318 (1965). Under section 318, once an ISP permits a person to store and transmit data on its system, it must exercise reasonable care to stop other users from intentionally harming others. Even without more strained analogy, the provision might be applicable, assuming the choice not to provide a secure environment was no longer reasonable.

The analogy to property law is found in section 344 of the Restatement, which provides:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id. § 344. Were cyberspace analogized to real property, such a general obligation would dramatically alter the role of Internet providers and others.
Again, the technology will evolve to separate the issue of data security and digital rights management from the delivery mechanism used for the underlying data. Information may want to be free, but technology will not serve as the vehicle of freedom. Systematic digital rights management carries its own risks because all information, facts, and ideas will be protected by the same technological controls that protect the copyrighted works. Instead of technology, social norms and legal rules will determine the prevailing degree of access for facts, ideas, and public domain content. Only by achieving balance among technology, social responsibility, and law will we establish a healthy balance that can truly promote progress and provide respect for both the author and the public.

C. Legal Reality—Shaping, Acting, and Reacting

Each of the three influences on the normative copyright law—social ethics, technology, and the law—profoundly influences the other two as it develops. The legal rules of copyright have shaped both technology and the associated social ethics, but the law, in turn, has been shaped by them. The law of copyright has expanded to respond to shifts in global commercial traffic and in the cultural importance of copyrighted works.

Law may be unique in that it is more centralized than either technology or social norms. With the stroke of a pen, the President can sign significant policy changes into law. With a single vote, a Supreme Court Justice can alter the outcome of a seminal case and shift the copyright paradigm. The ProCD precedent has dramatically increased the role of contract over copyright in many of these issues. Sony established an entire category of fair use by a 5-4 majority. Feist Publications, Inc. v. Rural Telephone Service Co. restated the minimum requirement of originality, moving databases and other labor intensive but unoriginal materials out of copyright protection. As a result, the architects of copyright laws must be particularly attuned to the sociological and technological impact of the rules they create.

See, e.g., TRIPs Agreement, supra note 331, arts. 11, 14(4).
ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
The Court specifically overturned the "sweat of the brow" doctrine which justified upholding copyright protection for such compilations. Id. at 352 (citing Leon v. Pacific Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937) and Journer's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83 (2d Cir. 1922) as courts that developed the doctrine).
1. Changes to Limit the Law’s Reach

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. This is not to suggest that Congress should automatically legitimize all existing copyright piracy any more than the academic community should be compelled to drop its norms against plagiarism and insistence on proper attribution for using another’s material. Instead, both Congress and the courts should return to primary principles when reviewing the more difficult cases involving copyright and the accompanying legal issues.

The central themes previously highlighted are those in which the current tensions in the law affect ethical and normative conduct. Among the more controversial topics are the practices associated with home copying of music, fair use for reverse engineering, access to facts and ideas embodied in technologically or contractually protected packaging, and the role of the public domain. The law in each of these areas highlights the tensions among public perception, the state of the law, and optimal public benefit.

To achieve this goal, society should maintain the balance of the idea-expression dichotomy and fair use rather than dramatically altering these fundamental constructs of the copyright regime. As the Court itself acknowledged, the idea-expression dichotomy provides a First Amendment basis for giving Congress nearly unlimited discretion over copyright.\(^\text{386}\) "Copyright's idea[-]expression dichotomy '[strikes] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.' No author may copyright his ideas or the facts he narrates."\(^\text{387}\) If contract law is allowed effectively to eliminate the dichotomy through contractual limits on access to facts and ideas, then it will erode the First Amendment values promoted by copyright and the marketplace of ideas.

To protect the most fundamental aspects of copyright policy, Congress must clarify the relationship between copyright and contract law in nonnegotiated, mass market consumer transactions. Congress should specifically preempt those contract terms inconsistent with the limitations on copyright that exist in §§ 107–122 of the Copyright Act, including those limitations imposed through judicial interpretation.\(^\text{388}\) Congress cannot establish an appropriate balance between

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\(^{387}\) Id. at 556 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983)).

copyright owners and the public without acknowledging the corrosive impact of these one sided contracts on the law and on the societal respect in which the law is held. By removing public domain and fair use from the construct of clickwrap contracts and returning them to the purview of copyright law, Congress can mitigate much of the current mischief.\textsuperscript{389} Congress has already recognized the social utility of criticism, comment, news reporting, teaching, scholarship, and research.\textsuperscript{390} Only through congressional control over these prepackaged term, can Congress hope to achieve its copyright balancing.

Besides the clickwrap agreements, Congress must also address the technological encryption of computer files. Congress has exempted some aspects of reverse engineering from the strictures of the anticircumvention provisions for technology in the statutory provisions added as Title I of the Digital Millennium Copyright Act.\textsuperscript{391} Although the exemptions are too narrow and technical, they provide a solid starting point for recognizing the legitimate concerns of non-copyright owners, but who are authors of other works.

Congress correctly identified reverse engineering for interoperability and security as a legitimate purpose for fair use.\textsuperscript{392} Congress needs to add an additional category of legitimate reverse engineering, and to create an additional ground for circumvention so that it reopens access to facts, ideas, and public domain materials and provides for fair use of copyrighted materials. By taking the legal strictures off fair use, facts, and the public domain, the provisions of the anticircumvention statute will restore the public's rights that have been lost to the balancing act between copyright owners and the public.

For both clickwrap contract law and encryption technology, Congress should act to maintain the longstanding idea-expression balance. This is one area where Congress must manage both law and technology so that the ethical norms and social policy which have long

\textsuperscript{389} An example of this is the negotiations regarding digital music "streaming," also known as Internet radio broadcasting. Recommended statutory rates were created by a Copyright Royalty Tribunal panel only to be rejected as too high by the Librarian of Congress. The amended rates were still viewed as likely to preclude use by most small Internet broadcasters, so negotiations began to structure a more reasonable fee based on practical market conditions. The final agreement will later be captured as legislative amendments to the Copyright Act. See Jon Healey, "Webcasters Closer to Royalties Deal," L.A. TIMES, Oct. 2, 2002, at C2; cf. Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763 (E.D. Pa. 2001) (holding that although Congress has not directly addressed the issue, the Copyright Office did not exceed its authority by excluding streaming from the statutory exemption to copyright coverage).


supported copyright can be maintained despite the advent of new technologies and methods of conducting business.

2. Changes to Strengthen the Law's Legitimacy

Copyright law's regulation of private copying is arguably the most confusing and least obeyed area of copyright law for the public. Simply put, the law no longer matters. Since the Supreme Court decision in Sony, the public has accepted the premise that it has the right to make home copies. The fervor attached to home copying explains a great deal of the current tension regarding copyright. As one scholar has recently noted,

... private copying, again unlike traditional infringement, represents a critical form of democratic self-governance: civil disobedience. Copyright laws have become increasingly unjust, and in the face of unjust laws, individual citizens have no choice but to disobey and thereby force society to enforce the law in a way that makes its injustice palpable.

The irony of this baseless, self-indulgent approach is that a good deal of private copying has become lawful, despite the shift away from the copyright owner’s original interest.

This shift towards a private copying exception was introduced in Sony and has expanded into home audio taping and home video taping. In Recording Industry Association of America v. Diamond Multimedia Systems Inc., the Ninth Circuit extended consumer copying into the realm of acceptable conduct when the copying involves temporary copies made by the consumer. The statutory limitations

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391 See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 453 (1984). The Sony Court distinguished among the permitted time-shifting that copyright owners allowed at the time of the case, the unauthorized time-shifting that the Court considered fair use, and the librarying of broadcast that the Court chose not to treat as fair use.


395 See Sony, 464 U.S. at 451. The Court acknowledged the sea-change feared by the copyright owners. “‘Plaintiffs’ greatest concern about time-shifting is with ‘a point of important philosophy that transcends even commercial judgment.’ They fear that with any Betamax usage, ‘invisible boundaries’ are passed: ‘the copyright owner has lost control over his program.’″ Id. (quoting Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 467 (D.C. Cal. 1979)).


398 180 F.3d 1072 (9th Cir. 1999).

399 See id. at 1079 (“Rio merely makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive. Such copying is a paradigmatic noncommercial personal use...” (citation omitted)). Although the Ninth Circuit did not address fair use, its discussion of the Napster litigation strongly supports this approach. As the Ninth Circuit explained in Napster:
placed on software and music rental do not reflect a philosophical distinction between the differing forms of copyright, but a commonsense recognition that piracy occurs too frequently and too easily with software and music rentals to validate the practice.

As part of an initiative to better educate the public, Congress—or even the Copyright Office—could take the lead to marshal the disparate rules into a more cohesive statement on the personal copying rules. Assuming Sony, Diamond, and Napster reflect the current state of law, as augmented by statutory exemptions, it is becoming clear that an individual may make a copy of a song if she lawfully owns the source of the recording. Ownership of the copy is contingent on continued ownership of the original version. There is some ambiguity regarding whether copies of a digital file must be for temporary use rather than permanent use, but this distinction is not commercially relevant and should be accepted by the copyright owners.

If such a consumer use policy were adopted by the Copyright Office, Congress, or the Recording Industry Association of America, the rules and framework could begin to be explained. So long as the rules themselves are unclear and ambiguous, then no educational campaign can be expected to succeed.

Similarly, either the Copyright Office or Congress should reiterate the statutory, industry, and court-established fair use rules regarding home videotaping. With these private uses established, Congress should next convene hearings and negotiations to establish a set of guidelines for noncommercial personal web pages. Like the guidelines established for educational uses, clear statements regarding the minimum fair use recognized by copyright owners and the public would establish a set of normative practices. Again, the current chaos and ambiguity undermine the law without adding any legal protections to copyright owners.

If consumer copy issues disappeared from the copyright debate, the hysteria surrounding copyright policy might abate. Then the consequences of copyright piracy could be separated from the issues of personal convenience in a manner that would allow for the reestablishment of ethical norms.

Both Diamond and Sony are inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user. In Diamond, for example, the copyrighted music was transferred from the user's computer hard drive to the user's portable MP3 player. So too Sony, where "the majority of VCR purchasers... did not distribute taped television broadcasts, but merely enjoyed them at home."


3. Safe Harbor for a Net Etiquette of Copying

New technologies allow for the exploration of opportunities beyond mere clarification of existing copyright policy on personal copying, and stronger preemption of copyright over mass market, nonnegotiated contracts. There should be expansion of the Internet's tremendous opportunities for communication and media to the greatest extent possible, so long as that expansion also enables further progress.

One approach is to encourage the dissemination of copyrighted works once the dissemination transaction costs exceed the works' economic value. This can be accomplished by providing a safe harbor for noncommercial digital publication in a manner similar to that provided under § 110 of the Copyright Act. In its simplest form, Congress could bar damages (but not injunctive relief) for the copying and public display of a United States work published at least twenty years prior to the unauthorized use, if the copying was noncommercial and if the copyright owner did not object in advance. Copyright owners could opt out of this system simply by listing the copyrighted work in a publicly available registry. The registry would then identify those works for which the safe harbor would not apply. Moreover, website operators who posted material without permission would be obligated to respect any take down notice, whether provided by the registry or the copyright holder.

The ability to opt out of the system would protect economically valuable copyrights, while greatly expanding the availability of other copyrighted works. To accommodate the formality requirements of the Berne Convention, such a registry may need to be limited to United States works; however, the expansion of publicly available material would still be quite significant.

This registry would also restore one aspect of the prior copyright law, namely the requirement that the copyright owner act positively in some manner to control the dissemination of the work. Unlike past requirements of copyright registration or renewal, however, failure to act would never invalidate the copyright, merely limit the initial monetary remedy. The copyright owner could quickly stop any unpermitted use of the work simply by notifying the user of the work that such use was not permitted. Essentially, the registry reverses the presumption for permission requests—permission is automatic unless the copyright holder objects.

401 Such a time period is arbitrary, but the number of years should be sufficiently long enough to reduce the incentive to register a copyrighted work and remove it from the exploitable collective.
To illustrate the point, a novel long out of print could be posted to the Internet by a fan at her personal website. Interest in the novel might just generate activity, and if the publisher wished to reissue the novel, it could add the book to the registry, notify the website owner and begin once again to exploit the work commercially. The present alternative is that the novel will not be available until at least ninety-five years after publication. Because the registry would be limited to copying, no rights would be granted to create derivative uses or to exploit the work commercially. Thus, the model imitates the practice of free permissions that publishers grant to noncommercial use, but would greatly lower the transaction costs and the time required without creating any significant change in the copyright owners’ economic or management interests.

While significant debate would accompany this and similar proposals, such safe harbors would expand the public availability of works without undermining any of the economic or other interests associated with the 1976 Copyright Act, the adoption of the Berne Convention, or any of the more recent copyright amendments. An opt out system for older works would breathe fresh life into a body of works that cannot be economically exploited, but which may still have some marginal use. If the works have no such value, then the opt out system will cause no harm; it will merely go unused. Either way, the proposal illustrates that there are additional options for expanding public availability of copyrighted works and minimizing the loss of copyright as a public good.

As public education continues regarding the role of copyright and the rights of authors, other proposals can also be sought that promote progress and access. So long as the proposals do not strip copyright owners of their valuable economic and other interests, these proposals should be encouraged.

**CONCLUSION**

Copyright law continues to be an integral part of the government’s role in promoting progress and the useful arts. Congress, however, must take steps beyond copyright legislation to achieve this goal. Education remains the critical component to any copyright policy intended for wide adoption and serves its normative goal of shaping public conduct. The public will not follow rules it does not understand, nor respect laws that go generally unheeded. To accomplish this educational goal, Congress, the courts, and the Copyright Office must also clarify the meaning of key controversial activities such as home taping.

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402 This assumes it was published prior to January 1, 1978.
Congress and the courts must also recognize the problematic interplay of contract law. So long as mass market consumer shrinkwrap and clickwrap agreements can alter the normative copyright outcomes, confusion and overreaching will continue to plague intellectual property policy. Congress must preempt state law to clarify policy statements on the importance of the idea-expression dichotomy, fair use (including reverse engineering), and the public domain.

With few exceptions, however, economic incentives, control over publication and dissemination of works, and other competing social needs remain well managed by the existing congressional balance. Technological change may reduce the public’s benefit from the public good nature of broadcasting, but this does not change copyright generally. Although selected delivery mechanisms of copyrighted works create public goods, the works themselves are not thereby transformed into public goods.

Furthermore, treating the conceptual framework of intellectual property as unique because of its intangible nature ignores the intangible nature of many real and personal property principles. Only when the intangible nature becomes both nonrivalous and nonexclusive does that conceptualization affect perception and public policy. Only when “intangible” is synonymous with “public good” does the intangible nature of property matter.

Similarly, the natural rights conception of intellectual property does not provide a meaningful predictive tool for assessing either the nature of intellectual property or the social relationship between author and audience. The power to control one’s work may serve this purpose, but such control is neither necessary nor guaranteed by the natural rights approach. Given the historical disrepute of natural rights in the economically centered U.S. copyright regime, such discourse may actually undermine the social framework of modern copyright, making the educational imperative more difficult. The only exception is that the right of first publication is so central to both the natural rights and economic rights models that the discourse of this right may well be described as inalienable and sacred. Nonetheless, the law can respect the first publication right under a traditional economic model or under the broader constitutional mandate to promote progress.

Finally, education is imperative. The increasingly Internet-savvy public has grown accustomed to the “public good” of unfettered copying on the Internet. Even as technology and law begin to provide alternatives to unlimited peer-to-peer file sharing, the social damage continues. Already, Internet culture has eroded social respect for copyrighted works, authorial ownership, and the rule of law. Education, legal enforcement, and technological change can stem this tide.
Overreaction to this potential problem through draconian information and security policies, however, is as dangerous as ignoring the problem altogether. The central task, then, is to reverse Internet anarchy through a combination of education, technology and law, shaping each in concert with the others so that the copyright balance can be restored and ownership respected, while maintaining the important role of the public domain, fair use, and reverse engineering. If these central themes are reinforced and the goal of progress is retained, then the normative social compact regarding copyright’s authors, adapters, and consumers can be maintained.

The constitutional mandate is to promote progress. The constitutional vehicle promotes authors’ expression as a tool to expose the underlying facts and ideas such expression provides to the public. The public imperative is to balance law, technology, and normative ethics. To achieve this balance, copyright’s values must themselves be valued.

Education is the key; only through education can progress truly be achieved.