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Intellectual Property's Negative Space: Beyond the Utilitarian

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INTELLECTUAL PROPERTY'S NEGATIVE SPACE: BEYOND THE UTILITARIAN

ELIZABETH L. ROSENBLATT*

ABSTRACT

A growing body of scholarship addresses intellectual property's "negative spaces": areas in which creation and innovation thrive without significant formal protection from intellectual property law. A number of negative space scholars have used case studies to examine the relationship between negative spaces and economic incentives for creation and innovation. But for a full understanding of intellectual property law, and particularly its negative spaces, we must go beyond utilitarianism. This means exploring negative spaces not only as they relate to incentive and efficiency considerations, but also as they relate to conceptions of intellectual property based on labor-desert, personality, and distributive justice theories.

I. INTRODUCTION 441
II. IP'S NEGATIVE SPACES 447
III. THEORIES OF INTELLECTUAL PROPERTY 453
A. *Utilitarian* 453
B. *Labor-Desert* 454
C. *Personality* 456
D. *Distributive Justice* 457
IV. UTILITARIAN THEORY OF NEGATIVE SPACE 459
V. NON-UTILITARIAN THEORIES OF NEGATIVE SPACE 461
A. *Labor-Desert* 461
1. *Non-Exclusivity Rewards* 464
2. *Exclusivity Would Harm Creation* 466
B. *Personality* 468
1. *Norms-Based Protection of Personhood Priorities* 468
2. *Communities of Sharing* 470
3. *Consumer Personhood* 471
C. *Distributive Justice* 473
1. *Strong Creator Interest in Dissemination of Works Regardless of the Consumer's Ability to Pay* 474
2. *When Copying Generates Creation* 475
VI. NORMATIVE IMPLICATIONS 476
A. *Naming Names* 478
B. *Leaving Room for Productive Infringement* 479
C. *Resisting the Urge to Overprotect* 482
VII. CONCLUSION 485

I. INTRODUCTION

Imagine that you awake one morning with the following agenda: first, you cook breakfast from a recipe that you hand-copied out of a

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* Assistant Professor and Director, Center for Intellectual Property Law, Whittier Law School. Thanks to Mark Lemley, Wendy Gordon, Robert Merges, Greg Mandel, Aaron Perzanowski, Eric Johnson, Brenda Simon, the participants at the 2011 Intellectual Property Scholars' Conference, and the participants at the Fall 2011 Southern California Junior Law Scholars' Workshop for their insight and input.

friend's cookbook. Then, you work on a law review article that quotes liberally from colleagues' scholarly works. In the afternoon you settle down to sew an outfit heavily influenced by a designer runway sample. Finally, you wear your newly sewn outfit to perform a show of stand-up comedy consisting entirely of paraphrased jokes you heard other comedians tell.

Are your activities wholly original? No. Though they may require some creativity on your part, they range from adaptation to out-and-out copying. Even so, they are not likely to make you an intellectual property infringer. Cuisine, fashion, and stand-up comedy are notoriously unprotected areas of creation,[1] and academic quotation is fair use.[2] And yet, with a few changed details—copying a company's recipe for solvent rather than a chef's recipe for breakfast, copying a script to sell rather than a law review article for scholarly commentary; copying a sculpture rather than a dress, or playing a concert of cover songs rather than second-hand jokes—you would be much more likely to owe royalties or face infringement liability.

Intellectual property law stringently protects some areas of creation and innovation. It does not protect others, either because the law excludes them from protection or because creators opt out of protection or enforcement. Some of these unprotected areas even seem to benefit from the lack of protection. These are intellectual property's "negative spaces"—areas where creation and innovation thrive without significant formal intellectual property protection.[3]

In recent years, scholars have turned their attention to this phenomenon. Most have conducted case studies, exploring such diverse negative spaces as fashion,[4] cuisine,[5] magic tricks,[6] stand-up comedy,[7]

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1. *See generally* Christopher J. Buccafusco, *On The Legal Consequences of Sauces: Should Thomas Keller's Recipes Be* Per Se *Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007) (exploring the copyrightability of recipes and concluding that economic, public policy and cultural considerations counsel against extending copyright protection to recipes); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008) (exploring copyright protection for stand-up comedy and noting that social norms provide a substitute for IP law); Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) [hereinafter Raustiala & Sprigman, *Piracy Paradox*] (focusing on the lack of intellectual property protection for fashion designs).

2. *See* 17 U.S.C. § 107 (2012) (defining copyright fair use).

3. *See* Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1, at 1764 (coining and defining the term "negative space" in the intellectual property context).

4. *Id.*; Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009) [hereinafter Raustiala & Sprigman, *Revisited*] (clarifying and expanding on the arguments explored in *Piracy Paradox* and responding to scholarly proposals for legislative reform).

5. *See* Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 44-45 (1994) [hereinafter Litman, *Exclusive*] (reexamining the bargain between

typefaces,[8] open source software,[9] sports,[10] wikis,[11] academic science,[12] jambands,[13] hip hop mixtapes,[14] and even roller derby pseudonyms.[15]

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copyright holders and the public that copyright entails and arguing that nascent industry can be stimulated by lack of copyright protection); *cf.* Raustiala & Sprigman, *Piracy Paradox, supra* note 1, at 1768. *See generally* J. Austin Broussard, Note, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691 (2008) (arguing for copyright protection for chefs' innovative recipes as original works of authorship); Buccafusco, *supra* note 1 (exploring the copyrightability of recipes and concluding that economic, public policy, and cultural considerations counsel against extending copyright protection to recipes); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008) (arguing that recipes are better protected by self-enforced social norms than by intellectual property law).

6. *See generally* Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, *in* LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine A. Corcos ed., 2010) (describing the ways in which the magic community has developed social norms that protect intellectual property in the absence of IP law).

7. *See generally* Oliar & Sprigman, *supra* note 1 (arguing that intellectual property law is not a cost-effective way to protect creativity of stand-up comedians and that social norms provide a substitute for IP law).

8. *See* Blake Fry, *Why Typefaces Proliferate Without Copyright Protection*, 8 J. TELECOMM. & HIGH TECH. L. 425, 432-37 (2010) (arguing for the continued exclusion of typefaces from copyright protection and explaining why that exclusion does not prevent innovation). *See generally* Jacqueline D. Lipton, *To © or Not to ©? Copyright and Innovation in the Digital Typeface Industry*, 43 U.C. DAVIS L. REV. 143 (2009) (calling for Congress, the Copyright Office, and courts to reexamine the issue of typeface copyrightability and arguing for at most thin protection for digital typefaces).

9. *See generally, e.g.*, Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L.J. 369 (2002) (analyzing the economic and cultural implications of peer production of information).

10. *See* F. Scott Kieff, Robert G. Kramer & Robert M. Kunstadt, *It's Your Turn, But It's My Move: Intellectual Property Protection for Sports "Moves*,*"* 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 765, 766, 774-76 (2009) (arguing that the use of IP rights in sports give more bargaining power to a much broader range of athletes); Gerard N. Magliocca, *Patenting the Curve Ball: Business Methods and Industry Norms*, 2009 BYU L. REV. 875, 877 (2009) (arguing that "there should be a presumption against considering a process patentable subject matter under 35 U.S.C. § 101 when a norm can be found in the relevant industry against patenting the class of innovations at issue").

11. *See generally* Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARVARD J. SPORTS & ENT. L. 95 (2010) (arguing for a wiki model in which collaboration is encouraged but normative expectations of authorship are maintained).

12. *See* Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain, Part II*, 18 COLUM.-VLA J. L. & ARTS 191, 204 (1994) [hereinafter Aoki, *Part II*] (explaining that academic scientists are driven by "desires to obtain priority and to gain professional recognition, promotions, grants, tenure and increased funding" to publish their research regardless of intellectual property incentives). *See generally* Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, *in* UNIVERSITY ENTREPRENEURSHIP AND TECHNOLOGY TRANSFER: PROCESS, DESIGN, AND INTELLECTUAL PROPERTY 93 (Gary D. Libecap ed., 2005).

13. *See* Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 653, 676-77 (2006) (describing the ways in which the jamband community uses social norms to enforce copyright law).

14. *See* Horace E. Anderson, Jr., *"Criminal Minded?": Mixtape DJs, the Piracy Paradox, and Lessons for the Recording Industry*, 76 TENN. L. REV. 111, 114, 140-53 (2008)

Until now, this examination has proceeded from a utilitarian perspective with scant attention to other theoretical frameworks. Commentators have been most concerned with negative spaces as anomalies to incentive theory and have analyzed how creators and innovators in these spaces benefit from efficiencies and incentives other than formal intellectual protection.[16]

But while the constitutional underpinnings of intellectual property law are explicitly incentive-based for copyright and patent law,[17] and implicitly so for trademark law,[18] utilitarian theory alone cannot explain all aspects of current intellectual property law.[19] For

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(extending Raustiala and Sprigman's "piracy paradox" from the fashion industry to mixtapes and arguing for a model that employs strategic forbearance of copyright enforcement).

15. *See generally* David Fagundes, *Talk Derby To Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012) (investigating the extralegal governance scheme used to protect derby names to explain the emergence of subcultural IP norms). For a taxonomy of negative spaces and examined factors conducive to their creation and maintenance, see Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011).

16. *See generally* Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010) (collecting and analyzing case studies of "constructed cultural commons" such as patent pools, open-source software, Wikipedia, the Associated Press, and jamband communities using a utilitarian framework); Raustiala & Sprigman, *Piracy Paradox, supra* note 1 (describing negative spaces as defying incentive theory and posing utilitarian explanation for fashion's success as a negative space); Rosenblatt, *supra* note 15 (discussing factors that contribute to creation and maintenance of negative spaces from utilitarian standpoint).

17. *See* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall . . . 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."); Diamond v. Chakrabarty, 447 U.S. 303, 307 (1980) (describing the objective of the patent monopoly as existing so that "[t]he productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy" (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974))); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors. It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius." (internal quotation marks omitted)); *see also* Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 108 n.5 (1997) (noting that Thomas Jefferson explicitly disavowed any natural-law underpinning of intellectual property rights); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 473-75 (2005) [hereinafter Tehranian, *Et Tu*] (discussing U.S. courts' early rejections of non-utilitarian theories of intellectual property).

18. *See In re* Trade-Mark Cases, 100 U.S. 82, 94-95 (1879) (describing utilitarian incentive justification for trademark law).

19. *See, e.g.*, ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 150-53 (2011) (arguing that "efficiency is not capable of serving as a stand-alone foundation for IP rights"). Some have identified disjunctions between the utilitarian justification for intellectual property law and the actual creative process. *See, e.g.*, Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA ST. U. L. REV. 623, 624 (2012) ("New strains of thinking in the fields of economics, psychology, and business-management studies now debunk the long-venerated idea that legal authority must provide some

example, the term extensions of the Sonny Bono Copyright Act are retroactive, although retroactivity could not incentivize past or future creation.[20] Patent law protects software well past the point of obsolescence,[21] and trademark law protects marks regardless of the quality of the underlying products.[22] Various doctrines permit *gratis* uses of works and inventions as beneficial to society despite the risk of decreased production.[23]

Empirical research shows that despite the Constitution's utilitarian justification for intellectual property protection, the American public is largely unconcerned with the incentive function of IP law.[24] People see intellectual property infringement as "unfair," not on incentive grounds, but based on natural law and distributive justice concepts that the creator is "entitled" to damages and that copying is immoral or theft-like.[25] This finding is radically different from the traditional justification for intellectual property protection and is

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artificial inducement to artistic and technological progress.") Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) [hereinafter Tushnet, *Economies of Desire*] ("Psychological and sociological concepts can do more to explain creative impulses than classical economics. As a result, a copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote."). *But see* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 169, 180-81 (Stephen R. Munzer ed., 2001) (noting that "empirical work has failed to answer the ultimate question of whether the stimulus to innovation is worth its costs"); Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010) (discussing psychology of creation in utilitarian terms).

20. Tehranian, *Et Tu*, *supra* note 17, at 488-92 (describing areas of copyright law that are more consistent with natural-law justifications than utilitarian incentive theory); John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 13-16 (2011) [hereinafter Tehranian, *Parchment*] (discussing how the extension of copyright term signals a non-utilitarian justification for protection).

21. *See* Mark E. Stallion, *A Practical Overview of U.S. Patent Law Challenges and Strategy*, *in* DEVELOPING A PATENT STRATEGY: LEADING LAWYERS ON COUNSELING CLIENTS ON PATENT PROTECTION, EVALUATING PATENT PORTFOLIOS, AND WORKING WITH THE USPTO 219, 228 (2010) (noting that new software technology can become obsolete even before a first office action by the patent office, to say nothing of the time required for a patent to issue).

22. *See* J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 3:10 ("[T]he quality function of marks does not mean that marks always signify 'high' quality goods or services—merely that the quality level, whatever it is, will remain consistent and predictable among all goods or services supplied under the mark.").

23. *See, e.g.*, 17 U.S.C. § 107 (2012) (defining copyright fair use); 35 U.S.C. § 287(c) (2012) (denying remedies for infringement of patents on medical activities).

24. *See* Gregory N. Mandel, *The Public Psychology of Intellectual Property*, 23 (Nov. 13, 2012) (unpublished manuscript) (on file with author) ("Overall, respondents were substantially more likely to identify a natural rights entitlement basis for intellectual property rights (60%) than either an incentive (23%) or expressive (17%) basis. These results run strongly contrary to the dominant theories of intellectual property law recognized in most intellectual property policy, economic, and legal analysis.").

25. *Id.*; *see also* Moore, *supra* note 17, at 81-82.

crucial to understanding intellectual property's negative spaces—if people's relationships with intellectual property law aren't driven by utilitarian concerns, then we must look past those concerns to understand why people elect to create in intellectual property's negative spaces.

To the extent that current law embodies theories beyond utilitarianism, our understanding of negative spaces—and hence our ability to apply the lessons of negative space to our formal protection scheme—is thus incomplete without examining how negative spaces fit into these other rubrics. Despite the wealth of analysis both illuminating and applying labor-desert, personality, and distributive justice theories to intellectual property law, it has yet to apply them specifically to negative spaces. This article undertakes that examination.

Courts and scholars have, generally speaking, advanced three non-utilitarian justifications for intellectual property law:[26] (1) labor-desert theory, which originates loosely from John Locke's *Two Treatises* and posits that creators deserve to own the fruits of their intellectual labor;[27] (2) personality theory, which extends from Hegel by way of Margaret Jane Radin and suggests that creators have a moral claim on their creations as an expression of their personalities;[28] and (3) distributive justice, the idea that formal intellectual property rules should advance a "just and attractive culture."[29]

Why should we care? Theorizing the world as it already exists may seem like navel-gazing—retroactively categorizing what may be fortuitous or coincidental—and intellectual property theorizing is no exception. But it has considerable normative value; by pinpointing the theoretical justifications for formal intellectual property protection, we can understand the extent to which our laws achieve and fail to achieve their theoretical aims and how the law should evolve to reflect those goals.[30] There is an equally high value in understanding when and why our traditional justifications for intellectual property protection do *not* apply—or apply in surprising ways. Every theory of

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26. Many scholars have expounded upon this framework; William Fisher, Justin Hughes, and Robert Merges have provided particularly enlightening analyses. *See generally* MERGES, *supra* note 19 (categorizing IP theories differently, but offering similar underlying theoretical bases for IP law); Fisher, *supra* note 19 (outlining various theories underlying intellectual property law); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (exploring labor-desert and personhood theories of intellectual property law).

27. *See generally* Moore, *supra* note 17 (arguing that current intellectual property law is more Lockean than utilitarian).

28. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

29. Fisher, *supra* note 19, at 194. *See generally* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

30. *See* Fisher, *supra* note 19, at 194-99 (on the value of theoretical discussion).

intellectual property supports protection of one sort or another. Yet in negative spaces, protection is either unnecessary or undesired. Does this overturn our understanding of intellectual property as we know it?

No. Negative spaces do not undermine the justifications for formal intellectual property protection, but they do shed light on when such protection is—or is not—called for. The utilitarian approach illuminates when protection is not necessary as an incentive to production. The same is true for the other theories; by exploring negative spaces through the lens of labor-desert, personality, and distributive justice theories, we can gain new insight into when protection may not constitute an ideal reward for labor (per labor-desert theory), when protection may not be necessary to vindicate personhood concerns (per personality theory), and when protection may be at odds with the creation of a just and attractive society.

This article begins with background, first regarding negative spaces, and then regarding theories of intellectual property law. Then it explores how these theories apply to negative spaces, and suggests several normative conclusions that follow from this exploration.

II. IP'S NEGATIVE SPACES

The term "negative space" originates in art, where it refers to the area surrounding a figure that makes the figure stand out.[31] In the intellectual property lexicon, the term refers to areas of creation and innovation that thrive with little or no intellectual property protection. To be clear, many areas of creation function in the absence of intellectual property protection, but not every such area constitutes negative space. Much as the negative space of a painting includes only the unfigured portions of the canvas rather than the air surrounding the canvas, the negative space of intellectual property law does not reach so far as to include *everything* that is not protected by intellectual property law. It includes only those areas of creation and innovation that actually *benefit*—or at least do not seem to suffer—from the lack of intellectual property protection.[32]

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31. *See* David Leggett, *Enhancing Your Art With Negative Space*, TUTORIAL 9 (Oct. 21, 2008), http://www.tutorial9.net/resources/enhancing-your-art-with-negative-space/.

32. *See* Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1, at 1764 (defining the term as encompassing any "substantial area of creativity" in which intellectual property laws do not penetrate or provide "only very limited propertization"); Rosenblatt, *supra* note 15, at 322 (defining "negative space" in intellectual property context). Of course, since our laws are not a controlled experiment, it is impossible to say with certainty whether an unprotected area of creation or innovation *definitely* benefits or does not suffer from a lack of protection. The most we can know is whether an area thrives in that absence; from that, we can assess whether it belongs in the category of negative space.

It is appropriate that negative-space scholarship flourish now. Consider the growing economic and social significance of negative spaces: software companies are releasing major products in open source form, and creative commons licensing is commonplace.[33] Musicians are experimenting with negative-space models in the traditionally strong IP world of record distribution, hoping that voluntary payment schemes will bring new listeners and sales of backing tracks will bring new buyers interested in remixing.[34] Viral video makers, bloggers, and the twitterverse have embraced the idea that copying can be good for business.

At the same time, negative spaces are under fire, as litigation, legislation, and community customs push against the boundaries of previously stable regions of the public domain. Efforts to create industry-specific fashion design protection legislation have persisted for years and may succeed.[35] Debate continues over the benefits and drawbacks of adopting European-style database protection.[36] Controversy rages over the patentability of gene sequences and basic research.[37] The "hot news" misappropriation doctrine has gained atten-

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33. *See, e.g.*, *Metrics*, CC WIKI, http://wiki.creativecommons.org/Metrics (last modified August 27, 2012) (mapping growth in use of creative commons licenses).

34. Examples abound, including Radiohead, Jonathan Coulton, and Nine Inch Nails. *See* Alex Blumberg, *An Internet Rock Star Tells All*, NPR: PLANET MONEY (May 13, 2011, 1:59 PM), http://www.npr.org/blogs/money/2011/05/14/136279162/an-internet-rock-star-tells-all (describing Coulton's financial success using this model); *Case Studies: Nine Inch Nails The Slip*, CC WIKI, http://wiki.creativecommons.org/Case_Studies/Nine_Inch_Nails_The_Slip (last modified July 12, 2012) (describing the band Nine Inch Nails' model of distributing songs and multi-track source files for free and inviting remix use); Eric Garland, *The 'In Rainbows' Experiment: Did It Work?*, NPR: MONITOR MIX (Nov. 16, 2009, 10:00 PM), http://www.npr.org/blogs/monitormix/2009/11/the_in_rainbows_experiment_did.html ("Releasing a pay-what-you-wish album now is almost yawn-worthy. Major artists are experimenting with price points, novel distribution models and giveaways at a dizzying pace."); *Songs*, JONATHAN COULTON, http://www.jonathancoulton.com/songs/ (last visited Feb. 15, 2013) (Coulton's release of songs without digital rights management, on a partially pay what you want model, under creative commons license, inviting users to remix and/or purchase wordless karaoke tracks); Josh Tyrangiel, *Radiohead Says: Pay What You Want*, TIME (Oct. 1, 2007), http://www.time.com/time/arts/article/0,8599,1666973,00.html (discussing Radiohead's "pay what you want" pricing).

35. *See* Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012) (proposing amendment to 17 U.S.C. § 1301 *et seq.* to add 3-year protection for fashion designs); *see also* Anandashankar Mazumdar, *Witnesses Praise Latest Version of Fashion Design Protection Legislation, Urge Passage*, BLOOMBERG BNA: PATENT, TRADEMARK & COPYRIGHT LAW DAILY (July 19, 2011) (discussing industry and academic testimony regarding previous iteration of the bill).

36. *See* Miriam Bitton, *Protection for Informational Works After* Feist Publications, Inc. v. Rural Telephone Service Co., 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 612-14 (2011) (framing the continuing debate).

37. *See, e.g.*, Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 689 F.3d 1303 (Fed. Cir. 2012) (holding that composition claims covering isolated DNA sequences were directed to patent-eligible subject matter), *cert. granted in part*, Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 694 (U.S. Nov. 30, 2012) (No. 12-398) (granting certiorari on the question of whether human genes constitute patentable

tion as consumers have turned to internet news aggregators for up-to-the-minute information—and whether Google News and The Huffington Post are hot news infringers depends upon who you ask.[38] Though tattoo artists have traditionally shunned copyright and trademark protection in favor of community policing,[39] one sued the makers of the film *Hangover 2* for giving a character a face tattoo like Mike Tyson's.[40] Bikram Choudhury, the entrepreneur responsible for popularizing "hot yoga," has sued other "hot yoga" purveyors for copyright infringement—challenging not only traditional notions about the boundaries of intellectual property protection for athletics but also the conventional wisdom that athletic communities would rather compete in the ring or on the field than fight each other in court.[41] Similarly, although scholars have hailed performance magic as one of intellectual property's negative spaces,[42] stage magician Teller has sued a Dutch entertainer over a YouTube video that imitates Teller's famous trick "Shadows."[43] Litigation has challenged the common understanding that fair use protects copying for scholarly and classroom

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subject matter); ARIAD Pharms. v. Eli Lilly & Co., 598 F.3d 1336, 1353 (Fed. Cir. 2010) (holding that written description requirement of 38 U.S.C. § 112 barred patenting of basic research).

38. *See, e.g.*, Barclays Capital Inc. v. Theflyonthewall.com, 650 F.3d 876 (2d Cir. 2011) (holding that "hot news" claim was preempted by copyright law; permitting the republishing of securities recommendations issued by leading financial institutions); Jonathan Stempel, *Dow Jones, Briefing.com Settle "Hot News" Lawsuit*, REUTERS (Nov. 16, 2010), http://www.reuters.com/article/2010/11/16/us-briefingcom-dowjones-hotnews-settleme-idUSTRE6AF37G20101116 (describing settlement between Dow Jones and Briefing.com in which Briefing.com admitted to "hot news" liability for republishing financial news and headlines). *See generally* Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011) (discussing the relatively recent resurgence of the "hot news" misappropriation doctrine).

39. *See generally* Aaron Perzanowski, *Intellectual Property Norms in the Tattoo Industry* (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145048.

40. Whitmill v. Warner Bros. Entm't Inc., No. 4:11-cv-00752-CDP (E.D. Mo. filed April 28, 2011); *see* Noam Cohen, *Tattoo Artist Settles Tyson Dispute With 'Hangover 2'*, N.Y. TIMES.COM (June 21, 2011, 2:18 PM), http://mediadecoder.blogs.nytimes.com/2011/06/21/tattoo-artist-settles-tyson-dispute-with-hangover-2/ (describing dispute and settlement).

41. Bikrams Yoga Coll. of India LP v. Yoga To The People Inc, No. 2:11-cv-07998-DMG-FMO (C.D. Cal. Nov. 30, 2012); *see also* Ben McGrath, *Steamed*, THE NEW YORKER (Feb. 6, 2012), www.newyorker.com/takl/2012/02/06/120206ta_talk_mcgrath (discussing Choudhury suit); David Wright, Ben Newman & Lauren Effron, *Bikram Yoga Guru Reaches Settlement in Copyright Suit*, ABC NEWS (Dec. 3, 2012), http://abcnews.go.com/Business/bikram-yoga-guru-reaches-settlement-copyright-suit/story?id=17869598#.UL_R39fNDfJ.

42. *See generally* Loshin, *supra* note 6 (describing IP without IP norms in performance magic).

43. Teller v. Dogge, No. 2:12-cv-00591-JCM-GWF (D. Nev. filed April 15, 2012); *see* Eriq Gardner, *Teller of Penn & Teller Breaks Silence to Sue Over Magic Trick*, HOLLYWOOD REPORTER (Apr. 15, 2012, 11:41 PM), http://www.hollywoodreporter.com/thr-esq/penn-teller-lawsuit-reveal-secrets-youtube-312296 (discussing Teller suit).

use.[44] Publisher John Wiley & Sons sued U.S. patent attorneys for submitting copies of journal articles to the U.S. Patent Office during the patent prosecution process, notwithstanding a 2012 patent office memo stating that such copying should be considered a non-actionable fair use.[45] Some of these stories no doubt represent outliers in the broader arena of negative space. But taken together, they tend to demonstrate a trend toward greater protection in areas where law or custom had previously barred or shunned it.

Negative spaces are not only growing but are also at the center of intellectual property debates and crackdowns. What makes them so appealing and so volatile, and what can they tell us about formal intellectual property protection? To answer these questions, we must understand what makes negative spaces tick.

Negative spaces may vary greatly from each other. In some—fashion, hairstyles, sports—copying is rampant and expected.[46] In others, custom and community standards enforce a sort of "IP without IP" that may even result in a *greater* level of protection than formal intellectual property law would provide. Stand-up comedians rely on community norms, for example, to protect not only expressions, but also ideas.[47] In still others—creative commons and the open-source movement, for example—creators invite copying and imitation, but do so in the shadow of law.[48] But despite their differences, all negative spaces share a "low-IP equilibrium," where intellectual property protection is absent, or largely so, but creation thrives.[49] The absence

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44. *See, e.g.*, Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (holding that some, but not all, of professors' uses of excerpts and/or chapters of copyrighted works in classroom "course packs" constituted fair use under Copyright Act).

45. *See* John Wiley & Sons v. McDonnell Boehnen Hulbert & Berghoff, LLP, No. 1:12-01446 (N.D. Ill. filed Feb. 29, 2012); Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A., No. 0:12-cv-00528-RHK-JJK (D. Minn. July 2, 2012); Memorandum from Bernard J. Knight, Jr., General Counsel, U.S. Patent & Trademark Office, USPTO Position on Fair Use of Copies of NPL Made in Patent Examination (January 19, 2012), *available at* www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf. The USPTO has intervened in the Minnesota case and filed a counterclaim for declaratory judgment seeking a ruling that patent prosecutors do not infringe by copying journal articles while researching prior art for patent applications. *See also* Answer to Amended Complaint and Couterclaim, Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A. No. 0:12-cv-00528-RHK-JJK (D. Minn Nov. 13, 2012).

46. *See* Magliocca, *supra* note 10, at 876-77 (discussing sportsmanship norms); Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1, at 1722, 1772 (copying in fashion and hairstyles).

47. *See generally* Oliar & Sprigman, *supra* note 1 (describing "IP without IP" in stand-up comedy).

48. *See* Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 CARDOZO L. REV. 1437, 1449 (2010) (discussing how various sharing regimes depend upon the existence of formal intellectual property protection).

49. Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1, at 1764 (discussing low-IP equilibrium in negative spaces).

of intellectual property protection may be the result of legal exclusion or may be the creator's choice.

One may draw a metaphorical map of IP's negative spaces based on the ways in which areas of creation and innovation are most likely to end up outside the boundaries of traditional intellectual property protection.[50] This approach reveals three categories of non-protection: (1) doctrinal no-man's land; (2) areas in which the creators themselves decline formal intellectual property protection; and (3) use-based carve-outs.[51]

Doctrinal no-man's land represents what is most commonly understood to be the "public domain."[52] The law permits copying of creations residing in doctrinal no-man's land because they fall completely or substantially outside the boundaries of intellectual property protection schemes. When unprotectable elements form the basis for entire endeavors, negative spaces may arise. In the field of fashion design, one of the best analyzed areas of doctrinal no-man's land, most designs are not protected by copyright law (because they are functional), trademark law (because they have not acquired secondary meaning), or design patent law (because they are unregistered).[53] Other areas of doctrinal no-man's land include electronic databases, cuisine, perfume, and typeface design.[54]

IP forbearance occurs when putative intellectual property holders forego IP exclusivity by declining to seek protection, declining to pursue infringers, or engaging in widespread royalty-free licensing. Although a single creator may forbear, that solitary act of forbearance does not create a negative space. For any particular creator, forbearance may be idiosyncratic.[55] But when an entire community of creators forbears, it signals that something systemic in that community makes a lack of protection preferable to protection. IP forbearance may exist on an industry-wide basis (as in the worlds of stand-up comedy, magic, and roller derby pseudonyms) or may occupy partial

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50. Rosenblatt, *supra* note 15, at 323-25.

51. *Id.*

52. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 995 (1990) [hereinafter Litman, *Public Domain*] (explaining the term public domain and noting that it has fallen out of favor).

53. Raustiala & Sprigman, *Piracy Paradox, supra* note 1, at 1698-1705 (discussing lack of intellectual property protection for fashion designs).

54. *See, e.g.*, Buccafusco, *supra* note 1, at 1124-27 (discussing cuisine); Fry, *supra* note 8, at 430-36 (discussing typefaces); Raustiala & Sprigman, *Piracy Paradox, supra* note 1, at 1770, 1772-73 (discussing electronic databases and perfume).

55. *See* Van Houweling, *supra* note 29, at 1537 ("Some creators want the monetary incentive that [intellectual property law] provides; others do not. Some creators can bear the expenses that [intellectual property law] imposes; others cannot.").

industries (as in popular music, open source software, and the copyleft movement).[56]

Use-based carve-outs are areas in which the judiciary and Congress create negative space by exempting uses from infringement liability. These include copyright fair use; trademark fair use and nominative fair use; the narrow "experimental use" exceptions to patent infringement; and the statutory exemption for practice of patented medical or surgical techniques.[57] These carve-outs differ from doctrinal no-man's land because they relate to types of use, rather than types of works. Like forbearance and doctrinal no-man's land, the existence of a use-based carve out does not automatically lead to the creation of a negative space. Rather, such carve-outs create negative space only when they influence entire types of work. For example, copyright fair use is not itself a negative space, since it may have very different impacts on different types of works. It is possible to make fair use of clips from a major motion picture release, but that does not make "major motion pictures" a negative space. But copyright fair use does create negative spaces, such as academic writing. Most uses of academic writing (commentary, quotation, classroom copying, library copying) qualify as fair use; scholars continue their work despite the likelihood that others can copy their work. Indeed, they likely want their work to proliferate through unauthorized, but attributed, copying. Along the same lines, creators of medical techniques proceed undaunted although they cannot hold others liable for infringement of their patents, and it's unlikely that accountants and tax lawyers will cease developing new tax avoidance strategies merely because such strategies are no longer patentable.[58]

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56. *See generally* Anderson, *supra* note 14 (discussing hip hop mixtapes); Fagundes, *supra* note 15 (discussing roller-derby pseudonyms); Eric E. Johnson, *Rethinking Sharing Licenses for the Entertainment Media*, 26 CARDOZO ARTS & ENT. L.J. 391 (2008) (discussing copyleft and automatic licenses); Loshin, *supra* note 6, at 18-24 (discussing magic); Jim Markwith, *The Coexistence of Open Source and Proprietary Software*, 954 PLI/PAT 227 (2008) (discussing relationship between open and closed source business models); Oliar & Sprigman, *supra* note 1, (discussing stand-up comedy); Schultz, *supra* note 13 (discussing jambands).

57. 15 U.S.C. § 1115 (2012) (defining classic "descriptive" trademark fair use); 17 U.S.C. § 107 (2012) (defining copyright fair use); 35 U.S.C. § 271(e) (2012) (defining experimental use exception); 35 U.S.C. § 287(c) (2012) (providing an exemption for practice of patented medical or surgical techniques); *see also* New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 308 (1992) (defining nominative fair use of a trademark).

58. 35 U.S.C. § 287(c) (2012) (providing an exemption for practice of patented medical or surgical techniques); Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 14, 125 Stat. 284 (2011) ("For purposes of evaluating an invention under section 102 or 103 of title 35, United States Code, any strategy for reducing, avoiding, or deferring tax liability, whether known or unknown at the time of the invention or application for patent, shall be deemed insufficient to differentiate a claimed invention from the prior art.").

III. THEORIES OF INTELLECTUAL PROPERTY

The Constitution provides a utilitarian rationale for the existence of copyright and patent law—to advance the progress of science and the useful arts[59]—and the commerce clause justifies trademark law as consumer protection and quality incentives.[60] But as discussed above, intellectual property protection serves not only economic goals, but also moral and social ones. This Article will address the four most prominent theories justifying intellectual property protection—utilitarian, labor-desert, personality, and distributive—and, in turn, how each of these theories applies to intellectual property's negative spaces.

A. Utilitarian

The utilitarian approach holds that intellectual property law should maximize social welfare from an economic perspective.[61] It provides the Constitution's reasoning that intellectual property protection promotes the advancement of science and the useful arts[62]: Exclusivity enables creators to charge for their creations, which in turn provides material incentive to create.

An underlying premise of the utilitarian approach is that copying costs less than initial creation. Without laws preventing copying, consumers would copy works and inventions rather than purchasing them, which would deny creators the resources they need to engage in further creation.[63] Intellectual property exclusivity also provides an incentive to create public goods by spreading the cost of production among multiple potential purchasers. Thus, creators will make

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59. *See* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall . . . 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.").

60. *See In re* Trade-Mark Cases, 100 U.S. 82, 94-95 (1879) (describing utilitarian incentive justification for trademark law).

61. Although it aims to maximize social welfare based on Bentham's "felicific calculus," the hallmark of the utilitarian approach is wealth maximization. *See, e.g.*, F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 44-46 (2004).

62. *Id.*; Hughes, *supra* note 26, at 303-04 ("The instrumental argument clearly has dominated official pronouncements on American copyrights and patents. Even the Constitution's copyright and patent clause is cast in instrumental terms . . . . In almost all of its decisions on patents, the Supreme Court has opined that property rights are needed to motivate idea-makers."); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 32 (1996) ("Economists tell us . . . that, at the margin, there is always an author who will be persuaded by a slight additional incentive to create another work, or who will be deterred from creating a particular work by a diminution in the copyright bundle of rights.").

63. Fisher, *supra* note 19, at 169 (identifying as a utilitarian concern that creators "will be unable to recoup their 'costs of expression' . . . because they will be undercut by copyists who bear only the low 'costs of production' ").

things even if the creators' cost of doing so would be greater than the individual benefit to the creator of doing so.[64] A pharmaceutical company will expend the massive resources needed to develop a drug, not because the company is ill and needs the drug, but because it believes people will purchase the drug when it is developed. Similarly, an author may expend resources and forego other income to write a great work of fiction not only because writing the book is personally rewarding, but also in the hope that future readers will want to purchase the book.

Although the utilitarian approach relies on exclusivity as a production incentive, it neither inherently favors nor opposes strong intellectual property protection. Rather, it recognizes that protection renders works more expensive to consumers and, as a result, can chill further creation and innovation. Thus, utilitarian theory advocates for a balance between the potential incentive benefit of exclusivity and the potential drawback of curtailed enjoyment or use of works.[65]

B. Labor-Desert

Labor-desert theory is a natural-law approach most often associated with Locke's *Two Treatises*.[66] It proceeds from the premise that all the world is initially owned in common.[67] One may remove property from the commons by improving it through labor, and one who labors has a natural property right to the fruits of those labors, which the state must respect and enforce.[68] When someone mingles labor

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64. Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 854 (1993) (discussing theoretical underpinnings of incentive theory).

65. *See* Fisher, *supra* note 19, at 169-70 (summarizing incentive theory).

66. *See* Hughes, *supra* note 26, at 296 ("Reference to Locke's *Two Treatises of Government* is almost obligatory in essays on the constitutional aspects of property."); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL'Y 817, 821-35 (1990) (discussing other philosophers who supported a labor-desert conception of intellectual property); *see also* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1542-43, 1549-50 (1993) [hereinafter Gordon, *Property Right*] (discussing Lockean theory).

67. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-86 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); *see also* MERGES, *supra* note 19, at 34-35 (elaborating on Locke's theory of a commons); Hughes, *supra* note 26, at 297 ("Locke begins the discussion by describing a state of nature in which goods are held in common through a grant from God."); Moore, *supra* note 17, at 81 (describing a commons-based interpretation of Lockean labor-desert theory); Seana Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138, 143-54 (Stephen R. Munzer ed., 2001) (describing a commons-based interpretation of Lockean labor-desert theory).

68. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (promoting the "fair return for an 'author's' creative labor" in addition to the incentive justification for

with the raw materials of the commons, the laborer deserves to own (that is, control and benefit from) the resulting product.[69] This is entirely distinct from a utilitarian wealth-maximization theory; rather, it embodies the notion that "authors and inventors *deserve* a reward for their labor and should be given it regardless of whether they would continue their work in the absence of such compensation."[70] Although Locke developed his theory with reference to physical property, it extends seamlessly to intellectual property: Creators and innovators pluck ideas from a common pool and exert their creative labor upon them to make works, inventions, and marks—and when they do, they deserve to own them as intellectual property.[71]

The adage that "none should reap where another has sown" is part, but not the whole, of the labor-desert picture. This is because Locke's theory recognizes the value of a rich commons and thus includes two crucial provisos: first, the products of labor must remain available to the commons if removing them would not leave "enough and as good" in common for others; and second, property should not be wasted.[72] Some scholars interpret the provisos to mean that property should be owned exclusively only if such ownership would not result in harm.[73] Thus, labor-desert theory is not the strong IP imperative it might initially appear to be.[74] Intellectual property

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copyright); Fisher, *supra* note 19, at 170-71 (summarizing labor-desert theory); Hughes, *supra* note 26, at 297-98 (summarizing labor-desert theory).

69. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1204 (1967) (articulating labor-desert theory as an ethical foundation of property ownership).

70. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1688-89 (1988). *But see* Hughes, *supra* note 26, at 298-99 (noting the existence of both instrumentalist and normative branches of Lockean theory).

71. *See* MERGES, *supra* note 19, at 32-33 (proposing that "Locke's theory applies equally well, if not better, to intellectual property"); Hughes, *supra* note 26, at 315 (noting that differences between ideas and physical goods "suggest that ideas fit Locke's notion of a 'common' better than does physical property"). *See generally* Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609 (1993) (discussing how individuals may deserve to own intellectual property more than they deserve to own the products of their physical labor).

72. *See* Fisher, *supra* note 19, at 170 (summarizing labor-desert theory); Hughes, *supra* note 26, at 297-98 (summarizing labor-desert theory); Shiffrin, *supra* note 67, at 146-47 (discussing "enough and as good" and waste conditions of the Lockean proviso).

73. *See, e.g.*, Gordon, *Property Right*, *supra* note 66, at 1540-43.

74. Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management*,*"* 97 MICH. L. REV. 462, 474 (1998) [hereinafter, Cohen, *Lochner*] (discussing possible interpretations of Lockean philosophy). S*ee generally* Shiffrin, *supra* note 67. Shiffrin's approach to Lockean theory is different from many, but it is informed directly by Locke's text. Whereas the more common conception of labor-desert theory would state that one has a natural right to convert property to one's own through labor so long as the proviso is met, Shiffrin's interpretation states that one has a natural right to subsistence, and that only when exclusive use of a resource is necessary (as it is with, for example, food) or when the resource would otherwise be wasted, may that resource be converted to ownership through labor. *Id.* at 146-50. While the roots of Shiffrin's interpretation are

protection makes intellectual resources more expensive and creates an anti-commons. Once an idea is improved and removed from the commons, it is difficult to say that "as much and as good" is available to others because ideas and improvements, unlike most commons resources, are not fungible—one idea is not necessarily as good as every other idea, and one improvement is not necessarily as useful as every other improvement.[75] Thus, much like utilitarian theory, labor-desert theory must mediate between the ownership rights of the creator and the rights of others to use information that would otherwise be available to the commons.

C. Personality

Personality theory originates with Hegel,[76] but has been refined and popularized by Margaret Jane Radin.[77] Personality theory advocates that society should permit creators to own (*i.e.*, control and benefit from) their creations because creation—the process of imposing one's stamp on the world—is important to human flourishing.[78] One has a fundamental right to oneself, and one's products are a manifestation of that self. Thus, ownership of one's creations satisfies one's fundamental needs.[79] A creator must control her creations because the holder of property "could not be the particular person she is without it,"[80] and the creation and control of intellectual property is valuable "for self-actualization, for personal expression, and for dignity and recognition as an individual person."[81]

Unlike labor-desert theory, which began solely as a philosophy of tangible property, personality theory has always incorporated a philosophy regarding intellectual creations. Hegel envisioned intellectual property as embodying personality and works of authorship, inventions, and trademarks as identifying oneself. Although Hegel did not advocate for exclusive rights to personal property, both he and others relied on his theory to justify exclusivity over intellectual

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considerably more communitarian than some, the outcome is similar in the intellectual property context, as ideas would presumably be wasted in the commons if not used by creators or innovators, and thus common ideas are susceptible to ownership through labor.

75. Shiffrin, *supra* note 67, at 156 (discussing differences between ideas and tangible property).

76. *See generally* G. HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans., 1965) (1821).

77. *See generally* Radin, *supra* note 28. *See also* Palmer, *supra* note 66, at 835-49 (discussing other philosophers who focused on a personality theory of intellectual property).

78. *See* Hughes, *supra* note 26, at 330-34 (summarizing personality theory in Hegelian terms).

79. *See* Fisher, *supra* note 19, at 171 (summarizing personality theory of intellectual property law); Michelman, *supra* note 69, at 1205 (articulating personality theory as an ethical foundation of property ownership).

80. Radin, *supra* note 28, at 972.

81. Hughes, *supra* note 26, at 330.

creations, since fundamental needs or interests such as self-realization, security, leisure, and identity would be more tied to one's intellectual creations than to more fungible assets.[82] For this reason, the more "self" is associated with a creation—that is, the more original it is—the more it deserves protection.[83]

Personality theory is more concerned with recognition than with payment or livelihood. From a personality perspective, payment matters only indirectly, as recognition and acknowledgement that a particular work reflects the creator's personhood.[84] Attribution vindicates personality rights in a way that royalties alone do not. In real property terms, if I can justify a trespass on your property with an automatic payment, I have only partially acknowledged your ownership of the property. Although the payment requires me to recognize that the property is not my own, it does not require me to recognize that the property is specifically *yours*, nor does it respect your right to exclude me. Thus, the "moral rights" of attribution and integrity—specifically, the right to be publicly identified as the creator and the right to protect the work against changes—are touchstones of personality theory.[85]

D. Distributive Justice

"Distributive justice" loosely characterizes a theoretical approach concerned with basic fairness, or "advancing a vision of a just and attractive culture."[86] On its face, it appears very similar to its utilitarian counterpart, as both are instrumentalist; but unlike the stricter utilitarian approach, distributive justice considers social and

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82. Fisher, *supra* note 19, at 186 (explaining that, as a matter of personality theory, exclusivity of control is called for when it would promote peace of mind, privacy, self-reliance, community, self-realization, security, leisure, responsibility, identity, citizenship, or benevolence); *see* Hughes, *supra* note 26, at 334, 348 (explaining that Hegel was comfortable with alienation of tangible creations, but had great distaste for alienability of intellectual property).

83. Radin, *supra* note 28, at 986-87 (describing a continuum on which people should have more property protection for non-fungible goods more closely associated with their identities).

84. *See* Hughes, *supra* note 26, at 349 ("From the Hegelian perspective, payments from intellectual property users to the property creator are acts of recognition. These payments acknowledge the individual's claim over the property, and it is through such acknowledgement that an individual is recognized by others as a person.").

85. *Id.* at 350 (identifying attribution and integrity as "essential" to the justification of alienation in personality theory).

86. *See* MERGES, *supra* note 19, at 102-36 (taking a Rawlsian philosophical approach to distributive justice and IP); Fisher, *supra* note 19, at 175 (summarizing "social planning" approach to IP theory as drawn from the political philosophy of several notable theorists, including Jefferson, Marx, and the legal realists).

communal goals beyond wealth maximization and considers the interests of intellectual property *users* in addition to creators.[87]

Distributive justice theories posit that the government has a duty to foster people's fundamental independence and ability to shape their own social and economic environments.[88] In his essay *Theories of Intellectual Property,* William Fisher identifies a series of social policies, most of which might fairly be described as distributive concerns, that could animate intellectual property policy: consumer welfare (*i.e.*, happiness); creation of a cornucopia of ideas (including creative incentive and access to ideas); creation of a rich artistic tradition; distributive justice; semiotic democracy (*i.e.*, the creation of meaning by everyone); sociability (community); and respect.[89] These interests may frequently be at odds with each other and, in some cases, themselves, but to achieve an intellectual property system that promotes distributive justice, they all must be considered and balanced.[90]

Distributive justice theory demands neither looser nor tighter intellectual property laws, since intellectual property protection can both benefit and harm the poorly funded. On one hand, IP protection facilitates funding for those who might otherwise not be able to afford to create[91] and helps facilitate creation of works and technologies that benefit the poor.[92] On the other, shorter terms of protection, use-based carve-outs, and compulsory licensing also serve distributive concerns.[93] Carve-outs, in particular, subsidize uses that have

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87. This is not to say that the user is irrelevant to the other three theories; indeed, the "remix" user is addressed in all theories. Utilitarian theory seeks to maximize the value of works, including the user's ability to access and use them. *See generally* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005) (approaching users' rights from a utilitarian standpoint); Shiffrin, *supra* note 67 (discussing users' rights, including the maintenance of a full and rich commons and the universal accessibility of necessities, as elements of a Lockean approach); Tehranian, *Parchment*, *supra* note 20 (taking a personhood approach to user's rights). But in each of these theories, the user takes a secondary role, whereas in considering distributive justice, the user's role is central. *See generally* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) [hereinafter, Tushnet, *Copy This Essay*] (taking a distributive approach to users' rights); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003) (taking a distributive approach to users' rights).

88. *See Fisher*, *supra* note 19, at 172-73 (summarizing "social planning" approach).

89. *Id.* at 192-93; *see also* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 400 (1995) (discussing value of creation as engagement of social dialogue).

90. *See* Fisher, *supra* note 19, at 192.

91. *See* Van Houweling, *supra* note 29, at 1540-42 (discussing ways in which copyright law acts as a subsidy for poorly financed creators).

92. *See* MERGES, *supra* note 19, at 118-20 (discussing how IP institutions help poor consumers).

93. *See* Van Houweling, *supra* note 29, at 1542-43; *see also* Fisher, *supra* note 19, at 172 (discussing how distributive concerns may inform intellectual property law).

social value but high prices for individual users—such as classroom copying of copyrighted works or medical treatment using novel techniques.[94] Distributive justice theory also recognizes the value of non-transformative copying, which has the distributive benefits of permitting consumption and re-expression by poorly funded consumers, and also benefits participatory culture.[95] The theory thus demands balancing the distributive value of copying against the distributive value of remunerating poorly funded creators.

IV. UTILITARIAN THEORY OF NEGATIVE SPACE

Negative space scholarship has, until now, followed a utilitarian model, casting negative spaces as foils for the conventional wisdom that strong intellectual property protection acts as an incentive for creation. That's reasonable—in every negative space, creators and innovators proceed, either by choice or by operation of law, without the incentive of exclusivity. A number of commentators have conducted case studies of low-IP industries and creative cultures from a utilitarian perspective, pointing out how those industries or cultures idiosyncratically thrive in the absence of significant intellectual property protection, either by permitting productive copying or relying on anti-copying norms. For example, Kal Raustiala and Chris Sprigman have noted that the lack of formal intellectual property protection for fashion may benefit creation because it fuels the "fashion cycle," creating trends and rendering them obsolete more quickly than exclusivity would.[96] Several scholars have noted that despite a general lack of intellectual property protection for recipes and foods, community norms in the world of *haute cuisine* tend to protect culinary innovation and place limits on copying.[97] Dotan Oliar and Chris

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94. *See* 17 U.S.C. § 107 (2012) (defining copyright fair use); 35 U.S.C. § 287(c) (2012) (exempting medical technique patents from remedies for infringement); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1606-10 (1982) [hereinafter Gordon, *Market Failure*] (suggesting that fair use exists in part to create positive social externalities not otherwise susceptible to bargaining because they do not benefit the copyright holder as much as society); Van Houweling, *supra* note 29, at 1567-73 (suggesting that distributive justice should be taken even more into account in carve-outs and fair use).

95. *See generally* Tushnet, *Copy This Essay*, *supra* note 87 (discussing value of participatory culture).

96. *See generally* Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1 (arguing that copying in the fashion industry drives rather than chills innovation); Raustiala & Sprigman, *Revisited*, *supra* note 4 (clarifying and expanding on the arguments explored in *Piracy Paradox* and responding to scholarly proposals for legislative reform).

97. *See* Litman, *Exclusive*, *supra* note 5, at 44-48 (reexamining the bargain between copyright holders and the public that copyright entails and arguing that nascent industry can be stimulated by lack of copyright protection); s*ee also* Raustiala & Sprigman, *Piracy Paradox, supra* note 1, at 1768. *See generally* Broussard, *supra* note 5 (arguing for copyright protection for chefs' innovative recipes as original works of authorship);

Sprigman have observed that community norms protect stand-up comedy well beyond the scope of copyright.[98] Others have made similar observations regarding typefaces,[99] open source software,[100] wikis,[101] hip hop mixtapes,[102] and roller derby pseudonyms.[103]

These scholars have demonstrated that negative spaces are not quite as inconsistent with incentive theory as they might seem. If one accepts that other benefits may provide greater incentive than exclusivity would, then negative spaces make sense from a utilitarian perspective: negative spaces arise where a lack of protection provides those benefits more efficiently than exclusivity would.[104] Specifically, negative spaces would likely arise in four relatively common situations: (1) when creation is driven by rewards not reliant on exclusivity, such as a desire for recognition or community, or a market-based advantage such as a network effect or first-mover advantage; (2) when exclusivity would harm further creation; (3) when there is high public or creator interest in free access without harm to creativity; and (4) when creators prefer to reinvest scarce resources in further creation than in protection or enforcement of intellectual property, *i.e.*, when the cost of protecting or enforcing exclusivity exceeds the benefit of pursuing infringers.[105]

Buccafusco, *supra* note 1 (exploring the copyrightability of recipes and concluding that economic, public policy, and cultural considerations counsel against extending copyright protection to recipes); Fauchart & von Hippel, *supra* note 5 (arguing that recipes are better protected by self-enforced social norms than by intellectual property law).

98. *See generally* Oliar & Sprigman, *supra* note 1 (arguing that intellectual property law is not a cost-effective way to protect creativity of stand-up comedians and that social norms provide a substitute for IP law).

99. *See* Fry, *supra* note 8, at 432-37 (arguing for the continued exclusion of typefaces from copyright protection and explaining why that exclusion does not prevent innovation). *See generally* Lipton, *supra* note 8 (calling for Congress, the Copyright Office, and courts to reexamine the issue of typeface copyrightability and arguing for at most thin protection for digital typefaces).

100. *See generally* Benkler, *supra* note 9 (analyzing the economic and cultural implications of peer production of information).

101. *See generally* Garon, *supra* note 11 (arguing for a wiki model in which collaboration is encouraged but normative expectations of authorship are maintained).

102. *See* Anderson, *supra* note 14, at 114, 140-53 (extending Raustiala and Sprigman's "piracy paradox" from the fashion industry to mixtapes and arguing for a model that employs strategic forbearance of copyright enforcement).

103. *See generally* Fagundes, *supra* note 15 (investigating the extra-legal governance scheme used to protect derby names to explain the emergence of subcultural IP norms).

104. Rosenblatt, *supra* note 15, at 326-36 (discussing doctrinal no man's land, IP forbearance, and use-based carve-outs); *see also* MERGES, *supra* note 19, at 85-87, 228-30 (discussing waiver of rights in the context of collective efficiency, arguing that "[t]he best way to facilitate sharing while retaining traditional respect for autonomy is to make it easy for owners to waive their rights," and posing models for such waiver).

105. Rosenblatt, *supra* note 15, at 336-57 (exploring what makes a type of work well-suited to IP's negative space).

This analysis assumes both that intellectual creation relies on incentives and that lawmakers, creators, and users will do what is most efficient to satisfy their ends. Thus, it posits that every category of negative space, represents an area in which creation or innovation is incentivized more efficiently without protection than with it. When lawmakers create gaps in protection, or when creators in certain areas elect not to obtain or enforce protections available to them, they must, be doing so either because exclusivity is not the best incentive in those areas, or because exclusivity somehow undermines creation in those areas. Something else—unrestricted copying, or community norms that govern the circumstances of copying—replaces formal protection. Copying carried out according to the norms would, in turn, act as an incentive to creators through non-exclusivity based benefits such as first mover advantages, network effects, reputational boosts, community recognition, or reduced costs for further creation.

To the extent that intellectual property laws focus on incentives, this story works well: it explains the existence of negative spaces without undermining the premise that intellectual property exclusivity can act as an incentive for creation. But what of other justifications for intellectual property protection? Are there circumstances under which a lack of protection is preferable to protection according to those philosophies? And if so, what are they?

V. NON-UTILITARIAN THEORIES OF NEGATIVE SPACE

Like incentive theory, non-utilitarian theories of intellectual property protection have at their hearts the premise that at least some degree of exclusivity is good—good because creators deserve exclusivity as a reward for their labor, good because creators are entitled to control over their own personal endeavors, or good because exclusivity reflects justice, enables beneficial creation, or promotes other similar values. As with incentive theory, negative spaces may initially seem inconsistent with these theories. But for each theory, there are circumstances in which a *lack* of protection vindicates the theoretical justification for protection better than protection would. This Part identifies those circumstances and characterizes the negative spaces they are likely to generate.

A. Labor-Desert

Whether negative spaces are consistent with labor-desert theory depends on what portion of labor-desert theory one focuses on. If the theory stated only that "none should reap where another has sown," then negative spaces—arenas in which third parties are legally or practically permitted to reap where a creator has sown—would be entirely incompatible with natural law.

On the other hand, a more communitarian version of labor-desert theory would at least permit, and possibly encourage, large-scale copying.[106] Under that approach, described by Seana Shiffrin, every idea and creation is naturally part of a commons and need not be removed from the commons to be used.[107] Some things demand exclusive use—for example, once food is ingested it cannot be shared. In contrast, completed intellectual goods are non-rivalrous—that is, the use of a creation by one person does not preclude its use by another[108] According to this interpretation, the concept of "labor" defines not *whether* something should be removed from the commons, but *to whom* rivalrous items should go—so intellectual goods never need to be removed from the commons.[109] This communitarian version of labor-desert theory would certainly lead to a weak or nonexistent formal protection regime, but it would not necessarily create negative spaces. Most ideas and creations would fall into the commons for others to build on, but if everything were available to everyone at no cost, creation and innovation might grow in some areas—particularly the creation of derivative and dependent works—but might stagnate in others, such as technologies in which there would be no need to invent around the patents of others.

The more complete labor-desert theory—the one most scholars espouse and this article adopts—resides at neither of these extremes. It supports exclusive ownership of intellectual creations by those who labor upon them, but only when "enough, and as good" remains for others, and when exclusivity would not result in "waste."[110] According to this reasoning, creators deserve exclusive intellectual property rights in their creations, but should not be granted such rights if or when doing so would unduly restrict the size and richness of the commons or would "waste" ideas. The Lockean provisos embody potentially conflicting rights: the right of the creator to own her work, and the right of the user to consume, communicate, participate, and become a creator herself. The laborer deserves to own the fruits of her labor—but cannot block access to the commons.[111] These principles, combined, support both exclusive intellectual property rights

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106. *See* Shiffrin, *supra* note 67, at 156-57 (posing the lack of a Lockean justification for exclusive control of many intellectual works).

107. *Id.*

108. *See, e.g.*, R. Polk Wagner, *Information Wants to be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1002 (2003) ("Whereas on Blackacre every square yard that is propertized diminishes the total left in the commons, in the information commons, no such zero-sum game exists.").

109. *See* Shiffrin, *supra* note 67, at 156-57.

110. *See* MERGES, *supra* note 19, at 48-51 (exploring various readings of these provisos).

111. *See* Gordon, *Property Right*, *supra* note 66, at 1556-57 (describing the natural right to use intellectual creations as part of a common heritage for expressive capacity).

and a robust public domain.[112] Thus, these principles are not only consistent with the existence of negative spaces but also helps explain when they are likely to arise.

Balancing the creator's right with the need for a commons helps to define the boundaries of doctrinal no-man's land. It requires protection of expressions but not ideas, even when those ideas may reflect the labor of one who originated them, and requires the eventual expiration of intellectual property exclusivity. Everyone has a natural right to enjoy access to the raw materials of creation such as facts and ideas, and giving laborers exclusivity over them would not leave "enough and as good" for others or would "waste" their potential. Similarly, creations must be able to enter the commons in some capacity, as works and marks become part of the fabric of communication and inventions become part of human thriving.[113] An inventor of a language can't keep it to herself—and intellectual creations form our common language.[114] As Justin Hughes explains, "[T]he more generally required by society an idea is, the more important and less subject to propertization it becomes."[115] This justifies a number of limits on protection—for example, the bar on copyright and trademark protection for functional creations; the bar on copyright and patent protection for ideas; the bar on trademark protection for generic terms; and the limitation on patentability of basic research and mathematical formulae.[116]

Along similar lines, Locke's provisos support the existence of use-based carve-outs in the public interest. For example, granting exclusive use of medical techniques to inventors would not permit the poorly financed sick to enjoy medical care that is "enough and as good" as the care available to the rich. Granting exclusive use of copyrighted works to authors would harm the public good if it made them unavailable for educational use. Lockean theory thus supports the Patent Act's carve-out eliminating damages for infringement of medical technique patents,[117] and supports fair use of copyrighted works for certain educational purposes.[118] It requires, however, that we balance these carve-outs against the reward to the creator; for medical techniques and educational copying, the creator may draw a

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112. *See* MERGES, *supra* note 19, at 35-39 (discussing the complex relationship between Locke's common and the public domain).

113. *See id.*

114. *See* Hughes, *supra* note 26, at 316-17 (discussing computer language as an example of a case in which one contribution to society makes other contributions possible).

115. *Id.* at 322.

116. *See* Litman, *Public Domain*, *supra* note 52, at 1016-17 (discussing concept of "seepage," by which creations reenter the public domain).

117. 35 U.S.C. § 287(c) (2012).

118. 17 U.S.C. § 107 (2012) (defining fair use).

sufficient reward (such as fame or respect) without exclusivity, while for publicly beneficial goods that require more labor to create—such as pharmaceutical products—a purely reputational reward may be less than the creator deserves.

With these theoretical underpinnings in mind, we can see that labor-desert theory supports two types of negative spaces: (1) those where the most appropriate reward for a creator's labor is something other than exclusivity, and (2) those where exclusive protection would harm further creation.

1. Non-Exclusivity Rewards

The first type of labor-desert negative space lies in the simplest core of the theory: that creators should be rewarded for their labor. Although the assumption is that this reward should come in the form of exclusive ownership, it would be a fallacy to assume that exclusivity is the most appropriate reward for every creation. When human survival does not require exclusivity, labor-desert theory would not require that creators be rewarded for their labor with exclusivity—quite the contrary. To paraphrase Wendy Gordon, the law should provide for exclusivity only when copying would interfere with the laborer's purpose.[119] Sometimes, a creator's "purpose" expressly envisions that others will take and use their work, and that they will receive a non-financial reward such as respect, fame, or community membership. Others may desire financial rewards, but expect to reap them through network effects or other first mover advantages that depend on copying. For these creators, the "ownership" they "deserve" isn't exclusivity—it's a scheme in which copying is encouraged or permitted under certain circumstances.

We can conclude from this that negative spaces are likely to arise when returning the works to the commons does not devalue them for the creator. In the traditional incentive calculus, intellectual property infringement diminishes the reward the creator receives: In a world where everything is protected, every instance of unpaid copying deprives the creator of the payment that she *could have received* for that use.[120] Yet there are instances—fashion, for example—in which creators feel comfortable reintegrating their works into the

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119. *See* Gordon, *Property Right*, *supra* note 66, at 1547-48 ("A stranger's taking of another's labored-on objects is likely to merit legal intervention only if the taking interferes with a goal or project to which the laborer has purposely directed her effort. If the taking does interfere, the actor needs some special justification for doing it. The scope of the laborer's purpose will help to define the scope of the rights she can assert.").

120. *See* MERGES, *supra* note 19, at 40 ("If I copy a work you created, you may be harmed even though you may still use your copy. My use may not take the information out of your hands; but it may take some money out of your pocket.").

commons with few (or no) restrictions on use, even when the creators would have received some benefit from exclusivity.[121] Why do they do it? One must presume that for these creators, reintegrating their works into the commons does not significantly diminish the value of the works—rather, it accelerates the fashion cycle and creates demand for their next creations.[122]

Creators may place a high value on recognition, and therefore want their works to be copied, albeit with attribution. Copying of fanworks or wiki entries is not in itself problematic for those who create them—unless the copying strips the work of attribution.[123] The recent proliferation of various attribution-focused licenses, including creative commons, science commons and GPL/GNU, emphasizes that some creators would prefer attention to money.[124] Others such as academics hope to be rewarded financially, but would rather earn that money through recognition, prestige, network effects, or other market-based advantages than through licensing.[125] It may also occur when creators value membership in a community—such as a community of fanfiction writers or athletes—and create as a manifestation of their membership in that community. For these creators, membership is its own reward, and copying (with attribution) enriches the community in a way that exclusivity would not.[126]

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121. *See* Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1, at 1705, 1718-33 (discussing reasons why fashion creators may not seek design patent protection for their works).

122. *See id.*

123. *See* Garon, *supra* note 11, at 101 (discussing attribution on wikis); Rebecca Tushnet, *Payment In Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 156-60 (2007) [hereinafter Tushnet, *Payment in Credit*] ("[F]ans need to credit—or, depending on the degree to which they distinguish intrafan morality from external morality, to get permission to use—other fans' work, whereas they feel free to mine the outside world for raw material, as long as the resulting works stay noncommercial."). *But cf.* Tushnet, *Economies of Desire, supra* note 19 (characterizing many fanwork creators as motivated primarily by a desire to create).

124. *See, e.g.*, Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 53-56 (2006) (discussing value of attribution); Garon, *supra* note 11, at 115-16. *See generally* CLAY SHIRKY, COGNITIVE SURPLUS: CREATIVITY AND GENEROSITY IN A CONNECTED AGE (2010) (discussing the attention economy and its products).

125. *See* Daniel F. Spulber, *Solving the Circular Conundrum: Communication and Coordination in Internet Markets*, 104 NW. U. L. REV. 537, 549-50 (2010) (discussing network effects in internet markets); Tushnet, *Payment in Credit*, *supra* note 123, at 158 ("Historians, who generally rely on reputation more than money as compensation for their contributions to the sum of knowledge, care more about proper attribution within the profession than outside it.").

126. *See* Kieff et al., *supra* note 10, at 768-81 (discussing community as a value trumping protection in athletics); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 657 (1997) [hereinafter Tushnet, *Legal Fictions*]. Tushnet explains:

> The ethos of [fan fiction] is one of community, of shared journeys to understanding and enjoyment. Regardless of literary value, fan fiction is a pleasurable and valuable part of many fans' experiences. The political importance

This sounds much like the utilitarian theory that negative spaces are likely to arise when creators are driven by incentives other than exclusivity.[127] Indeed, it justifies the same IP forbearance and is likely to result in the same negative spaces. But it has different theoretical roots; whereas the utilitarian version is concerned with what is likely to create the greatest *incentive* for creators, here the question is what acts as the best *reward* for the creator's labor in light of the creator's purpose. Thus, this theory is unconcerned with the reward's effect on the creator or her decision to create. This difference highlights the value of looking at negative spaces through different theoretical lenses: if we rely on utilitarian theory to justify limited protection in these circumstances—such as limiting protection for sports moves because recognition and financial benefits through improved reputation will reward sports innovators—we will not necessarily betray the natural-law impulse in favor of providing protection. As shown below, the same is not necessarily true for every negative space justified by incentive theory; for some, a deprivation of protection might harm other non-utilitarian interests.

2. Exclusivity Would Harm Creation

The second intersection between labor-desert theory and IP's negative spaces lies in the provisos that property rights must leave "as much and as good" for others and must not result in waste.[128] Negative spaces are likely to arise when ownership will not satisfy these provisos. Creators deserve exclusivity, but also deserve open access to the raw materials of creation and, in some circumstances, the fruits of other creators' labor. Labor-desert theory thus supports the proposition that negative spaces are likely to arise when exclusivity would harm creation.

This reasoning helps to explain the open-source movement and similar communities of intellectual property forbearance. These arise when creators' own aim is to expand the commons rather than to benefit from exclusive rights to their works. The expanded commons, improved resources, and whatever recognition they may gain inci-

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> of fandom stems from *sharing* secondary creations. Fans feel that they are making significant life choices when they share their work with a broader community of like-minded people.

Id. (footnotes omitted).

127. *See supra* Part IV; *see also* Rosenblatt, *supra* note 15, at 342-48 (discussing circumstances under which creators are likely to be driven by incentives other than exclusivity).

128. *See* MERGES, *supra* note 19, at 58-59 (describing how Locke's "waste" proviso undercuts rules that would systematically encourage overclaiming because such overbroad IP rights might keep others from building upon the works of others).

dentally, is all the reward they want or need.[129] It is a particularly compelling explanation for self-propagating copyleft licenses such as the GPL/GNU license and the creative commons share-alike license, under which creators are ensured that their work remains in the commons even after others build upon it.[130]

The theory also manifests in legislative decisions to limit protection for facts, ideas and functional articles. These statutory gaps create doctrinal no-man's land and open up the commons in areas where intellectual property protection would limit access to factual information and areas in which creation and innovation require building on the works of others. The theory also animates the copyright doctrine protecting the arrangement of facts, but not the facts themselves,[131] and allows creators to build trends in areas such as fashion and cuisine.[132] In these instances, the law is less concerned with the incentive for creation than with maintaining a rich, full commons.

Finally, this theory may come into play when considering protection for works that rely on time-sensitive information. Allowing exclusive ownership of information that would go "stale" if not shared may constitute waste of that information, since a restriction on someone's idea to use the information at a particular time would essentially deprive the world of the information.[133] The "hot news" doctrine allows a sort of ownership over such information by providing recourse when one news outlet copies from another;[134] Locke's "waste" proviso to labor-desert theory tends to undermine the basis for this doctrine, since it permits one party to retain exclusive control over factual information for the period of time when it would be most valuable to others.[135]

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129. *See* Benkler, *supra* note 9, at 423-30 (discussing diverse motivations of open-source participants).

130. *See About the Licenses*, CREATIVE COMMONS, http://creativecommons.org/about/licenses/ (last visited Feb. 15, 2013); *GNU General Public License, Version 3* (June 29, 2007), http://www.gnu.org/copyleft/gpl.html.

131. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359-60 (1991) ("[O]riginality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works.").

132. *See* Buccafusco, *supra* note 1, at 1147-48 (discussing the practice of "serial collaboration" in cuisine); Raustiala & Sprigman, *Revisited*, *supra* note 4, at 1210-12 (discussing trend-building in fashion).

133. *See* Hughes, *supra* note 26, at 328-29 (discussing application of Locke's "non-waste" condition to intellectual property).

134. Int'l News Serv. v. Ass'd Press, 248 U.S. 215 (1918) (establishing "hot news" doctrine); Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997) (ratifying continued existence of "hot news" doctrine limited to time-sensitive material).

135. *But see* Balganesh, *supra* note 38, at 426-27 (describing the hot news doctrine as encouraging sharing of tips and news information rather than as a tool for exclusive dominion over time-sensitive facts).

B. Personality

Because personality theory focuses on the inherent relationship between creator and creation and posits an inalienable right to control one's intellectual creations,[136] it may seem entirely inconsistent with the existence of negative spaces. The theory may explain why moral-rights style norms arise when intellectual property protection does not protect a particular type of work—members of the creative communities for such work might band together to create pseudo-protection even when the law does not—but it is less obviously helpful in explaining why some creators might prefer a lack of protection. After all, negative spaces require creators to cede at least some control over their creations to the public. Thus, negative spaces are as fascinating from a personality standpoint as they are from a utilitarian one: why, if control of creations is essential to human flourishing, would creators ever engage in IP forbearance? Thus, forbearance-based negative spaces seem inconsistent with personality theory: exclusivity is clearly not crucial to the forbearers' fundamental human needs.

Some varieties of negative space are not only consistent with personality theory, but seem the inevitable products of personality concerns. These include areas in which community norms protect works as "IP without IP," areas in which creators' personhood is tied to a community of sharing, and areas in which consumer personhood depends on the ability to appropriate and build upon the works of others.

1. Norms-Based Protection of Personhood Priorities

Some IP forbearance occurs within communities that enforce norms-based "IP without IP." These are communities in which formal law—as it exists now—does not satisfy creators' preferences regarding copying, but the community is sufficiently capable of self-governance that it can generate a set of norms that serves its personhood-promoting needs. For example, comedians could, and sometimes do, protect their jokes through copyright law—but they want to be associated with their ideas in addition to their expressions, something that intellectual property law does not accomplish. Thus, the majority of comedians do not concern themselves with copyright law, but instead turn to community norms for protection.[137] The community deters copying of both ideas and expressions through professional sanctions and, on occasion, physical violence.[138] Along similar lines,

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136. *See* Hughes, *supra* note 26, at 334, 348 (explaining that Hegel was comfortable with alienation of tangible creations, but had great distaste for alienability of intellectual property).

137. *See* Oliar & Sprigman, *supra* note 1, at 1798 ("One thing is perfectly clear: copyright law has played little role in stand-up comedy.").

138. *See id.* at 1796-97 (describing physical violence as punishment for joke-stealing).

roller derby participants could rely on trademark law to protect their pseudonyms (and occasionally have done so), but they want to set their own community standards, rather than ceding control to the courts.[139] Participants avoid duplicating pseudonyms using an official database and a detailed system akin to trademark law for determining when two pseudonyms are too similar.[140] Thus, in IP-without-IP communities, creators' personhood interests are better satisfied without the operation of law than with it—and in fact, they may be doubly satisfied through the operation of community norms, since innovators enjoy the personhood value of controlling their creations while also enjoying the personhood value of belonging to a community.

Similarly, in other forbearance-based communities, copying is conditional on attribution. While scholars yearn for citations, academic plagiarism is the gravest of sins.[141] Fan fiction creators are generous and fastidious about giving credit.[142] All six of the creative commons licenses demand it.[143] Although these communities do not ensure creator "control" over works, they do protect the originator's personhood interest in being associated with his or her creation—an interest that, in most circumstances, is not protected by intellectual property law.[144] The penalty for copyright or patent infringement is damages—which do little to vindicate a personhood interest in control. On the other hand, a community penalty for plagiarism might be banishment or social shaming.[145] True, attribution-based communities require creators to relinquish control over whether, how, and to what extent, their work is copied and modified—but in exchange, they provide the creator with recognition. Furthermore, the community dictates the degree of permissible copying and modification. Among chefs, copying is limited and predicated on transformation.[146] Under some circumstances, academics encourage copying.[147] Thus,

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139. *See* Fagundes, *supra* note 15, at 1121-27.

140. *See id.* at 1115-19.

141. *See* Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1, 64-65 (2010) (discussing consequences to faculty of plagiarism).

142. *See* Tushnet, *Legal Fictions*, *supra* note 126, at 664 (describing the ritual of attributive copyright disclaimers in fan fiction).

143. *About the Licenses*, CREATIVE COMMONS, http://creativecommons.org/about/licenses/ (last visited Feb. 15, 2013).

144. *See* Latourette, *supra* note 141, at 45-50 (discussing distinction between plagiarism and copyright infringement).

145. *See, e.g.*, *id.* at 63-64 (describing penalties for plagiarism in academic community).

146. *See* Fauchart & von Hippel, *supra* note 5, at 192-93 ("[*I*]*t is not honorable for chefs to* exactly *copy recipes developed by other chefs*.").

147. *See* Aoki, *Part II, supra* note 12, at 204 (describing "considerable dismay in the scientific community" when Professor Walter Gilbert sought copyright protection for the human genome, something that scientists considered "the essential inheritance of the human species"); Strandburg, *supra* note 12, at 108 (describing a "communalism norm that requires making research results freely available to the community").

while members in these communities trade ownership for attribution, they do not relinquish all control over the ways in which their creations will be used. In these ways, the lack of formalized intellectual property protection, when paired with the presence of informal community protection, supports certain creators' personhood interests more than the law does. This is not to say that norms are inherently better at protecting personhood interests than formal law is; but law provides a one-size-fits-some solution. For communities capable of being governed by norms, norms are more customizable than law. Were formal law to adopt the personhood-promoting rules these communities preferred, they could rely on formal law. Since it does not, they must rely on norms.

2. Communities of Sharing

Human flourishing demands not only creation, but also the ability to connect with others to form communities of interest. These personhood interests are closely linked, since communities often develop around creative endeavors; people define themselves not only by what they make but by association with others who make similar things. For example, authors of fan fiction,[148] writers of open source software,[149] roller derby participants,[150] wiki contributors,[151] chefs,[152] scholars,[153] and athletes belong to communities defined by innovation, creation, and the sharing of creations among community members.[154] In these communities, the act of creating supports the personhood interest of community regardless of whether the work is protected by intellectual property law. The communities—and hence, community members' identities—rely on a philosophy of sharing.[155] When creators' identities are closely tied to a philosophy of sharing, intellectual property protection and enforcement actually under-

148. *See generally* Tushnet, *Payment in Credit*, *supra* note 123 (discussing community among creators of fan fiction).

149. *See* Rebecca Giblin, *Physical World Assumptions and Software World Realities (and Why There are More P2P Software Providers than Ever Before)*, 35 COLUM. J. L. & ARTS 57, 102 (2011) (identifying "strong norms in the software development community that promote sharing [software secrets] with the world").

150. *See* Fagundes, *supra* note 15, at 1108-10.

151. *See* Garon, *supra* note 11, at 106-11 (discussing community value of sharing and curation in wiki and Internet communities; indeed, among wiki contributors, community holds an even higher value than attribution).

152. *See* Fauchart & von Hippel, *supra* note 5, at 193-94 (discussing community of sharing and hospitality norms among chefs).

153. Strandburg, *supra* note 12, at 108-09 (describing community-enforced penalties for failing to share among academic scientists, including "loss of esteem" and "denial of the scarce resources of research funding and attention").

154. *See* Magliocca, *supra* note 10, at 876-77 (discussing effects on innovation of community among athletes).

155. *See supra* notes 148-154 and sources cited therein.

mines their personhood concerns. It is no surprise, therefore, that in sharing-based communities, IP forbearance is widespread.

3. Consumer Personhood

Personality theory also contemplates that the creators of works may not be the only ones with personhood interests in those works. Consumers may have such interests as well. Personhood may be expressed through the consumption of creations; for example, a person's identity may be very closely tied to the clothes she wears, the television she enjoys, or the technology she uses.[156] Human flourishing depends not only on the ability to create, but also the ability to use the creations of others to control, retell, and manipulate the story of one's life.[157] But this consumption-based personhood interest may be at odds with the creator's interest in controlling the disposition of her work. David Byrne doesn't want his music associated with a conservative politician.[158] J.K. Rowling is unhappy with sexually explicit "Harry Potter" fan fiction.[159] Abercrombie & Fitch doesn't want its fashion designs to be associated with reality television star Michael "The Situation" Sorrentino.[160] And yet the politician, the fan fiction author, and the fashion plate all have personhood interests in their re-expression that are as real as the originators'.

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156. *See* Tehranian, *Parchment*, *supra* note 20, at 27-30 (discussing the intermingling of personality and consuming of media and goods).

157. *See* Gordon, *Property Right*, *supra* note 66, at 1536 (discussing the personhood value of manipulating the narratives of shared cultural meaning).

158. Similar examples abound. In the last few years, the band Survivor sued Newt Gingrich for using its song "Eye of the Tiger" as a campaign anthem; Tom Petty requested that Michele Bachmann stop using his song "American Girl"; Jackson Browne and John Mellencamp both took issue with John McCain's use of their music, and David Byrne extracted an apology from former Florida Governor Charlie Crist for the use of the song "Road to Nowhere" in a campaign advertisement. *See* Todd Martens, *Survivor Songwriter Wants Gingrich to Stop Using "Eye of the Tiger," Pop & Hiss*, L.A. TIMES (Jan. 31, 2012, 12:44 PM), http://latimesblogs.latimes.com/music_blog/2012/01/newt-gingrich-eye-of-the-tiger-survivor.html.

159. *See* Chilling Effects Clearinghouse, *Harry Potter in the Restricted Section*, http://www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522 (last visited Feb. 15, 2013). Although many authors are content to ignore fan fiction or even celebrate it, others have sought to use the law to silence it. In 2012, the estate of Marion Zimmer Bradley sued fan author Mary Battle, asserting that her works infringed the author's copyrights and trademark rights. *See* Complaint at 2-3, Marion Zimmer Bradley Literary Works Trust v. Battle, No. 3:12-cv-00073-MEJ (N.D. Cal. Jan. 5, 2012). The same estate contacted the Organization for Transformative Works' "Archive Of Our Own," asserting that noncommercial fan fiction stories posted there infringed of Bradley's trademark and copyright rights. *See* Letter from Rebecca Tushnet, Professor, Georgetown University Law Center, to Ann Sharp, Representative, The Marion Zimmer Bradley Literary Works Trust (Feb. 28, 2012) (on file with author).

160. *See* Elizabeth Holmes, *Abercrombie and Fitch Offers to Pay 'The Situation' To Stop Wearing Its Clothes*, WALL ST. J. (Aug. 16, 2011, 7:31 PM), http://blogs.wsj.com/speakeasy/2011/08/16/abercrombie-and-fitch-offer-to-pay-the-situation-to-stop-wearing-their-clothes/.

This conflict is not easily resolved through the operation of intellectual property law, although some have tried to use it for that purpose. Rather, the tension creates pockets of negative space. Through a combination of statutory exceptions and creator forbearance, the law permits some personhood-promoting uses while prohibiting others. The law is less likely to protect against customization—that is, the consumer's use of a work to express personhood—than it is to protect against less personal copying. Take fashion, for example. Since fashion works signify the identity of the wearer in addition to the creativity of the maker, it would deprive the wearer of a personhood outlet to deprive her of sartorial options such as fashion trends. The law justifies the non-protection of fashion on the basis of "functionality,"[161] but in a sense, the law seems more concerned with personal customization than with functionality *per se*. To the extent that the law *does* prevent copying of fashion works, it bars literal copying of distinctive works—counterfeiting—and bars literal copying of ornamental features subject to design patents but permits copying that modifies the garments to create expressive trends.[162] Or take fan fiction: copyright law's fair use doctrine permits fans to write noncommercial transformative works that modify works for the purpose of expressing

161. 17 U.S.C. § 101 (2012) (stating that "the design of a useful article . . . shall be considered a [copyrightable] work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article"); 17 U.S.C. § 113 (2012) (declaring that the Copyright Act "does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law"); TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 34-35 (2001) (A design element is functional, and thus not protectable by trademark law, if it is "essential to the use or purpose of the article" or if it "affects the cost or quality of the article." (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 850 n.10 (1982))).

162. *See* Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1, at 1722-24 (describing how non-identical copying promotes the creation of trends). This is achieved through various legal doctrines. First, to the extent the garment is protected by trademark law, once it is modified to any significant degree it is no longer confusingly similar to the original and thus no longer infringes. *See* Nabisco, Inc. v. Warner-Lambert Co., 220 F.3d 43, 46 (2d Cir. 2000) (stating that dissimilarity "can be dispositive" and demand a holding of no trademark infringement). Second, to the extent the garment is protected by a design patent, the law is similarly concerned with whether an "ordinary observer" would find the design and accused product "substantially the same." Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665, 670, 678 (Fed. Cir. 2008) (en banc). Finally, trademark law's reverse passing off doctrine protects those who buy and then customize garments–even if they re-sell those modified garments, they are permitted to do so even with very slight modifications. The only thing barred is "mere repackaging." Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003) (holding that while mere repackaging would have constituted reverse passing off, even "arguably minor" modifications to content rendered copied videotapes noninfringing).

the fans' personhood but prohibits copying for non-transformative, commercial (*i.e.*, less personhood-promoting) purposes.[163]

C. Distributive Justice

Distributive justice theory seems the easiest to square with the existence of negative spaces. Distributive justice favors a level of protection sufficient to fund creation by creators of all wealth levels, but it also favors ample access by even the most poorly funded of consumers.[164] Thus, distributive justice supports forbearance by well-funded creators and doctrinal carve-outs for uses that benefit users and society. But with further examination, the existence of negative spaces challenges distributive justice theory just as it challenges utilitarian, labor-desert, and personality theories. While distributive justice may not demand strong intellectual property protection, it does not immediately indicate when—if ever—the lack of intellectual property protection would promote creation.

For example, when there is a high public interest in free (*i.e.*, no-cost) [165] access to creations and innovations, lawmakers are more likely to leave such creations unprotected by intellectual property law by creating doctrinal no-man's land and facilitating use-based carve-outs. For example, Congress has determined that there should be no damages for infringement of patents covering medical procedures;[166] that descriptive terms should not be protectable as trademarks unless they have already acquired secondary meaning;[167] and that people should be able to copy works of authorship for the purpose of criticism, commentary, or classroom use.[168] In each of these situations, the interests of the public—health, in the first instance, and speech in the latter two—trump the interests of the creator. These carve-outs serve the distributive concerns of consumers, but do so at the expense of creators' distributive interests. It is possible that, with their works carved out of protection, innovators may not be able to

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163. *See* 17 U.S.C. § 107 (2012) (stating fair use factors, including "the purpose and character of the use, including whether such use is of a commercial nature"); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994) (holding that fair use inquiry asks "whether and to what extent the new work is 'transformative' ").

164. Van Houweling, *supra* note 29, at 1539-46 (posing a distributive model of copyright).

165. In intellectual property discourse, there are two types of "free." Richard Stallman is credited with coining the terms "free (as in beer)" and "free (as in speech)," respectively. RICHARD M. STALLMAN, FREE SOFTWARE, FREE SOCIETY 65 (2002). "Free (as in beer)" refers to no-cost availability, whereas "free (as in speech)" refers to rights. For example, one has an unabridged right to political speech (because there is a "freedom" to engage in political speech), but no right to broadcast a political advertisement on television without paying (because advertising is not "free"). *See id.*

166. 35 U.S.C. § 287(c) (2012).

167. 15 U.S.C. § 1052(f) (2012).

168. 17 U.S.C. § 107 (2012).

afford to make the relevant advancements and would have to turn to other pursuits for income. For that reason, a high public value to access is not itself enough to create negative space. Although a strong public interest in free access is likely to weigh in favor of a gap in protection, the creation of such a gap may be neutral or possibly even harmful to creation.

Distributive justice predicts that creation and innovation would benefit from a lack of protection in two circumstances: (1) when there is a strong *creator* interest in dissemination of works; and (2) when free access to existing works enables further creation. The former is likely to serve as a basis for intellectual property forbearance and doctrinal carve-outs; the latter is likely to serve as a basis for doctrinal no-man's land.

1. Strong Creator Interest in Dissemination of Works Regardless of the Consumer's Ability to Pay

Some creators have an interest in wide distribution of their works—and in particular, do not want consumption of their works to depend on the consumer's ability to pay. They may engage in IP forbearance or may operate in areas of doctrinal no-man's land or use-based carve-outs. Bloggers and viral video-makers create with the hope and expectation that their works will be quoted, embedded in e-mails, and retweeted. Doctors invent medical techniques with the expectation that they will be widely used to help people; they operate for the public good and without significant patent protection.[169] Scholars write journal articles with the purpose of sharing their insights with all, regardless of funding level, and with the expectation that other scholars will read and cite their works.[170] Creators of open-source software often engage in IP forbearance with the (broadly stated) purpose of improving system functionality for users of all incomes and distribute it at no cost with the expectation and hope that others will use it to generate further system improvements to benefit the software-using public at large.[171] Athletes seldom seek intellectual property protection for their moves because doing so would violate the principles of sport and deprive others of an "even playing field"; they believe that society—or at least the athletic microcosm thereof—benefits from free access to athletic innovations.[172] Along

169. *See* 35 U.S.C. § 287(c) (2012) (limiting remedies for infringement of medical technique patents).

170. It may be a different matter for scholarly publishers.

171. *See* Benkler, *supra* note 9, at 406-23 (describing information gains and allocation gains from collective software creation).

172. *See* Magliocca, *supra* note 10, at 876-77 (describing sportsmanship norms of sharing).

similar lines, people who create religious works or works of political advocacy may be sufficiently interested in spreading the word that they want to minimize costs to the consumer.[173] The point is to get the word out, and it may not matter whether that word is copied, imitated, attributed, or paid for.[174]

Viewed from a utilitarian standpoint, one could say that each of these situations is one in which exclusivity does not provide a complete incentive for creation; as Wendy Gordon's work indicates, they are appropriate targets for use-based carve-outs because they involve social values that are not easily monetized, such as scholarship, political speech, noncommercial uses, and human health.[175] Yet we should resist the temptation to turn this analysis into a market-based one. Here, although legislators may have a utilitarian interest in promoting creation beyond what the market will bear, that utilitarian interest is not what creates negative space. What creates negative space is the *creator's* interest in producing outside the exclusivity-based market model, with the aim of what the creator sees as a social benefit—education, superior products, religious faith, and the like.[176]

In each of these circumstances, a desire for distributive justice generates creation in the absence of intellectual property exclusivity in a way that would not be possible in an IP-protected environment. For each of these creators, the drive to create would diminish if they could not attain their objective: low-cost access by a wide range of users.

2. When Copying Generates Creation

As discussed above, distributive concerns may drive lawmakers to limit intellectual property protection or carve out particular uses from liability; these decisions generate negative space, in turn, when

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173. *Cf.* Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 14 (2008) (discussing Catholic Church's exercise of copyright protection in order to offset production costs and generate income).

174. Not every creator with a strong interest in dissemination is driven by altruism. Creators and innovators who rely on network effects for their profits may prefer that their products be copied by users of all income levels, but they are not concerned with the social good. Adobe, for example, is surely thrilled when users copy their PDF reader, because it means that more users will ultimately purchase (more expensive) PDF creation software—not because they believe that PDFs result in a more just society. Advertisers might prefer that their copyrighted works be copied and distributed as widely as possible so that they might sell more goods—not because they believe that the advertisements themselves are culturally enriching. Thus, although IP forbearance in these areas may result in broader access to works that might otherwise be protected, it is not necessarily an example of distributive justice.

175. *See* Gordon, *Market Failure*, *supra* note 94, at 1631-32.

176. *See* Cohen, *Lochner*, *supra* note 74, at 489-94 (discussing social planning ramifications of fair use).

they serve the interests of under-funded creators by making the raw materials of creation affordable. For example, use-based carve-outs may permit productive uses that would otherwise infringe. The doctrine of fair use provides relatively free access to scholarly users for research purposes, who in turn use that free access as to enable creation of further scholarly developments. Poorly funded documentarians can rely on the doctrine of nominative fair use to incorporate others' trademarks in their films.[177] Along the same lines, doctrinal no-man's land makes the raw materials of creation available to all. Inventors need not worry about having to license algorithms or basic science, and creators of copyrightable works need not be concerned if they want to build on existing facts or useful articles.

Likewise distributive justice-driven IP forbearance may generate creation by making raw materials affordable. For example, in the copyleft movement creators license their works via creative commons or the GPL/GNU license, availing them for future creators to build on.[178] The self-proliferating nature of these licenses compels the follow-on creator to make his or her work freely available on the same terms. This not only demonstrates a creator interest in distributive justice, but also creates negative space by making creation easier and cheaper for future "generations" of creators.

VI. NORMATIVE IMPLICATIONS

As demonstrated above, the various theories of intellectual property align with different aspects of negative spaces. Each theory predicts negative spaces, but locates them in different places. Utilitarian theory puts negative spaces where protection would harm incentives; labor-desert theory puts them where sharing rewards creators more than exclusivity; personhood theory puts them where sharing supports the identity interests of creators and/or users; and distributive justice theory puts them where copying would benefit society.

The benefit of examining all four theories at once is identifying the intersections—the places where all four theories predict and support the existence of negative spaces. In these areas, the major justifica-

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177. *See* Rebecca Tushnet, *Why the Customer Isn't Always Right: Producer-Based Limits on Rights Accretion in Trademark*, 116 YALE L.J. POCKET PART 352 (2007), http://yalelawjournal.org/2007/04/25/tushnet.html. *But see* Elizabeth L. Rosenblatt, *Rethinking the Parameters of Trademark Use in Entertainment*, 61 FLA. L. REV. 1011 (2009) [hereinafter Rosenblatt, *Trademark Use in Entertainment*] *(*describing uncertainty of nominative fair use defense); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1903, 1914-15 (2007) (describing the chilling effects of having to rely on uncertain defenses in documentary filmmaking).

178. *See* sources cited *supra* note 130.

tions of intellectual property law hold that a lack of protection is superior to protection for all concerned—creators, consumers, and society at large.

First, all four theories predict that negative spaces will arise when the original creator receives a benefit from copying—such as attribution, recognition, community, or market advantage—that she would not receive from exclusivity. Each theory approaches the situation differently, but with clear commonalities. From a utilitarian standpoint, negative spaces will likely arise when creators are primarily motivated by a desire for an alternative benefit. From a labor-desert standpoint, negative spaces are likely to arise when the alternative benefit is a more fitting reward for creation. From a personhood perspective, negative spaces are likely to arise when creators belong to norms-based communities that honor such alternative benefits; and from a distributive justice perspective, negative spaces are likely to arise when creators are strongly interested in dissemination of their works.

Second, all four philosophies support the existence of negative spaces when creators have a strong interest in disseminating their creations. Utilitarian theory favors negative spaces in such circumstances—for example, for advertisements, religious works, or open-source software—since greater dissemination acts as its own incentive for creation. Labor-desert theory favors negative spaces in such circumstances not only because dissemination is its own reward, but also because it leads to a richer commons. Personality theory favors negative spaces in such circumstances when the creator has a philosophical interest in sharing or when sharing builds community among creators.

Third, all four philosophies indicate that negative spaces are likely to arise in fields where later works build closely on their forbears, such as fashion, cuisine, and wiki creation. Utilitarian theory holds that creators in these circumstances—who know that they will have to rely on the works of others as the raw material for their own creations—have an incentive to make their own works available as part of a reciprocal community. Labor-desert theory favors these to the extent they foster a rich commons. Personality theory favors them when creators belong to communities of sharing, and distributive justice favors them to the extent they permit poorly financed creators to use the raw materials of creation at low cost. Which leads to the question: what normative conclusions can we draw from these three commonalities?

A. Naming Names

Intellectual property protection should not rely solely on exclusivity. When alternative benefits such as attribution are available without legal intervention—such as when they are enforced by communities of creators and consumers—then the status quo might be sufficient. But there should be ways for creators to take advantage of non-exclusivity benefits when they cannot, or would prefer not to, depend on a community to ensure their availability. Likewise, creators should be able to take advantage of non-exclusivity benefits without also generating the potentially chilling effects of traditional intellectual property law. Copyrights, trademarks, and patents signal to the world that one must pay to use a particular work or face a potential infringement lawsuit. This triggers risk aversion; people won't use protected works even under circumstances in which those works' creators would not pursue them for infringement—indeed, even under circumstances in which those works' creators would *prefer* that they be used. Ideally, the law should encourage use in those circumstances rather than discourage it.

Specifically, the law should be structured with attribution in mind. To be clear, automatic inclusion of an attribution right atop existing protections would likely cause enforcement and adjudication difficulties, and could be a disincentive to create. Creators would have to fear not only traditional infringement suits, but also attribution-based suits in situations where attribution is difficult.[179] But giving creators the option of an attribution right instead of an exclusivity right would be more dependable than relying on community norms and would serve all four theories' policy interests. Providing an attribution alternative should be preferable to exclusivity from a labor-desert perspective, as it would provide creators their preferred reward without diminishing the commons. It would satisfy personhood concerns for those creators who value sharing. And it would satisfy distributive justice by balancing incentives with a broad commons.

Thus, it is worth considering the creation of a minimally formal attribution right that might serve as an alternative to copyright or

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179. Rebecca Tushnet has wisely pointed out that in the copyright context, attribution may be difficult to achieve in certain circumstances such as live broadcasting; that an attribution right might be difficult to adjudicate for works derived from multiple sources; and that it is difficult to attribute works made for hire and works owned by multiple rights holders. *See* Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 789 (2007) (positing that "identifying authors is beyond" the grasp of American copyright law). Outside the copyright context, attribution becomes even more difficult. Should an automobile maker be required to identify the inventors of every patented part in the car? How could the maker of a smartphone be expected to identify the inventors of every piece of software incorporated into the phone? It is harder yet to envision how a trademark attribution right would work, since trademarks are themselves source identifiers.

patent protection,[180] which would provide creators the opportunity to elect between exclusivity or an attribution right.[181] Less dramatic approaches include considering attribution among the factors in adjudicating copyright fair use, imposing an attribution requirement as a form of injunctive relief, or considering attribution as an ameliorating factor in assessing damages. Whatever the conclusion, however, encouraging attribution would serve the aims of all four intellectual property philosophies. It would promote creation and innovation by giving a greater number of creators the legal means to extract recognition and network-effect benefits from their creations; it would provide creators a way to elect their reward of choice without diminishing the commons; it would provide creators with a mechanism for being personally associated with their works; and it would reduce the price of intellectual creations for poorly funded consumers.

B. Leaving Room for Productive Infringement

All four theories suggest that negative spaces are likely to arise when new creations and innovations build closely on their forbears. In these situations, infringing activity adds value to existing works or produces new creations without diminishing the value of the original work. This implies that the law should leave room for productive infringement—infringement that does not compete with the original in such a way as to unduly undermine incentives or rewards for creation, but facilitates a broad, rich commons of low- or no-cost raw materials for follow-on creation.[182]

Creators have broad ability to create cultural meaning, and intellectual property exclusivity gives creators broad power to control the expression of that cultural meaning.[183] This exclusivity provides the utilitarian advantage of encouraging works, marks, and inventions that have cultural meanings—but it harms the personhood interests of consumers who want to incorporate that cultural meaning into their self-expression, it harms the distributive justice interests of those who want to participate in cultural community at low cost, and from a labor-desert standpoint, it shrinks the commons. One way to

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180. Identifying the best formal approach is beyond the scope of this Article, but others have attempted to do so. For example, Catherine Fisk offers a more detailed discussion of various pros and cons of formalizing attribution, as well as ideas for operationalizing such a formal system so as to promote the benefits of recognition. *See* Fisk, *supra* note 124, at 108-17.

181. This may be what many creators (incorrectly) believe they are doing when they select to license their work under a Creative Commons attribution-only license.

182. Note that the creation of remix technology (not to mention the resulting remixes themselves) is also a form of advancing the useful arts.

183. *See* Tehranian, *Parchment*, *supra* note 20, at 18-19 (discussing the creation of cultural meaning by creators and intellectual property law's ability to control that meaning).

mediate these concerns is to provide the owner with control over reproduction of his or her creation or innovation, but not over its cultural and social meaning.

One step toward accomplishing this is to provide a genuine opportunity for creators to abandon their copyrights. Patent law provides for abandonment of one's inventions and dedication to the public; trademark law permits abandonment of marks in a variety of ways.[184] Each of these measures creates opportunities for follow-on inventions and creations. Yet it is strikingly difficult, if not impossible, to abandon one's copyright.[185] Many creators may believe this is what they are doing when they license their works under Creative Commons and similar licenses, yet such licenses actually create additional layers of protection under contract law rather than freeing the work in any permanent sense.[186] Permitting creators to disavow copyright protection would enlarge the commons, permit consumers to use the work's cultural meaning without fear of liability, and enable creators with personal philosophies of sharing to express their personhood outside a discrete community of sharers.[187] Moreover, when a creator decides not to enforce her copyright, prospective copiers may fear that the creator will change her mind and sue; disavowal will eliminate that risk and its chilling effect. Nor would it require radical change in the law; all it would require would be a return to the past, when instead providing automatic protection upon fixation, copyright law was a formalities-based opt-in system.[188] That way, creators who do not wish their works to be protected could simply refrain from registering them or renewing their registrations.

But abandonment opportunities cannot resolve the matter entirely—and current copyright and trademark fair use doctrines and patent experimental use doctrines cannot either. Existing law contemplates liability for productive infringement that, for example,

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184. *See, e.g.*, 35 U.S.C. § 102(c) (2012) (providing for loss of right to patent if inventor has abandoned the invention); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 614 (1950) ("What is not specifically claimed is dedicated to the public."); *see also* 15 U.S.C. § 1127 (2012) (providing for abandonment of a mark "[w]hen its use has been discontinued with intent not to resume such use" and "[w]hen any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark").

185. *See* Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 391-99 (2010) (describing copyright abandonment as a "paper tiger").

186. *See* Dreyfuss, *supra* note 48, at 1449 (discussing Creative Commons' dependence on formal intellectual property protection).

187. *See* MERGES, *supra* note 19, at 85-87 (posing that creator autonomy demands property rights that are "widely available" but "easy to waive").

188. *See* Tushnet, *Copy This Essay*, *supra* note 87, at 543 (discussing the transformation of copyright system from opt-in system to one of automatic protection).

replicates large portions of a copyrighted work,[189] creates a trademark likelihood of confusion,[190] or builds upon a patented invention for any purposes beyond mere intellectual curiosity.[191] Instead, I suggest something akin to the proposal by Christopher Sprigman that noncounterfeiting copyright and trademark infringement should depend on whether an infringement competes with the original.[192] Although Sprigman does not discuss patent law, his theory can be extended by analogy to promote productive patent infringements such as experimental uses. Another, less dramatic approach would eliminate injunctive relief and/or limit the opportunities for damages in the context of productive infringement. This would not only reduce the risks to those who engage in productive infringement but also permit the growth of beneficial negative spaces. A reduction in remedies will decrease the potential benefit of pursuing infringers so that only those who have experienced genuine harm, or those with deep pocketbooks, will be interested in pursuing productive infringers.

From a utilitarian perspective, by definition, productive infringement does not harm incentives. Unlicensed derivative works do not harm the financial incentives of authors who aren't positioned to exploit licensing markets, and unforeseeable copying, as a matter of logic, cannot affect incentives.[193] Creating space for productive infringement also provides an incentive *benefit* because it allays the chilling effect of risk-aversion: in areas where creators build closely on their forbears, they may elect not to create for fear of suit; but if productive infringement were permitted, they could create without fear. The proliferation of attribution-based noncommercial copyright licenses suggests that broadening fair use-style exemptions for the creation of noncommercial derivative works will likely promote both initial creation of works and further creation. An explicit exemption for expressive and/or nominative uses of trademarks would generate similar public benefits without impairing the value of marks.[194] By the same token, the fragile negative space of academic science implies that broadening the experimental use exception for patent in-

189. *See* 17 U.S.C. § 106 (2012) (providing copyright holders an exclusive right to prepare derivative works based upon the copyrighted work).

190. *See, e.g.*, Rosenblatt, *Trademarks in Entertainment*, *supra* note 177, at 1040-42 (describing circumstances in which expressive uses of trademarks may create, or come to create, likelihood of confusion).

191. *See* Madey v. Duke Univ., 307 F.3d 1351, 1361-62 (Fed. Cir. 2002) (articulating that "experimental use" defense is limited to acts that are "solely for amusement" and not "in furtherance of the alleged infringer's legitimate business").

192. Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. TELECOMM. & HIGH TECH. L. 317, 334-41 (2009).

193. *See id.*

194. *Cf.* Rosenblatt, *Trademarks in Entertainment*, *supra* note 177, at 1073-74 (proposing exemption for "artistically relevant" uses of trademarks in expressive works).

fringement would benefit, rather than stifle, innovation.[195] But the benefits of productive infringement extend beyond the utilitarian: a productive infringement doctrine would serve labor-desert ideals by expanding the commons while at the same time not permitting infringers to reap precisely where their predecessors have sown. Similarly, productive infringement advances distributive justice by lowering the cost of production and reducing the risks to those who engage in productive infringement, without disrupting intellectual property exclusivity's ability to finance creators through exclusive rights in commercial reproduction of their works. A productive infringement doctrine would also serve personhood interests of creators and consumers alike: remix creators and innovators in highly accretive areas like the software industry would be able to form communities based on their activities without fear of exposing themselves to infringement liability, and consumers would be able to express themselves through customization without facing intellectual property wrath.[196]

C. Resisting the Urge to Overprotect

Finally, the negative space analysis demonstrates that doctrinal limits on protection are not necessarily bad for creators under any of the four theoretical approaches. This analysis can help resolve current protection debates. A steady stream of scholars and business interests have urged broad interpretations of current infringement laws or proposed new protections that would fill in the gaps of doctrinal no-man's land. Lobbyists and scholars alike have argued for statutory protection of fashion designs; the "hot news" doctrine has experienced a recent resurgence; various constituencies have encouraged us to adopt European database protection standards; and the debate over the patentability of business methods rages on.[197] We should resist the urge to "protect first and ask questions later."

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195. Dreyfuss, *supra* note 48, at 1469-70. A more dramatic application of the same principle might categorically eliminate patent suits by nonpracticing entities. To my mind, such an extreme step would be counter-productive as nonpracticing entities often provide key sources of income for inventors and, as such, have become part of the invention economy. Thus, while eliminating the opportunity for nonpracticing entities to sue would likely permit more opportunities for follow-on invention, it would also have a significant, indirect undermining effect on the incentives for initial invention.

196. *See* Tehranian, *Parchment*, *supra* note 20, at 24-27 (discussing the relationship between customization and personhood).

197. *See, e.g.*, Balganesh, *supra* note 38, at 421-22 (discussing the relatively recent resurgence of the "hot news" misappropriation doctrine); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1184-90 (2009) (proposing tailored protection for fashion designs); Jad Mills, *Patentable Subject Matter in* Bilski v. Kappos, 130 S. Ct. 3218 (2010), 34 HARV. J. L. & PUB. POL'Y 377 (2011) (discussing effect of ruling on patentability of business method patents); *see also supra* notes 34-38 and accompanying text.

This is particularly true for information that has formerly resided in the public domain—facts;[198] functional elements of works of authorship and source identifiers;[199] physical phenomena, products of nature, abstract ideas, basic research;[200] and the like. The public domain is a commons of information that serves as the raw material for creation and belongs to no one. From a labor-desert perspective, freedom to use this information is crucial, and it is not appropriable unless appropriation is necessary.[201] Even though one may expend considerable labor in gathering such information, permitting it to be appropriated merely by virtue of that labor would decimate the commons and unacceptably stifle creation.[202] A broad public domain is also crucial for distributive justice; without it, poorly funded information consumers and those who use the information to create would effectively be denied access to information and raw materials.[203] From a personality standpoint, factual information (aside from information about the self) lacks the self-association of originality and thus does not merit protection.[204] Only the utilitarian calculus supports, to any extent, the intellectual property protection of facts and similar public domain information on the theory that creators need incentives to engage in the toil of information gathering, arrangement, and dissemination.

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198. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359-60 (1991) (defining the originality requirement for copyright).

199. *See* 17 U.S.C. § 101 (2012) ("[T]he design of a useful article . . . shall be considered a [copyrightable] work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."); 17 U.S.C. § 113 (2012) (The Copyright Act "does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law . . . ."); TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23 (2001) (A design element is functional, and thus not protectable by trademark law, if it is "essential to the use or purpose of the article" or if it "affects the cost or quality of the article." (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 466 U.S. 844, 850 n.10 (1982))).

200. Bilski v. Kappos, 130 S. Ct. 3218, 3225 (2010) (noting that "laws of nature, physical phenomena, and abstract ideas" are not patentable subject matter (quoting Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980)); ARIAD Pharms., Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1353 (Fed. Cir. 2010) (holding that 35 U.S.C. § 112 bars the patenting of basic research).

201. *See* Shiffrin, *supra* note 67, at 156-57.

202. *See id.*; MERGES, *supra* note 19, at 58 ("IP rules that systematically encourage creators to claim much more than they have in fact produced through their efforts may . . . bring about a fair amount of spoilage in the true Lockean sense.").

203. *See* Van Houweling, *supra* note 29, at 1575 (discussing the value of the public domain to poorly-financed creators).

204. *See* Radin, *supra* note 28, at 986-87 (describing a continuum on which people should have more property protection for non-fungible goods more closely associated with their identities); Hughes, *supra* note 26, at 334, 348 (explaining that Hegel was comfortable with alienation of tangible creations, but had great distaste for alienability of intellectual property).

One could argue that the utilitarian basis for intellectual property protection outweighs the potential harms to labor-desert, personhood, and distributive justice concerns that might arise from granting exclusive rights in works near the edge of the public domain.[205] But the existence of negative spaces demonstrates that even from a utilitarian standpoint, intellectual property protection is likely unnecessary—and possibly counter-productive—in these and similar areas. The fashion industry benefits from the "fashion cycle" of copying-based trend creation and replacement.[206] "Hot news" and databases are both significantly more valuable to first movers than to others. The first broadcasters and compilers of useful information will, in this age of electronic customer mobility, be able to capture a larger market share; we do not need exclusivity to promote speedy news and useful databases. A 2005 European Commission study indicated that the U.S. database industry, which operates in a relative low-IP environment, was growing faster than the European Union's, which operates under a *sui generis* protection system.[207] The same is true of business methods: a genuinely superior business method will not require patent protection to benefit those who create it—and if it is not superior, no one will use it.[208] Patent protection is thus unnecessary to incentivize the creation of superior business methods. Rather, patent protection of business methods chiefly serves to increase transaction costs.[209]

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205. In the database context, Keith Aoki identified these ills as the result of artificially (through the mechanism of intellectual property protection) shifting information from "public" to "private," trading the specter of "potential scarcity" from underproduction in the absence of incentives for the known ill of "actual scarcity" from private control of otherwise-public information. Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain, Part I*, 18 COLUM-VLA J.L. & ARTS 1, 19-21 (1993).

206. *See generally* Raustiala & Sprigman, *Piracy Paradox*, *supra* note 1.

207. *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases* 20, 22-23 (Dec. 12, 2005) (DG Internal Market and Services Working Paper), *available at* http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf.

208. *See, e.g.*, Dan L. Burk & Mark A. Lemley*, Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1618 (2003) ("As many commentators have noted, however, companies have ample incentives to develop business methods even without patent protection, because the competitive marketplace rewards companies that use more efficient business methods. Even if competitors copy these methods, first mover advantages and branding can provide rewards to the innovator. Because new business methods do not generally require substantial investment in R&D, the prospect of even a modest supracompetitive reward will provide sufficient incentive to innovate.").

209. *See, e.g.*, *In re* Bilski, 545 F.3d 943, 1005 (Fed. Cir. 2008) (Mayer, J., dissenting) ("Business innovations, by their very nature, provide a competitive advantage and thus generate their own incentives."); Rochelle Cooper Dreyfuss, *Are Business Method Patents Bad for Business?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 263, 275 (2000); *but see* Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation,* 83 N.Y.U. L. REV. 337, 340 (2008) (arguing that firms need incentives for "market experimentation" when first mover or branding advantages prove insufficient).

The analysis concludes, therefore, that we should resist the temptation to shrink the public domain. On the contrary, we should look for opportunities to expand it when protection is not necessary to generate an incentive to create. Intellectual property law often continues to provide exclusivity long after that exclusivity acts as an incentive. The law should value these harms and permit—or compel—creations to reenter the commons to promote further creation when their cultural and social value overtakes the incentive value of exclusivity. Otherwise, the risks of such overprotection—to the commons, to the personhood of consumers, and to distributive justice—are apparent.[210]

VII. CONCLUSION

Negative spaces are incubators for intellectual property theory: they invite inquiry and provide a medium for theoretical testing. Because each negative-space microcosm functions without formal intellectual property protection, the ecosystem of negative spaces challenges us to examine assumptions about the purpose and effectiveness of intellectual property protection in all contexts. To meet that challenge, we must examine intellectual property not only from the utilitarian standpoint of incentives and efficiencies, but also from the perspective of the other philosophies that animate intellectual property law as we know it: labor-desert, personality, and distributive justice theories. This Article undertakes such an examination and draws conclusions about how low-IP systems arise and survive while surrounded by legal, economic, and moral frameworks that demand formal legal protection of intellectual creations.

Utilitarian, labor-desert, personality, and distributive justice theories all support intellectual property protection, although they provide different justifications for that protection. But each theory can also be distilled to a justification for negative space: (1) as a matter of incentives, negative spaces will exist where sharing promotes creation more than protection would; (2) from a labor-desert perspective, negative spaces will arise where exclusivity would result in waste, would deprive creators of adequate source material, or would deprive creators of their preferred rewards; (3) personality theory predicts negative spaces when sharing supports the identity interests of creators and/or users; and (4) distributive justice theory would expect them when creators have a strong interest in disseminating their works or where copying creates a net benefit to society at large.

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210. *See* Liu, *supra* note 87, at 408-20 (discussing various personhood-fostering uses, such as time/space shifting, community building, self-expression such as mix tapes, fan-art, or learning a piece on the guitar).

The result is far from a clear-cut theoretical agreement about when to provide formal protections for intellectual creations and when to avoid such protections. But we can draw some normative guidance from their overlap. The lesson, it appears, is moderation. Each theory demands both formal protection and its absence; each theory demands a mix of exclusivity and sharing. The trick is balancing. I propose that focusing on one theory to the exclusion of others harms that balance. By observing the fragile ecosystems of negative spaces through all theoretical lenses, we not only observe that sometimes-precarious balance, but also provide a tool for maintaining it. Taken together, the theories suggest that formal systems should, when possible, encourage attribution, and even permit creators to elect attribution-based protection in lieu of exclusivity-based protection. They also reinforce the importance of a robust public domain and suggest that formal mechanisms—not merely forbearance—should exist to permit "productive infringements" that build on existing works and inventions without harming their value or meaning. Finally, and most broadly, they counsel skepticism over expanding protection. Formal protection may generate some benefits, but may just as easily undermine other theoretical bases for creative liberty.