

Michigan Law Review

Volume 94 | Issue 5

1996

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Recommended Citation

Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996).

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RHETORIC AND REALITY IN COPYRIGHT LAW

*Stewart E. Sterk**

Why give authors an exclusive right to their writings? Copyright rhetoric generally offers two answers. The first is instrumental: copyright provides an incentive for authors to create and disseminate works of social value.¹ By giving authors a monopoly over their works, copyright corrects for the underincentive to create that might result if free riders were permitted to share in the value created by an author's efforts. The second answer is desert: copyright rewards authors, who simply *deserve* recompense for their contributions whether or not recompense would induce them to engage in creative activity.²

The rhetoric evokes sympathetic images of the author at work. The instrumental justification for copyright paints a picture of an author struggling to avoid abandoning his calling in order to feed his family. By contrast, the desert justification conjures up a genius irrevocably committed to his work, resigned — or oblivious — to living conditions not commensurate with his social contributions. The two images have a common thread: extending the scope of copyright protection relieves the author's plight.

Indeed, the same rhetoric — emphasizing both incentives and desert — consistently has been invoked to justify two centuries of copyright expansion.³ Unfortunately, however, the rhetoric captures only a small slice of contemporary copyright reality. Although some copyright protection indeed may be necessary to induce creative activity, copyright doctrine now extends well beyond the contours of the instrumental justification. The 1976 stat-

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1. The Supreme Court often has invoked an incentive justification for copyright. *See, e.g., Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984) (noting that copyright "intended to motivate the creative activity of authors and inventors by the provision of a special reward"); *see also infra* section II.A.1.

2. The Supreme Court also has offered this desert justification for copyright. *See, e.g., Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.")

3. *See infra* Part I.

ute⁴ and more recent amendments⁵ protect authors even when no plausible argument can be made that protection will enhance the incentive for authors to create. The notion that according copyright protection to architectural works will generate more creative architecture, for instance, is manifestly ridiculous.⁶ Even in situations where instrumental justifications remain plausible, their foundation is often shaky. The desert justification for copyright fares little better. The beneficiaries of expanded copyright doctrine often are not struggling authors but faceless corporate assignees well-versed in the ways of the business world. Moreover, even when authors would benefit from expanded protection, it is far from clear why they deserve financial remuneration commensurate with their talents. Indeed, the underexplored premise that authors "deserve" the rewards copyright gives them requires some heroic assumptions.

My first objective in this article is to explore the gulf between copyright rhetoric and copyright reality. After examining copyright rhetoric, the article demonstrates how neither the need to generate creative activity nor the desire to reward deserving authors provides a plausible justification for current copyright doctrine.

Why, then, does copyright doctrine continue to expand? The concluding section suggests some answers. Interest-group politics provides an obvious answer and one well-substantiated by the history of copyright legislation. But the story does not end with interest-group politics. Instead, I suggest that the nation's elite, including its lawmakers, has a stake in believing and acting on copyright rhetoric. The elite's investment in the status quo reinforces the power of the interest groups who have fueled copyright expansion.

I. COPYRIGHT RHETORIC

Since the Statute of Anne,⁷ copyright rhetoric has focused both on economics and on "deserving" authors. The statute's preamble deplored the growing tendency of printers and booksellers to reprint books "without the Consent of the Authors or Proprietors . . .

4. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 et seq. (1994)).

5. See e.g., Visual Artists Rights Act of 1990, Pub. L. No. 101-649, 104 Stat. 5128 (codified as amended at 17 U.S.C. §§ 101, 106A (1994)); Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5133 (1990) (codified as amended at 17 U.S.C. §§ 101-02, 120 (1994)).

6. See *infra* section II.C.3.

7. Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.).

to their very great Detriment, and too often to the Ruin of them and their Families."⁸ According to the preamble, not only were these printers and booksellers usurping revenues from more deserving authors, but copyright legislation also was needed "for the Encouragement of Learned Men to Compose and write useful Books."⁹ Indeed, the statute was entitled "An Act for the Encouragement of Learning."¹⁰

Early American enactments also focused on these twin goals: assuring authors their just deserts and encouraging authors to create and disseminate works of social value.¹¹ Thus, the preamble to Connecticut's 1783 copyright statute recites:

Whereas it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind.¹²

Other preambles started with the need to provide encouragement to authors and moved to natural rights, "there being no property more peculiarly a man's own than that which is procured by the labour of his mind."¹³

The Copyright Clause of the Constitution focused on the instrumental justification for copyright, granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹⁴ The first federal copyright statute maintained this focus on "the encouragement of learning."¹⁵

Over the ensuing two centuries, as copyright protection has expanded, each expansion has been accompanied by rhetoric championing the needs of the deserving author, emphasizing the need to induce creative activity, or both. Thus, in 1831, when Congress

8. Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.).

9. Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.).

10. Statute of Anne, 1710, 8 Anne, ch. 19 (Eng.).

11. See generally 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 21 (1994); Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 998-1002 (1990).

12. 1783 Conn. Pub. Acts Jan. Sess., reprinted in U.S. COPYRIGHT OFFICE, COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, at 11 (2d ed. 1906).

13. See, e.g., Mass. Act of Mar. 17, 1783, reprinted in U.S. COPYRIGHT OFFICE, *supra* note 12, at 1, 4-15.

14. U.S. CONST. art. I, § 8, cl. 8.

15. See 1 Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831) (entitled "An Act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned").

doubled the initial copyright term to twenty-eight years, the extension was dubbed "an act of pure justice," needed to ensure American authors treatment more similar to that accorded authors abroad.¹⁶ When the statute limited renewal rights to the author's surviving spouse and children, a member of Congress emphasized the plight of the author's family at the author's death.¹⁷

The same pattern appears in the extensive debate over the 1909 Act.¹⁸ In fighting provisions that explicitly would have exempted sheet-music rentals from charges of copyright violation, the Music Publishers' Association submitted a brief emphasizing both desert and incentive. The brief asked, rhetorically, "[W]hy should the exclusive right of performance be denied to the creator of the work if he is to enjoy any exclusive rights because of his contribution to the knowledge and usefulness of mankind?"¹⁹ The brief went on to argue that any limitation on the composer's public-performance rights would "restrict the production of important musical works because of less encouragement to the composer."²⁰ In pithier terms, composer John Philip Sousa made the same points in a telegram to the chairman of the committee considering the copyright legislation: "Earnestly request that the American composer receives full and adequate protection for the product of his brain; any legislation that does not give him absolute control of that he creates is a return to the usurpation of might and a check on the intellectual development of our country."²¹ Invocation of these themes was not limited to debate over public-performance rights; similar themes were ad-

16. See 1 PATRY, *supra* note 11, at 465-66 (citations omitted).

17. See *id.* at 466.

18. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (amended 1976).

19. *Arguments on H.R. 11943 Before the House Comm. on Patents*, 59th Cong., 2d Sess. 19, 19 (1906), reprinted in 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. G. (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter LEGISLATIVE HISTORY].

20. 4 *id.* at 20.

21. 4 *id.* at 3. Sousa was not alone among American composers in emphasizing these dual themes. A letter signed by Victor Herbert and three others asked the committee to "[p]icture this brilliant and enjoyable scene [a magnificent church performance], but let us also not forget the one man whose brain and heart created the music and made the entertainment possible." 4 *id.* at 21. The Herbert letter went on to suggest the need for incentives, noting that

[w]hen copies of the music are rented or borrowed and not bought, all the composer gets is glory and applause. Now, glory is all well enough, and applause to most men is sweet. But we wish to say to you, gentlemen, that glory alone will not put a coat on that man's back; it will not help him to protect his wife; nor will glory alone clothe and feed his children.

4 *id.*

vanced to support a longer copyright period²² and protection against mechanical reproduction of musical works.²³

Advocates of strong copyright protection — authors and lawyers alike — hammered on the same principles during the long process leading to the enactment of the 1976 Act.²⁴ In a 1965 attack on a proposal to permit photocopying for educational purposes, novelist Elizabeth Janeway wrote: “Our American society is founded on the principle that the one who creates something of value is entitled to enjoy the fruits of his labor.”²⁵ Ten years later, Irwin Karp, counsel for the Authors League of America, in arguing for a life-plus-50-years copyright term, again emphasized that authors deserve compensation for value produced: “Some of the greatest literary, dramatic and musical works . . . would not, even under life-plus-50, provide their authors with adequate compensation for the value of their contributions to society. But these authors are entitled to at least that much for themselves and their families.”²⁶ Rhetoric accompanying the 1976 Act also stressed economic incentives, as in the warning by a representative of a publishing group that if an exemption for educational photocopying were enacted, “the end result, in the aggregate, would be the erosion of entire markets for certain books and periodicals and in many instances to

22. Thus, in discussion at the Conference on Copyright convened by the Librarian of Congress as a prelude to preparation of the draft legislation, one participant, arguing for a life-plus-50-years term, said, “There is no reason under heaven why, in an act of this kind, the Republic should not treat its men of letters and its men of art in a way to bring them some concession for benefits which they have wrought.” 1 *id.* pt. C, at 75.

23. See, e.g., Letter from D.P. Lewandowski, M.D., to Senator Alfred B. Kittredge, Chairman of the Senate Committee on Patents (June 5, 1906), reprinted in 4 *id.* pt. H, at 59 (complaining of “piracy” by phonographic reproduction) (“I feel how dreadful it is in general to suffer and to be deprived of remuneration for the just and intelligent inventive brain work which a man produces by his genius.”).

24. The process began with a 1961 report by the Register of Copyrights recommending revisions to the Copyright Act and culminated with enactment of the new statute in 1976. See Copyright Act of 1976, Pub L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101 et seq. (1994)). See generally 1 PATRY, *supra* note 11, at 74-89.

25. *Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965), reprinted in 5 GEORGE S. GROSSMAN, *OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY* 100 (1976) [hereinafter *Hearings on H.R. 4347, 5680, 6831, 6835*]; see also *Hearings on H.R. 4347, 5680, 6831, 6835, supra*, at 93, reprinted in 5 GROSSMAN, *supra*, at 79 (statement of Rex Stout, President, Authors League of America) (arguing in favor of termination rights) (“The termination clause insures that the constitutional purpose of copyright, to provide incentive and reward to authors, is carried out.”).

26. *Copyright Law Revision: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975), reprinted in 14 GROSSMAN, *supra* note 25, at 352 (1975) (statement of Irwin Karp, Counsel, Authors League of America).

make the publishing of a work simply uneconomical."²⁷ The warning went on to assert that the unfortunate economic effects of an exemption were not "mere specters or dramatics" but "inexorable conclusions drawn from the private enterprise system of our economy."²⁸

Proponents of the most recent amendments to the copyright statute also have struggled valiantly to find economic justifications for the enactment. Thus, the committee report accompanying the Architectural Works Copyright Protection Act²⁹ asserts that "[p]rotection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal."³⁰ Even in enacting the Visual Artists Rights Act,³¹ which extended a form of "moral rights" protection to works of art, the committee report managed to articulate an economic justification: "The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation."³² As with past enactments, advocates of the recent amendments have advanced desert-based arguments for expanding copyright protection.³³

The same rhetoric that has accompanied the legislative expansion of copyright can be found in the Supreme Court's copyright opinions. From a superficial reading of the Court's opinions, one

27. *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973), reprinted in 12 GROSSMAN, *supra* note 25, at 129 (1977) (statement of Ambassador Kenneth B. Keating, representing Harcourt Brace Jovanovich, Inc. and MacMillan, Inc.); see also *Copyright Law Revision, 1965: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965), reprinted in 8 GROSSMAN, *supra* note 25, at 65 (1976) (statement of Abraham L. Kaminstein, Register of Copyrights) ("The basic purpose of copyright protection is the public interest, to make sure that the wellsprings of creation do not dry up through lack of incentive, and to provide an alternative to the evils of an authorship dependent upon private or public patronage.").

28. 12 GROSSMAN, *supra* note 25, at 130 (1977).

29. Architectural Works Copyright Protection Act, Pub L. No. 101-650, 104 Stat. 5133 (1990) (codified as amended at 17 U.S.C. §§ 101-02, 120 (1994)).

30. H.R. REP. NO. 735, 101st Cong., 2d Sess. 13 (1990).

31. Visual Artists Rights Act of 1990, Pub. L. No. 101-649, 104 Stat. 5128 (codified as amended at 17 U.S.C. §§ 101, 106A (1994)).

32. H.R. REP. NO. 514, 101st Cong., 2d Sess. 5 (1990) (quoting statement of Ralph Oman, Register of Copyrights); see also *id.* at 6 (quoting testimony from sculptor Weltzin B. Blix that incentives would diminish if there were a possibility that the works might be destroyed).

33. See, e.g., *Hearings Before Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 129 (1990) (statement of Richard Carney, Chief Executive Officer, Frank Lloyd Wright Foundation) ("We feel that architecture is the mother art . . . and it's only just that architecture should be copyrighted."); see also 101 CONG. REC. 12, 609-10 (1955) (Statement of Representative Markey in support of Visual Artists Rights Act) ("Artists who work in painting, drawing, and sculpture are intellectual authors who deserve protection for their works.").

could get the impression that desert is irrelevant to copyright doctrine and that copyright rests solely on a utilitarian foundation. Thus, in *Sony Corp. v. Universal City Studios*,³⁴ the Court wrote that copyright's monopoly privileges "are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward."³⁵ In *Harper & Row v. Nation Enterprises*,³⁶ the Court acknowledged former President Ford's efforts in preparing his memoirs, concluding "[i]t is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value."³⁷ Indeed, it is incentive language that pervades the Supreme Court's copyright jurisprudence.³⁸

But even the Supreme Court occasionally slips into language suggesting that desert is significant in copyright doctrine. Thus, in *Mazer v. Stein*,³⁹ after emphasizing the incentive rationale for copyright, the Court closed its opinion by writing "sacrificial days devoted to such creative activities *deserve* rewards commensurate with the services rendered."⁴⁰ In *Harper & Row*, the Court, again, after invoking an instrumental justification for copyright, acknowledged that "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."⁴¹

The remarkable persistence with which the same rhetoric has been used to support a wide variety of copyright protections is somewhat surprising and leads naturally to questions about whether and how often the rhetoric matches reality. To what extent do copyright incentives encourage creative work? Whether or not par-

34. 464 U.S. 417 (1984).

35. 464 U.S. at 429.

36. 471 U.S. 539 (1985).

37. 471 U.S. at 546.

38. See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.").

39. 347 U.S. 201 (1954).

40. 347 U.S. at 219 (emphasis added).

41. *Harper & Row*, 471 U.S. at 546-47.

ticular incentives actually encourage creativity, do courts and Congress proceed *as if* the incentive justification underlies copyright, or is incentive rhetoric merely a fig leaf for protection that serves other, less lofty, interests? If desert serves as the foundation for copyright protection, what premises underlie the notion that authors and their assignees “deserve” the array of statutory protections they have sought? The next two sections explore these questions.

II. THE INCENTIVE JUSTIFICATION’S ROCKY ROAD

Although the incentive justification for copyright law has both constitutional foundation and intuitive appeal, the match between the incentive justification and copyright doctrine has always been problematic. Moreover, doctrinal innovations of the last two decades have exacerbated the disparity between doctrine and justification. This section explores that growing gulf.

A. *The Economics of Copyright*

In a world without copyright, one would expect creative works to be underproduced. If the author of a creative work cannot prevent copying, any potential copyist has an incentive to reproduce the creative work so long as the market price for the work is greater than the marginal cost of reproduction. As a result, the market price for copies of the work would approach the marginal cost of reproduction. If copies were indistinguishable in quality from the original, the market price for the original, too, would approach the marginal cost of reproduction. At that price, however, the author would realize no financial return on his investment in creating the work.⁴² In this world, only authors unconcerned with financial return would produce creative works.⁴³

Copyright combats underproduction of creative works by giving authors a property right in their creations. The property right, however, creates two new problems. First, the property right gives the

42. The analysis assumes that copyists instantaneously can copy the original. If the author has significant lead-time advantages — advantages that are diminishing with improvement in technology — and if purchasers are willing to pay a premium to obtain the work quickly, the author is in a position to obtain some financial return on his creative effort despite the copyist. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 299-302 (1970).

43. See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989) (arguing that, when the price of a book is bid down to the marginal cost of copying, the book “probably would not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work”).

author, for the statutory period, monopoly power in the market for any work he has created and thus results in an undersupply, for that period, of copies of the work. Second, copyright protection, beyond modest limits, may begin to reduce the number of creative works produced because it constrains the right of authors to base their own work on preexisting copyrighted work.

1. *Copyright and the Market for Existing Works*

Consider first the effect of copyright protection on the market for existing works. Some copyright protection may be necessary to induce people to forego other opportunities in order to pursue creative work. Any copyright protection beyond that necessary to compensate the author for lost opportunities would generate no additional incentive to create and would discourage production of additional copies even when the cost of producing those copies was less than the price consumers would be willing to pay.⁴⁴

To the extent that copyright protection eliminates copiers from the market, the original author becomes a monopolist in the market for his copies of his work.⁴⁵ Assume that D represents the demand curve facing the monopolist-author (Figure 1).

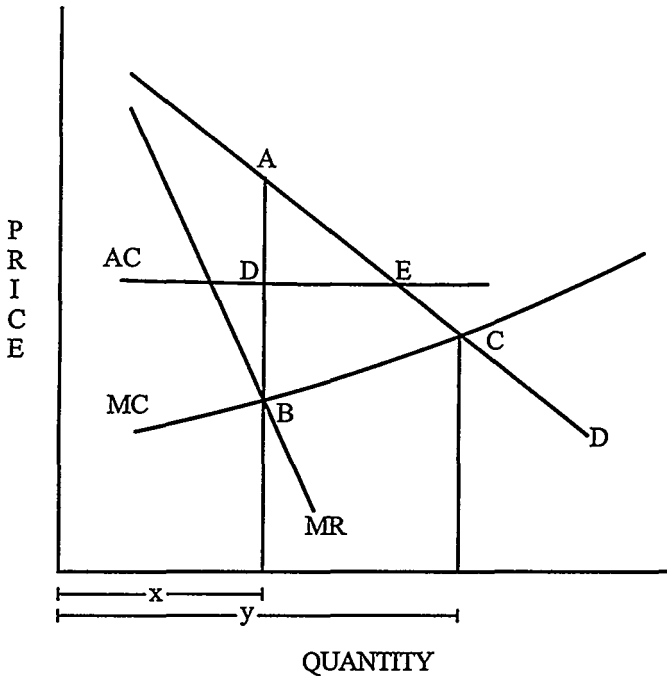
44. Of course, even if giving authors an expansive property right in their work created a deadweight loss, the right might be justified if no other mechanism were available to eliminate that loss without also discouraging authors from creating new works. But there are a variety of mechanisms for limiting the scope of an author's monopoly. For instance, by adjusting the time period of the monopoly or by limiting the remedies available to an author for unauthorized copying, a copyright system might reduce deadweight losses without discouraging authors from creating new works.

45. The notion that copyright turns an author into a monopolist, of course, is subject to challenge. If one assumes that the works of one author are good substitutes for the works of another, then even with copyright, the market would be characterized by competition, not monopoly. The assumption that one work is a good substitute for another, however, undercuts the major premise of copyright law's economic justification: creative activity is a valuable social good. If an existing work always furnishes a good substitute for a new work, then any energy spent creating new works would represent a waste of resources. Rather than producing new works — at high initial cost — society would be better off if we widely reproduced old works, at much lower cost.

Hence, the economic rationale for copyright protection — books and other creative works would be underproduced in a market without copyright — depends upon the assumption that one book is *not* a complete substitute for another and that an author with a copyright does enjoy, to some degree, monopoly power.

In practice, as William Fisher has noted, there is a spectrum between those books for which no adequate substitute exists and those for which there are nearly perfect substitutes. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1702-03 (1988). As a result, copyright gives each author at least some monopoly power, and it gives greater power to some authors than to others.

Figure 1.



Because the monopolist's curve typically is sloped negatively, unlike the flat demand curve facing a firm in a competitive market, each additional unit the author sells reduces the price the author can collect on all units sold. As a result, the marginal revenue the author derives from each additional copy sold is less than the price he receives for that copy.

If the author stops distributing copies as soon as his marginal costs exceed his marginal revenues, he will distribute only x copies. Yet, for each additional copy distributed until y copies are distributed, there are consumers who would pay more than the cost of that copy. If marginal costs exceed average costs when x copies are produced, triangle ABC represents the deadweight loss.

If, however, the initial cost of creating the work is high relative to the cost of making copies, average costs are likely to exceed marginal costs at all relevant quantities. The author would have to receive a price at least equal to the average cost in order to induce him to create the work in the first place. As a result, the deadweight loss copyright protection generates is better represented by triangle ADE.

2. *Copyright and Incentives To Produce New Works*

As we have seen, so long as the cost of copying is low, some copyright protection is necessary to assure authors a financial return on the time and energy devoted to creative activity. If free-riding copyists could appropriate the gain associated with works of authorship, some authors would find it worthwhile to abandon authorship for other pursuits. By giving copyright protection to works of authorship, we increase the cost of copying, raise the return on creative authorship, and, at the margin, encourage more people to create.

Although each additional increment in copyright protection increases the return to authors and hence induces potential authors to give up other enterprises, the number of creative works produced will not be directly proportional to the level of copyright protection. We would expect each additional increment of protection to induce fewer additional authors to engage in creative work. That is, once returns to creative activity have become high relative to returns in other pursuits, more of the people who could be induced to engage in creative activity already would have done so.

At the same time, expanded copyright protection increases the cost to authors by requiring them to obtain permission when they seek to build upon existing work. As Landes and Posner have pointed out, as the number of copyrighted works increases, the amount of material in the public domain falls, making it more expensive for authors to acquire the raw material necessary for creating new works.⁴⁶ At relatively low levels of copyright protection, the effect of additional copyright protection on the public domain may be trivial; as copyright protection expands, however, the incremental reduction in available source material is likely to be greater. At some point, giving authors additional copyright protection will reduce the supply of new works because the number of marginal authors deterred from creating by the high cost of source material will exceed the number encouraged to create by the increased value of a work associated with a marginal increase in copyright protection.

Consider, for instance, the impact of changes in one variable associated with copyright — the duration of protection. Providing authors with twenty years of protection may induce authors to create — and publishers to publish — many works that would never see the light of day without copyright protection. The benefits asso-

46. See Landes & Posner, *supra* note 43, at 342-43.

ciated with these works almost certainly would exceed the costs generated for subsequent authors by twenty years of protection. Suppose, however, we compare twenty years of protection with seventy-five years. Although the additional fifty-five years of protection may induce the publication of some works that would not have been published if copyright were to expire after twenty years, the marginal increase in publication due to the additional fifty-five years of protection almost certainly will be smaller than the increase associated with the first twenty. At the same time, the impact on the public domain would be far greater with seventy-five years of protection than with twenty. To restrict the right of current authors to build on materials created at any time since 1921 would inhibit creative activity far more than a prohibition on the use of works created since 1976.

3. *Copyright Enforcement*

Like any property-rights system, a copyright system requires an enforcement mechanism. Enforcement entails expenditure of social resources on litigation and on drafting agreements to obtain and structure rights to avoid litigation.

Eliminating copyright protection would not entirely remove these costs. In the absence of copyright, authors and publishers might rely more heavily on contract to structure their transactions. An author, for instance, might refuse to show a work to a publisher unless the publisher contracted not to disseminate the work without making specified payments to the author.

As a practical matter, however, authors — especially successful ones — could not, by separate contracts with each consumer of his work, restrict the consumer's right to copy the work or to incorporate it into the reader's own work.⁴⁷ As a result, in a free-use regime, negotiations rarely would occur between authors and consumers seeking to build on the author's work. By contrast, in a copyright regime, anyone seeking to reproduce a copyrighted work risks an infringement action unless he first negotiates with the copyright holder for permission to use the work. The result is more negotiations and, in those cases where a copier fails to secure clearance from the author, more litigation.⁴⁸

47. Authors or publishers might try to market books in the same way that some consumer software is currently marketed — packaged together with “shrinkwrap” license agreements. On the enforceability of these agreements in the software field, see Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995).

48. Indeed, current copyright law recognizes, in a number of ways, the costs of copyright enforcement. The first-sale doctrine embodied in § 109(a) of the Copyright Act, 17 U.S.C.

4. *Summary*

Copyright protection has serious costs. Copyright creates the deadweight social loss associated with monopoly power over distribution of already-created works, it increases the cost of creating new works by making it costly to avoid infringing existing copyrights, and it requires an enforcement mechanism. Some form of copyright protection nevertheless may be desirable in order to induce authors to create new works. It is critical, however, that no efficiency justification — other than administrative simplicity — can support a copyright regime that gives authors protection that would not induce the creation of new works. Indeed, from an efficiency standpoint, the optimal copyright system would not seek to maximize the number of works created but, in recognition of the costs of copyright, would withdraw protection even when marginally more protection would result in a marginal increase in creative activity.⁴⁹

B. *Traditional Doctrine*

If copyright law were founded on the incentive justification, one would expect doctrine to be most protective when economic incentives are most necessary to generate creative activity and when the threat of monopoly power is least significant. One would neither expect — nor want — the match between economics and doctrine to be perfect; the administrative costs of fine tuning doctrine to provide precisely the right incentives to the right authors and publishers would be astronomical. Nevertheless, one would expect doctrine to reflect, to some extent, the economics of copyright.

Traditional doctrine, as developed by Congress and the courts, reveals an awareness that copyright protection creates monopoly power. When monopoly power poses the greatest threat to efficiency or other values, a variety of doctrinal rules limit the protection available to authors. On the other hand, copyright doctrine shows little recognition of the other insight provided by economic

§ 109(a) (1994), which permits the purchaser of a copy of a book or copyrighted book to resell or lend that copy without infringing the copyright, avoids the administrative nightmare that would result if every reseller or lender of a book were required to obtain copyright clearance. Similarly, by holding that copying television programs onto videocassette for purposes of time shifting does not constitute infringement, the Supreme Court implicitly recognized the enforcement problems that copyright protection would generate. See *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984). The current debate over library photocopying reflects similar concerns about enforcement. See *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994).

49. See Landes & Posner, *supra* note 43, at 343-44.

analysis: copyright protection serves no economic purpose when the protection is not necessary to induce authors to engage in creative activity. This section explores first, doctrinal limitations designed to limit monopoly power and second, the extent to which copyright law extends protection to authors even when that protection is unlikely to induce creative activity.

1. *Doctrinal Limitations Designed To Restrain Monopoly Power*

Three long-standing doctrinal limitations on copyright protection reflect a concern with the monopoly power that overbroad copyright doctrine generates. By refusing to extend protection to ideas,⁵⁰ by developing the "fair-use" doctrine,⁵¹ and by treating utilitarian articles as noncopyrightable,⁵² Congress and the courts have limited protection in areas where copyright would not generate incentives sufficient to warrant the losses associated with monopoly power.

Consider first the refusal to protect ideas. Authors generate many ideas at zero cost from ordinary observation, general reading, and other activities they would pursue apart from any quest for professional advantage. To give authors any monopoly over such ideas would serve no economic purpose; by hypothesis, authors would generate them without any incentive.⁵³ Moreover, if copyright protection did extend to commonplace ideas, subsequent authors would produce less work because of the increased cost associated with a smaller public domain.⁵⁴ Hence, commonplace ideas receive no independent protection; they are protected only as they are embedded in an author's expression.

Other ideas — a new bookkeeping system,⁵⁵ a new computer algorithm, and the Pythagorean Theorem⁵⁶ — may be generated only at considerable cost to the idea's "author." To ensure that authors continue developing such ideas, copyright protection, at first glance, might appear appropriate. But because these ideas often

50. See *Baker v. Selden*, 101 U.S. 99 (1880).

51. See 17 U.S.C. § 107 (1994) (codifying fair-use defense to infringement).

52. See, e.g., *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985).

53. See Landes & Posner, *supra* note 43, at 349-50 (noting that a novelist can acquire many ideas at zero cost from observation of the world around him or from works long in the public domain).

54. See *id.* at 347-48; see also Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 319-20 (1988) (noting that the pool of everyday ideas available to subsequent authors would be reduced if everyday ideas were protected).

55. See *Baker v. Selden*, 101 U.S. 99 (1880).

56. See Hughes, *supra* note 54, at 320.

have many applications, their economic value may be high relative to the cost of producing them. A grant to the author of monopoly power over all uses of these applications would ensure an economic return beyond that which would have been necessary to induce the author to engage in creative activity, while at the same time increasing the price of the idea to potential consumers, thus making the idea less available.⁵⁷ Copyright's compromise is to give the author a monopoly only to the extent that the idea is incorporated into a particular expression; if the idea cannot be separated from the expression, the author receives no copyright protection.

The "fair-use" doctrine, too, limits copyright protection when the dangers of monopoly power are great and the need to provide additional incentive to the copyright holder is small. Section 107 of the Copyright Act provides that fair use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright."⁵⁸ The statute goes on to list factors relevant in determining whether a use is "fair," including the "substantiality of the portion used in relation to the copyrighted work as a whole" and "the effect of the use upon the potential market for or value of the copyrighted work."⁵⁹

Because a use is unlikely to be considered "fair" if it would affect the market for the copyrighted work significantly,⁶⁰ the fair-use doctrine should not dissuade many authors from engaging in creative work. At the same time, the fair-use doctrine eliminates the transaction costs that might prevent subsequent authors from quoting copyrighted work to enrich their own.⁶¹ Were it not for fair use, an author who made even brief reference to the work of others, whether for purposes of exposition, analysis, or criticism, might be required to secure approval, in advance, from the holders of copy-

57. See Landes & Posner, *supra* note 43, at 351.

58. 17 U.S.C. § 107 (1994).

59. 17 U.S.C. § 107 (1994).

60. See Harper & Row v. Nation Enters., 471 U.S. 539, 566 (1985) (characterizing the effect of a use on the market for the original as "undoubtedly the single most important element of fair use"). *But cf.* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. J. 667, 693-97 (1993) (criticizing the Court's emphasis on market effect).

61. See American Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1994) (concluding that fair-use analysis appropriately focuses on whether a practical licensing scheme effectively could reduce the transaction costs associated with obtaining permission for reproduction of journal articles); 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, 1627-32 (1982); Landes & Posner, *supra* note 43, at 357-58; see also Fisher, *supra* note 45, at 1724-25 (noting transaction costs but also noting that a licensing scheme might reduce those costs significantly).

rights in earlier works. The likely result would be less commentary on past works. Moreover, the importance of fair use is not limited to transaction costs; without the doctrine, authors would be able to suppress unwanted parody or criticism of their own work.⁶² Effective parody or criticism often requires quotation from the original,⁶³ and, were it not for the fair-use doctrine, the original author could use its monopoly power to prevent that quotation.⁶⁴ Thus, the fair-use doctrine makes it easier for authors to build upon — and to attack — prior works, without reducing the incentive for the creation of original works. As a limitation on copyright protection, the doctrine is quite consistent with the economic concern about restraining monopoly power.

Although the Supreme Court, in *Mazer v. Stein*,⁶⁵ held that a work of art does not lose copyright protection merely because it is incorporated into a useful article — in *Mazer*, a lamp base — neither Congress nor the courts have been willing to extend copyright protection to the design of useful products. Thus, courts have held uncopyrightable mannequins used to display clothing⁶⁶ and a wire sculpture adapted for use as a bicycle rack.⁶⁷

This limitation on copyright protection, too, appears generally consistent with the incentive justification for copyright. First, if copyright is designed to reduce free riding, copyright is most critical when the cost of copying is low relative to the cost of initial creation.⁶⁸ For bike racks, mannequins, and other manufactured products, however, the cost of copying is not likely to be low: to profit from someone else's design, a free-riding manufacturer must invest in the machinery and raw materials necessary to make the product, materials likely to be more expensive than the paper and ink used to copy a book. Second, incentives other than copyright exist for a manufacturer to invest in attractive product design. In particular, an appealing product design is likely to generate more customers

62. See *Acuff-Rose Music, Inc. v. Campbell*, 114 S. Ct. 1164 (1994) (noting that the role of courts in fair-use cases is to distinguish between biting criticism, which suppresses demand of a copyrighted work, and infringement, which usurps demand for the work); see also Gordon, *supra* note 61, at 1632-35.

63. See *Acuff-Rose Music*, 114 S. Ct. at 1176 (“When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”). See generally WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 167 (2d ed. 1995).

64. See Fisher, *supra* note 45, at 1730-31 & n.303.

65. 347 U.S. 201 (1954).

66. See *Carol Barnhart, Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985).

67. See *Brandir Intl. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987).

68. See generally *supra* section II.A.1.

than an indifferent design.⁶⁹ At the same time, the monopoly power associated with copyright protection might create even greater inefficiencies if designers were given a monopoly over useful articles than when the monopoly is limited to artistic works. The fact that patent protection is more difficult to obtain and endures for a shorter period than copyright protection suggests that Congress is more concerned about extending monopoly power over useful articles.⁷⁰ Hence, reluctance to extend protection to the design of useful articles appears generally consistent with the economic justification for copyright.

2. *Copyright Doctrine and the Need To Provide Incentives*

a. *Copyrightable Subject Matter*

Although the deadweight losses a copyright monopoly creates might be greater in some areas than in others, all monopoly power creates some inefficiencies. Hence, from an efficiency standpoint, copyright is justifiable only to the extent that copyright protection is necessary to induce additional creative activity.⁷¹ Not all "authors" need copyright protection to induce them to create. For instance, giving copyright protection to personal snapshots or home videos is unlikely to have any impact on their volume. People who take snapshots and videos expect no financial return and would engage in the same behavior without regard to the availability of copyright protection. By contrast, for authors and publishers of trade books or textbooks, financial gain is a significant motivation, and one might expect copyright to generate more publication and more creative activity.⁷² That is, if copyright is designed to provide incentives, there is greater reason to extend copyright protection to authors of books than to home-video photographers.

Congress and the courts, however, have made few efforts to limit copyright protection to those areas in which incentives are

69. See Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 723 (1983).

70. See 35 U.S.C. § 102 (1994) (novelty requirement for patents); 35 U.S.C. § 103 (1994) (requirement that subject matter be "non-obvious"); 35 U.S.C. § 154 (1994) (20-year term for patents).

71. Indeed, even when additional copyright protection would induce creative activity, extending that protection still would be inefficient if gains from the creative activity would be outweighed by the higher costs associated with works that would have been produced even without the additional protection. See Landes & Posner, *supra* note 43, at 343.

72. Twenty-five years ago, however, now-Justice Breyer wrote a penetrating article questioning the need for copyright protection even in the book-publishing industry. See Breyer, *supra* note 42. Breyer emphasized that a variety of factors other than copyright give original authors an advantage over copiers, making the case for copyright protection "uneasy."

likely to have an effect on the level of creative activity. More than a century ago, Congress added photographs to the list of protected works,⁷³ and the Supreme Court, in *Burrow-Giles Lithographic Co. v. Sarony*,⁷⁴ upheld the statute against a constitutional challenge contending that a photograph is not a writing within the Constitution's meaning. Would photographers — be they commercial, studio, or free-lance — take fewer or less artistic photographs without that protection? The answer most certainly is “no” in each case. Each category of photographer works to satisfy clients who will pay more for photographers with a reputation for high quality work. Given the small chance that any particular photograph will find a market beyond its immediate intended purpose, copyright protection is unlikely to have any impact on the volume or quality of photography. At the same time, if the unusual photograph of enduring value does enjoy copyright protection, the photograph will be less available and more costly to the general public.⁷⁵

Copyright protection for commercial advertisements has even less economic justification. Advertising is generally designed to differentiate the advertiser's product or service from others on the market. That differentiation might be based on price, quality, or more ephemeral characteristics. If an advertiser's overwhelming objective is to sell products or services by differentiating them from others on the market, what effect does copyright protection have? Even if no protection were available, it would do an advertiser little good to copy a competitor's ads wholesale; copycat ads would give consumers little reason to buy one product rather than another. Hence, even if copyright protection for advertisements were unavailable, no advertising writer concerned about future employment would stint on creativity.⁷⁶ Yet, in *Bleistein v. Donaldson Lithographing Co.*,⁷⁷ the Supreme Court, over a dissent, held that

73. See Amendment to an Act to Promote the Progress of Useful Arts, 13 Stat. 533 (1865); see also 1 PATRY, *supra* note 11, at 43.

74. 111 U.S. 53 (1884).

75. Cf. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (emphasizing the public interest in having full information about President Kennedy's assassination and upholding as “fair use” a book's use of photographs made from Abraham Zapruder's home movies of the assassination).

76. Moreover, in an environment where the cost of advertising space in the media may dwarf the monies spent on the creative aspects of an ad campaign and where advertisers feel the competitive need to change campaigns frequently, the claim that copyright induces creativity in advertising becomes especially implausible.

77. 188 U.S. 239 (1903).

the design of a commercial advertisement was copyrightable subject matter.⁷⁸

In general, when an author creates a work with one market in mind, the incentive justification fails as a reason to give the author monopoly power in another market; the author would have created the work even without the prospect of monopoly. Of course, no formula identifies cases in which the prospect of reward in a particular market motivated the author, so a rule denying authors copyright for works produced for a particular market would be a nightmare to administer.⁷⁹ What is important about cases like *Sarony* and *Bleistein* is that they offered Congress and the Court an opportunity to deny copyright protection to easily defined categories of works when copyright is unlikely to provide any incentive for creative activity. By declining to act on the opportunity, Congress and the Court cast doubt on their allegiance to the incentive justification, thus indicating a willingness to condone monopoly even when it is unsupported by the need to induce more creative activity.

b. *Derivative Works*

The Copyright Act,⁸⁰ following the 1909 Act and preexisting case law, gives the owner of a copyright the exclusive right "to prepare derivative works based upon the copyrighted work."⁸¹ Why give the author of a book the exclusive right to prepare a movie version? Why give the creator of a cartoon the exclusive right to create stuffed toys or piggy banks based on the cartoon's characters? Giving an author the exclusive rights to prepare derivative works extends the author's monopoly. Does the need to provide authors with an incentive to produce justify such an extension?

One argument for giving authors copyright in derivative works is that the prospect of profits from derivative works is necessary to create adequate incentives for production of the original. The argument is persuasive only in those situations when (1) the projected returns from the original work are too small to justify the costs of production, and (2) the projected returns from the derivative work are so large relative to the cost of producing the derivative work

78. For an article arguing that *Bleistein* should be legislatively overruled, see Douglas O. Linder & James W. Howard, *Why Copyright Law Should Not Protect Advertising*, 62 OR. L. REV. 231 (1983).

79. Cf. Landes & Posner, *supra* note 43, at 344 (emphasizing the importance of administration and enforcement costs in any copyright system).

80. 17 U.S.C. § 101 et seq. (1994).

81. 17 U.S.C. § 106(2) (1994).

that the difference will more than make up the projected deficit on the original work alone. These conditions may apply when the original work is an extraordinarily high-budget movie with the potential for sales of toys, t-shirts, and the like, but they are less likely to apply in more common derivative-works cases.

Consider, for instance, the argument that an exclusive right to produce a movie version is necessary to ensure production of the book. For an author's first book, potential movie royalties are unlikely to be a significant factor either in the decision to write or in the decision to publish. Indeed, because the chance that movie rights to the book will command a high price is infinitesimally small, any first author who makes movie royalties a critical factor in deciding whether to write is almost certainly misperceiving his own interests. If movie royalties were simply unavailable, the overly optimistic first author might make more rational calculations. For books by a more established author, movie rights may well have significant value. But for the established author, revenues from the book alone generally will be enough to keep the author writing, unless the author has other opportunities that are more remunerative.⁸² For most established authors, movie rights represent a form of economic rent. Hence, it is not surprising that even Landes and Posner, in attempting to justify derivative-works protection, reject the argument that protection is necessary to ensure that authors recover their costs.⁸³

Landes and Posner offer two other economic justifications for giving an author exclusive rights in derivative works, but both are unpersuasive. First, they argue that denying derivative-rights protection to original authors would delay production of the original work so that the authors simultaneously could prepare the derivative work.⁸⁴ By the same token, however, giving protection to original authors may cause them to delay production of the derivative work in order to increase sales of the original. That is, for those

82. Even when returns on the original work are currently dwarfed by returns on the derivative work, it is not inevitable that the author would stop writing or the publisher would stop publishing if derivative work protection were abolished. The market might adapt to changing legal conditions. For instance, legal treatises and other trade books frequently are written and published to sell at relatively low prices, with the expectation that captive consumers later will pay higher prices for "updates" that authors can produce cheaply and quickly. If the updates were not protected as derivative works, authors and publishers might face competition in the production of updates. As a result, the price of the original work might rise to reflect the cost of production. Consumers, however, would be likely to recognize that this higher cost would be offset by lower maintenance costs. If they do, eliminating derivative-works protection would have little impact on the production of these works.

83. See Landes & Posner, *supra* note 43, at 354.

84. See *id.* at 355.

who prefer the movie version to the book version but want one of the two quickly, the author may obtain two sales if, armed with monopoly power, he delays the movie version until the book market has been tapped out. It is not apparent why this problem is less serious than the timing problem emphasized by Landes and Posner.

Second, Landes and Posner argue that giving derivative rights to the original owner reduces transaction costs by requiring a publisher who wants to bring out a new translation of a previously translated work to deal with only one copyright holder rather than two.⁸⁵ On this point, they are simply wrong. If the copyright in the original did not extend to derivative works, the publisher of the translation would not have to obtain the original author's consent. Hence, giving the original author an exclusive right in derivative works does nothing to reduce transaction costs.

If derivative-works protection has any significant economic basis, that basis must rest on the administrative difficulty of distinguishing preparation of a derivative work from copying an original work. That is, suppose a translation were to include a verbatim transcript of the original work. Even if derivative works were not protected, the translation nevertheless might be treated as an infringement of the original work. What if the translation includes significant passages of, but not the entire, original work? These boundary-line determinations are not necessary under current law, but they might be if derivative-works protection were abolished. Even under current law, this sort of boundary-line determination is a staple of infringement litigation. It is far from clear that abolishing derivative-works protection would increase overall litigation rather than just shift the boundary lines.

The broad protection copyright doctrine extends to derivative works, then, appears generally inconsistent with the incentive justification for copyright. Derivative-works protection extends the copyright monopoly without generating significant incentives for creative activity.

c. *Renewal and Termination Rights*

From 1790, when the first federal copyright statute was enacted, until 1976, copyright protection was divided into two terms: an original term and a renewal term.⁸⁶ This division of copyright into

85. *See id.*

86. The Copyright Act of 1790 provided for a 14-year copyright term, followed by a 14-year renewal term. The renewal term was available only if the author was still alive at the expiration of the original term. *See* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (re-

two terms apparently was designed to increase the chance that the author would derive financial benefit from a work of enduring value. Thus, the legislative history accompanying the 1909 Act, in rejecting a proposal for a single copyright term, emphasized that:

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.⁸⁷

In other words, the two-term formulation was designed to ensure that the author who makes an outright sale of his copyright will get a second shot at remuneration if the work is a long-term success.⁸⁸

Does the division of copyright protection into two terms induce authors to engage in more creative activity? The answer is almost certainly "no": either the bifurcation of protection would have no effect on creative activity, or it would reduce the incentive to create by decreasing the value of copyrights to publishers.

If authors were free to assign their renewal rights at the same time they assigned the original copyright, bifurcation could have no effect on author incentives. An author willing to assign a single fifty-six-year copyright to a publisher would be equally willing to assign two twenty-eight-year copyrights. Similarly, an author who would be willing to assign only the initial twenty-eight-year copyright in a bifurcated system would be free, in a system that gives authors a single fifty-six-year term, to grant only a single twenty-eight-year license. Moreover, in a system of free assignment, con-

pealed 1831). In 1831, Congress expanded the original term to 28 years and made the 14-year renewal term available to the author's widow or children if the author did not survive the original term. See Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436 (amended 1909). The 1909 Act extended the renewal term to 28 years, see Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (amended 1976), after congressional committees rejected a proposal to substitute a single, longer copyright term. See H.R. REP. NO. 2222, 60th Cong., 2d Sess. 14-15 (1909); S. REP. NO. 1108, 60th Cong., 2d Sess. 14-15 (1909).

87. H.R. REP. NO. 2222 at 14-15.

A similar justification appeared in the committee report accompanying the earlier 1831 Copyright Act, which expanded copyright protection by giving a renewal right to the family of an author even if the author did not survive until the end of the initial period: "The question is, whether the author or the bookseller shall reap the reward." 7 CONG. DEB. app. CXIX (1831).

88. At hearings accompanying the 1909 Act, a congressman referred to a conversation with Mark Twain during which Twain supposedly indicated that much of the benefit he derived from copyright came during the renewal period. See *Hearings on Pending Bills to Amend and Consolidate the Acts Respecting Copyright Before the Senate and House Comms. on Patents*, 60th Cong., 1st Sess. 20, 62 (1908), reprinted in 5 LEGISLATIVE HISTORY, *supra* note 19, pt. K (Statement of Rep. Currier).

cerns about unequal bargaining power⁸⁹ would be misplaced: any publisher able to use bargaining power to extract assignment of a fifty-six-year copyright would be able to use the same bargaining power to demand assignment of the twenty-eight-year original term and assignment of the right to renew upon expiration of the original period.⁹⁰ In *Miller Music Corp. v. Charles N. Daniels, Inc.*,⁹¹ however, the Supreme Court held that an author was *not* entirely free to assign renewal rights under the 1909 Act. The Court noted that the copyright statute vested renewal rights in the author only if the author were "still living" and otherwise vested those rights in the author's widow and children, if living, or in the executor or next of kin. Because the author did not survive until expiration of the initial period, the Court concluded that the author's prior assignment was ineffective.

Commentators have long suggested that the market value of the renewal term, measured at the beginning of the initial term, is near zero.⁹² If so, denying authors an absolute right to assign the renewal term would have no effect on author incentives. If, however, an author's renewal right does have value, the Court in *Miller Music*, by treating the renewal right as a contingent interest, reduced the value of the bundle of rights an author could sell to a publisher. That reduction, if it had any effect on authors at all, would produce a *disincentive* to engaging in creative activity.⁹³

89. See *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 654 (1943) (rejecting the argument that "authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance, and therefore assignments made by them should not be upheld").

90. Conversely, authors with enough bargaining power to prevent assignment of a renewal term also would be able to limit assignment to the first 28 years of a 56-year term. Even those concerned about the inequality of bargaining power of authors and publishers are willing to concede that there might be some authors with power to bargain around provisions in form contracts. See Marci A. Hamilton, Comment, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act, Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1309 (1987).

91. 362 U.S. 373 (1960).

92. See, e.g., Zechariah Chafee, Jr., *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 721 (1945).

93. Moreover, the uncertainty the Supreme Court created about ownership interests in the renewal term also generated disincentives for another group of authors: potential creators of derivative works. Twenty years into the initial copyright term of a book, the book's author, if alive, could not assure a potential moviemaker of copyright protection that would last beyond eight years. Even if the book author assigned all rights in the renewal period, the moviemaker would have been limited to an eight-year monopoly if the author died before the expiration of the initial period. Cf. *Stewart v. Abend*, 495 U.S. 207 (1990). The 1976 Act since has been amended to ensure that "a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright." 17 U.S.C. § 304(a)(4)(A) (1994).

Hence, bifurcation of the copyright term hardly seemed consistent with the incentive justification for copyright protection.⁹⁴

Although the 1976 Act substitutes a single life-plus-fifty-years term for the bifurcation between the original and renewal term, the termination provision in the new statute⁹⁵ preserves and perhaps even expands the disincentive created by prior law. Under prior law, an author's assignment of the renewal term bound the author if the author survived until the end of the renewal term but did not bind the author's statutory successors if the author did not survive.⁹⁶ Under the new statute, not even the author himself is fully bound by his own assignment of his copyright. Instead, the author is entitled, after thirty-five years, to terminate an assignment.⁹⁷ As a result, any publisher knows that any copyrights it has acquired, if valuable, will expire after thirty-five years. Nothing in the statute prevents publishers from taking that fact into account in setting the prices they are willing to pay to authors. Thus, like renewal rights under prior law, the 1976 Act's termination provision is difficult to justify as an incentive to creative efforts.

d. *Feist and the Originality Requirement: The Incentive Justification Turned Upside Down.*

Works of significant value may be generated by a random creative spark or by sustained, sometimes tedious effort. The incentive justification for copyright would suggest that protection is more important for works whose production requires great effort than for works whose production requires a spark of genius.⁹⁸ People generally need incentives to engage in tedious efforts; the need for incentives is much less clear when a work's success is more

94. Although the 1976 Act introduced a single copyright term, its provision for termination rights duplicated some of the features of the renewal provisions under prior law. For discussion of the termination right, see *infra* section III.A.2.

95. 17 U.S.C. § 203 (1994).

96. Compare *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943) (holding the assignment of renewal term by original author binding when original author is alive at time for renewal) with *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960) (holding that the original author's assignment of renewal rights does not cut off rights of statutory successor if author dies before renewal time).

97. See 17 U.S.C. § 203(a) (1994).

98. Indeed, generating the appropriate incentives for works of inspiration is notoriously difficult. For instance, generous federal government support for art and artists — particularly during the great Depression — has been attacked for producing mediocrity. See Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 74, 112-19 (forthcoming 1996) [hereinafter Hamilton, *Art Speech*].

attributable to random sparks than to sustained effort.⁹⁹ Nevertheless, in *Feist Publications, Inc. v. Rural Telephone Service Co.*,¹⁰⁰ the Supreme Court appeared to suggest that originality — not effort — is a necessary predicate for copyright protection. An originality requirement appears entirely inconsistent with the incentive justification for copyright.

In *Feist*, the Court held that a Kansas public utility was not entitled to copyright protection for the white-pages telephone directory it had published. Concluding that “[t]he *sine qua non* of copyright is originality”¹⁰¹ and that originality requires “at least some minimal degree of creativity,”¹⁰² the Court held that the selection and arrangement of the utility’s directory was not sufficiently creative to qualify for copyright protection. In the course of its opinion, the Court expressly disapproved the “sweat-of-the-brow” theory of copyright protection¹⁰³ and suggested that effort alone, without creativity, would be insufficient to entitle an author to copyright protection.¹⁰⁴

Although the result in *Feist* is extraordinarily attractive, the Court’s opinion is entirely inconsistent with the incentive justification for copyright. Because generating a directory is so tedious — unless the “author” already has all the data, as the public utility did in *Feist*¹⁰⁵ — no one is likely to engage in the task without some assurance of financial return. Because the effort involved in copy-

99. The role of effort in creating works of genius is not well understood. As Howard Gardner has written: “Some of the artists who have left records of their thoughts about their work have emphasized the effortless ways in which ideas flow from their unconscious and are then mysteriously organized; creation emerges as an autonomous process requiring little will or intention on the creator’s part.” HOWARD GARDNER, *THE ARTS AND HUMAN DEVELOPMENT* 268 (1973). On the other hand, Gardner notes evidence of effortful labor by some of these artists, *see id.* at 269, and ultimately concludes that artistic creation should be conceived as “a practice of problem-solving within a given medium,” *id.* at 270.

100. 499 U.S. 340 (1991).

101. 499 U.S. at 345.

102. 499 U.S. at 345.

103. *See* 499 U.S. at 352-61.

104. For a discussion of *Feist* indicating that condemnation of “sweat-of-the-brow” reasoning was unnecessary to reach the Court’s result, *see* Marci A. Hamilton, *Justice O’Connor’s Opinion in Feist Publications, Inc. v. Rural Telephone Service Co.: An Uncommon Though Characteristic Approach*, 38 J. COPYRIGHT SOC. 83 (1991).

105. Rural Telephone Service, the publisher of the “original” directory, did not have to expend much sweat to compile the directory. As holder of the monopoly telephone franchise in the area, Rural had at its disposal all of the telephone numbers of its subscribers and hence enjoyed a substantial advantage over competitors like Feist, who had no similar access to the raw data. *See Feist*, 499 U.S. at 342-43. Indeed, by statute, Rural was required to prepare the directory for which it claimed copyright protection. Yet, Rural attempted to argue that the copyright laws required Feist to compile its own directory from scratch — a result that would have given Rural and comparable monopoly franchisees a substantial cost advantage in the publication of directories.

ing the directory is negligible compared to the effort in compiling it, the potential for free-riding copiers is especially high, reducing the expected return for any prospective compiler and consequently the likelihood that any compiler will compile. Finally, the dangers of monopoly are small when the original work required no creativity to produce: by definition, anyone, however dull, could duplicate precisely the original directory by returning to original sources and duplicating the efforts of the original compiler.

Despite the expansive language in *Feist*, perhaps the opinion was meant to be limited to its facts. The Court, after all, emphasized that the "vast majority of compilations" should qualify as original works of authorship¹⁰⁶ and that protection would be denied only to "a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent."¹⁰⁷ But to the extent that the opinion definitively rejects "sweat-of-the-brow" protection, the Court undermined the incentive justification for copyright.¹⁰⁸

C. *The 1976 Act and More Recent Changes*

One might try to reconcile traditional copyright doctrine with the incentive justification by emphasizing the administrative costs of fine tuning a system to provide protection only when necessary to induce creative activity. One might point to fair use,¹⁰⁹ the idea-expression dichotomy,¹¹⁰ and the refusal to extend protection to useful articles¹¹¹ as evidence that courts and Congress have recognized the importance of limiting copyright doctrine when monopoly power is most threatening.

However plausible that defense of traditional doctrine, a number of copyright innovations introduced in the 1976 Act and subsequent amendments are thoroughly inconsistent with an incentive theory of copyright. This section examines three such innovations.

106. See 499 U.S. at 359.

107. 499 U.S. at 359.

108. The Court did not explicitly prohibit state law regulation, through unfair-competition law, of copying that appropriates the sweat of another's brow, but the Copyright Act's broad preemption provision, see 17 U.S.C. § 301(a) (1994), raises questions about the permissible scope of state regulation.

109. See *supra* text accompanying notes 58-64.

110. See *supra* text accompanying notes 53-57.

111. See *supra* text accompanying notes 65-70.

1. *Extension of the Copyright Period*

Before enactment of the 1976 Act, an author was entitled to a copyright term of twenty-eight years, together with one renewal term, for a total of fifty-six years.¹¹² Under the 1976 Act, by contrast, a copyright endures until fifty years after the author's death.¹¹³ Thus, if a forty-year-old author writes a book and lives to the age of eighty, the book will not enter the public domain until ninety years after its creation.

The new statute more closely approximates the period applicable elsewhere in the world, and it clearly rewards authors who create works of enduring value. But is this reward necessary to induce authors to create such works? The answer is almost certainly "no." For the extended period to operate as an effective incentive to increased creative activity, there must be some authors who would not have created with the fifty-six years of copyright protection available under the old statute but who would create with the life-plus-fifty scheme currently available. But only an author with extreme confidence in his own success would worry about the rights to his work more than fifty-six years into the future; the overwhelming majority of copyrighted works will have no economic value after fifty-six years.¹¹⁴ Moreover, any author who expects his work to have significant value fifty-six years from now is likely to expect more immediate rewards as well; few works remain undiscovered or unpopular for half a century, only to catch the public imagination long after their creation. An author who expects his work to be successful immediately is unlikely to abstain from creating because he will not be able to retain a monopoly after fifty-six years have expired — especially given the small present value of the revenues that might be derived fifty-six years from now.¹¹⁵ Even if an author were so respected that the present value of future copyright protection were not trivial, the author could not realize that value currently because of the termination provisions in the new statute.¹¹⁶

112. See Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080 (amended 1976).

113. See 17 U.S.C. § 302(a) (1994). When a work is anonymous, pseudonymous, or a work made for hire, the copyright endures for 75 years from first publication or 100 years from creation, whichever comes first. See 17 U.S.C. § 302(c) (1994).

114. A House Report accompanying the 1976 Act put the number at 85%. See H.R. REP. No. 1476., 94th Cong., 2d Sess. 136 (1976).

115. Thus, assuming an interest rate of six percent, the present value of the right to receive a dollar 50 years from now is just over five cents; at an interest rate of ten percent, the present value of that dollar would be less than a penny.

116. See *infra* section III.A.2.

Of course, society suffers no economic harm if the author retains a monopoly on the use of a work that has lost all economic value. But for those few enduring works that do retain economic value after fifty-six years, copyright protection will result in the usual deadweight social losses that result from monopoly pricing. Thus, extension of the period will cause economic losses that are entirely unnecessary to achieve the supposed purpose of copyright — “[t]o promote the Progress of Science and useful Arts.”¹¹⁷

2. *Elimination of the Statutory Notice Requirement*

Although the 1976 Act retained the requirement that published copies of copyrighted works include a notice of copyright as a condition of obtaining copyright protection, Congress eliminated the notice requirement when it enacted the Berne Convention Implementation Act of 1988.¹¹⁸

The notice requirement had been a feature of American copyright law since 1802.¹¹⁹ Although the notice requirement served a number of functions, perhaps the most important was its role in screening out of the copyright system those works in which the author had no desire for protection.¹²⁰ That is, if the author of a published work chose not to affix a copyright notice to the work, the work fell into the public domain and became available for public reproduction without charge. Since 1988, however, every author of an original work of authorship fixed in a tangible medium of expression automatically receives copyright protection, whether or not the author wanted that protection at the time the work was created. The result is a smaller public domain and greater monopoly power in authors.

Elimination of the notice requirement did not generate any corresponding incentive to engage in creative activity. Those authors motivated by the prospect of copyright protection, in any regime,

117. U.S. CONST. art. I, § 8, cl. 8.

118. Copyright Act of 1976, § 401(a), 90 Stat. 2541, 2576, *amended by* Berne Convention Implementation Act of 1988, § 7(a), 402 Stat. 2853, 2854 (codified at 17 U.S.C. § 401(a) (1994)).

119. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 143 (1976).

120. The legislative history accompanying the 1976 Act listed this function first among the four identified functions of the notice requirement:

- (1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;
- (2) It informs the public as to whether a particular work is copyrighted;
- (3) It identifies the copyright owner; and
- (4) It shows the date of publication.

H.R. REP. NO. 1476 at 143.

would have taken the steps necessary to ensure that protection. Those were the authors most likely to seek professional advice and to include the requisite statutory notice. Elimination of the notice requirement principally protects those authors who create without copyright protection in mind — the very people who do not need the copyright incentive to create.

Consider for instance, the famous “I have a dream” speech made by Dr. Martin Luther King during the 1963 Civil Rights March on Washington. It seems obvious that King would have made that speech even if he had been informed explicitly that no copyright protection was available. Indeed, when King made the speech, he distributed copies to members of the press without including any copyright notice.¹²¹ Under the current statute, King would hold a copyright in the speech even though he wrote it with the hope that it would be disseminated, for free, to as broad an audience as possible and even though he made no claim to copyright protection. Perhaps that is the right result on some ground,¹²² but King did not need a copyright incentive to make the speech. A notice requirement at least would shield the public from copyright monopoly when financial gain occurs to an author only as an afterthought, not as a motivating factor.

3. *Protection of Architectural Works*

Until 1990, the Copyright Act provided no explicit protection for architectural works. Architectural plans were themselves copyrightable writings, but copyright law did not prevent the copying of a building constructed from those plans. As one court summarized the law: “[O]ne may construct a house which is identical to a house depicted in copyrighted architectural plans, but one may not directly copy those plans and then use the infringing copy to construct the house.”¹²³ The principal resistance to extending copyright protection to buildings themselves was the fear that protecting useful articles — buildings — “would give architects unwarranted monopoly powers with the result that the costs of houses and other buildings would rise unnecessarily.”¹²⁴

121. See *King v. Mister Maestro, Inc.*, 224 F. Supp 101, 103 (S.D.N.Y. 1963).

122. The court held King entitled to copyright protection because delivery of the speech to members of the press and, in public, to 200,000 people did not constitute general publication within the meaning of the 1909 Act. See 224 F. Supp. at 107. The court started with the proposition that “it seems unfair and unjust for defendants to use the voice and the words of Dr. King without his consent and for their own financial profit.” 224 F. Supp. at 105.

123. *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 280 (6th Cir. 1988).

124. 858 F.2d at 279.

In 1990, however, Congress enacted the Architectural Works Copyright Protection Act,¹²⁵ which added "architectural works" to the list of "works of authorship" catalogued in section 102(a) of the Copyright Act.¹²⁶ An "architectural work" is defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings."¹²⁷ Although the statute was designed in part to bring the United States into compliance with the Berne Convention,¹²⁸ respectable authority suggested that the Berne Convention did not require a statutory provision for works of architecture.¹²⁹ Moreover, the House Report accompanying the statute acknowledged that copyright legislation had to be consistent with the constitutional grant of power to "promote the progress of science"¹³⁰ and concluded that "[p]rotection for works of architecture should stimulate excellence in design, thereby enriching our public environment in keeping with the constitutional goal."¹³¹

This attempt to reconcile architectural protection with the incentive justification for copyright is patent nonsense. Architects do not design buildings in the abstract; they work for clients with concrete objectives. If the architect does his job well, his client may provide him with more business or refer associates to him. If the building's excellence attracts attention, the architect who designed it surely will attract more business. Copyright protection adds little to the incentives for excellence that already compel the architect.¹³² Whatever other reasons support copyright protection for architectural works,¹³³ the need to provide appropriate incentives to architects is not one of them.

125. Pub. L. No. 101-650, 104 Stat. 5133 (1990) (codified as amended at 17 U.S.C. §§ 101-02, 120 (1994)).

126. See 17 U.S.C. § 102(a)(8) (1994).

127. 17 U.S.C. § 101 (1994).

128. See H.R. REP. NO. 735, 101st Cong., 2d Sess. 18-20, 22 (1990).

129. See H.R. REP. NO. 735 at 11 & n.22 (referring to testimony by Paul Goldstein and Barbara Ringer).

130. H.R. REP. NO. 735 at 12.

131. H.R. REP. NO. 735 at 13.

132. See generally Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L. J. 1598, 1606-08 (1992) (cataloging noncopyright incentives to architect creativity); James Bingham Bucher, Comment, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 399 EMORY L.J. 1261, 1269 (1990) (same).

Indeed, if copyright protection inhibits the copying of architecturally successful buildings, the principal result may be more employment for second-rate architects and more construction of second-rate buildings.

133. See Natalie Wargo, *Copyright Protection for Architecture and the Berne Convention*, 65 N.Y.U. L. REV. 403, 469-70 (1990).

III. COPYRIGHT AND THE DESERVING AUTHOR

Copyright persists and expands despite the deficiencies in the incentive justification. To support copyright protection when the economic foundation is weak, courts, Congress, and scholars have invoked the notion that authors “deserve” the public benefit their creations generate, even if those authors would have created the same works without any promise of copyright monopoly. Indeed, a number of long-standing copyright doctrines are far more consistent with a desert theory of copyright than with any incentive rationale. This section first surveys uses of the deserving-author justification in doctrine and then explores its normative underpinnings.

A. *The Deserving Author in Doctrine*

1. *Exclusive Right To Prepare Derivative Works*

Consider first the author’s exclusive right to prepare derivative works. As we have seen, extending this right to authors rarely would induce an author to produce an original work that the author would not otherwise produce.¹³⁴ Giving authors an exclusive right over derivative works, however, is entirely consistent with the notion that a work’s creator deserves to share in all benefits generated by the work.

Indeed, the deserving-author justification provides a coherent explanation for the Supreme Court’s holding in *Stewart v. Abend*.¹³⁵ In *Stewart*, the author of a copyrighted story assigned the right to make a movie of the story, agreed that, at the appropriate time, he would renew the copyright in the story, and agreed to assign the movie rights for the renewal term. A production company headed by Stewart succeeded to the movie rights and made and copyrighted the movie. When the author died before he was able to renew the copyright, his statutory successors renewed the copyright and assigned the renewal rights to Abend. Abend sued Stewart, contending that Stewart was infringing Abend’s copyright in the original work by displaying the movie after expiration of the initial copyright period in the story. The Supreme Court agreed, holding that if an author of an original work dies during the original copy-

134. See *supra* section II.B.2.b.

135. 495 U.S. 207 (1990). I do not propose to enter the debate about the Court’s process of statutory interpretation in *Stewart*. To the extent that the statute mandated the conclusion the Court reached, the statutory provision is understandable primarily by reference to a “deserving-author” rationale.

right period, the creator of a copyrighted derivative work authorized by the original author may not use that work during the renewal period of the original work without the consent of the owner of the renewal period.¹³⁶

From an incentive perspective, the result in *Stewart* was perverse. No author would devote additional energy to writing on the hope that he might die before the end of the initial term, allowing statutory successors to terminate his grants of rights in derivative works. But potential creators of derivative works might well be reluctant to purchase rights to produce derivative works from an elderly author toward the latter part of the initial copyright term if the author could not assure the purchaser of a continued right to display those derivative works during the renewal term. Yet *Stewart* — or the statute the Court construed — made it impossible for an author to give that assurance.

On the other hand, from a “deserving-author” perspective, *Stewart* made considerable sense. In many cases, albeit not in *Stewart* itself, the spouse or children of the initial author would hold the renewal right.¹³⁷ If the author initially had assigned his copyright before the work had reached the height of popularity, those family members might not have derived substantial benefit from the author’s efforts. Especially if, as in *Stewart*, the original assignment of the right to make the movie was given for a lump sum, with no provision for royalties, the renewal right might represent the only opportunity family members would have to capitalize on the author’s work.

2. *Renewal and Termination Rights*

Both the renewal provisions in the 1909 Act¹³⁸ and the termination provisions in the 1976 Act¹³⁹ are most easily understood as mechanisms to provide for the deserving author and his family. The committee report accompanying the 1976 Act justified the termination provision by noting that “[a] provision of this sort is needed because of the unequal bargaining power of authors, resulting in part from the impossibility of determining a work’s value un-

136. See 495 U.S. at 220-21.

137. See Copyright Act of 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (amended 1976), which gave renewal rights to the author’s widow, widower, or children if the author was not living at the time for renewal.

In *Stewart v. Abend*, the author died without a surviving wife or child, so the ultimate beneficiaries of the court’s holding were a charitable trust and its assignee.

138. See Copyright Act of 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (amended 1976).

139. See 17 U.S.C. § 203 (1994).

til it has been exploited.”¹⁴⁰ Proponents of the 1909 Act used similar language to justify the renewal period.¹⁴¹

If, by “unequal bargaining power” the drafters of the statute meant that publishers possess monopsony power that permits them to pay less than competitive prices to authors, the statutory cure — termination rights — will do nothing to solve that problem. Publishers simply will use their monopsony power in some other way, for instance, by reducing the price they pay to authors for their work.¹⁴²

If, on the other hand, the “problem” Congress sought to address is the inability of publishers and authors to predict which works ultimately will prove successful, then Congress implicitly has decided that authors of successful works *deserve* greater compensation than authors of less successful works. The termination provision deals with the “problem” by guaranteeing future compensation to authors of successful works.

3. *Limitations on “Work Made for Hire”*

American copyright law has long recognized an employer as the author of a work created by an employee within the scope of the employee’s employment.¹⁴³ Work-made-for-hire doctrine is largely consistent with the incentive justification for copyright: an employee working for a salary has adequate incentive to create without giving the employee copyright protection; copyright protection gives employers an incentive to hire creative employees.

In codifying work-made-for-hire doctrine, Congress made termination rights inapplicable to works made for hire.¹⁴⁴ At the same time, Congress limited the right of parties to contract for work-made-for-hire status; a commissioned work can qualify as a work made for hire only if the parties so agree and the commissioned

140. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 124 (1976).

141. See *supra* text accompanying notes 86-88.

142. Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 102-03 (3d ed. 1986) (discussing the effect of monopoly on contract terms and concluding that “there is no reason to expect the terms . . . to be different under monopoly from what they would be under competition; the only difference that is likely is that the monopolist’s price will be higher”).

143. Section 201(b) of the current statute provides:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201(b) (1994).

144. See 17 U.S.C. § 203(a) (1994).

work falls into specified statutory categories.¹⁴⁵ If, for instance, a modern-day Charles Dickens were to contract with a serial publisher to write monthly installments of a novel for a fixed monthly price, the parties could not provide that Dickens's work would constitute a work made for hire.¹⁴⁶

By limiting the power of parties to contract into work-made-for-hire status, Congress made the same tradeoff it made when it created inalienable termination rights: it reduced marginally the power of all authors to obtain remuneration now, while increasing the power of a class of successful authors to obtain remuneration when the time for termination arrives. The most plausible justification for this tradeoff is a sense that successful authors deserve a second shot at compensation.¹⁴⁷

B. *Implications of the Deserving-Author Model*

Suppose we take seriously the notion that intellectual property law is designed to protect "deserving" authors. Why are those authors deserving of protection? In general terms, two noneconomic justifications for protecting authors have been advanced. The first — developed most extensively by Wendy Gordon — is based on the principle that one should not reap where another has sown.¹⁴⁸ The second, most prevalent in the literature on moral rights, is based on the notion that strong copyright protection is necessary to safeguard the personal autonomy of authors.¹⁴⁹ This section considers these justifications and explores their broader implications.

145. Current § 101 defines a work made for hire as a work "prepared by an employee within the scope of his or her employment" or "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101 (1994). The statute then goes on to define supplementary work.

146. Of course, if Dickens entered into an employment relationship and had income and social-security taxes withheld, he could qualify for work-made-for-hire status. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-53 (1989).

147. The argument that work-made-for-hire limitations redress unequal bargaining power reduces to an argument that the market should be structured to permit authors to reap the compensation they deserve because of the value of their contributions. See Hamilton, *supra* note 90, at 1313-14, 1319 (arguing that further limitations on work made for hire, together with related reforms, are necessary to secure "fair remuneration" for authors).

148. See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992) [hereinafter Gordon, *Restitutionary Impulse*]; see also Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) [hereinafter Gordon, *Merits of Copyright*].

149. See, e.g., Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988).

1. *Of Reaping and Sowing*

The principle that a person should not reap where another has sown has great intuitive appeal. Like many desert-based principles, the reap-sow principle's intuitive appeal is undoubtedly due, in large measure, to its underlying economic wisdom: a society that wants to ensure that farmers sow had better protect the right of a farmer to reap what he has sown. To justify copyright doctrines that expand protection beyond what would be necessary to induce creative activity, however, the reap-sow principle must rest on a noneconomic foundation. In this section, I explore two bases for the principle, one based on corrective justice and the other based on distributive justice.

a. *The Inadequacy of the Corrective-Justice Justification*

Professor Gordon, using restitution law as an analog, suggests that the reap-sow principle rests on a model of corrective justice. She identifies three propositions to support her claim that authors are entitled to compensation from those who use their work: (1) a person has a right and privilege not to labor unless payment or satisfactory inducement is forthcoming; (2) persons should have no affirmative right to the benefit of others' labor; and (3) persons who have labored are entitled to use the legal system to obtain payment from others for their use of the benefits the laborers have produced.¹⁵⁰ Gordon's third proposition does not follow from the first two, and her corrective-justice rationale for intellectual property law falls with it.

As Gordon recognizes, corrective justice "disregards the parties' overall moral worth or social contribution"¹⁵¹ and operates to rectify gains and losses when "necessary to protect a distribution of holdings or entitlements from distortions."¹⁵² Gordon also acknowledges that the law of restitution usually requires a plaintiff to show either a loss or the violation of a "legally protected interest."¹⁵³ These premises make it difficult to understand how corrective-justice principles in general or restitution law in particular can justify intellectual property rights, when the basic question is whether the author's social contribution merits reward or, put in legal terms, whether the author has a "legally protected interest" in

150. See Gordon, *Restitutionary Impulse*, *supra* note 148, at 181.

151. *Id.* at 171.

152. *Id.* (quoting Jules Coleman, *Moral Theories of Torts: Their Scope and Limits*, 1 J. L. & PHIL. 5, 6 (1983)).

153. See Gordon, *Restitutionary Impulse*, *supra* note 148, at 196-97.

creative works. If corrective-justice principles require restoration of legally protectible interests, there is an evident circularity in using those same principles to define legally protectible interests.¹⁵⁴

Gordon attempts to avoid this problem by emphasizing that individuals have "a privilege and a right not to labor"¹⁵⁵ and can "trade on this entitlement package to obtain compensation via contract."¹⁵⁶ She concedes difficulty in jumping from that proposition to the conclusion that persons have a right to be paid for the results of their labor without contract.¹⁵⁷ Ultimately, the only argument she musters is one that rests not on the moral claim of the "creator" of intellectual work but on the absence of any claim by the work's user that the user would be wronged if required to pay for the work.¹⁵⁸ This argument goes nowhere. As Gordon herself recognizes, we all constantly derive benefits from the labors of others without incurring any moral obligation to pay for those benefits.¹⁵⁹ Gordon never explains why the user of intellectual work has any greater moral obligation to pay for that work than the Delaware state lottery has to pay the National Football League (NFL) for profits it derives from a lottery keyed to the results in NFL football games.¹⁶⁰

After attempting to derive a reap-sow justification for intellectual property rights from abstract moral principle, Gordon turns to the positive law of restitution. There, on more than one occasion, she draws an analogy to the obligation of a patient to compensate a physician who has given the patient emergency treatment while the

154. Cf. Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31, 38 (1989) ("Markets work only after property rights have been established and enforced, and our question is what sorts of property rights an inventor, writer, or manager should have . . .").

155. Gordon, *Restitutory Impulse*, *supra* note 148, at 181-82.

156. *Id.*

157. *See id.*

158. *See id.* at 185-86. She writes: "There is no reason to give users a baseline entitlement to whatever they could have obtained in a world without legal protection for intellectual products." *Id.* at 186. Other versions of the same argument appear in her earlier work, Gordon, *Merits of Copyright*, *supra* note 148, at 1454-60, and her more recent work, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1549 (1993) [hereinafter Gordon, *A Property Right in Self-Expression*].

159. *See* Gordon, *Restitutory Impulse*, *supra* note 148, at 167 ("A culture could not exist if all free riding were prohibited within it. Every person's education involves a form of free riding on his predecessors' efforts, as does every form of scholarship and scientific progress.").

160. *See* National Football League v. Governor of Del., 435 F. Supp. 1372 (D. Del. 1977) (holding that the lottery was entitled to make references to NFL games), *quoted in* Gordon, *Restitutory Impulse*, *supra* note 148, at 168 n.68.

patient was unconscious.¹⁶¹ But an examination of the leading restitution treatise — liberally cited by Professor Gordon — reveals that the patient's obligation to the physician represents a narrow exception to the general rule that denies restitutionary relief to a person who has provided unsolicited benefits to another.¹⁶²

Moreover, there are sound *economic* reasons for the rule permitting the physician to recover for services rendered to the unconscious patient. First, the physician had every reason to assume that the patient would want him to bypass the market in providing treatment; the unconscious patient was in no position to enter into an express contract, and nearly anyone would be willing to pay a reasonable doctor's fee for treatment when unconscious. Neither of these conditions applies in the intellectual property context. Market transactions are possible, and it is far from clear that everyone willing to use a free intellectual work would be willing to pay for that work.¹⁶³ Second, there are obvious policy reasons to provide physicians with an economic incentive to treat unconscious patients. While both of these reasons support allowing the physician to recover from the patient, neither of them provides a corrective-justice rationale for recovery.

My point here is not to attack Professor Gordon's conclusions; indeed, after developing her restitutionary model for intellectual property rights, her enterprise has been to show that the model supports only a narrow range of intellectual property rights.¹⁶⁴ Rather, my point is to demonstrate that even when a distinguished and energetic scholar seeks to place intellectual property rights on a

161. See Gordon, *Restitutionary Impulse*, *supra* note 148, at 188, 197.

162. Compare 2 GEORGE E. PALMER, *THE LAW OF RESTITUTION* §§ 10.2-10.3 (stating that restitution generally is not available for unsolicited payment of another's debts or for unsolicited expenditures to protect another's property) with § 10.4 (stating that restitution may be available for intervention to protect life and health). Palmer writes: "Courts have placed a higher value on protection of these interests [protection of life or health] than they have on protection of property, as a comparison with the preceding section will demonstrate." *Id.* § 10.4, at 376.

Indeed, Professor Gordon herself speaks of the "rule that volunteers are not entitled to payment" and seeks to argue that copyright falls into one of the exceptions to that rule. Gordon, *Merits of Copyright*, *supra* note 148, at 1456.

163. Gordon acknowledges these points explicitly. Thus, she notes that the creator of intellectual work could release his work to a user on the condition that any resale by the user would involve royalty payments to the creator, and she also acknowledges that "[i]n the real world, it may be impossible to know whether a given work . . . would have been sold with a royalty promise attached." Gordon, *Restitutionary Impulse*, *supra* note 148, at 184.

164. See Gordon, *A Property Right in Self-Expression*, *supra* note 158, at 1607 (indicating that her goal is "to help prune back the overweening growth in natural law rhetoric that has prompted many ill-conceived intellectual property decisions over the last two decades").

corrective-justice foundation, the effort fails. If intellectual property rights are to be justified, the justification must lie elsewhere.

b. *Copyright and Distributive Justice*

Unlike corrective-justice claims, which ignore the moral worth and social contributions of competing parties, the distributive-justice claim for intellectual property protection rests on the premise that authors, artists, and other creators have, by virtue of their contributions, an entitlement to the benefits associated with those contributions. Most distributive-justice arguments for intellectual property rights trace their origin to Lockean labor theory.¹⁶⁵

Locke's labor theory today might be called an equality-of-opportunity theory about the acquisition of property rights. Locke started with the premise that each individual has a property interest in his own person and the labor of his own body.¹⁶⁶ He then asserted that whenever an individual joins his labor with a resource that previously belonged to mankind in common, the individual laborer acquires a private property right in that resource, at least so long as "enough, and as good" of the resource is left for other potential laborers.¹⁶⁷ In Locke's words:

God gave the World to Men in Common; but since he gave it them for their benefit, and the greatest Conveniences of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational, and Labour was to be *his Title* to it; not to the Fancy or Covetousness of the Quarrelsome and Contentious. *He that had as good left for his own Improvement, as was already taken up, needed not complain, and ought not to meddle with what was already improved by another's Labour:* If he did, 'tis plain he desired the benefit of another's pains, which he had no right to . . .¹⁶⁸

That is, so long as each individual has an equal opportunity to exploit undifferentiated common resources, those who capitalize on the opportunity are entitled to resist claims by those who do not.

165. See, e.g., Hughes, *supra* note 54, at 296-329 (deriving Lockean justification for intellectual property rights); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *Ohio St. L.J.* 517, 546-47 (1990) (tracing the impact of Lockean philosophy on copyright law).

Professor Gordon also suggests that an author's labors give the author rights superior to consumers generally, see Gordon, *Restitutionary Impulse*, *supra* note 148, at 186, and that Locke's labor theory might be helpful in understanding intellectual property rights, see *id.* at 208-09, although she prefers not to cast her claim as one rooted in Locke, see *id.* at 167.

166. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* para. 27 (Peter Lasslet ed., 1963) (1698).

167. See para. 27; see also *id.* paras. 28, 33, 34.

168. *Id.* para. 34 (emphasis added).

Locke's emphasis on labor as the foundation of property rights has made his work especially attractive to intellectual property theorists. After all, unlike the farmer or the industrialist, who must combine labor with liberal doses of land or capital to create something of value, the author or artist draws only on inexhaustible resources — the wealth of human experience — to create works of value. Thus, the author, more than most property claimants, appears quite likely to satisfy the Lockean "proviso": after the author uses common resources, "there is enough, and as good left in common for others."¹⁶⁹

But why should a person hold property rights in his own labor, and why should adding that labor to common resources give the laborer a property right in the common resources? The notion that a person is entitled to his labor and thus merits compensation from those who would use it has great intuitive appeal but also serves an important economic function: it encourages people to work in a way that they might not if labor were treated as part of a common pool of societal resources.¹⁷⁰ If increased labor generates increased social welfare, rules that encourage work have positive social consequences. Moreover, by giving a person who labors not only the right to profit from that labor but also a right to common resources with which he "mixes" his labor, Lockean theory provides yet greater incentive to work and simultaneously encourages privatization of resources, thus avoiding the "tragedy of the commons."¹⁷¹ As Locke himself recognized, if individuals could not privatize common resources without the consent of all mankind, "man might have starved, notwithstanding the plenty God had given him."¹⁷²

169. *Id.* para. 27.

Indeed, as often emphasized in judicial pronouncements, if a second author uses the same background material to create a work similar or identical to that created by a prior author, there is no infringement so long as there was no copying of the first author's work. See, e.g., *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (Hand, J.) (noting that "if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's").

By contrast, once an inventor patents a work, a subsequent inventor is precluded from using or marketing an identical work even if the subsequent inventor was entirely unaware of the prior invention. Yet, given the opportunities for invention in the society and the pace of technological advance, it would be nearly impossible to argue that the grant of one patent reduced the opportunity for other inventors to invent.

170. Cf. Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 425 (1993) (noting that giving creditors claims against earning capacity might cause the debtor to substitute leisure for work).

171. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

172. LOCKE, *supra* note 166, para. 28. Richard Epstein makes a similar point in arguing that Lockean theory has a consequentialist cast:

My goal here is not to portray Locke as the ultimate consequentialist but to observe that, like many natural-rights theories, Locke's labor theory is appealing, at least in part, because it generates attractive consequences.¹⁷³ The question then becomes whether Lockean theory would be so compelling were it not for the economic advantages a Lockean regime generates. The question is important in the intellectual property context because giving authors property rights in their creations does not generate the economic advantages generally associated with Lockean theory.

First, as we already have seen, many intellectual property rules and especially many of those most recently adopted do not create any significant incentive to engage in creative activity.¹⁷⁴ Second, unlike land, intellectual property offers no potential for a tragedy of the commons. Once created, intellectual property is a public good, capable of enjoyment by millions without incurring significant extra costs. No efficiency justification requires privatizing intellectual property. Hence, if Lockean labor theory supports a regime of intellectual property rights, it must do so without the added ballast that efficiency arguments generally lend to Lockean natural rights.

Stripped of its consequentialist underpinnings, the principal attraction of Lockean labor theory is its emphasis on respect for personal autonomy, affording each person an equal opportunity to pursue his own vision of the good life. For Locke, when a person acquires a resource from the common pool by adding his labor to it, others have no claim to the resource so long as enough similar resources are available for them to develop through the use of their own labor. As Locke put it, "he that leaves as much as another can make use of does as good as take nothing at all."¹⁷⁵

Equal labor, however, does not generate equal results. All men are *not* created equal in talent, and all men are not, therefore, equally positioned to develop common resources to their best advantage. Some farmers, because of greater physical strength or

There will be bargaining breakdown if the consent of all individuals is necessary for the consumption of any portion of the whole. . . . Now the ultimate justification for Locke is no longer desert theory, but simple necessity. . . . Consent is not required to establish property rights because the number of parties is too great for it to work. When necessity, not consent, becomes the origin of property, then we have a utilitarian system, not a social contract theory.

Richard Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POLY. 713, 733-34 (1989).

173. See generally Epstein, *supra* note 172 (arguing that many natural-law theories are congruent with consequentialist arguments).

174. See *supra* text accompanying notes 71-133.

175. LOCKE, *supra* note 166, para. 33. Professor Gordon appears to endorse the same view. See Gordon, *Merits of Copyright*, *supra* note 148, at 1446 (quoting John Stuart Mill).

greater intelligence, will reap a better harvest from the same land even if they expend no more effort than their weaker or duller neighbors. The same is true — to an even greater degree — with intellectual works: all may have the same opportunity to use the existing world as background for a creative work, but only some have the talent necessary to capitalize on that background material.

In a world where differences in talent appear far more critical than they did in Locke's hypothesized world of acorn gatherers, farmers, and fishermen, why should those with greater talent be entitled to greater reward? John Rawls explicitly rejects the Lockean notion that each person is entitled to the fruits of his own labor, arguing instead that the talented do not deserve to be rewarded for their talents.¹⁷⁶ To Rawls, the distribution of talents is arbitrary from a moral point of view and should not furnish a basis for the distribution of social resources.¹⁷⁷ Rawls acknowledges that natural talents should earn premiums, but those premiums "are to cover the costs of training and to encourage the efforts of learning, as well as to direct ability to where it best serves the common interest."¹⁷⁸ That is, for Rawls, rewarding talent is justified only on instrumental grounds, not because the person who holds and uses talent deserves reward.¹⁷⁹ Rawls's "difference principle" would permit return to those endowed with talent only to the extent that rewarding the talented would improve the lot of the least fortunate.¹⁸⁰ In a Rawlsian scheme, then, desert provides no justification for copyright protection; only the need to provide economic incentives would support rewarding those with creative abilities.

Suppose, however, one were to believe that people do deserve to benefit from their talents, perhaps as a reward for the efforts they have made to develop whatever natural abilities they might have.¹⁸¹ There remains no reason to assume that the benefits a tal-

176. See JOHN RAWLS, *A THEORY OF JUSTICE* 102 (1971) ("No one deserves his greater natural capacity . . ."); *id.* at 311 ("[T]he initial endowment of natural assets and the contingencies of their growth and nurture in early life are arbitrary from a moral point of view.").

177. See *id.* at 311-12.

178. See *id.*

179. Rawls acknowledges the intuitive appeal of a distribution according to effort but rejects a moral claim based on effort, arguing that "[t]he better endowed are more likely, other things equal, to strive conscientiously, and there seems to be no way to discount from their greater good fortune." *Id.* at 312.

180. See *id.* at 78-79.

181. Rawls attacks this position by suggesting that the inclination to develop natural talents itself may be an inborn ability distributed among people in a morally arbitrary fashion. He notes that "[t]he better endowed are more likely, other things equal, to strive conscientiously," *id.* at 312, and that "[t]he extent to which natural capacities develop and reach fruition is affected by all kinds of social conditions and class attitudes," *id.* at 74.

ented person deserves should in any way be tied to the market power associated with copyright protection. As Freidrich Hayek has observed, market prices have little to do with merit or desert: "Their function is not so much to reward people for what they *have* done as to tell them what in their own as well as in general interest they *ought* to do."¹⁸² Unforeseeable changes in market conditions easily can make one market participant rich and another poor even though the ideas they develop may be quite similar.¹⁸³ Moreover, if our goal is to reward "deserving" creators, a variety of alternatives are available, including prizes, grants, honors, and awards.¹⁸⁴ Desert, then, provides little basis for property-right protection for authors or for other protection tied to market forces.¹⁸⁵

Suppose, however, one believes that a person with natural talents is entitled to benefit from them even if the talents themselves are undeserved. Consider Robert Nozick's vigorous attack on Rawls's formula for redistribution of resources.¹⁸⁶ Nozick does not disagree with Rawls's assertion that the distribution of natural assets is morally arbitrary and that the holder of natural assets does not "deserve" to profit from them. Instead, Nozick argues that desert is irrelevant, that "[w]hether or not people's natural assets are arbitrary from a moral point of view, they are entitled to them, and to what flows from them."¹⁸⁷ Nozick's argument, however, lends little ammunition to proponents of a desert-based copyright law.

For a critique of Rawls's position and an argument that differences in ability to make efforts have little moral significance, see George Sher, *Effort, Ability, and Personal Desert*, 8 PHIL. & PUB. AFF. 361, 364-70 (1979).

182. 2 F.A. HAYEK, LEGISLATION AND LIBERTY 71-72 (1976).

Moreover, one might argue that all intellectual products are inevitably the result of many people's talents, over a long period of time, and that no one author has a natural right to the market value of those products. See Hettinger, *supra* note 154, at 39.

183. See Russell Hardin, *Valuing Intellectual Property*, 68 CHI.-KENT L. REV. 659, 667-69 (1993) (noting that IBM's decision to use Bill Gates's operating system made Gates a multi-billionaire and noting that Gates's wealth rested as much on IBM's need to have a single operating system as on the particular merits of Gates's system); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 856 (1993) (noting that readiness to pay for a new song may have little to do with the merits of the songwriter but with factors such as "how many other catchy tunes there are on the market this week, whether the state of the world fosters a general desire to be cheered up, and so on").

184. See Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 622 (1993); Breyer, *supra* note 42, at 287; Hettinger, *supra* note 154, at 41. *But cf.* Hamilton, *Art Speech*, *supra* note 98 (emphasizing the failures of government funding for the arts).

185. Wendy Gordon, for instance, argues that her restitutionary principles lead not to property rights but to claims for compensation by authors. Gordon, *Restitutionary Impulse*, *supra* note 148, at 192-93.

186. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 183-228 (1974).

187. *Id.* at 226.

Nozick starts with the premise that so long as a person's holdings were generated properly, the state should not intervene to redistribute those holdings to accord with any social notions of need or desert.¹⁸⁸ Instead, all redistribution should occur by voluntary transfer, with or without consideration, without regard to the transferor's reasons for making the transfer.¹⁸⁹ To the extent that one of Nozick's primary objectives is minimizing state interference with private transfers, Nozick's theory is not helpful to advocates of broad intellectual property rights because a strong intellectual property regime requires state intervention to inhibit private voluntary transfers. Nozick himself notes disagreement within the libertarian community about the merits of copyright protection.¹⁹⁰

Thus, for those who believe in the distribution of social wealth according to moral principle, copyright is problematic because the talents people are born with appear morally arbitrary. For those who believe the state should not intervene to redistribute the proceeds of natural talents, copyright is problematic because authors cannot rely exclusively on voluntary transfers to derive a return on their talents. The notion that authors "deserve" copyright protection, then, rests on shaky foundations.

2. *Copyright and Personal Identity*

a. *Personal Identity as a Justification for Broad Copyright Protection*

Running through the copyright literature is yet another justification for protecting authors: creative people define themselves by reference to their work, and giving them control over their work is essential in order to protect their self-conceptions.¹⁹¹ Intellectual property rights are designed not so much to provide financial rewards as to allow the author to maintain a sense of identity.

188. *See id.* at 230 ("If the set of holdings is properly generated, there is no argument for a more extensive state based upon distributive justice.") Nozick rejects all "patterned" principles of justice, by which he means principles such as "to each according to his ____." *Id.* at 159-60.

189. *See id.* at 158-60.

190. *See id.* at 141.

191. *See* Becker, *supra* note 184, at 610; Damich, *supra* note 149, at 25-40; Hughes, *supra* note 54, at 331-50; Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 *IND. L.J.* 47, 60 (1994); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 *CARDOZO ARTS & ENT. L.J.* 1, 13-23 (1994); Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 *DUKE L.J.* 1532, 1541-42.

The notion that intellectual property rights are essential to protect personal identity is often traced to Hegel.¹⁹² For Hegel, property is the means by which personality is objectified.¹⁹³ Property forms a medium through which a person obtains recognition by others.¹⁹⁴ To Hegel, the abstract person is exactly that, abstract. He has no distinguishing characteristics and cannot, therefore, be recognized by others. That is, property transforms abstract individuals into persons with distinguishing individual characteristics.¹⁹⁵ The person must acquire external effects, including talents and other personality traits, in order to become recognizable. Acquisition of property enables each of us to relate to others in a way we otherwise could not.¹⁹⁶

One's work is among the many types of objects a person can use to obtain recognition from others.¹⁹⁷ If, however, the work were

192. Less often, a similar justification is attributed to Kant. See Netanel, *supra* note 191, at 17-23.

193. HEGEL, *PHILOSOPHY OF RIGHT* para. 51 (T.M. Knox trans. Oxford University Press 1967) (1952).

194. Hence, Hegel insists that to obtain a property right, a person must take "occupancy" so that "[t]he embodiment which my willing thereby attains involves its recognizability by others." *Id.*

195. See Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 *MINN. L. REV.* 55, 133-34 (1994); see also Hughes, *supra* note 54, at 343 ("Hegel argues that recognizing an individual's property rights is an act of recognizing the individual as a person.").

196. Thus, Hegel notes that

[a] person by distinguishing himself from himself relates himself to another person, and it is only as owners that these two persons really exist for each other. Their implicit identity is realized through the transference of property from one to the other in conformity with a common will and without detriment to the rights of either.

HEGEL, *supra* note 193, para. 40. Jeanne Schroeder notes that "the Hegelian concept of the person is always already implicitly driven by the erotic desire to be desired" and that "[t]he individual cannot exist except through concrete relationships with other individuals." Schroeder, *supra* note 195, at 136. Property fosters those concrete relationships. See *id.* at 110-12 (showing how a market community fosters personal interrelationships between individuals who may appear to have little in common).

197. Hegel recognized that some might be uncomfortable treating the talents and skills as property because they appeared to be an essential part of the individual rather than an object acquired through mediation of the will. He explained:

We may hesitate to call . . . abilities, attainments, aptitudes &c., "things," for while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it, and for this reason the Understanding may be in perplexity about how to describe such possession in legal terms Attainments, erudition, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them . . . and in this way they are put into the category of "things." Therefore they are not immediate at the start but only acquire this character through the mediation of mind which reduces its inner possessions to immediacy and externality.

HEGEL, *supra* note 193, para. 43.

Hegel concluded that only a small class of objects that, once appropriated, become an inherent part of the individual personality, are, unlike ordinary property rights, inalienable. See *id.* para. 66 ("Substantive characteristics which constitute my own private personality and

treated as a public good, recognition would be one-sided; the creator, like the donor of a gift, would be recognized by admirers of the work but would have no opportunity to recognize the admirers. For the creator, the admirers would be only means to his own end: recognition.¹⁹⁸ By contrast, treating creative work as property susceptible to exchange opens up the possibility of mutual recognition; creator and admirers must treat each other as subjects with their own independent wills.¹⁹⁹

Within the Hegelian scheme, property rights are more important for their existence than for their substantive content. Because property is about relations, not about objects, the precise contours of legal doctrine are unimportant so long as property law enables people to engage in intersubjective relations. Intellectual property rights, although entirely consistent with Hegel's conception of property, are not strictly necessary. Perforce, intellectual property rights need not have any particular content or form. Indeed, after raising questions about the boundaries of plagiarism, Hegel wrote: "There is no precise principle of determination available to answer these questions, and therefore they cannot be finally settled either in principle or by positive legislation."²⁰⁰ Hegel's statement is consistent with his more general belief "that philosophy could not give definitive answers to practical questions of positive law."²⁰¹ Thus, it would be wrong to invoke Hegel to support, say, a longer copyright period or protection for derivative works. In fact, without endorsing any particular positive law rules, Hegel evinced a keen awareness that overbroad intellectual property protection would inhibit the ability of future creators to build on the works of their prede-

the universal essence of my self-consciousness are inalienable and my right to them is imprescriptible.")

198. See Schroeder, *supra* note 195, at 139 (discussing the superiority of exchange over gift as a means of alienation) ("In exchange . . . I am not only a giver but also a recipient who simultaneously recognizes the other's objectification in and indifference to the object I receive. In other words, I see her as someone who has her own ends rather than merely as a means to my ends.").

199.

Contract recognizes a moment in which two persons are united in that they are bound together in a common will at the same time that they recognize each other as separate individuals having specific rights and duties. Because we share a common will (i.e., the intent to exchange objects), we can simultaneously serve each others' ends without being reduced to the mere means to each others' ends.

Id.

200. HEGEL, *supra* note 193, para. 69. Hegel went on to conclude that "plagiarism would have to be a matter of honour and be held in check by honour." *Id.* para. 69, at 56.

201. Schroeder, *supra* note 195, at 131 n.287.

cessors.²⁰² Moreover, given property's role in filling out the individual personality, it would be particularly difficult to argue from Hegel that copyright protection should extend beyond the author's death.²⁰³

b. *Personal Identity and Moral Rights*

Hegel is most frequently invoked to support protection for moral rights — particularly the right to be identified as author and the right to prevent unapproved changes of copyrighted works.²⁰⁴ The argument runs that Hegel's insistence that an individual may not alienate elements of his own personality²⁰⁵ requires that an author control his own work even after giving up ordinary copyright protection. According to Joseph Kohler:

[T]he writer can not only demand that no strange work be presented as his, but that his own work not be presented in a changed form. The author can make this demand even when he has given up his copyright. *This demand is not so much an exercise of dominion over my own work, as it is of dominion over my being, over my personality which thus gives me the right to demand that no one shall share in my personality and have me say things which I have not said.*²⁰⁶

If the concern is about harm to an author's reputation as a result of false attribution of words or artworks, contemporary defamation law provides an adequate remedy for the injured author, as for

202.

[T]he purpose of a product of mind is that people other than its author should understand it and make it the possession of their ideas, memory, thinking, &c. . . . The result is that they may regard as their own property the capital asset accruing from their learning and may claim for themselves the right to reproduce their learning in books of their own. HEGEL, *supra* note 193, para. 69; *see also id.* para. 68:

In the case of works of art, the form — the portrayal of thought in an external medium — is, regarded as a thing, so peculiarly the property of the individual artist that a copy of a work of art is essentially a product of the copyist's own mental and technical ability.

203. Except, of course, that Hegel, too, recognized an instrumental justification for intellectual property rights:

The purely negative, though the primary, means of advancing the sciences and arts is to guarantee scientists and artists against theft and to enable them to benefit from the protection of their property, just as it was the primary and most important means of advancing trade and industry to guarantee it against highway robbery.

Id. para. 69.

204. *See, e.g.,* Damich, *supra* note 149, at 28 n.135; Hughes, *supra* note 54, at 350; Netanel, *supra* note 191, at 21-23.

205. *See* HEGEL, *supra* note 193, para. 66 (“[T]hose goods, or rather substantive characteristics, which constitute my own private personality, and the universal essence of my self-consciousness are inalienable. . . . Such characteristics are my personality as such, my universal freedom of will, my ethical life, my religion.”).

206. Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law — A Proposal*, 24 S. CAL. L. REV. 375, 402 (1951) (emphasis in original) (quoting JOSEPH KOHLER, *URHEBERRECHT AN SCHRIFTWERKEN UND VERLAGSRECHT* 15 (1907)); *see also* Damich, *supra* note 149, at 29; Netanel, *supra* note 191, at 21-23.

others injured in their professions by false representations.²⁰⁷ When reputation is not at stake, however, Hegel's Philosophy of Right furnishes only limited support for the notion that personal dignity requires giving an author permanent control over the destiny of his work.

In asserting that "those goods, or rather substantive characteristics which constitute my own private personality and the universal essence of my self consciousness are inalienable," Hegel listed such characteristics as "my personality as such, my universal freedom of will, my ethical life, my religion."²⁰⁸ Because, for Hegel, property serves as a mediator between persons, property presupposes some definition of the person as a recognizable subject. In defining some characteristics as inalienable, Hegel was, in Jeanne Schroeder's words, "in effect asking what absolute minimum objects a subject must retain to remain recognizable as a specific individual by other subjects and called these minimum objects 'personality.'"²⁰⁹ By definition, a person who surrenders the right to hold beliefs or to make any future decisions has ceased functioning as a recognizable person and has become instead an object — the property of another person.²¹⁰

At the same time, Hegel explicitly acknowledged the power of a person to alienate his labor for a time-limited period and to alienate products of his physical and mental skill.²¹¹ Indeed, without power to alienate labor or the products of physical and mental skills, a person's opportunities to exercise his will and to relate to others would be reduced significantly. Thus, Hegel's restraints on alienation are narrowly limited: only if I alienate "the whole of my time, as crystallized in my work, and everything I produced" would I be "making into another's property the substance of my being, my universal activity and actuality, my personality."²¹² Hegel's concern was with the person who would sell himself into slavery and cease functioning as a person, not with the artist or author who sells a completed work of art only to see it transformed or destroyed.

207. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 790-91 (5th ed. 1984).

208. HEGEL, *supra* note 193, para. 66, at 52-53.

209. Schroeder, *supra* note 195, at 144.

210. See *id.* at 143 (noting that Hegel's inalienability of personality is merely a definitional matter) ("If the minimum definition of the person is the free will, one must not alienate one's capacity for freedom.")

211. See HEGEL, *supra* note 193, para. 67.

212. *Id.*

Beyond Hegel, it remains difficult to understand why the identity of artists and authors should be more bound up with their work than the identity of others who enjoy no protection against alteration of their work. Jamie Boyle has noted the anomaly that underlies moral-rights claims by asking "Could we imagine giving a plumber a control over the pipes she installs even after the work is paid for, or a cabinetmaker the right to veto the conversion of her writing desk into a television cabinet?"²¹³ It may be appropriate to give copyright protection to the author and not to the cabinetmaker because the author's work and not the cabinetmaker's has the characteristics of a public good that would be underproduced without the copyright monopoly.²¹⁴ That distinction, however, has nothing to do with the supposed identification between craftsman and craft.

IV. ALTERNATE EXPLANATIONS FOR EXPANSIVE COPYRIGHT PROTECTION

A. *Copyright and Interest-Group Politics*

If the most frequently proffered justifications for expansive and expanded copyright protection are unsatisfying, does copyright legislation merely reflect the political power of the copyright industries? Indeed, much in the history of twentieth-century copyright legislation suggests that those industries have used political muscle to expand protection at public expense.

Public choice theory suggests that legislation will be more likely to reflect the interests of small but organized groups than the interests of the public at large.²¹⁵ The history of copyright legislation certainly supports that thesis. The 1909 statute, for instance, developed out of a series of conferences convened by the Librarian of

213. James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 629 (1988).

214. See *supra* section II.A.

215. The problem identified by public choice theorists is that creation of an effective lobbying force requires collective action, and individuals who contribute to the collective enterprise confer external benefits on beneficiaries who do not contribute. Thus, in responding to pluralists who argued that appeasement of a variety of small groups achieved the ends of democracy, Mancur Olson noted that members of large groups have little incentive to organize effectively so long as the benefits to be secured by group action would be collective benefits. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 125-28 (1971). In Olson's words:

It follows that the analytical pluralists, the "group theorists," have built their theory around an inconsistency. They have assumed that, if a group had some reason or incentive to organize to further its interest, the rational individuals in that group would also have a reason or an incentive to support an organization working in their mutual interest. But this is logically fallacious, at least for large, latent groups with economic interests.

Id. at 127; see also JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 283-95 (1962).

Congress. Invited to the conference were representatives of interest groups protected by existing copyright legislation. When the draft bills generated out of these conferences ran into opposition from other interest groups, not represented at the conferences, the problems were resolved by negotiations among representatives of the various groups. Congress promptly enacted the compromise bill.²¹⁶

In the period leading to the 1976 Copyright Act, Congress made it clear that industry representatives would have to hammer out a bill acceptable to all interest groups.²¹⁷ A new statute could only advantage all interest groups if it expanded the scope of copyright protection — at the expense of the public domain — and that is precisely what the 1976 statute did.

Jessica Litman, in her examination of the legislative history accompanying the statute, summarized the statute's evolution: "The bill that emerged from the conferences enlarged the copyright pie and divided its pieces among conference participants so that no leftovers remained."²¹⁸ In an article designed not to critique the statute itself but rather to criticize courts for ignoring the deals struck by participants in the drafting process,²¹⁹ Litman highlighted the compromises made to ensure that each interest group was at least as well off as it was under the preceding statute. Authors secured a number of substantial advantages: copyright attached upon fixation rather than publication; copyright duration was extended dramatically and without any need to renew; the work-made-for-hire doctrine was significantly reduced in scope; and authors obtained an inalienable right to terminate copyright grants they previously had made.²²⁰ The new rights obtained by authors, however, did not come at the expense of publishers or other assignees. To accommodate the interests of publishers and studios, parties, by agreement, could treat works commissioned for use in a collective work or for use "as a part of a motion picture or other audiovisual work" as works made for hire.²²¹ Authors were entitled to exercise

216. For a more detailed history of the 1909 legislation, see Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 283-88 (1989).

217. For extensive discussion of the process, see Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870-79 (1987) [hereinafter Litman, *Copyright, Compromise*]; and Litman, *supra* note 216, at 306-42.

218. Litman, *supra* note 216, at 317.

219. See Litman, *Copyright, Compromise, supra* note 217, at 903.

220. See *id.* at 890-93.

221. See 17 U.S.C. § 101 (1994); Litman, *Copyright, Compromise, supra* note 217, at 890-91.

termination rights only during a “window period”; if they failed to do so, assignees would derive the full benefit of the extended copyright period.²²² Moreover, a licensee who had produced a derivative work before termination would be entitled to use it after termination; by comparison, under the old statute, a licensee often could not ensure continued copyright protection of the derivative work once the initial copyright period on the original work had expired.²²³

The drafters’ technique, Litman notes, was to confer copyright protection in expansive terms and then to provide exceptions to appease parties with significant bargaining power.²²⁴ Her discussion of performance rights illustrates the point. Section 106(4) of the statute gives copyright holders the exclusive right to perform the copyrighted work publicly, without any of the “for-profit” limitations that had existed in pre-1976 law.²²⁵ Section 110 then catalogues a variety of exceptions included to obtain the support of interest groups concerned about the effect an expansive performance right would have on their own operations.²²⁶

It is hardly shocking to discover that interest-group power has shaped copyright legislation. Indeed, it would be astonishing if interest groups were not involved. Similarly, it is not surprising that the rhetoric advanced in support of statutory reform emphasized the public interest rather than the private interests that the new statute actually was designed to promote. What is surprising is the paucity of criticism — from Congress, public interest groups, and the academic community — that has accompanied each new expansion of copyright protections.²²⁷ The next subsection advances a tentative theory to explain the general support copyright protection has enjoyed.

222. See Litman, *Copyright, Compromise*, *supra* note 217, at 892-93.

223. See *id.* at 893; compare *Stewart v. Abend*, 495 U.S. 207 (1990) (applying old law and holding that the right to use derivative work expired with the initial term of the copyright on the original work).

224. See Litman, *Copyright, Compromise*, *supra* note 217, at 893-94.

225. See *id.* at 884.

226. See *id.* at 885.

227. In recent years, of course, a number of distinguished commentators have recognized the need to limit copyright protection and have sought to show how their own theories of copyright are consistent with doctrinal limitations. See *e.g.*, Gordon, *Merits of Copyright*, *supra* note 148; Gordon, *Restitutory Impulse*, *supra* note 148; Yen, *supra* note 165.

B. *Copyright Rhetoric and Self-Justification of the Lawmaker Class*

One explanation for the general failure to question copyright rhetoric is that participants in the lawmaking process — not only legislators and judges, but also lawyers, opinionmakers, and persons with wealth and political influence — have a self-interest in widespread acceptance of the proposition that authors deserve to benefit from their work. Rejecting the argument that authors deserve returns from their labors also would undermine the claim that prosperous members of society deserve their prosperity.

Friedrich Hayek has attributed the self-esteem and even self-righteousness of many businessmen to the belief — fostered by popular American writers — that free enterprise regularly rewards the deserving.²²⁸ It is nice to be prosperous, but it is even nicer to believe that our prosperity is deserved.²²⁹ Beyond increasing our self-esteem, the belief that we have earned our wealth and power assuages guilt as we confront, in our daily lives, many people who are substantially less well off. How, then, do we support the belief that we deserve our prosperity?

The argument that professionals deserve higher compensation than unskilled workers often emphasizes long years of expensive education, accompanied by foregone income during that period.²³⁰ As a group, however, authors tend to have educational backgrounds more akin to lawyers and architects than to cashiers and maintenance workers. If authors do not deserve incomes commensurate with their educational backgrounds, then how can other professionals justify high compensation based on their educational attainments? Similarly, if one believes that those blessed with greater intelligence deserve greater financial reward — a difficult moral claim to sustain²³¹ — authors as a group would appear to be

228. See HAYEK, *supra* note 182, at 74.

229. Within Protestantism, this attitude has religious origins, as individuals seek professional success for reassurance that they are among the chosen rather than the damned. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 109-13 (Talcott Parsons trans., 1958).

230. Indeed, some of the public grumbling about the salaries awarded to professional athletes appears to reflect the view that athletes do not deserve high salaries because, as a group, they do not have the education or intellectual abilities generally associated with high compensation occupations. *But see* HAYEK, *supra* note 182.

I have never known ordinary people grudge the very high earnings of the boxer or t-
rero, the football idol or the cinema star or the jazz king — they seem often even to
revel vicariously in the display of extreme luxury and waste of such figures compared
with which those of industrial magnates or financial tycoons pale.

Id. at 77.

231. See *supra* text accompanying notes 176-90.

at least as deserving as other members of the professional and managerial class.

Extensive copyright protection, then, is quite consistent with the popular notion that the market system rewards the deserving. If copyright protection is necessary to ensure financial rewards for authors, and if authors, by virtue of their education and innate abilities, resemble other people who reap generous financial rewards, then authors must deserve copyright protection.

Although only participants in the creative industries have a direct financial stake in expanded copyright protection, a much broader and more influential group has reason to support legal rules that reinforce the premise that rewards in a market system mirror intelligence, education, and effort. Not only does such a premise increase self-esteem among the wealthy and powerful; it also increases public acceptance of disparities in wealth and power.²³² Copyright lawyers understandably have seized upon rhetoric emphasizing the talents and efforts of authors; that rhetoric has been successful not only in the legislative process but in court as well.

But the notion that market rewards are deserved — and, consequently, that authors deserve compensation commensurate with their talents — rests on a faulty foundation. In a market economy, the principal importance of high compensation is as a signal designed to affect future behavior, not as a reward for past achievement.²³³ Lawyers do not deserve high incomes as a reward for their many years of training; instead, high incomes — reflecting the value clients attach to legal advice — serve to induce able people to invest years of their life in legal training. Changes in market demand for legal services — like those that accompanied the recession in the early 1990s — may alter significantly lawyer compensation. Lawyers graduating before and after the decline in market demand invested the same time and energy in legal training; the disparity in compensation was not “deserved,” but the drop in compensation

232. See HAYEK, *supra* note 182, at 74.

233. In Hayek's words,

the importance for the functioning of the market order of particular prices or wages, and therefore of the incomes of the different groups and individuals, is not due chiefly to the effects of the prices on all of those who receive them, but to the effects of the prices on those for whom they act as signals to change the direction of their efforts.

Id. at 71.

was important as a signal to recent college graduates deciding whether to pursue law as a career. Hayek put it well:

The remunerations which the market determines are, as it were, not functionally related with what people *have* done, but only with what they *ought* to do. They are incentives which as a rule guide people to success, but will produce a viable order only because they often disappoint the expectations they have caused when relevant circumstances have unexpectedly changed The element of luck is as inseparable from the operation of the market as the element of skill.²³⁴

Whatever its ultimate truth value, widespread acceptance of the proposition that market participants deserve their rewards may generate advantages for society — in particular, it may induce people to work harder.²³⁵ Indeed, copyright protection in some form may be important as an incentive to creative activity. But it is as unrealistic to assume that any of the recent expansions in copyright protection will reinforce the general premise that financial rewards in our society are deserved as it is to assume that those same expansions directly will induce more creative activity. Nevertheless, the rhetoric persists and, apparently, persuades.

234. *Id.* at 116-17.

235. *See id.* at 74.