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Jason M. Wiener

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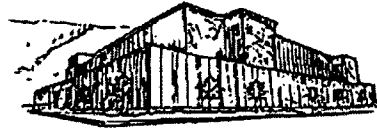
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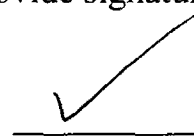
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CONDITIONS FOR THE JUSTIFIABILITY OF COPYRIGHT
AS PROPERTY IN NOVEL EXPRESSIONS

by

Jason M. Wiener

B.A. Wabash College, Indiana. 1998

presented in partial fulfillment of the requirements

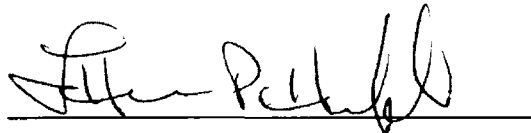
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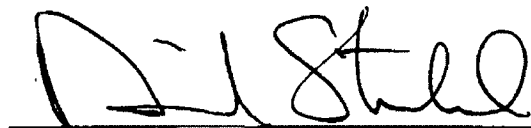
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Conditions for the Justifiability of Copyright in Novel Expressions

Chairperson: Tom Huff



Copyright is a form of intellectual property, which is a form of property generally. The normative justification for copyright must be considered, therefore, against the background of the general justification for property. Lawrence Becker, in his book *Property Rights: Philosophic Foundations*, outlines arguments from three types of general justifications for property rights - utility, labor and political liberty - and then a number of arguments for these rights. This paper, drawing on the lines of reasoning established by Becker, seeks to test the existing justifications for copyright against justifications for property generally in order to establish the basis for and scope of property rights in novel expressions.

While it is feasible to justify some form of copyright that conforms to each of the lines of justification considered, United States copyright fails with respect to each because of its broad scope and lengthy duration. Under the utilitarian justification, copyright is offered in exchange for a more robust creative sphere; instead, it has resulted in artificial scarcity because of its pernicious effects on the structure of cultural production. Under the labor-desert justification, copyright is sometimes a fitting benefit for the value created by labor expended generating novel expressions but United States copyright fails to conform to the proportionality and appropriateness criteria that are elements of the labor-desert justification. Under the political liberty justification, copyright is understood as derivative of an existing system of political liberty to which its enforcement must not be hostile; given changes in the technology of cultural production, the enforcement of United States copyright requires abridging political liberties constitutive of copyright. Bringing existing copyright law into compliance with sound and valid justifications for property rights generally will require reducing copyright's duration, narrowing its scope, and broadening compulsory licensing provisions that uncouple compensation from control.

Once I've made the music then it tends to disappear. It sort of stands up and starts to walk away from you by itself and has its own sort of life because when it starts to become important to other people, have significance to other people - and they all give it their own significances, they all give it their own realities - then at that point, to a certain extent, it becomes theirs and not yours.

- Mark Knopfler

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Introduction

Copyright is a form of intellectual property, which, in turn, is a form of property generally. The normative justification for copyright must be considered, therefore, against the background of the general justification for property. These general justifications for property are not settled but have been established along several lines of reasoning drawn from the history of philosophy.

Lawrence Becker, in his book *Property Rights: Philosophic Foundations*, gathered the best among these arguments and collated them into a statement of the plurality of sometimes conflicting and sometimes cohering justifications for property. He outlines arguments from three types of general justifications for property rights – labor, utility and political liberty – and then a number of arguments for these rights. Becker's intent is to carefully consider general justifications for and arguments against property rights, largely leaving open specific questions about the sorts of rights that ought to be allowed, the scope of those rights and what sort of entities ought to bear property rights with respect to what kinds of property.

This paper, drawing on the lines of reasoning established by Becker, seeks to test the existing justifications for copyright against justifications for property generally in order to establish the basis for and scope of property rights in novel expressions.

I. Copyright Distinguished from other Forms of Intellectual Property

Copyright is the right to copy – or to prevent copying. Copyright operates by granting a limited monopoly over sale and publication of novel expressions to a creator or her assignees. Copyright, however is just one form of intellectual property and needs to be distinguished from several others.

The most similar of these other forms of intellectual property is the patent. Patents are intellectual property in inventions; they grant inventors exclusive control over an

invention for a limited term; in the United States, the maximum life of an unrenewed patent is twenty years. However, patents differ significantly from copyright because patents cover the ideas embodied in an invention, while copyright purports to cover only the expression itself.

Trademarks and service marks are other forms of intellectual property sometimes confused with copyright. Trademarks are symbols or stylized texts used to identify a product by its brand name; service marks cover services rather than products. Each lasts for a limited term but may be renewed as long as the mark meets the criteria for registration. Trade secrets are a final form of intellectual property, covering nonpublic information integral to a business. Trade secrets are not registered and are covered by state law to varying degrees rather than by a uniform federal law.

Each of these forms of intellectual property has a purported rationale. For trademarks and service marks, the rationale is consumer protection; when someone purchases a product with a recognizable brand name, he or she can be sure that the product is the same as others labeled under the same mark. This rationale is fairly distinct from the rationale for copyright. Patents, though, are justified under a rationale analogous to copyrights; in fact, the authority for the United States Congress to grant patents and copyrights is granted in the same clause of the Constitution: Article I, Section 8, Clause 8.

The basic rationale for patents and copyrights is that insufficient incentive exists for invention and expression without the assignment of a property right in the results of the productive process. The insufficiency of the incentive results from the non-rivalrous nature of ideas and expressions, the items that can be classified as intellectual property. In contrast, traditional property rights cover rivalrous goods, goods that cannot be used by two people simultaneously without one use diminishing another. For example, in order to use a lawnmower, I need exclusive possession of it; anyone who attempts to use the lawnmower at the same time is a rival for disposition of the lawnmower. This characteristic of tangible

property, rivalrousness, lends itself much more agreeably to the notion that, in order for any person to use something, only one person can use it.

Non-rivalrous goods, on the other hand, have a natural status as something that can be acquired and used by many people without being possessed or consumed by any one of them. Because non-rivalrous goods can be proliferated without diminishing the potential for use by the proliferator, non-rivalrous goods are not subject to natural scarcity. Therefore, in the words of Thomas Jefferson, once an idea is released to the public “it forces itself into the possession of everyone, and the receiver cannot dispose himself of it.”¹ Because of this, the justification goes, the creator of a novel expression or the inventor of a new device cannot expect robust compensation for generating novelty; once an idea or expression is first divulged, there is no need for any user to return to the source to get use of it. Therefore insufficient incentive to undertake the process of innovation exists in the absence of control over the proliferation of ideas and expressions once divulged.

Copyright and patents are intended as a remedy for this. Their respective operations, however, differ with respect to scope and duration in significant ways. Patents are broad and exhaustive, covering the ideas used in some device or process; their term is sharply limited, currently to a maximum of twenty years. Copyright is intended to be narrower, protecting only novel expressions while allowing the underlying ideas to proliferate freely; the term of copyright, however, is much longer than patents, currently lasting the lifetime of the author plus seventy years or ninety-five years from publication in the case of a corporate copyright. The scope and duration of patents present interesting questions, some along the same lines of analysis as those raised by copyright, however this essay, now that copyright has been clearly distinguished from patents, will set aside patents and focus exclusively on copyrights.

¹ Thomas Jefferson to Isaac McPherson, Monticello, August 13, 1813 in *The Writings of Thomas Jefferson*, 13:326-38, quoted in Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2003), 23.

II. The Idea-Expression Dichotomy

The differential protections afforded by patents and copyright rely on a distinction between ideas and expressions. This notion of a dichotomy between ideas and expressions is fundamental to copyright law, which does not mean it is not problematic. Paul Goldstein, in *Copyright's Highway*, describes the idea-expression dichotomy as a safety valve embedded in copyright that protects “the taproot of all creativity” for “were one to protect plots with copyright, that would effectively stop almost everyone from writing novels or making movies.”² Goldstein is highlighting the fact that creativity requires raw material for its composition and pointing to the idea-expression dichotomy as preserving a healthy commons of ideas while allowing private control of particular expressions.

A concrete illustration of the idea-expression dichotomy in action will both demonstrate its practical utility while opening the increasingly difficult problem of its application. James Joyce borrowed freely from *The Odyssey* while writing *Ulysses* but the works have a different status under copyright law. *The Odyssey* (though not any recent translation of it) is part of the public domain and may serve as raw material for any sort of expression. *Ulysses*, in contrast, is protected by a copyright held and vigorously enforced by James Joyce's estate. American filmmakers Joel and Ethan Coen also extensively borrowed from *The Odyssey* to craft the plot for the film *O Brother, Where Art Thou?* and James Joyce's estate had no claim for infringement of the copyright on *Ulysses* because the ideas and the expression of *The Odyssey* received no protection when Joyce drew upon them. But both the Joyce estate and the Coen brothers would have a claim for infringement on anyone who used elements from those expressions in some other work. Oliver Wendell Holmes tried to capture the essence of the expression half of the idea-expression dichotomy as follows:

² Goldstein, Paul, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford, CA: Stanford University Press, 2003), 14.

The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright.³

While this distinction between ideas and expressions is useful in understanding the operation of copyright law, it is not particularly sound. Derivative works illustrate the issue. Both *Ulysses* and *O Brother, Where Art Thou* are derivatives of *The Odyssey* but, since *The Odyssey* is in the public domain, neither derivative presents a question for copyright. If, however, someone were to make a movie based on *Ulysses*, that movie would be an infringement on the copyright held by James Joyce's estate. Clearly, the claim of infringement upon the protected expression would be reasonable to the extent that dialogue or some other specific arrangement of words was taken from the novel.

But a movie that set the book in a different city but structured a similar plot with similar characters would also be an infringement, even if nothing of the expression of the book was expressly cribbed. In fact, the current test for infringement by a derivative work, established in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,⁴ is an amorphous "total concept and feel" standard that clearly covers more than the expression strictly construed. The treatment of derivative works attempts to preserve the economic use of an expression from one medium in other mediums but, in the process, blurs the distinction between expressions and ideas by providing protection to some ideas, albeit those closely related to an identifiable expression.

The idea-expression dichotomy is a fundamental element of copyright law but, as is apparent, it is not completely unproblematic. Copyright purports to protect the public interest in free circulation of ideas while offering a moral basis for establishing property in

³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 250 (1903)

⁴ *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (1977)

the public resources relied upon by creators as their raw material, but it is based upon a distinction that is not strictly respected in practice. As a key to the operation of copyright, the distinction between ideas and expressions is something to which this essay will repeatedly return. Though the idea-expression dichotomy is a critical element of understanding copyright, the history of copyright encompasses much more than merely the idea-expression dichotomy.

III. A Brief History of the Development of Copyright Under United States Law

United States copyright law descends from the Statute of Anne, enacted in England in 1709. The Statute of Anne is often credited as the first copyright law, however the roots of copyright in England extend considerably further back in time than the statute's implementation. Members of the book trade first developed the concept of copyright as a method of protecting their interest as publishers' in preventing the piracy of printed materials, doing so during the years preceding the trade's 1557 charter of incorporation, which created the Stationers' Company.⁵ Complicity in the censorship exercised by the Crown during the 16th and 17th centuries permitted the stationers to develop copyright without interference from interests outside the trade. Therefore, copyright originated not as a property right for authors, as it is currently conceived, but for the publishers who created the rules. The Statute of Anne, which established the first statutory copyright, developed out of a desire to control the bookselling industry. Specifically, the monopoly exercised by the booksellers had become increasingly unpopular, and Parliament sought to break it.

In the Statute of Anne, passed in 1709, Parliament provided a statutory copyright based upon the stationers' copyright, with two major changes. First, the term of copyright was limited to twenty-one years for new works and twenty-one years from the passage of the

⁵ Patterson, Lyman Ray. *Copyright in Historical Perspective*. Nashville: Vanderbilt University Press, 1968, 4.

statute for works already covered by a copyright; second, copyrights no longer needed to be held by members of the Stationers' Company.⁶ Instantiating the existing stationers' copyrights in a statute served to reduce the scope of copyright because all the works covered by the existing company copyright would become part of the public domain once the twenty-one year period expired. The limitation of the term of copyright was a move to reduce the power of publishers, whose perpetual ownership of copyrights was an irritant to the British public.⁷ Further, allowing anyone to register a copyright meant that piracy prevention moved from being a private sanction of the Stationers' Company to a public function, which essentially opened bookselling to anyone with material to publish and the means to do so. By limiting the term of copyright and breaking the booksellers' monopoly, the Statute of Anne demonstrated Parliament's intent to foster greater dissemination of ideas rather than ensure control over expression on behalf of copyright holders. This logic of promoting novel expression, rather than the notion of protecting author's rights, served as the basis for Anglo-American copyright at its inception.

Copyright was an uncontroversial element of the US Constitution which, in Article I, Section viii, Clause 8, grants Congress the power "to 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." The wording of the clause demonstrates the instrumental nature of copyright, by subsuming the actual power exercised by Congress - "securing exclusive rights" - under the direction of a specific end - "promotion of learning" - and by limiting the method - "a grant of exclusivity" - to a limited term.

United States copyright law developed through a series of statutes beginning with the Copyright Act of 1790, which provided protection for "maps, charts and books" and under which a copyright could be obtained for a term of fourteen years, renewable for another

⁶ Ibid., 143.

⁷ Ibid., 146.

fourteen by the author or his “executors, administrators or assigns.”⁸ The first major revision of copyright law occurred in 1831 when protection was extended to musical compositions, the term of copyright was lengthened to twenty-eight years renewable for fourteen and a living widow or child was permitted to renew the term.⁹ Throughout the remainder of the 19th century, copyright was defined mostly by the courts rather than the legislature. Further legislative action occurred in 1870 when the class of derivative works was created to broaden the scope of copyright protection in order to prevent the translation of novels without a grant of copyright from the author. 1909 witnessed a major revision of copyright law and introduced a longer term for copyright – now twenty-eight years renewable for twenty-eight more – as well as a broader scope. The 1909 bill broadened the scope of copyright by including mechanical reproductions of music and introducing the “work for hire” doctrine, which allows corporations to claim authorship of works produced under contract.

Copyright existed in uneasy balance with rapidly evolving technology for producing and distributing novel expression until a full-fledged rewrite of copyright came about in 1976. The current regime of copyright enshrined in United States law basically results from the 1976 Copyright Act and two pieces of legislation from 1998, the Sonny Bono Copyright Term Extension Act and the Digital Millennium Copyright Act.

Several significant changes made to the law made by the 1976 Copyright Act bear on the normative basis for copyright. First, statutory copyright after 1976 no longer relies on publication or restoration for the acquisition of a copyright; copyright is automatic when a work is “fixed in a tangible medium of expression.”¹⁰ With this, copyright became a right of the creator by virtue of the creative process rather than a privilege of monopoly granted when

⁸ 1 Stat. 124, quoted Patterson, *Copyright in Historical Perspective*, 197.

⁹ Patterson, *Copyright in Historical Perspective*, 201.

¹⁰ 17 USC 102.

a creator releases a work to the public as an incentive for that release, undermining the original intent of copyright and its Constitutional basis. The Act also grants a long list of exclusive controls to the owner of a copyright in 17 USC 106, which include all rights of publication, derivation, presentation, display and transmission. Finally, and most tellingly, the duration of copyright was extended to the life of the author plus fifty years or seventy-five years from publication for a corporate copyright. Essentially, copyright after the 1976 Act became primarily a means to compensate a creator and her heirs rather than a mechanism for granting the public access to new work.

Nonetheless, there are concessions in the US Code to the original conception of copyright as a publicly granted privilege. 17 USC 102b asserts, "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." This clause is a nod to the idea/expression dichotomy but the "total concept and feel" test of Krofft, which undermined the distinction, came just a year after the 1976 Copyright Act was passed. Similarly, 17 USC 107 allows fair use exemptions to copyright; these exceptions are designed to prevent the use of copyright as a regime for control by carving out exceptions for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." The fair use exemption does serve the Constitutional directive to promote learning by carving out specific exceptions for teaching, scholarship and research. This exception is a narrow construal of learning and the useful arts, however, and, as an element of the complete regime of copyright, serves more to restrict the scope of material available for recombination by future creators than fostering that creation.

In 1998, legislation promoted by industries that rely on copyright for their business model further broadened the scope and lengthened the duration of copyright, in abrogation of its original purpose of promoting expression. The first of these, the 1998 Copyright Term

Extension Act, extended the term of all new and existing copyrights by twenty years, prompted by, depending on who you ask, the EU's directive to members to establish a copyright lasting the life of the author plus seventy years or the pending 2003 expiration of Disney's copyright on Mickey Mouse. Either way, it is difficult to see how Congress's action does anything to promote learning or stimulate creativity. Rather, the CTEA's effect was to ensure continued compensation to holders of copyrights on already existing works. This move comes at the expense of works that might use existing expressions in order to construct new expressions.

The second significant piece of 1998 legislation related to copyright was the Digital Millennium Copyright Act, designed by current copyright holders to strengthen their ability to use technology to prevent violations of copyright. On this score, the most significant portion of the DMCA is the prohibition, in Section 103, of any attempt to circumvent electronic content controls. This prohibition makes copyright enforcement the domain of content companies by permitting content control at the source and deferring to that control as a rule. The DMCA also creates a "safe harbor" for Internet Service Providers in Section 201, a provision that effectively means that copyright holders can bully ISPs into removing content by issuing letters threatening lawsuits. The DMCA orders ISPs to comply with the demands of copyright holders, including removing content and providing the names of copyright infringers when subpoenaed by copyright holders. Furthermore, the DMCA abrogates any responsibility of the ISP to those whose content may be removed at the behest of copyright holders by absolving the ISP of any liability for removing content regardless of the content's actual status. In effect, Sections 103 and 201 give copyright holders the power to enforce copyright privately with secondary recourse to criminal procedures for anyone who attempts to circumvent the privately installed and enforced controls.

The legislative development of United States copyright law over the previous thirty years exemplifies the continually increasing scope and duration of copyright that has

characterized copyright's history since its modern beginning in the Statute of Anne. Contemporary copyright law, the end result of a legislative process captured by copyright holders, describes the copyright with which the logic of property rights in general must be squared.

IV. Goals and Methodology

The philosophical inquiries that make up the rest of this paper take up this task, attempting to square the normative justification implied by the institutionalized political morality of copyright with the normative justification for property generally. In doing so, Becker's lines of justification for property rights will serve as starting points for forays into the specific area of copyright. The investigation will begin by considering the soundness of the utilitarian justification of copyright then proceed to the justifications from labor and political liberty. Considering the coherence among and conflicts between the different lines of justification will lead to a conclusion about the scope and duration of copyright justified as a form of property.

The Utilitarian Justification of Copyright

Although it is only one among several lines of justification for property rights, utilitarian logic was originally the motivating principle behind United States copyright law, which provides a good reason to begin an analysis of the justification for copyright specifically with this line of the general justification for property.

Lawrence Becker, in *Property Rights: Philosophic Foundations*, makes the utilitarian argument for property rights generally. His argument for the utility of property rights is that one of those institutions that is required to facilitate human happiness serves a human need to acquire, use, possess and consume things and that this need can only be ordered under a system of property rights. If this claim about human personality holds, it raises the issue of what types of things should be allowed as property and what the nature of property rights ought to be, both issues that are important to the question of copyright.

An application of Becker's general justification of property to the case of copyright specifically would involve asserting that people who create novel expressions need an exclusive right to prevent others from copying those expressions in order to develop a reasonable expectation of satisfaction from undertaking the activity in the first instance. This premise is analogous to the claim that, in the absence of copyright, creators will lack the incentive to produce novelty because those expressions will not be as likely to garner financial compensation. There are two suppositions of this analogous claim regarding copyright – the presumptive scarcity of expression in the absence of guarantees of exclusivity and the efficacy of copyright as method for alleviating that scarcity – that will be problematized during the application of Becker's general justification of property rights to the specific case of copyright.

I. The Application of Becker's General Argument to the Specific Case of Copyright

Becker's argument from utility for the general justification of property rights (57-58) begins with the assertion (a) that institutions are needed for a reasonable degree of happiness to result from individuals joined in society, and, further, (b) some institutions are not merely convenient or efficient but necessary to foster a reasonable degree of happiness. From this assertion follows the requirement (c) that necessary institutions be specifically identified based on the requirements of the society in question and (d) the character of the institutions be defined according to the demands of utility.¹¹ In Becker's view, these premises are shared between a general justification of property rights and the specific justification of any particular system of property rights.

The general argument next relies on the claim (e) that "people need individually to acquire, possess, use and consume some things in order to achieve (the means to) a reasonable degree of happiness."¹² The corollary for the case of copyright would be that people who create novel expressions, in order to develop the expectation of adequate compensation for undertaking creative activities, need an exclusive right to prevent others from copying those expressions. The chief incongruity between the general justification for copyright and its specific application to copyright is the entity toward which the rights are directed. In the case of tangible property, property rights are directed with respect to the objects in possession; however, in the case of intellectual property, the rights are directed against the actions of other individuals. Though both the general and specific cases express the preservation of some zone of exclusion, copyright's zone of exclusion extends into the prerogatives of other actors, even when their actions do not diminish the acquisition,

¹¹ Becker, Lawrence. *Property Rights: Philosophic Foundations*. (London: Routledge & Kegan Paul Ltd., 1977), 57-58.

¹² *Ibid.*, 58.

possession, use and consumption of the copyright holder in the same way that seizure of tangible property would.

The reason for this dissimilarity is the non-rivalrous status of intellectual property, its natural status as something that can be acquired and used by many people without being possessed or consumed by any one of the users. If the general justification for property relies on the premise that “people need individually to acquire, possess, use and consume some things in order to achieve (the means to) a reasonable degree of happiness”,¹³ and the types of things covered by the property right can be acquired and used without diminishing the possession and consumption of others, the utilitarian justification of property rights does not require an exclusive right to copy in order to satisfy those who possess but did not create the expression.

This seems appropriate since copyright is designed to offer a means to increase the benefit for creators of novel expressions, although it must be kept in mind that this interest is instrumental and subordinate to the ultimate end of satisfying the public desire for an abundance of novel expression, i.e. overall utility. Still, for the creator of a novel expression, it might easily be the case that excluding others from the use of that expression is something needed or persistently wanted as a prerequisite to undertaking the activity. For instance, diary entries are expressions that may benefit a creator only as something from which others are excluded. This example clearly points to the way in which exclusivity in a novel expression can be maintained, which is to not release the expression to a public that may proliferate the idea.

Copyright enters as an effective force only after publication, really making the claim that a copyright holder ought to have the ability to exclude others from acquisition and use that, once an expression was published, would otherwise be possible without the copyright holder’s consent. The exclusivity enforced by copyright does not directly benefit the creator

¹³ Ibid., 58.

but enhances the possibility that sales of the expression could. Because of this, copyright's exclusivity does not secure exclusivity in possession and use as an end but as a means to financial compensation for cultural production. In doing so, copyright creates the expectation of compensation for novel expression. While this does not justify the expectation of compensation, it does further open the question of what justifies a copyright in novel expressions.

The status of intellectual property as a nonrivalrous good means that exclusivity in its possession and use is not required in order to prevent exhaustion of the good; any person can use the expression protected by copyright without diminishing any other person's use of it. Copyright carves out an exception to this situation in order that creators may restrict proliferation of an already published expression to those who pay for it and thereby creators can use cultural production to generate benefits. This argument holds well enough to continue applying Becker's logic, however, it should be noted that the presumption of scarcity in cultural production is never established by the premise; the only thing established is that copyright may serve as a means to satisfy cultural producers because it increases their likely returns from the activity. The presumption of scarcity is essential to staking out this position, but it is not self-evident.

Becker's general argument for property rights asserts that (f) security in possession is impossible without restraint and (g) insecurity in possession is an insurmountable barrier to satisfaction; therefore, Becker concludes that (h) some property rights in some things are justified.¹⁴ With respect to the specific case of copyright, the argument requires a final premise that denying creators the control over novel expressions that creators need or persistently want is unjustifiable in so far as that control is perceived as a necessary means to satisfaction. This premise essentially asserts that copyright will serve as a corrective mechanism for presumably inefficient markets in cultural production because inefficient

¹⁴ Ibid., 58.

markets will negate the possibility that generating novel expression can be a means to satisfaction for creators. The argument asserts that the exclusivity offered by copyright will restore efficiency to those markets, raising the benefit from generating novelty to the creator who undertook the activity. This line of reasoning may hold, with the resulting conclusion that copyright is justified, but a caveat that sufficient countervailing concerns may negate or modify the rights established is still required.

The final premise opens the expectations of creators for examination because, by asserting that insecurity in possession is an insurmountable barrier to satisfaction, it uses those expectations as an indication of the unjustifiability of denying them. To a large extent, however, the expectations that serve as the basis for a justification of copyright must be based upon the existing regime of copyright; it is hard not to think that, in the absence of copyright or even in a regime of shorter duration and narrower scope, the expectations of creators would not be different. There is something problematic about developing a justification after the fact based on expectations set up by the fact.

But, it is clearly true that there is an expectation from contemporary cultural producers that they will have exclusive control over the proliferation of their expressions even after those expressions have been published. This expectation of control, rooted in the current existence of copyright law, is the basis for the often repeated claim that, in the absence of the control, an insufficient amount of novel expression will be generated. There is a profound circularity at work in the logic justifying copyright because the expectation of compensation is based on a copyright established in the name of remediating a scarcity which is presumed because of the logic of copyright and, to the extent that it exists, might be a product of copyright itself.

Elucidating and applying Becker's general argument to the specific case of copyright has raised issues that require further investigation. Specifically, the presumption of scarcity in novel expressions needs to be considered to determine how much of the presumption

results from a circular reliance on the expectations created after the fact by the existence of copyright. Further, the efficacy of copyright as a method for alleviating scarcity, whether the presumption of scarcity is valid or not, cannot be taken for granted.

II. The Presumption of Scarcity

The claim that insufficient incentive for creativity exists without copyright relies on an economic phenomenon called market failure. Market failure, according to economists, occurs when the private benefits and costs of an action differ from the social benefits and costs of the action. The result may be too much or too little of the action. In the case of copyright, market failure analysis generates the claim that the social benefit of novel expression exceeds the private benefit a creator can expect in the absence of copyright. Because the social benefit of novel expression exceeds the social cost while the private benefit may not exceed the private cost, a less than optimal amount of novel expression will be produced. Copyright becomes a mechanism for aligning the private net benefit of novel expression with the social net benefit of novel expression; it becomes a method for enclosing externalities.

Externalities occur when social wealth is affected outside of direct productive processes, meaning that overall welfare is increased or diminished but in a manner such that the immediate producer does not exclusively enjoy the benefit or suffer the costs. In the case of cultural production, externalities arise because the novel expression of an idea creates benefits that are likely to proliferate and redound to more people than participated in the generation of the expression. Such externalities, in which the social benefit exceeds the private benefit, are called positive externalities. Copyright becomes a legal mechanism for a creator to recapture some economic value generated external to her production by insisting that those who wish to have access to a novel expression gain access from the initial expresser (or her assignees) rather than the immediate proliferator of the expression.

Copyright not only exists because of the likelihood of externalities but operates by enclosing them; therefore copyright relies on externalities for both its justification and value. But what is an externality? A positive externality is a manifestation of raw material that is not consumed in the productive process but increases in value as it proliferates and is held in common. Because of this, the more some expression is held in common, the greater the value of the exception to its commonality carved out by copyright. Thus the value of a copyright is not increased by its scarcity, unless the specific embodiment of the good has some value by virtue of its rarity (as in a first edition or painting), but rather the most valuable copyrights are those that govern something that all wish to access.

But the source of the value of the positive externality in the first instance is that the abundance of novel expressions that is supposed to result from a regime of copyright will be free to be taken up and used as raw material by other creators. To the extent that the scope and duration of copyright makes this impossible by virtue of the control it exercises, the value of the externality copyright seeks to capture is diminished. This understanding of the nature of an externality acknowledges the disutility of copyright for the society that grants it. And it expresses the tacit balance that has undergirded debate surrounding copyright since its inception: granting control to copyright holders means extracting freedom from those subject to copyright's control. Still, acknowledging the beneficial nature of positive externalities and the problematic posed by their enclosure does not answer the question of whether expression will be scarce in the absence of enclosure.

The presumptive scarcity of novel expressions at the base of economic analysis of copyright is that cultural goods face a positive externality problem because novel expressions will be produced in insufficient quantities in the absence of some mechanism to ensure compensation for creators. Traditional economists think about the net benefit of copyright in terms of an allocation of the benefits of novel expression between the producer and the consuming public. Even the most favorable treatments of copyright concede that it is

possible for copyright to be too expansive, resulting in the elimination of social benefit as all derivative uses of copyrighted material are enclosed by copyright holders and the possibility of effectively building on existing creative material without assigning any economic benefit to existing copyright holders disappears. Further, copyright has the potential for harm to copyright holders, who may benefit from unauthorized copying.¹⁵

But economic theory has only so much to say about the magnitude of the benefits and costs of copyright. Too much depends on the ends sought by copyright – social welfare, complete compensation of producers, encouragement of further novelty – and the specific scope and duration of the rights assigned. The complete absence of copyright suggests that producers will be undercompensated while a perpetual and thoroughgoing copyright that leaves no derivative uses open will certainly deprive society of any benefit. Through it all, the presumption of scarcity on which the analysis relies remains an *a priori* assumption.

Historical evidence to contradict the presumption of scarcity is abundant. For instance, statutory copyright only came into existence in the early 18th century though it existed as a collusive business practice among publishers in England as early as the 16th century. Certainly, there is historical evidence to suggest that novel expressions existed, in abundance at times, before there was ever a method such as copyright to secure economic benefits for creators. Also certain is the fact that the growth of the internet in recent years indicates a strong willingness by individuals to invest large amounts of time in producing materials that are functionally bereft of protection from uncompensated appropriation once published to the network. What then is the basis for the presumption of scarcity that underlies the justification for copyright?

¹⁵ Watt, Richard. *Copyright and Economic Theory: Friends or Foes?* (Northampton, MA: Edward Elgar Publishing, Inc., 2000), 201.

III. The Romantic Author & The System of Creativity

James Boyle charges that the presumption of an inefficient market for cultural goods results from a romantic notion of authorship underlying the current discussion of many issues related to property rights in information, including copyright. The romantic author, he says, is “defined not by the mastery of a prior set of rules, but instead by the transformation of genre, the revision of form.”¹⁶ The romantic author is the portal of imagination, a rare and ephemeral gateway for inspiration; the basis in fact for this notion of creativity is unclear to put it charitably, but it persists in the discourse surrounding copyright with the result that the labor of the author is privileged over the other elements of a system of creativity. By privileging the labor of the author over other elements of creativity, the romantic view of authorship exaggerates the private costs of creativity, raising the threshold at which a creator will begin seeking to express novelty. By making creativity seem unlikely to appear without copyright, the *a priori* presumption of an inefficient market for cultural goods in the absence of copyright prejudices the analysis of the proper scope and duration of copyright needed to incentivize cultural production.

The romantic view of authorship is neither the only nor the most rigorously constructed view on the subject. Psychologist Mihaly Csikszentmihalyi’s 1996 study *Creativity* offers the following conception of creativity: “the interaction of a system composed of three elements: a culture that contains symbolic rules, a person who brings novelty into the subjective domain, and a field of experts who recognize and validate the innovation.”¹⁷ Setting up creativity as a system has two effects that distinguish it from the romantic notion. Creativity as a system relies on a culture with existing symbols and rules governing those symbols. The individual actor in the system of creativity presupposes the creative output of

¹⁶ Boyle, James. *Shamans, Software, Spleens: Law and the Construction of the Information Society*. (Cambridge, MA: Harvard University Press, 1996), 54.

¹⁷ Csikszentmihalyi, Mihaly. *Creativity*. (New York: HarperCollins Publishers, 1996), 6.

other people and creative activity takes place in the context of already existing symbols. The individual enters the system as a locus of combinatory activity rather than a gateway to some space of imagination to which the creator has privileged access. Further, calling creative only output certified by a field of experts admits that novelty is not sufficient for creativity. Being recognized as creative means that some novelty has become part of the domain of symbolic rules that constitute the raw material of other creators. The creative individual is a necessary condition for novelty but is not a sufficient condition for the system of creativity.

While the systematicity of creativity is tacitly acknowledged by the logic that makes novelty laudable, copyright primarily relies on the portrait of the author as a transformative and radically novel figure; this emphasis on the author at the expense of the domain and field of creativity “plays down the importance of external sources by emphasizing the unique genius of the author and the originality of the work.”¹⁸ Viewing authors through the lens of romantic authorship emphasizes protecting the integrity of novel expressions because expressions generated under a myth of romantic authorship obscure the crafting and combinatory functions actually undertaken by the author, perhaps to the detriment of those functions.

Relying on a romantic notion of creativity to justify the scarcity of novel expression results in a displacement of concerns for the health of the public domain from which authors must draw raw material. Similarly, the romantic notion of the author undervalues the social benefits of the uptake and modification of the contributions of authors in favor of consideration of incentives for the “private” production of cultural goods by romantic authors. In combination, these two factors lead to a situation in which the focus of copyright is on control for its own sake instead of emphasizing a careful balance between the expectation of compensation by cultural producers and the public need for a robust domain of symbols available to future creators.

¹⁸ Boyle, *Shamans, Software, Spleens*, 114.

But the founding logic of copyright is utilitarian and based primarily on the benefits expected to result from its implementation. The romantic notion of the author, by ignoring the need for a robust public domain from which the raw material of creativity can be drawn, provides support for the presumption of scarcity that drives copyright's justification but invalidates the logic of public benefit that lies at the core of the justification.

IV. The Efficacy of Copyright as a Solution to Scarcity

In addition to altering the perception of the creative process and thus the legitimacy of copyright enclosures, copyright may be generating material conditions that make novel expression scarcer in fact and not just in appearance. As copyright has increased in its scope and duration, particularly during the last one hundred years, it may have discouraged novel expression by encouraging concentration in the structures governing the reproduction and distribution of cultural goods. This possibility brings into question the validity of the second presupposition upon which the utilitarian justification for copyright relies, that the existence of copyright actually generates a greater abundance of cultural production.

Prior to its restraint and subjugation to the public interest in the proliferation of ideas, copyright, after all, began as a collusive business practice among publishers and booksellers in England. Its genesis was a desire to accumulate capital by limiting reproduction and distribution of books to create artificial scarcity in order to keep prices high. Does similar logic show itself in contemporary cultural production? One example that suggests that cultural producers create scarcity through concentrating industrial organization is the filmed entertainment industry, in which copyrighted cultural products serve as collateral for corporate finance and the basis for coercive productive structures.

One case of the capitalization of copyright by a major media corporation was the 1990 deal in which Pathe Communications Corporation bought a 76% stake in MGM/UA for \$1.3 billion. In addition to \$560 million in debt, Pathe financed the deal by dividing and

parceling out property rights established by copyrights in United Artists and MGM/UA films for a variety of markets and modes of distribution,¹⁹ showing how thoroughly divorced from the context of the creative process the rights derived from copyright easily become. Further, the distribution leverage developed using filmed entertainment as capital is often brought to bear on the production of cultural goods themselves. In a recent example, Disney Corporation anticipates using its ownership of the rights to the library of films created during its recently dissolved partnership with Pixar Animation Studios to force Pixar back into a relationship with Disney.²⁰ As a matter of fact, in 1998, movies released by the top seven film distributors accounted for 95 percent of domestic box office earnings.²¹ Without access to distribution, which is dominated by the old movie studios whose privileged position is based on capital accumulated by exploiting copyright, reaching the public with a film is extremely difficult. Without guaranteed distribution, many films will never even be made so, in effect, a very small slice of the business world effectively exercises a preemptive veto over the production of filmed entertainment. The power of their positions is a result of the scope and duration of copyright law because copyright serves as the basis for the capital accumulation that has created the ownership structure in the filmed entertainment industry. Similar concentration of the means of distribution is evident in books and music, creating a privileged position not for the creators on behalf of whom copyright is invoked, but for the controllers of the channels of distribution.

In one sense, the logic of increased compensation leading to increased production seems natural. This occurs because of the blind spot manifested in traditional economic

¹⁹ Bettig, Ronald V. *Copyrighting Culture: The Political Economy of Intellectual Property*. (Boulder, CO: Westview Press, 1996), 53.

²⁰ McCarthy, Michael. "Disney Dangles Film Library Over Mirimax, Pixar" *USA Today*. Aug 10, 2004. Apr 4, 2005. <http://www.usatoday.com/money/companies/earnings/2004-08-10-disney_x.htm>

²¹ "The Motion Picture & Theater Industry Overview" Cushman & Wakefield Valuation Services. Dec 2004. Apr 4, 2005 <<http://valuation.cushwake.com/Documents/20493.pdf>>

analysis with respect to the relative power of actors in the marketplace. Economic analysis too easily grants the notion that competition will characterize interactions in the marketplace, failing to consider the evidence that capital accumulation results in oligopolistic structures that skew bargaining positions, as the evidence from the filmed entertainment industry illustrated. Copyright is a method of accumulating capital in the products of cultural production; this accumulated capital becomes leverage that has been used by copyright holders to secure assets in distribution that privilege their own content and freeze out independent producers of media content. In so far as copyright serves as the engine of accumulation that has led to consolidation in the media industry and to the extent that such consolidation results in homogeneity rather than increasing novelty, the current regime of copyright in the United States serves not to facilitate creation but to stifle it.

The two presuppositions of the utilitarian justification for copyright depend upon one another in ways that are not obvious at first glance. As the case of copyright in filmed entertainment made clear, the commercial structure that results from profits based on copyright can actually make it more difficult for producers of novel expressions to reach the public because the value of copyrighted material has become capital for fueling media consolidation. Far from being the solution (presupposition #2) to an already existing situation of scarcity (presupposition #1), copyright's historical existence, in fact, may perpetuate the scarcity that copyright claims to remedy.

But all creativity is not merely a result of profit-maximization by corporations. There exists a long history of individuals driven by a creative impulse to seek novel expression, often ignoring the potential for personal enrichment. So the consolidation of media and the difficulty that perhaps may arise in distributing novel expressions will not be a discouragement to such personalities. But neither will the absence of a financial motive facilitated by copyright. Granted, copyright results in some measure of creative control and

not merely a financial interest and so the absence of copyright might result in less creativity from those for whom control of their expressions is important.

Copyright, especially under the utilitarian justification, is about money more than anything else. The driving logic is that insufficient novelty will arise from inadequate compensation. Compensation through copyright, at least with the current expansive scope and duration available under the law, has created conditions generally hostile to the hypostasized romantic author. The extent to which such a notion of creativity is valid is doubtful but to the extent that it holds, compensation through copyright need not be the driving influence.

V. The Utility of Copyright

This chapter problematized two presuppositions of the utilitarian justification for copyright law: first, novel expressions will be overly scarce in the absence of the power of creators to exclude others from making copies of those expressions without permission and, second, the establishment of powers of exclusion for creators of novel expressions will result in an abundance of cultural production. The presumption of scarcity relies heavily on a notion of creativity, the romantic author, that is perpetuated by the structure of copyright law, but which downplays importance of access to the domain of raw material for creativity. Further, the establishment of copyright has resulted in the accumulation of capital among major entertainment interests with the result that the field of creativity, by which novelty reaches the public, has been captured by a small group of interests. Both of these conditions belie the logic of copyright law as it was enacted; both, however, serve powerful interests in the industry of cultural production.

What then are the interests of the creative individual? Perhaps in Becker's labor-desert justification for property there is a justification for copyright that matches the intuition that those who generate novelty ought to expect compensation for it.

The Labor-Desert Justification of Copyright

The Anglo-American logic of copyright relies explicitly on utilitarian logic of public benefit, but this is not the only possible justification for copyright. Lawrence Becker establishes a justification for property that combines labor with the concept of desert to make a claim for property rights generally. Becker's labor-desert justification may serve as the basis for a specific justification of copyright, understood as property rights in the expression produced, by relying on the intention of individuals that generate novelty and the requirements of satisfying those intentions.

I. From Labor to Desert

Becker begins developing a general argument for property rights in virtue of labor by relying on John Locke's *Second Treatise on Government*, from which Becker identifies two key contentions: "one is entitled to the whole of the value one's labor adds to things and...one is entitled to the other expected benefits as well."²² Locke's view has been criticized in a number of ways; Becker identifies the key objection as the one opposed to the idea that any ownership of the labor in one's body (which he also problematizes) automatically transfers to ownership in anything that one's labor is mixed with. "Why," he asks by paraphrasing Robert Nozick, "is it that investing one's labor in something causes one to come to own that thing? Why does it not instead just mean that one has lost the investment?"²³ If there is no clear reason to believe the mixing of labor with raw material results in the extension of personality rather than its contraction, the transferability of labor alone does not justify property rights in the thing produced.

Although Becker effectively refutes a property right based on the transferability of ownership in labor to the ownership of labor's products, he allows that there might be a claim

²² Becker, *Property Rights*, 35.

²³ *Ibid.*, 40.

for entitlement to the products of one's labor on the basis that something has been produced and no one besides the laborer deserves the product, and therefore it would be wrong for the laborer not to have a property right in the product. Becker attributes this view to John Stuart Mill and identifies three conditions that support a claim of entitlement: first, the labor must be beyond what is required by morality; second, the labor must produce something which would not have existed except for the labor; third, the product must be something that no one suffers for being excluded from.²⁴ These conditions, when explicated, impose severe restrictions on entitlement to property rights based on labor alone.

Especially onerous is the no-loss requirement of the third condition. If competitive parity is a good with respect to which no one ought to be placed at a disadvantage, using Mill and Locke's labor theory contradicts rather than confirms a justification of private property in the means of production because not owning the means of production in a society where production is required to survive puts workers at a serious disadvantage to owners. Further, if property rights do not merely include liberty rights for the owners of property but also claim rights that require actions on the part of others with respect to property covered by rights, then property that does not extract a loss from those who must respect property rights could be difficult, if not impossible, to discover.

Becker finally eliminates the possibility that labor alone points to a sound justification for property rights in the thing produced. He points out that the form in which the labor theory is acceptable, particularly given the no-loss provision, simply does not conform to the circumstances in which property rights are granted. The fact that property rights in the thing produced are sometimes expected, while at other times not expected, points not to property rights based on the transferability of property in self to property in labor and then property in the thing labored upon. Instead, the variability in the expectation that property rights will be granted as a result of labor expended highlights the idea that laborers deserve some benefit

²⁴ Ibid., 41.

for their labor – whether this is a property right in the thing labored upon or something else.²⁵ This notion of desert, derived from labor theory, may serve as a fundamental principle on the basis of which a general justification of property might be established.

Becker argues that desert is suitable as a fundamental principle upon which to base an argument from labor to property rights because desert itself is constitutive of morality. Every moral system requires assigning praise or blame, an activity that would be meaningless without recourse to an idea that actions or character traits can deserve approbation or reprobation, which means that desert is fit to serve as a fundamental principle.

Relying on Joel Feinberg's analysis of desert, Becker points out that a desert claim must have a basal reason, some activity or character trait in virtue of which a claim can be leveled. Becker asserts that "a person's 'adding value' to the world – in the sense of discovering, inventing or improving something which helps others – can be a basis for a desert claim." Once stipulations are added concerning the morality of the actions by which value is added, Becker "cannot imagine any objection to the assertion that such 'adding of value' *must* be a basis for a desert-claim."²⁶

Thus, Becker begins the general labor-desert justification for property with the premise that "[w]hen it is beyond what morality requires them to do for others, people deserve some benefit for the value their (morally permissible) labor produces, and conversely, they deserve some penalty for the disvalue their labor produces."²⁷ In the specific case of copyright, the principle would be the following: Generating novel expressions is not morally required but does generate value and, therefore, when the generation of novelty is undertaken subject to

²⁵ Ibid., 47.

²⁶ Ibid., 40.

²⁷ Ibid., 53-4.

the constraints of morality, creators deserve a benefit for the value they create; conversely, if creators generate disvalue, they deserve a penalty.

II. Creation of Value as the Basis for Desert

The specific justification of copyright under the labor-desert principle rests primarily on the supposition that generating novel expressions adds value to the world. Is this the case? If it is not, then none of the discussion surrounding copyright would seem to make much sense at all. That the generation of novel expressions is a positive, value-adding activity seems as constitutive of copyright as desert is of morality because copyright is essentially a reward for generating novelty and, if generating novelty is not the type of activity that ought to be rewarded, it seems like the discussion never would have been opened.

There is, of course, an affirmative argument to be made for the importance of generating novelty: novel expressions expose commonly held ideas and symbolic understandings of the world in ways unanticipated by those who currently hold them. Insofar as humans possess the capacity to generate symbolic understandings of the world, recombining those understandings in ways that may promote revisions of a subject's understanding is about as near to declaring a purpose for human life as a humanist is likely to come. In their power to recontextualize human experiences, novel expressions create value by helping others, precisely in the sense that Becker points to in his general principle.

Answering the question of whether value is created affirmatively in the case of novel expressions is even easier than in the case of something tangible and rivalrous because creating a non-rivalrous good does not demand removing any resources from possible use by anyone else. Non-rivalrous goods are not consumed in the creative process, which means no loss is imposed on others. Rather, new symbols are produced, which others are free to use in the absence of any form of control over them.

Of course, copyright seeks to impose just such a regime of control, which could mean that creation under a regime of copyright results in disvalue, which would demand a penalty. But copyright can only generate disvalue when it is controlling something that would otherwise be available, and copyright, by covering only novel expressions, would seem to foreclose only creative possibilities not in existence prior to the generation of novelty that gave rise to the claim of desert in the first instance.

This may sound a bit abstract and tangled; let's slow down and develop this point. Before a novel expression is released to the public, there is no apparent loss from a creator keeping control over the expression. For instance, Charles Darwin waited until decades after his voyage on *HMS Beagle* to publish *On the Origin of Species*, but none of Darwin's contemporaries could perceive him- or herself as worse off for not having access to its insights until after the book had been released. Someone looking back from the present might say "Oh, what a loss that such and such wasn't published during the author's lifetime" but this thinking only demonstrates the retroactive rather than proscriptive manner in which the value of novel expressions is judged. Clearly, one cannot know what one is missing if one never finds out that the thing exists in the first instance; presence must precede absence if absence is to be perceived. So, even though disvalue can be created by excluding people from uses of symbols that would otherwise be permitted in the absence of the control copyright offers, disvalue can only be created if value is first generated by disclosure of novel expression.

Given that both value and disvalue can result from the generation of novelty under a regime of control such as copyright, what can be said about the sources and relative magnitudes of the value and disvalue created? The likelihood of value being created increases as the time an expression has been circulating increases because the value of an expression increases as the expression proliferates and becomes more commonly understood. Disvalue is created when something that would otherwise be available to

potential creators as raw material for their own novelty generation is enclosed by a regime of control instituted in response to a claim of desert. The potential disvalue of restricting the uptake and modification of an expression increases as an expression proliferates because the common understanding developed by that expression is unavailable for use by those who possess it but do not own it.

Consider two contrasting cases. The characters and setting of the Harry Potter books were novel when they emerged. While they relied on many elements of literature that preceded them, such as magic and the English boarding school system, the first book obviously portrayed something very appealing that was previously unavailable. At such a point, the value added to the world by J.K. Rowling's creation was clearly significant and the basis for a claim of desert. There are two ways in which her work's inclusion under a scheme of copyright could be the basis for disvalue. First, a similar storyline – if similar enough – could be the basis for a claim of copyright infringement. Second, further expressions relying on the symbolic vocabulary developed in the Harry Potter stories might be possible and novel in their own right but restricted because of the control over derivatives that is afforded under copyright law. The value of the copyright on a Harry Potter novel amounts to an enclosure of the value of not just words themselves but also the value of the copyright extends to the elements of the story, setting, and characters under the doctrine of derivative works.

Novel expression within a regime of copyright creates value by producing novel expressions based on existing materials. However, to the extent that copyright forecloses use of the expression covered – even as those expressions become part of the language and culture upon which people rely for crafting not just commercial expressions but also private understandings of the world and their place within it – creation with a system of copyright also creates disvalue. Copyright's creation of value is a diachronic phenomenon in which the value created by a novel expression increases, at least initially, as the understanding embodied in the expression proliferates and is held commonly. Similarly, disvalue enters

over time as the restrictions imposed on reembodiment of the understanding conveyed in a novel expression come to have force on the uses to which some novelty may be put. On balance, because the generation of novel expression can only create disvalue subsequent to creating value, the disvalue that accrues cannot exceed the value created. Further, because copyright is designed to control only expression and not ideas (even if it often blurs this distinction in practice), there is certain to be some value created by novel expression not cancelled by the enclosure of expression copyright provides.

While these sources of disvalue are certain not to exceed the value created, and almost certainly will be less than the value created, they do count against the net value that can be ascribed to an act of novelty generation when applying Becker's desert principle. Therefore, even considering the potential disvalue resulting from copyright controls, novel expression under a regime of copyright generates value that may be the basis for a desert claim though that value is less than the whole amount of value created by the novel expression.

Ultimately, generating novel expression is a deserving activity on the basis of value created even under conditions that create disvalue by restricting the uptake and modification of the expression. Establishing the creation of value provides sufficient impetus to move analysis beyond the fundamental principle of desert and into the conditions on benefits awarded imposed by Becker's labor-desert theory. That said, the relationship between the value created by novelty and the disvalue created by its control will remain important in refining the sort of control that copyright ought to offer, particularly with respect to the scope and duration of copyright.

III. Fitness of Copyright as a Deserved Benefit

The next step in Becker's justification of property from labor-desert moves from establishing the claim of desert to ensuring fitness of the benefit deserved: "The benefits

and penalties deserved are those...fitting for the type of labor done" (54). Becker relates the fitness of a benefit for the type of labor expended to the motives of the individual undertaking value-creating labor. Becker determines fitness based on the motives of the laborer in order to avoid collapsing into a utilitarian argument because, if the criterion for fitness is the general cost and benefit of the outcome produced, the fitness test is essentially consequentialist. Fitness under a situation of desert ought to rely on satisfying the deserving actor rather than on a generalized calculus. The fitness condition on deserved benefits under the general labor-desert justification applies to the specific case of copyright as well.

The fitness test of the labor-desert justification requires that the benefit offered by copyright for generating novel expression satisfies the motives for undertaking the generation of novel expressions. More precisely, the question of fitness speaks to the issue of whether property rights in the things produced, basically what copyright provides, are a fitting benefit for generating novel expressions.

Determining the fitness of the benefits offered by copyright based on the motives of people who undertake creative activity opens the complicated question of the motives for generating novel expression. Some creators' motives are financial, others' motives are ideological, and others' motives are deeply personal in that they reference no one aside from the creator herself. To complicate the question, these motives do not exist in isolation from one another nor from the general conditions of creativity in a specific historical setting. Further, the fitting rewards for each will vary. If financial compensation is the motive, money will be benefit enough to satisfy the motive of the creator. On the other hand, ideological novelty seeks a change in the principles by which the viewer lives. No system of laws can accomplish this change, but perhaps something could be done to facilitate the opportunity of an expression to work upon its intended audience. Finally, novelty that results from an individual's desire to understand himself seeks a result that no law can guarantee and perhaps seeks an end that no copyright law could even facilitate. Starting from the motives

numerous. Fortunately, evaluating the specific case of copyright permits using the benefit offered as a starting point, which means the fitness of copyright as a benefit for generating novel expressions can be measured against the motives of creators.

There are two benefits that copyright offers to satisfy a claim of desert based on value created with labor expended: control over the proliferation of an expression and compensation for ceding control. Unlike the utilitarian justification, in which compensation is primary because the purpose of copyright is promoting public disclosure and dissemination, the labor-desert justification emphasizes control over an expression and therefore focuses on satisfying the motives of the creator. Control aims to facilitate the creator's motive, whatever it may be, by placing disposition of a novel expression under the prerogative of the person who created it. Compensation can be facilitated by sale of reproduction rights or copies themselves; proliferation can be facilitated by making reproduction and dispersal of the expression easy. Whatever motive a creator seeks, it can be better facilitated by control over an expression than by the absence of control.

IV. Proportionality of the Benefit from Copyright to the Value Created

Control may be a fitting benefit for creativity, however, copyright must be subject to a proportionality test according to Becker's labor-desert justification, specifically that "the benefits and penalties deserved are those proportional to the values and disvalues produced."²⁸ It is important to note that proportionality ought to be measured relative to the values created rather than the labor expended. Becker explains this by referencing the desert principle, which relies on labor as a necessary but not sufficient condition for desert, i.e. a change in value without labor is not deserving and labor that does not affect value is not deserving.

²⁸ Ibid., 54.

The proportionality requirement raises another tough question with respect to providing property rights as a benefit for the generation of novel expression: What amount of benefit is proportional to the value created by a novel expression? Answering this question requires understanding the value of a novel expression writ large and, further, understanding how much of that value ought to be attributed to the prior symbols required for an expression's formation compared to how much may be attributed to the novelty produced using those symbols.

Csikszentmihalyi's system of creativity offers a framework in which these questions can begin to be made sense of. One of the elements of Csikszentmihalyi's system is the field of creativity, which is composed of experts who validate innovation as creative.²⁹ With respect to some fields, such as science, the experts that compose the field are often a small group of elites, but, with respect to cultural innovations like books, music and films, the field of creativity is considerably more inclusive. While there are some individuals with considerably more power over what is construed as creative, such as owners of distribution networks and critics whose opinions are widely circulated, the basic standard for the success of cultural products is commercial: how many people pay for access to a novel expression is the primary measure of the expression's worth. Also important as a source of value, though used less because it is a less commensurable measure, is the influence some expression has on future expressions: the amount subsequent expression owes to the symbolic language developed in some prior expression is a significant, but tough to quantify, source of value.

Any expression relies on prior expressions for the raw material of whatever novelty it produces. Therefore, the value added by the labor of generating novel expressions must be whatever remainder is produced once the value embodied in the prior expressions is factored out. This operation seems, frankly, just about impossible. Even given fairly precise

²⁹ Csikszentmihalyi, *Creativity*, 6.

distinctions about what is novel and what is prior, ascribing value to these respective pieces would be very complicated. For instance, perhaps the value of the prior expressions themselves is enhanced by their being recast in novel forms. For instance, the short stories of Philip K. Dick have recently enjoyed a resurgence in popularity because they were made into movies. Such recycling of the elements of expressions is very common, particularly in the culture industries that reprocess content through one medium after another. Even when the bearers of copyright and the impact of influences are fairly easy to identify, negotiations over compensation can be incredibly tedious and complicated. Trying to implement a system that would require regular agreement on such value in order to determine the proportionality of benefit to value added would be more likely to frustrate the motives of creators than satisfy them.

A novel expression may create value by combining existing symbols in such a way that people come to understand their life and world in a previously unavailable way, and the field of creativity is the place in which signals about these judgments are generated. This recontextualization of experience by novel expressions seems most likely not long after an expression has been released because understandings opened by new expressions tend to be taken up and subtly incorporated into the culture that shaped the expression. The domain of creativity, another feature of Cziskzentmihayli's system, highlights a different way in which novel expressions can be sources of value. Novel expressions also create value by becoming the raw material for subsequent expressions, adding symbols to the domain of creativity from which generators of novelty draw their symbols. Derivative uses, these uses in which an expression becomes raw material for another expression, seem more likely after some period of time has gone by to allow that material to be taken up into a context that can be recombined for future texts.

The first sense, the sense in which novel expressions add value as expressions qua expressions, seems to most clearly merit a benefit because the person receiving the benefit

is the proximate cause of the generation of the expression adding value. In contrast, someone drawing upon an existing expression uses (without consuming) the value of existing raw material to generate further novelty, which has value both as recontextualizer and text, as both novelty and raw material for future novelty. The difficulty posed by awarding control over expressions as the benefit for adding value is that awarding control over novel expressions greatly diminishes the ability of others to modify and recombine existing material in the service of generating future novelty. This would hardly seem to be a problem if all creativity did not already require existing raw material, held in common.

But since creativity relies on a common domain of symbols that serve as raw material, removing raw material from the common to satisfy the desert claim of one person could eliminate the possibility for future creators to draw upon the common for raw material. It seems to privilege the present over the past and future; it ought to be suspect as an attempt to establish a privileged position on previously level terrain. Because copyright can be so damaging to the interests of those who are potential generators of novelty, the benefit offered by copyright could easily exceed its proportionality to the value created.

V. Appropriateness of Copyright as a Benefit for Value Created

Becker introduces a hierarchy of appropriateness to highlight instances in which control taking the form of a property right in the thing produced is not always the most appropriate manner in which to award a benefit. Becker's hierarchy of appropriateness for benefits in response to desert takes the following shape: If nothing but property rights in the things produced will do (subject to fitness and proportionality tests), property rights are deserved; if a substitute for the thing produced can be considered fitting and proportional, the substitute or the original is deserved; if property rights are not either fitting or proportional or if the benefits of the rights exceed the value produced by the labor, property

rights are not deserved.³⁰ The implication of the hierarchy for copyright is that copyright, taking the shape of exclusive control over an expression even after the expression has begun to proliferate, is only a fitting benefit for generating novelty if nothing else will do. Remember that the criterion for whether exclusive control over a novel expression will do is the intention of the creator for creating in the first instance. For some motives, control over the thing produced seems to be all that will do; in other cases, a substitute may be acceptable. For instance, if the motive for generating novelty is financial, substitutes for control are certainly available.

Compulsory licenses are an example of a structure within copyright law that awards financial compensation without guaranteeing exclusivity. Compulsory licenses allow anyone “upon paying a statutorily fixed fee, [to] use an author’s work without even contacting him.”³¹ Compulsory licenses effectively uncouple financial compensation from exclusive control by allowing all uses and apportioning compensation based on use. Such a scheme would seem to be preferable in many ways to exclusivity over expressions because it would immediately open up the possibility of transformation while ensuring that some compensation would flow to creators.

But it is not the case that a substitute for control over the actual expression will always adequately satisfy a creator’s motives for undertaking novel expression. For instance, someone who creates an expression as a critique could quickly find a revision in circulation that reverses its ideological stance. In such a situation, the creator would have no recourse if control over an expression, once released, was impossible to exercise. Therefore, a compulsory licensing system could fail in important ways to satisfy the motives of creators by denying the control over an expression that might be required to prevent dilution of an ideological motive for generating expression.

³⁰ Becker, *Property Rights*, 54.

³¹ Goldstein, *Copyright’s Highway*, 15.

It seems like copyright, understood as the control it grants the bearer over the thing produced, might be the only benefit that could compensate for novel expression if the motive concerning the creator is the integrity of the work that is copyright's subject. In one sense, this is the most compelling argument for the grant of a property right in the thing produced because it would be very easy to imagine circumstances in which the use of a novel expression could contravene the wishes of the expression's generator, even in ways that so fully violate the purpose of the creative act that the creator might wish he or she had never undertaken the project. This measure of control, though it seems important under the labor-desert justification, is currently the least vibrant part of current United States copyright law, which has a specific provision for what is called Fair Use.

Fair Use carves out an exception from uses of copyrighted works that would otherwise be infringing based on a balance among the following four factors: the purpose of the use (favoring noncommercial), the nature of the work (more latitude for scholarship than fiction), the amount taken from the original work (less is better), and the effect of the use on sales of the copyrighted work (less is better).³² Particularly when the use is not commercial nor anticipated to affect the sales of the copyrighted work, as in the case of altering the ideological perspective in an expression, the avenues for a copyright holder to exercise control by asserting a property right in the work produced are limited.

Fair Use exists because of the tacit acknowledgement that creation is an activity that requires raw material. This admission corresponds to a principle made explicit by Locke when he said there can be no objection to property rights based on labor "at least where there is enough, and as good, left in common for others."³³ Becker attempts to make good this element of Locke's theory by enjoining against awards of property rights in cases when the benefit would exceed the value produced by labor. If the value added by generating

³² Vaidhyanathan, *Copyrights and Copywrongs*, 26.

³³ Becker, *Property Rights*, 35.

novelty does not include the value of the raw material incorporated in a novel expression, but the property right granted in the novel expression prevents the uptake and modification of its constituent parts, the property right is too expansive to accord with Becker's labor-desert theory and may relegate copyright to the third tier of Becker's hierarchy of appropriateness – the level at which property rights in the thing produced are inappropriate.

United States copyright, which currently has a duration of the lifetime of the author plus 70 years and captures greater than 99.8% of the value offered by a perpetual copyright,³⁴ seems to be in serious jeopardy with respect to the third tier of Becker's hierarchy. If the enclosure of virtually all the value of a creative expression does not exceed the value added by creative labor then very little value indeed is being ascribed to the raw material of an expression. Further, the expansiveness of the domain enclosed as derivative works, including "translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or *any other form in which a work may be recast, transformed, or adapted*,"³⁵ also adds to the benefit afforded by property rights as produced by the current regime of copyright. Because of the broad scope and almost indefinite duration of copyright in the United States, it is not proportional to the value created and therefore falls into the third tier of Becker's hierarchy where it is an inappropriate benefit in response to desert.

VI. Harmonizing Copyright with the Labor-Desert Justification

Although copyright as it is currently constituted in the United States is overbroad, it does not follow that there is no regime of copyright that incapable of satisfying the desert claims of creators as well as the conditions imposed by appropriateness, fit, proportionality

³⁴ Eldred v. Ashcroft, 537 U.S. 261 (2003)

³⁵ 17 USC 101.

and preservation of the commons. How might copyright be redrawn to comply with the labor-desert justification?

With regard to financial compensation, there is no clear indication that the current system even adequately compensates for value created. The most novel expressions, requiring great labor and creative energy from the creator, may not generate much if any value under the regime of copyright. Conversely, the most tired and formulaic sequel could easily be a financial boon but require very little adding of value by expenditure of labor. In fact, the returns from a sequel may be based on little more than recycling of the value of symbols generated by earlier novelty but enclosed by copyright such that the reuse of the symbols is not subjected to the full range of creative possibilities existing in the marketplace. But is there a better way to determine how much value has been created than the market mechanisms currently in use? Certainly, no one wants to see rewards doled out by cultural czars pretending to serve the universal interest, but a system that more clearly acknowledges the role of raw material in constituting novel creation might actually enhance the amount of attention paid to truly innovative work by facilitating, rather than obstructing, the generation of derivatives. The current artificial scarcity in derivative works caused by copyright effectively lowers the threshold for the recognition of innovation. A system that more effectively facilitated creativity would enhance the possibilities for financial and other kinds of recognition for those to whom a significant creative debt is owed.

With regard to control for the sake of ensuring the integrity of the meaning in a novel expression, Becker's theory seems to demand a property right in the thing produced as the only benefit that fittingly satisfies the motives of the creator. But such control for its own sake seems to provide a benefit in excess of the value added by the work of a creator because it forecloses the opportunities for others to modify not just symbols introduced by the innovation but, to a certain extent, those that also constitute the raw material for a novel expression. Further, something strange but important happens with the possession of non-

rivalrous goods. Unlike a piece of tangible property, which seems more closely wedded to the personality of its owner the longer it exists, non-rivalrous goods proliferate and become more widely held as their value increases. In a very real sense, the value of an expression as a way to view the world becomes more diffuse as it increases in value; the uses to which that value can be put ought not be restricted by the individual who generated it when it has become an element of the self-understanding of others. Tropes upon the meaning of an expression are one of the primary ways of recontextualizing experience in order to make sense of oneself; forbidding this by granting extensive control over a novel expression to its generator simply ignores the position of those who generated prior material in favor of rewarding those who are currently creating to the detriment of future creators. The capture of value by control of novel expressions exceeds the value added by the generation of novelty.

Finally, self-valorization through the generation of novelty does not seem to demand a property right in compensation. Labor undertaken for its own sake has a self-referential motive that does not demand a reward based on a claim of desert. It may be appropriate to offer honor and recognition for particularly notable forms of self-expression. A more fitting reward, though, would be the preservation of a robust public domain from which self-valorizing creators of both the present and future can draw inspiration and raw material.

The labor-desert justification of property rights facilitates a claim of desert from individuals who generate novelty based on the value added to the lives of others by their labor. The justification, however, lays a number of restrictions upon the benefits that restrict the expansiveness of property rights awarded. Further, property rights ought only to be awarded when those rights are the only reward that can satisfy the intention behind the labor of the individual who claims desert; not all instances of novelty generation require property rights as a reward and even those that do might run afoul of some forms of intentions at the expense of others. The labor-desert justification outlined by Becker validates the intuition

that creators deserve a benefit for generating novel expressions but seriously problematizes making copyright, understood as the provision of an exclusive right to copy an expression, into the form the benefit takes.

The Political Liberty Justification of Copyright

Any system of copyright is bound to be just one element of a more comprehensive political system. Such a system will have not just laws relating to property but also a full system of political liberties, entitlements and policy goals. Copyright needs to be considered within the broader political system of which it is a part to ensure that its effects accord with the balance of the political system. On this count, the specific character of a political system often provides a justification for property as well as imposing limits on the exercise of property rights; these will be important in understanding how copyright fits into a system of political liberty.

I. Justification from Political Liberty to Property

Becker's final line of justification for property rights relies on the compatibility of property with an existing system of political liberty. Becker asserts that "the regulation of acquisitive activities, by what amounts to a system of property rights, is...required to preserve liberties to which people are entitled." The system of regulation that takes shape as property rights is required because "it is a fact that human beings will try to acquire things, control them, exclude others from their use, modify them, and use them as wealth." Further, and crucially, "the effective prohibition of such activities...would require a comprehensive and continuous abridgement of people's liberty which...is at best unjustifiable and at worst flatly prohibited by the existence of political liberties to which people are entitled, morally."³⁶ Essentially, Becker argues that there is a presumption built into a system of political liberty against interfering with the material liberties of individuals and that material liberty includes undertaking acquisitive activities, which could only be prohibited by abridging political liberty generally.

³⁶ Becker, *Property Rights*, 75.

The first noteworthy feature of the political liberty justification is that it presumes a rigorously defined system of political liberties and justifies property by claiming that property's abolition would be hostile to political liberty. This makes property a derivative rather than a fundamental right; its solidity requires a foundation in political liberty. Becker offers some essential features of any system of political liberty strong enough to provide a general justification for property. First, political liberties must be rights, which means that others do not have an unconditional claim on restricting whatever activities political liberty protects. Second, political liberty must be concerned with protecting from interference activities that are materially and not merely formally possible; otherwise, political liberties have no force. Finally, rights afforded under a system of political liberty must be basically compatible with a universal right of each individual to survive; individual property rights cannot extend to obstructing the continued existence of others. Becker notes that any system of political liberty this robust, in addition to supporting a justification for property rights, also imposes limitations on those property rights .

This raises an interesting question: "What conditions are sufficient to defeat to the non-interference presumption (and thus invalidate the corresponding claim rights)?"³⁷ For an answer to this question, recourse to the character of the presumed system of political liberties is necessary. This question becomes especially important in considering copyright because property rights in expressions differ so significantly from property rights in tangible goods.

II. Copyright's Inversion of the Political Liberty Justification

The general justification from political liberty highlights a crucial feature of copyright as a specific regime of property. Copyright is currently instituted within the framework of a system of political liberty that provides backing for property rights generally. But, unlike

³⁷ Ibid., 80.

many property rights relating to tangible property, immaterial goods are property only to the extent that others are precluded from infringing uses of them. In the case of copyright, this preclusion from the otherwise existing material liberty to copy must meet the conditions necessary to defeat the non-interference presumption.

The inversion of the justification from political liberty with respect to copyright results from the non-rivalrous nature of the expressions copyright is designed to provide control over. Prohibiting – not allowing – the acquisition, use and modification of non-rivalrous goods requires the regulation of material liberty. In Becker's general justification, property formalizes and facilitates individual action that is taken to be inherent to human behavior; in its specific application, copyright is a sanction on behavior that would otherwise be widely allowable. Copyright is not covered under the preference for material liberty that generally sanctions property under the political liberty justification; copyright is the exception to the preference for material liberty.

As an exception to the general presumption of non-interference with material liberty, no copyright has any force without at least the threat of interference. Therefore, copyright requires a justification apart from the system of political liberty because interference claims cannot be derived from political liberty. Support for copyright can only be provided by the existence of a claim right, a right with corresponding duties on the part of another to undertake or forebear from some action,³⁸ that trumps the non-interference claim. Here, the elements of the system of political liberty against the backdrop of which the justification from political liberty is formulated enter for it is within that system that claim rights are established.

Do copyright holders have a claim right that demands interference, over the presumption of non-interference, with the liberty of others to use and modify the expressions covered by copyright? In a state with a copyright established by statute, such a claim exists.

³⁸ *Ibid.*, 11.

But, because property rights are derivative from the political system, the enforcement of copyright cannot abrogate political liberties even though it aims to restrict material liberty.

Obviously, the establishment of any claim right is going to affect the material liberty of those who are not right-holders but who have a duty with respect to the right-holder. All rights, though, are not equiprimordial; some are fundamental and others are derivative. Simply because a copyright holder can claim a right to enforcement of copyright does not mean that those subject to copyright enforcement do not themselves have rights to free expression or privacy that may frustrate copyright enforcement. And, if those fundamental rights conflict with the enforcement of derivative rights, some priority will have to be established.

III. Copyright Within a System of Political Liberty

Becker's justification from political liberty highlights the dependence of property rights upon the broader system of political liberty in order to set the conditions under which action by the state on behalf of property is warranted. A copyright that establishes exclusive control for a creator but is not enforced to police that exclusivity is hollow. But the enforcement of a system of copyright must not be hostile to the broader system of political liberty from which property rights are derived. This injunction against abridging political liberty is especially potent in the case of copyright because copyright is property only to the extent that it is enforced while most property lends itself much more agreeably to exclusivity.

As the ease of copying, using and modifying expression becomes greater, the effort to establish exclusive control over novel expressions on behalf of copyright holders becomes more likely to offend political liberties related to privacy. And, the more broadly construed are prohibitions on derivative uses of expressions, the more likely those prohibitions are to transgress political liberties related to self-expression. There is a significant danger that the steps required to enforce broad and enduring copyrights, particularly given the ease of

reproduction and distribution with digital technology, will require breaching political liberties like freedom of expression and freedom from unreasonable searches that are constitutive of property rights generally, including copyright specifically.

The problem posed to copyright by the justification from political liberty is not whether compensation for generating novel expressions is warranted; political processes establish the existence of claims on behalf of copyright holders. These processes are derived from an existing political system, which must have its own free-standing justification. Rather, the justification from political liberty requires that claims on the basis of copyright be understood as derivative from constitutive political liberties and that the enforcement of copyright does not require “comprehensive and continuous abridgement of people's liberty.”³⁹

For this reason, satisfying the purpose of copyright law in raising the expected private benefit to individuals who generate novel expression should be done in a way that interference with the use and modification of expressions is as limited as possible. The idea that those who create value through labor expended generating novelty deserve some benefit for creating that value is not, in itself, hostile to political liberty. But a benefit that requires securing enduring control for copyright holders when individuals would otherwise be at liberty to use novel expressions without diminishing the value of that expression cannot be compatible with a robust system of political liberty. Compensation must be uncoupled from control, and statutory copyright returned to its origin in public benefit.

³⁹ *Ibid.*, 75.

Conclusion

Copyright exists because it seemed like a good idea to publishers. Its origins as a collusive business practice among British stationers are well established and easy to understand; after all, monopoly profits are every producer's dream. Even though they were aware of copyright's ignoble beginning, the British Parliament felt it was prudent to grant some limited form of monopoly in novel expressions so they established a statutory copyright in 1709. The United States followed suit once they began setting out their own laws about such things. Somewhere during the early legislative history of copyright, the idea that copyright promotes a public good started circulating; the idea seems sensible enough.

This logic, by which copyright is presented as a bargain between the public and innovators, is seldom presented as the justification for copyright any longer. Instead, copyright persists because it accords with a persistent intuition many people share that creators ought to be compensated for creating, an intuition largely generated by the existence of copyright as the means of compensation. The rhetoric of authorial rights and creative control makes up the substance of the arguments forwarded for copyright as it currently exists.

There is also a sensible reason for this shift in rhetorical strategy: the broad and enduring copyright currently established under United States copyright law makes no pretense of offering anything to the public in exchange for the monopoly granted by the law. Instead, copyright makes a claim on all the value created by a novel expression. The arguments for expansive copyright protection rely on inflated rhetoric about the scarcity of novelty to justify copyright's expansiveness, but this is a scarcity that copyright itself has created by facilitating the concentration of distribution and limiting the opportunity to revise existing expressions. Copyright claims to work on behalf of the creator even though the most powerful figures of cultural production are not artists, authors and filmmakers but industry executives that control access to distribution. If United States copyright law was primarily

concerned with the interests of creators, why would it provide the weakest protection for the interest of creators in the integrity of their work but go to great lengths to ensure revenue from commercial uses flow to copyright holders? The institutional political morality of copyright does not square with its sound and valid normative justifications.

And yet copyright is more important now than perhaps it ever has been because copying is easier than ever before; digital media can be reproduced and modified using software and hardware commonly owned by the residents of affluent countries, technology that becomes more widely available each day. This democratization of copying has been followed swiftly by a democratization of distribution as well; the internet radically decentralizes the movement of data by making publishing as easy as writing. This decentralization of copying and distribution results in the migration of copyright's effects further from their roots in the guild system with the result that the agents constrained by copyright's provision of exclusivity no longer perceive their interest in abiding by its strictures. And so the logic of copyright faces a contradiction: the people in whose name copyright has been granted no longer see fit to respect its injunctions.

Copyright holders have responded by labeling file-sharing theft, assuming that property through copyright exists to codify a natural right rather than understanding it as derivative of a political system justified by the consent of the governed. And, to protect their interests, copyright holders call for an enforcement regime that would be hostile to the liberties constitutive of the United States's political system. Efforts to restrict the flow of information over the internet, the technological innovation that has made copyright as contentious an issue as it has been in the last 300 years, can only succeed by changing the architecture of the internet itself. The internet seems endlessly adaptable because it is just hardware, not discriminating among the data passing through it, that executes a protocol. This protocol is just a few simple rules that allow any device to connect any other device. Unless intelligence is placed in the technology of the internet itself through the revision of

protocols and the reprogramming of network hardware, the internet will continue to be incapable of restricting the distribution of anything potentially digitized. Such intelligence would hardly be useful only to prevent the infringement of copyright; in fact, it could be used to prevent any sort of communication over the internet.

Efforts to intimidate equipment and software manufacturers into complying with digital rights management protocols being promulgated by companies in the music and movie industries that control content are already underway. Just this term, the Supreme Court heard the case of *MGM v. Grokster*; the decision in that case could open the way for copyright holders to sue engineers who design software or hardware that has potentially infringing uses, regardless of what other intended or unintended uses a technology could be put to. Already, provisions of the Digital Millennium Copyright Act have removed the enforcement of copyright from the public sphere. This Act allows copyright enforcement through software controls that are themselves forbidden to be circumvented, regardless of whether the content controlled is protected by copyright. Copyright is about control; enforcing copyright as it is currently legislated will facilitate control far more comprehensive than either copyright requires or political liberty can tolerate.

But powerful interests in cultural production face a threat from technology that democratizes cultural production and distribution; this threat is not merely to their business models but to the false premises upon which the control they exercise is justified. The ease with which raw material for creative processes can be obtained using network technology and the obviousness of the ways in which creativity relies on such raw material during digital manipulation threaten the romantic notion of authorship often invoked by proponents of robust copyright protection. Similarly, the opportunity for unmediated communication offered by peer-to-peer networks – on which any one node can communicate with any other by obeying simple, open protocols – poses a threat to elaborately fortified channels of

distribution for cultural production that are the basis for market power. Copyright holders, then, are in a fight for the survival of their privileged position.

But this is not how the argument is framed. Instead, the arguments for copyright center on the artists who are suffering at the hands of copyright infringing teenagers, of the self-sacrificing authors whose moral rights are violated by thieving youngsters. This paper sought to slice through the rhetoric of copyright in an effort to discover a principled basis for understanding what an individual who generates a novel expression is entitled to. I have considered the best established rationales for property rights and believe there is a legitimate claim that can be made by creators for a benefit from their creations.

The benefit, however, must be understood for its costs and must be strictly limited to ensure that it does not grow beyond proportionality to the value created or establish market power hostile to vibrant discourse communities. This is how United States copyright was originally designed. Over the course of its history, however, copyright has expanded in scope and duration such that the property rights it offers reflect nothing but the naked interest of the powerful industries that have played such an important role in cultural production during the past 100 years. There is no philosophical story that can explain copyright; only politics can explain the current state of the law.

It may be possible to reconstitute copyright as a justifiable system of property rights. A compulsory licensing system for content traded over peer-to-peer networks would be a good first step. By promoting the proliferation and modification of novel expression while providing a method of compensating those who generate novelty, compulsory licensing would clearly move copyright back to its original purpose of promoting a vibrant cultural sphere while encouraging individuals not merely to consume what has been prepared for them but to use and modify any expression that it seems fit to rearrange.

Some creators will doubtless object to seeing the integrity of their creations violated by other interests. Whether there can be some limited artist's right to preserve the integrity

of their creations seems unclear, however if United States law regarding libel is any indicator, such a system would contravene important political liberties. The simple fact is that digital computers connected by networks make the exchange of information and the production of novelty easier than ever before. For someone whose business depends on the preservation of scarcity, this is doubtless a frightening prospect. But rhetoric about the rights of creators only obscures the logic of self-interest at the expense of public benefit that was copyright's origin and that still generates so much of its content.

It makes a good story but not one that holds up under philosophical scrutiny.

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