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Copyright Norms and the Problem of Private Censorship

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COPYRIGHT AND FREE SPEECH

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COPYRIGHT NORMS AND THE PROBLEM OF PRIVATE CENSORSHIP

*Wendy J Gordon**

Copyright policy must resolve intelligently the tension between upstream and downstream creators, between incentives to create and incentives to use. Downstream authors who copy and transform others' images or words as an input to new creativity have obvious free speech concerns. So do simple copiers in those many instances where even non-creative copying is essential for expressing one's ideas or allegiances. **4.01**

Part of the tension is economic. Because virtually every author needs access to predecessor texts, a legislature that increases copyright protection for today's creators simultaneously increases tomorrow's costs of creation[1] or use. But the issue goes far beyond mere pricing and output. **4.02**

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[1] WM Landes and RA Posner, 'An Economic Analysis of Copyright Law' (1989) 18 J Legal Studies 325–63.

4.03 All exclusive rights impose restraints on the behaviour of fellow citizens.[2] This is true not only of rights enforceable by injunction; the law typically enforces even rights to receive money, such as compulsory licence provisions,[3] by criminal sanctions and the courts' contempt power, leading at the extreme to imprisonment for users who refuse to pay. Therefore, like all privately-held rights, copyright empowers a private person[4] (including juridical persons such as corporations) to impose restraints on liberty.

4.04 Moreover, since copyright subsists in work of expression, it has great potential for restraining liberties of speech. In particular, copyright can empower a private party to censor criticism or ridicule to which his works might otherwise be subject, or to limit how copies of his work are used. Criticism often needs to replicate part of its target's content in order to illustrate for the audience the flaws perceived. If copyright is too strong, however, the law can strip the critic of his or her ability to reproduce crucial evidence.[5]

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[2] For every exclusive right in the law, there is (definitionally) a corresponding duty. Persons subject to a duty are (definitionally) not at liberty to disregard it. See generally WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed W Cook (1923); WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale L J 16.

[3] It is easy to overstate the differences between 'liability rule' protection (money only) and 'property rule' protection (injunctive power given to private owner). For the origins of the locution, see G Calabresi and AD Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 Harv L Rev 1089–128.

[4] Governments can also own copyrights under US law, except for works created by federal employees within the scope of their employment. 17 USC, s 105. Thus, for example, some cases involve copyright claims by local municipalities. This chapter focuses on private rather than governmental copyright owners. However of course a First Amendment defence should be available a fortiori when the plaintiff is a governmental entity.

[5] The courts in the US do sometimes recognize the importance of copyrighted work as 'evidence' in public debate. In *Nunez* the publicly debated question was whether the copyrighted photograph of a near-naked beauty queen should deprive her of her crown, and the media reproduction of the photograph was upheld as fair use. *Nunez v Caribbean Intern News Corp* 235 F 3d 18 CA 1 (Puerto Rico), 2000. Similarly, some courts seem to be sensitive to the way that created works, once integrated into the culture, can become facts of life with which the defendant and her audience need to engage. See *SunTrust Bank v Houghton Mifflin Co* 268 F 3d 1257 (11th Cir 2001) (reversing on fair use grounds a preliminary injunction against a novel parodying and criticizing the American classic *Gone With The Wind*). However, under most current interpretations of doctrine, such uses can be defeated if the other factors in the fair use calculus so indicate.

Evidence in public debate is, further, only a subset of a larger class: all those instances in which the copyrighted work is reproduced *because its existence as a fact* is what makes it important to the defendant.

Similarly, people need symbols and texts that they mutually recognize, and for copyright to deprive the public of the ability to use symbols in the contexts they prefer can distort their ability to inform and reform culture in which they live.[6] The question is how the law should reply to such attempts at private censorship.

4.05 In the USA, the federal Constitution empowers Congress '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'.[7] The Constitution also, in its First Amendment, invalidates laws that restrain free speech.[8] The question then becomes how the Amendment limits either Congress's power to enact copyright legislation, or courts' interpretation and implementation of the legislation. If that Amendment is unavailable, then the focus needs to shift to what other protections the law contains for free speech. This chapter will address the First Amendment issue first, and then explore alternative avenues for shelter.

A. First Amendment Protection for Free Speech

4.06 In regard to First Amendment doctrine, three kinds of cases should be roughly distinguished: cases using the First Amendment to challenge legislation in which Congress uses copyright to take sides in a religious or ideological dispute; cases using the First Amendment to challenge legislation in which Congress amends the copyright statute in a general way that nevertheless affects speech; and cases that do not raise facial challenges to copyright legislation, but rather seek to use the First Amendment against particular claims of copyright infringement. The term 'private censorship' applies to this last group of cases. In this last class, defendants either seek to assert an explicit First Amendment defence, or seek to persuade courts that they can avoid conflicts with the First Amendment only by interpreting existing

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[6] See generally Jack M Balkin, 'Digital Speech And Democratic Culture: A Theory Of Freedom Of Expression For The Information Society', 79 NYU L Rev 1 (2004); Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham NC: Duke University Press, 1998).

[7] US Const, Art I, s 8, cl 8.

[8] 'Congress shall make no law . . . abridging the freedom of speech, or of the press', US Const Amendment I.

provisions of copyright law (such as the fair use doctrine or the non-ownable status of ideas and facts) in a broad, pro-liberty fashion.

4.07 Most obviously vulnerable to challenge on First Amendment grounds is legislation in the first group, namely, copyright laws through which the government seeks to favour one speaker or viewpoint over another. One such case (and they are rare) involved the writings of Mary Baker Eddy, founder of Christian Science. When a split in the Christian Science Church arose, the branch of the Church that owned copyright in Eddy's work asked Congress for private legislation to extend or restore Eddy's copyrights, as a means to prevent variant editions by believers who disagreed doctrinally with the majority group. 'Church witnesses supporting enactment of [the] Private Law . . . frankly admitted that their distress over variant editions was religiously motivated',[9] and Congress was persuaded to extend the copyrights by enacting the requested Private Law. The courts struck the Private Law down as unconstitutional, on the ground that Congress had 'lent the Church leadership the assistance vital to shaping the beliefs of lay worshipers'. To my knowledge, this is the only piece of copyright legislation struck down on First Amendment grounds, and even there the court based its decision on the Amendment's 'free establishment' clause rather than on the 'free speech' clause.[10]

4.08 A second class of cases involves challenges to generally oriented provisions of the copyright statute—provisions that do not take sides in ideological or religious controversies, but nevertheless have the potential to distort public communications and debate. The *Eldred* challenge to the Sonny Bono Act's extension of copyright term is one such case, and a key issue in such cases is the level of scrutiny to which the Court should subject the statutes at issue.[11]

4.09 The third class of cases, the area of 'private censorship', involves the desire of individual defendants to use free speech as a defence to a particular charge of copyright infringement, either explicitly or to give force to other

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[9] *United Christian Scientists v Christian Science Board Of Directors, First Church Of Christ, Scientist* 829 F 2d 1152 (DC Cir 1987).

[10] Ibid. Note, however, that the opinion in passing mentions both 'speech and religious' issues, and it is hard to imagine that the court would have come out any differently had it rested explicitly and solely on free speech grounds.

[11] *Eldred v Ashcroft* 537 US 186 (2003). See the extensive discussion of *Eldred* in ch 6 below.

doctrines such as fair use. Explicit First Amendment defences have almost never been allowed, and even First Amendment influence is sometimes resisted;[12] ordinarily the courts act as if the traditional fair use doctrine and the dichotomy between ownable expression and non-ownable ideas and facts provided such sufficient shelter for free speech that the constitutional issue need not be reached. Yet many sad proofs exist that conventional doctrine fails in this regard.

4.10 One such case ironically parallels the Christian Science example. A splinter church begun by former ministers in the Worldwide Church of God sought to reproduce an unexpurgated version of the writings penned by the founder of both churches. The writings at issue were protected by generally applicable copyright (rather than by a Private Act in which Congress took sides in the dispute). The majority church disapproved of the unexpurgated original, and had solely issued a revised edition. The court refused to shelter the dissidents' reproduction under fair use, not seeing that the defendants' use of the scriptures was essentially factual, as providing the dissidents' best evidence for proper belief.[13] In such cases, one person's exclusive right under copyright conflicts with—and is enforced over—another person's desire to write, paint, sing, proselytize, or otherwise 'speak' in ways that employ the symbols and expression of his culture.

4.11 This third class of cases is difficult in part because the First Amendment prohibits *government* from abridging free speech, and copyright plaintiffs are not government actors. Although much American scholarship questions how sharp a divide really exists between 'private action' and 'state action', a divide between public and private still informs much jurisprudence: American lawyers usually think of the federal and state constitutions as

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[12] Thus, Judge Posner writes:

> 'Copyright law and the principles of equitable relief are quite complicated enough without the superimposition of First Amendment case law on them; and we have been told recently by the Supreme Court not only that "copyright law contains built-in First Amendment accommodations" but also that, in any event, the First Amendment "bears less heavily when speakers assert the right to make other people's speeches." Eldred v. Ashcroft, 537 U.S. 186, 123 S.Ct. 769, 788–89, (2003). Or, we add, to copy, or enable the copying of, other people's music.'

In re: *Aimster Copyright Litigation* 334 F 3d 643 at 656 (7th Cir 2003). It is difficult, however, to know how to interpret his brief reference.

[13] *Worldwide Church of God v Philadelphia Church of God, Inc* 227 F 3d 1110 (9th Cir 2000).

having the task of reining in abuses of governmental power, and usually think of federal and state legislation as having the role of reining in abuse of private actors' wealth or strength. The notion of using the federal Constitution to rein in private actors' use of law fits uneasily in this scheme. Yet when a private person sues, he or she is using the government's own power.

4.12 Private rights to sue have sometimes been recognized as sufficiently governmental action that the First Amendment applies to them.[14] Thus, in defamation suits, Supreme Court case law allows newspaper reporters to draw on the First Amendment for shelter if they print false and injurious statements about a public official as a result of reasonable error.[15] Arguably a critic, historian, or other author who utilizes another's copyrighted expression for, for example, evidentiary purposes should be able to avail herself of similar free speech defences based in the First Amendment.

4.13 There are many reasons why the courts hold back from employing free speech analysis wholeheartedly in copyright cases. One contributing factor may be the interaction between the Supreme Court precedent on physical property and the familiar if controversial trope that treats copyright as 'property'[16]. Although some early US Supreme Court cases suggested that free speech could provide a defence to suits enforcing rights in land (as when a speaker sought access to the streets of a wholly-owned 'company town' to address its residents), for many years now the Court has been reluctant to recognize that property cases can implicate the First Amendment. Although that reluctance is probably ill-founded, it may play a role in the courts' reluctance to embrace the First Amendment wholeheartedly in copyright cases. There is ample

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[14] Netanel points to helpful precedent in the areas such as trademark, right of publicity, intentional infliction of emotional distress. See para 6.08 below.

[15] *New York Times v Sullivan* 376 US 254 (1964) holds that the First and Fourteenth Amendments protect media false statements made about the official conduct of a public official, such that damages may be awarded only if 'actual malice' is shown. When the plaintiff shows that the media defendant published the statement in reckless disregard of its truth or falsity, that constitutes a sufficient showing of actual malice.

[16] Virtually any right can be characterized as 'property' if it involves a right to forbid, a liberty to do, and a power to transfer. Yet the concerns of *physical* property law are inapplicable to many of the rights in intangibles.

I can suggest some alternative labels for the 'property' nomenclature in copyright. One is 'transferable mini-monopoly', or the coined word, 'minopoly'. By 'mini' I mean to reflect that copyright is not a full monopoly: although copyright law prevents strangers from duplicating the copyrighted work, it is not necessarily accompanied by market power and does not prevent competition from similar but independently created works.

ground to distinguish physical property from copyright—for example, copyright governs behaviour in regard to *patterns*[17] rather than *things*; for another, the infringing act in copyright law need not harm the plaintiff in the least, unlike the typical invasion or taking of physical property—yet the 'property' locution is so well-embedded in copyright practice that judges may fear that recognizing a First Amendment defence to copyright could erode physical property rights.

4.14 Probably the most important factor is that American judges typically feel that the First Amendment commits them to a neutrality that discourages them from making distinctions based on the content of particular speech.[18] The value of one position or another is supposed to evolve through public debate, not through governmental fiat. How then can judges evaluate if disallowing a particular copyright suit—to avoid imposing a burden on speech—would 'outweigh' the arguable loss of incentive, or the injury to the plaintiff's 'right to keep silent'? And if judges cannot weigh, would recognizing the First Amendment's applicability commit them to dismiss *any* copyright cause of action that has even the slightest impact on speech? The latter course would gut copyright, which is not a route the courts are willing to follow.

4.15 In the defamation area, accommodations have been found for these desires to achieve neutrality while simultaneously protecting both free speech and the core of the private right of action. To accomplish this, the courts employ a mixture of devices, primarily tests of factual falsity and recklessness: if a reporter prints something false with reckless disregard as to whether the statement about a public official was true or not, a court can feel comfortable imposing damages on him. A reporter's proven recklessness serves as a proxy for the low value of his contribution to debate. In copyright, by contrast, no similar proxy has been identified that can serve to substitute for direct evaluation of the worth of speech.

4.16 These are some of the reasons why American courts vacillate when copyright confronts the First Amendment. Not long ago a federal court held that 'copyrights are categorically immune from challenges under the First

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[17] WJ Gordon, Chapter 28: Intellectual Property Law, in Peter Cane and Mark Tushnet (eds), *Oxford Handbook of Legal Studies* (Oxford: OUP, 2003) 617–46.

[18] This is one reason why European jurisdictions regulate 'hate speech' in ways that would be unthinkably direct for the USA.

Amendment'.[19] The US Supreme Court then repudiated that harsh ruling.[20] The High Court acknowledged implicitly that sometimes each of us *does* have a Constitutional right under the First Amendment to employ the copyrighted works of others.[21] However, the Court treated that right as 'second-class',[22] and upheld a copyright term extension without the kind of scrutiny that content-distorting legislation ordinarily receives. Wrote the Court, 'The First Amendment . . . bears less heavily when speakers assert the right to make other people's speeches.'[23] Many Americans hope that US copyright law will be written and applied in a way that safeguards the public's interest in free speech,[24] but the aspiration remains to be realized.

4.17 The question remains largely open elsewhere as well. Like the US Constitution, the Universal Declaration of Human Rights simultaneously recognizes both a right to own one's expression and a right of free speech. Thus, Article 27(2) provides support for patents and copyrights. It states that 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' Yet Article 19 states that 'Everyone has the right to freedom of opinion and expression' including 'freedom . . . to seek, receive and impart information and ideas'. Similarly, Article 27(1) states that 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'

4.18 Both copyright on the one hand, and cultural participation and free speech on the other, can serve goals of human flourishing. That both appear in the same documents is therefore unsurprising. But different means to the same abstract end can conflict with each other. Which clause governs in the case of a conflict? The Declaration does not say. In the USA, by contrast, it is clear

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[19] *Eldred v Reno* 239 F 3d 372 at 376 (US Ct of Apps (DC Cir), 2001), reversed *sub nom Eldred v Ashcroft* 537 US 186 (2003).

[20] Wrote the Supreme Court, 'We recognize that the DC Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment".' *Eldred v Ashcroft* 537 US at 789–90.

[21] Ibid.

[22] D McGowan, 'Why the First Amendment Cannot Dictate Copyright Policy' [2004] 65 U Pitt L R 281.

[23] 537 US at 789–90.

[24] Thus, the *Eldred* Court noted: '[I]t is appropriate to construe copyright's internal safeguards to accommodate First Amendment concerns'. Ibid at n 24. Although the Court's suggestion was essentially rebuffed in *Aimster Copyright Litigation* 334 F 3d 643 at 656 (7th Cir 2003), it may fare better in other contexts.

that free speech holds the trump card;[25] although, as mentioned, there is often a lack of clarity as to when and how (and even *if*) the trump may be exercised in copyright cases.

4.19 What besides the First Amendment could protect free speech in copyright law? Copyright law contains specific exemptions that sometimes can serve the interest of free discussion. In the USA, for example, these include provisions for library photocopying[26] and the doctrines of 'first sale' or 'exhaustion' that allow for the circulation of used copies.[27]

4.20 Most nations also share some doctrines whose defining concepts are capable of flexible interpretation, such as the rule that copyright ownership does not extend to 'facts'. However, these are of uncertain reliability. For example, except when considering issues of computer interoperability,[28] most US courts persist in refusing to see that copyrighted works that usually function as expression sometimes can also function as facts.[29] Thus, in the *Worldwide*

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[25] The First Amendment *commands*—Congress 'shall make no law . . . abridging the freedom of speech, or of the press', US Const Amendment I—while the Constitution's copyright and patent clause merely *authorizes* Congress to enact copyright legislation, and does not command it. US Const Art I, cl. 8.

[26] 17 USC, s 108.

[27] Ibid, s 109.

[28] In computer cases US courts have come to recognize the importance of allowing factual uses: as when the factual dominance of a particular copyrighted computer program will make some copying necessary for the purpose of achieving interoperability. Thus, defendants prevailed in such cases as *Sega Enterprises Ltd v Accolade, Inc* 977 F 2d 1510 (9th Cir 1992) and *Lotus Development Corp v Borland Int'l, Inc* 49 F 3d 807 (1st Cir 1995), aff'd mem, 516 US 233 (1996) (4–4 decision). Also see *Computer Associates Int'l, Inc v Altai Inc* 982 F 2d 693, 710 (2nd Cir 1992) (copyright does not extend to features of the program 'dictated by efficiency or external factors').

[29] Some of this inability to see that our cultural landscape exists as a 'fact' is due to the all-or-nothing way in which the US statute frames the fact–expression dichotomy. Facts cannot be 'owned' and are placed outside the protectable scope of copyrightable subject matter, 17 USC s 102(b), but the harder question is how to handle works of expression that sometimes act as facts and sometimes do not.

Also important are Supreme Court dicta that posited a false dichotomy between works of authorship that are 'created,' and facts that are not 'created' but merely 'found'. See, eg, WJ Gordon, 'Reality as Artifact: From *Feist* to Fair Use' (1992) 55 L & Contemporary Problems 93–107 (arguing against the dicta of *Feist* that created works do indeed sometimes function as facts in the world, and arguing that special privileges should pertain in such cases). An analogy can be made to the way that the US law of evidence treats some statements as facts: US courts do not consider it 'hearsay' when witnesses quote statements made by third parties for a reason other than proving the truth of the matter asserted. Thus, when such a quotation is offered for the purpose of proving some *other* matter (such as the hearer's state of mind), the witness can repeat the statement made by another person without that 'copying' being hearsay.

Church of God case, mentioned earlier, worshipers wanted to rely upon what they considered the authoritative version of their scripture as their best and perhaps only evidence of correct belief. Yet in empowering the majority faction of the church to curtail this liberty, the court saw the non-ownership of facts as irrelevant.[30]

4.21 Other doctrines with some flexibility are the requirement that the plaintiff prove that the amount the defendant copied was 'substantial' enough to be wrongful, and the rule that 'expression' but not 'ideas' can be owned. But the elasticity of these concepts is limited, as is suggested below in the discussion on the idea–expression dichotomy.

4.22 A more fruitful avenue is the adoption of flexible, equitable doctrines (either as defences or as limitations on the copyright owner's prima facie rights) that allow explicit reference to the public interest. For example, nations with independent judiciaries should supplement the specific statutory exemptions with such defences as an expanded 'fair use'[31] and 'fair dealing' defence, or a

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[30] *Worldwide Church of God v Philadelphia Church of God, Inc* 227 F 3d 1110 (9th Cir 2000) (enforcing the copyright owned by a dominant church group against the effort of a splinter group to reproduce the unexpurgated version of their founder's writings). The racist nature of the works the defendants wanted to reproduce may have played a role in the court's decision.

[31] A judicially developed doctrine that retains its flexibility, 'fair use' now appears in the copyright statute at 17 USC, s 107. That provision reads as follows:

> § 107. Limitations on exclusive rights: Fair use
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Note that the statutory section on fair use singles out 'criticism and comment' as deserving of solicitude, and parody as a form of criticism has long been considered an important exercise of fair use.

'free speech' defence—that can allow individualized, case-by-case accommodation. Such defences are needed both in litigation involving traditional copyright infringement (roughly, 'copying' cases) and where a defendant is accused of bypassing encryption to reveal copyrighted material (roughly, 'access' cases). No nation has a fully available 'fair use' defence; even the USA disallows use of the defence in cases charging bypass of encryption devices,[32] and many US courts, even in copying cases implicating free speech issues, will refuse to employ the fair use defence in the face of strong substitutionary harm.

4.23 In the Aristotelian sense, equity is a means of correcting for the law's inevitable over-inclusiveness.[33] The purpose and justification of such flexible doctrines is usually that they allow the judge or other decision maker 'to say what the legislator himself would have said had he been present, and would have put into his law if he had known'.[34] Free speech warrants the extra cost of individualized investigation.

4.24 For reasons explored earlier, the First Amendment is unlikely to yield immediate payoff today. The remainder of the chapter will explore other doctrinal sources for sheltering free speech. In particular, it will suggest that the idea–expression dichotomy is problematic, but that the very norms that justify

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The Supreme Court has indicated that, at least in cases of parody, a factor weighing in favour of a defendant receiving fair use treatment is a copyright owner's unwillingness to license an attack on its property. Where there is no licensing market, there may be an absence of harm from giving fair use. Thus the Court wrote:

> The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. *Campbell v Acuff-Rose Music, Inc*, 510 US 569 at 592 (1994).

For general discussion of fair use and an unwillingness of plaintiffs to license, see WJ Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors' (1982) 82 Columbia L Rev 1600; also see WJ Gordon, 'Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only *Part* of the Story' (2003) 13 J Copyright Society 149 (Fiftieth Anniversary Issue).

[32] Digital Millenium Copyright Act, codified as amended at 17 USC §§ 1201–5.

[33] Aristotle writes, 'When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission.' Aristotle, '10 Ethics', in D Ross trans, JL Ackrill and JO Urmson, *The Nicomachean Ethics* (Oxford: OUP, 1984), 133.

[34] Ibid.

copyright can be referenced as sources to flesh out flexible doctrines, such as fair use, in a way that furthers free speech goals.[35]

B. Is There Shelter for the Necessary Freedom to Borrow in the Idea–Expression Dichotomy?

4.25 A primary tool for accommodating the interests of new generations who wish to criticize their predecessors is the doctrine that while expression can be owned, ideas remain free for all to borrow. The doctrine, often known as the idea–expression dichotomy, is adopted by most copyright systems as a mode of keeping the social costs of the copyright monopoly low. Someone who wishes to quote, but is unable or unwilling to pay the requisite price, is entitled to restate the underlying idea in her own words. The dichotomy seeks to assure that the fundamental building blocks of creation can be used freely, with no need to seek out and bargain with the party who placed the idea in the stream of culture. But it is far from clear that courts today are using the doctrine to safeguard this necessary freedom with the requisite vigilance.

4.26 The line between 'ideas' and 'expression' is, not surprisingly, a hazy one, and should a new artist happen to cross the line, he will be guilty of creating an unauthorized derivative work. Further, sometimes ideas and expression are inextricably linked. Scholars such as Richard Lanham suggest that this is the rule rather than the exception; they view the purported independence of message from mode of expression as largely an illusion.[36] Thus, James Joyce's

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[35] See WJ Gordon, 'Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship', 57 U Chicago L Rev 1009–49 (review essay, 1990). Some of the material in Section B and following is indebted to that early essay.

[36] Richard Lanham, *Analyzing Prose* (2nd edn, Continuum International Publishing Group, 2003). Also see Stanley Fish, *Rhetoric*, in Frank Lentricchia and Thomas McLaughlin (eds), *Critical Terms For Literary Study* 203 (Chicago: U Chicago Press, 1990). On one occasion, even the US Supreme Court recognized this, although not in a copyright context. When a young man was arrested for displaying the words 'Fuck the Draft' in a public building, the Court ruled that the First Amendment freed him. The defendant could have found other words to express the idea, yet, as the Court noted, '[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.' *Cohen v California* 403 US 15, 26 (1971).

work deeply questioned 'copyright's notion that ideas and facts are anterior to their particular expressions, and thus separable';[37] he doubted ideas and facts could 'yield[] to paraphrase, transmissible without either disfigurement or infringement'.[38]

Yet, art sometimes requires the use of predecessors' work, whether the use is hostile (as discussed by Harold Bloom)[39] or grateful (as discussed by Lewis Hyde).[40] The author of a new work is unlikely to obtain permission from a prior author if he wishes to criticize the prior work or use the prior author's material in a way that rejects or undercuts the meaning the predecessor meant to invest in her materials or symbols. It may be precisely the travesty that is most in the need of freedom.[41] **4.27**

It is true that 'creative misprision' can often proceed without infringing a prior work. But that is not always the case. For example, central to the post-modernist movement in art is commenting on existing culture, often by employing the specific icons and images others have popularized.[42] Whether the art at issue is a photo-collage showing the Statue of Liberty swimming for her freedom,[43] a retelling of Hamlet from the point of view of its minor characters,[44] or a collocation by Picasso that pastes copyrighted textiles onto **4.28**

Such recognition is rare for copyright courts. And one can understand why: the more sensitively the courts recognize how restraining the copying of words can also restrain the substance of communication, the more the courts will need to develop a new jurisprudence if much is to be preserved of copyright. This development will hopefully occur, but has not yet.

[37] P K Saint-Amour, *The Copywrights: Intellectual Property and the Literary Imagination* (Cornell, 2003) 189 (discussing the 'Oxen of the Sun' episode in Joyce's *Ulysses*).

[38] Ibid.

[39] Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (2nd edn, Oxford: OUP, 1997).

[40] Lewis Hyde, *The Gift: Imagination and the Erotic Life of Property* (Vintage, 1983).

[41] Compare T Stoppard, *Travesties* (Grove Press, 1975) 85–7.

[42] 'The referent in post-Modern art is no longer 'nature,' but the closed system of fabricated signs that make up our environment.' John Carlin, 'Culture Vultures: Artistic Appropriation and Intellectual Property Law' (1988) 13 Columbia-VLA J L and the Arts 103, 111. Carlin argues that 'some arrangement needs to be developed whereby artists' traditional freedom to depict the environment in which they live and work is upheld' (ibid 140–1). The art form known as 'appropriation' makes an audience see pre-existing art in a new light or take a different stance towards it. Sometimes appropriation art involves making substantial changes in the pre-existing artwork; sometimes it does not. See generally, ibid.

[43] As in M Langenstein's 'Swimmer of Liberty,' pictured in Latman, Gorman, and Ginsburg, *Copyright for the Nineties* at 159. (Note I merely speculate about the reasons for Ms Liberty's dip).

[44] As in T Stoppard's *Rosencrantz and Guildenstern are Dead* (Grove Press, 1967).

canvas,[45] much art might not be created if consent were required from the person whose work is being commented on. More generally, an artist or speaker sometimes needs to use the expressions, symbols, and characters that represent what he is attempting to rebut, integrate, or criticize in order to make his point clearly. In American doctrine, 'fair use' gives its strongest shelter to transformative uses, but uses that simply take and use symbols created by others can also have profound free speech implications.[46] Thus, in holding that the State may not criminally prosecute someone for burning a flag in political protest,[47] even the US Supreme Court has recognized that it can be essential to self-expression to make hostile use of symbols originated by others.[48]

4.29 We are social creatures, and there are many symbols less noble than the flag that have a power over our minds. As the Court observed, 'Symbolism is a primitive but effective way of communicating ideas . . . a short cut from mind to mind. Causes and nations . . . and . . . groups seek to knit the loyalty of their followings to a flag or banner, a color or design.'[49] Advertisers and entertainment conglomerates also seek to knit loyalty through the use of symbols. To free one's self or one's neighbours from an unquestioning loyalty, or simply to retain cultural vitality, it is sometimes necessary to use a

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[45] The derivative work right, 17 USC section 106(2), has sometimes been extended to bar the reuse of legitimately puchased embodiments of a copyrighted work.

[46] For example, consider a dissenting church that wishes to distribute copies of a copyrighted 'scripture' that exactly duplicate the scripture's original form, but differ from the expurgated version preferred by the copyright holder. The free speech implications are clear, even though the dissenter wants to 'copy' rather than 'transform'. Nevertheless, in a case closely resembling this fact pattern, the copyright holder (the dominant portion of a divided church) was granted a judgment of copyright infringement against the dissenters. *Worldwide Church of God v Philadelphia Church of God, Inc* 227 F 3d 1110 (9th Cir 2000). The importance of non-transformative copying to free speech—and the sometimes inadequate shelter the fair use doctrine may provide it—is explored in Rebecca Tushnet, 'Copy This: How Fair Use Doctrine Harms Free Speech and How Copying Serves It',__Yale LJ__(Essay, forthcoming).

[47] *Texas v Johnson* 491 US 397 (1989).

[48] See *Texas v Johnson* 491 US 397 (1989). If anyone originated the flag design, it was Betsy Ross. But the Court has difficulty seeing the issue when it is presented in the context of a so-called intellectual property right. Thus, in *The San Francisco Arts & Athletics, Inc v United States Olympic Committee* 483 US 522 (1987), the Court held that the unauthorized use of the word 'Olympics' to promote the Gay Olympics, a non-profit athletic event, violated the US Olympic Committee's property right in the word.

[49] *Texas v Johnson* 491 US 397 at 405 (1989), quoting *West Virginia Bd of Ed v Barnette* 319 US 624, 632 (1943).

received symbol in an unexpected way, a way that the originators would not have wanted.[50] When the Disney organization successfully restrained a counter-cultural comic parody of Mickey Mouse that implicitly mocked both Disney and the suburban lifestyle legitimated in the Disney canon, one critic of the decision aptly commented: 'Prodigious success and its responsibilities and failures draws parody. That's how a culture defends itself. Especially from institutions so large that they lose track of where they stop and the world begins so that they try to exercise their internal model of control on outside activities.'[51]

4.30 How might these necessary freedoms be preserved? One answer is to apply the First Amendment as a defence where appropriate in particular cases, but so far the courts are resistant to that approach for reasons already intimated. Another possibility is to look at the policies on which copyright itself is justified, and discover whether they contain natural 'limits' that would prevent their restraining important communicative activity. In prior work, I have argued that the public has a right to self-expression—a right to copy and adapt that can trump copyright in appropriate circumstances—based on the same justificatory claims that provide copyright's own normative foundations. Flexible doctrines such as fair use can and should take content from these norms.

C. Identifying Relevant Principles and Policies

4.31 There are at least two possible referents when searching for antecedents consistent with giving hostile works some degree of freedom: copyright itself, viewed as an isolated set of doctrines, or copyright within the context of the law as a whole. Let us begin with the copyright law, canvassing briefly some of the available principles and policies. The chapter will then turn to cognate areas of law, restitution and tort.

4.32 Copyright in the USA has one dominant purpose, 'to further the progress of Science and the Useful Arts', but many subsidiary purposes are intermittently recognized, such as maintaining equality among different classes of authors,

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[50] See paras 3.31–3.34 above.

[51] S Brand, 'Dan O'Neill Defies US Supreme Court: A Really Truly Silly Moment in American Law' [Spring 1979] Coevolution Q 41.

or honoring a perceived moral claim that authors may have in their works.[52] It is not yet clear how the various policies should be ranked and weighted. This chapter will explore this mix of purposes and ways we might resolve the problem this mixture poses.

(1) Maximizing social welfare

4.33 There are many norms by which a property system might be judged or justified. One type of justification is instrumental and aggregative, producing legal rules dictated by a social welfare function aimed at maximizing some particular variable. In copyright, the three most salient candidates for maximization are dollars (economic value 'as measured by . . . willingness to pay'),[53] utility, and the 'progress of science'.[54]

4.34 Each of these variables has its own definitional ambiguities and internal variations, but their major deficiencies and strengths are fairly clear and familiar. The chief advantage of economic inquiry is that dollars are measurable; the chief disadvantages are that it reflects existing distributions of wealth, ignores the non-monetizability of many values, and treats preferences as sovereign even when the preferences are perverse or mistaken.

4.35 The strength of utilitarianism is that it treats people as equals regardless of wealth. Yet utility, too, (in many hands) measures nothing but simple

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[52] I speak here of moral entitlements underlying conventional copyright. There is also a doctrine known as 'moral rights' which protects, in particular, the 'integrity' of a piece of art. That right, too, should be limited by free speech defences. (See paras 9.01–9.60 below.) By giving the holders of an integrity right a protection against distortion, 'moral rights' doctrine gives them a power of manipulation. The integrity right allows an author to say 'This is my symbol, my character, my image: use it only as I want you to use it. If you think my use distorts a truth, you must find some way to address that problem without making direct use of my distortion.' In the USA, the integrity right is limited largely to *originals*. That is, an artist can stop someone from marking up or otherwise distorting his original canvas, 17 USC, s 106A, or even a limited number of signed copies, but mass reproduction is outside the scope of the integrity right. It is submitted that this is a good compromise: when there is only one instantiation of a work (like the original canvas), and a choice must inevitably be made between artist and critic, it makes sense to honour the former more. But when a work exists in multiple copies, the critic's desire to use *one copy* is backed by a stronger claim than the author's desire to eliminate criticism or mockery.

[53] See, generally, RA Posner, *Economic Analysis of Law 9* (Little, Brown, 3rd edn, 1986).

[54] See RS Brown, 'Eligibility For Copyright Protection' (1985) 70 Minnesota L Rev 579.

preference, and even when preference-satisfaction is a proper goal, utility is difficult or impossible to measure and to compare interpersonally.

4.36 The progress of 'science' (understood as 'knowledge') has the strength of being, in the USA at least, the Constitutional explanation for copyright. Yet progress, too, is difficult to measure, and its use as a criterion poses an additional institutional difficulty: judges have been admonished by years of copyright jurisprudence to beware the inability of 'persons trained only to the law' in evaluating cultural worth.[55]

4.37 In seeking to maximize social welfare, moreover, each of these approaches seems to suffer from another potential deficiency: paying insufficient attention to individuals. Under an aggregative inquiry, the interests of a person who has done nothing morally culpable can be improperly sacrificed in order to serve the 'greater good' (however measured).[56]

(2) Authors' rights

4.38 The authors' rights tradition contains two strands that are commonly blended,[57] but that in copyright law play separate roles meriting individual

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[55] *Bleistein v Donaldson Lithographing Co* 188 US 239, 251 (1903) (Holmes). The institutional problem persists even if the 'progress of science' criterion could be applied to types of work or the system as a whole, rather than to individual works. See *Mitchell Brothers Film Group v Cinema Adult Theater* 604 F 2d 852, 860 (5th Cir, 1979).

[56] See U LeGuin, *Those Who Walk Away from Omelas*, in *The Wind's Twelve Quarters* (Harper & Row, 1975) 224 (powerful allegory of a culture dependent on allowing harm to innocents). In practice, aggregative approaches may not lead to such extreme results. Mitchell Polinsky reminds us, for example, that persons whose interests are sacrificed in the pursuit of economic efficiency can be rewarded by transfer payments after the 'larger pie' has been created. AM Polinsky, *An Introduction to Law and Economics* (2nd edn, Little, Brown, 1983) 7–10, 119–27. Even without transfer payments, utilitarianism can yield significant protection for individual interests. For example, FI Michelman, in 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 Harv L Rev 1165, 1224, examines the US constitutional requirement that 'just compensation' be paid for 'takings' of property. That requirement is open-ended, and judges can interpret it through both utilitarian and fairness approaches. Michelman shows that both utilitarian and fairness criteria yield significant protections for the existing property entitlements of individuals—with utility, surprisingly, sometimes protecting individuals from uncompensated State action in ways that a pure fairness approach might not.

[57] Although these strands are usually seen as non-aggregative, they are also often intertwined with aggregative instrumental arguments. See, eg, D Ladd, 'The Harm of the Concept of Harm in Copyright' (1983) 30 J Copyright Society USA 421, 425–6.

treatment.[58] One strand rests on the beneficial results that authors generate. It has to do with securing, for those who create works of value, reward for their 'just deserts'. It can be viewed in various ways: as a form of causation-based corrective justice,[59] (holding that the person who creates value should be paid for it, just as—arguably—those who generate harm should be made to compensate their victims);[60] as an offshoot of Lockean labour theory;[61] as a notion of fairness; as a sort of strict liability for benefits; or as a variant of the law of unjust enrichment. The key notion in this branch of the so-called 'authors' rights' or 'natural rights' tradition is the claim to deserve some reward, which might take the form of a claim to control.

4.39 The second 'authors' rights' strand has to do with an author's personal stake in what she has made. It too can be found in Locke,[62] though arguably only with some strain, and its defenders often make use of the work of Hegel and his interpreters.[63] Its proponents might emphasize that 'we have the feeling of our personality being in some inexplicable way extended to encompass the objects we own.'[64] If people experience such cathexis to ordinary items of

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[58] For an interesting investigation of one form that the restitutionary and personality approaches might take, and comparisons between them, see J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown L J 287. See also, AC Yen, 'Restoring the Natural Law: Copyright as Labor and Possession' (1990) 51 Ohio State L J 491; WJ Gordon, 'An Inquiry Into The Merits Of Copyright: The Challenges Of Consistency, Consent, And Encouragement Theory', (1989) 41 Stanford L Rev 1343 at 1446–69; EC Hettinger, 'Justifying Intellectual Property' (1989) 18 Philosophy and Public Affairs 31; WJ Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia L Rev 149–281 and WJ Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 Yale L J 1533–609.

[59] See the discussion of corrective justice in WJ Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia L Rev 149–281 and the sources cited therein.

[60] Compare G Sher, *Desert* (Princeton, 1987) 69–90.

[61] See J Locke, *The Second Treatise of Government* (Bobbs-Merrill, 1952) ch 5. Also see WJ Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property' (1993) 102 Yale L J 1533 and J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown L J 287, 296–330.

[62] See, eg, K Olivecrona, 'Appropriation in the State of Nature: Locke on the Origin of Property' (1974) 35 J Historical Ideas 211; K Olivecrona, 'Locke's Theory of Appropriation' (1974) 24 Philosophical Q 220, 225.

[63] See J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown L J 287, 330–66 and MJ Radin, 'Property and Personhood' (1982) 34 Stanford L Rev 957.

[64] K Olivecrona, 'Appropriation in the State of Nature: Locke on the Origin of Property' (1974) 35 J Historical Ideas 211.

property, then how much closer, it is thought, must be the connection of the author to his creative works? Proponents of the 'personality view' might also argue that property contributes to 'self-actualization . . . personal expression . . . dignity and recognition as an individual person,'[65] and that control over one's intellectual products is a form of property uniquely suited to these ends.

4.40 Searching for a definitive ordering among these policies and principles, the scholar founders. The courts' statements waver, and policies interpenetrate.[66] Given this ambiguous mix of policies, with instrumentalism dominant but not exclusive, how should the flexible doctrines be construed? One might handle suppression cases by assessing the underlying policy concerns implicated by each fact pattern and deciding, according to some calculus, whether enforcing the author's prima facie rights of control, or giving the hostile user the freedom to copy, best serves the relevant goals. But, as noted above, determining the relevant calculus to accommodate the various goals is, at this stage of copyright's development, a difficult matter. This is not a sign of copyright's immaturity as a discipline; virtually all legal doctrines contain a mix of policies competing for strength.[67]

4.41 Another way to handle the mix of policies is to minimize the conflict by identifying some dominant purpose. Thus, one might identify providing economic incentives as the dominant purpose of copyright, and recommend that special consideration be given to users whenever the copyright owner's motivations differ from that approved motive. But such a simplification threatens to distort.

4.42 A third way of reconciling these diverse policies is to investigate whether there is any result on which all relevant policies can converge. This possibility will now be considered.

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[65] J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 Georgetown L J 287, 330

[66] For an intriguing exploration and application of several alternative policies, see WW Fisher III, 'Reconstructing the Fair Use Doctrine' (1988) 101 Harv L Rev 1659.

[67] See, eg, AA Leff, 'Law And . . .' (1978) 87 Yale L J 989 (arguing that such mixes are inevitable).

D. Safeguarding Hostile Uses from Suppression: A Search for Converging Policies

4.43 As mentioned, the two major strains in copyright are the economic or instrumental perspective, and the authors' rights perspective. This dual perspective parallels the configuration in property and tort law as a whole, where quandaries such as the suppression problem are sometimes analysed in terms of whether the individual holding an entitlement is a 'steward' entrusted with the resource solely for the social good that is likely to result from his productive use of it, or a 'sovereign' to be left unregulated in managing the resource.[68] Despite their potential for conflict, the sovereignty and stewardship models often generate results that converge.[69] It may be that copyright's various normative strands can be similarly reconciled in regard to particular issues. It will be suggested that in regard to at least some suppression issues—notably, those involving authors who have already made the copyrighted work part of the public debate or consciousness[70]—it may be possible to reach some consensus among the competing policies and principles, thus rendering it unnecessary to choose one dominant strand on which to rely. But such an analysis requires that one voyage some distance beyond the explicit words of the copyright statute.

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[68] See LL Weinreb, 'Fair's Fair: A Comment on the Fair Use Doctrine' (1990) 103 Harv L Rev 1137, 1139–41 (implicitly addressing sovereignty and stewardship models).

[69] It is their convergence in the usual case that permits their continued coexistence as competing perspectives. For example, one way to serve the 'social good' is, arguably, to respect individual owners' investments in their property; compare FI Michelman, in 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 Harv L Rev 1165 (utility arguments support paying compensation to owners disadvantaged by government activity in a fairly wide range of instances). Similarly, a way to serve the economic health of a society is, arguably, to honour owners' decisions as to how their property should be used. This latter argument is, at its extreme, Adam Smith's 'invisible hand' notion.

On the general notion of convergence, I am indebted to Randy Barnett.

[70] The arguments that follow apply most strongly to the enforcement of copyright in published works.

(1) The economics of suppression

4.44 It may seem odd to contend that second-guessing an owner's decision whether or not to license or sell a resource can be consistent with neoclassical economics. That tradition stresses the sovereignty of individual decision-making. However, in the suppression context, there exist many well-recognized economic phenomena that should diminish our confidence that the owner's decisions will in fact tend toward the 'maximization of economic value' in any meaningful sense. Consider, for example, a historian who denies a hostile critic permission to quote fairly extensively from her book, or sets an extremely high price (say, $10,000) that she believes will be the amount lost in revenues if the critic's hostile review is published. Also assume that the review would be ineffective without the quotations. If the critic, who stands to make, say, $500 from the review, declines to purchase a licence but publishes the quotations nevertheless, and the historian sues, the following reasons counsel that the courts not assume that because the historian's price was higher than the critic's offer it would produce more 'value' to enjoin the unconsented use of the quotations rather than to allow distribution of the review.

4.45 First, the critic's fee is unlikely to represent all the value that publication of the review will bring to the affected audience, in part because the market for such goods rarely if ever gives their sellers a price that captures the resulting surplus.[71] Thus, the buyer's likely maximum offer ($499) will probably understate significantly the actual value of the use in her hands.

4.46 Secondly, the historian's minimum price of $10,000 is likely to overstate significantly the social value of the quotations remaining solely in the historian's hands, since much of that amount reflects mere pecuniary loss: if the review is published, many consumers of historical works will simply shift their purchases to other (perhaps better) historians, and there may be no net social loss at all. There may even be a social benefit if an inferior history is ignored and a better one supported by the reading public.

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[71] See ML Katz, 'An Analysis of Cooperative Research and Development' (1986) 4 Rand J Economics 527, 527 (in the absence of price discrimination, a firm that invests in research and development 'will be unable to appropriate all of the surplus generated by the licensing of its R&D'). Whether the historian's similar inability would exceed the critic's would be an empirical question.

4.47 Thirdly, the historian's reputation and image are involved, and when such irreplaceable items are at stake the very ownership of an entitlement can crucially change one's market behaviour.[72] When goods as important and irreplaceable as life or reputation are on the table, the effect of the initial grant of entitlements is so strong that it may well determine where the resource rests in the final analysis: Persons are unlikely to sell what they own at any price;[73] yet if they have no legal entitlement to the thing at issue, their ability to buy it is limited by their available resources. In such cases, the results of consensual bargains cannot be relied upon to yield any independent information about 'value'.

4.48 Of course, the above discussion is quite summary. Nevertheless, it should suggest why the copyright owner's pursuit of a non-monetary interest could give an economically-oriented court special reason to inquire into the weight of the affected interests rather than simply deferring to the plaintiff's claim of right.

(2) Authors' rights and suppression

4.49 The authors' rights approach has, as mentioned, two principal lines of argument, one resting largely on the perceived appropriateness of rewarding valuable labour, the other on the perception that authors have a special personal attachment to their works. While, conceivably, either of these strands could be employed to argue that authors should be free to suppress others' unfriendly use of their work, such an argument does not inevitably follow from the arguments' terms. To the contrary, attention to questions of proper reward, or personal development and psychological cathexis, may better indicate that the power to suppress should not be given to artists.

4.50 Turning first to the restitutionary strain of argument, it appears to rest on the notion that a person should retain the benefits that he or she generates.

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[72] For further discussion of the way that owning an entitlement can shift resource allocation, see for example, EJ Mishan, 'The Postwar Literature on Externalities: An Interpretive Essay' [1971] 9 J Economic Literature 1, 18–21 ('income' or 'welfare' effects illustrated arithmetically); see also AC Yen, 'Restoring the Natural Law: Copyright as Labor and Possession' 51 Ohio State L J 518–19.

[73] Compare RH Coase, 'Notes on the Problem of Social Cost' in RH Coase, *The Firm, the Market, and the Law* (U Chicago, 1988), 157, 170–4 (suggesting that the effects of owning an entitlement are unlikely to be significant in contexts not involving irreplaceable goods such as, in this context, reputation or self-esteem).

That notion in turn might be traced to any one of a number of arguments: a strict view of personal responsibility, perhaps, suggesting that every individual should keep the benefits she generates and pay for the harm she does; or perhaps a notion that the existing balance of goods among persons warrants respect as a prima facie matter, so that any unjustified taking of a benefit or imposition of a harm causes an imbalance or inequality that demands recompense. But these notions do not support an unqualified plaintiff's right.

4.51 Instead, they tend to be symmetrical;[74] they suggest that if 'pay for the benefits you receive from others' is a relevant principle, so is 'do no harm to others', or 'pay for the harm you do others'. If so, the author's right is limited by the very consideration that supports it.[75] An author under an obligation to refrain from harm is not at liberty to withdraw her work at will from the use of those whom it has affected.

4.52 Another possible foundation for the restitutionary strain is the 'natural rights' argument is Lockean labour theory. Here, too, non-owners' rights against harm have an important role. A harm-based limitation on property rights is captured in Locke's theory by his famous 'enough and as good' proviso.[76]

4.53 Locke argued that one who labours in the common to draw forth water from the lake or pick apples from the field is entitled to that to which his labour is joined. Modern debates have employed his theory to suggest that an artist who labours to give expression to ideas he draws from the public domain is similarly entitled.[77] But Locke thought the ownership entitlement could only

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[74] In fact, if there were an asymmetry, it would probably be to give defendants a stronger protection against harm than it would give plaintiffs a right to recapture benefits. See S Levmore, 'Explaining Restitution' (1985) 71 Virginia L Rev 625, 671–2 (suggesting that such an asymmetry exists in the common law).

[75] This is the key point explored in WJ Gordon, 'A Property Right in Self-Expression' (1993) 102 Yale L J 1533.

[76] See J Locke, *Second Treatise of Government*, ch 5 at para 26, 32. The condition that 'enough and as good' be left for others is commonly known as the 'proviso' or 'sufficiency condition'.

[77] This reliance sometimes extends to claims for a perpetual and unlimited copyright. Such a use of Locke is particularly inapt, given his expressed views on the pre-copyright Licensing Act. See Peter King, *The Life and Letters of John Locke* (London 1884) 202–09 (memorandum from 1693 in which Locke expresses inter alia the view that rights over copying should be limited in time).

arise where 'enough, and as good' was left for others.[78] If giving exclusive dominion to the labourer will leave others worse off than they would have been in his absence, then the proviso is not satisfied, and the labourer is not entitled to property rights in what he has taken.

4.54 The structure of this argument gives primacy to the harm principle, as it should, since it can be argued that Locke's affirmative argument also derives from a harm principle. To see this, consider Locke's primary argument for property.[79] Locke first argues that each of us has a property in his body and the labour of his body. Secondly, he posits that when one appropriates things from the common (picking apples, drawing water from the river) one joins one's labour to the things so taken. Thirdly, he posits that because labour is property, others have no right to what the labour is 'joined to'. Here he is implicitly building upon his earlier expressed notions of what it means to have 'property': it is an entitlement not to have something unjustifiably taken away or harmed.[80] It would harm the labourer to take the apples or water from him because doing so would take the labour he had joined to these items of sustenance as well.

4.55 Therefore, one who labours to draw forth objects from the common plenitude 'has a property' in the things so gathered, at least if there is 'enough, and as good' left for others, because others are under an obligation not to harm him by taking the things from him. In short, Locke's labour theory may depend upon a 'do no harm' rule, and acting upon the theory (with no additional justification) is problematic when doing so itself causes harm. Suppression can cause harm, both in the sense of injury, and in the sense of making someone worse off than if they had never encountered the suppressed text.

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[78] See J Locke, *Second Treatise* ch 5 at para 26, 32; also see para 37 ('though men had a right to appropriate by their labour, each one to himself, as much of the things of Nature as he could use, yet this could not be much, nor to the prejudice of others, where the same plenty was still left, to those who would use the same industry').

[79] See ibid, and the discussion in WJ Gordon, 'A Property Right in Self-Expression' (1993) 102 Yale L J 1533. Given here is an interpretation of Locke's 'labour-joining' argument. Locke's *Second Treatise* also contains other arguments regarding, for example, the beneficial results of property ownership.

[80] See J Locke, *Second Treatise*, ch 5. The proviso that 'enough, and as good' be left for others constitutes an additional 'do no harm' principle. See also LC Becker, *Property Rights: Philosophic Foundations* (Routledge & Kegan Paul, 1977). Similarly, Locke's argument regarding waste suggests he saw nothing wrongful in taking property from someone to whom it had no value. J Locke, *Second Treatise*, ch 5 para 36–37. If so, Locke would seem to view a non-harmful taking as non-wrongful, at least in the state of nature.

4.56 Once a copyright owner has injected something into the common culture, its audience may be unable to purge it from their memories. Having changed the community's culture, the author may actively be committing a harm if he then withdraws the work from the community when its new artists seek to integrate, assess, and respond to its influence. Perhaps, on balance, the first artist's work is still more valuable than not; if so, perhaps some payment is owed to that first artist even when a hostile or critical use is made of his work. But even if the restitutionary strain in 'natural rights' theory will justify complete control and injunctive relief in some circumstances, it will not do so here: neither an entitlement to capture the effects one creates, nor Lockean labour theory, supports a complete right of exclusion against those whom the property negatively affects.[81] Locke's property right works against those who are not 'industrious', those who merely desire to benefit from 'another's pains'.[82] The copyist who cares about the content of the work, either positively or negatively, is simply not the kind of trespasser Locke envisaged.[83]

4.57 What of the 'personality' theories? Clearly the artist who finds his work attacked will not be happy about it. And yet a regard for emotional attachments or self-actualization does not point solely in the direction of suppression and the artist's interests; audiences, too, develop attachments to the symbols surrounding them, and for audiences, as for artists, use of the symbols may be essential to self-expression and to making an impression on

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[81] For a fuller development of this theme, see WJ Gordon, 'A Property Right in Self-Expression' (1993) 102 Yale L J 1533; WJ Gordon, 'An Inquiry Into The Merits Of Copyright: The Challenges Of Consistency, Consent, And Encouragement Theory' (1989) 41 Stanford L Rev 1343 at 1460–5.

[82] It is the proviso that 'enough and as good' be left that helps Locke identify persons who have a duty to respect claims to own private property. Locke writes:

> 'God gave the world to men in common, but since He gave it them for their benefit and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was to be his title to it); not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement as was already taken up needed not complain, ought not to meddle with what was already improved by another's labour; *if he did it is plain he desired the benefit of another's pains*, which he had no right to . . .' Locke, *Second Treatise*, ch 5, par 33 (emphasis added).

[83] Ibid. Also see WJ Gordon, 'Render Copyright Unto Caesar: On Taking Incentives Seriously' 71 U Chi L Rev 75 at 78–81 (using Locke to identify the defendants against whom copyright is most appropriately used) (2004).

the world around them.[84] When the defendant seeks to deface the only copy of the plaintiff's work, the plaintiff's interest should probably prevail. But when the plaintiff's work exists in myriads of copies, it is the critic's personal interest in producing her defaced, altered, or out-of-place copy—her 'moral right' to do so—that seems the greater and should prevail.[85]

(3) Reference to analogues in the common law

4.58 Yet, all this is at a fairly high level of generality, and debatable. To what other sources might one look to determine what a lawmaker should decide when faced with a claimed right to suppress? One possibility is to look to decision makers in analogous contexts. This leads us to the common law, particularly the area known as substantive restitution or 'unjust enrichment'.[86] This is the area of the common law most concerned with copyright's central issue: the question whether (and when) the law should impose non-contractual liability for benefits one person derives from another's efforts. Persons who wilfully take advantage of benefits made possible by others' efforts are sometimes required to pay for them.[87]

4.59 The restitution cases, however, are marked by a strong concern with preserving the defendant from an erosion of his autonomy,[88] and with preserving

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[84] See J Waldron, *The Right to Private Property* (Oxford: OUP, 1988) 4, 343, 378–81 (arguing that the upshot of the Hegelian analysis is that, in Hegel's own words, 'everyone must have property').

[85] The US moral rights statute, 17 USC sec 106A, roughly follows this pattern. It applies only to works of visual art that exist in only one or a very few number of copies, 17 USC sec 101 (definitions) and 106A, and the moral rights are subject to fair use, 17 USC sec 107.

[86] I here mean to focus on restitution that provides the basis of a cause of action, rather than on restitution that serves simply as a remedy for the violation of rights provided by other doctrines.

[87] See WJ Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse* (1992) 78 Virginia L Rev 149 (exploring the implications of restitution and unjust enrichment doctrine for issues concerning rights over data); WJ Gordon, 'Of Harms and Benefits: Torts, Restitution, and Intellectual Property' 21 J Legal Studies 449–82 (1992) (comparing the exceptions to the 'intermeddler' rule with doctrines in copyright).

[88] See GE Palmer, *The Law of Restitution* (Little, Brown, 1978) 359 ('long-standing judicial reluctance to encourage one person to intervene in the affairs of another by rewarding restitution of benefits thereby conferred.')

the defendant from harm. Thus, when the choice is between leaving a labourer unrewarded and causing a net harm to the defendant, frequently the labourer is left without recourse.[89] If the common law is any guide, then, authors might not be entitled to copyright's rewards in cases where copyright enforcement would leave the defendant suffering a net harm. If so, authors who attempt to use copyright law to suppress works unfavourable to them should not be completely free to do so.[90] Some concern for the users' autonomy and safety from harm—some concern with the audience's own moral rights—is necessary. Thus it is not merely the Lockean proviso that counsels giving some latitude to the user who is trying to recast for herself and others harmful symbols and text that have been thrust upon her.

4.60 The common law might also offer guidance to some of the other questions canvassed above. A particularly useful source of analogy might be torts, which in many ways functions as the converse of intellectual property.[91] As a mirror provides a great deal of information through its reversed images, it may be that the literature of tort law, the civil branch of the law of harms, could contain significant wisdom applicable to the jurisprudence of benefits.

4.61 First, both copyright and torts can be interpreted as serving non-instrumental ends. Thus, whether using terms of morality, fairness, or 'corrective justice', one can argue that an innocent victim injured by a harm-causer 'deserves' to be made whole and that the defendant 'ought' to pay. Similarly, it is often argued that a creative person 'deserves' to be paid for what he has brought to the world, and that the user of another's work 'ought' to give recompense for it.

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[89] See S Levmore, 'Explaining Restitution' (1985) 71 Virginia L Rev 625, [77–8, 84] (law denies restitution where a non-bargained 'benefit' may not in fact make the recipient better off; even at a 'less-than-market' price the unsolicited benefit 'may be undesirable to a wealth-constrained' recipient); see generally WJ Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 Virginia L Rev 149.

[90] Of course, the desirability of avoiding harm expresses itself as a legal principle with weight in many other areas of the common law as well.

[91] See WJ Gordon, 'Copyright as Tort Law's Mirror Image: "Harms", "Benefits" and the Uses and Limits of Analogy' (2003) 34 McGeorge L Rev 533; WJ Gordon, 'Of Harms and Benefits: Torts, Restitution, and Intellectual Property' (1992) 21 J Legal Studies 449–82.

4.62 The question of what role should be played by a creator's claim to 'fair return' is largely unresolved in copyright. It is likely that there is some grain of truth in that much-invoked but little-analysed notion, 'the natural rights of an author', and only systematic analysis can separate that grain from the rhetoric of perpetual and all-encompassing claims that now clings to it. Perhaps the literature exploring notions of 'desert' and 'corrective justice' in torts, and in criminal law as well, could be of assistance here. In all nations, tort rights have limits; not all injuries are compensable.

4.63 Secondly, and perhaps more importantly, both copyright and torts serve a particular incentive function: they seek to 'internalize externalities'. That is, both copyright and torts seek to bring decisions' effects to bear on persons with power to affect how things are done. In torts, the primary person to be affected is the tortfeasor; he is ordinarily the 'cheapest cost avoider' and is discouraged from taking unnecessary risks with others' persons and possessions by the spectre of a suit imposing liability for harm caused. In copyright, the primary person to be affected is the creator; he is ordinarily the 'best benefit generator' and is to be encouraged to produce by being given a right to capture a portion of the benefits he creates.[92]

4.64 Thus, both doctrines aim at providing incentives. Conceivably, the lessons of one could be useful for the other. We might, for example, try viewing the creative user problem from the perspective of the tort doctrines that recognize that the person best able to effectuate desirable action is not always the person in the defendant's position. For example, consider accident law. If a pedestrian is 'contributorily' or 'comparatively' negligent by running in front of a car, that behaviour will eliminate or reduce any recovery that might be sought. The economic logic is familiar: when the pedestrian is better positioned than the driver to avoid an accident,[93] it is the pedestrian's behaviour the law should seek to change; one way to change that behaviour is to force pedestrians to bear some of their own costs if they choose to behave carelessly.

4.65 The formal lesson of the logic is also familiar: in every transaction there are two parties, and deciding how to 'internalize' costs between them is a choice

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[92] Persons with the potential to create valuable works have rights over the use others make of their products; the benefits the authors create are brought home via licence or royalty fees, and productive behaviour is encouraged.

[93] See generally G Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale, 1970) 134–40 ('cheapest cost avoider').

that should depend on context rather than on formal classifications such as plaintiff or defendant.[94] If all the harms that would not occur 'but for' the defendant's driving were internalized to that driver, others who might become involved might have an inadequate incentive to be careful.

The same lesson could be applied, just as simply, to copyright. If all the benefits that could be traced to a first artist through a 'but for' test were internalized to her, no one else would have a monetary incentive to build upon her work. If a creative copyist is in a better position to contribute to the culture than is the first artist, then perhaps the law should take care to direct positive incentives to such persons by, for example, giving them shelter from infringement suits.[95] Tort tests of responsibility remind us that 'incentive' works both ways. **4.66**

Similarly, tests of 'proximate cause' in tort tend to ask if the injury caused was of the kind that made the defendant's act negligent. Courts in copyright cases should make a similar inquiry: they should ask if the plaintiff's motives for suit are of the kind that made the legislature provide copyright protection in the first instance. Motives to suppress were not those the legislature sought to further in the copyright law, and should not be effectuated through copyright suits.[96] **4.67**

E. Conclusion

Copyright is not a self-executing concept. It must have limits to make sense. An unlimited copyright would give an author a perpetual right to control **4.68**

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[94] See RH Coase, 'The Problem of Social Cost' (1960) 3 J L & Economics 1.

[95] Such shelter is especially needed when the new author is unable to purchase a licence, but is not limited to such cases. See sources cited immediately infra.

[96] See, eg, WJ Gordon, 'Fair Use as Market Failure', 82 Columbia L Rev 1600 at 1632 (1982) (arguing that fair use may be employed to defeat anti-dissemination motives); also see WJ Gordon, 'Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only *Part* of the Story' (2003) 13 J Copyright Society 149 (arguing that fair use should be divided into two subcategories, excuse and justification; the excuse category involves factual obstructions like transaction costs, while the justification category involves occasions when the copyright owner asserts a right that is outside the proper normative scope of her control). Admittedly, many cases involve mixed motives. To examine the difficult questions they pose would take us beyond the scope of this chapter.

all the benefits that others draw from her work. Such a regime would cause paralysis.

4.69 In searching for the limits that can make sense of copyright, one can make reference to its dominant policies, namely, incentives and authors' rights. One can also explore analogies in other areas of law. All these investigations converge in reminding us that sometimes encouraging the copyright *defendant* rather than the copyright plaintiff can best serve copyright's goals. In particular, blind copyright enforcement is particularly unwise in cases where the copyright owner seeks to restrain a defendant who wishes to copy for purposes of criticizing or mocking the copyrighted work.

4.70 In some ways, this offers a distinctly American view. In our 'romance with the First Amendment',[97] Americans honour the iconoclastic dissenter and critic over the person whose feelings may be hurt or whose orthodoxy may be weakened. But even for nations with different priorities, equitable doctrines such as 'fair use' can provide great benefits to individuals and the societies to which they belong.

4.71 The same norms that give copyright its (contested) claim to legitimacy should simultaneously generate significant protections for free speech. Those protections may not be sufficient—they largely protect the public from harm from being unable to respond to existing works that have shaped their environment and their very selves, and free speech may demand more. Nevertheless, if recognized and incorporated into flexible doctrines such as fair use, these limits could ameliorate some of the unfortunate results caused by the American courts' reluctance to embrace fully the First Amendment's applicability to copyright.

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[97] See Steven H Shiffrin, *The First Amendment, Democracy And Romance* (Princeton University Press, 1990).