

## “Copyright Law for the Participation Age”

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**"Copyright Law for the Participation Age"**

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I. INTRODUCTION

At the end of the Twentieth Century, the principal threat to intellectual property holders was the specter of mass duplication facilitated by digital technology and the Internet.<sup>1</sup> Today, the threat is from what is called "participatory culture."<sup>2</sup> With the rise of citizen bloggers, we are warned of the potential demise of print media and professional journalism.<sup>3</sup> YouTube is the world's largest channel, with half of its content provided not by professional content industries but by ordinary people.<sup>4</sup> The rise of "do-it-yourself" or "DIY" culture raises concerns about cultural quality and incentives for creative professionals, particularly when amateur content is

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1. The U.S. Congress passed the Digital Millennium Copyright Act in 1998 in response to claims that without extra legal protections, the Internet would bring about the death of copyright. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 12 Stat. 2860; see generally Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999) (critiquing as overly broad the anti-circumvention restrictions of the DMCA).

2. See, e.g., ANDREW KEEN, *THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE* 9 (2007).

3. *The State of the News Media 2013, An Annual Report on American Journalism*, PEW RESEARCH JOURNALISM PROJECT, (Mar. 18, 2013), <http://stateofthedia.org/2013/overview-5>.

4. Marco R. della Cava, *YouTube Spends \$100 Million to Redefine TV*, USA TODAY, (Jan. 12, 2012), <http://usatoday30.usatoday.com/life/television/news/story/2012-01-11/youtube-channels/52501780/1>.

ripped, mixed, and burned from professionally produced copyrighted content.

Will the next great Copyright Act come to the rescue of professional creators on the theory that they are threatened by amateurs—just as Congress responded to the perceived death of copyright by digital technology in the 1990s?<sup>5</sup> Or will Congress recognize the oft-ignored benefits of participatory culture and of semiotic democracy—that is, a democracy in which all people are engaged in the production of our culture? I will argue that a copyright law befitting our participation age, far from stamping out the emergent participatory culture, ought to put its weight firmly behind it. I will argue that participatory culture is the very goal of Enlightenment, and ought to be a goal of modern copyright law.

In this sense, I would contrast the direction of my remarks from what we have heard today from Professor Garon.<sup>6</sup> Professor Garon spoke very powerfully about users of copyrighted content as consumers and not as producers—a consumer protection model of copyright law.<sup>7</sup> In contrast, I am not focusing on consumers swallowing hook, line, and sinker culture handed down to them *as is*. To the contrary, my concern is with how ordinary people become producers of culture in their own right. I am concerned with the ability of each person to speak back to the culture around them through activities as far-ranging as book clubs to blogs, mash-ups to fan fiction and fan art.

I will deliver my lecture in three parts: First, I will step back from the debate today about participatory culture to consider our history.<sup>8</sup> Although we speak about participatory culture as something new, in fact, we have been here before.<sup>9</sup> If we look at Jurgen Habermas's account in his influential book, *The Structural Transformation of the Public Sphere*, we will see that the Enlightenment public sphere of the Eighteenth and early Nineteenth centuries, with its vibrant coffee houses, resembled in important ways the emergent participatory culture that we see today.<sup>10</sup> In revisiting that history, I hope to elaborate the connections between participatory culture, Enlightenment, and copyright. I further hope to consider the

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5. See Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 350 (2008).

6. Jon Garon is the inaugural director of the Northern Kentucky University Chase Law + Informatics Institute, who also spoke at Ohio Northern University Law School's 2013 Carhart Program on Legal Ethics. 2013 CARHART PROGRAM ON LEGAL ETHICS, <http://law.onu.edu/news/3581> (last visited Mar. 22, 2014).

7. See *id.*

8. See *infra* Part II.

9. See MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 63 (2012).

10. See *id.*

implications of these connections for a better understanding of how to regulate copyright in today's Participation Age. Second, I am going to turn to consider some ethical implications of participatory culture on a global scale.<sup>11</sup> I argue that, in many cases, the world's poor are creating music, films, and culture. But they are vulnerable to the exploitation of their cultural creations in a global marketplace that is characterized by sharp inequalities of knowledge and power. Third, I will consider ways in which my account of participatory culture challenges the dominant law and economic analysis of copyright law today.<sup>12</sup>

## II. ENLIGHTENMENT HISTORY AND THE PARTICIPATION AGE

Let us first consider the participatory culture during the period now known as the Enlightenment.<sup>13</sup> In Habermas's influential account, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*,<sup>14</sup> he tells of the rise of the liberal, bourgeois public sphere in late Eighteenth and early Nineteenth Century Europe during the Age of Enlightenment.<sup>15</sup> There, for the first time in history, individuals rejected monarchy and feudal social relations in favor of republicanism.<sup>16</sup> The Enlightenment motto, articulated by Kant as "think for oneself," extended well beyond politics to include art, philosophy, and literary meaning.<sup>17</sup> Public opinion on a vast range of matters was formed in what Habermas calls the "public sphere:" places and spaces where private individuals gathered as citizens to publicly debate the issues of the day.<sup>18</sup> Salons, coffee houses, pamphlets, and journals became sites of critical, rational debate where public opinion could be freely formed and reformed.<sup>19</sup>

Habermas's ideal public opinion has several key features, namely, that individuals are equals, debate takes place on rational terms, and persuasion involves mutual recognition, not coercion.<sup>20</sup> Habermas adopts C.W. Mills's formulation for determining what constitutes public opinion: in a public 1) virtually as many people express opinions as receive them; 2) people can immediately and effectively answer back any opinion expressed in public; 3) there is a ready outlet to express opinions even against, if necessary, the

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11. *See infra* Part III.

12. *See infra* Part IV.

13. This essay is excerpted and adapted from portions of my book. *See id.*

14. JÜRGEN HABERMAS, *The Structural Transformation of the Public Sphere*, in *THE ENLIGHTENMENT, A SOURCE BOOK AND READER* 386 (Paul Hyland ed., 2003).

15. SUNDER, *supra* note 9, at 51.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. SUNDER, *supra* note 9, at 51.

prevailing system of authority; and 4) authoritarian institutions do not penetrate the public, which is more or less autonomous.<sup>21</sup> It is important to recognize that for Habermas, the promise of Enlightenment was not simply its commitment to public access to cultural knowledge in the form of literature, books, and essays.<sup>22</sup> Rather, Habermas valued the Enlightenment commitment to democratic participation in cultural debates about the *meanings* of the works themselves.<sup>23</sup> Simply stated, intellectual works are the means, and not the ends of enlightenment.<sup>24</sup> Habermas valued not a culture that simply produced more books or more literature, but a culture of *book clubs* in which citizens could freely engage the given works.<sup>25</sup> Indeed, according to Habermas, without the freedom to critically engage cultural works, there would be no difference between republicanism and feudalism.<sup>26</sup> For Habermas, the growth of an autonomous public sphere in newspapers, journals, reading clubs, masonic lodges, and coffee houses in Eighteenth Century Europe was crucial for maintaining the public's independence of thought.<sup>27</sup> The essential characteristic of the public sphere was its critical nature, whereby the public no longer accepted the authority of the monarch or *any authority*, including any cultural authority.<sup>28</sup>

Those who are familiar with the book will know that *The Structural Transformation* tells two tales.<sup>29</sup> In the second half of the book, Habermas recounts an ironic transformation from a culture-debating society to a culture-consuming society during the course of the Twentieth Century.<sup>30</sup> Two simultaneous developments—the rise of mass media alongside the introduction of the concept of leisure for a bourgeois middle class—transformed the participatory culture of the Enlightenment era, where citizens debated and created meaning, into a culture of consumption.<sup>31</sup> “At one time the commercialization of cultural goods had been the pre-condition of rational, critical debate,” Habermas writes.<sup>32</sup> “But over time, this access to cultural goods began, ‘surreptitiously,’ to become the end and not the means of the debate.”<sup>33</sup> By the Nineteenth and early Twentieth Centuries,

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21. *Id.* (citing C.W. Mills, *THE POWER ELITE* (1956)).

22. *Id.*

23. *Id.*

24. *Id.*

25. SUNDER, *supra* note 9, at 56.

26. *Id.* at 51-52.

27. *Id.* at 52.

28. *Id.*

29. *Id.*

30. SUNDER, *supra* note 9, at 52.

31. *Id.*

32. *Id.*

33. *Id.* (citing Jürgen Habermas, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 160 (1960)).

we were beginning to see “the replacement of a reading public that debated critically about matters of culture by the mass public of culture consumers.”<sup>34</sup> Culture as commodity and as entertainment replaced the culture of participation.<sup>35</sup> Culture as commodity stimulated mental relaxation rather than the engaged and critical faculties required for the public use of reason.<sup>36</sup> Additionally, there was a heightened separation between cultural elites— who produced culture— and the consuming public.<sup>37</sup> Intellectuals, artists, and big media conglomerates would produce culture, and the general public would passively receive it.<sup>38</sup> As Habermas tells it, “the public is split apart into minorities of specialists who put their reason to use non-publicly and then the great mass of consumers whose receptiveness is public but uncritical.”<sup>39</sup>

In short, the public sphere became privatized.<sup>40</sup> Meanwhile, the very core of democratic society, a critical and innovative citizenry, was dulled.<sup>41</sup> Habermas compares public opinion, where everyone participates, to what he calls “mass” opinion,” where cultural meanings are produced by a few and imposed on the many.<sup>42</sup> Furthermore, the flow of culture from mass media to the public is, largely, unidirectional.<sup>43</sup> Cultural products are presented as finished products and consumed as is.<sup>44</sup>

Intellectual property law by the end of the Twentieth Century reflected commodity culture, not participatory culture.<sup>45</sup> Copyright law, for example, viewed the production of more cultural commodities as an end in itself, without regard to who produced the goods, who could access them, and on what terms.<sup>46</sup> Cultural production came to be seen as the ends of progress, not its means.<sup>47</sup> As Habermas showed, the enlightenment commitment to universalizing access to knowledge perversely led to a single-minded focus on the production of culture for the people, but not by them.<sup>48</sup> Simply stated, the production of books took precedence over a culture of book clubs and discussion groups.<sup>49</sup>

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34. *Id.* (quoting Habermas, at 164, 168).

35. SUNDER, *supra* note 9, at 53.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (citing Habermas, at 175).

40. SUNDER, *supra* note 9, at 53.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. SUNDER, *supra* note 9, at 6.

46. *Id.* at 55.

47. *Id.* at 56.

48. *Id.* at 55-56.

49. *Id.* at 55.

Today, we are again at a crossroads between participatory culture and commodity culture.<sup>50</sup> We are moving away from a culture of Mickey Mouse to a culture empowered by the computer mouse.<sup>51</sup> The question is whether Congress will return us to a copyright law that enables cultural production by the few, not the many. My hope is that revisiting the history of the Enlightenment public sphere will elaborate the normative benefits to participatory culture that we may want to expressly consider when making policy choices about copyright today.

In fact, participatory culture lies at the center of the modern project to promote democracy and human development itself.<sup>52</sup> Just as John Stuart Mill described local government as a “school of political participation and skill,”<sup>53</sup> today we are recognizing some of the ways in which cultural participation also serves as an arena for developing engaged and active political citizens, particularly among youth.<sup>54</sup> Take the example of one thirteen-year-old Heather Lawver.<sup>55</sup> This young woman was so inspired by J.K. Rowling’s blockbuster Harry Potter series that she founded an online “school newspaper” for the fictional Hogwarts School of Witchcraft and Wizardry that forms the central setting for the Potter books and films.<sup>56</sup> Lawver’s online newspaper, published on the Internet, was written, edited, and created entirely by more than a hundred kids from around the world working together.<sup>57</sup> In the process, Lawver and other kids inhabiting the Potter universe, not working outside of it but working within it, developed their own critical reading, writing, thinking, and social skills through the popular Harry Potter lore.<sup>58</sup> The Harry Potter Alliance is another real world extension of the fictional Potter universe in which young fans of the books apply the values found in the books to today’s real world problems— from book-banning to human rights violations in Darfur.<sup>59</sup> There are even real world Quidditch leagues at universities around the world.<sup>60</sup>

Some may dismiss such activity as trivial. I disagree. Working through cultural works that we love, helps engender sociability and mutual understanding required in a successful democracy.<sup>61</sup> More importantly, the ability to deeply engage and work through copyrighted cultural works,

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50. SUNDER, *supra* note 9, at 56.

51. *Id.* at 14.

52. *Id.* at 62.

53. *Id.* at 68.

54. *Id.*

55. SUNDER, *supra* note 9, at 68.

56. *Id.*

57. *Id.*

58. *Id.* at 68-69.

59. *See id.* at 68.

60. SUNDER, *supra* note 9, at 75.

61. *See id.* at 3.

while they are still protected, requires that we be able to critique those works that profoundly shape ourselves and our society.<sup>62</sup> This freedom to think for oneself lies at the core of the Enlightenment<sup>63</sup> and is threatened by a copyright law that would focus more on the production of goods as the ultimate end rather than on the facilitation of discourse about these cultural works.<sup>64</sup> A copyright law befitting our participation age must lift its gaze from the narrow goal of just promoting more *goods* (without regard to who is producing the goods and on what terms), to focus instead on the production of *a good life*. Copyright law affects everything, from our ability to think freely to the distribution of the discursive power to speak and shape knowledge of our world.

Efficiency is one goal but it should not be our only goal. Modern copyright law must stay attuned to the full range of values implicated by copyright, from the right to speak to the freedom of thought required of democratic citizens.

### III. ETHICAL IMPLICATIONS OF PARTICIPATORY CULTURE

I want to turn now to consider some ethical implications of participatory culture on a global scale. I have largely focused my remarks on the benefits of ordinary people participating critically and actively with popular cultural works under copyright. I have spoken of the benefits of democratic culture or semiotic democracy in the sense that all people should have some freedom to think, critique, modify, and play with the dominant cultural stories that shape us. Now I want to think about democratic culture in another sense—how do we ensure that more people in the world, including the global poor, have an opportunity to create world culture and to share their contributions on fair terms in global markets? In this regard, I argue that in many cases the world's poor are creating music, films, and culture that all may enjoy, but they are vulnerable to exploitation of their cultural creations in the global marketplace. Consider the story of a man named Solomon Linda.<sup>65</sup> In the 1930s, Linda was the composer and lead singer of a musical group called the Original Evening Birds in South Africa.<sup>66</sup> Linda was living in a squalid, Johannesburg hostel in 1939 when he composed a haunting melody that recalled his childhood protecting cattle from lions in the jungle.<sup>67</sup> The Original Evening Birds recorded the song and called it

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62. *See id.* at 14.

63. *Id.* at 38.

64. *Id.* at 78.

65. SUNDER, *supra* note 9, at 2.

66. *Id.* at 87.

67. *Id.* at 2.



“Mbube,”<sup>68</sup> which means “lion” in Zulu.<sup>69</sup> Mbube became Africa’s first pop hit.<sup>70</sup> Linda’s record soon crossed the Atlantic and was reborn, first as “Wimoweh” and later as “The Lion Sleeps Tonight.”<sup>71</sup> In all, Linda’s song went on to be re-recorded over one hundred seventy times over the course of the Twentieth century before eventually finding its way into the immensely popular and profitable *Lion King* by Disney.<sup>72</sup> What has been called “the most famous melody ever to emerge from Africa,” made millions for many, especially for Americans, but not for the song’s composer, Solomon Linda, who died destitute of a curable kidney disease at the age of fifty-three.<sup>73</sup>

In recent years, after the story of the injustice to Linda came to light, Disney shared an undisclosed settlement with Linda’s children.<sup>74</sup> But the settlement came too late for Linda’s daughter, Adelaide, who had died of AIDS as recently as 2001 because she could not afford the costly anti-retroviral medications needed to save her life.<sup>75</sup> Another of Linda’s children had died as a baby of malnutrition.<sup>76</sup> I share this story with you for three reasons: first, the story illustrates well the value of free culture. Linda created “Mbube” by freely mixing the American jazz of the day with his own South African traditions to create a melody that is timeless and globally appealing.<sup>77</sup> At the same time, Linda’s story also dramatically illustrates how “free culture” is not necessarily “fair culture.”<sup>78</sup> In the real world, cultural exchanges often take place in the presence of sharp differences of power and knowledge.<sup>79</sup> Third, Linda’s tale tragically illustrates the relationship between intellectual property rights and other freedoms. Linda’s failure to be recognized for his contribution to our shared global culture in turn prevented him, and his family, from having the resources to access life-saving medications.<sup>80</sup>

Herein lies my second point: there is a potential connection between enhanced cultural participation on a global scale and the goal of poverty eradication. Copyright is a tool for promoting not only democracy and enlightenment, as I talked about in the first part of my comments, but also

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68. *Id.* at 82.

69. *Id.*

70. SUNDER, *supra* note 9, at 82.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. SUNDER, *supra* note 9, at 82-83.

76. *Id.* at 83.

77. *Id.* at 82.

78. *Id.* at 88.

79. *Id.*

80. SUNDER, *supra* note 9, at 83.

human and economic development. But this will mean that our copyright laws must be attuned to promoting not only a free culture but also a fair culture. Fair culture is one in which more and more people can have the capacity to participate in global cultural production and one in which they can expect recognition and a fair return for their cultural contributions in global markets. The beauty of Solomon Linda's song is that it is a melody that the whole world knows. But copyright must care not just for the production of more culture but also fair recognition and reward of authors, especially those who are easily exploited.

#### IV. THE LIMITS OF ECONOMIC ANALYSIS OF COPYRIGHT FOR THE PARTICIPATION AGE

Finally, let me now say a few words about how my account of participatory culture challenges the dominant law and economic analysis of copyright law today. I want to first consider the ability of fans of fictional works to deeply engage the works they love, from the Hogwarts fictional newspaper I mentioned, to fan fiction, to Quidditch. The dominant economic approach to fan activity has focused on market failure.<sup>81</sup> In the absence of an express license for use, statutorily authorized fair use is limited to a narrow set of circumstances where market failure prohibits private bargains from being struck.<sup>82</sup> A classic case of fair use under this market failure rationale is parody of a copyrighted work.<sup>83</sup> In Richard Posner's words, "negotiating for a parody license is a high transaction cost negotiation."<sup>84</sup> What is the logic here? It is that few people would be ready to license the right to be made fun of.<sup>85</sup> The law and economics approach would limit fair use only to these few cases of market failure and demand that, elsewhere, users either get a license or cease and desist.<sup>86</sup>

The upshot is that even though much user-generated content is non-commercial and consciously so, it may be illegal under current copyright law and policy. Kids writing themselves into the Potter stories are pirates taking the property of Warner Brothers and J.K. Rowling, unwelcome in copyright law's safe harbor.<sup>87</sup> I argue that law's current view of fair use, and of culture, is too narrow. First, the market failure approach misrecognizes how individuals actually participate in culture. I use the

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81. *Id.* at 33.

82. *Id.*

83. *Id.*

84. *Id.* at 33-34 (citing Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992)).

85. SUNDER, *supra* note 9, at 34.

86. *Id.* at 37.

87. *Id.* at 34.

phrase “working through culture” to describe what contemporary cultural theorists from Bourdieu to Foucault to Habermas recognize as how modern subjects engage their world.<sup>88</sup> Foucault describes authorship not as the search for an original subject but rather as the quest to “grasp the subject’s points of insertion, modes of functioning, and system of dependencies on existing discourses.”<sup>89</sup> Cultural theory elaborates the view that the modern subject is situated within contemporary discourses and yet is not fully defined by them either.<sup>90</sup> We inhabit the stories we love.

Furthermore, there are important normative benefits to enhanced capacity for participation in the cultural sphere, not just in the political sphere. Participation and critical thinking in the cultural sphere help to develop the skills of democratic citizenship, as we saw with the kids who are writing and editing online newspapers based on the Harry Potter stories. Going further, participatory culture distributes the power to speak and to make our world. One of the most important copyright cases in recent years illustrates this well. In the case of *Sun Trust Bank v. Houghton Mifflin*,<sup>91</sup> the Eleventh Circuit upheld the right of an African-American woman, Alice Randall, to rewrite the influential story of Margaret Mitchell’s *Gone with the Wind*, from the perspective of an African woman slave living on the O’Hara plantation.<sup>92</sup> Though the case turned on a finding that Randall’s book, *The Wind Done Gone*, was a parody of Margaret Mitchell’s bestseller and, therefore, a fair use,<sup>93</sup> I would argue that more than market failure hung in the balance. The case highlighted the importance of being able to talk back to the dominant culture and to tell one’s own story. Alice Randall happened to be lucky that she fit into the narrow, parody slot. But today, much fan fiction would fail the parody test because fan fiction and fan activity are more often homage and borne out of love for the original work, not criticism of it.<sup>94</sup> In contrast to economic analysis, cultural theory elaborates the benefit of cultural participation by many in telling and retelling stories and helps to lay the ground work in going beyond the limited market failure approach to fair use. The good news is that this does not require rewriting the law of fair use. Instead, we may properly value *comment on*—and not just *criticism of*—a work, both of which are expressly mentioned as valid concerns of copyright fair use under the existing statute. What I am arguing is that we need to be concerned about more than just the

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88. *Id.* at 35.

89. *Id.* at 37 (citing MICHAEL FOUCAULT, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 118 (Donald F. Bouchard, ed., 1977)).

90. SUNDER, *supra* note 9, at 38.

91. 268 F.3d 1257 (11th Cir. 2001).

92. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276-77.

93. *Id.* at 1276.

94. SUNDER, *supra* note 9, at 35.

black letter law. Our theory of copyright matters. If our theory of copyright is one that understands fair use as just arising when there is market failure, then we will have much more limited opportunities for participation in cultural discourse than a broader theory that recognizes plural benefits of cultural participation.

What about the global context? Here, too, economic analysis of copyright focuses on the production of more culture without attention to who is producing culture and who is benefitting from it financially.<sup>95</sup> As Martha Nussbaum has critiqued, the dominant economic paradigm ignores the distributive questions of "who is making the money and whether any of it is mine."<sup>96</sup> Global copyright law must seek to equalize the capacity of all peoples, rich and poor, to make culture and to share it in global markets on fair terms.

#### V. CONCLUSION

There is more at stake in intellectual property law than simply the optimal production of goods, from Harry Potter to iPods. Copyright law affects the ability of people everywhere to live a good life. Copyright law does not regulate widgets. It regulates culture; we need to understand that culture is more than just goods—more stuff and more things. Culture is this sphere of life in which we exchange stories, sing, dance, share, and enjoy life together. Culture is this sphere that gives life meaning. Promoting culture, then, requires a richer view of culture beyond the promotion of goods, to the promotion of a good life. Using social and cultural theory, I emphasize the benefits of a society that is actively engaged in questioning, debating, making, and remaking culture. Participatory culture breeds not only critically engaged democratic citizens but also respect for others as creators of the world. Participatory culture provides for more diverse, creative output which helps, in turn, to think critically about dominant discourses, which are revealed to be just one among many options. Finally, in the knowledge age democratizing cultural production has distributive effects as more global creators seek to reap the financial rewards of sharing culture.

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95. *Id.* at 29.

96. *Id.* at 30 (citing CHARLES DICKENS, *HARD TIMES* 74-75 (Oxford Univ. Press 1989) (1854)).