



2023

Defeating the Economic Theory of Copyright: How the Natural Right to Seek Knowledge is the Only Theory Able to Explain the Entirety of Copyright's Balance

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**Defeating the Economic Theory of Copyright:
How the Natural Right to Seek Knowledge is the Only Theory Able to Explain the Entirety
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Michelle M. Wu*

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Introduction

The practice of copyright was once a perfect balance, reflecting the intent of the Founders to create an environment where new works were constantly made available to the public. The author would create a work, a user would buy a copy of it and be free to use it. Neither party had any right to interfere with the other’s activities. All of that changed with newer technologies, exposing the flaws both in our laws and the applications of them.

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Copyright laws, on their face, prohibit many reasonable uses of copyrighted works by end users, such as making mixed tapes, converting LPs to mp3s, and playing music at a piano recital. But for the better part of two centuries, the end uses of copyrighted works were treated by the public, Congress, and courts as free from copyright's purview. There was no need to amend the broad rights as described in §106 because, in practice, they were applied primarily against entities that were believed to have used someone else's work for profit without paying for that use. On the few occasions where a lawsuit was filed and the defendant felt that their use was the type which copyright was not intended to control, they would assert a claim in equity, judges would make decisions on a case-by-case basis, and in that manner, the early body of fair use law developed.

When Congress passed the Copyright Act of 1976,¹ it codified fair use,² a doctrine formerly undefined and subject to no specific rules. In doing so, lawmakers took care to describe it as "an equitable rule of reason..." where "...no generally applicable definition is possible."³ To avoid foreseeable unintentional narrowing of fair use in application, they went further to explicitly deny any intention to draw boundaries: "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."⁴

Despite this intent, fair use is now analyzed primarily as a matter of law, not equity. The four factors listed in the statute drive every judicial opinion to the near exclusion of all others.⁵ The test articulated by statute, and developed through case law, leans heavily on market harm and lends itself well to an economic analysis. The consequence is that the unspoken safe harbors of copyright use are no longer as safe.

The economic theory of copyright carried relatively few costs when infringement litigation was primarily between commercial actors and about for-profit uses, but as newer technologies emerged, enforcement has expanded to include individuals and non-profit entities for non-profit uses that were once considered immune from the copyright owner's control. Some of these attacks are indirect, such as the suit against Sony for the Betamax, which sought to prevent the use of technology by individuals for recording broadcast programs.⁶ Though the technology was commercial, the use was by individuals who had already "paid" for the content they were viewing or taping.⁷ Other attacks were direct, such as the current suit against the Internet Archive, an effort by publishers to dictate how a library lends the content that it has

¹ Pub. L. No. 94-553, 90 Stat. 2541 (1976).

² 17 U.S.C. §107.

³ H.R. REP. NO. 94-1476, at 65 (1976).

⁴ *Id.* at 66.

⁵ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Matthew Sag, *Predicting Fair Use*, 71 OHIO ST. L.J. 47 (2012).

⁶ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁷ I use the word "paid" liberally, encompassing programs that were made available to the public by broadcasters without fees as well as those available through paid cable.

legitimately acquired to its users.⁸ In these types of cases, if the courts were to side with copyright owners, owners would gain the right to interfere with the reasonable consumption and use of information.

The stakes in infringement litigation are therefore higher today than they have been in years past, potentially resulting in real harm to all. Any continued insistence on viewing copyright as purely a matter of positive law and economics only increases the jeopardy, as the value of copyright for society has little to do with financial interests. The balance of copyright has meaning beyond the laws in which any nation has embodied it, and for that reason, current attempts to exploit copyright in opposition to those principles should be challenged. This paper will put forth the argument that in these cases, there remains a separate, equitable claim for the use of knowledge that survives despite fair use's codification in §107.

Part I shows how courts who openly acknowledge copyright's equitable purpose at the start of their opinions nonetheless find themselves reverting to an economic analysis, and why an economic theory of copyright is fundamentally flawed. Part II describes three natural law theories (labor, personality, and occupancy), explains why the same flaw has stopped them from replacing the economic theory, and then introduces a new natural law basis (knowledge) that explains the entire balance of copyright in a way that other theories have failed to do. Part III provides a quick summary of how technology has changed copyright practice, allowing it to be wielded against the public and authors it was designed to serve, and Part IV sets out a strategy to raise equitable claims along with statutory ones where reasonable public use is challenged.

The Blindspots in the Economic Theory of Copyright

Introductory language in copyright decisions, particularly those involving fair use defenses, commonly nod to its equitable purpose, that of societal benefit. An example is *Aiken*, whose court stated that "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."⁹ However, that seemingly broad understanding inevitably falls by the wayside when it comes to the actual analysis. Any consideration of equity is confined to copyright's exceptions, most notably fair use. Even there, courts typically focus only on statutory language¹⁰ and base their reasoning on economic principles¹¹.

When viewed through the lens of commerce, the fair use factors as chosen by Congress and the shorthand developed by courts make a great deal of sense. Of the four factors courts must consider, two have commercial components, and they happen to be the ones that empiricists have

⁸ *Hachette v. Internet Archive*, Case No. 1:20-CV-04160-JGK (the claim against library lending is only one claim in the suit).

⁹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁰ Beebe, *supra* note 5; Netanel, *supra* note 5.

¹¹ Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

shown to predict case outcomes.¹² Where a use has a commercial purpose, factor one (purpose and character of use) leans against fair use, and where there is market harm to a work, factor four (effect of the use upon the potential market for or value of the copyrighted work) will weigh against fair use. Generally, market harm (a monetary measure) is the most influential factor, where harm appears presumed if the new use substitutes for the original work.¹³ A 2008 empirical study found a 99% correlation between a finding of market harm and the outcome of the case.¹⁴

Courts have developed exceptions to these general rules, and those are also easily explained in economic terms. For example, transformative uses can be fair despite a commercial purpose because transformation (1) creates opportunity for additional commerce that would not have existed but for the actions of a new actor (2) while not harming the market for the original work.¹⁵ In contrast, courts view as suspect uses that create copies of a work that can substitute for the original because this offers no new economic benefit to society and seemingly profits from another person's labor without independent contribution.

The economic approach to copyright is reinforced by case law, without recognition that the expense of a lawsuit as well as the economic incentives in statutory damages¹⁶ will logically bring before the court more economic issues than non-economic ones. The average costs of copyright litigation today (not including appeal) are \$161K for cases worth up to \$1M; \$882K for cases worth \$1M - \$10M; \$1.125M for cases worth \$10M - \$25M; and \$2.501M for cases worth more than \$25M.¹⁷

Non-economic claims are not absent in copyright, but (1) few public rights are explicitly defined, and even where they are defined (e.g., §§108, 109), they are treated as defenses, not freestanding rights, (2) few individuals or non-commercial entities who have non-economic claims have the resources to defend themselves when accused of infringement, and (3) copyright's remedies focus on the author and rely heavily on monetary rewards¹⁸. It is not by chance that early fair use cases --- the ones on which the factors in §107 are based --- were brought by authors, or by entities who had paid for the right to use a work commercially, against those who had not paid for that right (and who were believed to be using the work for profit). The parties on both sides had financial reasons to engage in a legal battle.

¹² Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008) and Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011).

¹³ Leval, *supra* note 11 at 1125.

¹⁴ Beebe, *supra* note 12 at 617.

¹⁵ Leval, *supra* note 11 at 1101 (instead of the word commercial, Leval says a transformative use must be productive, but his analysis is still based on market harm.)

¹⁶ 17 USC §504.

¹⁷ Costs inclusive of discovery, motions, and claim construction. AM. INTELLECTUAL PROP. LAW ASSOC., 2021 REPORT OF THE ECONOMIC SURVEY, I-208 - I-214 (2021).

¹⁸ There are equitable remedies included in Chapter 5 of Title 17 of the U.S.C., such as injunctions, impoundment, and the destruction of infringing copies, but it is not by chance that cease-and-desist letters emphasize the risk to an alleged infringer of high monetary penalties. Example:

https://nppa.org/sites/default/files/cease_and_desist_sample.pdf

Copyright laws and practice have therefore been shaped by cases that emphasize the economic aspects of copyright, blind to other purposes. In those cases, one of the two foundational interests in copyright (i.e., the public) consistently had no independent representation.¹⁹ Having developed under such circumstances, it is unsurprising that our laws do a poor job of representing the whole of non-financial interests in copyright; they drew from cases where those interests were either invisible or narrow in scope.

To be clear, profit was (and is) certainly a motivation for copyright protection, but it logically cannot be the only, or even the primary, motivation. A purely economic basis fails to explain why copyright protects works with no commercial purpose (e.g., diary entries, personal photos) and excuses as non-infringing uses that neither educate nor stimulate productive activity (e.g., recording songs from the radio).²⁰ The number of works and uses falling into these categories wildly outstrip the ones that have a financial purpose or use.²¹

This is the reason why infringement cases, once commercial actors started targeting not-for-profit uses, became so fraught. An economic analysis works best on for-profit use. In contrast, the law has ignored everyday infringements, such as writing fan fiction or capturing someone's artwork in the background of a picture, since copyright's inception. These types of uses are more honored in the breach of copyright than in adherence to it, and courts have historically had no role in judging them. The economic theory cannot explain this long-standing inconsistency in practice.

The Equitable Underpinnings of Copyright

Copyright statutes are structured around the author and the rights to which copyright entitles them. But copyright has never been solely about authors' rights; it includes less explicitly expressed rights for the public, contained in the purpose of copyright to promote the "the progress of science and useful arts."²² Courts, Congress, and scholars alike acknowledge this public purpose, and in fact, consistently name it as the only reason for copyright to exist.²³

It is these public rights that justify tolerance of the incidental and not-for-profit examples of infringement described above, and which serve as the foundation for statutory exceptions to

¹⁹ Courts may say that they themselves represented these interests, but even judges have their own cognitive biases shaped by their experiences. Many judges will not have experienced, nor researched, the full range of not-for-profit activities involving copyright and therefore will be unable to do it full justice.

²⁰ Leval dismisses the uses under the "doctrine of de minimis non curat lex--the law does not concern itself with trifles" (Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1458 (1997)) but that approach is insupportable in a world where non-actionable infringement widely outstrips those in which a legal claim is recognized. A doctrine makes no sense if violations of it are as acceptable as adherence to it.

²¹ For example, in 2022, it was estimated that every minute, 66K photos were shared on Instagram, 500 hours of video were uploaded to YouTube, 527,760 photos were shared on Snapchat, and 231.4M email messages were sent. DOMO, *Data Never Sleeps 10.0*, <https://www.domo.com/data-never-sleeps#> (last visited March 29, 2023). Many of these activities not only create new copyright works but also qualify as common law fair use of copyrighted works (e.g., fan video that incorporates pre-existing music or program footage).

²² U.S. CONST. art. I, § 8, cl. 8.

²³ Aiken, *supra* note 9.

copyright such as first sale, fair use, and library use. If these natural rights did not exist, the whole of copyright --- not just the law but its everyday application --- would make very little sense. So, how do we pinpoint which natural law justifies copyright?

We can start with the debates surrounding the first appearance of copyright language in American government documents. There, authors like Joel Barlow greatly influenced thought, explaining why authors might be reluctant to publish in the absence of copyright protection:

Indeed we are not to expect to see any works of considerable magnitude, (which must always be works of time & labor), offered to the Public till such security be given. There is now a Gentleman in Massachusetts who has written an Epic Poem, entitled “The Conquest of Canaan”, a work of great merit, & will certainly be an honor to his country. It has lain by him, finished, these six years, without seeing the light; because the Author cannot risque the expences of the publication, sensible that some ungenerous Printer will immediately sieze upon his labors, by making a mean & cheap improvisation, in order to undersell the Author & defraud him of his property.²⁴

Barlow’s most convincing argument was not that an author had a right to profit from their work but rather that they should have a right to prevent others from using it for profit without paying them. In other words, copyright was necessary to combat unjust enrichment²⁵ by publishers who were pirating authors’ works for financial gain²⁶. This argument persuaded the Continental Congress to issue a recommendation to states to “secure to Authors or Publishers of New Books the Copyright of such Books for a certain time.”²⁷ All states but Delaware followed the recommendation,²⁸ though most reserved the right only to authors²⁹ and some explicitly called out unfair business practices by publishers as the motivation for the law (e.g., Maryland³⁰). The vast majority named the public purpose of copyright as the reason for the law. That same public purpose was incorporated into the Copyright Clause.

²⁴ Letter from Joel Barlow to the Continental Congress (1783), PRIMARY SOURCES ON COPYRIGHT (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org. Original source: The National Archives, Center for Legislative Archives: Papers of the Continental Congress, RG 360, 4: 369-373 (No. 78).

²⁵ Unjust enrichment, most commonly raised in the context of contracts, is more broadly encapsulated in the statement that “[n]atural justice requires that no-one should be enriched at the expense of another.” *Chapter One: The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2029 (2020), citing the DIGEST OF JUSTINIAN 12.6.14.

²⁶ Hall et al., *Practices of Reading*, in A HISTORY OF THE BOOK IN AMERICA. VOLUME 1: THE COLONIAL BOOK IN THE ATLANTIC WORLD, 377–410 (Hugh Amory & David D. Hall eds., 2007) (describing reader interests and types of materials in demand); ROBERT SPOO, WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN (2013) (detailing the history of piracy in the early American history).

²⁷ U.S. COPYRIGHT OFFICE, COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA, 1783–862, at 1 (1962).

²⁸ PHILLIP WITTENBERG, THE PROTECTION OF LITERARY PROPERTY 33 (The Writer Inc. rev. ed. 1978).

²⁹ The only exceptions were Pennsylvania and Virginia, who also extended the right to those who bought the rights to books from authors. PRIMARY SOURCES, *supra* note 24, Pennsylvania Copyright Statute, Pennsylvania (1784) & Virginia Copyright Statute, Virginia (1785).

³⁰ PRIMARY SOURCES, *supra* note 24, Maryland Copyright Statute, Maryland (1783).

This same equitable issue reappears with every major piece of copyright legislation, as evidenced in the hearings surrounding the 1909 Copyright Act, where Samuel Clemens (aka Mark Twain) advanced his support for an extended copyright term, remarking that:

The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it for that term has had the profit of it long enough, and therefore the Government takes the property, which does not belong to it, and generously gives it to the eighty-eight millions. That is the idea. If it did that, that would be one thing. But it does not do anything of the kind. It merely takes the author's property, merely takes from his children the bread and profit of that book, and gives the publisher double profit. The publisher and some of his confederates who are in the conspiracy rear families in affluence, and they continue the enjoyment of these ill-gotten gains generation after generation. They live forever, the publishers do.³¹

Clemens believed in the right of an author to profit from their work, but the commentary above shows that this claim was seated in a sense of injustice that people other than the author could continue to financially benefit from a work long after the author had lost their own ability to do so. In contrast, he implies that if the government did what it claimed to do – to give copyrighted works to the public after the author had profited from it for some years – this would be justifiable (even if not particularly welcomed by the author).

In short, copyright's purpose is the spread of knowledge, and author control was the means through which lawmakers hoped to achieve that goal. The granting of control over their works was not about profit but about fairness; authors should be entitled to stop others from profiting from their work without payment, and copyright was intended to give them the tools necessary to combat commercial pirates. From recognizing that equity, not money, formed the basis for the rights granted by copyright, we now move to looking more deeply at which natural law(s) drove the equitable argument.

Current Natural Law Theories of Copyright

Natural law precedes the creation of positive law, does not change over time, is neither good nor bad (though can be used for either by an actor), and is not defined by the speaker. It simply is. Two points under natural law are key: that it represents fundamental activities that are objectively necessary to the thriving of humanity, and that the exercise of government authority on these activities is legitimate only insofar as it advances those activities.³²

³¹ *To Amend and Consolidate the Acts Respecting Copyright: Hearing on S. 6330 and H.R. 19853 Before the S. Comm. on Patents and the H. Comm. on Patents, conjointly*, 59th Cong. 116-7 (1906) (testimony of Samuel L. Clemens).

³² JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23 (1980).

Summaries of commonly accepted natural theories of copyright are below, followed by an explanation of why these theories also fail to account for the entirety of copyright and why a new theory could overcome those deficiencies.

Labor

One natural law theory is based in Locke's reasoning on labor and property, summarized as: a person owns themselves, labor comes from each person's body, and so belongs exclusively to oneself.³³ The natural rights that attach from this theory is explained in two parts. The first is that natural resources cannot be used without the intervention of human labor, so each person has the right to expend their labor on making these resources useful, and their labor converts common property to private property.³⁴ The second notes that conversion is legitimate only so long (1) the object of conversion was common property, (2) the person does not take so much common property that there is an insufficient amount or a lesser quality left for others, (3) the person does not convert so many resources that some will be wasted without use.³⁵

Since common resources are so plentiful that a person will be able to convert more things than they themselves can use, society maximizes the benefits from labor while avoiding waste by allowing that person to donate the excess to the common stock or to sell the excess to those who need it and do not want to expend their own labor in conversion.³⁶

The translation of Locke's theory into intellectual property is that a person owns their own mind, the products of their mind can only be produced by their labor, and therefore, the resulting product is their private property. The common resources used by such a laborer include the information commons around them, in the ideas and creations that preceded them and on which future creations are built. A laborer is able to create intellectual property without diminishing the ability of others to create products of their own minds based on these common resources.

Note, though, that while Lockean theory justifies the creation of intellectual property, as well as the selling of any "excess" property (e.g., copies of books) not usable by the owner and valuable to others, it does not speak to a right to profit, only to when private property comes into being, and how its use can be maximized not only for individual benefit but for public benefit. The labor theory has been used to support the utilitarian theory of copyright and shares its weakness: it cannot explain why many daily infringements on intellectual property have been tolerated.

³³ John Locke, *Chapter V (Of Property)* in *SECOND TREATISE OF GOVERNMENT*, Sec 27 (1689). (It should, however, be recognized that Locke contradicts himself, implying that the labor of servants belongs to their owners. See Sec 28 as an example. The two statements might be reconciled by saying that the labor belongs to the servant, but the end product has been sold to the owner in the form of wages to the servant.)

³⁴ *Id.* at secs. 26-28, 44.

³⁵ *Id.* at secs. 27, 31-32, 36 .

³⁶ *Id.* at sec. 46.

Personality

A second natural law theory for copyright resides in the personality theory as articulated by Hegel, where "...the individual's will is the core of the individual's existence, constantly seeking actuality (Wirklichkeit) and effectiveness in the world."³⁷ Property, in this way, is tied to personhood, and its manifestation in intellectual property is found most often in moral rights, where an author is permitted to limit the use of their work even after sale to avoid reputational harm.³⁸ Moral rights may permit a painter to prevent destruction or modification of their work or to require their name be displayed (or withheld) along with the art. Because these rights are an extension of oneself, they expire upon the individual's death. As with the labor theory, profit is absent from this analysis, as the personality theory as applied to copyright concerns itself with the natural right to prevent psychic injury. It also is unable to explain away frequently tolerated infringements.

Occupancy

The third theory of copyright is based in a Roman natural law called occupancy, where ownership attached to the first person who claimed an unattached item, so long as the item was actually containable.³⁹ For example, a tract of land could be contained, whereas air or the ocean could not be. A wild animal was free unless captured and kept continually in captivity; its escape would immediately sever any ownership claim, leaving anyone else free to capture it and become its owner.⁴⁰ Applied to intellectual property, ideas then could be owned as long as they could be contained (e.g., distilled into a tangible form) but they could not be owned if they eluded capture, such as factual observations (e.g., $1+1=2$) which are logical deductions possible by every mind able to reason, or unwritten thoughts. As with the other two theories, occupancy does not concern itself with profit, but rather with defining ownership, and does not fully explain why copyright permits frequent infringements by individual users.

Natural Law in Courts

Several attempts have been made to assert these natural law claims in copyright cases, primarily under labor or occupancy theories.

Examples can be found with booksellers in England unhappy with the then short term of copyright, claiming that common law protected the author/publisher even when statutory law did

³⁷ Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 331 (1988).

³⁸ *Id.*

³⁹ Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517, 523 (1990).

⁴⁰ *Id.*

not.⁴¹ The most notable fight was between two publishers, Millar, the original publisher of a poem, and Taylor, who published the same poem after copyright term expiration. Millar claimed rights at common law based on the labor theory, insisting that a man's right to benefit from a work produced by their labor outlasted any legislatively-defined copyright term. Taylor countered on the basis of occupancy principles, noting that an incorporeal property was incapable of being possessed.⁴² Millar won the case, with the court viewing the Statute of Anne as providing additional, temporary security to copyright owners, not replacing the ownership rights guaranteed at common law.⁴³

However, the House of Lords overruled Millar five years later in *Donaldson v. Beckett*:

Copies of books have existed in all ages, and they have been multiplied; and yet an exclusive privilege, or the sole right of one man to multiply copies, was never dictated by natural justice in any age or country; and of course the sole liberty of vending copies could not exist of common right, which gives an equal benefit to all... The common law has ever regarded public utility, as the mother of justice and equity. Public utility requires, that the productions of the mind should be diffused as wide as possible; and therefore the common law could not, upon any principle consistent with itself, abridge the right of multiplying copies.⁴⁴

In this decision, one can see where the economic theory of copyright took root. By denying any natural right of the author to restrict duplication of their work, the justification for copyright had to come elsewhere. Because the infringement cases that came before courts were always commercial in nature, the repeated association of profit with copyright resulted in seeing one as the basis for the other. Interestingly, though, the language of *Donaldson* does not eliminate natural rights as a basis for copyright principles. It only denies an author of any such rights, but in contrast, it affirms the public's natural right to information.

Donaldson is held as the moment when the natural law theory of copyright died in England, but the debate continued in America. Early Americans cited both economic and natural law arguments in the construction of copyright laws, both in the states and then later in the Constitution.⁴⁵ Courts also entertained common law claims to copyright. For example, in *Wheaton v. Peters*, two publishers debated the rights to publish case law that was not statutorily protected. One of the claims was based on the common law principle of labor and the right to

⁴¹ *Millar v. Taylor*, 98 Eng. Rep. 201 (1769), which cites the earlier cases of *Atkyns* and *Roper v. Streater*, in which the common law interest in copyright had been recognized.

⁴² It should be noted that Taylor's argument was not contained to only his reprinting after the copyright term ended, and this may have harmed his credibility with the court. Part of his claim was that publishing any work meant that it had been dedicated to the public, and anyone buying an authorized copy was fully within their rights to duplicate the work as many times as they wished. *Id.* at 202.

⁴³ *Yen*, *supra* note 39 at 527-8.

⁴⁴ *Donaldson v Beckett*, 1 E.R. 837 (1774).

⁴⁵ *Yen*, *supra* note 39 at 528-29, citing Act of Encouragement of Literature, 1783 N.H. Laws 305 and THE FEDERALIST NO. 43, at 279 (J. Madison) (E.M. Earle ed. 1976).

prevent others from unjustly benefitting from that labor.⁴⁶ The court held that there was no right of an author to copyright at common law though also recognized that an author did have a common law right to their manuscript and any copies they had made.⁴⁷

Like Donaldson, Wheaton has been cited as proof that copyright is solely based on utilitarian principles, but Yen argues that the court's reasoning is actually based on common law principles of labor and occupancy:⁴⁸

...an author has a natural right in her manuscript because it is the product of her labor. That right finds vindication as property because the author physically possesses the manuscript immediately after writing it. At this point, the author owns not only the manuscript, but also the intangible ideas embodied in the work because physical possession of the manuscript enables the author to prevent others from seeing the intangibles represented in the manuscript. However, once the manuscript is published and the copies are circulated to the public, the author has relinquished possession. As a matter of common law, the act of publication releases the author's work to the public just as exhaling returns the air in one's lungs to the public. Therefore, any post publication property rights given to the author must be granted by statute.⁴⁹

He claims that three core copyright principles prove that copyright derives from the natural right of occupancy: (1) the differentiation between idea and expression limits copyright protection only to expression (which can be contained) and not ideas (which cannot be possessed), (2) the requirement of originality (the owner of the expression having claimed something previously unclaimed),⁵⁰ and (3) the separation of copyrightable parts from public domain ones when a single work merges both (only some parts can be contained).⁵¹ In the third case, the labor theory is also present, as the author has a property right only to the portion of the work that originated from their creation (i.e., the parts which stem from her labor).

Knowledge

The problem with the labor, personality, and occupancy theories is that all of them might explain an author's right to claim their work as their own and to limit its use in certain situations, but they cannot completely explain the other side of copyright, that of the public's right to use that work. Therefore, I would argue that there is a different natural law at the heart of copyright, and

⁴⁶ *Wheaton v. Peters*, 33 U.S. 591, 8 L. Ed. 1055 (1834).

⁴⁷ *Id.* at 592.

⁴⁸ Yen, *supra* note 39 at 531.

⁴⁹ *Id.* at 550–51.

⁵⁰ *Id.* at 531–33.

⁵¹ *Id.* at 534–36.

that is knowledge. Knowledge, usually phrased as the seeking of knowledge, is universally recognized as a basic and necessary good in natural law.⁵²

But this narrow phrasing ignores two unavoidable truths: it is impossible to benefit from the seeking of knowledge unless knowledge exists and can be accessed. For that reason, it is not only the seeking of knowledge that is part of natural law but also the creation of knowledge and the sharing of it. Creation and sharing of knowledge form the two primary interests in copyright, and therefore, copyright laws --- both the defining of exclusive rights as well as the exceptions to such rights --- are the tools through which legislatures try to give natural law practical effect. They do not do so perfectly, as any attempt to confine a broad equitable principle in a narrow definition is impossible. Understanding the natural laws that drive copyright laws, therefore, can better illuminate sound copyright practices.

Copyright both obstructs and enables knowledge creation, seeking, and sharing, which is why it cannot be expressed as anything other than a balance. It facilitates knowledge creation by rewarding it, allowing authors to gain payment for their labor. But it also cabins it, denying future creators the right to build on these works for a set term (except in fair uses). Copyright encourages seeking and sharing in two ways: (1) by a term-limited copyright, guaranteeing a continually growing public domain, and (2) by largely treating individual use as outside copyright's purview. On the other hand, it reduces the opportunities for sharing by not allowing the world to freely make copies of a work and sell it.

When copyright practice is viewed through the lens of the natural right to knowledge, the reason for its balance becomes clear. There is the right to receive fair payment for sharing knowledge on one side, and the right to use knowledge on the other. Given this balance, the inconsistencies in practice no longer look inconsistent. Society will not tolerate a commercial actor making a profit from a work that is not their own without compensating the creator, but it accepts infringements by the average person (e.g., fan art, performing a song in a talent show) as reasonable because these are natural outgrowths of consumption and use. Permitting everyday consumer use supports the spread of knowledge and does not implicate the unjust enrichment principles that underlie copyright.

In short, an economic view of copyright applies to a very small percentage of copyright instances, and a natural law view based on labor, personality and occupancy explain only parts of copyright practice, but a natural rights approach based on knowledge provides a principled way to explain all of its protections, its exceptions, and the seeming infringements not explicitly permitted by law but widely accepted.

Why Knowledge is Considered a Natural Right

⁵² FINNIS, *supra* note 32 at 59-73.

Natural right = “A right that is conceived as part of natural law and that is therefore thought to exist independently of rights created by government or society, such as the right to life, liberty, and property.”⁵³

Human communication depends on having common frames of references. Without a common language – written, verbal, or sign – people would be unable to understand, agree with, or disagree with each other. This knowledge is valuable whether anyone gives conscious thought to its use. Further, societal growth depends on the sharing of information. One cannot imagine a conveyance such as a cart or a car if one has not first learned about the wheel, and a person has a better chance of building a better house if they know what it is intended to do, can study current houses to identify their weaknesses, and have access to research (e.g., engineering resources). It is not only entirely normal for us to share information, but sharing knowledge is essential to our survival and growth. That very fact does not change with time, technology, or function.

Few other things can claim to be as essential to human well-being. Take money, for example. It has utility in achieving other common rights, such as quality of life, but it is not necessary to it. In a world without money, for instance, one could very well achieve a strong quality of life through barter. Knowledge, on the other hand, is valued for itself, and there is no substitute for it or alternative way to reach it. It cannot be gained without its existence and its availability.

Fair Use as a Natural Right

Copyright law as explained through natural law is about the good of knowledge creation and the good of knowledge sharing, with the creator of knowledge on one side and the consumer of knowledge on the other, both participating in and benefitting from a good as defined by natural law.

Some of copyright’s provisions, such as defining rights exclusive to the author (§106), push the balance towards knowledge creation, and others, such as those defining first sale (§109) push the balance towards knowledge sharing. Fair use (§107), sits between these, taking neither the side of knowledge creation nor of knowledge sharing, but instead requiring that the two be considered together. Fair use (not the statute, but the concept) is the embodiment not only of the balance of interests as described in the Copyright Clause but also the balance of interests in knowledge found in natural law. Where a use both supports knowledge creation and knowledge sharing, a reasonable claim can be made that the use is a natural right.

Current Copyright Practice Runs Counter to Natural Rights

⁵³ RIGHT (subentry: natural right), Black’s Law Dictionary (11th ed. 2019)

Even those who agree that knowledge creation and sharing are goods recognized by natural law may still find reasons to hoard the goods for themselves or deny others the same access. Positive law is often seen as necessary to effectuate natural law because universal agreement on principles will not stop some actors from undermining them for their own benefit. Or, as phrased by Finnis, positive law is necessary to “force selfish people to act reasonably.”⁵⁴

Unfortunately, positive law can be a poor reflection of underlying natural law because legislators can only use the tools available and known to them at the time of passage to effectuate a broad and multi-faceted purpose. To better understand what positive law is intended to do then, we have to start the inquiry at what type of reasonable behavior the applicable law was intended to force.

Given the history above, in copyright, it was the actions of publishers that was seen as selfish and which copyright sought to control. It was the profiting from another’s work without compensation that deterred information sharing by creators. (Side note: despite common assertions that economic incentives are necessary to the creation of new works, there is little evidence that information creation was ever a concern. In the points made by authors over the years – with Barlow’s letter above being an example --- knowledge had already been created. If anything related to knowledge was discouraged by the lack of copyright protection, it was the sharing of that knowledge.)

Copyright laws were enacted to constrain the ability of publishers to exploit authors without payment, not to get in way of public access or use. Indeed, for most of the nation’s history, that is how copyright was practiced.⁵⁵ Commercial actors sued other commercial actors (e.g., *Wheaton v Peters*) or authors sued commercial actors (e.g., *Burrow-Giles Lithographic Company v. Sarony*) for infringement,⁵⁶ but the public remained generally unpoliced, free to engage in all the activities that came naturally in the course of information sharing, including fan art, playing songs at recitals, or posting copies of comic strips on their office doors. Each of these activities technically infringes on one or more rights considered exclusive to the author but yet is seen as a permitted, reasonable use.

Copyright was, at a practical level, an equal exchange, with a user paying a copyright owner for the content of a work and then being free to use it in whatever way they wished. Each party had equal power, and neither had any control over the other’s actions; a user could not dictate what a copyright owner wrote or charged (e.g., terms of contract with their publisher), and a copyright owner had no control over downstream use, whether this was the setting of prices by distributors (e.g., bookstores) or how the end-user ultimately used the book.

Clearly, common practice showed that copyright laws were not meant to restrain normal use and sharing of information by people who had gained access. The fact that this was true

⁵⁴ FINNIS, *supra* note 32 at 29.

⁵⁵ Yvette Joy Liebesman, *Redefining the Intended Copyright Infringer*, 50 AKRON L. REV. 765, 783 (2017).

⁵⁶ Patry summarizes the shift on the meaning of copy through the lens of practice. From the beginning of copyright up to the introduction of digital media, the fight over copies was one between the entities that held power, like publishers. WILLIAM F. PATRY, *HOW TO FIX COPYRIGHT* 38 (2011).

regardless of the means of access demonstrates how strong end-user protection was. Someone singing a song at a local talent show, for instance, was as unlikely to be sued whether she learned the song from the radio, a mixed tape from a friend, or a purchased CD. Policing the activities by an end user were simply not seen as furthering the purpose of copyright.

Advances in technology, particularly digital technologies, fundamentally changed the copyright landscape in three different ways. The first was that technology enabled content creation and sharing at a volume and speed society had never seen before. Authors flood the web with new creations daily, and information can be shared in an instant, across vast distances. Automated translation and text-to-speech technologies have broken down long-standing barriers to information sharing, and publishers interested in doing so are able to provide broad access to information through networks or databases. This change aligns with both copyright and natural law. It fosters creation and facilitates both seeking and sharing of knowledge.

The second change in practice was the increased use of non-copyright tools to subvert copyright's public purpose. One category of tools was the application of laws outside of copyright, such as contract law. By turning an acquisition into a license, copyright owners retained all the advantages of copyright protection while escaping all of the societal obligations on which that protection was based. They now not only could demand payment for their work but they could interfere with the actual use of the work even after payment. This practice runs directly counter to the balance of copyright in that it allows the use of copyright's monopoly to condition access to a work on waiving the public use rights (e.g., lending, reselling, privacy) normally attendant to copyright end use. Another category of tools came in the form of technology itself, allowing for enforcement of copyright by a copyright owner instead of by the government (e.g., digital rights management or automated take downs). By using technological controls, copyright owners could prevent fair uses as well as infringement. This second change will not be discussed in detail here, as both it and proposed remedies of its harms have already been covered in-depth elsewhere.⁵⁷

The third change is in litigation targets. On its face, the shift is understandable. The type of commercial exploitation that was once only possible for for-profit entities became possible for everyone. The threat described by Barlow in his letter to the Continental Congress is now seemingly present not only in publishers but in users as well. So, everyone became a target of litigation. The cases that signaled this seismic shift were those on music sharing, where publishers sued users directly, even where there was no proof of harm.⁵⁸ Even though a case

⁵⁷ See, for example, PATRY, *supra* note 56; REBECCA GIBLIN & KIMBERLEE WEATHERALL, WHAT IF WE COULD REIMAGINE COPYRIGHT? (2017); Pamela Samuelson, *Members of the CPP, The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1194 (2010); Michelle M. Wu, *Restoring the Balance of Copyright: Antitrust, Misuse, and Other Possible Paths to Challenge Inequitable Licensing Practices*, 114 LAW LIBR. J. 131 (2022) (proposing combatting license terms through antitrust, misuse, preemption, and unconscionability); Michelle M. Wu, *The Corruption of Copyright and Returning It to Its Original Purposes*, 40 LEG. REF. SVC. Q 113 (2021).

⁵⁸ Genan Zilkha, *The RIAA's Troubling Solution to File-Sharing*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 667 (2010); Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977, 983 (2008).

could be made that some of these uses (e.g., uploading music to pirate sites) were not reasonable, neither incidental to ownership nor necessary to the use of a work, and the unreasonableness was what brought a normally immune individual activity into copyright's grasp, the outrage by the public demonstrated how different music publishers' views of the proper use of copyright were from society's.

The backlash and public relations fallout from those lawsuits made publishers more cautious about suing end users directly but the aggressive stance against unpaid uses continued and even expanded to incidental and productive uses. Lawsuits were filed or threatened on temporary copies (e.g., caching) as well as against tools designed to help users get the full benefit of the materials they had purchased (e.g., text-to-speech).⁵⁹ Suddenly, infringement suits were no longer solely about unjust enrichment but were aimed at controlling use by the consumer. Even where the litigation parties themselves remained commercial, the actual target was the public, because the uses challenged as infringing were private, personal uses. Fearful that some uses might harm current or future sales, some content owners tried to deprive everyone of technologies that made it easier to duplicate, distribute, or make derivative works.

The expansion in focus is illustrated in cases such as *Williams*, *Sony*, *Cambridge University Press*, *HathiTrust*, and *Hachette*. In these cases, the goal was to prevent users from preserving, accessing, or using information they had a right to access. In *Williams*, NIH libraries circulated copies of journals they had purchased to its researchers and would, upon request, copy an article for a researcher, an action that publishers considered infringing.⁶⁰ In *Sony*, studios sought to make illegal the Betamax, preventing users from taping shows to which they had legitimate access.⁶¹ Against libraries, publishers sought to make illegal e-reserves⁶² and the provision of digitized texts to their vision-impaired users,⁶³ as well as to dictate how libraries provided their users with the content that they had acquired⁶⁴.

While threatening litigation is not the only evidence of copyright's changing reach,⁶⁵ it is the most visible one and has the potential for the greatest impact, over not only the use of

⁵⁹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007) (caching); Mike Masnick, *Amazon Gives In to Ridiculous Authors Guild Claim: Allows Authors to Block Text-To-Speech*, TECHDIRT (Feb. 27, 2009), <https://www.techdirt.com/articles/20090227/1759173928.shtml>. Peter S. Lubin & Patrick Austermuehle, *Amazon's Audible Sued for Copyright Infringement over Caption Feature*, CHI. BUS. LITIG. LAW. BLOG (Oct. 10, 2019), <https://www.chicagobusinesslitigationlawyerblog.com/9096-2/>.

⁶⁰ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (1973), *aff'd*, 420 U.S. 376 (1975).

⁶¹ *Sony*, *supra* note 6.

⁶² *Cambridge Univ. Pr. v. Patton*, 769 F.3d 1232 (2014).

⁶³ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (the issue of digitized text to print-disabled users was only one of several claims).

⁶⁴ *Hachette*, *supra* note 8 (the issue of providing legitimately acquired content to users is only one of several claims).

⁶⁵ The expanded reach can also be seen in cease-and-desist orders received by libraries for interlibrary loan or course reserves (Jeffrey R. Young, *How a Lawsuit Over Electronic Reserves Could Affect Colleges*, CHRON. HIGHER ED. (May 12, 2008); George H. Pike, *The Delicate Dance of Database Licenses, Copyright, and Fair Use*, 22 COMP. IN LIBR. (May 2002) (interlibrary loan)). And it is present in the changing of laws to prevent the normal use of knowledge, including the extension of copyright to keep works out of the public's hands (Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.) and legitimizing technical controls (e.g., Digital Millennium Copyright Act).

copyrighted works but the use of any works. For instance, had home recording devices not survived a court's scrutiny, no one would have had access to technology to record even non-copyrighted programming (e.g., C-SPAN coverage of Congressional debate).

As noted earlier, the costs of litigation are beyond the capabilities of most individuals and nonprofits to bear, which means that the outcome of disputes is heavily influenced by wealth, with many potential defenses never making it to court.⁶⁶ The societal cost of expanding the enforcement of copyright beyond unjust enrichment to consumer use is steep, as each suit risks stripping more rights away from the public.

(Re)Establishing an Equity Claim in Fair Use Cases

The reason to reestablish an equity claim is simple. Fair use in §107 has been applied as a utilitarian principle and in application, downplays non-economic interests inherent to copyright. If an equitable claim can be raised alongside a §107 claim, it forces courts away from the four factors, back to natural law and the purpose of copyright. Where there is a conflict between law and equity, tradition dictates that equity prevails.⁶⁷ (It should be noted that an equitable claim is not limited only to fair use cases but applies to any practice that runs against the natural rights described in this paper. This paper spotlights its use in fair use claims because there is a current case before the courts.)

Fortunately, the existence of positive law does not close the door to equitable claims. "[B]oth law and equity seek the same result ... but do not necessarily draw the line in the line in the same place... The apparent similarity of the results achieved ... is ... deceptive. The claims are different, require different facts to be proved and have different consequences."⁶⁸ Where I imagine that this will make the biggest difference is in the types of cases mentioned above, where copyright owners seek to stop normal use of copyrighted works or innovations to facilitate normal use.

Hachette v. Internet Archive

The example I will use to assert an equitable claim is *Hachette v. Internet Archive*, and I will confine the analysis only to the legitimacy of Controlled Digital Lending (CDL). CDL has been described under a variety of names over the years but stands for the basic proposition that libraries have a right to use materials they have purchased even as technology changes. At its core, CDL has three principles:

⁶⁶ "Threatening litigation can be an effective business model for putative rights holders, because paying for a license is more predictable, and likely cheaper, than fighting about whether a license is necessary." Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. COLO. L. REV. 561, 566 (2015)

⁶⁷ Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1, 4 (2002).

⁶⁸ *Id.* at 2, citing 92 L.Q. Rev. 342, 346 (1976).

Properly implemented, CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an “owned to loaned” ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.⁶⁹

The Internet Archive (IA) offers CDL through their Open Library platform⁷⁰. Anyone can create a user account and check out a digitized version of a book that IA owns. How the platform works has changed over the years, but at the present time, anyone can search IA’s holdings, and if they click on a book, it will automatically check the book out to them for an hour. (If the user does not yet have an account, they will be prompted to create one before they can view the book in full.) For some books, users will be given the opportunity to extend the loan period to a longer one (i.e., 2 weeks). While checked out, the book cannot be checked out by anyone else,⁷¹ though they can add themselves to a wait list. IA does provide other services, including as a CDL provider for other libraries, but the analysis below will focus only on CDL in its most simplified form, where a library is lending digitized copies of books that it owns in print, in the same number as it owns, and controlled by DRM. While an equitable argument could still apply in other circumstances, such an analysis would be unique to IA’s specific practices, less generalizable and therefore less useful in illustrating the point of this section.

Four publishers filed suit against IA, alleging among other things that CDL is illegal, relying heavily on existing fair use case law that market substitution determines whether a use is fair or not.⁷² Courts have noted that if a copy does not substitute for the original, then copyright is not implicated.⁷³ The publishers assert the opposite is equally true, that if a copy substitutes for the original, it must be the product of an unfair use. But that assumption is belied by the fact that many reasonable uses substitute for the original. Recording a show on a DVR substitutes for watching that show live, a mixed tape substitutes for buying the songs, and so forth.

⁶⁹ *Position Statement on Controlled Digital Lending*, CONTROLLED DIGITAL LENDING BY LIBRARIES, <https://controldigitallending.org/statement>.

⁷⁰ <https://openlibrary.org/>

⁷¹ This is assuming that Open Library only has one copy. For some books, IA offers additional copies, either because they have been given permission by other libraries to include their CDL copies in IA’s holdings or because IA owns more than one copy. The number of copies IA can circulate simultaneously at any given time is tied to the number of print copies owned by IA and its partners.

⁷² Complaint in *Hachette Book Group, Inc. v. Internet Archive*, 1:20-cv-04160 (June 1, 2020).

⁷³ *Folsom v. Marsh*, 9 F.Cas. 342, 345 (C.C.D.Mass.1841); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

The fact that a library's reasonable use differs from that of the average person does not make their activities any less normal. A library buys books to lend them. CDL requires them to legitimately acquire – through gift or purchase – the number of copies it circulates. It allows for a change in format, but not in the number of copies used.

The fair use defense of CDL has been exhaustively covered elsewhere,⁷⁴ so it will not be rehashed here. It is important to note, though, that the fair use cases that courts have handled so far have not involved non-commercial users who have purchased their copies and are using them for the not-for-profit purpose for which they were intended. If the court relies solely on existing analyses, which is disproportionately shaped by parties with commercial interests on both sides, there is a strong chance that it will fail to recognize that copyright protects the user as much as the copyright owner.

In order to establish an equitable claim, one must have a basis that is not already covered by statute. In this case, fair use is a defense, and §107 serves as a test, but nowhere in that defense or in that test is a guarantee of public rights. (In contrast, author rights are clearly defined in §106). The equitable claim that could be established here is, writ broadly, the right to seek knowledge or the right to use knowledge. But that may be too broad for a court to apply in the context of copyright, as doing so would also allow anyone to take a work and sell it without paying an author. So, a narrower formulation of that right in the context of copyright is the right to reasonably use information legitimately acquired. Or, alternatively, the right to use information legitimately acquired for the purpose the acquisition was intended to meet. In both cases, the claims are not defensive, but rather a broader contention that reasonable uses of copyrighted works were never intended to be controlled by copyright law.

Let's see how an equitable analysis might apply. A library's lending of materials it has acquired in the same number of copies that it has acquired aligns with the principles of natural law and of the Copyright Clause. It supports the creation of knowledge by paying the author for the number of copies it uses, and it furthers the sharing of information both through the payment of that author for the number of copies used, as well as by extending access to those copies to their communities. If “[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors,”⁷⁵ then in any instance, that test has arguably been met once the author has been paid for the number of copies being used.

On the flip side, if the publishers' claim were to prevail, they would injure both the creation of knowledge and the sharing of the same. Instead of allowing libraries to convert purchased materials into formats more easily used, the publishers wish to force libraries to reacquire the same knowledge for the same community repeatedly, each time technology

⁷⁴ Michelle M. Wu, *Piece-by-Piece Review of Digitize-and-Lend Through the Lens of Copyright and Fair Use*, 36 LEGAL REF. SERVS. Q. 51 (2017);; Dave R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, CONTROLLED DIGITAL LENDING BY LIBRARIES (2018), <https://controlleddigitallending.org/whitepaper>; Michelle M. Wu, *Revisiting Controlled Digital Lending Post ReDigi*, 24 FIRST MONDAY (2019), <https://firstmonday.org/ojs/index.php/fm/article/view/9644/7793>

⁷⁵ Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)

changes. This would be contrary to natural law principles of minimizing resource waste and no undue burden on the commons.

Paying for the same content repeatedly (which results in no new creation) is wasteful and reduces common resources (e.g., public funds) that could be invested in other creations. The reduction in common resources is actually much greater than merely repurchasing the work, because presently, these publishers offer no digital equivalent to an analog book. There is no way to buy an e-book from them, so use rights (e.g., preservation) are also lost. Access is only through licensing, and they charge libraries more for the use of digital works than the average user pays while also limiting use.⁷⁶ This is in contrast to analog equivalents where a library could never be forced to pay more than the average user.⁷⁷

If libraries are forced to reacquire content repeatedly, at higher prices than a free market would bear, this reduces the community funds available to invest in new content. Both natural law and copyright law are intended to prompt the distribution of new content, not merely to reward creators repeatedly for the same work. License terms themselves also reduce the information commons for that community, though the reduction is in the form of anticipated reduction than immediate reduction. Since licenses expire, these are temporary resources, unlike physical books, which can remain in a collection forever.⁷⁸

The natural right to share information is also hindered. By forcing libraries to use works only in their original formats, one deprives them of the very technological advances that are used daily by users to speed the delivery of information or communicate with each other. It gives to publishers (1) the right to dictate to libraries how they serve their patrons, and (2) the right to limit the natural reach of a work. Under such restrictions, if a library feels it best to provide a homebound patron with content digitally, it will not be able to do so unless it buys the right to that particular method of transmission from the publisher, even where it has already paid for the content. It would also be unable to use a book for the life of that book, which it has always been able to do with print books, which can last for centuries and hundreds of uses (albeit with repairs along the way). Instead, that book's reach would be artificially limited by the terms of the publisher, whether those terms are in the number of permitted loans or in the form of a subscription term. With regard to CDL, where the same number of copies is being used as was

⁷⁶ Costs and limitations vary by publisher, but Michael Blackwell's study showed that digital copies across nine major publishers consistently exceeded the cost of their print equivalents, up to four times more, while conveying fewer rights (e.g., limit on the number of uses). Michael Blackwell, *Ownership, Licensing, and Library Materials: Changes, and Their Effects on Public Libraries*, METRO webinar (March 16, 2023).

⁷⁷ Controlling downstream costs in an analog world was practically impossible. A library could order a book from any store, and the publishers had no control over the prices set by booksellers. That's not to say that some didn't try – see *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 341, 28 S. Ct. 722, 722, 52 L. Ed. 1086 (1908) & *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 133 S. Ct. 1351, 1352, 185 L. Ed. 2d 392 (2013) – but such efforts were denied by courts.

⁷⁸ Some licenses are “perpetual” licenses, but even those are arguably temporary both because they often contain clause that allow the publisher to withdraw works at their discretion and because the data is not transferable. If the library is permanently closed, with its collections absorbed into a different library, it is not certain that the subsequent library will have rights to the content of the original perpetual license.

purchased, just in a different format, the attempt to constrain how that copy is used is a direct attempt to abridge the right to share knowledge.

The equitable, natural law analysis is more aligned to the purposes of copyright than an economic analysis, bringing together all of the interests in copyright, including those implicit in our laws but rarely present in lawsuits.

It may be too late to assert an equitable claim in Hachette, as the district court has already made its ruling,⁷⁹ and appellate courts entertaining new claims on appeal is rare⁸⁰. However, the equitable argument stands and should be considered in any future cases where plaintiffs seek to interfere with the reasonable use of copyrighted works.

Conclusion

The history of copyright clearly demonstrates that it was based on equitable principles. The right to copyright was not about the right of an author to make a profit, but rather about the right of an author to stop someone else from profiting from their work without payment. The former is about economic gain, but the latter is about equitable action: the ability to stop someone from engaging in behavior considered to be unjust. Granting that ability to authors was seen as necessary by Congress to ensure distribution of their work to the public for consumption and use.

This original purpose and balance of copyright has been lost over time as the voices heard by Congress and judges have primarily been those with a financial interest in copyright. Because these issues were more visible and measurable to our government representatives, they are disproportionately represented in our laws and cases.

The skewing of law towards private, financial gain undermines the natural law basis for copyright (i.e., the creation, seeking, and sharing of information), allowing copyright owners to expand enforcement of copyright far beyond its reasonable bounds. Where once individual use was largely considered outside of the scope of copyright, it is now the target of publishers. They have weaponized copyright to maximize profit, in direct opposition to equity and the purpose of the grant, using laws within and outside of copyright to do so.⁸¹

The bargain that Congress made in copyright was that authors would have the right to prevent others from unfairly profiting from their works so long as the public had the right to consume and use those works in a reasonable manner. Current lawsuits, legislation, and technologies are being used to end or restrict many of these normal uses, and this article seeks to restore them, not through law but through equity.

⁷⁹ Hachette Book Group, Inc. v. Internet Archive, 2023 WL 2623787 (S.D.N.Y.) (2023).

⁸⁰ Sage Prods., Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1426, 44 U.S.P.Q.2d 1103, 1108 (Fed. Cir. 1997). While new issues are not entirely foreclosed, the bar is high, largely permitted only when “the proper resolution is beyond doubt or where injustice might otherwise result.” Singleton v. Wulff, 428 U.S. 106, 121 (1976).

⁸¹ As an example, see Letter from SPARC to Assistant Attorney General Makan Delrahim, https://sparcopen.org/wp-content/uploads/2019/08/DOJ_Filing_08142019830.pdf (August 14, 2019) (quotes Cengage, “The growth in our digital business gives us access to a greater number of students in any given classroom and generates new sources of revenue from our existing adoption customers. In contrast to print publications, our digital products cannot be resold or transferred. We therefore realize revenue from every end user.”)

By affirmatively asserting public rights to use copyrighted materials at natural law, we can readjust copyright's focus, directing it away from profit back to its original equitable, balanced intentions.