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Copyright Law's Theory of the Consumer

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COPYRIGHT LAW'S THEORY OF THE CONSUMER

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Abstract: Copyright law has a rather well-developed theory of the author, but it has no similarly well-developed conception of the consumer. This exploratory Article is an attempt to begin piecing together a coherent image of the copyright consumer. The author argues that copyright law currently conceives of consumers in one of two ways, either as passive consumers of copyrighted works or as active authors in their own right. This binary conception of the consumer, however, is incomplete, as it neglects important and complex consumer interests in autonomy, communication, and creative self-expression. By examining these additional interests, it is possible to begin constructing a richer and more complex image of the copyright consumer. This image, in turn, can help shed light on some of the current debates over the proper shape and scope of copyright law.

INTRODUCTION

Copyright law has a rather well-developed theory of the author. The author of a copyrighted work is an individual who is motivated to create primarily by the hope or anticipation of economic gain. This individual writes, paints, or composes, thinking of the potential economic reward for the fruits of her labor. Without such a reward, the prospective author would write, paint, or compose far less, if at all. U.S. copyright law responds to this conception of the author by providing economic incentives to engage in creative activity. By harnessing the economic self-interest of the author, society benefits from the creation of new creative works. This is the dominant image of the author that underlies U.S. copyright law. It is reflected in both the

* © Copyright 2003 by Joseph P. Liu, Assistant Professor, Boston College Law School. E-Mail: liujr@bc.edu. Thanks to Margareth Barrett, Dan Burk, Stacey Dogan, Pam Samuelson, Mitch Singer, Alfred Yen, and participants at the Boston College Faculty Colloquium and the Boston College Symposium on Intellectual Property, E-Commerce and the Internet for helpful comments and suggestions. Thanks also to Glenn Pudelka for research assistance. An earlier version of this paper was presented at a U.C. Hastings College of Law symposium on Consumers in the Digital Age and at the Internet 2.0 Conference at the University of Minnesota.

shape of the Copyright Act as well as the underlying constitutional grant.[1]

At the same time, this dominant image of the author has been modified and critiqued in recent years. U.S. copyright law now recognizes, to a limited extent, that certain authors may have non-economic interests in their creations as well. Thus, the law now protects, for certain types of works, an author's right to attribution and to the integrity of those works.[2] At the same time, the image of the romantic, single author has come under powerful criticism from commentators who argue that it is sharply at odds with the reality of modern, collective, and corporate authorship of complex works such as software, movies, and sound recordings.[3] Others have leveled a post-modern critique of this image of romantic authorship, questioning the manner in which copyright law privileges certain creators over others.[4] The net result of both the dominant theory and its subsequent critiques is a relatively well-developed (though not uncontroversial) theory or set of theories about authors of copyrighted works.

Surprisingly, far less attention has been paid to consumers of copyrighted works. To be sure, the interests of consumers of copyrighted works are represented throughout the Copyright Act.[5] After all, the overall purpose of the Copyright Act is not to reward authors for the authors' sake, but to reward authors to benefit consumers and society more generally.[6] Copyright doctrines are thus shaped to keep this ultimate goal in mind.[7] Yet, despite this recognition of a general consumer interest, rather little has been written about the precise

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[1] U.S. CONST. art. I, § 8, cl. 8; Copyright Act, 17 U.S.C. §§ 101–1332 (2000).

[2] *See* Visual Artists Rights Act, 17 U.S.C. § 106A.

[3] *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 132–43 (1996); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT, at viii (1993); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 302, 319–20 (1992); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 460; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 288–92 (1992).

[4] *See, e.g.*, Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 263–66 (1996); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS., Spring 1992, at 139, 142–43.

[5] *See, e.g.*, 17 U.S.C. §§ 107–112.

[6] *See, e.g.*, Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 546 (1985) ("The monopoly created by copyright thus rewards the individual author in order to benefit the public.") (quoting Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting)).

[7] *See id.*

shape and scope of this interest. The Copyright Act itself scarcely mentions consumers—indeed, it contains no consistent generic term to refer to those who consume copyrighted works[8]—and the literature has generally followed suit.[9] What precisely are the interests of consumers of copyrighted works? Are consumers motivated primarily by economic considerations, such as price, quality, and variety? Do they view copyrighted works primarily as consumable commodities? Or is their relationship to copyrighted works more complicated? Until now, these questions have largely been unaddressed, at least in a comprehensive manner.

This exploratory Article is an attempt to begin piecing together a more coherent picture of the copyright consumer. The main point I wish to make is that consumer interests are quite a bit more complex than we ordinarily think. I will argue that, as currently structured, copyright doctrine and commentary contain two primary conceptions of the copyright consumer: the consumer as passive consumer and the consumer as author in his or her own right. Many existing copyright doctrines and much existing commentary funnel copyright consumers into one of these two categories.[10] Yet, as I hope to show below, consumers also have important and complex interests in autonomy, communication, and creative self-expression.[11] Existing copyright doctrines provide some indirect recognition of these interests as well.[12] Although recognition of these interests is not express,

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[8] The Copyright Act mentions "authors" and "copyright owners" many times, but contains no corresponding generic term to denote those who consume copyrighted works. The Act refers to these people variously as: "persons," *see, e.g.*, 17 U.S.C. § 101 (definition of "publication"); "the public," *see, e.g., id.* (definition of "publicly"); "owner" of a copy, *see, e.g., id.* §§ 109, 117; the "transmission recipient," *see, e.g., id.* § 114(d)(2)(C)(v); the "subscriber," *see, e.g., id.* § 119(d)(8); and "consumer," *see, e.g., id.* § 1008.

[9] *But see* L. RAY PATTERSON & STANLEY LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 191–218 (1991) (detailing the rights copyright users enjoy). For a discussion of copyright law from a consumer's perspective, see generally Jane C. Ginsburg, *Can Copyright Become User-Friendly*, 25 COLUM.-VLA J.L. & ARTS 71 (2001) (reviewing JESSICA LITMAN, DIGITAL COPYRIGHT (2001), which argues that copyright is now too complex and counterintuitive for users); Michael Landau, *Has the Digital Millenium Copyright Act Really Created a New Exclusive Right of Access?: Attempting to Reach a Balance Between Users and Content Providers' Rights*, 49 J. COPYRIGHT SOC'Y U.S.A. 277 (2001) (detailing flaws in the Digital Millennium Copyright Act of 1998 ("DMCA") from the user perspective); Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129 (2001) (exploring unauthorized uses of intellectual property in cyberspace and proposing adoption of a limited personal-use privilege).

[10] *See infra* notes 18–51 and accompanying text.

[11] *See infra* Parts I.C.1–3.

[12] *See infra* notes 43–80 and accompanying text.

these interests are important because they affect the extent to which consumers can derive full value and meaning from the copyrighted works they consume.[13]

Beyond initial recognition of the greater complexity of consumer interests, I also wish to begin exploring how this more complex image of the consumer might help shape our analysis of copyright law. In this Article, I will suggest that, in structuring copyright law for the digital environment, we need to be sensitive to the potential effects on these interests. It may well be, as some have suggested, that some of these interests will be satisfied by normal market mechanisms.[14] That is, if consumers truly hold these interests, it is possible that the market will eventually serve them. We need to be sensitive, however, to the possibility that the market, for a variety of reasons, may not fully serve these interests, or may not serve them in ways that we like. This conclusion suggests that certain legislative developments, which tend to assume that the market will address these interests, may be ill-advised.

Two caveats are warranted here. First, about the use of the label "consumer": as mentioned above, copyright law and commentary contain no universally accepted generic term for those who access, purchase, and use—i.e., "consume"—copyrighted works.[15] I am consciously choosing the term "consumer," rather than a more neutral term like "user," "the public," or "audience," in part because I wish to focus on those uses that are literally consumptive rather than productive in nature, and the term roughly captures this distinction.[16] I am also using this term, however, because it has been used in some of the copyright literature and public debate to describe copyright users more generally and has a certain passive connotation.[17] One aim of this Article is to challenge this connotation and expand the concep-

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[13] *See infra* notes 43–80 and accompanying text.

[14] *See infra* Part II.A.4 (discussing market responses).

[15] *See supra* notes 8–9 and accompanying text.

[16] *See* PATTERSON, *supra* note 9, at 191; Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562 (2000) ("Technology now makes possible the attainment of decentralization and democratization by enabling small groups of constituents to become *users* . . . ."); Jane Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 4 (1997) ("In this lecture, I will elaborate on what I perceive to be the causes of the current *user* rights challenge to copyright.") (emphasis added); Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 112 (2001) ("In this Article, I argue that the underpinnings of the fair use doctrine . . . have . . . utility in facilitating . . . a taxonomy for determining the rights of providers and *users* of content in cyberspace.") (emphasis added).

[17] *See generally* Benkler, *supra* note 16.

tion of the consumer to reflect accurately what copyright consumers actually do with their copyrighted works.[18] That is, I will argue that those thought of as everyday consumers of copyrighted works in fact have a more complex relationship to copyrighted works than commonly recognized.

Second, this Article is exploratory and its conclusions are tentative. The general point I wish to make is that copyright law currently does not have any persuasive or coherent theory of the consumer, and that examining consumer interests in more detail may shed some useful light on a number of existing copyright law debates. Beyond this basic point, I attempt to sketch out what a more fully developed theory of the consumer might look like and how such a theory might affect our thinking about the proper scope of copyright law. I do not, however, purport to lay out the definitive theory of the consumer. It may well be that this particular theory of the consumer is not persuasive, or that other, more compelling theories exist. I do hope, however, that by at least focusing more attention on consumers of copyrighted works, this Article will suggest to others that a useful alternative structure exists for examining some of the debates currently circulating in the copyright field.

I. Conceptions of the Consumer

In this part of the Article, I attempt to sketch out different conceptions of the copyright consumer. I will argue that copyright law contains at least two primary conceptions of the consumer: the consumer as passive consumer and the consumer as author. I will then argue that these two conceptions are incomplete, and that there exist additional consumer interests in autonomy, communication, and creative self-expression. I will group these interests under a general conception of the consumer as an active consumer. I will also show how existing copyright law doctrines currently provide some indirect recognition of these interests, and how changes in technology are forcing us to confront these interests more expressly.

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[18] I recognize that, in seeking to expand upon this term, there is a risk that these connotations are so strong and so entrenched that they will in fact undercut the broader point I hope to make.

A. *The Consumer as Passive Consumer*

One image of the copyright consumer is as a passive consumer of copyrighted works as entertainment commodities. Call this the "couch potato" view. Under this view, the copyright consumer is really no different from the consumer of any other good. The consumer is primarily interested in getting access to a wide variety of copyrighted works at reasonable cost. The consumer then consumes these works in a largely passive manner. That is, the consumer reads the book, watches the movie, listens to the CD, and does little more. Consuming books or movies is thus little different from consuming potato chips, bottled water, athletic shoes, or any other consumer product.

This image of the consumer should be familiar, as it largely reflects the reality of our existing mass-mediated markets for copyrighted works.[19] The copyright industries in the United States generate billions of dollars in revenue, much of which derives from the consumer market.[20] Books, movies, music, television, and much software are produced and marketed for consumers just like other consumer commodities. Advertising dollars are spent attempting to convince consumers to purchase one set of copyrighted works over another. Focus groups are conducted to discern consumer preferences. Consumers respond by purchasing products that they like, and they proceed to consume these works in a largely passive manner.

Copyright law responds to this image of the consumer primarily by ensuring that conditions exist for a functioning market in copyrighted works, i.e., by making sure there are works for them to consume.[21] It does this by solving the basic public goods problem, i.e., by giving entitlements to authors, so that authors will have adequate incentives to produce consumable works, and then permitting the market to direct investment so as to satisfy consumer preferences.[22] Rights against unauthorized reproduction, public distribution, and public performance thus permit producers to exploit these copyright mar-

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[19] *See* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 92–98 (2001) (discussing how mass media markets limit content diversity on television).

[20] *See, e.g.*, CRAIG JOYCE ET AL., COPYRIGHT LAW 2 (5th ed. 2001) (stating that core copyright industries accounted for 4.3% of the 1997 U.S. Gross Domestic Product, or $348.4 billion).

[21] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984).

[22] *See, e.g., id.*

kets without fear that initial investments will be undercut.[23] Once the law sets entitlements, competition among goods will serve consumer interests in passive consumption.[24] Beyond ensuring that such goods are produced, copyright law does not need to concern itself with consumer interests, because they are, under this view, rather minimal.[25]

Note that under this view, the ability of consumers to engage in fair use or more productive uses of copyrighted works is not a major consideration.[26] Under this view consumers see copyrighted works as commodities, so few consumers will in fact engage in any active transformation or adaptation of copyrighted works. Rather, the vast majority of consumers will consume such works passively. To the extent that some consumers wish to do more, these are treated as exceptional cases and may be accommodated under the fair use doctrine.[27] The fair use defense, however, should be narrow in scope, because if it is too broad, it may begin to undercut the stronger passive consumer interest in having materials to consume.[28] Indeed, if too broad, the doctrine may also undercut attempts by the market to respond properly by licensing some of these uses.[29]

This image of the consumer as a passive consumer is consistent with some of the thinking behind recent legislative initiatives. For example, the legislative history of the recently enacted Digital Millennium Copyright Act of 1998 ("DMCA") contains repeated references to "consumers," and the statute itself is aimed, quite consciously, at making sure that the necessary conditions exist for copyright owners to securely provide consumers with access to copyrighted works.[30] The

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[23] *See* 17 U.S.C. § 106 (2000) (detailing copyright owners' exclusive rights in their copyrighted works).

[24] *See, e.g.*, *Sony*, 464 U.S. at 429.

[25] *See, e.g.*, *id.*

[26] *See id.*

[27] *See* 17 U.S.C. § 107.

[28] *See, e.g.*, Tom Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 581 n.110 (1998).

[29] *See, e.g.*, *id.* at 581–84; I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2, ¶ 7 (1995), *available at* http://law.richmond.edu/jolt/v1i1/hardy.html. A broad fair use doctrine may also undercut a general consumer interest in ensuring that cultural properties have fixed, stable meanings. *See* Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 955–63 (1999).

[30] *See* 17 U.S.C. §§ 1201–1205; H.R. REP. NO. 105-551(II), at 21 (1998), 1998 WL 414916 ("Today, the information technology industry is developing versatile and robust products to enhance the lives of individuals throughout the world, and our telecommunications industry is developing new means of distributing information to these consumers in every part of the globe."); S. REP. NO. 105-190, at 2 (1998), 1998 WL 239623 ("[T]his

vision of the consumer in the legislative history is not much different from the consumer of any ordinary consumer good.[31] The primary concern is making sure that consumer preferences for entertainment commodities are satisfied. Comparatively less attention is paid to ensuring that consumers can actively rework or transform copyrighted works. Indeed, many provisions of the DMCA seem designed to prevent just this kind of activity.[32]

This image of the consumer also underlies some of the related copyright literature that supports a "fared use" or "pay per use" model of distribution.[33] A number of commentators have argued that, as copyrighted works are increasingly distributed over the Internet, authors should be given greater assistance in their attempts to control, and charge for, individual uses of copyrighted works.[34] Under this view, technology will eventually permit so-called "trusted systems" to impose "micro-charges" for access to copyrighted works.[35] Thus, instead of selling copies to consumers, their use of copyrighted works will be metered.[36] The benefit of this setup is that authors will be able to maximize their return from copyrighted works, while still providing access to all consumers who are interested in such access.[37] This view reflects, to some extent, the view of the consumer as a passive consumer of works as entertainment commodities.[38]

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bill . . . creates the legal platform for launching the global digital online marketplace for copyrighted works."); *see also* WORKING GROUP ON INTELLECTUAL PROP. RIGHTS, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 177–97 (Sept. 1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii [hereinafter WORKING GROUP].

[31] *See* S. REP. No. 105-190, at 2, 1998 WL 239623.

[32] Notably, the DMCA lacks any broad fair use defense, and instead substitutes a number of specific, narrower exemptions. *See* 17 U.S.C. §§ 1201–1205.

[33] *See, e.g.*, Bell, *supra* note 28, at 564–67; Hardy, *supra* note 29, ¶¶ 19–21; *see also* Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 45 (2000).

[34] *See* Bell, *supra* note 28, at 564–67; Hardy, *supra* note 29, ¶¶ 19–21.

[35] *See, e.g.*, Bell, *supra* note 28, at 564–67; Hardy, *supra* note 29, ¶¶ 19–21, 46.

[36] *See, e.g.*, Bell, *supra* note 28, at 564–67; Hardy, *supra* note 29, ¶¶ 19–21, 46.

[37] *See, e.g.*, Bell, *supra* note 28, at 585–90; Hardy, *supra* note 29, ¶¶ 19–21, 46.

[38] *Cf.* Bell, *supra* note 28, at 564–67; Hardy, *supra* note 29, ¶¶ 19–21, 46. True, more active modes of consumption might be permissible under this licensing scheme as well. That is, if consumers wish to do more than simply access the work briefly, then these uses might also be served by the market, through micro-charges. The primary focus of this view, however, is satisfying consumer interests, which are assumed to be largely passive.

B. *The Consumer as Author*

An alternate view of the copyright consumer, one that sits at the opposite end of the spectrum from the passive consumer view, is of the consumer as author. Although it may seem a bit odd to think of the author as a consumer, in fact the Copyright Act recognizes that authors often consume earlier works in the process of creating their own works.[39] Indeed, no work is truly and entirely new.[40] All works build upon earlier works to some extent.[41] Thus, in some sense, every author is also a consumer of earlier copyrighted works, again in the literal sense of that term.[42]

The tradeoff between earlier authors and later authors is expressly acknowledged in various copyright doctrines, such as the idea/expression doctrine,[43] the derivative-work right,[44] and the fair use doctrine.[45] Thus, later authors can take ideas, concepts, and themes from earlier works, and build upon them to create new works.[46] They can also engage in limited copying of the expression of prior works, to the extent such copying is permitted under the fair use doctrine.[47] At the same time, the derivative-work right limits the ability of subsequent authors to build too closely upon expressive elements from earlier works.[48] If subsequent authors wish to build upon these expressive elements, they must license this right from the original author.[49]

This relationship between earlier authors and later authors has been amply explored in the copyright literature, and my purpose here is not to recap that literature, but simply to observe that later authors are also consumers of copyrighted works.[50] Thus, this alternative im-

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[39] *See infra* notes 43–50 and accompanying text.

[40] *See, e.g.*, Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 218 (1983) ("The central problem is that all works are to some extent based on works that precede them."); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990) ("But the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.").

[41] *See, e.g.*, Goldstein, *supra* note 40, at 218; Litman, *supra* note 40, at 966.

[42] *See* Goldstein, *supra* note 40, at 218; Litman, *supra* note 40, at 966.

[43] *See, e.g.*, Baker v. Selden, 101 U.S. 99, 101–02 (1879).

[44] 17 U.S.C. § 106 (2000).

[45] *Id.* § 107.

[46] *See id.* §§ 106–107; *Baker*, 101 U.S. at 101–02.

[47] *See* 17 U.S.C. §§ 106–107; *Baker*, 101 U.S. at 101–02.

[48] *See* 17 U.S.C. § 106.

[49] *See id.*

[50] *See, e.g.*, Goldstein, *supra* note 40, at 218; William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 333 (1989) ("[E]very author is both

age of the copyright consumer can serve to anchor the opposite end of the spectrum from the passive consumer view. Instead of merely consuming a book or a movie in a passive manner, the consumer as author consumes a book or a movie to create new works. The copyrighted work is raw material that serves as the basis for future creation. Moreover, this consumer's engagement with the work is extremely active. The later author reshapes, adopts, reforms, and recasts elements of earlier works to create new ones.[51] This type of consumer, the consumer as author, already has a privileged place within copyright law doctrine.

C. *The Consumer as Active Consumer*

These two images of the consumer of copyrighted works, however, do not exhaust all of the possibilities. In fact, there exist, between these two polar extremes, a number of other consumer interests that are not as widely recognized, but that play an important role in setting the balance of rights between producers and consumers. These interests include interests in autonomy, communication, and creative self-expression. I group these interests under the image of the consumer as an active consumer of copyrighted works, one who does more with copyrighted works than simply passively consume them. Recognition of this more active image of the consumer can be found in some existing copyright doctrines.

1. Autonomy

Consumers have an interest in some degree of autonomy in their consumption of copyrighted works. Autonomy, in this sense, means freedom in choosing when, how, and under what circumstances to consume a copyrighted work. Consider, for example, the way one commonly reads a book. Rarely do you read it in a single setting, from front to back. Instead, you pick it up, read portions, put it down, and return to it later. Perhaps you reread sections, going back over earlier portions. Maybe you underline it and write comments in the margin. After you finish it, you might go back and read it again. Or consider

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an earlier author from whom a later author might want to borrow material and the later author himself."); Mark Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997, 1005–28 (1997) (discussing patent and copyright law's treatment of "improvers" of previously patented or copyrighted works).

[51] *See, e.g.*, Goldstein, *supra* note 40, at 218; Landes & Posner, *supra* note 50, at 333; Lemley, *supra* note 50, at 997, 1005–28.

the way individuals listen to music on a CD by repeating certain tracks and skipping others, or how others view scenes of a movie repeatedly on video or DVD.

This freedom, this ability to choose when and how to access a work, is an often unrecognized part of how individuals interact with copyrighted works.[52] Individuals process information in different ways. Sometimes, information needs to be processed repeatedly before it can be fully understood or appreciated. Each encounter with a creative work may give rise to a new inspiration, impression, or conclusion. Thus, repeated access and some degree of freedom in interacting with a copyrighted work can lead to a richer and more complex appreciation of the work.

This autonomy in consumption may also involve, at times, some degree of copying. For example, consider note-taking, i.e., reading an article and copying quotes or making notes about the contents of that article. In some cases, this copying may be essential to permitting full consumption of the copyrighted work. Or consider the process of photocopying journal articles and marking them up. Even if the person making the photocopy owns the original and could mark it up, a photocopy may in fact be a more useful format for consumption of the article.[53] All of these are everyday and rather mundane examples of the consumer interest in autonomy.[54]

This interest in autonomy is handled pretty well by the existing practice of selling physical copies of copyrighted works.[55] That is, the sale of books, CDs, and videotapes has traditionally delivered copy-

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[52] *Cf.* Benkler, *supra* note 19, at 41–50 (analyzing a different kind of autonomy interest); Tussey, *supra* note 9, at 1134–38.

[53] *See* Am. Geophysical Union v. Texaco, 60 F.3d 913, 918–19 (2d Cir. 1995) (considering argument that photocopying an article from a journal to store it in office files may be preferable to visiting the library to reference it).

[54] To some extent, this interest in autonomy is an interest that consumers of non-copyrighted goods share. That is, consumers have a similar interest in autonomously consuming potato chips, or in freely using their toaster ovens whenever and however they like. Yet autonomy in the consumption of copyrighted works raises additional complications because of the malleable nature of copyrighted works. As discussed below, because copyrighted works are more malleable, consumers can do far more with copyrighted works (i.e., copy them) than they can with physical consumer goods. At the same time, and for much the same reason, copyright owners have a greater interest in seeking to control such uses of copyrighted works, whereas they might not be so concerned about controlling uses of other consumer goods. Thus, these interests come into greater conflict in the context of copyrighted works than for other non-copyrighted goods.

[55] *See* Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1286–96 (2001) (discussing permissible uses of a physical copy of a copyrighted work).

righted works to consumers in a form that permits a good deal of autonomy in consumption.[56] The Copyright Act itself expressly recognizes the distinction between ownership of the copyright and ownership of a specific copy.[57] Individuals who own copies thus have a good degree of freedom and autonomy in choosing precisely when and how to consume the work.[58] Indeed, in paying for the copy, consumers are of course also paying for these additional rights. Thus, the sale of a copy represents a fixed bundle of entitlements giving the purchaser the ability to exercise a good deal of autonomy in consumption.[59]

In contrast, other methods of delivery do not afford as much autonomy in consumption. Public performances and television and radio broadcasts, for example, give consumers less freedom to control when and how they consume particular works. Yet even here, Congress and the courts have recognized an interest in autonomy by permitting consumers to copy such broadcasts under certain conditions.[60] For example, the U.S. Supreme Court's opinion in *Sony v. Universal City Studios* can be read as implicitly recognizing an interest in consumer autonomy.[61] In that case, the Court held that time-shifting of television broadcasts, i.e., recording such broadcasts on VCRs for later viewing, constituted fair use.[62] In addition to considering the traditional fair use factors (such as the noncommercial nature of the copying and the lack of impact on the market), the language employed by the Court seemed to recognize implicitly a consumer interest in dictating when and where to view that particular work and, correspondingly, a limit on the ability of the copyright owner to dictate the circumstances of such consumption.[63]

Similarly, copyright law permits copying in other areas, providing consumers with some degree of autonomy in consumption. The Audio Home Recording Act ("AHRA"), for example, gives consumers broad rights to copy recorded music for personal, noncommercial use.[64] The AHRA permits consumers to make tapes of music for the

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[56] *See id.*

[57] 17 U.S.C. § 202 (2000) ("Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied.").

[58] *See* Liu, *supra* note 55, at 1286–96.

[59] *See, e.g.*, 17 U.S.C. § 107 (fair use); Liu, *supra* note 55, at 1286–96.

[60] *See* Audio Home Recording Act, 17 U.S.C. §§ 1001–1010; *Sony*, 464 U.S. at 443–47.

[61] *See* 464 U.S. at 443–47.

[62] *Id.* at 456.

[63] *See id.* at 443–47.

[64] 17 U.S.C. §§ 1001–1010.

car stereo or to make mix tapes that combine different songs.[65] More broadly, the fair use doctrine ensures that individuals have some freedom to copy works for personal purposes, so long as the impact of that copying on copyright markets is not too significant.[66] Thus, the type of photocopying of articles mentioned above, for purely personal purposes, would almost certainly constitute fair use.[67] Together, these doctrines ensure that consumers will have some degree of autonomy in their consumption of copyrighted works.

Advances in technology, however, are testing this existing recognition of the consumer interest in autonomy. Digital technology makes it ever easier for individuals to copy works and consume them autonomously. Text becomes easier to cut and paste; music, once in digital form, becomes easier to move around (from computer to MP3 player to burned CD), combine with other tracks, and even alter. Similarly, movies and images become easier to manipulate for personal consumption. For example, technologies like ReplayTV give consumers ever more control over when and how to view broadcast television.[68] To take a more sophisticated example, consumers can even alter software to customize it to fit their own purposes.[69]

At the same time, digital technology potentially gives copyright owners greater ability to control how consumers interact with their copyrighted works. In response to the concern that digital technology now makes copying and distribution of copyrighted works much easier, copyright owners are increasingly using technology to limit significantly the uses in which consumers can engage, so that every use is metered and charged.[70] By carefully restricting and charging for uses, owners can both reduce the incidence of piracy and maximize

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[65] The statute provides for these permissible uses in exchange for a royalty payment for blank digital recording media. *Id.* §§ 1003, 1008.

[66] *See id.* § 107.

[67] *See id.*

[68] Current information about the ReplayTV product and service (both sold by SONICblue, Inc.) is available at http://www.sonicblue.com/video/replaytv5000/default.asp (last visited Mar. 26, 2003).

[69] *Compare* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 969–70 (9th Cir. 1992) (finding modification of playing characteristics of a video game constituted fair use), *with* Midway Mfr. Co. v. Artic Int'l, 547 F. Supp. 999, 1011–13 (N.D. Ill. 1982), *aff'd*, 704 F.2d 1009 (7th Cir. 1982) (finding a similar video game-enhancing device was likely copyright infringement).

[70] *See* Julie Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 161–63 (1997); Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137, 155–57 (1997).

their overall returns through price discrimination.[71] Thus, digital technology expands consumers' ability to engage in autonomous consumption, while at the same time providing a mechanism for greatly reducing this type of consumption.

Courts have already begun grappling with cases in which digital technology is affecting this interest in autonomous consumption.[72] Consider the following two cases involving MP3 music files. In *Recording Industry Ass'n of America v. Diamond Multimedia Systems*, the U.S. Court of Appeals for the Ninth Circuit refused to enjoin the sale and distribution of a portable MP3 player, which permitted consumers to "rip" songs from CDs and import them into an easy-to-carry format.[73] In *UMG Recordings v. MP3.com, Inc.*, the U.S. District Court for the Southern District of New York enjoined an online service that permitted consumers virtually to upload their CDs onto a website and then access these songs at any location, via the web.[74] Each of these cases involved specific doctrinal arguments, and there are many grounds for distinguishing the two results.[75] But they also can be analyzed through the lens of consumer autonomy. On the one hand, *Diamond Multimedia* gives greater recognition to consumer autonomy, while on the other hand, *MP3.com* gives comparatively less recognition to this interest.[76] Again, the different results may well be justified by doctrine or by differences in incentive effects, but they certainly have different implications for this interest in consumer autonomy.

Similarly, new technologies involving digital video recording devices also implicate this consumer interest in autonomy. These devices, such as TiVo and ReplayTV, permit consumers to exercise a significant amount of control over when and how they view broadcast

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[71] *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518–19 (9th Cir. 1993); *see also* Liu, *supra* note 55, at 1341–43 (analyzing the effect of charging for or restricting access to digital works); R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies"*, 2001 U. Ill. L. Rev. 83, 116 (discussing the importance of the display right to owners trying to license works online).

[72] *See Lewis Galoob Toys*, 964 F.2d at 970–72. *See generally* Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of* Sony, Galoob *and* Sega, 1 J. Intell. Prop. L. 49, 73–86 (1993) (considering the implications of various cases for software copyright disputes); Pamela Samuelson, *Modifying Copyrighted Software: Adjusting Copyright Doctrine to Accommodate a Technology*, 28 Jurimetrics J. 179, 204–21 (1988) (concluding that social costs of preventing software modification may be too high).

[73] 180 F.3d 1072, 1073–74, 1081 (9th Cir. 1999).

[74] 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

[75] *See Diamond Multimedia*, 180 F.3d at 1075; *MP3.com*, 92 F. Supp. 2d at 351.

[76] *See Diamond Multimedia*, 180 F.3d at 1080–81; *MP3.com*, 92 F. Supp. 2d at 352–53.

television.[77] Consumers can record shows automatically and then fast-forward over, or even automatically delete, commercials. Some of these devices also permit, or have been modified to permit, some ability to transfer video files to other devices. Broadcast owners object to both of these uses, and at least one lawsuit has been filed against a manufacturer of these devices.[78] The case directly implicates this interest in consumer autonomy in consumption.[79] In deciding the case and assessing the fair use claim, the court will have to decide to what extent consumers can freely consume television broadcasts at the time and in the manner they like, and to what extent copyright owners can keep consumers from engaging in this kind of consumption.[80]

2. Communication and Sharing

Consumers also have an interest in communicating with others regarding copyrighted works. Consider, for example, discussions at work about last night's episode of *Friends*, or the recent Harry Potter movie. One might recount certain scenes, debate the significance of certain actions, or argue over the quality of the work. Or consider how one might invite some friends over to watch a movie, or might sing songs around a campfire. Perhaps more formally, consider the way in which discussion of a book—whether in a class, a book club, or informally among friends—helps the reader make sense of it.

Such communication may sometimes involve an element of sharing. For example, one may clip out an article to send to a friend,

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[77] Current information about the TiVo product and service (both sold by TiVo, Inc.) is available at http://www.tivo.com (last visited Mar. 26, 2003). For current information about ReplayTV, see *supra* note 68.

[78] *See* Newmark v. Turner Broad. Network, 226 F. Supp. 2d 1215, 1217–18 (C.D. Cal. 2002) (denying defendant ReplayTV's motion to dismiss, and consolidating cases of Newmark v. Turner Broad. Sys., No. CV 02-04445 FMC (Ex) (ReplayTV users' declaratory judgment action), and Paramount Pictures Corp. v. ReplayTV, No. CV 01-9358 FMC (Ex) (suit against ReplayTV for contributory and vicarious copyright infringement)); *see also* Brief of Amici Curiae Center For Internet & Society at 17–30, Paramount Pictures Corp. v. ReplayTV, CV 01-9358 FMC (Ex) (C.D. Cal. 2002); Staci D. Kramer, *Content's King*, CABLEWORLD, Apr. 29, 2002, *available at* 2002 WL 9607304 (interview with Jamie Kellner, CEO, Turner Broadcasting System, Inc.).

[79] *See Newmark*, 226 F. Supp. 2d at 1218.

[80] *See* Washingtonpost.Newsweek Interactive Co. v. Gator Corp., No. 02CV909, 2002 WL 31319973 (Sept. 17, 2002) (news reports of the "Gator cases" are plentiful; see, for example, Lee Gomes, *BOOMTOWN: In Attacking 'Parasite,' Publishers' Lawsuit May Hurt Your Rights*, WALL ST. J., July 15, 2002, at B1); *see also* Drew Clark, *Bowdlerizing for Columbine?*, SLATE, Jan. 20, 2003, *at* http://slate.msn.com/id/2077192 (describing movie studio lawsuit against company distributing software that permits consumers to omit objectionable scenes in DVDs).

along with comments. Perhaps one might share a copy of a particularly good CD with friends, or make a tape of the CD for personal use. Or, one might lend a book to a friend. These activities have, within them, a communicative component, because they involve collective consumption of the information embodied in a work.

Copyrighted works are thus not only individual consumer goods, but also social goods, consumed in a social manner. That is, to make sense of and interpret many copyrighted works meaningfully, it is sometimes necessary to communicate with others about the works; to share viewpoints, to debate, and to argue. Although some works can certainly be consumed alone, by an individual consumer, many works are suited to social consumption. The ability to communicate about copyrighted works enriches our understanding of those works and enables us to get much more out of them.

Both the existing technology and law provide extensive opportunities for this kind of communicative consumption.[81] Certainly, nothing in copyright law prevents the communication, discussion, and sharing of ideas found in copyrighted works.[82] And even if such activities somehow violated an exclusive right, fair use would privilege many of them.[83] Similarly, the first sale doctrine permits widespread sharing of specific copies of works by allowing for the lending and borrowing of books, CDs, and movies.[84] Finally, the limitation of performance rights to public performances also permits a good deal of collective consumption.[85] Thus, music and movies can be listened to or viewed collectively, by groups of social acquaintances, without running afoul of the copyright laws.[86] All of these limitations on copyright owners' rights permit a good deal of sharing, communication, and social consumption of copyrighted works.

At the same time, copyright law places limits on sharing when the sharing is less communicative in nature and begins to harm incentives. The first sale doctrine is thus limited in the case of recorded music and computer software, out of concerns with piracy.[87] Similarly, shared performances of works are not privileged when the circle of

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[81] *See, e.g.*, 17 U.S.C. §§ 107, 109(a) (2000).

[82] *See id.* § 107 (deeming use of copyrighted works non-infringing if "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research").

[83] *See id.*

[84] *See id.* § 109(a).

[85] *Id.* § 101 (definition of "publicly").

[86] *See* 17 U.S.C. § 101.

[87] *See id.* § 109(b)(1)(A).

those exposed to the work exceeds a normal group of social acquaintances.[88] Furthermore, copying and distribution of works is certainly limited when they have a larger impact on copyright incentives.[89] Existing doctrines thus accommodate these competing interests, permitting a good amount of communicative consumption while restricting such consumption when it poses a harm to copyright incentives.[90]

Yet here, too, digital technology is changing both the opportunities for, and costs of, engaging in this kind of communicative consumption.[91] First, technology facilitates new kinds of communicative consumption by lowering the costs of communication.[92] Now, interpretive communities are not limited by geography, but can include participants that are separated by vast distances and are united by little more than a common interest in a particular author, movie, or musical group.[93] Web pages, online discussion forums, newsgroups, and other technologies all increase the ability of individuals to engage in social consumption (such as discussion and sharing) of copyrighted works.[94] The ability to engage in this kind of consumption is now greatly enhanced.[95]

At the same time, technology also increases the potential impact of this type of communicative consumption on copyright incentives.[96] Although sharing copies with a limited circle of close acquaintances may once have served this social function without unduly harming copyright incentives, sharing copies with strangers, or even a wider circle of online acquaintances, now potentially has a much larger impact on incentives.[97] Similarly, performance or display of a work to a limited circle of acquaintances may have, in the past, permitted an accommodation of such interests.[98] But similar performance or display on the Internet, even on a personal homepage, begins to pose a

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[88] *See id.* § 101 (definition of "publicly").

[89] *See id.* § 107 (explaining that fair use should be evaluated in light of "the effect of the use upon the potential market for, or value of, the copyrighted work.").

[90] *See id.* §§ 107, 109.

[91] *See* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 346–50 (1995).

[92] *See id.*

[93] *See id.* at 346 n.1 (citing ITHIEL DE SOLA POOL, TECHNOLOGIES WITHOUT BOUNDARIES, ON TELECOMMUNICATIONS IN A GLOBAL AGE (1990)).

[94] *See id.*

[95] *See id.* at 346–50.

[96] *See* Elkin-Koren, *supra* note 91, at 349.

[97] *See id.*

[98] *See id.*

more significant threat to copyright incentives because it is accessible by anyone around the world.

To take an example, consider *Los Angeles Times v. Free Republic*, in which a number of newspapers sued a website that permitted members to post articles from these newspapers and then comment critically upon them, looking in particular for evidence of journalistic bias.[99] Here, the new medium offered expanded possibilities for engaging in communal consumption of a copyrighted work, along with active discussion of that work.[100] It enabled contact among a wider array of individuals and greatly increased the ability of these individuals to critique and discuss a set of copyrighted works.[101] At the same time, *Free Republic* illustrates the potential increased costs of such modes of consumption.[102] In particular, the U.S. District Court for the Central District of California found no fair use, because the replication of an entire article on the website had the potential of reducing demand for the original article.[103] Thus, sharing poses the potential of greater harm to incentives than exists in the non-digital world.[104]

Furthermore, consider the case of file-sharing services like Napster,[105] Morpheus,[106] or Kazaa.[107] Much focus has been given to the ways in which such file-sharing services facilitate copyright infringement.[108] Yet at the same time, there is an element of this activity that is social—namely the sharing of common interests and information concerning copyrighted music. It may well be that this interest is rather minimal and vastly outweighed by the costs associated with permitting this kind of sharing. But even here, there is a sense that consumers are using copyrighted works in a certain social context.

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[99] L.A. Times v. Free Republic, No. CV 98-7840 MMM, 2000 U.S. Dist. LEXIS 5669, at *4, 54 U.S.P.Q.2d (BNA) 1453 (C.D. Cal. 2000), *final judgment entered at* 2000 U.S. Dist. LEXIS 20484, 56 U.S.P.Q.2D (BNA) 1862 (C.D. Cal. 2000).

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See id.* at *71–75.

[104] *See Free Republic*, 2000 U.S. Dist. LEXIS 5669, at *71–75.

[105] *See* A&M Records v. Napster, Inc., 239 F.3d 1004, 1014–17 (9th Cir. 2001).

[106] Morpheus is a service of Streamcast Networks, Inc., Kazaa is a service of Kazaa BV, and both are currently embroiled in copyright litigation. *See generally* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., No. CV-01-8541, 2003 WL 186657 (C.D. Cal. Jan. 9, 2003) (denying Kazaa and Streamcast Networks' motion to dismiss copyright infringement suit brought by movie studios).

[107] *See id.*

[108] Indeed, I have little doubt that they primarily serve exactly this purpose. *See A&M Records*, 239 F.3d at 1010–11; *Metro-Goldwyn-Mayer Studios*, 2003 WL 186657, at *1.

Thus, any balancing of harms analysis should at least acknowledge the potential costs to this interest in communicative consumption.

3. Creative Self-Expression

Finally, consumers also have an interest in using copyrighted works to engage in their own creative self-expression.[109] Here, I am referring to uses of works that fall short of authorship in the conventional sense, insofar as these uses primarily involve copying that is only minimally transformative. Thus, they do not involve the significant, independent creative input that we ordinarily think of when we think of authorship. Nevertheless, these forms of "mini-authorship" may at the same time contain a good deal of creative expression. Under this category of mini-authorship, consumers copy and adapt copyrighted works in small ways, in the course of making sense of the works, commenting on such works, associating themselves with such works, and communicating additional ideas.[110]

One example of this kind of self-expression might be making a mix tape or CD of songs from different albums. Although the basic building blocks are literally copied, there is some creative expression involved in the selection and ordering of these building blocks, and there may well be a communicative idea that is capable of expression only through these building blocks. Or, consider a child drawing a picture of Superman battling Batman.[111] Again, the copying is literal and the amount of transformation minimal, yet the act evinces some

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[109] *See* Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863–68 (1991) (arguing that intellectual property laws may stifle the optimal cultural conditions for dialogic practice); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405–07 (1990) (suggesting that a shift to more stringent intellectual property laws implicates free speech interests); *cf.* Wendy Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1556–58, 1606–09 (1993) (suggesting that the Lockean model of property rights does not justify today's system of excessive intellectual property rights).

[110] *See* Dreyfuss, *supra* note 109, at 397–98.

[111] *See* Lange, *supra* note 4.

> What I really have in mind is our innate emotional hunger for creative play, and our considerable incapacity to resist indulging it. The child playing in the sand on the beach builds castles, which no one but a monster would imagine forbidding a second child to imitate at will. Creative play in childhood becomes the adult fantasy that we recognize in authorship, and it is no less monstrous to limit authorship among adults than it is among children.

Id. at 146. *But see* WORKING GROUP, *supra* note 30, at 203–07 (suggesting that schools teach students about copyright infringement).

element of the consumer's own creative self-expression, even if we do not conventionally think of this as sufficient to constitute "authorship."[112] Or consider, finally, an individual performance of a piece of music on the piano or guitar. Although the individual is performing the creative work of the original author, there may be significant amounts of self-expression in the interpretation and performance of that work. In all of these cases, consumers use copyrighted works as vehicles or platforms for their own self-expression.

Of course, to some extent, this dichotomy between mini-authorship and macro-authorship (that is, authorship in the conventional sense) is artificial, as a spectrum exists between these two categories. Different types of uses can involve varying degrees of transformation, and there may be many fuzzy cases in between.[113] Consider, for example, fan fiction, which builds heavily on existing works, but nevertheless can embody significant creative contributions.[114] Whether this is macro-authorship or mini-authorship may be difficult to determine. Even at the minimally-creative end of the spectrum, however, there is some level of creative activity being engaged in, and this activity might be another important component of what it means to consume a creative work fully.[115] Accordingly, this activity should be considered in its own right, rather than as an inferior species of authorship.[116]

Although there is a temptation to consider these types of uses as rather unsophisticated, or "low" forms of authorship, I think that this is a mistake. True, we may place a premium on the ability of an author to contribute a significant amount of his or her own creative thought in building upon past works, and therefore privilege certain authorship claims. This should not lead us, however, to underestimate the value that consumers can derive from adapting works in less transformative ways to express themselves.[117] Although we might prefer it if

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[112] *See* Lange, *supra* note 4, at 146.

[113] *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997); Tussey, *supra* note 9, at 1139–40.

[114] Tushnet, *supra* note 113, at 655; Tussey, *supra* note 9, at 1139–40 (referring to fan sites).

[115] *See* Lange, *supra* note 4, at 141–43. In this sense, copyrighted works are even less analogous to other consumer commodities. We do not frequently attempt to modify or adapt a toaster oven, soft drink, or other consumer good. In contrast, we frequently do more with copyrighted works.

[116] *See, e.g.*, Tushnet, *supra* note 113, at 654 (arguing that noncommercial fan fiction should be protected by law).

[117] *See* Coombe, *supra* note 109, at 1863–68; Dreyfuss, *supra* note 109, at 405–07; David Lange & Jennifer Lange Anderson, Copyright, Fair Use and Transformative Critical Ap-

consumers always skillfully expressed themselves in their own creative terms, sometimes individual creative ability falls short of expressive desire. Copyrighted works can thus serve an important role in enabling individuals to express themselves.

Moreover, there may be much independent value in permitting this type of creative appropriation, insofar as consumers collectively may be able to generate unexpected and provocative perspectives on existing copyrighted works.[118] The value here is not in centralizing and coordinating the careful development of a cultural property.[119] Rather, the value is in the whimsical and unexpected juxtapositions that can arise when consumers begin to take and adapt existing copyrighted works for their own expressive purposes.[120] Copyrighted works can thus be the raw building blocks, a platform, for consumer creativity and self-expression.[121] Moreover, this distributed self-expression can lead to greater variety of viewpoints.[122]

Copyright law currently handles these forms of mini-authorship in two ways. First, current law contains the doctrine of fair use.[123] Thus, in many cases, individual modifications of works in these modest ways will likely constitute fair use, even if communicated to others, particularly if the use is noncommercial and poses no harm to the market.[124] Second, much of this activity is tacitly permitted through lack of enforcement. Because much of this activity is difficult to detect, and because the costs of enforcement likely outweigh any economic harm, such cases will rarely if ever be prosecuted or even the subject of a cease-and-desist letter.[125] Thus, in practice, a good deal of

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propriation, *at* http://www.law.duke.edu/pd/papers/langeand.pdf (last visited Apr. 3, 2003); *cf.* Gordon, *supra* note 109, at 1556–58. *But see* Hughes, *supra* note 29, at 940–42 (pointing out that non-owners of a cultural object have an interest in that object maintaining a stable, commonly understood set of meanings).

[118] *See* Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1816–19 (2000).

[119] *See* Yochai Benkler, *Coase's Penguin*, 112 YALE L.J. 369 (2002).

[120] *See* Cohen, *supra* note 118, at 1816–19; *see also* Pete Rojas, *Bootleg Culture*, SALON.COM, Aug. 1, 2002, *at* http://salon.com/tech/feature/2002/08/01/bootlegs/print.html; John Woods, *Showing Barbie's Head on Sex Web Site Found to be Fair Use*, N.Y. L.J., Nov. 6, 2002, at 1, *available at* http://www.law.com/jsp/article.jsp?id=1036542840163.

[121] Lange, *supra* note 4, at 142–43, 146–47.

[122] *See* Cohen, *supra* note 118, at 1816–19.

[123] 17 U.S.C. § 107 (2000).

[124] *See id.*

[125] *But see* EK Success, Ltd. v. Binney & Smith, Inc., 45 U.S.P.Q.2d (BNA) 1380, 1380–82 (S.D.N.Y. 1997); Girl Scouts v. Bantam Doubleday Dell Publ'g Group, Inc., 808 F. Supp. 1112, 1114–15 (S.D.N.Y. 1992).

freedom exists to engage in some degree of self-expression using copyrighted works.[126]

Digital technology is, once again, changing the nature of this interest. Indeed, perhaps the most dramatic change is the ease with which consumers can now access and use copyrighted works for their own self-expression. Mix tapes are much easier to make when the music is in digital form. Similarly, image, text, movie, and sound files are much easier to alter, transform, and incorporate into other works.[127] Creating a website is as easy as taking components found elsewhere and copying them onto a personal server. Moreover, as some studies have shown, a significant proportion of personal web pages contain material derived from other sites.[128] This kind of adaptation and use of preexisting materials is much more costly and difficult in a non-digital world. Digital technology thus greatly lowers the cost of engaging in this kind of mini-authorship and increases the potential for individuals to engage in this form of self-expression.

In many cases, copyright owners have recognized the more complex ways in which consumers can now interact with copyrighted works in digital form, and the ways in which consumers may be able to contribute to the value of copyrighted works by exercising their own creative faculties and building upon the original works. Consider, for example, the very express invitations issued to consumers to craft new levels for video games[129] or modify such games.[130] Other examples are massively multi-player online games like Everquest, where much of the "story" is created by the actions of the participants (and then recounted on many other web pages).[131] In many of these cases, consumers contribute to the value of the game and have a direct impact

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[126] *See* 17 U.S.C. § 107.

[127] Rojas, *supra* note 120.

[128] *See, e.g.*, Dale Herbeck & Christopher Hunter, *Intellectual Property in Cyberspace: The Use of Protected Images on the World Wide Web*, 15 COMM. RES. REP. 57, 61–62 (1998) (sample study finding 43.8% of images on student personal websites likely qualified as protected intellectual property).

[129] *E.g.*, DUKE NUKE'EM 3D (3D Realms Entertainment 1996). The game contains a "Build Editor" allowing players to create their own levels, which are then frequently posted on the Internet where others can download them. Micro Star v. Formgen, Inc., 154 F.3d 1107, 1109 (9th Cir. 1998). The manufacturer encourages the practice. *Id.* For other examples, see also QUAKE (ID Software, Inc., originally released 1996); WARCRAFT (Blizzard Entertainment, Inc., originally released 1994).

[130] *E.g.*, HALF-LIFE (Sierra Entertainment, Inc. 1999). A further example is *Day of Defeat*, a World War II modification of *Half-Life*.

[131] *E.g.*, EVERQUEST (Sony Entertainment, Inc. 1999).

on its shape.[132] Here, the creative contributions of the consumers are quite express and play a large role in increasing the value of the creative work.[133]

Some courts have already begun to grapple with evaluating the contributions of copyright consumers in the digital context.[134] For example, in a number of cases, courts have analyzed the copyright interests of consumers who build so-called game levels for computer games.[135] In *Micro Star v. Formgen*, for example, the U.S. Court of Appeals for the Ninth Circuit analyzed how game levels created by individual consumers created derivative works that were ultimately owned by the copyright owner of the computer software.[136] Or, to take another example, in *Lotus Development Corp. v. Borland International, Inc.*, the U.S. Court of Appeals for the First Circuit dealt with the investment that consumers had made by creating macros for making the Lotus spreadsheet work.[137] This consumer creativity, on top of a copyrighted platform, was a consideration that informed the court's decision.[138] Thus, there has been some recognition of this interest and the greater ability of individuals to engage in this form of interactive creativity.

At the same time, digital technology also raises the potential for constraining this kind of mini-authorship through technical measures. For example, the major record labels have begun to encrypt their music[139] in an attempt to prevent consumers from making cop-

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[132] *See, e.g.*, Press Release, LucasArts Entertainment Co., New Web Site for Posting of LucasArts Inspired Game Mods Launched by LFNetwork.com Fan Site (Dec. 11, 2002), *available at* http://www.lucasarts.com/press/releases/62.html (encouraging game modifications, or "mods," of its own games).

[133] *See, e.g.*, DUKE NUKE'EM, *supra* note 129; EVERQUEST, *supra* note 131; HALF-LIFE, *supra* note 130.

[134] *See, e.g.*, *Micro Star*, 154 F.3d at 1107; Lotus Dev. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995).

[135] *See, e.g.*, *Micro Star*, 154 F.3d at 1107; *Lotus Dev.*, 49 F.3d at 807.

[136] *See* 154 F.3d at 1109.

[137] 49 F.3d at 809–12, 818.

[138] *Id.* at 818–19. Note that in this case, the concern was less about promoting the interests of consumers directly, and more about permitting competitors to enter the market. *See id.*

[139] *E.g.*, Jon Healey, *AOL Selling Songs Online in Unprotected Format Music*, L.A. TIMES, June 15, 2002, at C2, *available at* 2002 WL 2483291 ("Consumers have been cool to the labels' encrypted songs, preferring digital files that can easily be copied, played on portable devices and burned onto CDs."); Steve Morse, *Burned? Last Year, Recordable Discs Outsold CDs for the First Time. With So Many People Copying Music, Is the Record Industry Toast?*, BOSTON GLOBE, Apr. 21, 2002, *available at* 2002 WL 4123385 (discussing consumers' appetite for exchanging digital music and the music industry's response to digital copying technology).

ies of such music, i.e., to thwart their attempts to "rip, mix, and burn."[140] Similarly, copy-protection schemes have been implemented to control copying of software, DVDs, VHS tapes, and even text.[141] All of these measures are backed up by the use of technologies such as encryption and watermarking, along with attendant legal support.[142] In many ways, the effect of these technologies is to eliminate or limit greatly the potential for consumer transformation and adaptation of the works.

II. Observations and Implications

In the discussion above, I have attempted to show the different ways in which consumer interests are more complex than we ordinarily think. In the following discussion, I outline how this more complex vision of the copyright consumer might affect how we think about copyright entitlements, particularly as we move from more fixed modes of consumption to more flexible, digital forms of consumption. These observations are necessarily tentative, but they may point the way for future study.

A. *Observations*

Because much of this discussion is tentative, I will list observations individually.

1. Copyright law has historically given space for additional consumer interests, through doctrines such as first sale, fair use, and private performance.

My first observation is purely descriptive: namely, that copyright law, prior to the advent of digital technology, had given consumers

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[140] Apple Computer, Inc., Apple Computer Advertising Campaign, *available at* http://www.apple.com/itunes/burn.html (last visited Nov. 18, 2002).

[141] *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436–37 (2d Cir. 2001) (concerning defendant's circumvention of the Content Scramble System, used by the motion picture studios to encrypt DVD movies); United States v. Elcomsoft, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (denying motion to dismiss; case currently pending) (news reports available at Electronic Frontier Foundation, http://www.eff.org/IP/DMCA/US_v_Elcomsoft/media.html); Press Release, Adobe Sys., Inc., Adobe Announces New Pricing and Distribution for its Digital Rights Management Software (Jan. 15, 2002), *at* http://www.adobe.com/aboutadobe/pressroom/pressreleases/200201/20020115contentserver.html (press release describing Adobe eBook, a software program that allows books to be bought and sold online, and read on the computer).

[142] *See* Digital Millenium Copyright Act, 17 U.S.C. §§ 1201–1205 (2000).

some degree of freedom, not only to consume copyrighted works either as passive consumers or as active authors, but also to fulfill these additional interests in autonomy, communication, and self-expression. That is, pre-digital copyright law and copyright markets did a reasonably good job of satisfying the full range of consumer interests, while adequately protecting authorial incentives.[143] This point is developed in more detail in the sections above, so I will not recap that analysis here.[144]

2. The relationship between these consumer interests and copyright owner interests is becoming more complex with advances in digital technology.

Much attention has been paid to the problems faced by copyright owners as digital technology permits nearly zero-cost copying and distribution of works.[145] Some attention has also been focused on how the Internet and digital technology may, at the same time, make it easier for authors to create and distribute their works.[146] But comparatively less attention has been paid to how digital technology affects the interests of copyright consumers. True, some have argued that digital technology may make consumer access to works even greater (i.e., satisfying the passive consumer interest).[147] Digital technology, however, also has the potential to increase the ability of consumers to realize more fully many of the more complex interests set forth in the framework above. Indeed, there are already many examples in which consumer relationships to copyrighted works are far more complex than they have previously been.[148] The preexisting balance between author interests and these more complex interests of the copyright consumer is being shifted in significant and unpredictable ways.[149] Again, these points have been made in more detail above.[150]

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[143] *See supra* notes 61–67, 82–86, 123–126 and accompanying text.

[144] *See supra* notes 61–67, 82–86, 123–126 and accompanying text.

[145] *See, e.g.*, Ginsburg, *supra* note 33, at 45; Hardy, *supra* note 29, ¶ 12; Tussey, *supra* note 9, at 1131–33.

[146] *See, e.g.*, *supra* notes 33–38 and accompanying text.

[147] *See, e.g.*, Bell, *supra* note 28, at 558–60, 618–19 (arguing for increased regulation of access to online works).

[148] *See supra* notes 68–69, 72–76, 91–95, 127–138 and accompanying text.

[149] *See supra* notes 68–69, 72–76, 91–95, 127–138 and accompanying text.

[150] *See supra* notes 68–69, 72–76, 91–95, 127–138 and accompanying text.

3. These complex consumer interests are important and should be considered in conjunction with concerns about incentives for authorship.

If, as I argue above, these more complex consumer interests do exist, and are becoming increasingly complex as digital technology evolves, it follows that we need to make a substantive judgment about these interests. They had some recognition in the pre-digital environment; the digital environment is now affecting these interests in unpredictable ways. If these interests are not significant, then perhaps we need not worry and should just let the market do what it will. If, on the other hand, they are significant, then perhaps we need to pay a bit more attention to how such interests will be looked after in the digital environment.

As is probably clear from the above discussion, I think these interests in autonomy, communication, and creative self-expression, though up to now largely overlooked, are quite important. They are important because they go directly to the ability of consumers to derive meaning from copyrighted works.[151] Although individuals often interact with copyrighted works in a passive manner, some individuals also interact with copyrighted works in a more active manner, and this has an impact on what they take away from the works.[152] Some degree of freedom and autonomy when interacting with a copyright work is necessary to obtain full meaning from that work. The law must allow for freedom to communicate about that work, and even freedom to manipulate the work.

Perhaps "necessary" is too strong: one could envision quite a useful world in which consumption is purely passive, where copyright owners have extensive control over how and when individuals consume works, with whom they share those works, and whether they can alter those works in any fashion. But this world would be far less rich and interesting than a world in which these activities were permissible. The latter world would be a lot more fun.[153] Indeed, what I have

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[151] *See, e.g.*, *supra* note 117 and accompanying text.

[152] *See supra* notes 109–122 and accompanying text.

[153] *See* Lange, *supra* note 4, at 139 ("I observe how new technologies, the most significant among them still essentially beyond imagining as Foucault wrote, are undermining the efficacy of intellectual property as 'a constraining figure' in the evolving embodiments of creative play."); *see also* Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & Comm. 509, 510–11 (1996); *cf.* Edward W. Felten, *The Fallacy of the Almost-General-Purpose Computer*, Freedom to Tinker, *at* http://www.freedom-to-

in mind here is very much David Lange's idea of readers "at play in the fields of the word."[154] As Lange presciently observed, digital technology offers precisely this potential.[155] It may be that consumers will not realize it—I certainly do not want to overstate the desire of consumers to engage more actively with copyrighted works (there is more than a little couch potato in all of us)—but as long as the potential exists, it would be a shame to cut it off too soon.

Indeed, I would argue that much of the instinctive resistance that consumers have voiced regarding attempts by copyright owners to control consumption of copyrighted works is not (or at least not entirely) due to a self-interested, passive-consumer concern with getting free or convenient access to works. Much of the objection can, I think, be explained as an instinctive resistance to the way in which extensive copyright-owner control affects what we get out of, and how we think about, copyrighted works. In part, this reaction may be because consumers have always been accustomed to some degree of autonomy in consumption. But it may also be because they think there is something essential about this autonomy and freedom when interacting with copyrighted works.

Of course, these interests need to be balanced against a concern with copyright incentives. If these activities harm incentives too much, then we need to make decisions about how much of this activity is permissible. Copyright law already does this in the pre-digital context.[156] We do not permit consumer interests in autonomy, sharing, and self-expression to undercut completely the incentives for authors to create works in the first place.[157] Moreover, as noted above, I do not wish either to overstate the value of more active modes of consumption or to understate the value of passive modes of consumption. It may well be that the vast majority of consumers are perfectly content to consume works passively, and privileging the few active consumers may too-greatly harm the interests of the more passive consumers. If that is the case, then limits on active consumption may be the price we have to pay to ensure that the passive consumption interest is satisfied.

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tinker.com/archives/2002_10.html (Oct. 14, 2002) (making a similar point in the context of technology).

[154] Lange, *supra* note 4, at 139 (title of article).

[155] *See id.* at 146–47.

[156] *See supra* notes 61–67, 82–86, 123–126 and accompanying text.

[157] *See supra* notes 61–67, 82–86, 123–126 and accompanying text.

My point is simply that copyright law should at least recognize these more complex consumer interests and consider them in conjunction with the underlying concern about incentives. It would be a serious mistake, in other words, to focus exclusively on the passive consumer interest and reject more active consumer claims as merely unrealistic, self-interested claims for free access.[158]

Applying the above framework to a concrete example, we might well conclude that consumer interests in communication and sharing may be sufficiently served even in a digital environment of strong copyright-owner control over access and copying. That is, we might conclude that individuals can still communicate freely and exchange ideas about the merit and meaning of copyrighted works. The Internet, by reducing costs of communication, has greatly expanded the opportunities for such communication from the pre-digital baseline. And the ability easily to link to and find copyrighted content may serve as a good substitute for the sharing of physical copies. Indeed, it may be quite superior to costly physical sharing. At the same time, permitting direct sharing of digital copies may present such a threat to copyright incentives that it outweighs the minimal additional communicative impact of permitting such sharing.[159] Thus, in the end, consideration of these more complex consumer interests in communication and sharing may still result in a conclusion that privileges copyright owner control, at least in this specific context. The point, however, is simply that, in making this judgment, we need at least to consider the social aspects of information sharing in setting copyright entitlements.

4. The market may evolve to satisfy some of these consumer interests.

Of course, to say that these more complex consumer interests are important is not to say that anything needs to be done to preserve them. It may well be, as some have suggested, that if we give broad entitlements to copyright owners, the market will eventually fulfill these consumer interests.[160] After all, if consumers derive an additional benefit from a certain amount of autonomy, sharing, or self-

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[158] *But see* Ginsburg, *supra* note 33, at 45.

[159] There may be other, non-consumer-related reasons to support continued sharing of copyrighted works. *See, e.g.*, Reese, *supra* note 71, at 116.

[160] *See, e.g.*, Bell, *supra* note 28, at 585–90. For a more complete discussion of the arguments behind copyright entitlements and market responses, see Liu, *supra* note 55, at 1314–24.

expression, they should be willing to pay for it.[161] Similarly, copyright owners will have incentives to satisfy these interests, provided that the technology permits them to do so and underlying concerns about piracy are satisfied.[162]

There may well be reasons to be hopeful on this score, particularly with respect to the consumer interest in autonomy. Consumers have, in the past, rejected some forms of control that they find too intrusive. The early experience with software copy protection is illustrative. Consumers rejected it because it made software less useful.[163] The failure, thus far, of pay-per-view methods of movie delivery may have similar causes. Today, the record industry may be facing much this same issue, as consumers reject modes of paying for music that too-greatly restrict their ability to make music portable, to keep it, and to share it.[164] Indeed, in response to this, record companies have already begun experimenting with methods of pricing that enable a good degree of autonomy in consumption, as well as some sharing.[165]

As markets settle down, as technology becomes a bit more stable, and as pricing and delivery structures emerge, many of these more complex consumer interests may well be satisfied. Individuals may still be able to do quite a bit with the works that they have access to, that is, consume them in autonomous ways, share them in certain ways, and build off of them in certain ways. Because the markets and technology are so nascent, it may well be premature to conclude that these interests are being harmed, or that their potential will not be adequately fulfilled in the digital environment.

5. Policymakers should be vigilant to ensure that these interests are recognized.

At the same time, there is no guarantee that the market will achieve the balance that we think is optimal. Indeed, the existence of various doctrines—like fair use in the physical world—indicates that

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[161] *See, e.g.*, Bell, *supra* note 28, at 585–90; Liu, *supra* note 55, at 1314–24.

[162] *See, e.g.*, Bell, *supra* note 28, at 585–90; Liu, *supra* note 55, at 1314–24.

[163] *E.g.*, Dawn C. Chmielewski, *Exec: Copy Guards Doomed, Buyers' Needs Not Met, Says Andreesen*, SAN JOSE MERCURY NEWS, Apr. 10, 2002, at 1C (reporting Netscape founder Marc Andreessen's view that consumer demand may doom future efforts to provide for copy protection, just as past efforts to protect software failed).

[164] Part of this, however, may be due to the easy alternative of free music via file sharing systems. *See, e.g.*, A&M Records v. Napster, Inc., 239 F.3d 1004, 1014–17 (9th Cir. 2001).

[165] *Cf.* Ginsburg, *supra* note 33, at 45 (suggesting that copyright owners use the DMCA and copyright caselaw to promote the broad distribution of works at reasonable prices).

the law does not generally rely entirely upon the market to satisfy these more complex consumer interests.[166] Instead, the law sets entitlements to give recognition to these interests, to provide breathing space for others to interact with copyrighted works.[167]

Although the market may satisfy some of these interests, it may be that the market will not satisfy all of these interests. The technology may not develop, for example, to permit the type of control that copyright owners would want before permitting autonomy or sharing. Transaction costs may stand in the way of these interests.[168] Pricing and bundling strategies may maximize copyright-owner returns, but at the expense of flexibility on the consumer side.[169] Finally, lack of information, fear of uncertainty, path-dependence, and bureaucratic conservatism may limit the degree to which corporations permit this kind of freer access, even if in their own self-interest.[170]

Moreover, even if some licensing schemes do emerge to address most consumer interests in autonomy and consumption, these licensing schemes may not provide as much freedom as we would like. Indeed, it would be hard for companies to predict and cost-effectively to provide licenses for all of the different ways in which consumers decide to interact with copyrighted works, given how increasingly complex such interactions will likely be. Even if licenses are low-cost, the very need to seek out a license may hinder an individual's ability to derive the full value from the copyrighted work. Much value, in fact, can come from the spontaneous and unpredictable nature of one's reaction to a copyrighted work.[171]

I do not think we yet have the information to determine whether markets will provide sufficient recognition of these more complex consumer interests. Thus, it may be wise to wait and see how the markets develop before intervening. We need at least to be attuned, however, to the possibility that the market may not provide sufficient recognition of these interests. In particular, if we give copyright owners ever greater control over consumer uses of works, and if markets do not develop to provide opportunities for the kind of autonomy, shar-

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[166] *See* 17 U.S.C. § 107 (2000).

[167] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984).

[168] *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 309–24, 332–34 (1996) (describing the neoclassicist approach to markets and copyrights and possible problems with market approaches).

[169] *See id.* at 333–34.

[170] *See id.*

[171] Cohen, *supra* note 118, at 1816–19.

ing, and self-expression that I have described above, then the resulting costs will be significant.

Even without solid information, there may be good reason to expect the market to be particularly ill-suited to recognizing the consumer interest in self-expression. Under a technology-backed licensing system, copyright owners will be able to choose which messages consumers can express, using their works as platforms.[172] That is, they may permit certain consumers to access unencrypted files to express certain messages, while holding back access to those who would express other, perhaps unfavorable messages.[173] Moreover, this activity may be perfectly rational, insofar as it preserves the value of the copyrighted work and protects it from exposure to contrary viewpoints.[174] From a social point of view, however, this type of control would eliminate much of the diversity and value of consumer self-expression.[175]

True, individuals might still be able to engage in some degree of creative appropriation, just without the ease associated with digital technology. For example, a consumer may be able to make an analog copy of an encrypted sound file or video clip. If creative self-expression is an interest we value, however, then it is hard to see why consumers should be automatically excluded from some of the advantages of the new technology.[176] Indeed, as pointed out above, one of the great benefits of digital technology is that it holds the potential for permitting consumers to express themselves much more fully and more easily.[177] Without some recognition of such an interest, the market may not permit enough room for individuals to use copyrighted works to engage in self-expression.

B. *Legal Responses*

How, then, should the law respond to the observations above? My conclusions here are tentative, but they suggest first that policymakers should be attuned to these more complex consumer interests and not be too quick to conclude that all consumer interests are satisfied once

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[172] *Cf.* Robert Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AM. INTELL. PROP. L. ASS'N Q.J. 305, 308–09 (1993) (discussing market failure when copyright owners flatly refused to license song for purposes of rap parody).

[173] *Cf. id.*

[174] *Cf. id.*

[175] *Cf.* Gordon, *supra* note 109, at 1556–58, 1606–09.

[176] *See supra* notes 117–122 and accompanying text.

[177] *See supra* notes 117–122 and accompanying text.

the passive consumer interest is satisfied. In the context of litigation, this conclusion suggests that courts, in dealing with new technologies, should acknowledge and give some weight to consumer interests in autonomy, communication, and self-expression. For example, in determining whether new kinds of uses (such as those enabled by new technology like MP3 players, TiVo, ad-stripping software, and web browsers) constitute fair use, courts should give some weight to these more complex consumer interests in autonomy, communication, and self-expression.[178] It may be that such interests are outweighed by competing concerns about the impact of such uses on copyright incentives. In this Article, I do not take a position on what should result from such a weighing. Rather, my point is simply that courts should not limit their consideration of consumer interests too narrowly.[179]

In the context of legislation, the observations above suggest that members of Congress also need to be conscious that, in their attempts to bolster copyright law for purposes of reducing infringement, their activities may have an undesirable impact on these more complicated consumer interests.[180] More specifically, the above observations suggest that efforts at this point in time to reinforce, through legal sanction, the ability of copyright owners to protect their works through technology may be problematic. The DMCA, for example, is an effort to give copyright owners an advantage as they begin distributing copyrighted works in digital form.[181] It does so by imposing liability for circumventing encryption and other access-control technologies.[182] It also imposes liability on the development and distribution of tools that enable such circumvention.[183] Significantly, the DMCA contains no broad fair use exception.

The justification for the DMCA has conventionally been that, without its assurances, copyright owners would be reluctant to make works available in digital form.[184] Even though copyright owners may use technology to protect their copyrighted works, such technologies

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[178] For examples of courts that have, at least implicitly, given some weight to these considerations, see Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 818 (1st Cir. 1995), and Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 969 (9th Cir. 1992).

[179] Consideration of such interests could also have an impact on other areas of copyright law. *E.g.*, MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518–19 (9th Cir. 1993).

[180] *See supra* notes 52–54, 72–86, 110–116 and accompanying text.

[181] *See* 17 U.S.C. §§ 1201–1205 (2000).

[182] *Id.* § 1201(a)(1).

[183] *Id.* § 1201(a)(2), (b).

[184] *See supra* notes 30–32 and accompanying text.

are easily circumvented.[185] Thus, the DMCA, by both imposing separate penalties for circumvention and outlawing circumvention technology, gives copyright owners a legal leg up in the technological arms race.[186] In this way, the DMCA serves the core, passive consumer interest in ensuring that consumers have available to them works that they can consume. As others have noted, the factual premises underlying the DMCA (i.e., both the need for, and efficacy of, the DMCA) are subject to debate.[187]

Yet even if one believes that the DMCA does in fact provide additional assurances against impermissible copying, it does this at a potential cost to some of the more complicated consumer interests set forth in this Article. That is, the DMCA gives added legal support to a world in which copyrighted works are tightly controlled through the use of technology.[188] This has the effect of making it far more difficult for individuals to consume copyrighted works autonomously, to share copyrighted works, and to incorporate copyrighted works in one's own self-expression.[189] A consumer will not be able legally to circumvent the access-control measure to move a song file to another device, to share that song file with another individual, or to use a portion of that song file on a personal web page.[190] Even if such uses would constitute fair use, the act of circumventing the access-control technology would result in liability under the DMCA.[191] Moreover, by banning technologies that facilitate such uses, the DMCA ensures that consumers will not have access to any method of engaging in such circumvention in the first place.[192] Thus, the DMCA holds the potential of effectively blocking out some of the breathing space that conventional copyright law made available for more active modes of consumption.[193]

It might be that, as supporters of the DMCA argue, this is the necessary price of fully satisfying passive consumer interests.[194] This claim, however, needs to be examined more carefully, particularly in

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[185] *See supra* notes 30–32 and accompanying text.

[186] *See supra* notes 30–32 and accompanying text.

[187] *See, e.g.*, Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134, 137–38, 188, 190, *available at* http://www.wired.com/wired/archive/4.01/white.paper_pr.html.

[188] *See* 17 U.S.C. §§ 1201–1205.

[189] *See id.*

[190] *See id.*

[191] *See id.* § 1201(a)(1).

[192] *See id.* § 1201(a)(2), (b).

[193] *See* 17 U.S.C. § 1201(a)(2), (b).

[194] *See supra* notes 30–32 and accompanying text.

light of the costs of such an approach. The aim of this Article has been to identify clearly the more complex interests that consumers have in copyrighted works and to argue that these interests are valuable. Accordingly, in deciding whether to give legal support to technological control over consumer uses, we need to weigh carefully the purported benefits of such an approach in satisfying more passive consumer interests against the costs in the form of more limited active consumer interests. It would be a mistake, in other words, simply to focus on the former and neglect or fail seriously to consider the latter.

As discussed above, it is possible that, even with strict copyright-owner control, normal market mechanisms may provide copyright consumers with some degree of autonomy and the potential for more active modes of consumption.[195] There are reasons to believe that consumers may reject methods of control that too-greatly restrict their autonomy, and that copyright owners may respond to consumer preferences by permitting some degree of autonomy and sharing. But this is not a foregone conclusion. Moreover, as already discussed above, there are reasons to doubt that copyright owners will sufficiently consider consumer interests in self-expression.[196] At the very least, these interests and these doubts suggest that it would be unwise to foreclose such uses here at the outset. Yet the DMCA appears to do just that, by creating the potential for stricter limits on the ability of individuals actively to consume copyrighted works.[197]

A more measured approach would at least preserve some ability for courts to modify the law if it appears that consumer interests are being harmed too greatly and the market is not satisfying such interests appropriately.[198] For example, a fair use defense to the DMCA would permit courts to police the market to ensure that some of these more complex consumer interests are recognized on a case-by-case basis.[199] Indeed, a number of bills have recently been introduced pro-

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[195] *See supra* Part II.A.4.

[196] *See supra* Part II.A.5.

[197] Under this view, proposed measures to require such protection measures to be included in consumer hardware are even more problematic. *See* Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. §§ 3, 6 (2002), *available at* http://www.politechbot.com/docs/cbdtpa/hollings.s2048.032102.html.

[198] True, under the DMCA, the Copyright Office can promulgate regulations exempting categories of works from the strictures of the DMCA. Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1)(B). The phrasing of the statutory exemption power (limited to categories of works, as opposed to uses), however, has led the Copyright Office to exempt only very narrow categories of works. *See id.*

[199] Many other arguments have been advanced in support of such a safety-valve. *See, e.g.*, Glynn Lunney, *The Death of Copyright*, 87 VA. L. REV. 813, 910 (2001) (arguing that a

posing to modify the DMCA to provide such breathing space.[200] These bills and the arguments supporting them, couched in terms of "consumer rights," reflect a growing recognition and appreciation of more active consumer interests in copyrighted works. Ultimately, as consumers themselves become more involved in the process of setting copyright entitlements, the political process itself may serve to foster greater appreciation for more active consumer interests.

Conclusion

In this Article, I have argued that copyright doctrine contains no developed theory or image of the consumer, and that such an image could help shed some useful light on the proper scope of copyright law. In the passages above, I have attempted to begin sketching out at least one such image and the implications of such an image. The conclusions of this Article, however, are quite tentative, and I do not purport to argue that this image of the consumer is the correct or only one. The hope is that, by proposing at least one such image, this Article will encourage more thought and analysis of copyright law's conception of the consumer.

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fair use defense ought to be incorporated into the DMCA, supplemented by weak encryption, faith in consumers, and possibly a limited tax on copying technology). This Article's analysis of the consumer interest in copyright law suggests perhaps another reason for favoring such a result.

[200] *See* Digital Media Consumers' Rights Act of 2002, H.R. 5544, 107th Cong. (2002) (to amend the Federal Trade Commission Act to provide that the advertising or sale of a mislabeled copyrighted music disc is an unfair method of competition and an unfair and deceptive act or practice); Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Cong. (2002) (to amend Title 17 of the United States Code to safeguard the rights and expectations of consumers who lawfully obtain digital entertainment). Also consider alternatives using compulsory licensing. *See, e.g.*, Lunney, *supra* note 199, at 845, 851–52, 910 (recognizing the option of compulsory licensing, but ultimately recommending a mixture of weak encryption and faith in American consumers).