

# I. Introduction

Some law students come to the subject of copyright law with at least a rough working understanding of what copyright is, and what it does (or is theoretically supposed to do). But for many others, copyright has been, and is at the moment, a subject that they've perhaps heard about but haven't explored too deeply. Whatever level of knowledge you have about copyright at the moment, by the end of this book you will gain a firm grounding in the fundamentals of U.S. copyright law. Let's now begin at the beginning, with a broad statement of what copyright is.

Copyright is a set of rights of limited scope and duration that are granted by law to the authors of original artistic and literary works, and that arise when such works are fixed in a tangible medium of expression.

We will inquire deeply into each of the elements of that very general definition. But first a short summary of the contents of this casebook:

In the remainder of this **Chapter I**, we'll explore the sources of U.S. copyright law, the history of U.S. copyright, and the theoretical justifications that underlie copyright.

In **Chapter II** we'll examine the subject matter of copyright protection—that is, what sort of “works” copyright protects. We'll also look at the threshold requirements for copyright protection, principally the requirements of *originality* and *fixation*. We'll also explore a central limiting principle of copyright law, the *idea-expression distinction*, which excludes from the scope of copyright protection ideas, facts, procedures, processes, systems, methods of operation, concepts, principles, and discoveries. We'll consider what those categories mean, and examine how the idea-expression distinction has been employed in cases involving a variety of subject matter.

In **Chapter III** we'll look at the meaning of *authorship*, and examine the rules governing *copyright ownership*.

**Chapter IV** covers *copyright formalities*, the *duration* of the term of copyright, and the rules governing *renewals* and the *termination of transfers of copyright*.

**Chapter V** details each of the *exclusive rights* granted to copyright owners. For all types of protected works, federal copyright law grants copyright owners the rights to (1) reproduce the work, (2) prepare derivative works based on the work, and (3) publicly distribute copies of the work. Federal law also grants copyright owners of certain types of works the right(s) to publicly display the work or to publicly perform it. For one type of protected work—sound recordings—the Act limits the right of public performance to performance by digital transmission. We explore these rights, including their scope and limitations. We also examine the operation of these rights in a specific context, the music industry, that presents special complexities. Finally, in this chapter we examine the narrow scope of co-called “moral rights” in U.S. copyright law.

In **Chapter VI** we'll examine copyright's *fair use* doctrine, tracing its historical development and modern applications.

**Chapter VII** details the rules governing *direct liability* for copyright infringement, as well as those defining the various forms of *secondary liability*. This chapter also examines the application of secondary liability rules to *online service providers* and the manufacturers of *devices* that may be used to infringe.

**Chapter VIII** examines various topics related to *copyright litigation and remedies*, including *subject matter jurisdiction, standing*, the operation of copyright's *statute of limitations*, and the role of the *Copyright Office*. Chapter VIII also details the remedies for copyright infringement, including both *injunctions* and various forms of *monetary relief*. The chapter closes with a brief review of *criminal copyright law*.

**Chapter IX** reviews the provisions of U.S. copyright law that prohibit the *circumvention of technological protections* for copyrighted works.

Finally, **Chapter X** details the relationship of federal copyright law to contract and other forms of state law.

The remainder of Chapter I presents first a short and general discussion of what sort of subject matter can be protected by copyright law, versus what *patent* and *trademark* laws protect. Patent and trademark laws are, along with copyright law, the principal branches of what's come to be referred to as "intellectual property" law. The chapter then summarizes the sources of copyright law, including a short account of the international framework of copyright treaties. Finally, the chapter reviews the principal theoretical justifications for copyright law.

## A. The Categories of Copyrightable Subject Matter

As we will discuss in considerably more detail in Chapter II, section 102 of the Copyright Act sets out the subject matter that copyright protects. The categories of copyrightable subject matter include:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

We will inquire into the particulars of each of these categories in Chapter II. Suffice now to say that copyright's subject matter can be understood, as a shorthand, to include a range of artistic and literary works. We can distinguish copyright's subject matter from that of patent, which protects scientific and technological inventions. We can also distinguish copyright's subject matter from that of trademark law, which protects words, logos, slogans, designs, domain names, and other symbols or "devices" that uniquely distinguish the goods or services of a firm.

For now, when you think of the subject matter of copyright, think of novels, poems, sculptures, photographs, plays, musical compositions, sound recordings, dances, movies, television shows, buildings, and computer software. Computer software? Yes, software is, somewhat counterintuitively, classified as a "literary work." More on that in Chapter II.

## B. The Sources of Copyright Law

### 1. The U.S. Constitution

Copyright law is predominantly *federal* law. **Article I, Section 8, Clause 8 of the U.S. Constitution** authorizes Congress to create copyright and patent laws. That clause—which is variously referred to as the “Intellectual Property Clause,” the “Copyright and Patent Clause,” and the “Progress Clause”—provides that

*Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.*

We will see as the course proceeds how federal courts have interpreted the meaning of this provision and the scope of the power it grants Congress to make copyright law.

#### NOTES

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1. Which, if any, of the different names for Article I, Section 8, Clause 8 of the Constitution—the “Intellectual Property Clause,” the “Copyright and Patent Clause,” and the “Progress Clause”—best captures the content and purpose of the clause? What substantive or rhetorical arguments do each of the labels advance?

2. Notice the “parallel” structure of the Copyright and Patent Clause: the clause provides Congress with both copyright and patent lawmaking power, supplies terms that comprise the grant of power for each type of law, and combines those powers in a single clause.

For copyright, the clause can be decomposed to read as follows: “*Congress shall have Power .... To promote the Progress of Science ... by securing for limited Times, to Authors ... the exclusive Right to their ... Writings ....*”

For patent, the clause can be decomposed to read as follows: “*Congress shall have Power ... To promote the Progress of ... useful Arts, by securing for limited Times, to ... Inventors, the exclusive Right to their ... Discoveries.*”

For a different, unitary, and thought-provoking reading of this Clause, see Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. REV. 421 (2009).

3. It may sound odd, to our modern ears, that the framers identified the purpose of copyright as promoting the progress of “Science.” That word sounds more like the domain of patent—laboratories, test tubes, inventions—than copyright. But to the eighteenth-century mind, “science” was a broad term that stood for *learning*, and, as you will see, the English Statute of Anne, the first modern copyright law and a model for both the Copyright and Patent Clause and the first U.S. copyright statute, was entitled “an Act for the encouragement of learning.” (Some may also find “useful Arts” a confusing signifier for patents. By “arts,” the framers meant “artifices”—that is, machines—and not “art” in the sense that word usually takes in modern language (that is, fine art)).

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## 2. The Copyright Act of 1976

The most important source of law for U.S. copyright is a federal statute, the Copyright Act of 1976, 90 Stat. 2541, which remains in force today with a series of amendments and additions. The Copyright Act is codified in Title 17 of the U.S. Code. Here is a URL for the Copyright Act as it appears on the website of the United States Copyright Office (we'll discuss the Copyright Office separately shortly): [www.copyright.gov/title17/](http://www.copyright.gov/title17/)

**PLEASE NOTE:** It is vital to your understanding of copyright that you become familiar both with the overall structure of the Copyright Act, and with the subset of statutory provisions that we will cover in detail in the course. This book will call your attention to particular statutory provisions as they become relevant. Please read them carefully and think about possible areas of incompleteness or imprecision in the statutory text.

## 3. The Decisions of Federal Courts

Although copyright law is driven by a federal statute, **federal court decisions** are a very important source of copyright law.

Sometimes court decisions are important because they are interpreting the meaning of a provision of the Copyright Act. For example, federal courts applying the fair use provision set out in § 107 of the Copyright Act have interpreted the meaning of that provision, elaborating on the relatively spare guidance found in the statute, and have considered the application of the fair use standard in a wide range of settings.

Sometimes court decisions are important because they establish principles that are later incorporated into the federal copyright statutes. For example, we will see that a limitation to copyright known as the “first sale doctrine” was first established by judicial decision, and only later incorporated into the Copyright Act (specifically, in § 109).

And then sometimes court decisions are important because they establish or articulate elements of copyright law about which the Copyright Act is silent. For example, we will review a number of court decisions that articulate standards for determining whether a work's copyright has been infringed. The standard for determining copyright infringement is a central element of any imaginable copyright system, and yet the Copyright Act says nothing about what the test for infringement is. As we shall see, there are a number of vital issues in copyright law on which the Copyright Act has little or nothing to say, and for which the decisions of federal courts are the sole source of law.

## 4. Copyright Office Regulations and Guidance

The United States Copyright Office, created by an act of Congress in 1897, is a department within the legislative branch of the U.S. government. The Copyright Office is housed within the Library of Congress, and is headed by a Register of Copyrights, who reports to the Librarian of Congress. The primary function of the Copyright Office is suggested by the title of the official who heads the Office; it is to register claims of copyright, and to serve as a record-keeper for related functions, such as the recordation of transfers of copyright ownership.

The Copyright Office is granted limited regulatory authority. The Copyright Act provides the Register of Copyrights with authority to “establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title. All regulations established by the

Register under this title are subject to the approval of the Librarian of Congress.” 17 U.S.C. § 702. You can find the regulations at [www.copyright.gov/title37](http://www.copyright.gov/title37).

We note that some have questioned the constitutional basis for *any* regulatory authority granted by Congress to this entity, which itself is a branch of Congress. See, e.g., Andy Gass, *Considering Copyright Rulemaking: The Constitutional Question*, 27 BERKELEY TECH. L.J. 1047 (2012). In any event, the authority granted to the Copyright Office to issue regulations through notice-and-comment rulemaking is directed mostly to the Office’s administrative functions and duties, most notably the registration of copyright claims.

In addition to regulations within the area of its authority, the Copyright Office also publishes an important document, the *Compendium of Copyright Office Practices*. The Compendium is a summary of the *practices* of the Copyright Office. It is not a compendium of copyright law generally, or of any aspect of copyright law that lies outside of the Copyright Office’s administrative functions. As noted in its introduction, the “primary focus” of the Compendium is “on the registration of copyright claims, documentation of copyright ownership, and recordation of copyright documents, including assignments and licenses.” For further clarification, the introduction notes that “[t]he Compendium does not cover every principle of copyright law or detail every aspect of the Office’s administrative practices.” And, of course, “[t]he Compendium does not override any existing statute or regulation. The policies and practices set forth in the Compendium do not in themselves have the force and effect of law and are not binding upon the Register of Copyrights or U.S. Copyright Office staff.” You can find the Compendium at [www.copyright.gov/comp3](http://www.copyright.gov/comp3).

## 5. The International Copyright Regime

There are aspects of international copyright treaties and agreements that bear on U.S. copyright law. This book will discuss the effect of the international regime on particular aspects of U.S. law throughout. Here we offer a short summary of the principal international instruments and institutions that affect U.S. copyright law.

### **The First Century of U.S. Copyright Law: No Protection for the Works of Foreign Authors**

For the first century of U.S. copyright, U.S. law refused to extend protection to the works of foreign authors not domiciled in the United States. During this period, U.S. policy was frankly mercantilist; the United States, as compared with Europe, was not a big producer of new works of authorship, and it suited American interests to have cheap foreign books readily available. And so publishers in the United States legally “pirated” the works of Charles Dickens, Anthony Trollope, Oscar Wilde, Émile Zola, Stendhal, and other non-U.S. authors.

That changed with the Copyright Act of 1891, which extended U.S. copyright protection to the works of foreign, non-U.S.-domiciled authors if either (1) their home countries accorded U.S. authors comparable protection, or (2) the United States and the author’s home country were both signatories to a treaty that guaranteed reciprocal protection. Significantly, the 1891 Act subjected foreign authors to the full range of U.S. copyright formalities (registration, deposit, notice, and renewal, which we will cover in more detail in Chapter IV). It also conditioned protection for foreign (as well as U.S. works) on a requirement that those works be manufactured in the United States. This “manufacturing clause” remained in effect in U.S. copyright law until 1986.

### **The United States Joins the Berne Convention**

The Copyright Act of 1909 and the Copyright Act of 1976 continued to embody the reciprocity principle adopted in the 1891 Act. But as the United States emerged as a major producer and exporter of cultural works, the U.S. interest in more closely aligning with international copyright agreements and norms grew. The United States had long remained outside the principal international copyright treaty, the Berne Convention for the Protection

of Literary and Artistic Works (1886), in part because, as will be discussed further in Chapter IV, the Berne Convention was (and is) hostile to formalities that affect “the enjoyment and the exercise” of copyright rights, whereas U.S. copyright law embraced such formalities. However, in the Copyright Act of 1976, Congress began a move away from mandatory formalities that was undertaken with the purpose of eventually acceding to the Berne Convention, a process that culminated in the Berne Convention Implementation Act of 1988.

## TRIPS and the WTO

In the wake of its accession to the Berne Convention, the United States joined the European Union and Japan in an effort to strengthen the international intellectual property system by embedding it in a multilateral trade negotiation and trade rule enforcement institution, the World Trade Organization (WTO), which was created in 1994 as part of the Uruguay Round of multilateral trade negotiations. One of the agreements which accompanied the creation of the WTO is the Agreement on Trade Related Aspect of Intellectual Property, or TRIPS. The TRIPS Agreement establishes a set of minimum substantive standards for many areas of intellectual property, including patents, copyrights, trademarks, trade secrets, industrial designs, and geographical indications. Part II of TRIPS focuses on copyright. Of particular importance is Article 9, which adopts the substantive standards of the Berne Convention (except for its moral rights provisions—more on that in Chapter V). The TRIPS Agreement gives teeth to the Berne Convention’s substantive standards by making them subject to the WTO dispute resolution process, in which a country can file a complaint against another country for failing to comply with its international obligations.

## C. The History of U.S. Copyright Law

### The Stationers’ Monopoly and the Statute of Anne

The origins of U.S. copyright law lie in England, and, specifically, in the history leading up to the enactment in 1710 of the Statute of Anne, which served as a model for the first U.S. copyright law.

Before the introduction of the printing press in the mid-fifteenth century, there was little need for copyright law. Books were expensive and time-consuming to copy by hand, which made unauthorized copying unattractive. But with the advent of the printing press and of the cheap mass copying that the technology made possible, copying emerged as a concern for book printers. In England, the printers joined together to organize a guild, the Stationers’ Company, chartered by the Crown in 1557. The guild, which was focused on controlling copying, entered into a pact with the Crown, which was interested in controlling seditious books. Under the terms of the 1557 charter and a number of licensing acts that followed, the members of the Stationers’ Company were granted an exclusive right to print most works within the realm. The Company itself was granted power to search for and destroy books printed by non-guild printers.

This cartel was designed to benefit publishers and the government, and not authors. Eventually, both the Stationers’ monopoly and the role of the Stationers’ Company in enforcing government censorship of books drew substantial opposition. In his famous polemic *Aereopagitica*, John Milton argued that books should not be subject to pre-publication licensing. His argument has both anti-monopoly and anti-censorship strands. For example, with respect to the Stationers’ monopoly:

*Truth and understanding are not such wares as to be monopoliz’d and traded in by tickets and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the Land, to mark and licence it like our broad cloath, and our wooll packs.*

JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 29 (1644) (H.B. Cotterill ed. 1959). And with respect to the censorship role of the guild:

*If we think to regulat Printing, thereby to rectifie manners, we must regulat all recreations and pastimes, all that is delightful to man. No musick must be heard, no song be set or sung, but what is grave and Dorick. There must be licencing dancers, that no gesture, motion, or deportment be taught our youth but what by their allowance shall be thought honest; for such Plato was provided of; It will ask more than the work of twenty licencers to examin all the lutes, the violins, and the ghittarrs in every house; they must not be suffer'd to prattle as they doe, but must be licenc'd what they may say. And who shall silence all the airs and madrigalls, that whisper softnes in chambers? ...*

By the 1690s, the Stationers' monopoly had fallen out of favor and Parliament allowed the licensing and censorship provisions that supported that monopoly to lapse.

At that point the Stationers adopted a different tactic: Rather than arguing for a monopoly in their own name, they argued that rights should be given to authors, whom they expected would assign those rights away to the publishers, thereby preserving the Stationers' monopoly in a different form.

The Stationers' new approach contributed to the passage in 1710 of the Statute of Anne. That act, entitled "[a]n act for the encouragement of learning," granted to authors (and not to publishers) an assignable right to control the "printing and reprinting" of books. That right endured for a term of 14 years, renewable once. The right was conditioned, moreover, on the registration of titles for which the author sought protection in the registry maintained by the Stationers' Company.

The 14-year term in the Statute of Anne was, in the publishers' view, simply a supplement, rather than a replacement, for the perpetual monopoly they had been given under the prior Crown system. The publishers' interpretation was defeated, however, in *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774). In that case, the House of Lords rejected the publishers' claims of perpetual copyright protection, and made clear that copyrights in published works were established by, and subject to the limits of, the Statute of Anne.

## **The U.S. Copyright Act of 1790**

The Statute of Anne was influential in the framing of the U.S. Constitution's Copyright and Patent Clause. In particular, like the Statute of Anne, which tied copyright to "the encouragement of learning," the clause tied Congress's exercise of its copyright lawmaking power to a public purpose: promotion of progress of knowledge. And again like the Statute of Anne, the clause imposed a temporal limitation on copyright rights, although the precise length of a permissibly "limited" copyright term was left undefined.

The influence of the Statute of Anne is also palpable in the first U.S. copyright statute, the Copyright Act of 1790. The Act, entitled "an Act for the encouragement of learning," applied to maps, charts (that is, maps of water), and books, and provided the copyright owner with the "sole right and liberty of printing, reprinting, publishing and vending" copies for a 14-year term, renewable once for another 14-year term by a surviving author. The 1790 Act also contained a stringent set of formalities. To gain protection under the Act, authors were required to register the title in their works, to publish the registration in a newspaper, and to deposit a copy of the work with the clerk of the local district court and to send another copy within six months of the work's publication to the U.S. Secretary of State.

### **NOTE**

1. As in England following the enactment of the Statute of Anne, U.S. copyright owners following the enactment of the 1790 Act pressed claims in litigation that statutory copyright was merely supplemental to a perpetual right granted by common law. And as in the English *Donaldson* case, those claims were rejected in

the United States. In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), the U.S. Supreme Court addressed copyright claims pressed by a private reporter of the Supreme Court's opinions. The Court recognized that the opinions themselves were uncopyrightable, but other material added by the reporter, such as summaries of the arguments presented by the parties to the Court, was eligible for protection. However, the reporter's additions were ineligible for statutory copyright because the reporter had failed to comply with the formalities required to gain protection under the statute. The reporter claimed that his material was nonetheless protectable under the common law, but the Supreme Court rejected that claim:

*That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.*

*The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works, when first published....*

*In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long; and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.*

*The result of their labours may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigour. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly....*

*That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general.*

The Supreme Court's rejection of common law copyright in published works means that published works are governed exclusively by federal law. That remains the state of copyright today. And as we shall see in Chapter IV, Congress has moved to preempt state protection of unpublished (but fixed) works as well.

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## Post-1790 Expansion of Copyrightable Subject Matter

As previously mentioned, copyrightable subject matter under the 1790 Act was limited to maps, charts, and books. Over the next century, Congress gradually expanded the categories of eligible subject matter to include engravings, etchings, and prints (1802); musical compositions (1831); dramatic compositions (1856); photographs and negatives (1865); and paintings, drawings, chromolithographs, statuary, and "models or designs intended to be perfected as works of the fine arts" (1870). In 1909, Congress enacted the first major overhaul of federal copyright law. The Copyright Act of 1909 embraced as copyrightable subject matter "all the writings of an author," but then offered a list of specific subject matter protected by copyright:

- (a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;

- (b) Periodicals, including newspapers;
- (c) Lectures, sermons, addresses, prepared for oral delivery;
- (d) Dramatic or dramatico-musical compositions;
- (e) Musical compositions;
- (f) Maps;
- (g) Works of art; models or designs for works of art;
- (h) Reproductions of a work of art;
- (i) Drawings or plastic works of a scientific or technical character;
- (j) Photographs;
- (k) Prints and pictorial illustrations.

In 1912, Congress amended this list to include “motion-picture photoplays” and “motion pictures other than photoplays.” In 1939, Congress added “prints or labels used for articles of merchandise.” In 1971, Congress added sound recordings.

## The Copyright Act of 1976

In the 1976 Act—which, as amended, remains the law—Congress sought “to free the courts from rigid or outmoded concepts of the scope of particular [subject matter] categories.” H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 47, at 53 (1976). Toward that end, the 1976 Act veered away from some of the more particular language used in the 1909 Act to describe copyrightable subject matter (such as “lectures, sermons, addresses, prepared for oral delivery”) in favor of broad categories of copyrightable subject matter.

Section 102(a) of the 1976 Act listed seven categories, which are deemed to be non-exhaustive of the range of copyrightable subject matter: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music;(4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.” These categories cumulate many of the narrower classes or copyrightable works that the 1909 Act listed separately. And because of the generality of the language that the 1976 Act uses to define categories of subject matter, Congress has avoided the need—at least in many instances—to amend the 1976 Act to account for new technologies. For example, Congress did not need to add new subject matter categories to the 1976 Act to have copyright protection extend to work fixed in digital audio recordings or DVDs; the statutory definitions of “sound recordings” and “audiovisual works” were worded broadly enough to encompass those new media. Since the passage of the 1976 Act, Congress has added, in 1990, only one more category to the list of copyrightable subject matter set forth in § 102(a): architectural works.

Since the 1976 Act, Congress has passed four additional major pieces of copyright-related legislation: the Digital Millennium Copyright Act (DMCA), 112 Stat. 2860 (1998); the Copyright Term Extension Act, 112 Stat. 2827 (1998); the Fairness in Music Licensing Act, *id.*; and the Music Modernization Act, Pub. L. 115–264 (2018). We will discuss issues related to the DMCA in Chapter VII when we study the liability of online service providers, and in Chapter IX when we examine the law governing technological protections for copyrighted works. We will discuss the effect and constitutionality of the Copyright Term Extension Act in Chapter IV. And we will review in Chapter V the changes to the structure of music industry rights and licensing brought about by the Fairness in Music Licensing Act and the Music Modernization Act.

## D. Why Do We Have Copyright?

As mentioned above, Article I, Section 8, Clause 8 of the U.S. Constitution provides Congress with authority to make copyright law, and links that authority to the accomplishment of a particular purpose—to “promote the Progress of Science.” But what exactly does it mean to “promote ... progress”? What role does copyright play

in achieving that purpose? And are there justifications for copyright that sound not in utilitarian arguments about promoting progress, but in arguments about authors' rights that are deontic (that is, rights-based and non-consequentialist)?

## 1. The Utilitarian Account

The dominant justification for copyright, at least in the United States, is **utilitarian**, or **consequentialist**. The claim is that copyright contributes to "progress of Science" by maintaining adequate incentives to engage in the production of new artistic and literary works. Creating anew is often expensive, and copying, cheap. Without copyright, it is claimed, copyists who don't face the same costs of creation that originators do will underprice originators and compete away the profits from new artistic and literary creativity, thereby suppressing incentives to create new artistic and literary works in the first place.

That is a sensible story. But is it true? On that question, we have little evidence. We are still at an early point in the empirical study of copyright. As some scholars have noted, while there are some helpful empirical studies establishing a link between copyright and creative incentives,<sup>1</sup> thus far the link appears to be considerably less systematically established than theory may have led us to expect. *E.g.*, Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (And Don't)*, 55 HOUSTON L. REV. 451, 454-55 (2017).

Indeed, some suspect that people would create works absent copyright incentives, owing to intrinsic motivation to do so. *See, e.g.*, JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY INTELLECTUAL PROPERTY* (2014); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011).<sup>2</sup> Others wonder, even so, whether businesses would create distribution channels for these works absent copyright's incentive. *See, e.g.*, Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WISC. L. REV. 141. In fact, an entire sub-genre has arisen within the academic literature on copyright documenting creative activity that appears to proceed without, or with little, dependence on formal intellectual property protection. This scholarship, sometimes referred to as the "negative space" literature, and alternatively as "intellectual production without intellectual property" (or "IP without IP"), includes studies of the fashion industry,<sup>3</sup> cuisine,<sup>4</sup>

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<sup>1</sup> Examples include Michela Giorcelli & Petra Moser, *Copyrights and Creativity: Evidence from Italian Operas*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2505776](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505776), and Rahul Telang & Joel Waldfogel, *Piracy and New Product Creation: A Bollywood Story*, 43 INFO. ECON. & POL'Y 1 (2018).

<sup>2</sup> For a survey of this literature, see Christopher Buccafusco, Zachary C. Burns, Jeanne C. Fromer & Christopher Jon Sprigman, *Experimental Tests of Intellectual Property Law's Creativity Thresholds*, 92 TEX. L. REV. 1921 (2014).

<sup>3</sup> Jonathan Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005); C. Scott Hemphill & Jeannie C. Suk, *The Fashion Originators' Guild of America: Self-Help At The Edge Of IP And Antitrust*, in *INTELLECTUAL PROPERTY AT THE EDGE* (Rochelle Dreyfuss & Jane Ginsburg eds., 2014); C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009); Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009).

<sup>4</sup> Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L. J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

fan fiction,<sup>5</sup> pornography,<sup>6</sup> nineteenth-century U.S. commercial publishing,<sup>7</sup> video games featuring significant user-generated content,<sup>8</sup> stand-up comedy,<sup>9</sup> roller derby,<sup>10</sup> software,<sup>11</sup> jam bands,<sup>12</sup> tattoos,<sup>13</sup> and magic.<sup>14</sup> These studies show the ways in which creative production can flourish in certain contexts with relatively little or no intellectual property protection.<sup>15</sup> Nonetheless, it is unclear whether these negative spaces reflect production and distribution with regard to the range of subject matter that copyright law protects (such as music, books, and movies).

Neil Netanel and others have offered a justification for copyright protection—the “democratic paradigm”—that is a variant of the utilitarian account. In the democratic paradigm, copyright is understood as a tool by which the state recruits market institutions to enhance the democratic character of civil society. According to this justification, both the rights that copyright law grants, and the limitations of those rights, can be understood as an “engine of free expression” that both encourages new speech and limits the extent to which speech relies on state patronage:

*In supporting a market for authors' works, copyright serves two democracy-enhancing functions. The first is a production function. Copyright provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association. The second function is structural. Copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy. The democratic paradigm requires that copyright protection be sufficiently strong to ensure support for copyright's production and structural functions. But at the same time, it would accord authors a limited proprietary entitlement, designed to make room for—and, indeed, to encourage—many transformative and educative uses of existing works.*

Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

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<sup>5</sup> Rebecca Tushnet, *Economics of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

<sup>6</sup> Kate Darling, *IP Without IP? A Study of the Online Adult Entertainment Industry*, 17 STAN. TECH. L. REV. 655 (2014); Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Data, Algorithms & Authorship in the 21st Century*, 94 N.Y.U. L. REV. (forthcoming 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3226566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3226566).

<sup>7</sup> ROBERT SPOO, WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN (2013).

<sup>8</sup> Greg Lastowka, *Minecraft as Web 2.0: Amateur Creativity & Digital Games*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1939241](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939241).

<sup>9</sup> Dotan Oliar & Christopher Jon Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

<sup>10</sup> David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012).

<sup>11</sup> YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2007); Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006); Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95 (2010); Josh Lerner & Jean Tirole, *The Economics of Technology Sharing: Open Source and Beyond*, 19 J. ECON. PERSP. 99 (2005).

<sup>12</sup> Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach About Persuading People to Comply with Copyright Law*, 21 BERKELEY TECH. L. J. 651 (2006).

<sup>13</sup> Aaron Perzanowski, *Tattoos and IP Norms*, 98 MINN. L. REV. 511 (2013).

<sup>14</sup> Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine Corcos ed., 2010).

<sup>15</sup> See also MAKING AND UNMAKING INTELLECTUAL PROPERTY (Mario Biagioli, Peter Jaszi & Martha Woodmansee eds., 2011).

## Coda: Copyright and the Economics of Non-Rivalry

The Constitution gives Congress power to pass laws establishing copyright rights, but that power is limited to the creation of rights that endure for “limited Times.” Why would we limit the term of copyright, especially considering that ordinarily, property rights are not time-limited? Why would we give property rights in a table, or in a plot of land, that last forever and can be passed down from owners to heirs indefinitely, but limit the owners of copyrights to a finite period of ownership?

Part of the answer can be found in the difference between **rivalrous** and **non-rivalrous** property. A laptop computer is rivalrous. If you are working on your laptop, I cannot work on it at the same time. In contrast, artistic and literary works are generally considered to be non-rivalrous. Consider a movie broadcast on television. If you turn your television on to view the movie, that doesn’t result in my television being switched off. Our consumption of the movie is non-rivalrous. Rivalrousness is closely related to scarcity. Rivalrous goods tend to be scarce. Non-rivalrous goods don’t face a scarcity problem. Additional access is always possible.

The law grants property rights in rivalrous goods in part because *property rights help us manage access to scarce goods*. You have a property right in your laptop, and, as a consequence, you can deny me access to it. That’s an important right to have, given that if I’m using your laptop it won’t be available for your use. Or you can choose to rent the laptop to me for a few hours. Your right to exclude me from your laptop allows you to charge me some price and impose conditions in exchange for allowing access to it.

Again, we grant property rights in rivalrous goods like laptops in part because property rights help us manage access to goods that are scarce. But this “resource allocation” justification for property rights doesn’t hold up very well when applied to artistic and literary works. Once such works are created, they are not scarce. If I teach you a song I know, I still know the song, and now you know it as well. Our access to the song is not rivalrous. And the same is true if we both start teaching the song to additional friends. Allowing additional people to have access to the song doesn’t reduce its value to us. Indeed, if we enjoy singing in a chorus, having a group of our friends know the song might *increase* its value to us. In this case, the song would be **anti-rivalrous**.

If there’s no need to manage scarcity for non-rival goods like literary and artistic works, then why do we grant property rights in them? The utilitarian account says that we grant property rights in literary and artistic works to *maintain adequate incentives to create these works in the first place*. That is precisely the utilitarian account described directly above. And, importantly, the “incentives” justification does not suggest that copyright should last forever. Scarce resources are rivalrous for as long as they exist, and so the property rights that we create to manage that scarcity must also be perpetual. But copyright rights need not be perpetual in order to create adequate incentives to create new artistic and literary works. Copyright rights need only endure long enough to permit creators to recover enough of the revenues that their work may generate to make the initial act of creation worthwhile.

How long a copyright term is sufficient? That is a surpassingly difficult question to answer with specificity. To answer the question, we’d need to know what level of creative output is optimal. And we’d need to know what duration and scope of copyright would produce that level of output. Those questions are theoretically tractable. But we lack the information—about our preferences for consuming literary and artistic works versus other goods, and about how different types of creators respond to incentives—necessary to answer them.

It is vital, moreover, to understand that copyright protection presents tradeoffs. If we increase the term or scope of copyright rights, we might get more new literary and artistic works (we say “might” because, as noted above, the empirical case for the incentives rationale is less than rock-solid). But copyright protection comes at a cost. In preventing competition from copyists, copyright protection allows copyright owners (or, at least that subset of owners that control works for which there is market demand) to charge a supra-competitive price for their

artistic and literary works. This has three effects. First, it leads to a transfer of income from consumers to copyright owners; that is indeed the purpose of copyright. Second, it leads to what economists refer to as “deadweight loss.” Copyright protection causes some consumers who would have consumed at the competitive price, but who will not consume at the supra-competitive price that copyright allows copyright owners to demand, to turn to their second-best consumption choice. This leads to a loss of welfare for those consumers, and for society generally. Third, and at least as importantly, copyright protection enables copyright owners to charge a high price to subsequent creators who wish to build on existing copyrighted work—or even to bar subsequent creators altogether. Thus, copyright might be used to prevent follow-on creativity that society might value.

In an 1841 speech to the British Parliament, historian and Whig politician Thomas Macaulay put it this way: copyright, Macaulay said, is “a tax on readers for the purpose of giving a bounty to writers.” And, Macaulay added, “the tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures.” For an economic model of copyright law, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

Copyright, in short, is a qualified good, and our structuring of copyright law involves a tradeoff. The goal, if we wish to benefit society as a whole, is not the maximal amount of copyright protection, but rather the *optimal* amount. That is, the amount that produces the degree of creative output that achieves the best mix of benefits and costs. Note that this “optimal” creative output is *not* necessarily the same as “more” creative output. Producing more artistic and literary works is not necessarily better, as there are only so many poems or movies or computer programs that people are able and willing to consume. (More on this in Chapter II.)

## NOTES

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1. Assuming that the utilitarian story is, at least in part, correct, do we want to have one set of copyright rights that applies to all sorts of creative work? Or would we be better off creating different rights of different scope or duration for different sorts of creative work? For example, should we protect software differently than motion pictures?
  2. What about fine art, like painting and sculpture? Does that need incentive at all to be created? For an argument that fine art does not require copyright incentives, and indeed is impeded by copyright, see Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313 (2018).
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## 2. Rights-Based Theories

There are, in addition to the incentives-based utilitarian theory, two well-established deontic justifications for copyright.

### Lockean Labor Theory

The first grows out of the theory of property set out in John Locke’s *Two Treatises of Government*. Locke’s theory identifies the individual’s contribution of labor as the mechanism by which objects are reduced to property, and it focuses on the harm—in terms of fairness rather than wealth maximization—when another deprives the owner of the fruits of that labor. Although Locke himself never applied his **labor-desert theory** beyond real property to creative expression and inventions, others have developed Locke’s theory as a non-utilitarian justification for intellectual property rules of varying scope.

Locke's labor-desert theory of property proceeds from the argument that a person who adds his or her labor to resources that are either unowned or held by all in common has a property right in the product of his or her efforts. The principal strand of Locke's theory is entirely non-consequentialist. Locke's argument is based primarily in fairness concerns, and is premised on a strong "no-harm" injunction: A person owns his or her own labor, and that person adds that labor whenever he or she appropriates a thing from the commons. If another takes the object the first person has appropriated, that person also takes the labor that the first person has added to that object in the original act of appropriation. That taking of labor is a harm. People are enjoined not to harm others; the "no-harm" injunction is at the basis of the first person's property right. The right is limited, however, by two provisos. The first is that the appropriation from the commons can result in a property claim only if "enough and as good" is left for others to appropriate. The second is that appropriation must not exceed what can be used: that is, appropriation must not lead to waste. As Locke puts it:

*God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life, and convenience....[Y]et being given for the use of Men, there must of necessity be a means to appropriate [the earth and its contents] some way or other before they can be of any use....*

*Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever he then removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property....[I]t hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.*

*He that is nourished by the Acorns he pickt up under an Oak, or the Apples he gathered from the Trees in the Wood, has certainly appropriated them to himself....I ask then, When did they begin to be his?...And 'tis plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common....And will any one say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? Was it a Robbery thus to assume to himself what belonged to all in Common? If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him....*

*It will perhaps be objected to this, That if gathering the Acorns, or other Fruits of the Earth, & c. makes a right to them, then any one may in gross as much as he will. To which I Answer, Not so. The same Law of Nature, that does by this means give us Property, does also bound that Property too....As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy....*

JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Book II, Chap. V) (1690). For criticisms of Lockean labor theory as an incoherent idea of property arising from the act of "mixing" labor with objects in the commons, see, for example, ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 174-75 (1974); Jeremy Waldron, *Two Worries About Mixing One's Labour*, 33 PHIL. Q. 37, 37 (1984).

Locke's understanding is, by analogy, an argument for the establishment of some form of property in creative expression and invention. The argument posits first that creative expression and inventions are built upon

facts and ideas that are in the commons. The labor involved in creating expression based on those common-stock elements is the basis of the laborer's property right in the resulting creative work. And the provisos are, in the view of most scholars applying Lockean theory to intellectual property, easily satisfied. The number of facts and ideas available for other people to use is without limit, so the ability of a first-comer to propertize any particular expression built on those common-stock elements is not substantially limited by the "enough and as good" proviso. It might, however, limit the exclusion of others from certain particular expressions. As to the "anti-waste" proviso, intellectual property can be licensed for money, and it can be held by immortal corporations, or, in the case of ownership by a natural person, transferred or devised so that it may always be actively exploited. It is possible that the anti-waste proviso would counsel that copyright and patent laws must contain provisions obliging owners to exploit their property or to license it if there is some demand for access to the particular invention or work at issue. For an analysis applying the Lockean framework to self-expression, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993). For an argument that it cannot be so applied, see Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138-67 (Stephen R. Munzer ed., 2001).

Does the Lockean framework readily carry over to the realm of creative expression, or are there further assumptions or arguments one must make to fit the framework to this context? A critical difference between tangible items and intangible ones, like creative expression, raises some questions about applying the Lockean framework to creative expression. The consumption of tangible items is rivalrous, whereas intangible items like ideas and expression are non-rivalrous. So reading a book and accessing its intellectual content is not the same as taking the book itself (the physical item).

For these reasons, the "no-harm" principle is not implicated in the same way when we focus on the "taking" of intellectual property—unlike in the case of tangible property, unauthorized access to an artistic or literary work does not ordinarily result in the owner of that work losing access to it. That is not to say that the no-harm principle has no purchase in the case of intellectual property. Unauthorized consumption of intellectual property might involve deprivation of the possessor's enjoyment of some *profit* from the intellectual property, and that might be the source of the unfairness on which labor theory focuses. This form of unfairness is not the same thing as deprivation of the property itself, but it is nonetheless an important concern. It is also, obviously, precisely the concern that animates the incentives-based utilitarian theory of copyright. There is thus a deeper connection between Lockean and utilitarian analyses of copyright than their respective categorizations might otherwise suggest.

## Hegelian/Kantian Personality Theory

A second deontic justification for copyright is found in the idea that because original expression reflects and embodies an author's personality, respect for creators' autonomy requires the recognition of property rights in creative works. This justification grows out of personality-based property theories set out by G.W.F. Hegel and (somewhat more accessibly) Immanuel Kant.

Personality theory is based in the autonomy interests associated with property ownership. The theory posits that property provides an especially powerful mechanism for self-definition, for personal expression, and for society's recognition of the dignity of an individual person. Margaret Radin describes this as a "personhood perspective" based on the view that "to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment." Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 957 (1982). The best way of providing control over external resources is to recognize property rights, and a particular person's property interest is strongest in the resources that reflect or embody his or her personality.

Personality theory is appealing in part because it aligns with modern understandings of the importance of property: In a consumer society, we are (in part) what we own. And given popular adherence to a Romantic conception of authorship, Western culture is apt to find a particularly strong link between an individual creator's personality and his or her creative expression.

Like the Lockean labor theory, the Hegelian/Kantian personality theory provides a distinct deontic justification for the establishment of some form of copyright. But also like the Lockean theory, application of the Hegelian/Kantian justification to particular copyright disputes beneath the most abstract level raises a host of complications. Most significantly, the Hegelian/Kantian system contains no mechanism for reconciling competing personality claims. Think, for example, of the use of another's copyrighted novel to create a movie version of the novel. In this example, the second-comer has made use of something that reflects the personality of the original creator and is therefore, under the Hegelian/Kantian justification, owned by that individual. And yet the second-comer is also a creator, and the movie is a reflection of his or her personality as well as the original creator's.

The Hegelian/Kantian justification offers no guidance for how property rights must be distributed in such an instance. Is the novelist's right absolute: can the novelist enjoin the moviemaker? Or is the novelist not entitled to stop the movie, but only to share in its profits? Or is the movie a sufficiently independent act of creation such that the moviemaker owes nothing to the novelist?

If one broadens the utilitarian framework beyond seeing copyright as simply a pecuniary incentive to create expressive works, one might reconcile important aspects of the labor and personality theories with utilitarianism. Specifically, these theories can be complementary in important ways because there is a utility to deontic concerns. As evidence from a multitude of vantage points demonstrates, creators of expressive work typically attach great significance to both their labor and personhood interests in their work. As such, the incentive to create ought to be all that much stronger when copyright laws are structured both to protect and to communicate solicitude for authors' labor and personhood interests. The ways in which intellectual property laws can protect creators' labor and personhood interests and employ rhetoric communicating concern for these interests can be seen as **expressive incentives**. The law's careful use of expressive incentives can bolster the utilitarian inducement to create valuable intellectual property. That is, copyright's utilitarian incentives can be pecuniary, expressive, or both. For an exploration of this reconciliation, see Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012).

The labor and personality theories have had and continue to have more obvious influence in copyright systems outside of the United States, such as Europe, but they are part of the general discussion about the purposes of intellectual property law and the content of intellectual property rules. Query, as we step through the copyright doctrines in the following chapters, whether and how labor theory and personality theory work their way into the otherwise dominant utilitarian approach that U.S. copyright law takes.