

UCLA School of Law
Public Law & Legal Theory Research Paper Series
Research Paper No. 07-34

WHY HAS COPYRIGHT EXPANDED? ANALYSIS AND CRITIQUE

by

NEIL NETANEL

6 New Directions in Copyright Law (Fiona Macmillan ed., Edward Elgar forthcoming 2008)



This paper may be downloaded without charge at:
The Social Science Research Network Electronic Paper Collection
<http://ssrn.com>

1. Why has Copyright Expanded? Analysis and Critique

Neil W. Netanel*

Numerous commentators, including myself, have decried the growth of copyright holder rights in recent decades.¹ Copyright's expansion is widely said to be inimical to copyright's core goals and economic rational. If so, why has that expansion occurred? Without question, there are multiple causes. This essay surveys and critiques a number of them, beginning with the copyright industries' raw political muscle and moving to the rhetorical and theoretical frameworks for expansion. My focus is on developments in the United States, but I trust that readers will find parallels in other countries.

1. COPYRIGHT INDUSTRY POLITICAL INFLUENCE

Experience and public choice theory teach us that organized, well-heeled groups holding a strong interest in sharply defined goals tend to have proportionally greater political influence than the public at large. That has certainly been the case with copyright law. Copyright industries and trade associations engage in extensive lobbying. Aided no doubt by Hollywood's visibility and cachet, they have achieved considerable success in attaining their agenda.

Hollywood's political influence need not reflect some sort of iniquitous scheme. It is quite natural for firms aggressively to seek advantage to solidify and further their market position. Firms regularly look to government for regulatory protections that enable them to earn 'rents', greater profits than could otherwise be reaped in a competitive market. Indeed, as economic

* Many thanks to David Nimmer for his insightful comments on an earlier draft of this chapter and to Lisa Kohn for her excellent research and editing assistance.

1 I describe and criticize copyright's untoward expansion in a forthcoming book, N. Netanel, *Copyright's Paradox* (Oxford University Press, forthcoming 2008). See also L. Lessig, *Free Culture* (New York: Penguin Press 2004); J. Litman, *Digital Copyright* (New York: Prometheus Books, 2001); M.A. Lemley, 'Property, Intellectual Property, and Free Riding', *Texas Law Review* 83 (2005), 1031; and numerous others.

analysts have noted, one of the disadvantages of legal regimes that allow firms to earn supracompetitive profits is that they provide a strong incentive for socially wasteful spending on lobbying and litigation to maintain and expand those rents.²

So my point is not that motion picture and recording studios are evil actors. It is simply that their interest is not necessarily the public interest. The copyright industries naturally wish to obtain as all-encompassing a copyright protection as possible for their extensive inventories of content. And they naturally wish to use that protection to ward off competition from new media entrepreneurs that threaten their traditional ways of doing business. But the public interest – as reflected in some 300 years of copyright precedent – is for a narrowly tailored incentive for authors to contribute to the store of knowledge and enrich the public domain. Copyright is meant to spur creativity and expressive diversity. When it has the opposite effect – when authors cannot freely build upon their predecessors' works in creating new expression and when copyright serves as a tool for entrenching media conglomerates – something has gone awry.

1.1 Congress

Copyright legislation has long been notorious for its embodiment of successful industry rent-seeking. As one commentator aptly notes: 'Changes in the Copyright Act have almost always been enacted with the consent of all "respectable" interest groups that would be affected by the change.'³ Extensions of copyright holder rights have consistently reflected industry lobbying and influence, if not outright congressional rubber-stamping of industry-drafted legislation. Copyright expansions do typically contain narrow exceptions, carved out for politically powerful industries and organized interests that use copyrighted works. But too often missing is any reflection of the vital, but diffusely-held interests of the public at large.

The practice of handing over drafting responsibility to the affected industries seems to have begun innocuously enough. In the first decade of the twentieth century, Congress faced the problem of updating and revising a law that was perceived as too arcane and complex for legislators to understand without expert assistance.⁴ To solve that problem, members of

2 F.S. McChesney, 'Rent Extraction and Rent Creation in the Economic Theory of Regulation', *Journal of Legal Studies* 16 (1987), 101; R.A. Posner, 'The Social Costs of Monopoly and Regulation', *Journal of Political Economy* 83 (1975), 807.

3 T.P. Olson, 'The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reforms Since the 1909 Act', *Journal of the Copyright Society of the USA* 36 (1989), 111.

4 For an illuminating account of the history of special interest influence over copyright legislation, see Litman, *supra* n. 1, at 35–63. This paragraph draws upon Professor Litman's account.

Congress prodded the Librarian of Congress to set up a series of meetings with representatives of industries with an interest in copyright. Those meetings, and the intensively negotiated intra-industry agreements that followed, shaped the Copyright Act of 1909.

Since then, Congress and the Copyright Office have continued to rely heavily on negotiations among interested parties for the periodic Copyright Act revisions and amendments that have been required to keep abreast of new technologies and the evolving international copyright treaty regime. The result, as one would expect from that delegation of legislative authority, has been an ever-expanding set of copyright holder rights, riddled with narrow exceptions for various interested parties present at the bargaining table. Copyright legislation has given short shrift to those sectors, including the public at large, without the funding, organization, and political muscle to participate effectively in the negotiations.

In recent years, the level and intensity of copyright industry involvement has surpassed even that of past copyright law revisions. As a former House Intellectual Property subcommittee staff member graphically describes it:

Copyright interest groups hold fund raisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or soldout concerts, and draft legislation they expect Congress to pass without any changes. In the 104th Congress, they are drafting the committee reports and haggling among themselves about what needs to be in the report. In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as their legislation and their committee report. With the 104th Congress we have, I believe, reached a point where legislative history must be ignored because not even the hands of congressional staff have touched the committee reports.⁵

Congressional delegation of statutory drafting to copyright industry representatives has continued unabated since the 104th Congress. Like the Audio Home Recording Act of 1992, numerous provisions of the Digital Millennium Copyright Act of 1998 were drafted by or at the behest of industry lobbyists, as was the Sonny Bono Copyright Term Extension Act.⁶ Given that influence, it is no surprise that Congress has doled out ever more bloated copyright-holder prerogatives.

5. W.F. Patry, 'Copyright and the Legislative Process: A Personal Perspective', *Cardozo Arts and Entertainment Law Journal* 14 (1996), 141.

6. For discussion of the DMCA, concluding that industry crafted committee reports must be relied upon to interpret the statute, see D. Nimmer, 'Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary', *Cardozo Law Review* 23 (2002), 909.

1.2 The Executive Branch

Copyright industry influence is felt in the Executive Branch no less than in the halls of Congress. The United States Trade Representative and other officials representing the United States in international trade and intellectual property treaty negotiations have consistently worked in tandem with industry associations. As a result, the United States has often pushed for the adoption of treaties and trade agreements that entrench or require more expansive copyright holder protection than under prevailing US law.

The copyright industry's road to the Executive Branch began with Congress.⁷ In 1984 the industries drafted and successfully lobbied to amend the Trade and Tariff Act to require the President to examine a country's enforcement of intellectual property rights in determining its eligibility for preferential trade benefits. Significantly, the amendment provided for a stick as well as a carrot. It clarified that the President could impose trade sanctions (so-called '301 sanctions', after the number of the pertinent statutory provision) against countries that failed to provide 'adequate and effective' protection for US intellectual property. Around the time the Trade Act was amended, eight copyright industry trade organizations, led by the Motion Picture Association of America, Recording Industry Association of America, National Music Publishers Association, Association of American Publishers, and Business Software Alliance, joined forces to establish an umbrella association, the 'International Intellectual Property Alliance', to lobby the United States Trade Representative to recommend imposing sanctions against countries that failed to protect US copyrights. In ensuing years, the Alliance has grossly exaggerated the extent of economic harm due to 'piracy' in other countries (counting every pirate copy as a loss of a licensed copy that would have otherwise been sold at full price) and the inadequacy of other countries' copyright protection.⁸ Nonetheless, the USTR has adopted Alliance representations as its own, even concluding in its 1989 Fact Sheet that 'no foreign country currently meets every standard for adequate and effective intellectual property protection'.⁹

With that foothold, copyright and other intellectual property lobbyists have also exerted extraordinary influence on the US position in international

7 My discussion in this paragraph draws on the detailed description in P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (New York: The New Press 2002), 85–99.

8 This phenomenon crosses sectoral and national borders. See H. Williamson, 'OECD Slashes Estimate Piracy Losses', *Financial Times*, 8 May 2007, at 10 (reporting OECD finding that intellectual property industry lobbies have grossly exaggerated their losses from product counterfeiting and piracy).

9 USTR Fact Sheet, *BNA's Patent, Trademark & Copyright Journal* 38 (1 June 1989), 131, quoted in Drahos and Braithwaite, *ibid.*, at 94.

treaty and trade agreement negotiations. The industries have regularly used their political muscle to lead US negotiators to initiate treaty negotiations and sponsor provisions requiring other countries to expand their copyright protection. The industries have also used international negotiations and agreements strategically to entrench and expand their copyrights in the United States.

A prime example is the negotiations leading up to the landmark Agreement on Trade-Related Aspects of Intellectual Property Rights (or 'TRIPs'), adopted under the auspices of the World Trade Organization in 1994. TRIPs requires WTO member countries to comply with prescribed standards for intellectual property protection and authorizes the imposition of trade sanctions against countries that fail to do so. In its initial submission to the TRIPs negotiations, the US delegation, working closely with copyright industry associations, proposed language on the permissible scope of countries' limitations to copyright holder rights that would have made all but a highly crabbed, market-centered version of fair use a violation of the agreement. The US proposed that TRIPs allow countries to provide for exceptions to copyright holder exclusive rights only in 'clearly and carefully defined special cases which do not impair an actual or potential market for or the value of a protected work'.¹⁰ In so doing, the delegation representing the United States ignored 150 years of fair use jurisprudence under which courts evaluate fair use claims on an equitable, case-by-case basis and market harm is only one factor (albeit an important one) to be weighed.

Fortunately, other countries insisted on giving greater leeway for exceptions and limitations to copyright holder rights, and rejected the proposal that the US copyright industry lobbyists crafted. Yet even so, some commentators express concern that TRIPs could impede judicial interpretation and application of fair use.¹¹

The TRIPs' submission was not mere oversight. Since then, the industry has continued adeptly to use international treaty negotiations as part of its domestic legislative strategy. The 'paracopyright' anti-circumvention provisions enacted as part of the Digital Millennium Copyright Act of 1998 are another case in point. These provisions were initially drafted by copyright industry lobbyists and included in the Clinton Administration's proposed NII ('National Information Infrastructure') Copyright Protection Act of 1995. The proposed Act died in committee in the face of strong opposition from telecommunications industries, the American Library Association, and

10 Draft Agreement on the Trade-Related Aspects of Intellectual Property Rights, Communication from the United States, Article 6, GATT Doc. No. MTN.GNG/GN11/W/70 (11 May 1990), reprinted in pertinent part in E.S. Yambrusic, *Trade-Based Approaches to the Protection of Intellectual Property* (New York: Oceana Publications, 1992), 104.

11 D. Nimmer, 'The End of Copyright', *Vanderbilt Law Review* 48 (1995), 1385.

others. In response, administration officials, led by former software-industry lobbyist Bruce Lehman, brought the copyright industry-backed digital agenda to the World Intellectual Property Organization and urged that it be incorporated into new intellectual property treaties then under consideration.¹²

In December 1996 a WIPO-sponsored diplomatic conference adopted two of those treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Like TRIPs, those treaties only partly reflect the US agenda. In particular, the United States had submitted language that tracked almost word for word the NII Copyright Protection Act anti-circumvention provision that had been rejected in Congress. The US proposal would have required countries to prohibit devices the ‘primary purpose or effect of which’ is to circumvent encryption or other technology that prevents or inhibits the violation of copyright holders’ rights.¹³ As had domestic opponents of the NII Copyright Protection Act, other countries expressed concern that the US proposal would be unduly restrictive of devices designed and used for multiple purposes and thus might inhibit the development and deployment of socially beneficial digital technology. In light of these concerns, the WIPO treaties as adopted at the conference give countries considerable flexibility to enact more balanced approaches in their domestic legislation. The treaties require only that countries ‘provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures’,¹⁴ focusing not on the distribution of circumvention devices but on the actual use of such devices when such use is undertaken to infringe copyright holders’ rights.

Undeterred by their partial setback at the WIPO, copyright industry lobbyists and their Clinton Administration allies then returned to Congress, insisting that Congress ‘implement’ the WIPO treaties by enacting anti-circumvention legislation along the very same lines as the failed NII Copyright Protection Act of 1995. And that is essentially what Congress did. The DMCA prohibits not just actual circumvention, but also the manufacture and distribution of devices ‘primarily designed or produced’ for circumventing technological controls or marketed with knowledge that the devices will be used for circumvention.¹⁵ The DMCA also goes far beyond the WIPO Copyright Treaty (and, for that matter, the NII Copyright

12 For an illuminating, detailed discussion of the US digital agenda before the WIPO, see P. Samuelson, ‘The U.S. Digital Agenda at WIPO’, *Virginia Journal of International Law* 37 (1997), 369. The WIPO is a specialized agency of the United Nations.

13 *Ibid.*, at 411–12.

14 WIPO Copyright Treaty, Article 11, adopted 20 December 1996, *International Legal Materials* 36, 65.

15 17 U.S.C. § 1201(a)(2); 1201(b). In fact the DMCA prohibits the act of circumvention for access controls, not use controls.

Protection Act) in prohibiting the circumvention of measures designed to control access to copyrighted works. The Treaty only requires protection against circumvention of technological measures used by authors ‘in connection with the exercise of their [copyrights]’.¹⁶ Neither the Treaty nor, until the DMCA, US copyright law gave copyright holders a right to control access.

The Senate Judiciary Committee Report accompanying the DMCA ultimately acknowledged that the legislation grants copyright holders broader protection than what the WIPO treaties require.¹⁷ Nevertheless, the Judiciary Report states that the legislation’s primary purpose is to ‘implement’ the WIPO treaties. Indeed, at copyright lobbyists’ calculated urging, the DMCA anti-circumvention provisions were affixed with the misleadingly innocuous title, ‘WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998’.

The industry’s practice of playing off copyright legislation and treaty negotiations to expand copyright holder rights continues. The industry’s current strategy is to push for ‘fast-track’ bilateral and regional trade agreements that require more expansive copyright holder prerogatives than the United States has been able to obtain in the multilateral frameworks of TRIPs or the WIPO. In negotiating these agreements, the United States Trade Representative and Department of Commerce work closely with the Industry Functional Advisory Committee on Intellectual Property Rights, a body organized under federal law and composed entirely of entertainment and other intellectual property industry representatives.¹⁸ Through a process of review and consultation, the industry committee has been instrumental in the drafting of the intellectual property provisions of bilateral and regional trade agreements. As the Committee stated in its recent report on the draft US–Peru Trade Promotion Agreement, the Committee aims, through its ‘close working relationship’ with US negotiators, to establish ‘strong precedents’ in the intellectual property provisions of bilateral free-trade agreements ‘in

16 Jane Ginsburg proffers a number of possible arguments that WIPO Article 11 could be interpreted to require protection against circumvention of access control. None are derived from the text or negotiating history of Article 11. J.C. Ginsburg, ‘Achieving Balance in International Copyright Law’, *Columbia Journal of Law and the Arts* 26, 201 (2003), 213–14.

17 Senate Comm. On The Judiciary, The Digital Millennium Copyright Act of 1998, S. Rep. No. 105–90, at 5 (1998).

18 US Dept. of Commerce, International Trade Administration, The Industry Consultations Program, Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters, <http://www.ita.doc.gov/td/icp/FactSheets/IFAC03.html>.

order to raise the global level of protection and enforcement globally, nationally and in regional and in multilateral agreements'.¹⁹

While couched as a vehicle for requiring US trading partners to bring their intellectual property laws up to US standards, the trade agreements also impose international obligations on the United States that lock in recent copyright expansions. These include a required copyright term of life plus 70 and the DMCA's anti-circumvention provisions, among others. They do so at a time when the Copyright Office has expressed concern about the orphan works' problem engendered by the long copyright term and the absence of registration requirements, and when the DMCA is under attack in Congress for being insufficiently solicitous of fair use.²⁰ Even more ominously, the drafts of the trade agreements' anti-circumvention provisions submitted by the United States have consistently been more onerous than those of the DMCA. For example, the drafts of the Free Trade Agreement of the Americas, which is designed to create a free-trade area encompassing most countries in the Western Hemisphere, even omitted the narrow exceptions to the anti-circumvention rules carved out under the DMCA.²¹ Thus far, several bilateral and regional trade agreements containing the anti-circumvention provisions have been signed, and the United States is actively pursuing still more.²² To the extent the United States successfully pushes other countries to agree to such industry-backed provisions, industry lobbyists will no doubt return to Congress, insisting that the DMCA be 'updated' to implement the trade agreements' entrenchment of ever greater copyright-holder control.

19 The US-Peru Trade Promotion Agreement Intellectual Property Provisions; Report of the Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15), 1 February 2006, at 3-4.

20 United States Copyright Office, *Report on Orphan Works* (2006), available at <http://www.copyright.gov/orphan/orphan-report.pdf>. The Freedom and Innovation Revitalizing US Entrepreneurship (FAIRUSE) Act of 2007, 110th Congress, 1st Sess., H.R. 1201, would amend the anti-circumvention provisions explicitly to provide for fair use exceptions. It follows similar legislative proposals, including The Benefit Authors Without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2005, 109th Congress, 1st Sess., H.R. 4536.

21 The proposed anti-circumvention provisions are in Article 21 of the Intellectual Property Chapter of the second consolidated draft of the Agreement. See FTAA - Free Trade of the Americas, Second Consolidated Draft Agreement, Chapter on Intellectual Property Rights, Article 21, http://www.ftaa-alca.org/ftaadraft02/ngip1_e.asp#IIsec.3Art.21, November 2002.

22 See A. Chander, 'Exporting DMCA Lockouts', *Cleveland State Law Review* 54 (2006), 205.

2. RHETORICAL AND THEORETICAL UNDERPINNINGS

The naked pursuit of self-interest only goes so far in shaping a legal regime. The most robust policy ideas are informed by a cogent rhetorical framework that resonates among lawmakers and eases the way to general acceptance. For that reason, competing rhetoric and theories have loomed large in the controversy over copyright's scope.

It may be, indeed, that rhetoric and theory play an especially prominent role in determining the scope of intellectual property. As Robert Merges cogently argues, intellectual property 'takes shape purely in the realm of the conceptual' in contrast to tangible things, for which 'hard physical reality' serves as a reference point for delimiting property rights. For intellectual property, therefore, '[t]here are no natural facts to act as a brake on expansive notions of how broad a right might be, how many people and activities it might reach, or how long it might last. . . . It means that what brakes and limits there are in this domain exist in our minds, or are encoded in the conceptual rules and principles that comprise this body of law.' Accordingly, Merges rightly concludes, 'Any change in the fundamental underpinnings of the rules . . . has potentially serious implications.'²³

2.1 Copyright is 'Private Property' and Any Unlicensed Use is 'Piracy'

We don't want to shut down innovation. We just want to protect private property from being pillaged.²⁴

Remember, the RIAA does not seek the identity of someone engaged in speech. The RIAA seeks the identity of those engaged in copyright infringement. That is not speech. That is theft.²⁵

23 R. Merges, 'One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000', *California Law Review* 88 (2000), 2239. See also D.A. Farber, 'Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"', *Minnesota Law Review* 89 (2005), 1318 (the controversy over copyright's scope implicates broader ideological conceptions 'of how the economy works, how power is distributed in society, and how individuals can best flourish under contemporary conditions').

24 Jack Valenti, President, Motion Picture Association of America. Quoted in E. Sanders and J. Shiver Jr., 'Digital TV Copyright Concerns Tentatively Resolved by Group', *Los Angeles Times*, 26 April 2002, at Part 3, page 5 (speaking before a congressional committee in favor of requiring television manufacturers to incorporate broadcast flag technology to prevent consumer copying of television programs).

25 Matt Oppenheim, Senior Vice President of Business and Legal Affairs, Recording Industry Association of America. Quoted in D. McCullagh, 'Piracy and Peer-to-peer', *Cnet.com*, 7 July 2003, <http://news.com.com/2010-1027-1023325.html>.

The metaphors used to describe social practices and legal rules have a powerful impact on people's perception of them.²⁶ For that reason, the copyright industry has assiduously promoted the notion that copyright is 'property' and that all who make unlicensed use of copyrighted material are 'pirates' or 'thieves'. That rhetoric has roots in the eighteenth-century argument for a broad, perpetual copyright grounded in natural law. For example, William Blackstone famously argued that because authors hold a 'property' right in their literary compositions, copyright must be a perpetual exclusive right covering any manner of communicating the author's work.²⁷ The nomenclature of property and thievery was also widely used in the nineteenth-century to refer to the commercial sale of counterfeit or near-exact copies to the public. But until recently, it has not been widely applied to transformative or non-commercial individual uses.²⁸

The 'property' rhetoric also stands in sharp contrast to the Supreme Court's traditional characterization. As the Court has repeatedly insisted, copyrights are 'monopoly privileges that . . . while "intended to motivate . . . creative activity . . . by provision of a special reward", are limited in nature and must ultimately serve the public good'.²⁹ Similarly, while the Court would certainly agree that those who make and distribute unlicensed copies of copyrighted material for commercial purposes are 'pirates', it would not extend this characterization to all infringers. In particular, the Court has emphasized that the dissemination of transformative, yet nevertheless infringing works is 'worlds apart' from 'simple piracy' and, indeed, that 'there may be a strong public interest in the publication of the secondary work'.³⁰ Accordingly, as the Court has repeatedly suggested, transformative authors who raise a colorable, but failed claim of fair use should often be required only to compensate the original author, not suffer an injunction.

26 For illuminating discussion, see J.M. Balkin, *Cultural Software: A Theory of Ideology* (New Haven: Yale University Press 1998), 173–87.

27 W. Blackstone, *Commentaries on the Laws of England* (London: T. Cadell and J. Butterworth and Son, 1825, 16th edn) (1765–69), 2, 405–6.

28 Compare *Emerson v Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845), stating that if a competing publication 'copies substantially from the map of the other, it is downright piracy', with *Folsom v Marsh*, 9 F. Cas. 342, 344–5 (No. 4,901) (C.C.D. Mass. 1841), and *Stowe v Thomas*, 23 F. Cas. 201, 207 (E.D. Penn. 1853), both ruling that transformative, independently creative borrowings are not 'piracy'.

29 *Fogerty v Fantasy, Inc.*, 510 U.S. 517, 526 (1994), quoting *Sony Corp. of America v Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). See also *Dastar Corp. v Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041 (2003), quoting *Bonito Boats, Inc. v Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989) ('The rights of a patentee or copyright holder are part of a "carefully crafted bargain", under which, once the patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution.')

30 *Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n. 10 (1994).

For purposes of setting copyright's proper scope and duration, it should not matter whether copyrights are termed 'private property' or 'monopoly privileges'. As any student of property law can attest, property rights can be broad or narrow, impermeable or riddled with exceptions, long-lasting or short-lived, exclusive or subject to forced sharing and even forfeiture, all depending on a host of factors and policy dictates. Likewise, authors' rights have sometimes been referred to as 'literary property' by those who have favored short-term, limited exclusive rights (or who referred only to authors' rights in unpublished manuscripts), not just by those who have championed robust, perpetual copyrights in published works.³¹ So even if copyright is a 'property right', there is no inherent reason why it should be of today's broad scope.

Yet despite the nuanced, policy-driven realities of property law and the logical possibility of narrowly tailored 'literary property', contemporary political discourse typically imbues the term 'private property' with a connotation of absolute right. In American culture, 'property' encapsulates an individualistic, almost libertarian, vision: what's mine is mine and no one can take it away. Hence, to denote copyrights as 'private property' is effectively to override their limited reach and public benefit character. It imbues them with the aura of Blackstone's proverbial 'sole and despotic dominion . . . in total exclusion of the right of any other individual in the universe'.³²

While the Supreme Court has generally spurned the copyright industries' private-property-and-piracy rhetoric, the lower courts have been far more receptive.³³ Many judges, it seems, have come intuitively to share Judge Frank Easterbrook's view that '[e]xcept in the rarest case, we should treat intellectual property and physical property identically in the law',³⁴ and thus that courts should narrowly interpret exceptions to copyright holders' rights.

31 Justin Hughes makes this point in a recent article, although he does not adequately distinguish among those who used property rhetoric to support expansive copyright, those who described authors' rights in unpublished manuscripts as 'literary property', and those who referred to authors' rights as 'property' despite favoring narrowly drawn copyrights. Nor does Hughes seem to appreciate the variable meanings of the word 'property' in different contexts and historical periods. See J. Hughes, 'Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson', *Southern California Law Review* 79 (2006), 993.

32 W. Blackstone, *supra* n. 27, at 1. Scholars note that Blackstone himself must have recognized that description as hyperbole, even as applied to real property. R.C. Ellickson, 'Property in Land', *Yale Law Journal* 102 (1993), 1362, n. 237.

33 The Supreme Court has referred to copyright as 'property', albeit 'property derived from a grant by the United States', in ruling that copyrights may be subject to state taxation. *Fox Film Corp. v Doyal*, 286 U.S. 123 (1932). It has also occasionally used property terminology in cases related to trade mark and trade secret.

34 F.H. Easterbrook, 'Intellectual Property is Still Property', *Harvard Journal of Law and Public Policy* 13 (1990), 118.

A telling example, was the Ninth Circuit's insistence in *Napster* that even copyright industries that appear to have colluded to deny copyright licenses on reasonable terms to potential competitors are entitled to an injunction to protect their 'power to control their intellectual property'.³⁵

The closely related notion that anyone who borrows from a pre-existing work without permission is a 'thief' or a 'pirate' has also pervaded judicial analysis. Indeed, even the otherwise resistant Supreme Court has succumbed to that rhetoric, not surprisingly in its dramatic imposition of a market-centered approach to fair use in *Harper & Row Publishers, Inc. v Nation Enterprises*.³⁶ The Court's pronouncement in that case, that '[t]he fair use doctrine is not a license for corporate theft', has been repeatedly cited by lower courts applying an exceedingly narrow view of fair use.³⁷

Likewise, rhetorical excess shaped the district court's denigrating characterization of Alice Randall's celebrated, radical reshaping of *Gone with the Wind* as 'unabated piracy', and thus not a fair use.³⁸ And the lower courts (no less than legislators and much of the press) have swallowed hook, line, and sinker the copyright industry's repeated characterization of individuals' non-commercial file trading as nothing but 'piracy'. Most troublingly, the 'piracy' trope informed a recent decision (subsequently reversed) rejecting a First Amendment challenge to a subpoena requiring an Internet service provider to divulge the names of subscribers suspected of file swapping. '[I]n light of the extent of copyright piracy over the Internet', held the court, 'any impact on expressive and associational rights on the Internet is negligible'.³⁹

Finally, Congress' moves to expand copyright holder prerogatives are replete with references to theft and piracy. The 'No Electronic Theft Act' brought file trading within the ambit of criminal copyright infringement and

³⁵ *A&M Records v Napster, Inc.*, 239 F.3d 1004, 1029 (9th Cir. 2001).

³⁶ 471 U.S. 539, 558 (1985) 471 U.S. 539, 558 (1985), quoting *Iowa State University Research Foundation, Inc. v American Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2nd Cir. 1980).

³⁷ See, for example, *Worldwide Church of God v Philadelphia Church of God*, 227 F.3d 1110, 1115 (9th Cir. 2000) (denying fair use to church dissidents' reproduction of a religious tract authored by the church founder but since repudiated by the mainstream church).

³⁸ *Suntrust Bank v Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1369 (N.D. Ga. 2001), *rev'd*, 252 F.3d 1165 (11th Cir. 2001). Randall's novel, *The Wind Done Gone* retells *Gone with the Wind* from the viewpoint of a slave.

³⁹ *In re Verizon Internet Services, Inc.*, 240 F. Supp. 2d 24 (D.D.C. 2003), reversed *Recording Industry Ass'n of America, Inc. v Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003); compare with *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.*, 545 U.S. 913, 961 (2005) (Breyer, J., concurring) (favoring a broad interpretation of the *Sony* safe harbor for suppliers of multi-use devices and questioning the extent of real harm that unlicensed file sharing causes record labels, but stating that 'deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft' and referring to unlicensing file sharing as 'piracy').

increased criminal penalties for such acts. The ‘No Digital Theft Deterrence and Copyright Damages Improvement Act’ raised statutory damages for copyright infringement. Senate hearings on peer-to-peer networks were called ‘Protecting Innovation and Art While Preventing Piracy’.⁴⁰

Such labels underwrite the notion that all unlicensed copying and borrowing from copyrighted works are immoral. As such, they ignore that copyright law has traditionally allowed considerable copying, and indeed that borrowing from existing works is an esteemed part of our artistic tradition. The theft and piracy labels also promote a rigid, unrealistic approach to applying copyright in the digital arena. As copyright industries are belatedly discovering, maintaining proprietary control over individuals’ digital copying, distribution, and modification of copyrighted works is exceedingly costly, if even possible. Accordingly, copyright holders might do better to seek more effective means of receiving remuneration for uncontrolled uses than to deplore users’ supposed immorality as part of a campaign for reasserting proprietary control.

2.2 Economic Value

As we have seen, metaphors, like ‘property’ for copyright and ‘piracy’ for file sharing, can transform ‘a false identification . . . into an apt analogy’.⁴¹ But a metaphor’s potency depends on an elaborate framework of cultural associations, ideology, and political dynamics. In the case of copyright, both the characterization of copyright as ‘property’ and the success of the copyright industry in the political arena owe much to the increasing value of copyright works in our national economy.

Throughout most of the nineteenth century, the United States was a net importer of copyrighted works, primarily books from Great Britain. Largely as a result, the United States did not accord domestic copyright protection to foreign works until Congress enacted the International Copyright Act of 1891, and even then it imposed, as a condition for protection, compliance with US registration, notice, and deposit requirements and the American manufacture of ‘any book, chromo, lithograph or photograph’.⁴² Copyright’s

40 No Electronic Theft Act (‘NET Act’), Pub.L. No. 105–47 18 U.S.C. § 101 (defining ‘Financial Gain’); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub.L. No. 106–60, § 2(1), 113 Stat. 1774 (1999) (increasing the range of statutory damages for non-wilful infringement from US \$500 to US \$20,000, from US \$750 to US \$30,000 and raising the cap from statutory damages for willful infringement from US \$100,000 to US \$150,000); Protecting Innovation and Art While Preventing Piracy: Hearing Before the Senate Comm. on the Judiciary, 108th Congress, 2d Sess. (22 July 2004).

41 C. Geertz, ‘Ideology as a Cultural System’, in C. Geertz, ed., *The Interpretation Of Culture: Selected Essays by Clifford Geertz* (New York: Basic Books, 1973), 209, 211.

42 26 Stat. 1106

expansion took hold when locally produced copyrighted works began to assume an increasing portion of the domestic economy and accelerated as the United States grew to become the world's largest exporter of copyrighted works. In its brief for greater copyright protection, the industry repeatedly emphasizes copyright's importance for the national economy. (In actual fact, the industry greatly exaggerates its importance: while Hollywood is a significant sector, it is several orders of magnitude smaller than the telecommunications and consumer electronics industries, upon which Hollywood now brazenly lobbies Congress to impose obligations to police copyright infringers.)

Indeed, as we have moved to an economy in which information and communication is a highly valued resource, a broad array of expanding intellectual property rights have colonized uses and subject matter that were previously public domain. These have included, most notably, business method patents, trade mark antidilution, and (in the European Union) database protection. Copyright's expansion is part and parcel of what Jamie Boyle calls the 'second enclosure movement' (the first being the propertization of the English commons when land was the most valuable resource).⁴³

There is no inherent reason why a resource should be subject to rotund property rights merely because it is of social value and people would pay to use it. Many valuable resources, including most ideas, roads, and the world's oceans, are owned by no-one (or by the public at large), and many things that are owned have little or no value. Indeed, many resources are more efficiently produced, exploited, and managed if left in the commons or made common property.⁴⁴ And even when resources are subject to property rights, those rights are limited. As Mark Lemley emphasizes, property owners are not normally entitled to capture the full social value of their property.⁴⁵ To do so would unduly restrict others' innovation, enterprise, and liberty.

The notion that anything of potential economic value must be subject to a property right enabling the owner to capture that value is, to borrow Felix Cohen's famous phrase, 'transcendental nonsense'.⁴⁶ Its application to copyright has a long pedigree nonetheless. In fact, William Blackstone

43 J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', *Law and Contemporary Problems* 66 (Winter/Spring 2003), 33.

44 Y. Benkler, 'Coase's Penguin, or, Linux and The Nature of the Firm', *Yale Law Journal* 112 (2002), 369; C. Hess and E. Ostrom, 'Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource', *Law and Contemporary Problems* 66 (Winter/Spring 2003), 111.

45 Lemley, *supra* n. 1, at 1046-50.

46 F.S. Cohen, 'Transcendental Nonsense and the Functional Approach', *Columbia Law Review* 35 (1935), 815 (the law 'purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected').

himself employed that argument to support classifying copyright as a common law property right: 'The one essential requisite of every subject of property is, that it must be a thing of value. . . . Whatever therefore hath a value is the subject of property.'⁴⁷ Today's lawmakers seem no less afflicted by that circular reasoning. The fact that copyrights create economic value in original expression, as well as forming an important part of the national economy, contributes greatly to their tendency to view copyright as a full proprietary right.

2.3 Neoclassicist Economics

In addition to political power and metaphor, copyright expansion has been fueled by a number of theoretical constructs. Embedding rhetorical tropes within a framework of deductive reasoning, these theories have helped to inform an understanding of copyright as Blackstonian property and control. Particularly influential has been the 'property rights' theory or (what I have termed) the 'neoclassicist economics' approach to copyright law. That approach, which draws upon elements of both neoclassical Chicago school economics and new institutional economics property theory, was initially articulated in the early 1980s in the work of leading copyright scholars.⁴⁸ It now reverberates through copyright policy and case law. Today, it is primarily neoclassicist economics that drives the copyright-as-property approach, with its naïve belief in the efficacy of maximal copyright-holder control.

The neoclassicist approach differs substantially from traditional copyright incentive economics. Incentive analysis looks at copyright as a necessary, but flawed solution to the public goods problem. Without some means to prevent unlicensed copyists, authors will have an insufficient incentive to create and disseminate their creative works. At the same time, incentive economics teaches us: copyright carries with it some of the problems of monopoly

47 W. Blackstone, *supra* n. 27, at 405. See also *Tonson v Collins*, 96 Eng. Rep. 169 (K.B. 1761), presenting Blackstone's argument that authors enjoy a perpetual common law copyright independent of statute.

48 The pioneering work was W.J. Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors', *Columbia Law Review* 82 (1982), 1600, which analyzed fair use principally in terms of the 'consensual exchange of owned goods', but also referred to non-monetizable speech interests. (In her later scholarship, Gordon has placed greater emphasis on the circumstances 'where we cannot rely on markets to function as socially satisfactory institutions for the distribution of resources'.) See, for example, W.J. Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives', in N. Elkin-Koren and N. Netanel, eds, *The Commodification of Information* (Hague: Kluwer Law International, 2002), 149. Preceding Gordon's article was Edmund Kitch's application of neoclassicist property rights theory (which he termed 'prospect theory') to patent law. See E.W. Kitch, 'The Nature and Function of the Patent System', *Journal of Law and Economics* 20 (1977), 265.

pricing and deadweight loss. As a result, copyright should not be expanded beyond the minimum necessary to provide authors with an incentive to create and make their works available to the public.

Neoclassicists label incentive theory ‘crude’ and ‘two-dimensional’.⁴⁹ They do not deny that copyright may serve as a necessary incentive for the creation of new works. But in their eyes copyright is much more: it is primarily a mechanism for facilitating markets in existing expression. Copyright can best serve this goal, neoclassicism posits, when copyright owners have full proprietary control over their works. Assured of proprietary control, copyright owners will move existing creative works to their highest socially valued uses. They will, in other words, transfer and license rights to exploit and develop existing creative works in ways that best satisfy consumer tastes. For neoclassicists, copyright enables owners to charge users for access to creative works not to preserve author incentives but to provide a mechanism for signaling what creative works are worth. In that way, copyright serves as a guide for copyright owners and prospective licensees in deciding how to allocate their resources in exploiting and developing creative expression. By asserting proprietary control over all means of marketing, transmitting, and transforming creative works, copyright owners can coordinate product development and determine investment timing as well as investment direction.

Not surprisingly, neoclassicism counsels strongly in favor of expansive, exclusive proprietary rights that are concentrated, at least as an initial matter, in a single owner. Concentrating exclusive rights requires prospective users to bargain with the copyright owner. That reduces transaction costs and enables the owner to manage rationally and efficiently expressive resources.

In that view, exclusive rights to make derivative works (such as sequels and motion picture versions of novels) are fully warranted even though such rights are generally unnecessary to enable authors and publishers to recover their fixed costs of creating and producing the original work. The exclusive right to make derivative works undergirds a more efficient after-market and enables copyright owners to capture the full value of their inventories. This broad right facilitates licensing and other marketing strategies. And it directs investment – as coordinated by the copyright holder – towards those works that are capable of being developed in ways that consumers want, including, for example, books that are well-suited to screen adaptation or television

49 R.P. Merges, ‘Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright’, *American Intellectual Property Law Association Quarterly Journal* 21 (1993), 306 (noting that economic literature on copyright has ‘progressed beyond the point where a crude “incentive” story passes for analysis in every case’); R.P. Merges and R.R. Nelson, ‘On the Complex Economics of Patent Scope’, *Columbia Law Review* 90 (1990), 842 (stating that newer economic approach to patent goes far ‘beyond the two-dimensional analysis of incentives and deadweight loss’).

programs with characters that can readily be spun off into product merchandising.⁵⁰

Neoclassicism also sharply restricts the availability of fair use. In the neoclassicist view, fair use reduces to anomalous cases of endemic and insuperable market failure. It is this aspect of neoclassicism that has probably had the most profound impact on case law. A prime example is the Supreme Court's adoption of the neoclassicist, market-centered view of fair use in its decision in *Harper & Row*. In that case, the Court twice cited the neoclassicist passages of a seminal article by Wendy Gordon that characterized fair use as market failure. Buttressed by Gordon's neoclassicist argument (and ignoring more nuanced aspects of her analysis), the Court ruled that the fair use 'exception' is available only in highly circumscribed instances of bilateral market failure. Fair use, the Court stated, is inappropriate unless a 'reasonable copyright owner [would] have consented to the use' given the 'importance of the material copied or performed *from the point of view of the reasonable copyright owner*'.⁵¹

For neoclassicists, then, fair use serves merely to effect a market bargain that cannot otherwise take place because the transaction costs are too high. Under that reasoning, fair use will rarely apply. Indeed, the Ninth Circuit has even followed a decidedly neoclassicist, market-centered approach in rejecting a dissident church's fair use claim to use a religious tract expressly repudiated by the copyright-holder mainstream church. The court cited (and oversimplified) Professor Gordon's article for the proposition that even a copyright owner with no concrete plans to distribute his work may enjoin and refuse to license uses that might conceivably usurp part of the 'potential market'.⁵²

Finally, neoclassicism lends unreserved support to a lengthened copyright term. Under traditional economic incentive theory, copyright's optimal term would be no longer (and no shorter) than required to provide a sufficient possibility of return to induce the creation and dissemination of new works. Neoclassicism, in contrast, focuses less on the creation of new works than on facilitating markets and preserving the value of existing works. Neoclassicism, therefore, has no reason to extinguish the owner's copyright

50 See, for example, Gordon, 'Fair Use', supra n. 48, at 1605–6.

51 471 U.S. at 550 (internal quotation marks omitted).

52 *Worldwide Church of God v Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1119 n. 2 (9th Cir. 2000) (quoting Gordon, 'Fair Use', supra n. 48, at 1634). Professor Gordon argued that '[m]arket failure should be found only when the *defendant can prove* that the copyright owner would refuse to license out of a desire unrelated to the goals of copyright – notably a desire to keep certain information from the public' (emphasis added). The Ninth Circuit found that the defendant had failed to meet that burden of proof given the Worldwide Church's unsupported testimony that it planned to publish 'at some time' an annotated version of a tract that it had expressly repudiated. 227 F.3d at 1119 n. 2.

after a term of years. So long as a work is socially valued, that value will be reflected in the price for using the work and the work will be licensed and developed accordingly, thus achieving an efficient allocation of resources. To withdraw protection from a work that is still socially valued would defeat this objective. It would deprive the copyright owner of the ability to manage a resource and thus eviscerate the value of that resource

In line with that reasoning, William Landes and Richard Posner propose a potentially indefinite copyright term, constrained only by a periodic renewal fee designed to ferret out works that are of little value to anyone.⁵³ For them, the public domain is not a rich field for diverse interpretation and cultural regeneration, but a threat to the commercial value of existing expression: ‘If because copyright had expired anyone were free to incorporate the Mickey Mouse character in a book, movie, song, etc., the value of the character might plummet. Not only would the public rapidly tire of Mickey Mouse, but his image would be blurred, as some authors portrayed him as a Casanova, others as catmeat, others as an animal-rights advocate, still others as the henpecked husband of Minnie’.⁵⁴ To prevent that ‘congestion externality’, the supposed loss of value resulting from too many different creative uses, Disney must have exclusive, proprietary control over Mickey Mouse, just as Margaret Mitchell’s estate must control *Gone with the Wind* – and Beethoven’s and Shakespeare’s heirs be given a veto over all transformative interpretations and recastings of those works – forever.

In applying neoclassicist economics to copyright, its proponents forget that, unlike with many other resources, we do not generally want one party coordinating speech. When speech is involved, we prefer multi-centered effusion over economically rational central control, even if by a private party. As a group of leading economists recently put it: ‘In copyright, diverse, “abundant” expression is the source of value, not successive refinements with respect to an agreed-upon metric of quality, and a large number of disparate innovators may be better at producing abundance’.⁵⁵ The myriad of productions, applications, and interpretations of Shakespeare and Beethoven over the years have only added to the value of their seminal works. Moreover, even if that’s not the case for a given work, even if conflicting uses over time distort or dilute the work’s meaning so as to destroy its commercial value, that Schumpeterian creative destruction is, after all, an integral part of a vital, rejuvenating culture. The *Mona Lisa* might never be quite the same after Marcel Duchamp bestowed upon her a

53 WM. Landes and R.A. Posner, ‘Indefinitely Renewable Copyright’, *University of Chicago Law Review* 71 (2004), 111.

54 *Ibid.*, at 488.

55 Brief of Amici Curiae, G.A. Akerlof et al., *Eldred v Ashcroft*, 537 U.S. 186 (2003) (No. 01–618) (internal citation omitted).

mustache, disco versions of Bach might be anathema to traditionalists, and counterculture comics might savage Mickey Mouse. But whatever the consequences of novel, iconoclastic reworkings, we would hardly want to empower copyright holders to protect classic works from creative insult, interpretation, and parody.

The contrast between neoclassicist control and decentralized, non-managed innovation is all the more striking today, with the Internet's propensity for generating a plethora of competing reformulations of the expressive works that populate our cultural, social and political universe. It is a fundamental precept of free speech jurisprudence that expression from diverse and antagonistic sources will yield a far richer field for advancement and a far more vibrant public discourse than if expression is managed by a few firms holding vast inventories of copyrighted expression. That expressive diversity, grounded largely in competitive interpretation and reinterpretation of works of high and popular culture, is of considerably greater social value than controlling symbolic meaning to prevent 'congestion externalities'.

2.4 Copyright as a Natural Right

The belief that authors have a natural property right in their creative expression might also be a factor in copyright's expansion. In contrast to neoclassicism, natural rights theory supports copyright expansion from an *ex post* rather than *ex ante* perspective. For neoclassicists, copyright, like other market-facilitating regimes, serves 'not so much to reward people for what they have done as to tell them what in their own as well as in general interest they ought to do'.⁵⁶ Natural rights theorists, on the other hand, posit that an author deserves a property right in original expression by virtue of having created it. Drawing upon a combination of Lockean labor-desert theory and nineteenth-century Romanticism, that view conceives of copyright as a right arising from fundamental precepts of natural law and justice. From the perspective of natural rights theory, copyright statutes are designed merely to codify the author's natural property right. In that view, copyright should be immune from exceptions and limitations that legislators might design to benefit the public (unless, as we shall see, those also derive from natural law).

The argument from natural law has a venerable tradition in copyright history. In the eighteenth century, proponents of a natural law copyright

⁵⁶ F.A. Hayek, *Law, Legislation and Liberty: The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 71–2 (discussing the function of markets in general), quoted in J. Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property', *Chicago-Kent Law Review* 68 (1993), 855.

applied to authors John Locke's proposition that one who improves a common resource by mixing his labor with it gains the right to acquire that resource as his own. Most famously, in his *Commentaries on the Laws of England*, William Blackstone posited, with reference to Locke, that an author enjoys a property right 'in his own literary composition' by virtue of the author's 'personal labour' and 'exertion of his rational powers' in producing 'an original work'.⁵⁷ The author's right, Blackstone opined, must extend to 'whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time'.⁵⁸ (On the other hand, in contrast to today's bloated copyright, Blackstone suggested that the author's property right lies only in the literal rendition of the author's composition, not in transformative modifications, and that authors should be required to reserve affirmatively their rights by affixing a 'mark of ownership' in order to continue to enjoy copyright after publication.)⁵⁹

The natural rights approach had profound implications for eighteenth-century legal doctrine. Most importantly, it served as the rhetorical and conceptual sword for the London booksellers in their efforts to retain their exclusive privilege to publish ancient texts. The London booksellers' privilege had been curtailed, first by Parliament's refusal to renew the Licensing Acts of 1662 and then by the enactment of the Statute of Anne in 1709, which established modern copyright and limited the copyright term to a maximum of 28 years. When their statutory copyrights approached the end of that term, the London booksellers went to court, invoking Locke to argue that a perpetual copyright both existed at common law and survived the 1709 enactment of the Statute of Anne. The 'Battle of the Booksellers' engaged some of England's leading legal minds, and figured prominently in legal discourse through much of eighteenth-century England. It came to an end in 1774, when, in the case of *Donaldson v Becket*, the House of Lords decided that, even if authors did hold a common law copyright, that right was superseded by the Statute of Anne.⁶⁰

The view of copyright as a natural right carried over to the United States. A contrary view, that copyright is an instrument for advancing learning and republican liberty, dominated the Constitution's Copyright Clause and the

57 W. Blackstone, *supra* n. 27, at 405–6.

58 *Ibid.*

59 *Ibid.* As Blackstone put it: 'Now the identify of a literary composition consists entirely in the sentiment and the language: the same conceptions, clothed in the same words, must necessarily be the same composition . . .'

60 4 Burr 2408, 98 E.R. 257 (1774). It is unclear whether the Lords determined that authors never had common law right in published works or that authors did have such a right, but that the right was merged into the Statute of Anne. See M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), 97–103.

first federal copyright statute. But the framers saw no contradiction between copyright's public good objectives and an author's individual claims for a (limited) proprietary right. Indeed, most state copyright statutes, enacted between 1783 and 1786 pursuant to the Articles of Confederation, explicitly invoked principles of natural equity and justice, alongside advancing human happiness. As the Massachusetts, New Hampshire, and Rhode Island preambles stated, copyright is justified in part for its role in promoting the 'progress of civilization' and in part because there is 'no property more peculiarly a man's own than that which is produced by the labor of his mind'.⁶¹

Akin to the House of Lords, the US Supreme Court held, in 1834, that copyright in published works derives entirely from federal statute, not common law.⁶² Nevertheless, as Lloyd Weinreb has documented, US courts and leading copyright treatises throughout the nineteenth century continued to defend copyright more as a matter of natural right and justice than promoting public welfare.⁶³ Eaton Drone, whose seminal treatise was published in 1879, insisted, for example, that copyright, no differently than any property right, is based on the principle that 'what a man creates by his own labor, out of his own materials, is his to enjoy to the exclusion of all others'.⁶⁴ According to Drone, principles of natural justice, grounded in Locke and other natural law, thus dictate that authors should enjoy an inviolable property right in the fruits of their intellectual labor.

As in the Battle of the Booksellers, the idea that copyright law secures an author's inherent property right in expressive creations has often been invoked to support expansive copyright-holder rights. As natural rights proponents have maintained, statutorily or judicially-imposed limitations to copyrights detract from what is rightfully the author's, and those who copy or borrow from the author's work have wrongfully 'reaped what they have not sown'.⁶⁵ Indeed, like Blackstone, Drone insisted that an author's natural right to the fruits of his labor means that copyright, like any property right, must be perpetual.

61 An Act for the Purpose of Securing to Authors the exclusive Right and Benefit of publishing their Literary Productions for Twenty-one Years, ch. 26, 1783 Mass. Laws 236; Act of Encouragement of Literature, 1783 N.H. LAWS 305; An Act for the Purpose of Securing to Authors the exclusive Right and Benefit of publishing their literary Productions, for Twenty-one Years, 1783 R.I. Pub. Laws 6.

62 *Wheaton v Peters*, 33 U.S. 591 (1834).

63 L. Weinreb, 'Copyright for Functional Expression', *Harvard Law Review* 111 (1998), 1150, 1211–14.

64 E. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (Boston: Little, Brown & Co.: 1879), 4.

65 As Judge Willes opined in an early case recognizing authors' natural right to copyright: 'It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work.' *Millar v Taylor*, 98 Eng. Rep. 201, 318 (1769).

In addition to, and perhaps intertwined with, Lockean labor-desert theory, copyright expansion might also bear the imprint of eighteenth- and nineteenth-century Romanticism. The Romantic ideal of the author envisions a solitary creator blessed with unique, transcendent insight, a ‘genius’, who brings forth into the world an entirely new and original work of art.⁶⁶ In introducing ‘a new element into the intellectual universe’, the Romantic author-genius draws solely upon his own independent vision, eschewing any imitation or reliance upon the work of others.

Few would explicitly embrace that rarified ideal of authorial genius today. Nevertheless, some critics assert, it continues to color our understandings of authorship and creativity and repeatedly emerges in different areas of copyright jurisprudence, even though, as a practical matter, American copyright law serves corporate owners of literary property far more than actual, living authors and protects countless quotidian works that bear no resemblance to Romantic high art.⁶⁷ In particular, the critics contend, the persistent, albeit generally unarticulated, influence of the Romantic paradigm predisposes courts and legislators to dismiss the creativity and social value of secondary authorship. It informs a dim view of works such as fan fiction, mashups, and critical recastings as parasitic on the original, true artists.

Neither Lockean labor-desert nor Romanticism has had nearly as explicit or direct an influence on recent copyright expansion as has neoclassicist property rights theory. In fact, since the nineteenth century, the notion that authors are entitled, as a matter of natural right, to a reward for their intellectual labor and thus to a full proprietary right in their creative product has been rejected repeatedly and in no uncertain terms by both Congress and the courts. As the House Report accompanying the 1909 Copyright Act stated (and has been often reiterated since):

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served Not

66 M. Woodmansee, ‘The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”’, *Eighteenth-Century Studies* 17 (1984), 425, 429–31 (discussing the conception of authorship advanced by William Wordsworth and Edward Young).

67 J. Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard University Press, 1996), 51–9; Rose, *supra* n. 60; D. Lange, ‘At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium’, *Law and Contemporary Problems* 55 (1992), 139; P. Jaszi, ‘On the Author Effect: Contemporary Copyright and Collective Creativity’, *Cardozo Arts and Entertainment Law Journal* 10 (1992), 293; P. Jaszi, ‘Toward a Theory of Copyright: The Metamorphoses of “Authorship”’, *Duke Law Journal* (1991), 455; J. Litman, ‘The Public Domain’, *Emory Law Journal* 39 (1990), 965–6.

primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.⁶⁸

In similar fashion, the Supreme Court has consistently referred to copyrights as ‘monopoly privileges’, a ‘special reward’, or a ‘limited . . . statutory monopoly’, which Congress is empowered to grant to authors out of a ‘conviction that encouragement of individual effort by personal gain is the best way to advance public welfare’.⁶⁹ Even when courts present the idea of giving a reward to authors as a secondary rationale for copyright, they characterize it either as an inducement to creative production, or as a ‘fair return’ that must be ‘commensurate with the services rendered’.⁷⁰ These formulations seem to envision a limited claim to compensation, not a broad proprietary entitlement.

Nevertheless, Lockean natural rights and some vestige of Romanticism may well remain a ‘significant factor in the background’ of copyright’s untoward expansion.⁷¹ Certainly, the copyright industries regularly employ labor-desert rhetoric and trot out well-known authors (and their heirs) in support of legislation to expand copyrights. They also wave the banner of creative authorship in briefs and oral argument.⁷² Natural rights theories (both Lockean and German idealist) have also dominated Continental European ‘authors’ rights’ jurisprudence, which has, in turn, greatly influenced the international copyright treaty regime to which the United States is now party. A number of copyright expanding amendments, including the elimination of formal prerequisites for copyright protection and the extension of copyright’s duration from a once-renewable 28-year term to a term of the life of the author plus 50 years, owe their origin to natural-rights-based provisions of the Berne Convention for the Protection of Literary and Artistic Works, which the United States joined in 1989.⁷³

68 H.R. Rep. No. 60-2222, at 7 (1909).

69 *Mazer v Stein*, 347 U.S. 201, 219, reh’g denied, 347 U.S. 949 (1954).

70 *Harper & Row, Publishers, Inc. v Nation Enters.*, 471 U.S. 539, 545–6 (‘fair return’, citing *Twentieth Century Music Corp. v Aiken*, 422 U.S. 151, 156 (1975)); *Mazer v Stein*, 347 U.S. 201, 219 (1954) (‘commensurate with services rendered’).

71 Weinreb, *supra* n. 63, at 1216.

72 See, for example, Brief of Amicus Curiae the Songwriters Guild of America Concerning First Amendment Issues and in Support of Respondent, *Eldred v Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), paid for in part by ASCAP, BMI, and the National Association of Music Publishers.

73 The Berne Convention prohibits formal prerequisites for copyright protection, requires protection for the moral rights of integrity and attribution, and requires a term of the life of the author plus 50 years for most types of works. Congress eliminated the notice and registration requirements as part of the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988). It moved to a life of the author plus 50 year term as part of the Copyright Act of 1976 in order to pave the way for the United States to sign the Berne Convention.

Putting aside international treaty obligations, it is far from clear why natural law principles must support an expansive copyright. Indeed, to the extent that a conception of an author's natural right has in fact informed judges' and lawmakers' expansion of copyright-holder control, that position seems to derive more from inchoate intuition than a careful parsing of natural law. Even if authors do have a legally cognizable moral claim by virtue of creating a work, that, in and of itself, tells us nothing about the content of that claim. Conceivably, the author's claim might support nothing more than a right to receive authorship credit, or a right to 'fair' compensation, or a right to prevent literal copies, all far more limited than today's full-blown right of proprietary control. Nor does the author's moral claim negate or necessarily trump the moral claim that others might have to use and borrow from the author's work.

In fact, as several scholars have convincingly demonstrated, natural rights theory supports considerable limits on copyright's scope and duration. Locke himself never applied his labor-desert theory to authors' creations and, in contrast to many who invoked him, strenuously opposed a perpetual copyright.⁷⁴ Further, as Lloyd Weinreb remonstrates, even if we do apply Locke's theory and determine that an author's contribution to a creative work entitles that author to some reward, it does not necessarily follow that the author's reward must take the form of a proprietary copyright.⁷⁵ It would be perfectly consistent with Locke, for example, for authors to be entitled only to an unhindered right to garner revenue from selling access to the work in the 'natural' market without copyright, perhaps by being the first to publish

74 Locke wrote in opposition to the renewal of the Licensing Act of 1662, which provided the Stationers Company with a printing monopoly: 'That any person or company should have patents for the sole printing of ancient authors is very unreasonable and injurious to learning; and for those who purchase copies [that is, publishers who purchase manuscripts] from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author, or the first printing of the book, as suppose, fifty or seventy years.' John Locke, Memorandum, 2 January 1683, 208–9, quoted in Rose, *supra* n. 60, at 33. Locke also drafted legislation, which was not enacted, but which appears to be much along of the lines of the subsequently enacted Statute of Anne, to grant a copyright to authors that would be limited in time and would extend only to the right to reprint copies.

75 Weinreb, *supra* n. 63, at 1228. In similar vein, see also S.V. Shiffrin, 'Lockean Arguments for Private Intellectual Property', in S.R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001), 138, 142; W.J. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property', *Yale Law Journal* 102 (1993), 1608; A.C. Yen, 'Restoring the Natural Law: Copyright as Labor and Possession', *Ohio State Law Journal* 51 (1990), 554–5. On the other hand, as Richard Epstein aptly points out, it makes little sense to attempt to isolate the author's proportional contribution from the manifold influences that might share some credit and then to tailor the author's reward precisely to that proportion. R.A. Epstein, 'Liberty Versus Property? Cracks in the Foundations of Copyright Law', *San Diego Law Review* 42 (2005), 9, 22.

the work before others can make and distribute competing copies.⁷⁶ Moreover, even if authors are entitled to some form of proprietary copyright, natural law provides no reason why it should assume today's open-ended dimensions. Apart from Romantic notions of authorial genius, do authors inherently deserve the right to prevent transformative variations as well as literal copies? Does natural law dictate that copyright must continue in force for 70 years after the author has died?

Finally, even if the author has, by virtue of expending labor in creating an expressive work, a *prima facie* entitlement to a proprietary copyright, there are a number of bases in natural law for sharply circumscribing that right. For one, those who wish to copy or modify copyrighted material might themselves have rights based in natural law. As Abraham Drassinower points out, natural law posits a fundamental equality and mutuality of right and obligation among individuals: 'My claim that another person respect what originates in me as mine binds me to accept that person's reciprocal claim that I respect what originates in *him* as his.'⁷⁷ Current copyright law follows that precept by denying an author the right to prevent another from using his ideas. It does so by defining the second author's expression as 'originating' with her even if she makes use of the first author's ideas. But, especially given the elusive line between idea and expression, that limiting principle could just as well apply to cases in which the second author invests significant independent creativity in transforming the first author's 'expression', as opposed to merely using the first author's 'idea'.

Additional limitations can be found within Locke's labor-desert theory. Locke imposed two provisos on a laborer's right to appropriate resources from the commons. First, the laborer may appropriate common resources only 'where there is enough, and as good left in common for others'. Second, a person who wastes appropriated goods loses his property right.⁷⁸

At first glance, the 'enough and as good' proviso is inapplicable to copyright. For one, unlike land and tangible objects, there is no scarcity in ideas and ways to express them. As an eighteenth-century advocate of broad copyright protection declared, 'The Field of Knowledge is large enough for

76 That seems to have been the position the Supreme Court took in its 1834 decision rejecting a common law copyright in published works. The Court accepted the Lockean argument that 'a literary man is as much entitled to the product of his labour as any other member of society'. But it ruled that the author 'realizes this product by the transfer of his manuscripts, or in the sale of his works, when first published'. *Wheaton v Peters*, 33 U.S. 591, 657 (1834).

77 A. Drassinower, 'A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law', *Canadian Journal of Law and Jurisprudence* 16 (2003), 13.

78 J. Locke, *The Second Treatise of Government*, in *Two Treatises of Government* (Cambridge University Press, 1988) (1690), 27, 31, 37–8, 46.

all the World to find Ground in it to plant and improve.’⁷⁹ In addition, an expressive work would never exist if not created by its author. So, it might be argued, even if the author is awarded a proprietary right in his creation, others are left no worse off than if the author had never created the work in the first place.

On further examination, however, the lack of scarcity and impossibility of harm arguments greatly underestimate the extent to which copyright effectively depletes the commons. There may be many ways of expressing an idea, but there are also numerous occasions in which speakers cannot effectively convey their message without copying or building upon *particular* expression. Consider the many who have sung *We Shall Overcome* at civil rights rallies, quoted from Shakespeare or the Bible to make a point, or appropriated bits of prior works to make new art. Indeed, our public discourse as a whole would be rendered disjointed, colorless, and flat if speakers could never, without a copyright license, incorporate expression that others have created. In many instances, therefore, the common’s sizable stock of ideas and potential means of expression is beside the point. If all that remains in the commons is the possibility of expression that would have little value for the speaker and her audience, then the author’s appropriation has failed to leave ‘enough and as good’ for others.

Much the same is true with respect to the notion that no harm arises in granting a property right in expression that would not exist but for the author. As Wendy Gordon has explained, when an expressive work becomes a central part of our culture, political landscape, or personal identities, speakers and audiences whom copyright denies access may well be left poorer than they would have been had the work never come into being.⁸⁰ Once created, such works become crucial reference points for effective communication and self-constitution. They also exert a powerful influence on societal attitudes. Those who cannot access or use them for edification, self-definition, artistic expression, or criticism are thus left at a considerable disadvantage.

The waste proviso might also seem more pertinent to perishable resources than creative expression. Crops and picked fruit can be left to rot, but, once created, an intangible work of art or literature exists forever (although the media in which it is embodied might disintegrate or become obsolete). But, as Benjamin Damstedt argues, waste occurs not only when a resource is allowed to perish, but also when ‘a unit of a product of labor is not put to any

79 Anonymous, ‘A letter from an author to a Member of Parliament. Occasioned by a late letter concerning the Bill now depending in the House of Commons, for the encouragement of learning, &c.’ (London: 17 April 1735), quoted in Shiffrin, *supra* n. 75, at 140.

80 Gordon, *supra* n. 75.

use'.⁸¹ Seen in that light, the unserved demand resulting from the supracompetitive pricing that copyright makes possible might constitute waste. If so, Locke's waste proviso might give rise to fair use and other limitations on copyright holder rights to enable uses of authors' works that would not take place under a broad, proprietary copyright regime.

There are possible counterarguments, among them that Locke's provisos apply only in the proverbial state of nature, not in a mature society in which money serves as a medium of exchange. But, as with neoclassicism, lobbyists and lawmakers who invoke authors' natural right do so in a manner that is unburdened by complexity, reservation, or even any attempt to come up with convincing counterarguments. In their simplistic – and fallacious – syllogism: Since authors create expressive works, they are entitled to a property right. And given that copyright is a 'property right', copyright holders in principle enjoy absolute dominion over their works. Therefore, the reasoning continues, any exceptions and limitations to copyright holder rights are isolated deviations from the copyright holder's proprietary rights, tolerated only as required by special circumstances.

2.5 Authors' Personality

There is an alternative basis for authors' natural rights. It is the idea, with roots in the theory of Immanuel Kant, that creative works are an extension of their authors' personalities and, therefore, that authors have a moral claim to receive authorship credit and determine the timing, manner, and form in which their works are communicated to the public. Some American commentators view personality theory as a significant cause of untoward copyright expansion. I disagree. While personality theory is an important pillar of European authors' rights jurisprudence, it has made only minor inroads in the United States. In addition, for reasons I will presently explain, personality theory represents a lesser threat to creative uses of existing works than either neoclassicist or labor-desert theory and, indeed, might actually promote free speech values rather than impede them.

In contrast to Blackstone, Kant categorized authors' rights as personality rather than property. According to Kant, an author's words are a continuing expression of the author's inner self. An author's right in his work is thus a fundamentally personal right. It is 'not a right in an object . . . but an innate right, inherent in his own person'.⁸²

81 B.G. Damstedt, 'Limiting Locke: A Natural Law Justification for the Fair Use Doctrine', *Yale Law Journal* 112 (2003), 1194.

82 I. Kant, 'Von der Unrechtmässigkeit des Büchernachdruckes', in E. Cassirer, ed., *Immanuel Kants Werke* (B. Cassirer, 1914), 213, 221.

For Kant, an author's moral claim lies in the right to communicate one's own thought, which Kant depicted as an aspect of autonomy and freedom, the 'one sole original, inborn Right belonging to every man in virtue of his Humanity'. A literary work is speech or discourse addressed to the public in a particular form.⁸³ It is a narration of the author's thought. The author alone may determine whether and how his words are to be disseminated. Any person who illicitly publishes or distributes a literary work infringes upon the author's freedom because he is speaking in the author's name without the author's consent. The infringer is in effect forcing the author to speak against the author's will, in a forum or through a vehicle that is not of the author's choosing.⁸⁴

Given that the author's rights are intimately bound up with the author's personality and autonomy, Kant viewed those rights as inalienable. Accordingly, though authors may grant to others the right to use their work and may appoint publishers to serve as their agents in enabling authors to communicate to the public, authors may not transfer title in their work or assign their rights with respect to it. In contrast to money and other exchangeable items of commerce, books are entirely 'means of carrying on the interchange of Thought'.⁸⁵

As interpreted and applied by late nineteenth century German legal philosophers, Kant's views profoundly influenced European authors' rights law. To this day, European law recognizes various inalienable rights of authors to control the presentation of their works to the public, rights that, to one degree or another, survive the author's license of economic exploitation rights. The most well-known of these are the author's so-called 'moral rights', including, most prominently, the right of authorship attribution, which enables an author to determine whether to be identified by name, a pseudonym, or not at all, and the right of integrity, which enables the author to prevent the public presentation of his work in a manner or context that would harm his reputation or contradict his intellectual literary, artistic, political, or scientific conceptions.

American commentators decry moral rights and the idea that authors should have a personal right to control their works' presentation as a dangerous 'charter for private censorship'.⁸⁶ But largely because of the

83 I. Kant, *The Philosophy of Law: An Exposition of the Fundamentals of Jurisprudence as the Science of Right*, W. Hastie, trans. (Edinburgh: T & T Clark, 1887), 56–7, 129–31.

84 See Kant, *supra* n. 82, at 213–14, 221 n. 1; Kant, *supra* n. 83, at 129–30.

85 Kant, *supra* n. 83, at 131. In contrast, money is 'the greatest and most useable of all the Means of human intercommunication through Things, in the way of Purchase and Sale in commerce'. It is 'a thing which can only be made use of, by being alienated or exchanged'. *Ibid.* at 124–5.

86 Jaszi, *supra* n. 67, at 497. See also L.A. Beyer, 'Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights', *Northwestern*

staunch opposition of the copyright industries, who fear that granting authors personal rights would impair the industries' ability to modify and market authors' works as they wish, neither moral rights nor Kantian understandings of an author's personal right of creative control have made any significant headway in this country. In *Harper & Row*, the Supreme Court did stress the importance of protecting the author's 'personal interest in creative control' in determining when a work is to be published.⁸⁷ And shortly after the United States signed the Berne Convention, which requires that countries protect authors' moral rights of attribution and integrity (albeit to a lesser extent than under the law of most European countries), Congress enacted the Visual Artists Rights Act, which gives creators of fine art the right to claim authorship attribution and to prevent the defacing or mutilation of paintings, drawings, prints, or sculpture. In addition, the exclusive right to make derivative works under US law can often be used to protect a work's 'integrity'. But that right is held by the copyright owner, not the creator of the underlying work *per se*; accordingly, it is rarely viewed as a right that secures the author's creative control. Aside from that, authors seeking to vindicate their 'moral rights' in the United States are relegated to searching for some rough analogue under the laws of defamation, privacy, or contract.⁸⁸

Further, even if US law did recognize authors' personal rights, it is far from clear that that would be nearly as injurious to transformative expression and free speech values as the view of copyright as a property right. In contrast to the tendency to view property as inviolable, personal rights, such as the rights to be free from defamation and invasions of privacy, are riddled with exceptions designed to protect free speech interests. For example, in contrast to courts' readiness to enjoin trespass and copyright infringement, courts have long refused to enjoin libel at common law. And unlike the strict liability that applies to trespass and copyright infringement, defamation law has traditionally recognized a privilege for news dealers, bookstores, and libraries that unknowingly transmit defamatory material published by others.

Much the same appears to be true with respect to the enforcement of moral rights in Europe. French and German law requires that authors assert

University Law Review 82 (1988), 1011 (arguing that moral rights are inimical to values of innovation and free expression); R. Tushnet, 'Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation', *Boston College Law Review* 42 (2000), 1 (suggesting that the addition of moral rights to copyright would run afoul of the First Amendment).

⁸⁷ *Harper & Row Publishers, Inc. v Nation Enterprises*, 471 U.S. 539, 555 (1985).

⁸⁸ For more detailed discussion, see N. Netanel, 'Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law', *Cardozo Arts and Entertainment Law Journal* 12 (1994), 1.

their moral rights reasonably and in good faith and that authors accede to reasonable modifications, such as those required to transfer the work into a different medium.⁸⁹ French law in particular is also more solicitous of parody than is property-based US copyright law. In telling contrast to the Ninth Circuit's infamous ruling in *Walt Disney Prods. v Air Pirates*,⁹⁰ for example, a French court held that cartoons portraying *Peanuts* characters in obscene situations infringed neither the copyright holder's adaptation right nor the author's moral right of integrity.⁹¹ So long as the parody is a distinct, independent work, clearly not that of the parodied author, the parodist's right of free expression trumps the author's moral right.⁹²

Finally and most intriguingly, a Kantian view of authors' rights might actually serve important speech interests. As I have discussed elsewhere, freedom of speech encompasses a right against being compelled to convey a message against one's volition. In turn, this right against forced speech would support authors' Kantian entitlement to prevent others from using the author's work in ways that imply the author's endorsement of a message to which the author does not adhere.⁹³

In addition, in line with Kant's view of publishers as mere agents for the author, Kantian rights might entitle authors to prevent publishers, movie studios, and other commercial enterprises from modifying the author's expression without the author's consent. Commercial enterprises do not have the same claim to expressive autonomy as individuals. (For that reason, under European laws, only actual creators, not employers and corporations, can have moral rights.) In the words of Justice White, "[T]he communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of the self".⁹⁴ Moreover, commercial firms, including most publishers and others that disseminate authors' expression, generally choose, package, and market their expressive product to maximize profit, often by selling to the lowest common denominator. Hence granting authors certain rights of continuing

89 Ibid. at 53–7.

90 581 F.2d 751 (9th Cir. 1978) (holding that the *Air Pirates* counterculture parody of Disney characters was not fair use).

91 The 'Peanuts' case, Trib. de. Gr. Inst. de Paris, 19 January 1977, 92 *Revue Internationale de Droit D'auteur* 167. See, also, the 'Tarzoon' case, Trib. de. Gr. Inst. de Paris, 3 January 1978, D. 1979, at 99 (Commentary of Henri Desbois) (holding that a parodic cartoon of Tarzan did not infringe the author's moral right of integrity). France's Author's Rights statute contains a specific exception from the copyright owner's economic rights for 'parodies, caricatures and pastiches, within the limits of the Laws of the Art'. I.P. Code Art. L 122-5-4.

92 M. Strowel and A. Strowel, 'La Parodie selon le Droit D'auteur et la Théorie Littéraire', *Revue Interdisciplinaire d'Etudes Juridiques* 26 (1991), 23, 25.

93 Netanel, *supra* n. 1.

94 *First Nat'l Bank v Bellotti*, 435 U.S. 765, 805 (1978) (White, J., dissenting).

control *vis-a-vis* commercial publishers might enhance both expressive autonomy and, on the margins, expressive diversity.

3. CONCLUSION

For those who invoke neoclassicism and Lockean natural rights theory in favor of copyright expansion, what appears to be most attractive about those theories is their seemingly crystalline simplicity. Each promises a hermetic and straightforward framework for decision, avoiding the messiness of balancing copyright incentives against public access. Even if dimly aware that the stripped-down versions of neoclassicism and natural rights theory that they profess errantly reduce complex issues of law and public policy to formulaic equations, lobbyists and lawmakers prefer an off-the-shelf working model with a ready rhetorical tag. Given the power of this copyright policy equivalent of the ten-second sound bite, counterarguments emphasizing the complexities of copyright economics and natural rights theory may well be ineffective in blunting those theories' rhetorical support for copyright expansion even if they make important and salutary contributions to scholarship.

A more productive avenue might be to find an alternative rhetorical framework that highlights the burdens imposed by copyright's ongoing distension. The characterization of copyright as a 'monopoly privilege', repeatedly invoked by the Supreme Court and eighteenth- and nineteenth-century critics of copyright expansion, serves that purpose to some extent. But the potent eighteenth- and nineteenth-century concept of monopoly as a source of public 'corruption' resulting from undue concentrations of wealth and power has given way to a narrower, more technical economic concept, carrying weaker rhetorical punch and of uncertain applicability to copyright.⁹⁵ Copyright expansion critics have accordingly moved on to new rhetorical arenas. Some commentators have underscored the potential of an overly broad copyright to impede technological innovation. Others have sought to reinvigorate the 'discourse of the public domain'. Still others have defined copyright as an integral part of information policy and our system of freedom of expression.⁹⁶ In that last vein, I argue in a forthcoming book that copyright strongly implicates free speech values that lie at the heart of our liberal democratic polity and that to speak of copyright in terms of free speech may prove a useful counterweight to labeling copyright as 'property',

⁹⁵ Boyle, *supra* n. 43, at 53–8.

⁹⁶ Among others, Jessica Litman, Yochai Benkler, Larry Lessig, Niva Elkin-Koren, Pam Samuelson, Tim Wu, Fred Yen and Diane Leenheer Zimmerman have taken that position in a number of their writings.

with the connotation of open-ended exclusive rights that that term, aided by neoclassicism and natural rights theory, has come to imply.⁹⁷

Of course, no rhetorical framework can be entirely effective against raw political muscle. Arguing that copyright law should be informed by the public domain or free speech concerns can only go so far in countering copyright industries' strategic use of Congress, the Executive Branch, and the courts to expand steadily the scope of copyright holder prerogatives. Opposing copyright expansion requires acumen in political organization and litigation strategy as well as understanding the multiple, intertwining causes of expansion.

⁹⁷ Netanel, *supra* n. 1.