An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory

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AN INQUIRY INTO THE MERITS OF COPYRIGHT: THE CHALLENGES OF CONSISTENCY, CONSENT AND ENCOURAGEMENT THEORY

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An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory

Wendy J. Gordon*

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* © 1989 by Wendy J. Gordon. All rights reserved. Associate Professor, Rutgers University School of Law—Newark. B.A. 1971, Cornell University; J.D. 1975, University of Pennsylvania Law School. A prior draft of this article was awarded a Lon L. Fuller Prize in Jurisprudence by the Institute for Humane Studies, Fairfax, Virginia.

An Inquiry Into the Merits of Copyright is one of a series of articles in which I investigate the theoretical structure of intellectual property law. I am grateful to the Rutgers University Research Council for its grant support for this project and to the S.J. Newhouse Faculty Research Fund for its ongoing assistance.

I want to express my appreciation to several persons. Bruce Ackerman and Frank Michelman offered important suggestions at the early stages of the piece that both clarified and broadened its reach. Annamay Sheppard's organizational suggestions helped the article come into being as a stand-alone work. I also want to thank Martin Adelman, Allan Axelrod, Richard Brandt, Ralph Brown, Robert Carter, Terry Fisher, David Fried, Jane Ginsburg, David Haber, Alan Hyde, Howard Laitin, Richard Lempert, Jessica Litman, Tom Palmer, John Payne, David Rice, Pamela Samuelson, Philip Shuchman, James R. Vance, Edward Wise, and the many other friends and colleagues who either commented on later drafts or in discussion made contributions to my treatment of the topics raised here. Valuable research assistance was provided by several students, among whom Lea Alvo (Rutgers class of 1988) had the central role.
Hostility to copyright has a long and honorable history. In the nineteenth century, for example, Lord Macaulay argued that while copyright might be necessary to ensure a “supply of good books,” the monopoly that it imposed was at best a necessary evil.

For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.\footnote{1. \textsc{Thomas Macaulay}, Speech Before the House of Commons (Feb. 5, 1841), in 8 \textsc{The Works of Lord Macaulay} 195, 199 (Lady Trevelyan ed. 1866) (opposing a bill which would have extended the duration of copyright protection).}

A number of studies critical of intellectual property followed in our century.\footnote{2. See the sources in collected note 25 infra.} The most well known is probably the economically oriented 1970 study by Stephen Breyer (then a professor, now a federal appellate judge) who argued that the “case for copyright protection is weak,” particularly as applied to certain classes of works.\footnote{3. Stephen Breyer, \textit{The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs}, 84 \textsc{Harv. L. Rev.} 281, 350 (1970) [hereinafter Breyer, \textit{The Uneasy Case}]; \textit{see also id. at} 283-84; Stephen Breyer, \textit{Copyright: A Rejoinder}, 20 \textsc{UCLA L. Rev.} 75 (1972).} The trend has continued. In 1988 William Fisher published a lengthy article recommending that the “fair use” doctrine\footnote{4. The “fair use” doctrine privileges acts that would otherwise constitute copyright infringement. Congress recognized this judicially created and protean doctrine in the Copyright Act of 1976, 17 U.S.C. § 107 (1982) (permitting “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”).} be reformulated to deny enforcement of copyright claims that conflict with particular economic
or utopian goals.\textsuperscript{5} Even more recently, Tom Palmer has attacked all intellectual property as illegitimate for giving rights beyond what would be available under the common law of tangible property and contract.\textsuperscript{6}

Most of the critics of intellectual property have not challenged the concept of private property in other contexts. This pattern is the reverse of what might be expected, since many of the most common criticisms addressed to the institution of private property are less applicable to authors' claims over their works. For example, private property has been strenuously criticized on the ground that it impedes full human development by allowing workers to be separated from the fruits of their labor.\textsuperscript{7} Patent and copyright, by contrast, extend the power of creative persons to control what they have made.\textsuperscript{8} Nevertheless, in some quarters intellectual property has been hard put to hold its own.

The special burdens scholars place on copyright may have their origins in public perception.\textsuperscript{9} There is often a distrust of copyright when its compulsions conflict with the usual expectations people have of the freedoms they should be entitled to exercise over their physical posses-

\footnotesize


7. See, e.g., ALAN RYAN, PROPERTY AND POLITICAL THEORY 160-66 (1984) (examining Marx's view that systems of production in which "property as capital . . . is in control" frustrate humankind's need for creative work. Id. at 163-64).

8. The primary protection that intellectual property law gives creators is a legal right against those who would use or copy the work without permission. That right can be employed as a tool of creative control. However, it is also a form of wealth. Subject to some limitations, notably the inalienable power to terminate copyright grants, see note 143 infra and accompanying text, creators can sell this wealth. Since intellectual property law can ameliorate but not eliminate underlying disparities in bargaining power, economic need might induce an impetuous author or inventor to part with control over her work, and even to give up the liberty to use it, perhaps in return for fairly small rewards. Thus, although intellectual property improves the creative person's position, it can guarantee neither adequacy of compensation nor continuation of control.

The issues raised by the transferability and employer ownership of copyright are outside the scope of this article. By and large, I treat the creative person as the copyright holder, and do not focus on the special issues that might be raised when the copyright holder is an employer or assignee. This should not significantly distort my arguments since neither the normative issue most directly implicated by these distinctions (namely, the "personality" interests served by copyright) nor empirical issues are the focus here. All that is necessary for the instant analysis is that creative persons receive some increased potential for control and reward from copyright, which they certainly do. I have therefore thought it beneficial so to simplify the discussion and reserve the questions raised for another time.

For further discussion of the varying roles of creators and others under copyright, see, e.g., BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 6-9 (1967) (suggesting that publishers rather than authors were the intended beneficiaries of England's first copyright statute); id. at 74-75 (suggesting that copyright also "serve[s] the material expectations and psychological cravings of the individual creative worker").

9. For a general discussion of the role that lay perceptions have played or should play in the development of property law, see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 88-167 (1977).
In everyday experience, when people who buy records, video cassettes, and computer programs are told not to use their own home machines to make copies of them, or when radio listeners are told it might be unlawful for them to tape music off the air, there is often a feeling of unfair restriction. Another source for popular unease regarding intellectual property is that one need climb no fences to make copies of intellectual products. The restraints are obviously artificial, making the state's hand visible in a way a physical barrier does not. One knows one is doing something wrong when one tries to sneak into a neighbor's house or pick the lock of another's automobile; it may not seem so obviously wrong to tape a musical recording or duplicate a computer program that is already in hand. In addition, an act of copying seems to harm no one. There is no perceptible loss, no shattered lock or broken fencepost, no blood, not even a psychological sensation of trespass. As a result of all these factors, ordinary citizens may perceive a copyright owner's intangible interest as imposing an "extra" restriction, limiting their liberty in a way that ordinary property does not.

Legal scholars show a parallel unease. Although lawyers and theorists have long recognized that property is not a matter of touchable "things" but rather a set of rules governing human relations in regard to resources, some commentators are concerned that certain objects of intellectual property law are not sufficiently "thinglike" to be the subject of "ownership." Thus, doubts about copyright often have a

10. As one commentator observed, "By the time the Supreme Court rendered its decision [Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (the Betamax case)], much of the population seem[ed] to have concluded that it was perfectly appropriate behavior [to use VCRs] to record copyrighted programs broadcast over the public airwaves." Fisher, supra note 5, at 1732.

11. Although the Supreme Court has ruled that certain off-the-air home videotaping of television broadcasts is fair use, Sony Corp., 464 U.S. at 417, it is not yet clear whether home audio taping, with its arguably greater potential for harm to the copyright owner, is entitled to the same treatment, see 3 Melville Nimmer & David Nimmer, Nimmer on Copyright § 13.05(F)(5)(b)(ii) (1988).

12. On the role of "harm" and "benefit" in copyright, see text accompanying notes 190-202 infra.

13. The Supreme Court has thus held that intangible interests can be "property." Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (trade secrets are "property" subject to the protection of the fifth amendment takings clause). The Court wrote:

It is conceivable that [the term 'property' in the takings clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

Id. at 1003 (quoting United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945)); see also Morris Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 12 (1928).

14. Timothy Terrell and Jane Smith present a sophisticated variant of such an approach; they usefully concentrate not on physicality but on specificity. They have suggested that the right of publicity so lacks boundaries and specificity that it should not be treated as an inheritable property right, but that other intellectual property rights might not manifest this deficiency. Timothy P. Terrell & Jane S. Smith, Publicity, Liberty, and Intellectual Property: A
remarkably *spatial* dimension. For example, Justice Holmes opined:

"[Copyright] restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong."¹⁵

Running through much of the commentary seems to be the perception, whether spoken or unspoken, that intellectual property is somehow a "sport," a statutory exception to the common law pattern, imposing unique restraints on liberty.¹⁶ Some critics seem to think that, as a moral matter, consent by the individuals affected is the only sufficient ground for imposing legal restraints on copying.¹⁷ As with the lay perception, at bottom there seems to be a feeling that having intellectual property rights is less natural than having tangible property rights, and that somehow the compulsions inherent in copyright require special justification.

One can further speculate about the reasons for such an attitude. History may fuel it. In England and on the Continent, governments sometimes did grant "exclusive rights" over printing and manufacture for unsavory ends, such as censorship.¹⁸ In my view, the origins of intellectual property raise questions quite separable from the issue of its

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¹⁵. White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring). Justice Holmes argued further that because of this intangibility, copyright "could not be recognized or endured for more than a limited time" and is therefore uniquely "a product of statute." *Id.*

¹⁶. "Copyright law is usually treated as an offshoot of patent law—as one of the two *queer branches* of our jurisprudence in which, by an exception depending on statute, intangible ideas are protected." Kenneth Umbreit, *A Consideration of Copyright*, 87 U. Pa. L. Rev. 932, 932 (1939) (emphasis added).

¹⁷. See, e.g., 2 Murray Rothbard, *Man, Economy, and State: A Treatise on Economic Principles* 652-60 (1962). Rothbard favored rights against copying, apparently on the ground that creators could bargain with potential copyists as a condition of physical access and obtain consensual no-copy agreements from them. *Id.* at 653-55. In his view, the copyright notice reflected such an agreement between authors and purchasers of copies. *Id.* at 654. He opposed rights against independent recreation, such as appear in patent law, because an independent inventor does not need to bargain with the original inventor and thus would have no reason to bargain away his freedom of invention. Tom Palmer takes such a view one step further. Palmer, *supra* note 6. Palmer opposes both copyright and patent, and he argues for limiting creative persons to the rights that they could extract through contract from the law of tangible property. I discuss these consent-oriented positions at text accompanying notes 313-388 *infra*.

¹⁸. See, e.g., B. Kaplan, *supra* note 8, at 3-9 (origins of copyright in England).
present functioning; but the circumstances under which the doctrines first appeared may leave a residue of doubt.19 Also, it is conceivable that a preference for physical over intangible claims reflects unchangeable aspects of human psychology.20 Or the attitude may simply be a habit of mind left over from a simpler age, when reprographic technology, and laws to control it, were not part of everyday life.

Whatever its sources, the unease with intellectual property has conceptual components that this article will analyze. For example: Are the compulsions of intellectual property really different from what appears in other areas of the law? What importance should tangibility have? Has the perception that intellectual property is "different" pushed scholars to judge the institution by inappropriate or unduly demanding criteria?

The question of appropriate criteria is raised in particular by the economic commentary on intellectual property, where a search for special justification is discernible. That economics should be a focus of attention is unsurprising, since both copyright and patent law are seen as serving primarily economic incentive functions.21 What may be sur-

19. Thus, Tom Palmer argues that "[m]onopoly privilege and censorship lie at the historical root of patent and copyright." Palmer, supra note 6, at 264 (footnote omitted).

20. See, e.g., ROBERT ARDREY, THE TERRITORIAL IMPERATIVE: A PERSONAL INQUIRY INTO THE ANIMAL ORIGINS OF PROPERTY AND NATIONS (1966) (suggesting that humankind is a "territorial species" for which physical space has a unique importance).

21. The constitutional clause is usually taken to indicate that the primary goal of copyright and patent law is to provide incentives: Congress is authorized to give authors and inventors rights of limited duration "To promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. Justice Stevens wrote that the Constitution authorizes Congress to convey limited "monopoly privileges" "to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984).


Several foundational works provide the background economists draw upon when analyzing intellectual property questions. In one of these, Harold Demsetz presents the "internalization of externalities" as the key function of property. Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 348 (May 1967) (papers & proceedings). Note that copyright allows authors to capture ("internalize") the payoff from benefits their works generate. In addition, intellectual products have what are known as "public goods" characteristics: They can be shared over a fairly broad range of use without diminishing any one user's enjoyment, and it can be difficult to exclude nonpayers from sharing them. See Gordon, Fair Use,
prising is that economic critics have spent relatively little time examining how copyright facilitates the evolution of economic markets,22 as compared with the attention they have devoted to examining flaws in the markets that have evolved. In particular, academic critics have expressed strong concern that intellectual property’s incentive effects for encouraging new works might be too weak to outweigh its so-called “monopoly” effects on resource allocation.23 Despite inconclusive em-

supra note 14, at 1610-12 & nn.65-73. Private markets do not reliably provide optimum supplies of “public goods,” and it is often argued that this failure justifies some kind of governmental intervention either to provide the goods directly (e.g., in the case of roads or national defense) or to restructure legal rights to create the excludability on which private markets depend (e.g., copyright). See Otto Davis & Andrew Whinston, On the Distinction Between Public and Private Goods, 57 Amer. Econ. Rev. 360 (May 1967) (papers & proceedings) (general discussion of public goods); Paul A. Samuelson, The Pure Theory of Public Expenditure, 36 Rev. Econ. & Statistics 387 (1954) (foundational analysis of public goods). Providing incentives for the creation of new works is not the only economic role intellectual property plays. See Edmund Kitch, The Nature and Function of the Patent System, 20 J.L. & Econ. 265 (1977) (suggesting that patents are also important in order to organize efficiently the development and exploitation of existing inventions); Robert Denicola, Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols, 62 N.C.L. Rev. 603, 637-41 (1984) (applying a similar analysis to trademarks).

Note that although the Supreme Court’s analyses continue to treat the provision of economic incentives to produce new works as important, an “authors’ rights” or fairness-based strain of analysis has also emerged. See Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 546 (1985); note 449-450 infra and accompanying text.

22. Some economic treatments sympathetic to copyright do exist, however. See, e.g., Landes & Posner, supra note 21.

23. Intellectual property law gives creators whose works have no perfect substitutes the power to increase their revenues by restricting their production of copies and charging for each a price in excess of marginal cost. At the extreme, this can amount to monopoly power. Economists discussing monopoly usually consider the decrease in quantity as the evil to be avoided. As a result of monopoly pricing, fewer consumers will purchase copies than would under conditions of perfect competition. See Jack Hirschleifer, Price Theory and Applications 238-44 (3d ed. 1984); Fisher, supra note 5 at 1700-04; Gordon, Fair Use, supra note 14, at 1605-14.

Perfect price discrimination would make it possible to induce the creator to produce both the work and the optimal number of copies. Of course, this would also enable the producer to capture all the consumer surplus. See Harold Demsetz, The Private Production of Public Goods, 13 J.L. & Econ. 293 (1970).

The possibilities of price discrimination aside, intellectual property’s ability to generate incentives does bring with it some quantity reduction. The notion of copyright’s causing a decrease in the number of copies purchased may seem odd, however, since the creator may not have fashioned the particular intellectual product at all had she not been able to look forward to the economic returns made possible by copyright. In other words, sometimes the alternative to copyright may be zero copies rather than more copies. For a model of quantitative analysis that takes this potential paradox into account, see Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21, at 186-88. Copyright supporters tend to argue that any short-run consumer loss that results from monopoly effects is more than compensated for by copyright’s ability in the long-run to cause new works to be created. Copyright critics tend to make the opposite empirical claim.

The balance between incentive and restriction is not always the same. For example, any particular book, movie, or invention is likely to face competition from other books, movies, or inventions which are near but not perfect substitutes. The extent to which monopoly power is present in any particular case is an empirical question. See Edmund Kitch, Patents: Monopolies or Property Rights?, in The Economics of Patents and Copyrights, supra note 21, at 31.

In addition to the quantity issue, the matter of price has normative implications. In everyday life, one common judgment of unfairness is that something costs more than it “should.” Macaulay suggested there is a moral aspect to the shift in consumer buying patterns that can
empirical evidence, a fairly wide range of encouragement-oriented commentary centers on the possibility that the institution of intellectual property is not carrying its economic weight.

This article will address three issues inherent in intellectual property criticism: (1) the descriptive question of whether the structure and function of intellectual property is essentially different from, or consistent with, the patterns found in other areas of the law; (2) the normative question of whether copyright should be condemned because it imposes state-enforced restraints on potential copiers; and (3) the normative question of the proper role that economic analysis should play in occur as books become more expensive: Copyright “is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures.” T. Macaulay, supra note 1, at 201. Of course, as book prices go down, there is no guarantee that the consumers will spend the cost savings in ways that would please Macaulay or anyone else; there are many variant noneconomic conceptions of what is socially desirable.

24. Part of the difficulty is methodological. See George Priest, What Economists Can Tell Lawyers About Intellectual Property, in THE ECONOMICS OF PATENTS AND COPYRIGHTS, supra note 21, at 19 (“[I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property.” Id. at 21).

25. See notes 396-401 infra and accompanying text. Judge Breyer’s work represents the leading modern analysis suggesting that copyright might not be economically justifiable. See Breyer, The Uneasy Case, supra note 3 (arguing that in several areas copyright is so unnecessary to securing remuneration that portions of the proposed statutory revisions then under consideration that would grant additional protections to authors would be inadvisable); see also Breyer, Copyright: A Rejoinder, supra note 3. For an earlier analysis reflecting similar judgments about the economics of copyright, see Arnold Plant, The Economic Aspects of Copyright in Books, 1 ECONOMICA (n.s.) 167 (1934) (arguing that publishers have ample means other than copyright to obtain remuneration and suggesting that instead of a long copyright term, a compulsory license arrangement should be imposed five years after publication so that “the public would no longer have to wait more than five years for cheap copies of the books they wish to buy.” Id. at 196); see also Robert Hurt & Robert Schuchman, The Economic Rationale of Copyright, 56 AM. ECON. REV. 421 (May 1966) (papers & proceedings) (stating what came to be the standard economic analysis—weighing incentive effects against restrictions on access—and concluding that the welfare effects of copyright required more empirical investigation).

In addition, there is some concern that any extra profits accrued by virtue of the intellectual property monopoly may not aid incentives toward creation but rather may be “dissipated through competition for the monopoly.” S.J. Liebowitz, The Betamax Case 30 n.4 (Aug. 16, 1984) (unpublished manuscript) (on file with the Stanford Law Review).


Much of the debate concerning the economic aspects of copyright surfaces within the context of fair use law. For varying uses of economics in that context, see Fisher, supra note 5, at 1698-1744 (analyzing how a court might restructure the law of infringement and fair use if its goal were solely to maximize economic value); Gordon, Fair Use, supra note 14 (suggesting that efficiency gains can justify fair use where, because of market failure, enforcing the copyright would not yield the copyright holder substantial revenues); Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21 (suggesting that copyright protection may be undesirable and “fair use” preferable when “the benefits of increased consumption appear to outweigh the harm from reduced production.” Id. at 188); see also Adelstein & Peretz, supra note 21 (evolutionary approach).
justifying copyright. On the first issue, I will show that the perception of difference is largely erroneous and that copyright is actually more consistent with the common law pattern than a lack of copyright would be. On the second issue, regarding the evils of compulsion, I will argue that consent cannot stand alone as a criterion of moral adequacy. On the third issue, economics, I will show that the special economic tests to which most critics subject copyright are premised on questionable foundations. In my view economics provides an important descriptive tool for understanding the operation of copyright law, and certain economic criteria can even provide useful guidance in interpreting some areas of ambiguity or “open texture” in the current statute. But I argue that “wealth maximization,” as an aggregative criterion that disregards the possibility of independently derived individual rights, cannot serve as an acceptable foundation for the initial assignment of entitlements. The article concludes that inquiries based on consistency, consent, and economics do not impair, and often offer affirmative support to, the legitimacy of intellectual property.

There are other important issues, notably the possibility that intellectual property rights may inhibit freedom of speech. Plaintiffs in several recent copyright infringement suits appear to have been motivated at least in part by the copyright owner’s desire to silence personally objectionable views, to forestall discussion of a subject the copyright owner wanted kept out of the public eye, or to control pub-

26. For example, Lord Macaulay argued that copyright might result in works being “totally suppressed or grievously mutilated.” T. MACAULAY, supra note 1, at 204. He was concerned particularly with suppression that might occur when the copyright had passed to heirs unsympathetic to the author’s works. See id. at 204-08. For commentary concerned with suppression issues in the copyright area, see, e.g., Robert C. Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 CALIF. L. REV. 283 (1979); Paul Goldstein, Copyright and the First Amendment, 70 COLUM. L. REV. 983, 988-90 (1970); Pamela Samuelson, Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases, 57 TUL. L. REV. 896 (1983).


28. A corporation controlled by Howard Hughes purchased the copyrights to several articles that had been written about him and then used them to attack an “unauthorized” biography with a copyright infringement suit. W. PATRY, supra note 27, at 73; see also id. at 72 (discussing “allegations that Hughes was attempting to suppress perceived unfavorable comments about him”). Hughes may also have been motivated by his ironically well-publicized
lic perception of the copyrighted work. Copyright law currently contains doctrinal protections for the free speech of copyright defendants, such as the “fair use” doctrine, and it would be worthwhile to discuss whether additional limitations are mandated by the public’s first amendment entitlements. This article, however, pays little attention to the first amendment question. Though it is my belief that the public interest in free speech should indeed “trump” conflicting intellectual property rights in appropriate cases, the quest for a determinate set of criteria capable of identifying all such cases of conflict would take us too far afield from my inquiry into copyright’s general legitimacy.

Thus, this article concerns itself with a limited set of questions, such as: whether it is appropriate to place on intellectual property a special burden of justification not imposed on other forms of property; whether the burden most often placed upon intellectual property, that it prove itself economically, is itself justifiable as applied by those commentators whom this article dubs the “encouragement theorists”; and whether the alternative proposed by intellectual property opponents has any clear claim to superiority. Even so limited, the field of inquiry is broad. To keep the discussion within manageable bounds, the discussion will focus on copyright law and will refer to other intellectual property doctrines (such as patent and trademark) only for comparison.

The article is divided into three parts. Part I is primarily descriptive. Responding to the perception of some critics that copyright and its kindred doctrines are out of kilter with the common law, Part I draws many structural and functional parallels between copyright and the common law of tangible property and torts. Among other things, I suggest that the set of boundaries provided by copyright serves largely the same functions as the physical boundaries of tangible property. Part I also gives persons previously unfamiliar with intellectual property law an overview of the area. Overall, Part I addresses the question of copyright’s consistency with common law patterns.

Part II briefly surveys several alternative legal structures for handling intellectual property questions. Opponents of intellectual prop-


30. The courts have been generally reluctant to embrace a distinct first amendment privilege, relying instead on the “idea-expression dichotomy” and the fair use doctrine to protect defendants’ free speech interests. See New Era Publications, slip op. 2863, 2882.

31. Even from an economic point of view, the utility of copyright enforcement is questionable when first amendment issues are involved. See Gordon, Fair Use, supra note 14, at 1630-32 (allocation of nonmonetizable interests such as free speech should not be tied to market-based intellectual property system); id. at 1632-35 (courts should tend to find fair use where authors seek to use copyright law to censor persons who wish to comment negatively on the author’s work or to investigate or report on the author).
Merits of Copyright

Property typically argue that members of the public should be privileged to copy any work freely as long as they violate no independent law (such as restraints arising out of tangible personality law, privacy law, or contract) when they obtain and make copies. Part II compares this option, which I denominate "copy-privilege," with other structural alternatives and shows why it is the one most often favored by intellectual property opponents.

Part III, the heart of the piece, presents a primarily normative comparison between copyright and copy-privilege, its most likely competitor. The first two sections of Part III deal with consent theory. The part begins by showing how the nature and sources of authors' power over their works would differ in a world with copyright and in a hypothetical world where the only restraints on copying were those contractually agreed upon. I then advance the following propositions: The noncontractual restraints imposed by copyright are of the same nature as those imposed by other areas of the law; the central role played by the user's consent in copy-privilege does not make that regime morally superior to copyright; and the state's imposition of noncontractual restraints on resource use does not per se necessitate more justification than does the state's refusal to intervene.

Part III then turns to the economic arguments. Rather than attempt to redebate the inconclusive empirical evidence, the discussion outlines the logic underlying most efficiency arguments against copyright. I argue that the normative base of the "encouragement" theory is not dictated by the foundational premises of welfare economics, and that it lacks any principle of distributional justice sensitive to individuals' claims as individuals. Further, I show that the distributional principle which, if normatively acceptable, would come closest to justifying "encouragement" theory's results is itself at odds with the common law—including the doctrine in restitution law that volunteers and intermediaries should ordinarily have no right to compel payment for their efforts. I also suggest that the "encouragement" critics take a position that is fundamentally at odds with moral notions of desert. Finally, I show that copy-privilege is inherently arbitrary, making the relations between authors and users depend largely on serendipitous physical circumstance, while copyright pays due respect to the intangible domain.

Through the route I have described, I seek to demonstrate intellectual property's legitimacy. I aim not to show that all forms and extensions of authorial rights are good or desirable, but that the decision to give creators some legal rights to control or be paid for certain

32. For an extended discussion of the limitations I believe should curtail intellectual property rights, see W. Gordon, Creative Labor, supra note 14 (arguing against recent judicial extensions of intellectual property rights and for reserving to the public a significant range of privileges to use others' creations).

33. Since this article analyzes whether authors should have any legal rights in their in-
uses of their creations embodies the same kind of structural, functional, and normative choices that are sewn into the legal fabric elsewhere.

I. ENTITLEMENT STRUCTURES: STRUCTURAL AND FUNCTIONAL CONSISTENCY

To begin the exploration of intellectual property's relation to the common law of tangible property and torts, this part reviews the set of entitlements that, taken together, ordinarily constitute property in tangible resources. It then reviews the set of entitlements that make up a federal copyright and compares the ways in which the entitlements that constitute intellectual property resemble, and differ from, those in the common law. Part I concludes that the commonalities in structure predominate over the differences. Part I then analyzes the distinct economic functions played by each component of the entitlement package and argues that intellectual and tangible property serve similar economic roles.

A. Entitlement Structures: Rights, Privileges, and Powers

1. Entitlement structures in tangible property and torts.

When the courts and laypersons speak of some tangible thing as being someone's "property," they usually mean that the person designated as the "owner" has rights to exclude other people from the resource and to obtain relief if they cause intentional or negligent damage to it, exclusive powers to transfer the property to others, and privileges to use the property to suit her purposes. Justice Holmes described the package of rights and privileges this way:

Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject-matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all, and is accountable to no one.

34. Property also gives owners a "privilege" to exclude. That is, one can not only sue trespassers, but one can also build fences to keep them out. See text accompanying notes 246-254 infra (distinguishing rights and privileges).

35. For a brief but relatively formal review of some of the entitlements that constitute typical fee simple ownership of realty under the common law, see Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710, 746-47 (1917). Varying and much more complex definitions of property have been suggested, see, e.g., Timothy P. Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861, 865-74 (1982), but these three basic entitlements (rights of exclusion, powers of transfer, and privileges of use) capture the essence of property for our purposes.

36. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 246 (1881). The Holmes view is revisited in notes 347-351 infra and accompanying text. Frank Michelman writes of a "pure" ownership model:

To be 'full owner' of something is to have complete and exclusive rights and privileges
Bruce Ackerman's description of the ordinary concept of property is little different:

A particular thing is Layman's thing when: (a) Layman may, without negative social sanction, use the thing in lots more ways than others can; and (b) others need a specially compelling reason if they hope to escape the negative social sanctions that are normally visited upon those who use another's things without receiving his permission.37

As the following discussion makes clear, copyright exhibits the same pattern: A copyright proprietor is privileged to use her work in many ways others are not and has the right to forbid certain uses of the work by others. In addition, a copyright owner, like any other owner, has certain powers to transfer her entitlements to others.38

Using the terms right, duty, privilege, and power in the precise senses employed by Wesley Hohfeld illustrates the property ownership pattern most clearly.40 This section defines the Hohfeldian categories and then uses them to examine the pattern of jural relations that together constitute “property.” This survey is followed by a parallel analysis of copyright. Hohfeld’s terminology, which illuminates the fact that all rights limit liberty, will help us focus on the question of whether the limitations on liberty imposed by copyright differ from those imposed by other forms of property rights.41

The rights of tangible property ownership. In the Hohfeldian lexicon, a right is an entitlement to have the government interfere on one’s behalf. For these purposes, right has no connotation of transcendency, natural law, or constitutionality. It is a nonnormative, positive term that simply represents that courts and other government agents will take action.

Where one party has a right, those against whom the right operates over it—the 'rights' meaning that others are legally required to leave the object alone save as the owner may permit, and the 'privileges' meaning that the owner is legally free to do with the object as he or she wills.


37. B. ACKERMAN, supra note 9, at 99-100 (footnote omitted).
38. This gender choice was made simply as a matter of convenience. In this article both masculine and feminine pronouns will be used when no particular person is being discussed.
39. Ackerman omits explicit mention of “rights of transfer” from his list because he views powers of alienation as a subset of the right to use the property. See B. ACKERMAN, supra note 9, at 100 n.11.
40. See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (W. Cook ed. 1929); Hohfeld, supra note 35; Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16 (1913) [hereinafter Some Fundamental Legal Conceptions]. When the Hohfeldian terms can be confused with the common ones, I emphasize the Hohfeldian terms with quotation marks or italics.
42. "Entitlement" as used in this section is simply a catch-all term for legal relations.
have a duty to respect it. That means that rights and duties are correlates, two faces of the same legal relation; for a right to be meaningful, someone somewhere must have a duty not to infringe it. Tort law, with its focus on duties, thus teaches a great deal about property, for often a property right may be best understood by tracing the duty it creates. For example, if negligence law specifies that persons have a duty to use reasonable care toward each other’s property, then one of an owner’s entitlements is the right to be compensated for negligent damage to the property.

This logical relationship between rights and duties makes clear that, while an owner’s set of rights may increase his security, and thus his own personal sense of liberty, the duties so created necessarily restrict the freedom of others. Every question about private property is therefore also a question about public restraint.

Property owners have at least three potential categories of rights worth mention: rights of exclusion, rights against harm or interference, and rights over the benefits their property yields. The right to exclude is generally agreed to be the most important of the owner’s entitlements. The right to exclude entitles the owner to call upon the police to eject or arrest trespassers or to call upon the courts for injunctive relief or damages against intrusions on the property. The public’s corresponding duty is to refrain from entry.

The right to exclude is broad. Any intentional intrusion onto the physical thing owned is ordinarily a sufficient basis for suit. Thus, a plaintiff charging trespass need not prove that the intruder has caused damage or done something socially undesirable on the land in order to maintain a cause of action. Further, the trespasser will be liable for

43. Some Fundamental Legal Conceptions, supra note 40, at 30-32.
44. See id. at 32. Hohfeld writes: “[If X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.” Id. Similarly, if X has a right that others use a particular standard of care when dealing with his property or a right to hold his property free from intentional injury, then others have a duty to use that care in regard to X or to avoid inflicting such injury.
45. Torts like trespass, conversion, and negligent infliction of damage to property are the litigative reflection of property rights; and in tort litigation those rights are concretized. In a trademark opinion, Justice Holmes evocatively wrote of this linkage between torts and property: “[H]is idea is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary.” Beech-nut Packing Co. v. P. Lorillard Co., 273 U.S. 629, 632 (1927).
46. See, e.g., Cohen, supra note 13, at 12 (the “essence” of property “is always the right to exclude others”); see also Carpenter v. United States, 108 S. Ct. 316, 321 (1987) (“exclusivity is an important aspect of confidential business information and most private property for that matter”); Nollan v. California Coastal Comm’n, 107 S. Ct. 3141, 3145 (1987) (“the right to exclude [is] one of the essential sticks in the bundle of rights that are commonly characterized as property” (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
47. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts § 13, at 70 (5th ed. 1984) [hereinafter Prosser & Keeton]. At one point unintentional as well as intentional intrusions onto land also gave rise to virtually automatic liability. But in most jurisdictions today, realty owners only have rights against those accidental intrusions or interferences that cause harm and satisfy generally applicable criteria for liability, such as negligence. See Restatement (Second) of Torts § 165 (1965)
intentionally setting foot on the owned land even if the boundary crossing occurred through a reasonable mistake.\textsuperscript{48}

A landowner’s rights against intentional but nonintrusive harm are somewhat more limited. Where no entry has interfered with possession, for example, intentional interference with an owner’s ability to use and enjoy property will give rise to an actionable private nuisance “only if the interference proves to be substantial and unreasonable.”\textsuperscript{49}

Also, the type of interference with the owners’ expectations can make a difference; thus, economic harm is not easily recoverable when it stands alone and is most reliably recoverable when it is parasitic on physical damage.\textsuperscript{50}

Rights to exclude and against interference also find protection under the fifth amendment takings clause, which in part functions as a sort of public tort law governing the redress available to owners whose interests in land have been subject to certain harms at the government’s hands. This protection is particularly strong for intrusions. When a wire is physically placed on an apartment building, a court might order compensation for the intrusion even if it caused virtually no harm to the building’s value.\textsuperscript{51} “Takings” law places a somewhat lesser emphasis on the importance of rights against noninvasive harm. For example, a local government’s prohibition against mining gravel might eliminate virtually all of the economic value in a previously operating gravel pit, yet the courts might rule that this nonintrusive governmental act does not constitute a “taking” requiring compensation.\textsuperscript{52}

In addition to rights against intrusion and harm, owners also have some rights to derive benefits from their property. But these are relatively weak and generally parasitic on the intrusion right. Thus, when someone receives a benefit from another’s property without harming it, the owner ordinarily cannot recover\textsuperscript{53} unless the benefited party has also physically interfered with the property either by entry (for land) or

\begin{itemize}
\item harmful intrusions caused by recklessness, negligence, or ultrahazardous activity; \textit{id.} § 821 (1979) (harm); \textit{id} § 822(b) (1979) (unintentional nuisance).
\item \textit{PROSSER & KEETON, supra note 47, at 74-75.}
\item \textit{id. at 70.}
\item \textit{See, e.g., RESTATEMENT (SECOND) OF TORTS} § 766C comment b (1979) (“parasitic” compensatory damages may be recoverable where pure economic harm would not be). For a general discussion of this issue, see Robert L. Rabin, \textit{Tort Recovery for Negligently Inflicted Economic Loss, 37} \textit{STAN. L. REV.} 1513 (1985).
\item \textit{See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982} (treating minor physical intrusion as a taking); \textit{see also} Nollan v. California Coastal Comm’n, 107 S. Ct. 3141, 3145 (1987} (treating easement as a physically invasive taking). \textit{See generally John M. Payne, From the Courts, 16} \textit{REAL EST. L.J.} 258, 263 (1988} (interpreting \textit{Nollan} in light of \textit{Teleprompter}).
\item \textit{See Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).}
\item \textit{See John W. Wade, Restitution for Benefits Conferred Without Request, 19} \textit{VAND. L. REV.} 1183 (1966} (persons who voluntarily improve their own property cannot ordinarily require payment from neighbors who incidentally receive benefits as by-product).
\end{itemize}
Generally, strangers who draw benefits from land can be sued successfully only where the owner can prove a boundary crossing. If that can be proven, intruders who cause no harm can be required to pay not only nominal damages but potentially substantial sums in restitution if they have either profited or saved money by using the other’s land. When there is no intrusion, a stranger’s mere benefit from (“use of”) another’s property does not ordinarily give rise to a right of action.

For example, many motels and restaurants may deliberately locate near a tourist attraction in order to take advantage of its popularity without giving the benefit-generating landowner any right to extract payment from them for such use. By contrast, as previously mentioned, a plaintiff landowner may be entitled to a significant recovery from a defendant who has used and entered the land. Thus, the law of physical property tends to use entry to distinguish between those benefits which the property owner has a right to control and those over which the owner has no legal right of recapture.

Powers of transfer. In addition to having rights to state protection, owners generally have powers to transfer their rights, powers, and privileges over the resource to others. The Hohfeldian term power denotes an ability to alter legal relations. Ordinarily, only owners have powers


56. Even with regard to tangible property, the law is somewhat uneven. See Dan B. Dobbs, Law of Remedies 372-75 (1973) (restitutionary remedies for trespass to land); id. at 416-19 (tangible personality). Most commentators seem to agree “that a defendant who trespasses on the plaintiff’s land should be liable to make restitution to the plaintiff in respect of both profits which he has earned and expense which he has saved thereby.” Robert Goff & Gareth Jones, The Law of Restitution 16 (1966); see also id. at 431-33.

57. See Edwards v. Lee’s Adm’r, 265 Ky. 418, 96 S.W.2d 1028 (1936) (plaintiff held entitled to a share of the proceeds where defendant charged fees for tours of a cave that extended under plaintiff’s land).

58. See Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946) (plaintiff held entitled to compensation despite the absence of harm when defendant transported more coal over plaintiff’s land than their existing arrangement allowed).

59. Under current law the owners of tourist attractions are not helpless. Those who wish to capture the “full” value of their enterprises try to purchase nearby land and build hotels and restaurants to receive the profits that the tourists bring. This is a form of “internalization by contract”; to the extent such internalization occurs, separate property rights over the benefits themselves are economically less necessary.

60. See notes 56-58 supra.
to affect the legal status of a resource.\textsuperscript{61}

A power, too, is an entitlement. While we often take the ability to make legally enforceable contracts for granted, as if it were the inevitable concomitant of the human propensity to make agreements, it is a powerful thing indeed to be able to enlist the state's might to enforce the allocations which two or more people make among themselves. Similarly, making a gift may seem the most natural thing in the world, as if the power of gift-giving flowed inevitably from the desire to be generous. But absent governmentally granted powers, sellers or donors could do no more than forbear from asserting their own claims on the thing transferred.

\textit{Privileges of use}. The last important category of entitlement to discuss is privileges. A privilege is an entitlement to be free of governmental interference or compulsion. For example, in the law of intentional torts, a person who uses a gun in self-defense is privileged to do so, meaning that the courts will not provide a cause of action against that person for harm so caused.

Although this category is most familiar from intentional tort law, the Hohfeldian term "privilege" is applicable whenever someone's actions would not violate existing rights. Thus, where negligence law governs, any unintentional and nonnegligent act is privileged, for an injured plaintiff has no right to use such an act as the premise of a successful damage suit. Furthermore, the policies underlying various privileges are often consistent with each other. Many privileges are based on the substantive desirability of the privileged act. For example, compare the absence of negligence, which will defeat a negligence suit, with the presence of a privilege such as "self-defense," which will defeat an intentional tort claim. Though each has different procedural implications,\textsuperscript{62} the two share a conceptual unity. A nonnegligent act is often described as not wrongful, as socially desirable, or, in economic terms, as yielding more benefits than costs.\textsuperscript{63} Most privileges in intentional tort law similarly involve actions, such as violence committed while defending oneself against unprovoked attack, or remaining on another's

\begin{footnotesize}
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\item\textsuperscript{61} In Hohfeld's scheme, where there is no power, there is a disability. Ordinarily, nonowners of an owned resource are disabled from affecting its legal status. They can physically destroy it; but ordinarily the law will not recognize their efforts to sell it, encumber it, or give it away. When others are disabled from affecting someone's legal relations, Hohfeld describes that person as having an immunity. Both physical and intellectual property ownership give an owner a large degree of immunity from nonowner powers. I do not list immunities separately as property entitlements since they are not particularly important for our purposes. Rather, the article generally employs the term "exclusive powers" to indicate that no one but the owner has powers over the resource.
\item\textsuperscript{62} The intentional tort defendant ordinarily has the burden of proving facts entitling her to the privilege, while in the negligence suit the jury will find the defendant nonnegligent unless the plaintiff proves otherwise.
\item\textsuperscript{63} See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 32-33 (1972); Henry T. Terry, Negligence, 29 Harv. L. Rev. 40 (1915).
\end{itemize}
\end{footnotesize}
land in cases of emergency, that are judged morally, economically, or otherwise desirable. Both tort doctrines "privilege" desirable behavior. Another type of "privilege" is based not on the substantive desirability of the privileged act, but on the policy judgment that certain spheres of behavior are best left unregulated by government. This is the basis of many of the privileges in the Bill of Rights.

Privileges also exist in property law. A landowner may have a privilege to build a house, reservoir, or factory on his land, for example, or a privilege to mine it. If he has such privileges, then others have no legal right to call on the state to prevent him from exercising them. As a definitional matter, persons negatively affected by the owner's exercise of a complete privilege will have no right to an injunction or damages; if the owner's privilege is "incomplete," those negatively affected cannot stop the contested activity but can obtain a damage remedy.

Generally speaking, property owners have broad privileges to use and enjoy their property, or to let it go to waste, as they see fit. Defenders of private property tend to argue both that owners will use their privileges in ways that are socially desirable and that governmental noninterference with property management is itself a positive good.

But a property owner's privileges are not unlimited; on some oc-

64. One measure of desirability might be the pursuit of distributional or "other justice" goals. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1098-1105 (1972).

65. Thus, for example, the first amendment privilege to speak and publish is theoretically based not on the positive desirability of every statement that might be uttered under its protection, but rather on the belief that government should not be choosing between desirable and undesirable utterances.

66. Privileges that function as defenses to tort suits are sometimes distinguished as "complete" or "incomplete." See Francis H. Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 HARV. L. REV. 307 (1925). For example, the privilege of necessity in tort law is "incomplete"—the person with the privilege may use another's property, but she must pay for any damage intentionally caused in the process. See Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910). The holder of the "incomplete" privilege is subject to the opposing entitlement-holder's "incomplete" right to payment. Note that in Calabresi and Melamed's terminology, a similar distinction is captured by focusing on the mode by which entitlements are protected: They compare a "liability rule" that gives a remedy of monetary recovery with a "property rule" that gives a veto or injunctive remedy. Calabresi & Melamed, supra note 64.

One can describe compulsory licenses as granting incomplete privileges and persons owning property subject to compulsory licenses as possessing incomplete rights. Copyright law frequently requires compulsory licenses. See, e.g., 17 U.S.C.A. § 111 (West 1977 & Supp. 1989) (compulsory license for cable retransmission of copyrighted material); see also note 135 and text accompanying notes 135-136 infra.

67. But see text accompanying notes 69-90 infra (discussing limitations on use and non-use of property in general); text accompanying notes 147-166 infra (discussing limitations on use and nonuse of intellectual property).

68. See, e.g., Gordon, Fair Use, supra note 14, at 1605-10 (discussing the legacy of Adam Smith and its role in contemporary economic defenses of private property); see also the sources cited in id. nn.35 & 59 (certain political and economic arguments in favor of property owners' independent decisionmaking).

69. See text accompanying notes 79-90 infra.
cassions the courts will indeed inquire into the use made of land. Thus, owners have some duties to the public.\textsuperscript{76} If a neighbor has a right that the owner not build a polluting factory, for example, or a right that the owner prevent any reservoir on his land from flooding the neighbor's mine shafts,\textsuperscript{71} then the owner has a duty to comply and no privilege to pollute or to allow his reservoir to leak. If strangers in emergencies have rights to enter the land, owners will not have the privilege to eject them.\textsuperscript{72}

2. Common law limits on ownership entitlements.

Property owners' rights to exclude, powers of transfer, and privileges of use are not unlimited.\textsuperscript{73} First, the privileges of others limit the rights that attach to ownership of land or tangible personality. For example, though owners may have many rights against intentional and intrusive harm, most jurisdictions give the public privileges to act reasonably even when reasonable acts accidentally cause intrusive harm to land. As a result, owners have no right to keep their real property secure from the unintentional and nonnegligent harms that others might inflict on it.\textsuperscript{74}

A property owner may not even have a right of redress against intentional entry to the land if the entrant acted pursuant to some recognized excuse or justification, such as the preservation of life or public necessity. Further, as mentioned above, when a stranger needs entry to someone's property greatly enough, the owner may not lose only a right of exclusion; the owner may also have a duty to refrain from interfering with the imperiled person's use of the land.\textsuperscript{75} Federal or state constitutional liberties may similarly limit property rights.\textsuperscript{76}

An owner's powers of transfer have their limitations as well. For

\textsuperscript{70} Definitionally, someone's duties arise where his privileges terminate and others' rights begin. Duties are the opposite of privileges.

\textsuperscript{71} See Rylands v. Fletcher, 1 L.R.-Ex. 265 (Ex. Ch. 1866), aff'd, 3 L.R.-H.L. 330 (H.L. 1868).

\textsuperscript{72} While a defendant who enters another's land out of necessity may be required to pay for any damage done, as in Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910), the entrant may be able to sue the landowner if the landowner tries to throw her off the land during the emergency. See, e.g., Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908) (landowner's demurrer overturned where his servant cut loose a boater's craft moored for safety from a storm).

\textsuperscript{73} Recall for example that Justice Holmes prefaced his description of property entitlements with the clause, "[w]ithin the limits prescribed by policy." See text accompanying note 36 supra.

\textsuperscript{74} See, e.g., Hammond v. Jenner, 20 Cal. App. 3d 528, 97 Cal. Rptr. 739 (Cal. Ct. App. 1971) (store owner not entitled to compensation where driver's negligence did not cause out-of-control vehicle's crash into storefront); RESTATEMENT (SECOND) OF TORTS § 166 (1965).

\textsuperscript{75} Ploof v. Putnam, 81 Vt. 471, 474, 71 A. 188, 189 (1908) (reversing demurrer for landowner whose servant had cast off plaintiff's boat into the water during a storm, even though the boat had moored without permission).

\textsuperscript{76} Thus, state constitutional law may give rights or privileges of entry to persons who wish to bring petitions into shopping malls. The mall owners may have no federal constitu-
example, the law will invalidate an owner’s attempt to control future disposition of his property that violates the rule against perpetuities; and some contracts regarding real and personal property are void as against public policy. 77 Furthermore, the owner’s powers to affect the property are not fully exclusive. As the doctrine of adverse possession exemplifies, strangers may occasionally have powers to affect ownership. 78 In addition, the government has several powers in regard to privately owned property, the most notable being the power of eminent domain and the power to require the owner to pay taxes on penalty of losing ownership.

Privileges are also limited. As already noted, owners have duties that limit their privileges of action; 79 and their privileges of inaction are also limited. For example, a landowner who neglects to make his land reasonably safe may be liable to an invitee who is injured; and owners who do not eject trespassers may eventually find that adverse possession has made their title unenforceable against the squatters. 80

As between private parties, the overall rule under the common law is that one is not privileged to act in ways that intentionally invade others’ legally protected boundaries, 81 or that do harm to others’ interests. 82 Although there are of course exceptions to this general approach, 83 the most noteworthy arising in the area of unintentionally caused harm, some theorists attempting to unify the various tort law


78. The Hohfeldian term “power” refers not only to an ability to form a binding contract but also to an ability to effect an alteration in legal entitlements. Thus, adverse possession is an exercise of “power,” for it results in loss of title. 7 Richard R. Powell & Patrick J. Rohan, Powell on Real Property § 1017 (1989). Since adverse possession requires some behavior by the “open and notorious” possessor, that possessor has some conditional power over the property; and the property owner’s immunity from the powers of others is correspondingly limited.

79. See text accompanying notes 69-72 supra.

80. See 7 R. Powell & P. Rohan, supra note 78, at 110-17 (adverse possession results in loss of title).

81. Harmless but intentional violations of boundaries have increasingly come to be treated as not only actionable, see Prosser & Keeton, supra note 47, at 75-77 (tresspass to land), but also as giving rise to potentially significant restitutionary recoveries, see, e.g., notes 54-58 supra and accompanying text; note 170 infra and accompanying text.

82. Regarding intentional harms, see Oliver Wendell Holmes, Jr., Privilege, Malice and Intent, 8 Harv. L. Rev. 1, 1-6 (1894) (general rule for intentional harms). As to unintentional harms, see Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973) (urging strict liability for all harms directly caused, subject to excuses and justifications); George F. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972) (urging liability for all harms resulting from nonreciprocal risk, subject to excuses and justifications); see also A.M. Honoré, Ownership, in Property: Cases, Concepts, Critiques 78, 85 (L.C. Becker & K. Kipnis eds. 1984) (property owners not entitled to use their property harmfully); Joseph L. Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 161-63 (1971) (suggesting that no compensation be owed for governmental restraints on previously privileged uses of land if those uses cause negative effects on other property).

83. See Singer, supra note 41 (discussing various privileges to do harm).
doctrines come close to recommending that the law of unintentional harms be seen as expressing a general principle of “pay for any harm you cause,” and several decades’ growth in strict liability and other pro-plaintiff tort developments have reduced the lacunae of noncompensation. The dividing line between an owner’s privileges and duties is more often drawn where the owner’s use of the property causes invasions or harm than elsewhere.

Note that the description here largely assimilates property owners’ duties with the duties persons generally owe. Although landowners once had a number of special duties and privileges peculiar to their status and to the status of the entrant in relation to the owned land, in many jurisdictions those duties and privileges today follow more general patterns, with landowners’ duties to trespassers, licensees, and invitees being judged by a unitary standard, for example. Admittedly, owners do have some limited privileges to do harm in defense of property; rights of exclusion in tangible property may be accompanied not only by privileges to build walls and lock gates, but also by privileges to use reasonable force against an intruder in certain circumstances. But nonowners’ privileges to defend their persons parallel landowners’ privileges to defend their property. Further, as demonstrated by the generality of Learned Hand’s negligence formula, the common law grants a privilege to do unintentional, cost-justified harm that does not at all depend on the privilege-holder being a land owner. Thus, while some differences exist, the limits the law places on an owner’s privileges generally parallel those affecting nonowners.

Although boundary invasion and harm provide the most obvious dividing line between privilege (to act) and duty (to refrain from acting), an owner’s liberties are sometimes limited even when their exercise would not invade or injure anything. Zoning is perhaps the most striking example of legal regulation that limits owners’ freedom to use land absent threatened harm or invasion, yet it is considered consistent with

84. See Epstein, supra note 82 (presumptive liability for all harms directly caused); Fletcher, supra note 82 (presumptive liability for all harms except where risks are reciprocally imposed).

85. The twentieth century has seen a sharp and accelerating trend toward favoring the victims of unintentional harms, particularly through expanding strict liability for hazardous activities and for products. Other pro-plaintiff developments include contraction in the ability of government, charity, or family-member defendants to claim immunities; growth in the non-delegable duty doctrine; increases in the kinds of duties that courts are willing to impose; and relaxation of causation requirements.

86. See, e.g., Rowland v. Christian, 69 Cal. 2d 108, 442 P.2d 561, 70 Cal. Rptr. 97 (1968) (adopting unitary standard of care). Similarly, unintentional trespasses are now largely governed by the same principles that govern liability for other unintentional acts. See note 47 supra and accompanying text.


88. The privileges afforded by the negligence principle have been narrowed in recent years by some forms of strict liability that apply with special force to landowners (such as for ultrahazardous activities), but other equally significant forms of strict liability (such as for products) are not particularly linked with land ownership.
property ownership. Another example is the eminent domain area, where many important cases have focused on whether a particular legislative limitation on previously existing privileges should amount to a "taking" of "property" for which compensation should be paid; it is far from clear that only "harmful" or "invasive" privileges can be restrained without paying compensation.

* * *

We should not allow the limitations to obscure the basic property model—rights of exclusion, privileges of nonharmful use, and exclusive powers of transfer. However variable the Supreme Court's treatment of threatened rights, powers, or privileges, for example, no one can doubt that a "taking" of "property" has occurred where the government cancels all of an owner's rights, powers, and privileges, particularly if the government simultaneously transfers those entitlements to itself. In a sense, then, we define "property" using a proportionality inquiry: The more complete the package of rights, powers, and privileges, the more comfortable most Americans feel in using the term "property" to describe the phenomenon to which these characteristics attach.

To what extent does the entitlement structure within copyright law mimic the patterns of the common law allocation of property entitlements? Clearly there must be differences. For example, since intellectual property has no physical boundaries that can be crossed, it must perforce use something other than entry to distinguish between those

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89. Compare Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (requirement that certain coal be left unmined held not to constitute a "taking") and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (city safety ordinance prohibiting excavations below the water table held not to constitute a taking of plaintiff's gravel business though the excavations essentially destroyed the business) with Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (prohibition of mining under dwelling houses held to constitute a "taking" of defendant's mining privilege). For an interesting exploration of the disparity between the Court's treatment of the privileges in Pennsylvania Coal and Goldblatt, see B. ACKERMAN, supra note 9, at 156-65.

90. See Sax, supra note 82, at 150 n.5; Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 46-50 (1964) ("[T]he problem is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses." Id. at 49.).

91. See note 89 supra.

92. See text accompanying note 37 supra (Bruce Ackerman's definition of property; it is a matter of proportion, not "either/or" choices).

93. The constitutional protections for "property" can be triggered by damage to interests which would not ordinarily be termed property interests. The Court in Ruckelhaus v. Monsanto Co., 467 U.S. 986, 1003 (1984), indicated that, for takings clause purposes, a materialman's lien as well as a valid contract have been held to constitute property. This is even more true in the due process context. See, e.g., Martinez v. California, 444 U.S. 277, 281-82 (1979) ("Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause.")(dicta); Perry v. Sinderman, 408 U.S. 593, 601 (1972) (certain expectations of continued employment are "property" for due process purposes). Nevertheless, ordinary conceptions of property have had an impact on the Court's takings law jurisprudence. See generally B. ACKERMAN, supra note 9, at 88-189.
uses of the property the owner can control and those she cannot. Yet we will find the parallels to be remarkably close.

3. Entitlement structures in copyright law.

Copyright is the body of law that protects works of authorship. "Works of authorship" include books, music, sculpture, movies, and even computer programs, but not ideas, processes, or systems, no matter how valuable or creative. Copyright today is largely governed by federal statute, the Copyright Act of 1976. The following overview of federal copyright law will outline how the copyright statute, like the law of tangible property and torts, grants to proprietors rights of exclusion, privileges of use, and powers of transfer.

Section 106, the central provision of the 1976 Act, gives authors a right to prohibit copying and other specified uses of their works of authorship. Section 106 grants to creators "exclusive rights to do and to authorize" the reproduction, adaptation, distribution, public performance...

94. See text accompanying notes 170-189 infra.
95. 17 U.S.C. § 102 (1982) (works of authorship include literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings); see also 17 U.S.C.A. § 117 (West Supp. 1989) (special provisions regarding computer programs); 17 U.S.C. § 101 (1982) (defining "including" as "illustrative and not limitative").
96. 17 U.S.C. § 102(b) (1982). Other areas of law, such as patent, protect some subject matter not protected by copyright.
17 U.S.C. § 301 (1982). Some areas of state activity are preserved, such as causes of action accruing prior to the new Act's effective date, id. § 301(b)(2), and state action regarding "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright," id. § 301(b)(3). The statute also emphasizes that preemption does not affect works "not fixed in any tangible medium of expression." Id. § 301(b)(1). Fixation is a requirement for federal protection. Id. §§ 101-102. State copyright in "unfixed" (unrecorded) performances thus remains available. State copyright in performance is sometimes given the name of the "right of publicity." This misnomer was carried into the Supreme Court in Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562, 564 (1977) (holding that Ohio would not violate the first amendment if it gave "human cannonball" Zacchini a right of publicity against news stations which broadcast his act in full, at least so long as Zacchini sought revenues from and not an injunction against dissemination of his performance).
98. Unless the article's context indicates otherwise, the terms "author" or "creator" will be used to include not only authors, composers, painters, and other creative persons, but also employers, assignees, licensees, heirs, and anyone else claiming copyright interest in work created by another. Potentially significant differences characterize the normative status and empirical effect of copyrights in the hands of original creative persons and copyrights in the hands of publishers and other derivative parties. Such issues are outside the scope of this article. See note 8 supra.
ance, and public display of their works.99 Taken together, I will gener-
ally refer to these as rights over “copying.”

Although section 106 employs only the word “rights,” it uses that
word loosely, as synonymous with “entitlements.”100 In fact, section
106 constitutes a simultaneous award of Hohfeldian rights, privileges,
and powers over the enumerated uses. Because the section 106 grants
are “exclusive,” the owner has the right to exclude others from the
physical acts described.101 Because the section 106 grant includes an
entitlement “to do” the enumerated physical acts, creators have a privi-
lege to use their creations in the manners specified. Because the grant
awards an entitlement “to authorize” the various physical acts, creators
have a power to transfer their entitlements. Because creators hold that
power “exclusive[ly],” they also have an immunity from other persons’
efforts to affect the legal status of the copyright. Thus, the intellectual
property entitlements include, for example, the privilege to make re-
productions, the right to forbid strangers to make reproductions, and the
power to sell others a privilege to make reproductions.

The right to exclude others from particular modes of enjoyment. As the tort
cause of action denominated “trespass” vindicates the duty to stay off
strangers’ land, the tort cause of action denominated “infringement”
vindicates the duty to refrain from copying others’ works of authorship.
Thus, as with tangible property, copyright’s core is a set of exclusive
rights; and violation of those rights gives rise to tort and other reme-
dies. Persons who enjoy a work in the ways reserved to the copyright
owner’s exclusive control—for example, reproducing the work verba-
tim, adapting it for use in new works, or publicly performing it—may be
liable for injunctions,102 damages,103 accounting for profits,104 criminal
penalties,105 and other sanctions.106

99. 17 U.S.C. § 106 (1982). Not all of the rights apply to all types of works or in all
contexts. For example, musical groups who record their performances have an exclusive right
of reproduction but not of performance. Id. §§ 106(1), (4), 114. Radio play, therefore, earns
royalties for the composer of the music but not for its performers.
100. Such a usage is quite common. In fact, Hohfeld offered his definition of entitle-
ments in part to clarify the many ways in which judges and commentators used the term
“right.” See Hohfeld, Some Fundamental Legal Conceptions, supra note 40, at 30-31. Hohfeld’s
stipulative definition attaches only one of the common meanings of “rights” to the word, and
he invented or borrowed other terms to denote the other meanings.
101. Since the grant states that owners have the exclusive privilege of using the work in
the specified ways, no one else can engage in the listed acts. Since persons other than the
creator have no privileges to use the work in the listed ways, they have duties not to so use it;
correlatively, the creator has rights against such persons.
102. 17 U.S.C. § 502 (1982); 3 M. NIMMER & D. NIMMER, supra note 11, at §§ 14.06(A)
(preliminary injunctions), (B) (permanent injunctions).
104. Id. § 504.
105. Id. § 506 (criminal penalties applicable only to infringements undertaken “will-
fully” for “purposes of commercial advantage or private financial gain”).
Rights in tangibles differ from the rights in intangibles largely with regard to the kind of control each set of rights gives. The differences can be illustrated, for example, by comparing how the law treats particular intellectual products with how it treats the physical objects embodying the intellectual products. Copyrightable narrative is routinely embodied in paper and ink, just as copyrightable artistic design is commonly embodied in canvas and paint, and someone who receives letters from famous friends owns the pieces of paper and the ink on them. But if the recipient includes the text of those letters in her memoirs she may be unpleasantly surprised by a copyright infringement suit. This is so even though the recipient would have been free to sell the letters to an autograph dealer or throw them away. Similarly, if a museum purchases a copyrighted painting but does not also purchase the artist’s copyright interest, the museum would infringe the copyright by making posters or postcards of the painting for sale in its gift shop without the artist’s permission.

Conversely, if a burglar steals the letters from the recipient’s desk drawer or the painting from the museum, that harm may not be redressed under the copyright law, even though the theft may deny the copyright owner effective use of the creative work. As long as the burglar only steals the letters or painting and does not reproduce them or otherwise employ them in violation of section 106, the copyright statute gives no redress. The legal avenues to achieve some “remedy” for the harm—notably burglary law and the tort law of conversion—

107. See Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (author obtained preliminary injunction against publication of a biography which contained quotations from some of his letters); see also Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E.2d 863 (1949) (owner of Mark Twain manuscript held not entitled to publish it because physical ownership of a manuscript does not necessarily include ownership of its copyright); 17 U.S.C. § 202 (1976) (transfer of object does not “of itself” carry with it ownership of copyright); id. § 204 (transfers of copyright ownership are invalid “unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed”). The existence of a chattel “embodiment” is essential to federal copyright, which applies only to works “fixed,” embodied, in “stable,” “tangible media of expression.” Id. §§ 101 (definition of “fixed”), 102(a) (subject matter of copyright). So, for example, until a playwright makes a stable record of his play, via pen, video camera, or otherwise, federal copyright law does not protect it. And although all objects “embody” the intangible ideas that make naming and understanding possible (a chair “embodies” the notion of chairness, for example), the large majority of these ideas fall outside the range of copyrightable subject matter.

108. Although one of a copyright owner’s exclusive rights is the right “to distribute copies or phonorecords of the copyrighted work to the public by sale,” id. § 106(3), lawful owners of copies have a privilege to resell or otherwise dispose of them; this has been established by the “first sale doctrine,” now embodied in id. § 109(a). That section “is an extension of the principle that ownership of the material object is distinct from ownership of the copyright in the material.” Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984). The doctrine does not apply to commercial record rentals. 17 U.S.C. § 109(b).

109. Note, however, that the burglar’s sale of the painting might violate the copyright owner’s exclusive right to control sale, 17 U.S.C. § 106(5) (1976), since the privilege of owners of copies to resell them is not available to persons who are not lawful owners. Id. § 109(a); see also § 109(d) (Supp. IV 1986).

110. Like a landowner, an object’s owner has rights to physical dominion over the thing
are available to the person who owns the physical object, who often does not own the copyright; and even that person's chances of gaining satisfaction are determined by the government's ability to identify the thief and enforce burglary law and by the thief's solvency as a tort defendant.

Thus a copyright owner's rights largely operate independently of the rules governing physical ownership. Intellectual property is concerned not with entry or physical interference but with forbidding specified uses of the work that may be quite independent of physical touching. Nevertheless, this right, like the right at the core of tangible property, can be viewed as a right of exclusion. Thus, in examining the "property" status of one type of intellectual property (trade secrets) for purposes of fifth amendment takings law, the Supreme Court in fact characterized the right at issue as a "right to exclude others."

Types of use a creator may exclude. The Court referred to the right to exclude others from "enjoyment," but that is not a technical term. Such phrases generally refer to the various rights an intellectual property owner might have to exclude others from benefiting from the intangible at issue. Any mode of drawing benefits from a resource might be referred to as "enjoyment" or "use," and intellectual property law does not purport to control them all.

There are many ways one can benefit from a resource, and different uses trigger liability under different intellectual property rules. Patent law approaches "use" most expansively. A patentee's rights to "make, use, or sell" the invention render it unlawful even for one who independently replicates—without copying—a patented invention to profit from it. In ordinary language, profiting from an independent invention seems to be an enjoyment of an invention that happens to be the same as the patented invention, rather than an enjoyment of the patented invention itself. Nevertheless, patent policy gives patentees the right to control independently created duplicates, at least partly because we believe that giving independent inventors' privileges to exploit what they find might interfere with potential inventors' overall

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owned and rights to redress physical harm done to it. See Restatement (Second) of Torts, supra note 74, §§ 216-218, 222 (trespass to chattels); id. §§ 222, 222A (conversion).
111. Ownership of an object containing a work of authorship includes no presumption of ownership of its copyright. See 17 U.S.C. § 202. This is true whether the object in question is an original manuscript or the 10,000th copy from a massive press run.
113. Id.
114. 35 U.S.C. § 271 (Supp. 1984) (it is an infringement to make, use, or sell any patented invention within the United States during the patent term, and no exception is made for independently derived duplicates of the invention); Edmund W. Kitch & Harvey S. Perlman, Legal Regulation of the Competitive Process 747-48 (3d ed. 1986). Although the statute does not exempt even the making of one copy of the invention, there are some judicially created exceptions, e.g., "the manufacture and experimental use of a machine ... until the machine is put to a commercially valuable use." 2 Peter D. Rosenberg, Patent Law Fundamentals § 17.02(1), at 17-15 (2d ed. 1988).
MERITS OF COPYRIGHT

willingness to invest in research. When several scientists are hot on the same trail, a promise of exclusivity to the winner may be the only prize meaningful enough to keep the race from flagging.115

Rights over use also can be defined quite narrowly. If the patent stands near the expansive end of the spectrum of infringement standards, at the opposite extreme is unfair competition law,116 including trademark and trade secret law. Here the plaintiff must show something substantially more than a mere unconsented use of the “owned” thing to prevail on an infringement claim. For example, in federal trademark law, only a mark’s uses that the plaintiff can show are likely to cause consumer confusion are actionable.117 Thus, even if the second user employs an identical mark, his use is not ordinarily actionable unless the plaintiff’s and defendant’s products are related enough that the defendant’s use of the mark is likely to cause confusion to consumers.118 Similarly, use of a trade secret is usually prohibited only if the user has violated some independent legal obligation, such as a fiduciary obligation not to disclose secrets revealed during confidential business negotiations. As the Seventh Circuit observed:

The only protection equity affords the possessor of a trade secret is to prevent its use by those who obtain the secret information in breach of contract or of a fiduciary relationship, and by third parties who knowingly participate in such breach. . . . The gravamen of a cause of action of this nature is wrongful appropriation. One who obtains secret information honestly may use it freely.119

115. History holds many examples of apparently simultaneous discoveries, so that the law’s grant of control to patentees even when others can prove the independent origin of their inventions is significant. A purpose of the public record of patent claims is to make the scientific community aware of their content.

116. The overall field of law that governs the control of intangibles is known as “intellectual property” or “unfair competition.” It can be helpful to distinguish between the two terms. The term “intellectual property” is best used to identify those areas of law, such as patent and copyright, where copying or use simpliciter constitutes an infringement. In these areas, the form of control can be easily analogized to the ownership of realty, where mere intrusion constitutes a trespass. “Unfair competition” is the term best used to identify those areas, such as trademark law and trade secret law, where more than mere copying or use is necessary to constitute infringement. These doctrines are more like the torts that govern interpersonal relations than like property. However, it is common to use the term “intellectual property” to refer to both sets of doctrines, and this article will often use the term in this fashion.

117. See 15 U.S.C. § 1114(1) (1982); 2 J. Thomas McCarthy, Trademarks and Unfair Competition § 23:1 (1984 & Supp. 1988). Although some recent cases have cast doubt on the continued vitality of the confusion requirement, see, e.g., Boston Professional Hockey Ass’n v. Dallas Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1012 (5th Cir.) (duplication of hockey team symbol for sale as a cloth emblem held an infringement of trademark rights because consumers would associate symbol with team, regardless of whether consumers would be misled as to the emblems’ source), cert. denied, 423 U.S. 868 (1975), trademark law is still predominantly employed in contexts where the mark is used to identify a product, rather than where the mark itself is the product being sold.

118. See 2 J. McCarthy, supra note 117, § 24:1, at 160-63.

119. Ferroline Corp. v. General Aniline & Film Corp., 207 F.2d 912, 923 (7th Cir. 1953); see also 1 Roger M. Milgrim, Milgrim on Trade Secrets §§ 4.03, 5.04(3)-(4)(a) (1988).
Thus, one may freely copy another's trade secret if one has discovered the secret by reverse engineering or other lawful means.

The uses prohibited by copyright law occupy a middle position between patent and unfair competition law on the infringement continuum. To obtain relief, a plaintiff must ordinarily show that the defendant had access to and borrowed some protectable aspect of the copyrighted work. Thus, a defendant can defeat a claim of infringement, regardless of how similar the plaintiff's and defendant's works might be, by proving that she independently created the supposedly infringing work. A plaintiff, however, need not show any injury, confusion, or violation of independent duty in order to prevail. Copying is per se actionable.

Copyright's grant of exclusive rights thus most closely parallels landowners' "right to exclude," for patent law gives proprietors something more than a "right to exclude" and trademark and trade secret law give something less. Copyright gives authors only what trespass law gives landowners: Authors have the right to exclude others from what they own.

Limitations on the exclusion right. As with the rights against physical interference that attach to tangible property, the exclusive rights of an intellectual work's creator against unconsented uses of her works are limited in various ways. The 1976 Act grants no rights at all for works that fall outside the subject matter and uses it designates for protection. Thus, the Act protects only expression and not ideas, processes, systems, discoveries, or similar products of mental effort, and so grants no rights in copyright in these subject matters even when

120. See, e.g., Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).
121. See 17 U.S.C. §§ 501-502 (1982) (proof of injury not a prerequisite for infringement suit); see also id. § 504(b) (entitlement to award of infringer's profits); id. § 504(c) (statutory damages available in lieu of actual damages and profits).
122. See text accompanying notes 46-48 supra (nature of trespass suits).
123. For example, patent proprietors can stop strangers from using what the strangers themselves have created. In real property law, that would be similar to granting landowners a right to bring trespass suits against anyone who entered property "just like" the owners' land.
124. For example, strangers can use marks or secrets as long as they cause no socially undesirable confusion and breach no independent duties. In real property law, that would be similar to landowners having no action for trespass without showing that the entrant had made some socially undesirable use of the land or was violating some independent obligation by entering.
125. See text accompanying notes 74-76 supra.
126. See note 95 (protectable subject matter) & text accompanying note 99 (enumerated rights) supra.
127. 17 U.S.C. § 102(b) (1982) (copyright does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery"); see also Baker v. Selden, 101 U.S. 99 (1879). Ideas are not subject to protection for several reasons, including deference to the first amendment. See M. Nimmer & D. Nimmer, supra note 11, § 1.10(B)(2); see also Laurence Tribe, American Constitutional Law § 12-14 (2d ed. 1988). Other reasons include practical considerations such as the costs of tracing ownership, see John P. Dawson, The Self-Serving Intermeddler, 87 Harv. L. Rev. 1409, 1412 (1974), and the injury that ownership of ideas would do to public life and to later creators' ability to make works of their own. See notes 172, 518 & 530-531 infra and accompanying texts.
they are contained in otherwise protectable works of authorship. Where the copyright statute grants proprietors no rights at all, potential users are privileged to copy.128 So, for example, anyone is privileged to copy an author's themes or ideas, since copyright does not protect these aspects of otherwise copyrightable works.129 Similarly, the Act's list of enumerated "exclusive rights" is limited. For example, copyright owners have rights over public but not private performance and display of their works;130 over initial distribution of their works but not over a library that lends the books it has purchased;131 and over reproduction132 but not over enjoyment.133

Copyright law imposes a number of additional limits on the rights it does grant. The most famous is probably the restricted duration.134 Although ordinary property can be owned forever, copyrights expire.

Another interesting limitation is the set of compulsory licenses copyright bestows in areas such as cable retransmission and the production of new recordings of existing music.135 Persons entitled to

128. However, legal protection other than copyright may be available. For example, although the refusal to protect general ideas stems from Congress's affirmative desire to keep ideas free of constraint, the refusal to extend copyright protection to utilitarian objects stems instead from a recognition that copyright is an inappropriate vehicle for such protection. (There may also be a constitutional dimension to copyright's refusal to protect useful objects. See Kenneth J. Burchfield, The Constitutional Intellectual Property Power: Progress of the Useful Arts and the Legal Protection of Semiconductor Technology, 28 Santa Clara L. Rev. 473, 501-02 (1988). Other legal regimes may be available and specifically tailored to the issues presented by the various forms of intellectual property.

Patent law, which is available to the inventors of utilitarian objects, demonstrates such a specific adaptation. A right only against copying is of limited value to an inventor. Though a right against all replication of an invention would be more valuable, it is more restrictive. Patent law has worked out a compromise: A patent gives rights against independent replication, but utility patents are quite difficult to obtain and have only a 17-year duration.

129. See Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (themes not protectable), cert. denied, 282 U.S. 902 (1931); see also notes 185-186 infra.


131. See id. §§ 106(3), 109. Lending the books one has purchased is privileged under the "first sale doctrine." Id. § 109(a).

132. Id. § 106(1).

133. See id. § 106 (no mention of a right of enjoyment of copyrighted works).

134. Except where Congress chooses to enact private bills at the behest of particular copyright owners, a copyright can last no longer than the life of the author plus fifty years. Id. §§ 302-305.

135. See, e.g. id. § 111 (1982 & Supp. IV 1986) (in designated circumstances, owners of copyright have no right to prohibit cable operators from retransmitting on-the-air broadcasts if statutory formalities are satisfied and governmentally specified fees are paid); id. § 115 (once a composer authorizes distribution of a nondramatic musical work on phonorecords in the U.S., virtually any performer can obtain a compulsory license to make and issue phonorecords using the composition); id. § 116 (juke boxes); see also Second Supplementary Report of the Register of Copyrights on the General Revision of U.S. Copyright Law, ch. 7, at 18-20 (Oct.-Dec. 1975) (draft [hereinafter Second Supp. Report] (exemplifying the attractions of the compulsory license as a mode of legislative compromise for conflicting claims in addressing protection for typeface designs). See generally Staff of Subcommittee on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., The Compulsory License Provisions of the U.S. Copyright Law (Comm. Print 1960) (H. Henn) (history of the phonorecord compulsory license). Some changes are in the offing for jukebox compulsory licenses. See Berne Convention Implementation Act of 1988,
such licenses have “privileges” to use the copyrighted material, regardless of the copyright owner’s preferences. The privileges are “incomplete” since the copiers must pay at least the governmentally set licensing fee. Correlatively, copyright owners have only “incomplete rights” of ownership in works subject to compulsory licenses.136

The most often litigated copyright limit is the “fair use” doctrine, judicially created and now enshrined in the statute.137 Uses of copyrighted works “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”138 are likely to be found “fair” and thus non-infringing. As currently interpreted, persons entitled to “fair use” have complete privileges to use copyrighted works in the sense that they are both permitted to use the work and free of any obligation of payment.139

Much debate surrounds the question of which situations are


Compulsory licenses continue to be created. The newest compulsory license permits satellite carriers to make certain secondary transmissions to “unserved households” with home dishes, for private viewing, at a statutory royalty fee. See Satellite Home Viewer Act of 1988, P.L. 10-667, creating a new section, 17 U.S.C. § 119. The Act is a temporary measure. On or before the end of 1992, the statutory fee option will no longer be available; and in 1994 the Act itself terminates. Id.

136. See note 66 supra.


139. Conceivably “fair use” could be implemented as an incomplete privilege instead. Under that approach, which has its own difficulties, a user might be allowed to continue utilizing the work but be required to pay. See Fisher, supra note 5, at 1724-27 (use of a liability rule); Gordon, Fair Use, supra note 14, at 1622-24. The common law contains several incomplete privileges, such as the incomplete privilege of “private necessity” in tort law, see Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910); other sources cited in note 66 supra, and the recognition in nuisance law that sometimes a valuable but noxious activity should be allowed to continue as long as it pays its own way, see, e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (defendant allowed to continue polluting as long as it paid damages).

With fair use cases, as in copyright litigation generally, the courts have so far adhered to an all-or-nothing approach, so that a defendant either is found to be an infringer, subject to injunction as well as damage liability, or is allowed to continue the contested use for free. In New Era Publications Int’l, ApS v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1988), aff’d on other grounds, Nos. 88-7707, 88-7795 (2d Cir. Apr. 19, 1989), Judge Leval attempted to depart from this approach. He had before him a critical biography of L. Ron Hubbard which used many quotations from Hubbard’s published and unpublished works. Finding that most but not all of the defendant’s quotations were fair use of Hubbard’s copyrighted expression, Judge Leval concluded that the biography did infringe. 695 F. Supp. at 1524-25. He nevertheless refused to grant an injunction against the book’s publication, id. at 1525-28, because it “would diminish public knowledge” and would “implicate[] concerns of the First Amendment,” id. at 1525. The Second Circuit repudiated that aspect of Judge Leval’s opinion and affirmed the denial of an injunction solely on the ground of laches. New Era Publications, Nos. 88-7707, 88-7795. There are, however, some signs that the all-or-nothing approach to remedial issues in copyright cases may be eroding. See Abend v. M.C.A., Inc., 863 F.2d 1465, 1479 (9th Cir. 1988) (injunction refused); see also New Era Publications, slip op. 2863, 2884, 2907-13 (Oakes, C.J., concurring; vigorously disagreeing with the majority opinion and referring inter alia to Boomer and other cases involving real property as analogical support for denying an injunction).
appropriate for fair use treatment. The most recent example of a use found "fair" by the Supreme Court is home videorecording of broadcast television shows for the purpose of time-shifting.\footnote{Sony Corp. v. Universal City Studios, 464 U.S. 417, 447-55 (1984). "Time-shifting" refers to viewing videorecorded broadcasts at a more convenient time.}

**Exclusive powers of transfer and their limitations.** The copyright statute gives copyright owners "powers" both to transfer exclusive rights and to grant mere privileges to use the work.\footnote{See 17 U.S.C. § 106 (granting "the owner of copyright... the exclusive rights to do and authorize" reproduction, adaptation, distribution to the public, public performance, and public display) (emphasis added); id. § 301(d) (transferability of rights).} Limits temper the exercise of these powers. For example, the Act requires certain formalities for transferring exclusive rights.\footnote{Thus, though grants of privilege (also known as "nonexclusive licenses" or "permissions") can be oral, transfers of exclusive rights must be memorialized in a signed writing. See id. § 204 (a signed writing required for any transfer of copyright ownership other than transfers by operation of law); id. § 101 (the phrase "transfer of copyright ownership" does not include nonexclusive licenses). Restrictions of this sort may frustrate owners' desires in the short run but tend to work to further the long-term functioning of the transfer system. They thus function much like the statute of frauds in contract law or the requirement that disinterested witnesses sign wills in the law of estates.} More significantly, the statute gives authors an inalienable power to terminate any grant after a specified period of time in virtually all but work-made-for-hire contexts, thus limiting most creators' present ability to make full transfers of what they own.\footnote{Sony Corp. v. Universal City Studios, 464 U.S. 417, 447-55 (1984). "Time-shifting" refers to viewing videorecorded broadcasts at a more convenient time.} The statute also limits inheritance of this termination power to grant mere privileges to use the work.


The new termination power largely replaces the "renewal" provisions of the Copyright Act of 1909, ch. 320, § 24, 35 Stat. 1075 (1909), which also aimed, though with limited effectiveness, at returning to authors control of their works. Whether or not the new limitation will prove to be in the authors' long-term interest is a matter of debate. Briefly, the debate is between those who see a disability to make transfers as a limitation that impairs authors' ability to get the best price for their efforts (as well as an interference with authors' autonomy), and those who view it as a way to protect authors' interests in a way the authors themselves cannot.

Congress, of course, intended termination rights to operate in the creators' interest. See H.R. REP. No. 1476, 94th Cong., 2d Sess., 123, 124-28, 139-42 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5738-44, 5755-58 [hereinafter HOUSE REPORT]. One could argue, however, that the new power merely eliminated one of an author's bargaining chips: Prior to the new statute, an author could have bargained for inserting a termination right into her contracts or could have received a higher license fee or sale price in return for forgoing such rights. "A right that cannot be the subject of bargaining is worth less . . . ." Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 11 (1984). Nevertheless, disparities in bargaining power might ordinarily have prevented authors from obtaining such concessions in the first instance. Also, it is not clear that moviemakers, publishers, and other grantees are paying authors less today than they otherwise would. Given discount rates, the value to a grantee of exclusive rights 35 years later is probably small, particularly since grantees can continue to use derivative works made prior to termination of the grants even after termination (e.g., motion picture dramatizations of novels). On the operation of the derivative works exception, see Mills Music, Inc. v. Snyder, 469 U.S. 153.
power to statutory beneficiaries rather than allowing it to descend to those whom the author would prefer to designate by will.\(^{144}\)

Despite these and other minor restrictions on the power of transfer, Congress, in the new copyright statute, ratified and even expanded the powers of the copyright proprietor. Most notably, declaring its adherence to “the principle of unlimited alienability of copyright,”\(^{145}\) Congress further eased transferability of copyright interests by making intellectual property more divisible than it had been under the prior law.\(^{146}\)

**Privileges of use and their limitations.** A “privilege” to use and refrain from using one's works is implicit in both the statutory grant of “exclusive rights” to use the work in designated ways\(^ {147}\) and in traditional Anglo-American law, under which people may use the resources they own. In addition, in 1912 the Supreme Court held that the privileges of “using . . . selling, producing, or performing” a copyrighted work are “[f]ederal right[s] specially set up and claimed” under the copyright statutes.\(^ {148}\)

When the copyright holder loses the exclusive rights guaranteed by section 106 or they expire, the work becomes a part of the public do-

\(^{144}\) 17 U.S.C. §§ 203(a)(2), 304(c)(2) (1982). Grants made by will, however, are not terminable. \(^{145}\) Id. §§ 203(a), 304(c). That is, if an author died possessed of the right to make a motion picture from her novel and bequeathed the right by will, the right so passed would not be terminable. A probate court could not enforce, however, a provision in an author’s will purporting to bequeath her power to terminate a previously made movie contract to persons other than the statutory beneficiaries.

\(^{146}\) House Report, supra note 143, at 123 (“The principle of unlimited alienability of copyright is stated in clause (1) of section 201(d).”.

\(^{147}\) Id. Prior law considered a copyright indivisible. Copyright’s embrace of a series of quite different entitlements that an author might wish to sell separately created a range of difficulties. “The indivisibility concept mandated a single owner or proprietor of copyright at any one time . . . . The ramifications of indivisibility reached such questions as notice, ownership, recordation of transfers, standing to sue, and taxes.” Alan Latman, Robert Gorman & Jane C. Ginsburg, Copyright for the Eighties 227 (2d ed. 1985). Under the new law, any holder of an exclusive license is an owner of copyright. 17 U.S.C. § 101; House Report, supra note 143, at 123.

main. Although the former copyright holder remains privileged to use
the work, she then shares the privileges with everyone else. This mu-
tual sharing is familiar from the common law, too, where unowned or
abandoned resources can be used by all, “free as air to common
use.”149 Unlike the common law pattern relating to unowned
tangibles, however, intellectual products whose copyrights have ex-
pired or been lost150 cannot be appropriated by later comers. Once a
work of authorship is in the public domain, it remains there.151

Although the copyright statute itself imposes virtually no limits on a
copyright owner’s privileges of use,152 other branches of the law do.
Under defamation law, for example, an author might be privileged to
write a story but have a duty not to utilize the story to malign someone
falsely. Similarly, the law of fraud might prohibit an author from em-
ploying a talent for fiction in a deceptive enterprise. Antipornography
laws may also restrain distribution of certain works. Overall, however,
use limitations are few. This is not surprising since most limits on privi-
leges in our system stem from a policy of preventing harm or inva-
sion,153 and much of the harm that works of expression can do is
permitted by the deference given to free speech under first amendment
document.154

Even when a copyright owner lacks a privilege to use the work in a
particular way, the copyright proprietor may still retain the right to pro-
hibit others’ use. Thus, for example, antipornography laws might pe-
nalize the author of an obscene film for publishing or distributing the
work and thus effectively destroy the author’s privileges for that work.
Yet the author may still possess exclusive rights in the work and thus be
able to command payment from anyone else who wishes to display it

149. Goldstein v. California, 412 U.S. 546, 570 (1973) (citing Justice Brandeis in Inter-
national News Serv. v. Associated Press, 248 U.S. 215 (1918)) (referring particularly to intel-
lectual products).
150. Publication without proper notice has been treated as an abandonment regardless
1989). With the adoption of the Berne Convention, lack of notice ceases to cause a loss of
copyright.
151. New creators can adapt existing public domain works—for example, a composer
might newly arrange an old song—and have a copyright in the adaptations. The copyright
extends, however, only to what has been added. 17 U.S.C. §§ 102-103 (1982). Also note that
if a second author, unacquainted with the public domain work, happens to duplicate it, that
independently derived duplicate can be validly copyrighted. Id. § 102 (copyright given in
“original” works; novelty not required). The public domain work will remain free for all to
copy, but persons who copy its copyrighted twin will be infringers. Sheldon v. Metro Gold-
wyn Pictures, Inc., 81 F.2d 49, 53-54 (2d Cir.), cert. denied, 298 U.S. 669 (1936) (classic state-
ment of the rule).
152. This contrasts with the many limitations it imposes on authors’ exclusive rights. See
notes 134-140 supra and accompanying text.
153. See text accompanying notes 82-85 supra.
154. See, e.g., Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that the first
amendment barred public figure’s claim that magazine’s caricature was tortious intentional
infliction of emotional distress).
(perhaps an exhibitor in a more sexually tolerant jurisdiction).\textsuperscript{155}

Not only are a creator’s privileges of use fairly unconstrained in intellectual property law, but a creator also has privileges of \textit{not} using the creation. For example, a nondisclosure privilege is inherent in the “right of first publication” long guaranteed by state common law.\textsuperscript{156} Although the 1976 federal Copyright Act preempted most state common law of copyright,\textsuperscript{157} the Supreme Court recently stressed that the judiciary would continue to protect the author’s first publication rights strenuously.\textsuperscript{158} In the patent area, the right not to use one’s patent and even to suppress it deliberately is well established.\textsuperscript{159}

Yet some negative consequences may attach to nonuse. For example, in the right-of-publicity area, some controversy has attached to the question of whether a deceased celebrity’s heirs should be able to assert the celebrity’s right of publicity only if the celebrity had exploited that right while alive.\textsuperscript{160} In the copyright field, authors who do not allow access to their works after initial publication\textsuperscript{161} may find their exclusion rights somewhat vulnerable to the fair use doctrine.\textsuperscript{162}

\begin{itemize}
\item \textsuperscript{155} See Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 853 (5th Cir. 1979) (obscenity held not a defense to infringement action); see also Belcher v. Tarbox, 486 F.2d 1087, 1088 (9th Cir. 1973) (fraudulent content held not a defense to infringement action).
\item \textsuperscript{156} See Samuel Warren & Louis Brandeis, \textit{The Right to Privacy}, 4 Harv. L. Rev. 193, 197-202 (1890) (suggesting that the “right of first publication” expresses a right of privacy).
\item \textsuperscript{157} See 17 U.S.C.A. § 301 (West 1977 & Supp. 1989); note 97 \textit{supra}.
\item \textsuperscript{159} See Special Equip. Co. v. Coe, 324 U.S. 370 (1945) (patentee is free not to use, and to suppress, its patent). The courts have hinted, however, that this liberty may be limited where a refusal to license a life-saving invention, or even a health-promoting process, is at issue. See id. at 380-84 (Douglas, J., dissenting); see also Vitamin Technologists, Inc. v. Wisconsin Alumni Research Found., 146 F.2d 941, 945-46 (9th Cir.) (patentee’s refusal to license vitamin-enriching process for oleomargarine, ‘the butter of the poor,’ might justify denying injunction against patent infringement) (dicta), cert. denied, 325 U.S. 876 (1945).
\item \textsuperscript{160} The trend seems to be away from requiring such exploitation. See Sheldon W. Halpern, \textit{The Law of Defamation, Privacy, Publicity and “Moral Rights”} 537-85 (1988).
\item \textsuperscript{161} Exercising the privilege of nonuse is very unlikely to prejudice an author’s ability to assert her exclusion rights as long as no publication at all has occurred. See Harper & Row, 471 U.S. at 551 (copying unpublished work is particularly unlikely to qualify as fair use). In such a context, privacy interests, and even an amendment right not to speak, may be implicated. In a recent controversial opinion, the Second Circuit extended this respect for a copyright owner’s interest in controlling initial publication to a case where the author of the unpublished work is no longer alive and where, unlike in Harper & Row, the copyright owners would themselves be unwilling to publish the passages quoted or paraphrased by the defendant. See New Era Publications Int’l, ApS v. Henry Holt & Co., Nos. 88-7707, 88-7795 (2d Cir. Apr. 19, 1989). Although, as the court notes, the copyright owners would “make available” L. Ron Hubbard’s unpublished writings to someone writing an “authorized biography,” id., slip op. at 2881, the unflattering passages would be unlikely to appear in such a publication and might thus remain unpublished for the full duration of the copyright.
\item \textsuperscript{162} See Gordon, \textit{Fair Use}, \textit{supra} note 14, at 1632-35 (antis.dissemination motives). See also Pacific & S. Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984) (“The fact that [plaintiff television station] does not actively market copies of the news programs [copied and sold by defendant] does not matter; for Section 107 looks to the ‘potential market’ in analyzing the effects of an alleged infringement,” id. at 1496, but the case might present different issues if the station “absolutely refused to allow the public to view recordings or scripts of its broadcasts,” id. at 1498.), cert. denied, 471 U.S. 1004 (1985).
\end{itemize}
Similarly, the intellectual property rights that have emerged from the common law of unfair competition are often harder to assert if the plaintiff does not serve the particular market where the defendant is responding to public demand. Thus, some state courts have demanded as a prerequisite to a misappropriation action that the plaintiff show that the defendant competed with the plaintiff in the given market.\textsuperscript{163}

In addition, the first amendment is more likely to defeat an intellectual property claim if the plaintiff is enforcing the exclusion right to prevent utilization of the work. For example, the Supreme Court held that the Constitution did not prevent Ohio from giving a “human cannonball” a common law right against a television station that had broadcast the entirety of his unfixed performance without permission.\textsuperscript{164} But the Court suggested that the result might have been different if, rather than using his rights to extract compensation, the plaintiff had sought to suppress dissemination:

\begin{quote}
[I]t is important to note that neither the public nor [the television station] will be deprived of the benefit of petitioner’s performance as long as his commercial stake in his act is appropriately recognized. Petitioner [Zacchini] does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.\textsuperscript{165}
\end{quote}

Thus, at least after initial disclosure, an intellectual property owner’s privileges not to use or license the work may be slightly limited as the courts seek to ensure that someone is serving the public interest by disseminating the work.

Finally, the “real world” limits privileges even when the law does not. A privilege’s value depends on the privilege holder’s ability to exercise it. This point is important not only when assessing the impact of copyright (the author of an unpopular song or unpublishable story gets very little from her privileges of use), but also when considering recommendations, like those of copyright critics, that privileges be substituted for rights.\textsuperscript{166} Someone holding a privilege unaccompanied by rights is vulnerable to the interference of other persons utilizing their own privileges of action.

\begin{footnotes}
\begin{enumerate}
\item See James Rahl, The Right to “Appropriate” Trade Values, 23 OHIO ST. L.J. 56, 57 (1962). Professor Rahl notes that “the court’s protection will be reserved for situations in which defendant’s conduct threatens to destroy the opportunity to market the trade value, the prospect of which has induced plaintiff to bring it forth.” Id. at 63. While this indicates that an owner’s refusal to use her property beneficially should trigger partial loss of her right to exclude, several misappropriation cases have declined to take that approach. See, e.g., Board of Trade v. Dow Jones & Co., 98 Ill. 2d 109, 456 N.E.2d 84 (1983) (holding competition between the parties not a prerequisite to misappropriation suit and permitting Dow Jones to enjoin use of the Dow Jones average in a market it did not wish to serve).
\item Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); see also text accompanying notes 457-458 infra.
\item Id. at 578. Some authority would limit this concern for public access solely to “facts.” See New Era Publications, Nos. 88-7707, 88-7795.
\item See generally Breyer, The Uneasy Case, supra note 3, at 321-22; text accompanying notes 246-264, 393-401 infra.
\end{enumerate}
\end{footnotes}
B. Assessing the Patterns

This article has thus far demonstrated that the tangible and intangible property structures are quite similar. Both have three key components: rights of exclusion, powers of transfer, and privileges of use. Two important differences, however, must be assessed. The first concerns boundaries: Since tangible property has physical edges while intangible property does not, how can intangibles be property? The second pertains to how an owner’s exclusion rights are defined, for where a realty owner has rights against physical intrusion, an intangible’s owner has rights over use. What are the implications of this difference?

In the following material, I suggest that intellectual property doctrine provides functional substitutes for the missing element of tangibility and argue that this functional understanding explains intellectual property law’s willingness to give rights over use. I also suggest that as a result, restraints on liberty need not be any more a part of intellectual property rights than they are of any property rights. Finally, I show the similarity in economic role played by the entitlement package in both forms of property. In sum, I suggest that copyright is functionally as well as structurally consistent with tangible property.


How can intellectual property’s grant of rights over use or enjoyment be squared with the law of tangible property, where ordinarily someone else’s extraction of benefits from the owner’s resource is not per se actionable? For real property, a stranger’s mere benefit from (“use” of) the land does not ordinarily give the landowner a right of action. Someone who crawls under the fence to see the circus is trespassing; someone who looks through a hole in the fence is not. An owner must ordinarily plead and prove intrusion before he can be awarded a share in a user’s profits. On the other hand, a copyright owner is presumptively entitled “to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work.” The owner of the copyright in a painting of a beautifully landscaped garden can therefore demand compensation from the publisher who prints a copy of the painting in a book. The owner of a magnificently landscaped garden, however, can-

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167. See notes 53-60 supra and accompanying text. Although the courts sometimes speak of the “right to exclusive use” for tangible personalty, see Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 286, 173 P.2d 652, 654 (1946), they seem to mean by that a right to exclusive physical use, equating “use” with a physical intermeddling that has benefited the defendant. Language concerning the “right to exclusive use” in the tangible property context tends to appear where there has been some physical intermeddling with the object. See id. at 286-87, 173 P.2d at 653-54. Such physical touchings invade the owner’s interest in physical dominion.

not demand compensation from those who benefit, even monetarily, from the sight or proximity of the landscaping.

Why should harmless enjoyment of another’s resources be actionable in intellectual property, yet nonactionable in the tangible realm? The answer lies largely in the similar role played by different types of boundaries in the two areas of law. For realty, physical intrusion triggers restitution; for copyright, violation of a specified exclusive right does the same.

In the law of real property, physical boundaries are essential to organizing transactions. To have a market, the objects to be bought, sold, and licensed must be clearly identified. Outside the market sphere, boundaries function to keep an owner’s rights within socially tolerable limits. Because physical boundaries give notice as to what constitutes a trespass, they make planning for the future possible (“What activities can I pursue without worrying that my neighbor’s property interests give him grounds to sue me?”) and make the tracing of consequences from past action practicable (“Now that someone has trespassed, what harms or profits have flowed from it?”).

These functions are so important that where physical boundaries lack this capacity to limit liability, even common law liability for harm is much less likely to be imposed. Limitless liability for benefits—a rule that we each be required to pay for any enjoyment or use we draw from another person’s property—would be even more potentially explosive. Requiring that a landowner prove a boundary crossing helps contain this liability.

169. “Harm” to a plaintiff in the usual tort context is determined by looking to the plaintiff’s condition “in the absence of any interaction with the other party.” Susan Rose-Ackerman, I’d Rather Be Liable Than You: A Note on Property Rules and Liability Rules, 6 Intl. Rev. L. & Econ. 255, 258 (1986). The absolutist but still dominant “but for” test of causation exemplifies this approach: “But for the defendant’s interaction with the plaintiff, what would the plaintiff’s welfare have been?” Thus, in a standard tort case, if the defendant has benefited from his interaction with the plaintiff, but without making the plaintiff any worse off than the plaintiff would have been if the interaction had not occurred, the plaintiff will be treated as one who has suffered no harm. However, “harm” is a relative concept that depends for its content on specification of a baseline, and “absence of any interaction,” id., is only one possible baseline. See text accompanying notes 190-195, infra, for further discussion of this issue.

170. George Palmer notes that while “[r]estitution is generally awarded only in order to deprive the defendant of an enrichment obtained at the plaintiff’s expense . . . [t]here need [not] be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.” George E. Palmer, The Law of Restitution § 2.10, at 133 (1978). For some of the technical difficulties arising when unjust enrichment remedies are sought for harmless trespasses, see D. Dobbs, supra note 56, at 372-75.

171. Avoiding that ‘nightmare of the common law judges,’ unlimited liability, has long been a motivating force in the law. See, e.g., Leon Green, Rationale of Proximate Cause 195-98 (1927). Tort law exhibits this concern in proximate cause doctrine and in the courts’ reluctance to make emotional and economic losses as easily recoverable as physical losses. In partially explaining the latter phenomenon, for example, Harvey Perlman has suggested that while physical harms must come to rest somewhere, economic effects have no natural stopping point. Harvey S. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 61, 72 (1982).
In short, an interdependent world requires demarcations to avoid paralysis and preserve valuable, mutually beneficial reciprocities. As John Dawson has argued,

Uncompensated gains are pervasive and universal; our well-being and survival depend on them. . . . Even with a bank of monster computers one could hardly estimate the consequences of discovering electric light. The radius of the fallout and the number of beneficiaries on whom it descends must be sharply reduced before one could even consider tracing the fallout back to its source.

Physical boundaries provide one important limit. Copyright provides its own boundaries which, by and large, substitute well for physical boundaries, both in regard to promoting transactions and to keeping liability within tolerable limits.

First among these substitute boundaries are copyright's fixation and demarcation requirements. Federal statutory copyright gives ownership not in vague and hazy abstractions but in "works of authorship" which are "fixed" in a "tangible medium of expression." The works so fixed—whether pencil-written melodies, tape-recorded symphonies, printed books, or computer programs embedded in plastic disks—have identifiable boundaries and stable identities much as physical things do. Additionally, notices attached to these "fixed" copies when the

172. In cultural life, the costs of tracing and administering payment might be high enough to bring intellectual life to a standstill if an unbridled restitutionary principle is allowed full play. But in the end there may be little conflict between the need to limit the restitutionary principle to avoid paralysis and the desire to give a "fair return" to those whose labor generates benefits for others. In many situations, it will likely be "just" to pay no compensation, because the donors will reap reciprocal benefits from leaving such benefits uncompensated in the long run. For example, authors might prefer having no copyright in their own oral conversations, see notes 182-183 infra, or in their general ideas, if the alternative meant that they would have to secure others' permission every time they wanted to quote a speaker or convey to a third party another's idea. For further exploration of this theme, see W. Gordon, Restitutionary Impulse, supra note 55; see also notes 530-533 infra and accompanying text (Pareto-based privileges of use).

This argument is obviously indebted to Frank Michelman's treatment of just compensation law. Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1222-24 (1967). In situations of reciprocity, where today's restrained landowner is likely to benefit tomorrow from like restraints on others, Michelman suggests that fairness does not require compensation to be paid. His analysis treats the possibility that restrained landowners may be better off in the long run without compensation, if having been compensated they would then (in their role as taxpayers) have to compensate all others similarly situated and bear the high administrative costs of doing so, or forgo (in their role as members of the public) the benefits of having a restraint like the one affecting their land applied to others' land as well. Id. at 1225-35, 1248-51. Similarly, there are some areas in which authors might benefit more from unencumbered reciprocity than from rights and duties over copying.


174. See Gordon, Fair Use, supra note 14, at 1612 (examining the economic role of demarcation in copyright).


176. See Terrell & Smith, supra note 14, at 28-54 ("thingness as specificity"). However,
works are published mark them as owned.\textsuperscript{177} Although the Berne Convention Implementation Act of 1988 makes the use of notices voluntary rather than mandatory,\textsuperscript{178} notices will probably continue to be widely used since, under the Act, the use of notices reduces defendants' ability to use the "innocent infringer" defense to mitigate damages.\textsuperscript{179} Fixation and notice requirements warn potential infringers of the copyright holder's claims.\textsuperscript{180} They also make it easier to avoid mistaken infringement and resulting unfair surprise.\textsuperscript{181}

Even state common law copyright in unfixed works seems to require that the work of authorship be bounded in some way.\textsuperscript{182} When Ernest Hemingway's widow claimed an ownership interest in the author's oral conversations, the New York court refused to honor the claim. Comparing oral with written communications, the court indicated that anyone who wished to exclude others from using his oral communications must provide boundaries around his claim and warn others that he asserts ownership.

Letters . . .—like plays and public addresses, written or not—have distinct, identifiable boundaries and they are, in most cases, only occasional products. Whatever difficulties attend the formulation of suitable rules for the enforcement of rights in such works . . . they are relatively manageable. However, conversational speech, the distinctive behavior of man, is quite another matter, and subjecting any part of it to the restraints of common-law copyright presents unique problems.

One such problem . . . is that of avoiding undue restraints on the freedoms of speech and press and, in particular, on the writers of history and of biographical works . . . .

the copyright owner's rights over adaptation and over non-verbatim copying can create some fuzziness at the edges.


\textsuperscript{180} As Justice O'Connor notes of the notice requirement in patent law, it "is designed 'for the information of the public' . . . and provides a ready means of discerning the status of the intellectual property embodied in an article of manufacture or design." Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 109 S. Ct. 971, 983 (1989). Patent law provides "clear federal demarcation between public and private property." Id.

\textsuperscript{181} Copyright law, like the law of trespass, does not exempt good faith, innocent infringement. A person who walks on a neighbor's land is trespassing even if she honestly believes the land is her own. A composer who has heard a rival's music is similarly liable if he unconsciously copies it. Both copyright law (via the notice requirement) and land use law (via recordation requirements) try to minimize the occasions on which such mistakes will occur. Boundaries and demarcation also help keep property rights from imposing unanticipated obligations of payment on recipients of benefits.

\textsuperscript{182} The 1976 Act did not preempt state protection for "unfixed" works. See 17 U.S.C.A. § 301 (West 1977 & Supp. 1989); note 97 supra.
Assuming, without deciding, that in a proper case a common-law copyright in certain limited kinds of spoken dialogue might be recognized, it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication. In the conventional common-law copyright situation, this indication is afforded by the creation of the manuscript itself.\textsuperscript{183}

The second way in which copyright imposes boundaries is by declaring only a limited set of intellectual products protectable.\textsuperscript{184} The copyright statute gives authors no rights at all in some aspects of creative works. Themes and general ideas may be copied without violating copyright law,\textsuperscript{185} for copyright protects only the author's expression. Copyright similarly does not restrain the copying of systems, methods of operation, processes, or discoveries that a work of authorship may contain;\textsuperscript{186} and the statute's protection does not extend to an article's utilitarian features, no matter how aesthetically pleasing they might be.\textsuperscript{187}

A third type of boundary is found in the statutory grant of only a

\textsuperscript{183} Estate of Hemingway v. Random House, 23 N.Y.2d 341, 347, 349, 244 N.E.2d 250, 254-55, 256, 296 N.Y.S.2d 771, 777, 779 (1968). Regarding the court's reference to "conventional common-law copyright," recall that at the time Hemingway was decided, states' "common-law copyright" covered unpublished documents such as letters.

\textsuperscript{184} 17 U.S.C. § 102 (1982).

\textsuperscript{185} See id. § 102(b); note 127 and text accompanying notes 126-129 supra; see also Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (classic discussion by Judge Learned Hand of those elements in literary works that may be borrowed by others), cert. denied, 282 U.S. 902 (1931).

\textsuperscript{186} 17 U.S.C. § 102(b) (1982). For example, assume someone invents and publishes a description of a solar-powered outboard motor. A copyright in the description will not impose on persons who read the description any duty to refrain from using what they learn from it to build such a motor or from selling it in competition with its inventor. The author's rights cover only the expression in the description. Furthermore, if the only way to communicate a given idea or system is to use the original author's language, then even copying of the particular language is permitted. See Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967) (no copyright in short statement of contest rules where there is only limited number of ways to convey their substance); Continental Casualty Co. v. Beardsley, 253 F.2d 702 (2d Cir.) (legal forms copyrightable but infringement finding necessitates higher-than-usual amount of copying), cert. denied, 358 U.S. 816 (1958).

\textsuperscript{187} 17 U.S.C. § 101 (1982) (definitions of "pictorial, graphic, and sculptural works" and "useful article"); id. § 118; House Report, supra note 143, at 54-55, 105 ("Unless the shape of an automobile, airplane, ladies' dress . . . or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill." Id. at 55); see also Mazer v. Stein, 347 U.S. 201 (1954) (statuette held entitled to copyright although sold as lamp base).

The dividing line between utility and aesthetics is often hard to locate, even within a single circuit's opinions. Compare Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985) (plaintiff's mannequins not copyrightable) with Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 899 (2d Cir. 1980) (plaintiff's ornamental belt buckles copyrightable); see also Esquire, Inc. v. Ringer, 591 F.2d 796 (D.C. Cir. 1978) (plaintiff's modernistic lighting fixtures not copyrightable), cert. denied, 440 U.S. 908 (1979); Norris Indus. v. International Tel. & Tel. Corp., 696 F.2d 918 (11th Cir. 1983) (plaintiff's automobile wheel covers not copy-
limited set of rights. As previously outlined, copyright gives proprie-
tors defined rights over specific ways in which people can benefit from a
work, rather than giving authors a generalized right to all the bene-
fits. For example, section 106 gives copyright owners no right to
control the public's ability to learn from a work or to enjoy it, as long as
the public does its learning or enjoying in ways that do not involve re-
producing the work or doing one of the other specified acts reserved to
the copyright proprietor. Thus, as an owner of realty has a right to be
paid for the use of his land if he can prove intrusion, to be paid for use
the owner of copyright must prove the defendant violated boundaries:
a specific section 106 right in regard to a protectable aspect of an origi-
nal and "fixed" work of authorship. Nor can the copyright holder ob-
tain relief simply because someone's activities are causing her economic
harm. To be actionable, the harm must result from copying or some oth-
er prohibited act. Thus an author cannot successfully sue a competi-
tor whose more popular, but independently created, work is cutting
into her market. As is often true with physical property, the copyright
owner's rights to recompense for economic harm is parasitic on intru-
sion, the violation of boundaries.

Although they are not physically "crossable," the fixation and mark-
ing requirements and the limits on protectable intellectual products
and copyright owners' rights function as boundaries in the same way as
the edges on personal property or physical boundaries around realty
do. Inevitably, the boundaries of intangibles will be less precise than
the metes and bounds of realty, and the courts must be vigilant in en-
forcing copyright's limits lest the public be "chilled" in its proper use
of the unprotected aspects of a work. If this vigilance is maintained,

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See generally Robert C. Denicola, Applied Art and Industrial Design: A Suggested Approach
to Copyright in Useful Articles, 67 MINN. L. REV. 707 (1983).

188. See Berlin v. E.C. Publications, 329 F.2d 541, 543 (2d Cir.) (rebuffing plaintiff's
 claim that "the copyright laws restrict the economic benefits of copyrighted works to the copy-
 right holders"), cert. denied, 379 U.S. 822 (1964). Copyright thus tends to avoid the dangers of
 unlimited accountings that concerned John Dawson, supra note 127, at 1412.

189. Although first amendment issues are outside the scope of this article, it may be
 worthwhile to discuss briefly the question of whether duties not to copy or adapt creative
 works create qualitatively different burdens on the public than do the duties not to harm and
duties not to enter that characterize tangible property; in particular: Do copyright's duties
inhibit liberty of thought and expression?

The short answer has three parts. First, since intellectual property does not protect
ideas, there is no explicit control on the expression of ideas one has learned from others.
Second, intellectual property, like the rest of the law, only imposes duties regarding physical
actions: replication, public performance, and public display. It does not purport to control
thought. However, some of these physical actions do have a special and intimate relation to
freedom of thought and expression of ideas. This leads to the third point: To the extent
intellectual property does indirectly impose such restraints, its borders should be redrawn.
Speaking one's mind in public is a form of public performance, for example, and responding
to one's opponents effectively may demand some use of their expression. That use should be

Connection between the physical and the intellectual also occurs, though with less fre-
quency, in the law of tangible property. Both tangible property law and intellectual property
copyright's boundaries can work simultaneously to identify the staked claim over which others must respect the owner's entitlements and to identify the intellectual material open to use by all. Because the natures of the intellectual property and tangible property boundaries differ, the natures of "trespass" and "infringement" differ. Yet the boundaries function alike in identifying what constitutes "property."

2. **Harms and benefits.**

Copyright gives authors an ability to sue for a share in the profits others make from using their works. In doing so, does copyright really go further than giving rights against harm? In the text so far I have been willing to assume so, in order to highlight certain potential differences between copyright and tangible property, but in fact the answer is largely a matter of definition. The word "harm" is usually used to indicate the extent to which someone's welfare is below some specified baseline level of welfare. Whether to call the author's failure to receive revenues from particular copiers a "harm" thus depends on how one characterizes the author's baseline.

The clearest case of "harm" is where a copier sells to the author's own customers a product identical (except for its lower price) to what the author would have sold, so that the author's sales are diverted to the copier. Giving the copyright owner a right to share in the infringer's profits where those profits simply represent revenues that the copyright proprietor would herself have earned in the infringer's absence would be uncontroversially described both as a right against "harm" and as a right to recapture benefits. (It is commonly recognized that in the area of intangibles it can be difficult to measure the amount of injury, and that giving authors a share in the profits copiers make is in part a reaction to, and compensation for, that difficulty.)

If the copying does not affect the copyright owner's expected markets, the case is harder to classify. Such a case might arise in several ways; perhaps the copier is a second creative artist with a valuable and novel

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law should and usually do give way when such conflicts occur. Thus, when the owner of a "company town" uses rights against trespass to inhibit first amendment rights, the federal Constitution requires those trespass rights to give way. See *Marsh v. Alabama*, 326 U.S. 501 (1946). When the owner of a shopping mall uses rights against trespass to keep out activists bearing petitions, certain state constitutions will require those rights, too, to give way and will privilege the strangers' entrance despite the landowner's protests. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). Similarly, and more systematically, copyright's fair use doctrine, and its refusal to give creators rights over ideas, seek to ensure that rights over copying will not significantly inhibit liberties that are essential to human self-expressiveness or to political life. To the extent such inhibition is threatened, copyright need not be abandoned. It can be designed to give way when conflicts occur. One can criticize particular copyright decisions for being insufficiently sensitive to first amendment issues without condemning copyright as a whole.


191. See **D. Dobbs, supra** note 56, at 431-34.
conception for adapting the copyrighted work, someone who transmits
the work to a new audience using a communications technology in-
vented after the work was created, or perhaps an entrepreneur who
knows of a market of which the author is ignorant. Assume that the
revenues these copiers earn are not revenues the copyright owner
could have earned on her own. If the author is entitled to control all
copying of her work then a lack of compensation from these copiers will
make her worse off than she was legally entitled to be. If “harm” is
deﬁned as the extent to which she is worse off in comparison with how
she would have fared had the copier respected her copyright and paid the
license fees the author would have demanded, then these copying activ-
ities done without her permission will be said to “harm” her. However,
if she is entitled to control all copying of her work, but “harm” is
instead deﬁned as the extent to which she is worse off in comparison
with how she would have fared in the defendant’s absence, then it will not
be said that she has been “harmed” in these cases. One would say in-
stead that when the copyright law allows a copyright proprietor to sue
successfully in such circumstances, it is solely giving her an entitlement
to share in the beneﬁts her work generates.

For the issues raised by copyright law, it is largely irrelevant
whether the author’s entitlement is viewed as an entitlement to be “free
from harm” or “to share beneﬁt.” As I will explore shortly, it is appro-
priate that copyright should give rights beyond mere protection against
harm (narrowly deﬁned). Among other things, it is desirable for au-
thors to be responsive to the public demand in new areas as well as
established ones,192 and a rule of law that denied authors compensa-
tion except to their “expected” markets could cause line-drawing
problems that would dampen the incentives that new markets should
bring.193

An additional point about the harm/beneﬁt distinction should be
mentioned. Although it is frequently argued that the law should only
be employed to regulate behavior that causes “harm to others,” that
argument in its strongest form has no applicability to copyright. The
“harm to others” argument is best used to argue that the law should
not regulate the category of behaviors John Stuart Mill described as
“self-regarding”—behavior that affects the actor much more than any-

192. See Gordon, Fair Use, supra note 14, at 1621-22. It might be argued that potential
revenues from unexpected uses are unlikely to play much of a role in the author’s pre-creation
planning, and they are thus irrelevant to incentives. However, revenues from works at various
stages of an author’s or publisher’s career commonly cross-subsidize each other. Thus, a
frequent argument for copyright is that the occasional best seller and its mammoth revenues
makes possible a publisher’s willingness to give ﬁrst time authors a tryout. For an individual
author, too, whose books are well adapted to a new use (for example, particularly suited to
cinematic presentation), obtaining large revenues the ﬁrst time his work appears in the new
medium may be important in providing him the wherewithal to make a second work.

193. Further, it can be quite diﬃcult to decide what is or is not an “expected” use. For
example, there certainly had been some expectation that new broadcast media would evolve
once radio was in existence and prior to the time television was announced as practical.
However, copying is not a "self-regarding" act; a legal decision whether or not to allow unauthorized copying to proceed does not only or primarily affect the copier. It also affects the author. For example, obtaining revenues from a new use could make the difference between a novelist staying a novelist or quitting to take a job in advertising.

A different question is presented if enforcing the copyright entitlement would not generate new revenues for the copyright owner; in such a case, the act of copying could conceivably be regarded as "self-regarding." In such cases, however, it is far from clear that the copyright owner could bring a successful suit.195

3. Differences in liability criteria.

Although formally the owners of both tangible and intangible property have a similar right to recapture benefits achieved through intrusion, there may be some concern that the impact of this right will be greater in the intangible realm. Physical boundaries might allow a wide range of uses to occur without compensation. Intangible rights' boundaries, by contrast, have been artificially defined precisely to bring within their scope a wide range of the uses that can be made of the product. When copyright gives authors rights over specific forms of use,197 the law arguably risks imposing a more expansive liability than with rights against physical intrusion or harm.

However, the differences are not as great as they may seem, and to the extent the design of intellectual property is broader, this breadth is tolerated because copyrights would provide little real protection without it. For physical property, rights triggered by intrusion allow the owners of realty to control most of the uses made of their land. Since most economically significant uses of land require physical entry (growing crops on arable land, building skyscrapers on a city plot) and most economically significant uses of tangible personalty require physical intermeddling (eating an apple, driving a car), rights against physical intrusion indirectly give tangible property owners a right to control most

194. See John Stuart Mill, On Liberty 91-95 (C. Shields ed. 1956). The typical example is freedom of thought or sexual behavior since how X thinks or how X behaves in the bedroom affects X more than it does anyone else, and since controlling X's thoughts or sexual behavior would hurt X more than it could help anyone else, the law should not interfere in these aspects of X's life. Other interpretations of "self-regarding act" and of Mill's position can be made. For example, it might be argued that Mill was not merely making a utilitarian calculus, but also had in mind a particular substantive idea for human development or a particular preference for liberty. See, e.g., Gerald Dworkin, Paternalism, in Morality and the Law 107, 117-18 (R.A. Wasserstrom ed. 1971) (exploring non-utilitarian arguments in On Liberty). Such a position might have different implications for intellectual property.

195. I have suggested that such copiers have a good claim to the privilege of fair use. See generally Gordon, Fair Use, supra note 14; text accompanying notes 434-435 infra.

196. See text accompanying notes 190-195 supra.

Economically significant uses of what they own. On the other hand, a right against physical intrusion would not enable an intellectual property owner to control most economically significant uses of the intellectual product. For example, assume that someone visits a park and photographs a famous statue, intending to mass-produce a replica of the statue in plastic. Giving the sculptor a right only to control physical touching of the work would give her no effective remedy. Or assume that someone writes a symphony. Inexpensive portable taping techniques may make it possible for someone who hears a broadcast of the work, or who is a member of the audience present at the work’s performance, to make recordings that will compete with the composer’s own records.

In these examples, a right against physical intrusion alone is unlikely to make the sculptor or composer fully responsive to the public demand for what they can produce. More generally, resources tend to be utilized most efficiently when the decisionmakers must take the costs and benefits of potential decisions into account when deciding. In economic language, they must “internalize” the costs and benefits. Demsetz and others have argued that “the main allocative function of property rights is the internalization of beneficial and harmful effects . . .” In the law of tangible property, an owner is encouraged to keep his land from going to waste and to use it productively because he bears the loss or reaps the profit that results. The same logic applies to accident law. Forcing harm-causers to “internalize” the costs of their harm by imposing tort liability on them deters their careless behavior.

Intellectual property performs the same internalization function; as accident law discourages careless behavior by internalizing costs, copyright encourages productive behavior by giving creators a share in the benefits they generate. For a nonaltruistic benefit-creator to alter her behavior to increase the benefits her work will give to others, economic theory suggests, she must be able to internalize at least part of those benefits. The more revenues the author can expect, the more she is likely to invest time, effort, or money in creating new works. As the statue and symphony examples suggest, achieving internalization of benefits for intangibles largely depends on rights not tied to physical touching.

Doctrinally, the Supreme Court seems not unduly distressed by differences between rights to exclude physically, on the one hand, and rights to control or profit from the benefits that flow from use, on the other. In Ruckelshaus v. Monsanto Co., the Court held that intellectual property rights (there, trade secrets) could constitute “property” enti-
ttled to the protection of the fifth amendment's "takings" clause.\textsuperscript{201} When the government, without prior notice that confidentiality would not be respected, obtained one company's trade secrets and then allowed other companies to use them, the Court required the government to pay compensation.\textsuperscript{202} In treating an occasion in which the government had simply made it possible for one entity to take physically nonintrusive advantage of another as a taking of property, the Court demonstrated its comfort with the different liability criteria for tangible and intangible property.


We can easily see why each of us should have dominion over our bodies. Under all of the normative perspectives one could name—natural law,\textsuperscript{203} Hegelian philosophy,\textsuperscript{204} utilitarianism,\textsuperscript{205} economics,\textsuperscript{206} common sense—it is easy to defend the notion that a soul should have dominion over the body it inhabits, in particular, a right to say "no" to intrusions. But it is not so clear why persons should be given the right to control things that lie outside their bodies, things as to which other persons might also have claims. Many theorists, including John Locke,\textsuperscript{207} have attempted to justify dominion over property as an out-

\textsuperscript{201} See also Carpenter v. United States, 108 S. Ct. 316 (1987) (confidential information is "property" under the mail fraud statute).

\textsuperscript{202} Monsanto, 467 U.S. at 1013-14.

\textsuperscript{203} J. Locke, The Second Treatise of Government § 27, in Two Treatises of Government 283 (P. Laslett ed. 1970) (arguing that persons have "natural" rights in self and products of the self).

\textsuperscript{204} See Margaret Radin, Property and Personhood, 34 STAN. L. REV. 957, 971-78, 986-88 (1982) (exploring Hegelian notions of property).

\textsuperscript{205} A utilitarian argument might run as follows: Someone else's action that affects my body will probably affect me more than it does them, so giving me control over my body is likely to help me more than it frustrates that other person, thus leading to an increase in utility. Giving me a legal right to exclude will cause less social disruption than will leaving me to rely on my own efforts to effectuate this control. (This argument adapts and extends Mill's argument for liberty regarding self-regarding acts, which pertained to the privilege of being free from state control, see J.S. Mill, supra note 194, to include rights to call upon the legal system to prevent other private parties from interfering with the self.) In addition, loss of control over the self injures dignity, which causes disutility.

\textsuperscript{206} Economists might adopt the utilitarian argument in part, although the relationship between "wealth maximization" and "utility" is always problematic. See generally Jules L. Coleman, Efficiency, Utility and Wealth Maximization, in Markets, Morals, and the Law 95-139 (1988). Alternatively, their argument might stress information and other transaction costs: Decisions about interferences with a body are not easily monetized; the person with the best information about the applicable costs is likely to be the person whose body it is, and this person will probably be better able to act on any decision reached than a third-party decisionmaker. See Calabresi & Melamed, supra note 64, at 1096-97.

\textsuperscript{207} Although Locke's view of property is often perceived as not based on "personality" interests, his basic argument was that a right of property in the things one labors to produce or appropriate grows out of one's right to control the labor of one's body. See J. Locke, supra
growth of rights over one's personal self;\textsuperscript{208} and an argument of that sort might also be used to justify intellectual property.\textsuperscript{209} In addition, many property rights clearly serve also to encourage desirable patterns of resource use. Since much of the criticism copyright faces is economically based, I shall explore the latter function and inquire into whether the institution's role in providing incentives differentiates it from tangible property.

The market-promoting and internalizing character of the legal institution known as "property" has been noted frequently in regard to tangible resources.\textsuperscript{210} As suggested above, the copyright statute similarly facilitates the use and development of copyrighted works through markets.\textsuperscript{211} Putting the matter most simply: "Just as a farmer will not voluntarily cultivate land if any other person can come along and harvest the land, an author without copyright will not have sufficient pecuniary incentive to engage in the productive act of artistic creation."\textsuperscript{212} The following discussion will show how the various components of the intellectual property package—the privileges, powers, and rights—all have distinct economic functions that allow authors to market their works and thus share in the benefits their works provide.

\textbf{Privileges.} Privileges have at least three sorts of value for the creator, even when considered without reference to rights over copying. First, with the liberty to use\textsuperscript{213} a work, the creator can enjoy the work herself.

\textsuperscript{208} For an argument that the "personal" element should remain an active and explicit part of property law, see generally Radin, supra note 204.

\textsuperscript{209} Immanuel Kant is often associated with the view that authors' personal interests can justify copyright, though the implications of Kant's views are far from clear. See Emanuel Kant, \textit{Of the Justice of Counterfeiting Books}, in \textit{1 ESSAYS AND TREATISES ON MORAL, POLITICAL, AND VARIOUS PHILOSOPHICAL SUBJECTS} 225 (W. Richardson trans. 1798), discussed in Breyer, supra note 3, at 288-89.

\textsuperscript{210} See, e.g., Richard A. Posner, \textit{ECONOMIC ANALYSIS OF LAW} (2d ed. 1977); Calabresi & Melamed, supra note 64, at 1099 (rights of exclusion and powers of transfer facilitate markets); Demsetz, supra note 21, at 347-48, 354-58.

\textsuperscript{211} See Gordon, \textit{Fair Use}, supra note 14, at 1605-10 (general overview of the market model), 1610-14 (analysis of copyright markets). For recent analyses usefully discussing the parallel functions performed by legal and physical modes of exclusion in market formation, see Adelstein & Peretz, supra note 21; Liebowitz, \textit{Copyright Law, Photocopying and Price Discrimination}, supra note 21; Palmer, supra note 6.

\textsuperscript{212} Liebowitz, \textit{Copyright Law, Photocopying and Price Discrimination}, supra note 21, at 184. Economic critics of copyright ask whether in the absence of property rights strangers would indeed be able to capture enough remuneration to undermine creators' incentives. A similar critique is often made of private property. Other entitlement packages might, in particular circumstances, facilitate desirable exchanges even better than the private property model. See, e.g., Kennedy & Michelman, supra note 41, at 717-39.

A creator wants to be able to sing her own song just as she wants to be able to eat her own apple.

Second, value stems from the privilege *not* to use one's own work. Nondisclosure is perhaps the most economically significant privilege, for the threat of nonavailability gives the author leverage with which to exact payment from potential users for access to the work. That threat is credible as long as the author possesses the only copies, for she can use tangible property law to keep those copies secure from prying eyes and photocopy machines. Once copies of the work are in hands other than the author's own, however, the creator may lose control of it unless the law gives her more than a mere privilege of nondisclosure and tangible property rights. Depending on the nature of the work and the market, once a copy of a work is provided even to one customer, strangers may obtain access to it through that customer. They then may either use it without paying or, even worse for the author, copy it and become competing sources of the work. The nondisclosure privilege thus gives the author some power to demand recompense, but the extent of the revenues that she can generate after the first customer has received a copy is uncertain.

Finally, creators may be able to charge others a fee for sharing in their privileged use. For example, a composer can obtain significant fees from an audience if she can use physical strength to exclude nonpurchasers ("pay to hear me play my music or I'll have my bouncers throw you out") or if she can piggyback protection of the intellectual product on other legal rights like the right of exclusion from real property ("this is my concert hall and I'll call the cops if you try to come in without paying").

*Rights.* The right to exclude—for intellectual property, the right to refuse others the privilege of using the work in specified ways—supplements the privileges that an author has in crucial ways. An exclusion right against copying greatly increases the copyright owner's ability to prevent strangers from interfering with her ability to market the work. Since others are prohibited from copying the work, strangers cannot reproduce the copies to which they may have access and thus cannot directly compete with the author in selling the work. This right raises immensely the ability of the nondisclosure privilege to effectuate internalization, for the right counteracts the first-publication consequence of making the author vulnerable to pirates.

The "trespass" character of infringement suits\(^\text{214}\) makes the exclusive rights in copyright easier to use. As compared with trade secret or trademark plaintiffs, a proprietor can more easily prevail in a copyright infringement suit. She does not need to prove, in each individual case, that the defendant's copying leads to a socially undesirable result, unlike the trademark plaintiff, who ordinarily must prove a likelihood of

\(^{214}\) See text accompanying notes 46-48 *supra* (nature of action of trespass to land).
confusion. She also need not show that the defendant committed any independent bad act, unlike the trade secret plaintiff, who usually must prove that defendants knew they were obtaining the contested information through someone’s breach of trust.215 This “formal” methodology, in which violation of the exclusion right is per se actionable, is a typical example of the common law’s ownership model. Rather than inquiring independently into whether plaintiff or defendant should control the contested use, as a prima facie matter the court defers to the owner as to a sovereign whose will is law over the owned territory.216 The copyright plaintiff need not even prove that defendants knew they were copying; as in trespass to realty, where a good faith and reasonable belief that one is on one’s own land will not protect a defendant who ignorantly crosses a neighbor’s boundary,217 even unconscious copying gives rise to liability in copyright cases.218

Limits on exclusion rights also have an economic dimension, in both tangible property law and copyright. Just as a landowner’s prima facie trespass claim can be defeated by a defendant who bears the burden of proving an applicable privilege, such as necessity, a copyright owner’s infringement claim can be defeated by a defendant who bears the burden of proving “fair use.”219 Implicit in both sorts of privileges is the judicial decision that, when special circumstances are present, a court should inquire into the merits of what the intruder or user intends to do with the property, thus guarding society from potentially disastrous assertions of the exclusion right. The privileges act as a “safety valve” in the event the self-regulating character of property fails to keep it within tolerable bounds.220

The privileges to trespass have evolved over the years into a discrete

215. See text accompanying notes 117-119 supra (trademarks and trade secrets).
216. Comparing trespass with negligence, for example, William Powers notes: Ownership embodies a formal methodology, since . . . questions concerning appropriate use are answered wholly by asking whether a proposed use has been sanctioned by the owner. A decision by the landowner . . . concludes legal debate under the ownership model. On the other hand, a duty of reasonable use embodies a nonformal methodology because it makes direct, ad hoc reference to efficiency [or other measures of social desirability]. Under this model, a decision concerning the landowner . . . would depend on a comparison of relative costs and benefits in the specific case.

William C. Powers, Jr., A Methodological Perspective on the Duty to Act (Book Review), 57 Tex. L. Rev. 523, 526-27 (1979). He notes that this formal and deferential approach “enhances predictability, is easier to apply, and controls bias or other sources of error in the decisionmaking process,” but that a formal approach also has costs, such as the “social cost of tolerating uses that do not maximize aggregate welfare in the short run.” Id. at 527.
217. Prosser & Keeton, supra note 47, at 74-75.
218. Bright Tunes Music Corp. v. Harrisons Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976) (George Harrison found liable for having “subconsciously” copied the song “He’s So Fine” in composing “My Sweet Lord.”)
219. See notes 137-140 supra and accompanying text (fair use); see also Sony Corp. v. Universal City Studios, 464 U.S. 417, 451 (1984) (commercial copying is “presumptively” unfair; in cases of noncommercial copying, plaintiff has initial burden to show defendant’s use has future to harm plaintiff’s future market).
220. See note 216 supra (costs of the “formal” approach); see also notes 62-64 supra and
set of defined privileges. But copyright law is newer, and “fair use” appears amorphous largely both because one doctrine is doing the work of many, and because the judicial understanding of appropriate grounds for privilege in copyright is still evolving. Eventually there are likely to be as many discrete privileges to use others’ works as there are privileges to enter land.

Powers. Because the exclusion right is coupled with powers to change the entitlements in the work, the copyright proprietor has an increased ability to demand significant payment from those who want to use the work. First, an exclusion right imposes on the public a duty not to copy; and if the proprietor is the only person empowered to void this duty, she can charge a fee for doing so. So, for example, persons who want permission to perform a musical composition publicly or to make numerous duplicates of it for use in their professional choirs will pay the copyright owner for her permission (a nonexclusive license). Similarly, the proprietor’s powers mean that the composer who wants to extract money for performances of her work would no longer have to rely on her ability to control physical access to the place where the music is played. With a right to prohibit strangers from publicly performing the work and a power to change their duty not to perform into a privilege of performance, composers can exact payment from performers other than themselves who give concerts over the airwaves or in buildings the composers do not control.

Second, in addition to enabling copyright owners to void otherwise applicable duties not to copy, powers also enable the copyright owner to transfer entitlements in full. Purchasers may pay significantly more for receiving the copyright owner’s own exclusive rights than they would for mere permission to use. For example, if a novelist merely waives his objections to publication, without transferring to the publisher any of his exclusive rights, the publisher might be unwilling to pay a great deal for the license out of fear that the author might later privilege other persons to publish the same work. Giving authors the power to terminate their own privileges and powers, to assign completely their entitlements in their work, eliminates such problems.

accompanying text (privileges for socially desirable behavior); notes 523-526 infra and accompanying text (exigency-based exceptions to copyright).

221. See Restatement (Second) of Torts §§ 167-213 (1965) (privileged entries on land).

222. Fair use has often been called the “most troublesome in the whole law of copyright.” Dollar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam). I do not contend that fair use will ever be a matter of bright line categories. But much of the sense of mystery surrounding fair use might dissipate if one recognized that this single doctrine, though supplemented by a number of more specific statutory limits on copyright owners’ rights, does the work that many separate privileges do in other areas of property law.

223. See Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 209 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953). Haelan, a suit between two chewing gum companies over the use of a baseball player’s picture on bubblegum cards, illustrates the importance of assignability. The player had purported to sell the “exclusive” right to use his photograph to one gum
Third, authors can use their exclusion rights to demand a share in the new value created by the technology, talent, or entrepreneurial activity of others, regardless of whether the authors personally could have implemented the new use. Since copyright proprietors have the power to transfer the rights and powers in their work to others, they can make transfers to persons who may be better situated than they to utilize the work to serve the demands of the paying public and who may earn more for the authors than they could earn for themselves. Thus, an author who knows nothing about movie making can still sell the motion picture rights for his novel to a film company. The right of exclusion allows the owner to act as a gatekeeper, demanding license fees from others who wish to apply their talents or resources to the works; economic theory suggests that over time authors will probably respond to the new possibilities created by such developments, and the prospect of these new revenues will induce the creation of works adapted to filling the new needs.

The entitlement package is more than just a way to give the author incentives to produce in the first instance. It also organizes the way already-produced works are rationed and coordinated. Owners "ration" the works by selling the privileges or rights to the highest bidder, thus allocating the entitlements to those economically best able to satisfy public tastes. Also, by taking steps to maximize their own profits, the owners through rationing and coordination control exploitation of the resource to encourage appropriate development.

224. The owner has no economic power, however, to exact license fees for unprotected aspects or uses of the work. See 17 U.S.C. § 106 (1982).

225. To illustrate, consider the example of movie producers who wish to purchase the motion picture rights to a best-selling novel. Smithian economists would posit that each producer's ability to raise funds from investors depends on the amount of revenue that his or her movie-making is expected to generate. Among producers of varying levels of skill, the producer best able to use the book to satisfy consumer tastes will be in a position to raise the most funds and thus to offer the highest bid. Similarly, the author or other owner of copyright in the novel will sell the rights only if the revenues he could anticipate by exploiting the work himself would be less than the purchaser's bid. Control over the resource will therefore gravitate through consensual transfers to the person in whose hands the resource can best be used to satisfy consumer desires.

Gordon, Fair Use, supra note 14, at 1606 (footnotes omitted); see also id. at 1615 (users who plan economically valuable applications of the work are likely to be able to pay for their use). The Court seems to accept that, at least in some contexts, persons who can use a work to serve social needs (economically defined) will be the persons most able to pay license fees for its use. See Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 559 (1985).

226. The classic article on the employment of intellectual property rights to rationalize production and exploitation is Kitch, supra note 21; see also Denicola, supra note 21, at 640 (arguing that coordination in trademark use may be necessary to preserve the value of the mark); Donald G. McFetridge & Douglas A. Smith, Patents, Prospects, and Economic Surplus, 23 J.L. & Econ. 197 (1980) (commenting on Kitch's analysis); Edmund W. Kitch, Patents, Pros-
This internalization, rationing, and coordination process does not necessarily lead to ideal allocations from a normative point of view, given, among other things, patterns of income distribution which may prevent certain groups from expressing their tastes. After all, "If wealth is very unequally distributed in a community, then the fact that a rich man buys caviar while a poor man goes without bread does not mean that the community as a whole values the caviar more than the bread." Nor does willingness to pay necessarily best indicate value. For example, trash novels regularly outsell classics, yet literature courses still spend more time on the latter. For another example, adopting strong trademark rights may make trademarks worth a great deal of money; but persons opposed to conspicuous consumption—like the beleaguered parents of teenagers demanding sneakers with "Reebok" and "Adidas" labels—might be delighted to see the drawing power of popular trademarks diminish. And, most generally, economic efficiency is not the only goal that law in general, or intellectual property in particular, should legitimately serve. Yet in promoting market formation, copyright serves the same function as the law of tangible property. Copyright seems no "sport" but an ordinary example of a common pattern.

II. ALTERNATIVES TO COPYRIGHT

This section will seek to illuminate the nature of the choices that must be made if copyright is to be eliminated, by briefly discussing some of the conceptually available alternatives to copyright. The discussion will first examine possible alternatives to copyright, focusing on three: (1) "copy-privilege"—eliminating copyright and all equivalent rights; (2) "no direct or indirect rights"—making unenforceable any

227. The governing principle of markets might be described as "To each according to how much he benefits others who have the resources for benefiting those who benefit them." ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 158 (1974) (commenting on the views of F.A. Hayek).

228. RONALD DWORKIN, A MATTER OF PRINCIPLE 222 (1985).

229. Roughly speaking, "conspicuous consumption" is the process of making wasteful purchases in order to demonstrate wealth or status. See THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 68-101 (1934).


231. See text accompanying notes 407-413, 444-445 & 516-533 infra; see also Fisher, supra note 5, at 1686-92 (discussing the underlying objectives of the fair use doctrine).

232. That copyright takes the form of property and serves functions that property serves does not mean that it deserves unquestioning deference on that account. Property entitlements vary with circumstance; courts and legislatures are continually faced with the question of what entitlements should attach to a given species of property in a particular context and are quite willing to vary entitlements as policies dictate. See B. KAPLAN, supra note 8, at 74, 77-78 (warning against the reification of "copyright as property"). In this regard, too, copyright is no exception.
right, even if not equivalent to copyright, whenever enforicing it would restrain or punish copying; and (3) "mandatory sharing"—imposing duties on authors to share their work.\(^\text{233}\) I will then compare these three options to one another, showing where the alternative most often favored by the commentators, eliminating rights specifically directed against copying, fits among the available choices. This "copy-privilege" option will provide the focus for the last half of the article, where I critically examine the major arguments advanced in favor of that option and against copyright.

A. Generating Alternatives to Copyright

Evaluating any legal institution requires identifying and understanding the possible alternatives. Commentators on copyright usually focus on only two systemic choices: copyright as we know it, or an absence of copyright.\(^\text{234}\) Yet other potentially important options exist.

Beginning with the most global set of alternatives, one might question all private property, whether in land, tangible personalty, or intellectual works, and examine a number of alternative property regimes. The law might be revised, for example, to substitute for private property a regime in which all property was owned in common, with varying degrees of restrictions on resource use set by the community. Another alternative might substitute for private property a regime of no property at all, i.e., a partial state of nature where self-help and voluntary assistance from others would replace police and courts as the primary means of protecting one's claim to resources.\(^\text{235}\) One might examine, as further examples, how property of various kinds would be handled in a regime governed by John Rawls's principles of justice,\(^\text{236}\) in Bruce

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\(^{233}\) Other options exist. For example, one might examine a regime of "copy payment." (I owe the term to Jane Ginsburg.) Currently, copyright grants exclusive rights that are backed by injunctive rights as well as rights to monetary relief. Eliminating the possibility of injunctive relief would leave creators with the right to remuneration but without a veto over how their works are used (a regime of "copy payment"). I explore that alternative here only insofar as it is a component of other regimes. Because the focus here is to show that some authors' rights, as opposed to an absence of rights, are normatively desirable, my analysis does not consider "copy payment" separately from copyright.

\(^{234}\) See generally Breyer, The Uneasy Case, supra note 3 (advocating that copyright not be extended); Hurt & Schuchman, supra note 25, at 425-32 (exploring various alternatives but primarily questioning intellectual property's exclusive rights); Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21 (suggesting that nonenforcement of copyright might be desirable where societal benefits of enforcement outweigh societal costs); Palmer, supra note 6 (arguing that copyright and patent are normatively inferior to legal schemes that would depend solely on creators' ingenuity in utilizing their common law entitlements in tangible property and contract).

\(^{235}\) I say a "partial" state of nature because an absence of property can coexist with state enforcement of contracts and other forms of government. For an interesting discussion comparing the efficiency of private property regimes with state-of-nature and things-owned-in-common regimes and suggesting that each model's comparative efficiency depends on empirical questions rather than on any inherent virtue or limitation of the models themselves, see Kennedy & Michelman, supra note 41.

\(^{236}\) See generally John Rawls, A Theory of Justice (1971).
Ackerman's liberal state, or in Robert Nozick's minimal state. Finally, one might take any of these sets of global guidelines and apply them solely to intellectual property.

Some rough observations can be made about the relation between certain of these global choices and copyright. Given a choice between a communitarian regime with extensive central control and a state-of-nature regime, copyright critics would probably prefer that the latter govern intellectual property, since copyright's supposed evils stem from too much control over copying rather than too little. The critics might be attracted to much of Rawlsian theory, such as the priority given to liberty or the way Rawls's "difference principle" would focus on the welfare of the worst-off, who might need to use what others produce. Since "[t]he difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset. . . .", this could lead to a greater degree of sharing than in our

237. Bruce A. Ackerman, Social Justice in the Liberal State 69-80, 100 (1980) (role of dialogue). To the extent that the legitimacy that can sanction ownership arises out of dialogue, it seems highly arguable that the elements of dialogue should not themselves be owned.


239. This assumes that in a state-of-nature regime, some incentives for the production of new works would remain. Otherwise, those critics who take an economic stance might not favor abrogation of rights against copying. See, e.g., Breyer, The Uneasy Case, supra note 3, at 283-306, 350-51.

240. See J. Rawls, supra note 236, at 60-61, 541-48. His first principle of justice is that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." Id. at 60. His second principle, the "difference principle," is that "[s]ocial and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." Id. at 83. Rawls gives liberty first priority, so that "a departure from the institutions of equal liberty required by the first principle cannot be justified . . . or compensated for, by greater social and economic advantages." Id. at 61.

The principle of liberty does not per se favor users of creative works over the authors of those works, for among "the basic liberties of citizens" appear not only "liberty of conscience and freedom of thought," the form of liberty with which persons seeking access to works of authorship might want to be aligned, but also "the right to hold (personal) property." Id. Nevertheless, particular such preferences could be constructed. Thus, Rawls argues that "all citizens should have the means to be informed about political issues. They should be in a position to assess how proposals affect their well-being. . . . The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate." Id. at 225. Concerns such as this might give rise to rules limiting, for example, the copyright of materials useful in political debate.

Rawls believes that in the Original Position (a hypothetical situation in which rational beings of equal liberty are to choose principles of justice to govern them), the participants would "set a particularly high value on the pursuit of their 'spiritual and cultural interest.'" T.M. Scanlon, Rawls' Theory of Justice, in Reading Rawls: Critical Studies of A Theory of Justice 169, 186 (N. Daniels ed. 1985). Arguably, in order to relate to one's culture, one must use its cultural creations—whether such use takes the form of reading, quotation, response, or adaption. The greater the importance to a society of cultural involvement, the greater its privilege to use intellectual products may be.

241. J. Rawls, supra note 236, at 83; note 240 supra.

242. Michael J. Sandel, Liberalism and the Limits of Justice 70 (1982) (quoting J. Rawls, supra note 236, at 101). Of course, it might be argued that an intellect would not be
current legal system.

But even if a wide range of alterations in the legal pattern could be implemented, most copyright critics tend to avoid fundamental rearrangements. They concentrate on alterations in the law that are specifically designed to decrease creators’ abilities to control the use that others make of their intellectual products and that operate within the framework of current legal institutions. But even if one refrains from essaying a wholesale redesign of the legal system, the choices are broader than copyright or no copyright.

If there were no copyright, creators would have no exclusion rights, and users would have privileges to copy without fear of the restraint that creators could have exercised with exclusion rights. As already noted, that regime might be called one of “copy-privilege.” As a second alternative, the law might give users privileges to copy which were good against any right whatsoever. Finally, the law might give users rights to the legal system’s assistance when they wish to copy. Restating these noncopyright alternatives from authors’ point of view, they amount to: (1) eliminating copyright and all rights equivalent to copyright (“copy-privilege”); (2) rendering unenforceable any tort or contract right, even if not equivalent to copyright, whenever its enforcement would restrain or punish copying (“no direct or indirect rights”); and (3) imposing duties to share on authors (“mandatory sharing”). The following material will describe these three options and then suggest why copy-privilege tends to be the commentators’ favored choice.

1. Entitlements revisited.

As a preliminary matter, it will be useful to highlight certain aspects of the Hohfeldian entitlements out of which these alternatives to copyright are to be built. Hohfeldian rights and privileges are commonly distinguished by describing privilege-holders as entitled to liberty and right-holders as entitled to enlist the state’s force. A privilege roughly treated the same for all purposes as other “common assets” in a Rawlsian state. It is nevertheless possible that a society that shares a sense that the creative person is “not really the owner but merely the guardian or repository of . . . assorted assets and attributes,” id. at 82, might impose significant limitations on such a person’s intellectual property rights, if any were granted at all. The difference principle might not lead in this direction, however, since the principle is also consistent with granting significant legal rights over works if those rights create incentives benefiting the worst-off, provided that the liberty principle is respected. See J. Rawls, supra note 236, at 100-08. Fisher briefly explores the applicability of the Rawlsian difference principle to copyright. See Fisher, supra note 5, at 1756-62.

243. One reason may be fear of hubris. For example, William Fisher has offered to recast copyright in light of his “utopian” vision of the role that intellectual products should play in modern life; but he admits the difficulties in trying to develop and implement a substantive vision of “the good life and the good society.” See Fisher, supra note 5, at 1697.

244. See sources cited in note 234 supra.

245. For simplicity’s sake, the discussion will employ “copying” as a proxy for the various uses of the work over which the copyright statute now gives creators control.
parallels what Isaiah Berlin termed a “freedom from” (although recall it is only a “freedom from” the state); and, correspondingly, a right roughly parallels a state-guaranteed “freedom to.”

One should not be distracted by the connotation of “undeserved advantage” that sometimes adheres to use of the word *privilege* in intellectual property debate. For Hohfeld, a privilege is simply a liberty. Nor should one be confused by American constitutional law’s occasional identification of *privilege* with “favor” or “gratuity” and *right* with “entitlement.” In the Hohfeldian lexicon, a *privilege* is also an entitlement—an entitlement to be free from governmental interference. Neither rights nor privileges are matters of “mere benefit” that can be disregarded at whim.

Every privilege is accompanied by a particular set of rights that operate to protect that privilege from erosion by the state. Thus, behind every privilege is a right, of some degree of strength, that restricts how the government may impinge on the privilege. For example, most of the freedoms guaranteed by the Bill of Rights analytically are Hohfeldian privileges backed by rights against governmental interference. In property law, the most notable of these back-up rights is the fifth amendment’s takings clause, which sometimes protects privileges with a requirement that compensation be paid for their abrogation. Some privileges are less strongly protected but, even so, the entitlement holder will have some rights, such as a right that the entitlement’s abrogation comport with due process, a right to demand proof that the abrogation is authorized by the state's police power, and a right that the restraint’s imposition comport with the substantive and proce-

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247. In the constitutional law area, the terms “right” and “privilege” have been most closely identified with the debates over what kinds of restrictions the government can lawfully impose as conditions for receiving benefits, and over what kind of benefits it can withdraw without due process or cause. See *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (Holmes, J.) (policeman fired because of his political activities held to have no valid suit, since “[h]e may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”). The classic article on the topic is William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-42 (1968) (discussing the fate of the *McAuliffe*-like distinction between constitutional right and “mere privilege”).

248. For example, the first amendment creates a wide range of privileges to speak and publish. Other privileges are created by state law and protected by the Constitution’s more general guarantees. See, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), as interpreted by *Paul v. Davis*, 424 U.S. 693, 708-09 (1976) (state action depriving person of privilege to purchase liquor was an alteration of legal status that, when coupled with injury from state’s defamatory statement, must meet due process clause requirements).

249. For a familiar (because classic and controversial) example of the Court’s willingness to hold that eliminating a privilege (called a “right” by the Court) constitutes a compensable “taking,” see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (state abrogation of a privilege to use certain land for subsurface mining held a taking requiring compensation). Although the Supreme Court has recently held that a law very similar to the one at issue in *Pennsylvania Coal* did not constitute a compensable taking, the opinion there takes care to distinguish rather than overrule *Pennsylvania Coal*. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 484-97 (1987).
dural constraints of local law. Thus, for example, federal intellectual property law currently contains both weakly and strongly protected privileges. The privilege to copy "unfixed" works is weakly protected. Although such copying is privileged by copyright, any state is free to replace that privilege with a duty not to copy within its borders, so long as the state does so by a proper legislative or judicial act. By contrast, patent law grants a privilege to copy nonsecret unpatented inventions that states cannot abrogate.

Although privileges are accompanied by weak or strong rights against government, they might not be accompanied by any rights at all against private parties. As between private parties, one's ability to make fruitful use of a privilege unaccompanied by rights may indeed be a matter of "favor" or fortuity, for either party is free to restrict the other's use of her privileges. Thus, if person X has a privilege to eat a plate of shrimp salad, by definition no one has the right to call upon the state to stop X from doing so. However, other persons may lawfully eat the shrimp salad before X gets to it, unless X's privilege to pursue eating shrimp salad is accompanied by a right to that salad. That is, where one private party has only a privilege, others have "no right" to interfere but they are privileged to interfere all they want. Privileges, like liberties of all sorts, can thus be valueless if the privilege-holder lacks the economic or physical strength to use them.

In any field of endeavor, some acts will be privileged, some forbidden, and some required. For example, one might be free to copy a work of art or prohibited from doing so; one might be free to restrict one's work to a particular favored market and mode of presentation, or required to license it to all comers. The alternatives to copyright that follow represent differing combinations of privileges, duties, and rights.

251. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 109 S. Ct. 971 (1989). One way to analyze preemption controversies is to ask whether a gap in federal protection creates merely a weak privilege that states are free to alter, or a strongly protected privilege that binds the states.
252. See W. Hohfeld, supra note 40, at 41 (the shrimp salad example); Some Fundamental Legal Conceptions, supra note 40, at 41-43; Kennedy & Michelman, supra note 41, at 752-53; see also Walter Wheeler Cook, Privileges of Labor Unions in the Struggle for Life, 27 Yale L.J. 779 (1918).
253. Hohfeld labels the correlative of a privilege a "no-right." If X has a privilege to act, Y has "no-right" to stop him; and the law will not intervene on Y's behalf. Some Fundamental Legal Conceptions, supra note 40, at 32-37.

Thus, someone who wishes to interfere with a privileged action cannot call upon the state to help him accomplish that interference. Hohfeld has been credited with helping the legal community realize more quickly that the law leaves much harm remediless—harm done by one person to another while pursuing their private mutual, antagonistic privileges. See Singer, supra note 41.
254. See Calabresi & Melamed, supra note 64, at 1095-96 (making a similar point).
2. Elimination of copyright: "Copy-privilege."

The most modest course of the three options would be merely to eliminate copyright and equivalent laws which affirmatively grant creators rights to prohibit others' use of their works, and to leave intact the various doctrines in the standing law which might indirectly augment authors' abilities to control or profit from their work. In such a regime, copying per se would not violate a creator's rights. A state would be free to enforce confidentiality contracts, however, or to restrain the publication of materials obtained through unlawful trespass or invasion of privacy, even if such enforcement might restrict access to some creative works. In other words, such a regime would grant privileges to copy that were strongly enough protected to void assertions of copyright, but not strongly enough protected to withstand rights grounded in policies unrelated to copying.

As a result, authors in a realm of copy-privilege would have those rights in their creative works which could ride piggyback style on other legal doctrines. If copy-rights were simply transformed into no-rights, for example, the law of conversion could nevertheless prohibit burglars from profiting from their thefts, thus precluding thieves from selling multiple editions of purloined letters, or the law of contract could nevertheless be employed to discourage persons who had signed confidentiality agreements from breaching their contracts. A desire to discourage trespass, breach of confidence, fraud, and the like, might therefore yield piggyback prohibitions against copying, not out of concern with copying itself, but because of a desire to avoid rewarding wrongful behavior.

Under this option, all persons would be presumptively free to copy whatever works of art or expression they could lawfully obtain; and states would have to determine the lawfulness of actions by criteria other than mere copying. The only governmental restraint on copying would be enforcement of duties arising out of an individual's behavior that involved more than simple copying (e.g., behavior inducing and violating a fiduciary relationship) or the individual's agreement. When no contractual or similar duty bound a potential copier and he violated no independent state law, he would be privileged to copy. The simple duty not to copy, now imposed by copyright law, would be imposed in a realm of "copy-privilege" only upon individuals who consented to accept it.

Thus, a publisher who wanted an author to submit her manuscript for possible publication might well promise not to publish the piece unless the two of them reached a mutually acceptable agreement about royalties. This promise would bind the publisher not to copy, even in a realm of "copy-privilege." Once a book was publicly available, however, any person who obtained a copy without having promised not to
duplicate it would be free to make as many copies or adaptations as he wished.

Just as users would be prima facie privileged to copy anything to which they had lawful access, in a realm of "copy-privilege" creators might be prima facie privileged to use any available mode of self-help to discourage copying. For example, publishers might try to come to informal or contractual agreements among themselves to respect each other's exclusive relationships with authors. They also might attempt to structure the industry to maximize an authorized publisher's lead-time advantage, use advertising to persuade customers there is special merit in the "authorized" edition, link their intellectual product (e.g., software) with a product that copiers cannot easily duplicate (e.g., customer service and updates), or issue low-price "retributive strike" editions to try to drive copiers out of the marketplace. (Of course, continuous publication below cost would ruin any publisher; the hope is that the mere possibility of retributive strike editions may deter piracy before it begins.) Another alternative is the use of "technological fences," such as programming copy protection into computer software, or building copy protection into videotapes or audio material to make them difficult to replicate accurately. These and similar devices might result in authors and publishers earning significant revenues.

In the eyes of many commentators, resolving the question of whether particular uses of creative works should be subject to the rights of authors and their assigns, or subject to the privileges of all, depends on estimating the likely outcome of struggles between authors and users holding equivalent privileges. If the income from privileged publication would be high enough to provide an adequate return on investment, such critics argue, authors should have no rights to prevent piracy. An inquiry into the likelihood that authors could earn enough revenues to support continued creation and publication even in a world of copy-privilege is the foundation of the position of Professor, now Judge, Breyer, whose 1970 article is probably the most important of the modern criticisms of copyright.

Judge Breyer expressed doubt about the desirability of copyright in particular areas and qualifiedly recommended that copyright not be expanded. He argued that existing common-law and self-help devices would enable at least some significant segment of publishers to restrain copiers sufficiently for the publishers to obtain an adequate return on

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255. In a real world context, all such modes of self-help would be subject to the antitrust laws.

256. When threatened by a "pirate" edition, an authorized publisher may respond with a "retributive strike" edition at below cost, in an effort to drive the copier out of the market. See Breyer, The Uneasy Case, supra note 3, at 300-01.

257. See Palmer, supra note 6, at 288-89 (discussing a range of technological "fences"). Prior to the invention of printing, the necessity for laborious hand copying was itself a technological "fence" that rendered copyright largely unnecessary.
their investments. Among those devices, Judge Breyer envisioned preserving contract rights that enable authors and publishers to be paid by persons wishing to obtain particular kinds of works, such as book clubs or subscription groups. His analysis also depended upon the continued availability of privileges of nondisclosure and reprisal, and on informal arrangements of various kinds. He clearly recognized that the extent of self-help’s viability would depend on circumstance. For example, in some industries, there might be a lead-time advantage making the first publisher relatively free of the need for copyright. In other industries, where marketing arrangements and technologies for reproducing intellectual works were available to allow copiers to enter the market immediately, this advantage might be unavailable. As he therefore noted, recommendations for and against copyright in one kind of intellectual product (trade books, for example) might not follow for other kinds of products where factors such as lead-time advantage, publisher customs, or alternative revenue sources are different.

Judge Breyer’s survey of noncopyright devices illustrates how the copy-privilege regime might look, though his emphasis on empirical questions to which there are no clear answers kept him from going so far as to urge that copy-privilege govern all intellectual products. More recently, an attack on patent and copyright by Tom Palmer, premised primarily on grounds of liberty but also making Breyer-like arguments that intellectual property is unnecessary for incentives, takes

258. Breyer, The Uneasy Case, supra note 3, at 300-06 (publishers’ use of “strike editions,” informal agreements and custom, and private subscription arrangements); see also id. at 309-29 (applying the analysis to varying classes of books); Breyer, Copyright: A Rejoinder, supra note 3, at 76-82; Tyerman, supra note 21, at 103-07. Judge Breyer similarly argued that the creators of computer programs might not need copyright protection if, among other things, time sharing and other industry developments made it easy for program suppliers to negotiate with potential users. Breyer, The Uneasy Case, supra note 3, at 346.

259. See Breyer, The Uneasy Case, supra note 3, at 306 (discussing book clubs). Thus, a contract that said, “Our subscription group will pay you X number of dollars if you research and write a particular volume for us,” would be enforceable.

260. See id. at 300 (“lead time advantage”).

261. See id. at 300-01.

262. See id. at 302.

263. Copy-privilege includes the possibility of contractual duties not to copy. Although Judge Breyer focused on contracts regarding payment rather than on contractual clauses that limit one’s publication privileges, his general reliance on contract as an alternative to copyright clearly indicates that he would not question the enforceability of either type of agreement. This is implicit in many of his arguments. For example, a credible scheme of privately commissioning works through book clubs or subscription groups might depend on authors having some assurance that if they send drafts to potential publishers, they would have some right to prevent the publishers from printing the material until they paid the agreed contract price. The same point applies to interpublisher modes of self-help. Reprisals against piratical competitors are of little assistance to a publisher unless the publisher can receive manuscripts and develop relationships with authors in the first instance. Without being able to enforce promises not to copy, publisher relations with potential manuscript sources will be difficult. It therefore seems clear that Judge Breyer imagined that in a world without copyright, the enforceability of contractual promises not to copy would be preserved.

264. See Palmer, supra note 6.
this further step. In Palmer's view, intellectual creators should have no independent exclusion rights in their intangibles and should rely solely on common-law and self-help means of protecting their work.

If Congress seriously desired to implement the copy-privilege option, it might be able to do so. The Constitution empowers Congress to enact copyright and patent legislation but does not require it.\textsuperscript{265} As mentioned earlier, legislation already contains provisions that affirmatively make some intellectual products unprotectable, granting privileges to copy strong enough to override inconsistent state rights.\textsuperscript{266} If conceptions of what was needed to "promote the progress of science" changed significantly enough, Congress conceivably could repeal the copyright statute and, under the copyright, commerce, and supremacy clauses, enact legislation preventing the states from reinventing copyright or giving other forms of rights over copying.\textsuperscript{267} (A drastic expansion of the first amendment might even accomplish a similar result.\textsuperscript{268}

\textsuperscript{265} U.S. Const. art. I, § 8, cl. 8.

\textsuperscript{266} See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 109 S. Ct. 971 (1989) (state law prohibiting use of direct molding process to duplicate unpatented boat hulls held preempted), in which the Court stressed that "the federal patent laws do create a federal right to 'copy and to use,'" id. at 985, and that this right privileges the public to duplicate any non-secret invention not protected by a patent; see also 17 U.S.C. § 301 (preemption of state rights); Ralph S. Brown, Jr., Unification: A Cheerful Requiem for Common Law Copyright, 24 UCLA L. Rev. 1070, 1092-9 (1977) (arguing that the copyright and patent statutes affirmatively place certain matters outside the scope of federal or state protection); text accompanying note 251 supra.

\textsuperscript{267} It could well be argued that such federal legislation would have to be based on the Constitution's commerce clause, U.S. Const. art. I, § 8, cl. 2, rather than the copyright and patent clause, since the latter simply empowers Congress to grant monopolies "for limited times" to authors and inventors, rather than giving Congress plenary power to regulate intellectual products as it sees fit, id. cl. 8. See The Trade-Mark Cases, 100 U.S. 82, 94 (1879) (copyright and patent clause did not give Congress power to create trademark law). In dicta, however, the Supreme Court has intimated that the copyright and patent clause could also provide adequate authority: "Where the need for free and unrestricted distribution of a writing is thought to be required by the national interest, the Copyright Clause and the Commerce Clause would allow Congress to eschew all protection." Goldstein v. California, 412 U.S. 546, 559 (1973). Of course, these dicta, like the abrogation of state rights effected in Bonito Boats, see supra note 266 and accompanying text, must be viewed with caution since neither appeared in contexts where Congress was abandoning all of its own intellectual property protections.

Independent of whatever support might be lent by the copyright clause, the commerce clause power might be a sufficient basis for a congressional ban on rights equivalent to copyright. In some sense, rights against copying can be seen as inhibiting commerce, and the commerce clause power is quite broad. See S. Rep. No. 425, 98th Cong., 2d Sess. 14-15 (1984) (concluding that legislation protecting semiconductor chip design could be premised upon commerce clause powers); Philco Corp. v. Phillips Mfg. Co., 133 F.2d 663, 668 (7th Cir. 1943) (upholding the constitutionality of substantive federal trademark regulation under the commerce clause: "Many things not themselves goods moving in interstate commerce are held to exert such a substantial influence upon the flow of commerce that they are 'instrumentalities of interstate commerce,' and as such subject to regulation by Congress... ."); see also Pamela Samuelson, Creating a New Kind of Intellectual Property: Applying the Lessons of the Chip Law to Computer Programs, 70 Minn. L. Rev. 471, 473 n.6 (1985) (discussing use of the commerce clause as basis for sui generis legislation regarding semiconductors).

If validly enacted, federal legislation granting privileges to copy could bind the states through the supremacy clause.

\textsuperscript{268} The courts have so far held that there is no necessary conflict between the first
It is already clear that the amendment invalidates some state law rights that impede the distribution of creative works. The takings due process and contract clauses might restrict the elimination of existing rights; but making the changes prospective, applicable only to newly created intellectual products in which property rights had not yet vested, would minimize conflicts with these clauses.

As for already-created intellectual products to which the government might wish to mandate free access, the government could subject them to eminent domain much as it now condemns privately owned real estate and then opens it to the public as parkland. Constitutional arguments that such an action is an impermissible exercise of governmental power are likely to fail. In Hawaii Housing Authority v. Midkiff, the Court concluded that "[r]edistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attrib-

amendment and copyright, primarily because copyright gives authors control only over expression and not over ideas and because the "fair use" doctrine integral to copyright is capable of incorporating first amendment policies. See 1 M. Nimmer & D. Nimmer, supra note 11, § 1.10 (suggesting that, in addition, there should be a first amendment privilege within copyright). Speaking literally, however, all copyright restraints free communication.

Although the Constitution grants Congress the power to give copyrights to authors, the first amendment postdates the patent and copyright clause. If one were willing to ignore the historical context in which the first ten amendments were adopted, the first amendment could conceivably be interpreted to constitute an implicit repeal of the copyright power or a sharp limitation on it. To the extent that the first amendment applies to the states through the due process clause of the fourteenth amendment, the amendment could also have the effect of striking down state rights equivalent to copyright.

269. See, e.g., Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988) (public figure's emotional distress claim directed at defendant who published an offensive caricature is subject to certain first amendment limitations).

270. Restricting or eliminating rights in intangibles can constitute "takings" which trigger the compensation requirement of the fifth amendment's takings clause. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000-04 (1984) (trade secrets are "property" within the meaning of the takings clause).

271. Since rights in intangibles can be "property" under the takings clause, id. at 1000-04 (trade secrets), there is every reason why they should also be so under the due process clause.

272. Contracts purporting to transfer exclusive rights in intellectual products presuppose the existence of those rights. If copyright were eliminated in all currently existing works of authorship, many contracts would become valueless.

273. The Supreme Court recently held that governmental disclosure of trade secrets submitted under assurances of confidentiality constituted a compensable taking but indicated that a prospective disclosure requirement constituted an exercise of the police power which would not require compensation. Monsanto, 467 U.S. at 1010-11. The Court took the position that when a new statute warns of the possibility of disclosure, the warning prevents the formation of "reasonable investment-backed expectations" that would trigger the takings clause compensation requirement. Id. at 1005-07. How far the Court would be willing to take this approach is unclear. Its treatment of Monsanto was undoubtedly influenced by the health and safety aspects of the issue presented. The contract clause issue is somewhat more straightforward. Since contract clause cases focus on the impairment of existing contracts, see Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), making any anticopyright law prospective should avoid most contract clause problems.

274. See, e.g., Monsanto, 467 U.S. at 986.

275. 467 U.S. 229 (1984) (statute redistributing land ownership from lessors to lessees in order to reduce concentration of land ownership held an appropriate exercise of eminent domain power so long as compensation is paid).
utable to land oligopoly is a rational exercise of the eminent domain power. 276 Similarly, if Congress were to abolish copyrights in order to correct market distortions attributed to them, 277 the Court would likely find this a valid public purpose achievable so long as compensation was paid.

Furthermore, although quite credible arguments could be made that abolishing copyright would increase only the public's short-term wealth by making works cheaper and would disserve the public's long-term material and cultural interest, 278 such a challenge to Congress's wisdom in choosing this method of responding to the necessary imperfections in copyright markets would be unlikely to succeed. The Court, in a case analyzing a sort of eminent domain in trade secrets, stated that "The optimum amount of disclosure to the public is for Congress, not the courts, to decide." 279 Though recent case law suggests a tightening of the public purpose requirement may be in the offing, 280 there is as yet no obvious constitutional bar to a massive legislative abrogation of intellectual property entitlements as long as compensation is paid.

3. No direct or indirect rights.

If freedom to use others' works is sufficiently important, why stop with copy-privilege? There is a host of legal doctrines, from privacy law and trespass through fiduciary duty and contract law, whose enforcement in particular contexts could lead to restraints on the use of intellectual products. For example, Jerry Falwell recently sought to use the state tort doctrine of intentional infliction of emotional distress to obtain damages when he was featured in and offended by a parodic cartoon by Hustler magazine. 281 Had Falwell been victorious, the state's concern with protecting emotional repose would have had the potential to chill the distribution of caricatures and other parodic material. Since

276. Id. at 243.

277. Of course, the issues presented by Midkiff and by copyright are far from identical, but both involve market distortions. As noted earlier, see note 23 supra, copyright provides incentives by making it possible for copyright owners to reduce the quantity of copies available and thus receive a higher per-copy price. This is a market distortion, in the sense that fewer copies are sold under copyright than would be sold in a hypothetical freely competitive market in the created work.

278. See generally Easterbrook, supra note 143, at 10-12, 21-29 (arguing that ex post forms of analysis, which might favor sharing what has already been produced, are less desirable from an economic point of view than ex ante perspectives concerned with incentives); Roland N. McKean & Jora R. Minasian, On Achieving Pareto Optimality—Regardless of Cost!, 5 W. ECON. J. 14, 22-23 (1966) (although exclusion rights in public goods such as recordings and inventions give rise to imperfect markets, the costs of these imperfect markets can be less than the costs of permitting no exclusion).

279. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1015; see also id. at 1014 ("The role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow.") (citation omitted); id. at 1015 n.18 ("The proper inquiry before this Court is not whether the provisions will in fact accomplish their stated objectives.").


Falwell is a public figure, his state tort rights were "trumped" by the first amendment. Using an analogous approach, advocates of free access to intellectual products might urge that free access policies should trump any rights that restrain copying, whether such rights are based in copyright itself or whether the restraint is direct or indirect. In other words, they might argue that the privilege of copying should be so strongly protected that all inconsistent entitlements should give way before it.

Such a regime, which we might dub a regime of "no direct or indirect rights," would not only affect copyright law itself (which it would eliminate) but would also prohibit the state and federal governments from enforcing other copy-restraining doctrines whenever such enforcement would assist someone who seeks to restrict, obtain damages for, or penalize the free circulation of works of authorship. For example, if this option were implemented, suits like Falwell's would be dismissed whether or not the plaintiff was a public figure. As another example, a promise by a fiduciary or an employee not to copy or disclose material revealed in the course of a relationship with an author would be unenforceable. The possibility that the public might need the information would privilege an otherwise wrongful act. In the regime of "no direct or indirect rights," authors and others would have no rights to call upon the government to prevent copying, whatever the context.

This is not an unthinkable possibility. The law already refuses to enforce at least one kind of confidentiality contract, the agreement between blackmailer and victim to exchange money for silence. Laws against blackmail have been justified on the ground that though contracts of silence may satisfy the interest of the blackmailer and victim, such contracts sacrifice the interests of those third parties who could be affected by the concealed information. Analogously, it might be argued that a promise not to copy a creative work impermissibly sacrifices the interests of those members of the public who might benefit if copies were made. Similarly, contracts embodying promises not to copy might be analogized to contracts that unreasonably restrain trade. Under the antitrust law, such contracts are unenforceable.

Tort rights too are commonly sacrificed when the interests they represent conflict with the Constitution or with congressional goals. In Hustler itself, the Supreme Court held that Falwell's state tort claim had to give way because allowing public figures to succeed in such suits


would conflict with "the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." Federal intellectual property policy as well has frequently preempted state tort rights. In a pair of cases commonly known as Sears/Compco, the Court held that the federal policy of encouraging free competition in the manufacture of unpatented products is so important that states cannot grant any rights that restrain the replication of innovative product designs, even if this means compromising state tort rights founded on legitimate state concerns, such as the desire to avoid consumer confusion as to the source of distinctively shaped products. The Court has not been so willing to sacrifice independent policies to intellectual property goals in recent years. Even its recent reaffirmance of Sears/Compco was accompanied by the suggestion that states retain some latitude in their efforts to prevent confusion as to source. Conceptually, however, the old approach suggests that if Congress made its intentions sufficiently clear, the Court would be willing to implement a broad scheme of preemption. If free use of others' intellectual products were considered a sufficiently important goal, therefore, it is likely that federal law could require inconsistent tort and contract doctrines to give way.

4. Mandatory sharing.

A third option, which one might call a "mandatory sharing" regime,

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284. Hustler, 108 S. Ct. at 879; see also New York Times v. Sullivan, 376 U.S. 254 (1964) (defamation claims). Note that adopting a regime of "no direct or indirect rights" would disable even nonpublic figures from bringing claims that interfered with the free dissemination of works of authorship.

285. Compco, 376 U.S. at 234; Sears, 376 U.S. at 225 (cases together striking down use of state tort rights against confusing product imitation on the ground that when a state policy of preventing confusion interferes with a federal policy of allowing free copying of unpatented utilitarian objects, the federal policy is supreme). Note that the actual evidence of confusion in the two cases was quite thin and could be ameliorated in similar cases by labeling. At least on their face, therefore, these cases may have appeared not to pose a conflict with a state interest of major importance.


286. See, e.g., Aronson v. Quick Point Pencil Co., 440 U.S. 257, 265-66 (1979) (contract for royalties on keyholders held not preempted although no patent was granted on the keyholders); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 493 (1974) (state trade secret law held not preempted); Goldstein v. California, 412 U.S. 546, 571 (1973) (state prohibition of record piracy, at a time when sound recordings were not protectable by federal copyright, held not preempted).


would not only strike down any direct or indirect governmental protections for intellectual property but would also give new rights to persons who want access to works of authorship. This approach would substitute for existing privileges of nondisclosure a set of duties to disclose. Such a regime might be employed in an effort to compensate for the loss of copyright’s positive incentives by providing a set of negative incentives to force publishing to occur and to keep prices down.289

There might be laws, for example, to break up any informal agreements that publishers might seek among themselves to respect each other’s exclusive relationships with authors. Such laws would not only make that sort of agreement unenforceable, as in a regime of “no direct or indirect rights,” but would also penalize participants for attempting to make one. Similarly, the law might penalize publishers who tried to use other self-help methods, like “retributive strike” editions.290 There might even be a governmental commission to require recalcitrant creators to make their drafts and sketches public, or to subsidize free distribution of literature to those who could not pay for it.

In such a regime, authors would not only lack rights to prevent copying but would also be deprived of freedoms they would otherwise have. Instead of liberties to refrain from disclosure or to use self-help, for example, creators might have affirmative duties of disclosure and publication.

In many ways the mandatory sharing option treats the author’s work as common property, owned by both the creator and the public. For example, under the law of tenancies in common, consent of one's co-owners is not a prerequisite to use;291 further, any co-owner can employ the courts to guarantee her access to the property.292 Members of the public, as hypothetical co-owners in such a tenancy, would have a privilege to use the resource, as well as a right to have access to the property, good against any effort by the author or any other co-owner to prevent use of it. Thus, although the parallels are not complete,293 a

289. For a discussion of how the different issues raised by positive and negative legal responses (such as rights to reward as compared with liability for damages) in restitution and torts affect intellectual property law, see W. Gordon, Restitutionary Impulse, supra note 55. On the differing roles of positive and negative legal responses in general, see generally Saul Levmore, Explaining Restitution, 71 VA. L. REV. 65 (1985); Donald Wittman, Should Compensation Be Based on Costs or Benefits?, 5 INT’L REV. L. & ECON. 173 (1985).

290. See note 256 supra.

291. In the real property context, see 4A R. Powell & P. Rohan, supra note 78, § 603(1); 4 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1793 (J. Grimes replacement ed. 1979). In the copyright context, see 1 M. Nimmer & D. Nimmer, supra note 11, § 6.10. See also Oddo v. Ries, 743 F.2d 630, 632-33 (9th Cir. 1984) (“A co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright.”).

292. In real property, a co-owner has a range of options available if a cotenant blocks her from the property. See 4 G. Thompson, supra note 291, § 1809.

293. For example, in a true tenancy in common, each co-owner owes some duties to the others, such as a duty to account for profits, that are not part of the mandatory sharing regime. See Oddo, 743 F.2d at 633.
regime of mandatory sharing largely follows a common property model.

The mandatory sharing approach is extreme but not without precedent. Many current regulatory regimes have mandatory disclosure characteristics, particularly in the environmental area. Federal law requires disclosure of pollution-related data, for example.\textsuperscript{294} If disclosure of works of authorship were considered as important to the public weal as disclosure of pollution data, a regime of mandatory disclosure might be implemented. Note, however, that existing disclosure requirements tend to be applied to industries that will have an incentive to manufacture or transport goods whether or not they are forced to disclose pollution or health data. Although the Supreme Court has upheld disclosure requirements even when such data is valuable to the company concerned,\textsuperscript{295} that data was not itself the industry's primary stock in trade. Whether authors would have sufficient incentives to produce new works in a world mandating their uncompensated disclosure raises quite different empirical questions.

As for the elimination of self-help privileges, the common law itself provides some relevant precedent. Tort law penalizes landowners who use self-help to eject strangers during emergencies when the strangers' lives depend on staying on the land.\textsuperscript{296} As for contracts, some forms of contract are unlawful as well as unenforceable. On the statutory level, the antitrust laws penalize both formal and informal agreements that interfere with designated social goals.\textsuperscript{297} If free copying and use of intellectual products were considered an important enough goal, otherwise legal acts that blocked public access to works might be outlawed, and duties of disclosure imposed, subject to constitutional protections for the author's privacy and right to be silent.\textsuperscript{298}

The "mandatory sharing" alternative would become more attractive, both in terms of incentives and fairness, if the government were to offer authors a payment along with imposing an obligation to publish.

\textsuperscript{295} Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (government requirement that pesticide information be disclosed as a prerequisite to registration is not a taking for which compensation must be paid, despite the possibility that the mandated disclosure might deprive the company that generated the valuable data of a competitive advantage, as long as the company has no statutory basis for expecting the government to keep the submitted data confidential).
\textsuperscript{296} See Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1906); see also Restatement (Second) of Torts § 197 comment k (1965) (possessor of land under a duty to let entrant privileged by necessity remain).
\textsuperscript{297} In the antitrust area, "contracts in restraint of trade" (such as price-fixing agreements) are not only unenforceable but also prohibited and subject to the imposition of civil and criminal penalties. Blackmail is also a criminal matter, though typically only one of the parties to a blackmail contract goes to jail.
\textsuperscript{298} See L. Tribe, supra note 127, § 12-14, at 889-90 (right of privacy with regard to personal information); see also Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 559 (1985) ("the right to refrain from speaking").
The payment could take the form of a governmental subsidy, fifth amendment “compensation,” or compulsory license fees.

Compulsory licenses in particular are familiar from current law. Under them, the government sets fees, and any eligible private party who pays the fee is entitled to copy regardless of the copyright owner’s preferences. For example, the Clean Air Act provides that patentees may be compelled to offer licenses on those patents that would not otherwise be “reasonably available” and for which there are no “reasonable alternative methods” where necessary for certain Clean Air Act compliance.\textsuperscript{299} Current copyright law itself imposes compulsory licenses on some intellectual products. For example, certain copyrighted television broadcasts are subject to compulsory licensing for cable re-broadcast.\textsuperscript{300} The copyright statute also gives compulsory license rights to any musician who wishes to record a song once it has been publicly distributed in phonorecords with the composer’s authorization,\textsuperscript{301} as long as the user pays the governmentally set license fees and complies with requisite procedures. The compulsory licenses imposed by copyright, however, are generally limited to works that are already distributed, or are in the process of being distributed, to the public. Furthermore, in contemporary times American law has usually adopted compulsory license schemes only in cases of special need (as in the pollution context) or as a compromise when creators ask Congress to extend existing rights to cover new technological methods of transmitting or reproducing works (as with cable television).\textsuperscript{302}

At bottom, payment requirements are not a likely component of a “mandatory sharing” scheme. Opponents of copyright vehement enough to seek mandatory sharing would be unlikely to enact licensing payment rules, since, after all, any requirement of compensation would sharply inhibit the public’s use of intellectual products. In a regime of noncompensated mandatory sharing, the career path of artist or author thus becomes somewhat uninviting. To provide the missing incentives, conceivably the mandatory sharing model itself might be taken a step further: Not only might our law be amended to treat works of authorship as common property, but it also might be amended to treat creative persons’ talents as common property as well.\textsuperscript{303} As Vermont’s good Samaritan law requires persons who are well situated for rescuing im-

\textsuperscript{299} 42 U.S.C. § 7608 (1982). Whether compulsory licenses will work to discourage the inventors of antipollution devices from using the patent system, or how they might affect the long-term prospect of antipollution research and development, are open questions.

\textsuperscript{300} 17 U.S.C. § 111 (1982 & Supp. IV 1986); see notes 135-136 supra and accompanying text (compulsory licenses).

\textsuperscript{301} 17 U.S.C. § 115 (1982 & Supp. IV 1986); note 135 supra. On the “compromise” nature of compulsory licenses, see, e.g., House Report, supra note 143 at 88-89 (cable); Second Supp. Report, supra note 135, ch. 9, at 3 (phonorecords); see also id. ch. 7, at 18-20 (typefaces).


\textsuperscript{303} To view the genius of individuals as a sort of “common pool” in which we all have an interest is not unusual. See, e.g., note 242 supra and accompanying text (discussion of
periled victims to give those victims aid, statutes might require talented persons who are well equipped to produce art to do so. Of course, there are significant constitutional problems with such a step (the first and thirteenth amendments leap to mind), but conceptually this is a logical extension of the mandatory sharing model.

B. Comparing the Noncopyright Options

Copy-privilege has a number of advantages over the other two noncopyright options, particularly in regard to publishing practicalities. For example, in a regime with a rule against enforcing promises not to copy (the regime of “no direct or indirect rights”), post-publication piracy by strangers is not the only threat to incentives. Authors might be reluctant to submit their works for publication out of fear that the publishers or the publishers’ employees will steal whatever they see. Not all publishers will find it in their long-term best interest to create a reputation for dealing with authors fairly. Similarly, some editorial and clerical employees might consider retention of their jobs less important than the chance of making a one-time killing by stealing a “hot” manuscript, particularly if they interpret the lack of legal rights against such behavior to indicate that it is morally permissible. If such behavior became the norm, initial agreements between potential buyers and sellers of intellectual products might not occur. Unless there is a custom of living up to agreements, or moral, community, or industry sanctions against those who break agreements, legally enforceable agreements of the “look but don’t publish until you pay” variety will be a prerequisite for successful dealings between potential authors and buyers.

The “mandatory sharing” regime would outlaw voluntary intra-industry sanctions, further decreasing the possibility that workable publishing arrangements would evolve. While private or governmental subsidy schemes or compulsory licensing might provide some compensation under mandatory sharing, there are dangers both in patronage and in leaving it to government to choose works “worthy” of sponsor-

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304. VT. STAT. ANN., tit. 12, § 519 (Supp. 1971) (imposing a duty of easy rescue and imposing a fine of $100 for its violation); see also MINN. STAT. ANN. § 604.05 (West 1986 Supp.) (similar statute). Although the Vermont statute does far less than impose a general “duty to aid” on all persons with resources, the common law resistance to imposing duties to aid is increasingly subject to exceptions. See MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 117-51 (4th ed. 1987). Any imposition of a duty to aid implicates questions of liberty similar to those raised by the extension of the “mandatory sharing” model I discuss in the text. See Epstein, supra note 82, at 197-201 (1973) (introducing a hypothetical “parade of horrors” to dramatize liberty issues that would be raised by imposing a duty to aid).

305. Courts sometimes read implied understandings of this sort into the dealings between the parties, even regarding uncopyrightable subject matter such as ideas. Werlin v. Reader’s Digest, 528 F. Supp. 451, 465-68 (S.D.N.Y. 1981) (magazine required to pay author a finder’s fee when, after rejecting her article for publication, it used the underlying idea). Where copyright applies, such contracts and obligations implied from a course of dealings are unnecessary; no one, including the potential publisher, can publish without permission.
ship or to set prices. As for the extension of the mandatory sharing model that would compel creative activity, practical problems (such as identifying who among the general populace should be forced to write what) and fundamental concerns with personal liberty (imagine a species of debtors’ prisons for those novelists afflicted with writer’s block) probably place the mandatory sharing approach outside the pale.

The copy-privilege regime, in contrast, preserves the enforceability of no-copy agreements and allows self-help. That option further seems to avoid the additional practical difficulties and the new layer of coercion that characterize the regime of mandatory sharing. As compared with copyright, copy-privilege may make it hard for a creator to demand payment when strangers copy; nevertheless, copy-privilege at least preserves the possibility that creators might enter into decentralized market bargains with publishers and users secure from piracy by the very people with whom they have dealt.

There is an additional set of possible reasons for the commentators’ reluctance to argue for regimes such as “no direct or indirect rights” and “mandatory disclosure.” Privacy rights, laws against burglary, or laws against breach of confidence or contract are not directed against copying. They serve independent policies, and developing exceptions to these laws for the purpose of fostering access to creative works would be costly. It could play havoc with the policies favoring security of dwellings, for example, to allow a burglar to profit from her theft by publishing a manuscript stolen during the burglary (as would occur in the regime of no direct or indirect rights). Copy-privilege, in contrast to the other procopying options, preserves these independent interests. It avoids difficult policy balancings by consistently deferring to any policy unrelated to copying.

The examination and comparison of various copyright alternatives demonstrate that the copy-privilege option, which eliminates copyright, does not outlaw self-help, and preserves independent private law rules that might affect copying, is the most obvious candidate for replacing copyright. It also would require the least change to implement and consequently is the most politically credible of the three alternatives. This option preserves independent state law policies and is likely to have less negative impact on the production of books, music, art, and other works of authorship than the other two noncopyright options, yet it eliminates the do-not-copy restraint on liberty inherent in copyright.

306. See Gordon, Fair Use, supra note 14, at 1611-12 (dangers of governmental subsidies); id. at 1622-24 (judicial price-setting); T. Macaulay, supra note 1, at 198 (dangers of private subsidies (patronage)).

307. See W. Gordon, Restitutionary Impulse, supra note 55 (exploring reasons why the law imposes no duties to create and discussing whether this is consistent with granting creators rights over their works); cf. Saul Levmore, Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations, 72 Va. L. Rev. 879 (1986) (exploring why the law generally imposes no duty to aid).
III. COMPARING COPYRIGHT WITH COPY-PRIVILEGE

This section compares copyright with copy-privilege, the alternative most commentators seem to envision when opposing copyright or suggesting that it be limited. The most powerful advocates of copy-privilege come from the ranks of those who view copyright and patent law in economic terms—call their particular use of economics “encouragement theory.” Their position hinges on empirical judgments that, given current industry structures, a copy-privilege system would provide sufficient incentives to induce new creativity while allowing the public more access to what is already created than the copyright system now permits.

Obtaining proof of such empirical contentions is difficult. Further, as an industry’s technology or conditions change, a legal structure that once gave sufficient incentives without copyright might no longer do so. For example, advances in reprography might eliminate previous lead-time advantages, or someone might “invent around” previous technological fences and sell devices that enable consumers to overcome copy-protect methods, descramble signals, or otherwise obtain easy access to what was previously physically unavailable. The comparative merits of copyright and copy-privilege might therefore have to be reassessed frequently.

Given the decades of legislative struggle necessary to produce the 1976 replacement for the 1909 Copyright Act, it would be unrealistic to expect Congress to meet such a continuously moving target.

Of course, it might be argued that the lack of convincing empirical data makes copyright as uncertain a venture as copy-privilege, and that when such information is lacking, neither governmental position (copyright or copy-privilege) can be recommended over the other. Yet wealth-maximization defenses of copy-privilege all depend on findings that eliminating copyright will not trigger a large degree of free riding because alternative legal or practical restraints on copying exist. Once it is conceded that as an overall matter free copying is not desirable and that the relevant questions are instead how much free copying should be allowed and when copying should be permitted in which works, copyright seems to have the advantage, for the following reasons.

First, at least some of these economic choices can be made prospectively and with generality. To take an obvious example: Forbidding the

308. See Breyer, The Uneasy Case, supra note 3; sources in note 25 supra. See also Fisher, supra note 5, and Palmer, supra note 6, who premise their recommendations on noneconomic as well as economic grounds.

309. Thus, for example, Judge Breyer notes that the decision whether or not to extend copyright protection to computer programs should depend on projections about likely developments in the way computers are used and programs marketed; he uses the “next decade or two” as the relevant time frame. Breyer, The Uneasy Case, supra note 3, at 346-48.

310. This is, roughly speaking, Judge Breyer’s position, when he argues that, in the absence of more information, copyright should neither be extended nor abolished. Id. at 283-84.
copying of general concepts would involve greater costs than forbidding the copying of particular ways of expressing concepts. A property-based system can be tailored to implement such choices, while a privilege-based system ordinarily cannot. As the prior discussion suggested, the impact of copy-privilege will depend on factors outside the legal system's control; it would seem largely serendipitous if those factors were so configured as to conform private behavior with public need, even if that need is defined in economic terms.  

Second, if any of the choices that an intellectual property system must make should be resolved by issues of noneconomic principle or right, other than a principle of liberty to use one's tangible property, then, too, copyright has an institutional advantage over copy-privilege. If the choices between copying and not copying are made simply as by-products of ever-changing technologies and industry structures, a legislature would have to review those results regularly to assure that the patterns of restraints on copying that emerged over time remained normatively acceptable. A property system, by contrast, can be tailored to express principles in a systematic way.  

These observations implicitly raise the several issues that will be discussed in the remainder of this article. First, is there a defense of copy-privilege that is not dependent upon empirical outcomes? The most likely such defenses are arguments that focus on liberties to use one's tangible property and on consent. I examine these arguments and suggest that neither suffices to indict copyright. In particular, I suggest that a focus on consent can no more justify copy-privilege than copyright.  

Next, to what extent does wealth-maximization provide an adequate normative guide to the allocation of intellectual property entitlements? In examining this issue, I conclude that economics is an inadequate basis for setting any initial scheme of entitlements, in part because of its insensitivity to distributional issues. I then go on to explore whether any distributional premise could be supplied to remedy this gap in a way that would lead to outcomes consistent with the encouragement theorists' method or results. I identify such a possible premise but conclude that it is normatively unacceptable. I further suggest some of the  

311. Although the decentralized market system has great flexibility, it responds only to costs and benefits that have an impact on decisionmakers. Thus, the notion that private behavior will serve public needs (the notion of the "Invisible Hand") depends, among other things, on the internalization of all relevant costs and benefits. See Demsetz, supra note 21. Where significant costs and benefits remain "external"—where, for example, producers of desirable things are not able to capture a significant share of the benefits generated—the "Invisible Hand" will not function.  

312. Recall that a property system can also grant privileges to copy that "trump" inconsistent rights. The Supreme Court sees such enforceable liberties as granted by the patent system. See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 109 S. Ct. 971, 985 (1989); see also note 266 supra. Thus a property system can protect both creators' entitlements and users' entitlements.
noneconomic values that should be taken into account but which “encouragement theory” defenses of copy-privilege ignore.

Finally, I explore copyright’s better ability to take noneconomic rights and principles into account as compared with copy-privilege and argue that only by utilizing a copyright system can legal decisionmakers pay due respect to authors and users in their capacities as authors and users.

A. The Gap Between the Contract Nature of Copy-privilege and the Property Nature of Copyright: Whose Consent Matters?

The common imagination places great stress on rights of tangible property and contract, and much of the hostility to copyright stems from the feeling that copyright inhibits one’s liberty to use one’s own tangible possessions in ways to which one has not consented. This perception probably plays a background role in much intellectual property criticism and it is most explicit in the works of Murray Rothbard and Tom Palmer. Rothbard seemed to argue that intellectual property is justified only when it replicates the results that would occur through the consensual agreements of creators and users. He thus approved of copyright (which he thought was contractual or mimicked contract-like results) and disapproved of patent (which he realized was inconsistent with a contractual approach). Palmer would go further. He suggests that any legal restraint on copying is impermissible except where it results from contract or from piggybacking onto rights in tangible property. He opposes both copyright and patent as improper incursions into a voluntary regime.

To analyze such positions, it will be helpful to begin by exploring whether copyright will produce the same results as would contract in a world of copy-privilege. Showing why Rothbard is incorrect in assuming an identity between copyright and contract will give us a new per-
perspective on the differences between a property-based system like copyright and a contract-based system. After concluding that copy-privilege, with its focus on user consent, gives creators less protection than does copyright, I examine whether the importance of consent itself justifies this lesser degree of protection.

1. Is copyright a form of contract?

As I already made clear, the world of copy-privilege allows some legal rights against copying to exist, including rights arising out of contract. Since having a privilege means that one is free only of state interference, not the interferences of other people, in such a world there can be something worth contracting about. For example, individual users may be willing to pay a creator to waive her privilege of nondisclosure.

Having transferable value does not necessarily make something "property," however, for contracts over privileges generally give the participants no right to employ affirmative state power against third parties. Only a contract signed by everyone could create rights good against the world. Using Hohfeld's terms, the rights and duties arising out of contract, like the rights and duties arising out of confidential relationships, tend to be "paucital" rather than "multital" entitlements. They are entitlements created by particular circumstances, at

319. The world of copy-privilege is thus different from a complete state of nature, where there are no legally enforceable means of preventing copying. See, e.g., Kennedy & Michelman, supra note 41, at 715 (describing a state of nature regime in which even contract rights cannot be created).

320. One can make contracts over both privileges and rights. Compare "If you pay me, I will not use my privilege to withhold this work from view" (leading to a contract over privileges) with "I want to sell you my ability to call on the state to exclude others from this resource" (leading to a contract over rights). Even if only a privilege is transferred, the transferor can bind herself to exercise it no longer, thus giving the transferee a legal right against her which did not before exist.

321. "Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation." International News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., concurring in part and dissenting in part) (opposing a holding that in certain circumstances transferable but noncopyrightable "hot news" should be treated as property).

322. Two persons can allocate an otherwise privileged activity between themselves and to that limited extent create a set of rights and duties between themselves that resemble the rights and duties between property owners and nonowners. Sometimes, albeit rarely, the positive law will treat aspects of the parties' dealings with regard to a resource as the basis for entitlements good against everyone. For example, depending on circumstance, the positive law sometimes imposes duties on third parties to respect others' contracts—the doctrine of tortious interference with contract.

323. Hohfeld defines the terms as follows:

A paucital right, or claim, (right in personam) is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else one of a few fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim, (right in rem) is always one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people.
good against particular persons, rather than generally applicable entitlements presumptively good against the world. Though there may be occasions when it suits the purposes of a statute or a constitutional guarantee to treat a paucital right as "property," rights premised on contracts or confidential relations between particular persons have effects potentially quite different from in rem rights good against the public in general. Yet Rothbard thought he perceived in the copyright area an identity between the property and contract categories.

One can understand praise for American copyright law based on a belief that its prohibition against copying merely reflects the agreement the typical creator and user would voluntarily reach. Focusing on the way American copyright law restricts only the user's privileges to copy material to which he has had access, and gives no rights against independent recreation (unlike patent law), it is plausible to suggest that copyright does no more than provide a substitute for the contractual conditions that the author would normally impose, and that users would normally accept, as a condition of allowing access to the work. Thus, since the typical user wants to read a book, not republish it or make it into a movie, the standard contract for persons who want access to the intellectual product for their own immediate use would presumably contain a do-not-copy prohibition and a low price. Persons who want to copy would contract to do so, but at a higher price. Under this view, copyright law's prohibition against unauthorized copying merely provides "standard terms" for a convenient unwritten standard contract and requires unusual users (those who want to copy) to bargain over their special needs.

Hohfeld, supra note 35, at 718 (footnotes omitted). Although I am obviously drawing on Hohfeld's treatment, my mode of employing his paucital/multital distinction is not identical to his. For example, he speaks of rights against a "very large and indefinite class" where I speak of rights good "against the world."

324. Carpenter v. United States, 108 S. Ct. 316 (1987) (confidential information treated as "property" under the mail and wire fraud statutes). This opinion exhibits an unfortunate willingness to label an overly large category of rights as "property"—whether those rights are paucital or multital and whether or not they embody the "formal" mode of control characteristic of property law. See note 216 supra.

325. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (confidential information treated as "property" under fifth amendment takings clause); cf. Martinez v. California, 444 U.S. 277, 281 (1979) ("Arguably, the cause of action for wrongful death that the State has created is a species of 'property' protected by the Due Process Clause.") (dicta).

326. He argued that in copyright a "plaintiff must prove that the defendant stole the former's creation by reproducing it . . . in violation of his or someone else's contract with the original seller." 2 M. Rothbard, supra note 17, at 653.

327. Id. at 652-60. Rothbard's treatment of the copyright issue is somewhat unclear, since his main interest seems to have been to argue against patent law that it did not follow a contractual model. My interest in his views centers on that contractual model.

328. Whether the transaction is a purchase or something else matters little. Any requirement of payment—whether a requirement that a ticket for viewing be purchased (e.g., for concerts and plays), that a copy be purchased (e.g., for books), or that a copy be rented (e.g., for movie videocassettes)—potentially gives the creator opportunities to extract agreements not to copy.

329. Of course copyright law itself allows and encourages a "contracting out" alterna-
The implicit fulcrum of such a position is the author/owner’s physical control over access, for it is this control that gives the author power to extract agreements not to copy. If one accepts Rothbard’s apparent assumption that all persons who want access to a creative work can obtain it only by bargaining with the author or those with whom she has a contractual relation, the results achievable by contract in a copy-privilege regime would be essentially the same as those achievable under a copyright system. If Rothbard is correct, then copyright law merely codifies the legal relations that persons would create among themselves in a realm of copy-privilege. Dissolving copyright would then matter little, for equivalent private contracts would take its place. In addition, Rothbard’s analysis temptingly seems to suggest that copyright law can be morally justified by the implied consent of all parties. If copyright and contract would not come to the same results, however, then we need to analyze whether that divergence itself is a ground for condemning copyright.

In some circumstances contracts can substitute for copyright. For example, though the copyright statute allows libraries to do a great deal of photocopying for their patrons without copyright owners’ consent, Stanley Liebowitz suggests that libraries today may pay largely the same monies to those who own the copyrights in scholarly journals as they would have paid had copyright law not granted libraries a photocopy privilege. His research shows that scholarly journals charge institutional libraries a higher subscription rate than they charge individuals, apparently because of the amount of photocopying likely to be done by the libraries and their patrons. The high subscription rate amounts to an implicit license fee for photocopying.

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30. By giving the copyright proprietor an exclusive right to do or to authorize copying, 17 U.S.C. § 106 (1982), the copyright law gives the proprietor the ability to prohibit or to permit the copying that users might desire. See text following note 343 infra.

330. Presumably the author could extract from the first purchaser an agreement that, upon reselling the resource, he would (1) similarly bind any later purchaser to the same no-copy agreement and (2) similarly require the later purchaser to agree to extract similar agreements from the next person in the chain of title. (Given the hypothetical nature of the inquiry, I shall not examine whether such clauses would be valid under current law.)

331. In later work Rothbard seems to argue that any initial contractual limitation on copying that is agreed to by someone who purchases a copy of the work should remain attached to the copy and should restrain anyone who happens to be exposed to the copy. M. Rothbard, supra note 314, at 123-24. Such a position would come closer to yielding copyright-like results, but it has drifted fairly far from “consent.”

332. See text accompanying notes 387-388 infra for this analysis. Even if Rothbard were correct that copyright and contract came to the same results, a person who placed great stress on autonomy might nevertheless object to copyright on the ground that only actual consent by users should suffice as a basis for imposing duties on them. It may be that Rothbard really believed that the use of a copyright notice assures that actual consent is present. But see note 316 supra.


334. See Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21, at 191-94; see also Liebowitz, Copyright and Indirect Appropriability: Photocopying of Journals, supra note 21.

335. Liebowitz, Copyright and Indirect Appropriability: Photocopying of Journals, supra note 21.
In addition, the legal rules that govern at least one type of intellectual product—trade secrets—follow the consent/contract line rather closely. The originator of industrial secrets has little more than a non-disclosure privilege as far as the general public is concerned. The trade secret originator’s ability to redress unauthorized copying legally depends on a showing that the defendant has violated rights other than a per se right against copying, such as a showing that the defendant is an employee who breached an agreement of confidentiality or an outsider who bribed employees who signed contracts not to disclose. Someone who learns the industrial knowledge of another by reverse engineering or by innocent observation is not liable.

Thus, a safety pin discloses its “secrets” upon use, so it is not protectable under trade secret law. If a soft drink’s taste, however, depends on a step in its manufacturing process that cannot be discovered by a chemical analysis of the end product, trade secret law can protect the secret formula. This results not because the formula is more valuable than other “advances in knowledge,” but simply because using the drink does not give knowledge of its contents; and those few who know the formula are bound by contractual duties not to disclose.

Copyright, however, works differently. Contemporary copyright is valuable precisely because it extends beyond the place where the proprietor and his contractual extensions can stand guard. When a copyrighted book falls into the hands of an innocent nonpurchaser, the property regime’s prohibition against copying binds him just as closely as a person who has promised the author not to copy.

This distinction would be unimportant if creators in a noncopyright world could rely on their initial customer being willing to offer such a high payment that fees from future copiers would be irrelevant. But such customers are rare. Liebowitz’s research results do not indicate otherwise. Libraries can charge their patrons membership fees or, if affiliated with institutions such as universities, can obtain institutional budget funds to buy subscriptions to the journals that will be photocopied by the students and staff of the institutions. Libraries thus receive implicit payment from copiers in the same way as they pay implicit fees to copyright owners. But in a world without any copyright, publishers are the creator’s most likely “big price” customers; and their

336. See 1 R. Milgrim, supra note 119, §§ 2.03-06, 5.04.
337. Copyright can be understood as a historical response to creators’ decreasing abilities to control personally their creations. Thus, Liebowitz suggests: The role of technology in disembodying the intellectual property from its creator must not be underestimated. The printing press is so familiar that it becomes difficult to imagine authors not being disembodied from their work. However, prior to the printing of words on paper, authors had to tell their tales in person. Only someone with an exceptional memory would have been able to reproduce a story in all its nuances. Copyright was probably unnecessary at the time . . . .

Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21, at 184.

338. See note 334 supra and accompanying text.
situation is quite different. Unlike libraries, publishers have no institutional ties to potential copiers that would allow them to pass on relevant costs. Publishers could be vulnerable to free rider copiers eating into their profits—potentially as vulnerable as the creator himself would have been—and if so would be unlikely to offer the author significant remuneration.339

The distinction between having privileges of nondisclosure and having rights over copying is also important because rights constitute a form of wealth. Authors with copyrights are able to make different bargains than authors without.340 An impecunious artist might lack the bargaining power to extract a no-copy promise341 or a price high enough to cover copying from her customers.

At bottom, copy-privilege and copyright lead to different results because of the many occasions on which persons have access to copyrighted works without needing to purchase them and thus have the means to copy independent of a contractual nexus. Wherever one could have access to a copyrighted work without asking consent—where one views statuary in a public square,342 receives a free broadcast of an advertiser-supported concert,343 or picks up a book that someone else has dropped—ordinary contract rules would not support restricting what the person with access can do with what he receives. The person has had access without needing to ask the creator’s permission and thus has been free of the creator’s leverage. Since this potential consumer or copier has already received what he wants, the work’s originator has nothing with which to bargain.

The “consent nexus” so central to Rothbard’s conceptual scheme thus fails at many points. In some cases, like the libraries studied by Liebowitz, a lack of direct control over copying will not reduce the creator’s revenues from the copying that occurs. In other situations, such as those explored by Judge Breyer, a lack of legal control will not pre-

339. In fact, the Statute of Anne, from which Anglo-American copyright descends, appears to have been a response to publisher, not author, pressure. See B. Kaplan, supra note 8, at 5-8.

340. It is well recognized, the Coase Theorem notwithstanding, that income or wealth effects created by granting legal entitlements can change the allocational patterns resulting from bargaining. See, e.g., E.J. Mishan, The Postwar Literature on Externalities, 9 J. Econ. Literature 1, 18-21 (1971) (examining the allocative impact of “welfare effects”—more commonly known as “income effects”—flowing from alterations in legal entitlements).

341. Copyright is open to the challenge that it offers no more protection than a noncopyright regime if the artist lacks bargaining power: She may well be forced to sell the copyright. A right good against third parties, however, is more valuable than a privilege of dominion (for reasons already suggested); therefore copyright gives the author something of value that should be worth more than a privilege in the marketplace.

In addition, American copyright law has long contained paternalistic provisions to protect the legendary artist in the garret (who might be tempted to sell too cheaply) and to protect that artist’s family. See notes 143-144 supra and accompanying text.


343. See note 11 supra.
vent an author or publisher from inhibiting copying by other methods. Yet the lacunae which would result from a contract-only system may be significant. In a copy-privilege regime even one person free of a contractual duty not to copy can make thousands of copies, and all who purchase their access from her would similarly be free of the author's restrictions. Is there some way to avoid this problem consistent with a focus on contractual rights?

2. Changing the form of noncontractual rights and duties to enlarge the domain of contract.

One way to finesse the problem of contractual nexus might be to introduce contracts into most occasions on which persons have access to copyrighted works by imposing on users a duty to obtain the creator's permission before enjoying the work. But that is a far cry from a realm of privilege supplemented by a willingness to enforce contracts. It would be, in fact, a form of supercopyright. The fulcrum of the contract system would simply have been shifted from physical control to control of the intangible.

To see this, consider: If copyright were eliminated and replaced with privileges restrained by contracts, each person would have: (1) a privilege “to enjoy and copy whatever is open to my sight or senses without my breaking through physical barriers or otherwise breaking the law,” (2) a privilege “to conceal what I can of my own creations from the access of others,” and (3) a power to make state-enforceable contracts and a corresponding obligation to obey contracts made. Users would thus be privileged to copy whenever the creator lacked a bargaining lever with which to obtain a contract to refrain.

If the law were to create a duty to obtain the creator's permission before enjoying and make that duty applicable regardless of what was physically accessible, then the user would no longer be entitled “to enjoy whatever is open to my sight or senses without physical barriers.” The user would now be entitled only to “enjoy what the artist gives me permission to enjoy.” After such a change, the patron of sculptural arts would indeed probably contract for the privilege of enjoying the sculpture in the plaza; as part of the payment, the sculptor may extract from the viewer a promise not to duplicate the piece of art. But to get to that point, the law will have had to replace the privilege of enjoyment with the duty to restrain oneself from enjoying until the owner's permission was secured. And that is largely what copyright itself does. In fact, imposing a duty to get a creator's permission before enjoying is an even greater incursion on users' liberty than is the copyright duty to get a creator's permission before copying.

Neither copy-privilege nor copyright nor any other mode of allocating resources is "equivalent to" contract, for the content of contracts depends on the starting points from which the contracts are made. A
contract scheme in which the author's leverage depends on physical
close will yield different results than a scheme in which a creator has
independent rights over the intangible. Copy-privilege leaves creators
vulnerable in a way that copyright would not, and it gives users liberties
to copy that copyright would not.

B. Compulsion and Consent

As we have seen, without a set of state-imposed multital duties not
to copy and a corresponding set of state-imposed multital rights against
copying, gaps in contract protection could leave room for free riders to
operate. Persons who favor copyright on economic grounds argue that
under copy-privilege the presence of free riders would make the eco-
nomic return on intellectual products too low to support a desirable
level of creative activity. Yet if copyright yields extra economic return,
it does so because it empowers the author to restrain others from using
the work in particular ways. Thus, the increase in incentive is
purchased at the price of imposing this compulsion on potential users.

The following discussion will examine the question of whether that
incentive is purchased at the price of an impermissible sacrifice of liberty. I first address the conflict that can occur between intangible rights
and persons' privileges to use their tangible possessions. I argue that
restraints on persons' liberties to use their tangible property are both
common and inherent in a legal system that grants some people legal
rights that operate against others. I then address the emphasis that is
sometimes placed upon consent as a justifying criterion for treating
creative works and conclude that it cannot adequately fulfill this role
since copyright shows no less a respect for consent than does copy-
privilege. I conclude that copyright's restraints on liberty do not make
that regime morally inferior to the regime of copy-privilege.

1. Conflict between entitlements.

Intellectual property rights often operate to restrain the owners of
tangible things from their ordinarily privileged uses of those things.
With copyright, the legitimate owners of paintings, floppy disks,
records and papers, computers, tape recorders, and videocassette
recorders cannot do with them as they wish. For example, A may
purchase a word processing program embedded on a floppy disk. If A
copies the program just purchased, using the computer A saved for
months to buy, onto another floppy disk for which A has also paid good
money, A will probably think that she was doing nothing wrong. "After

344. 3 M. Nimmer & D. Nimmer, supra note 11, § 13.05(b)(ii), at 13-124 to -129
(home audio taping may not be fair use).

345. Although the Supreme Court in Sony Corp., 464 U.S. at 417, held that certain home
uses of videocassette recorders (VCRs) constituted "fair use," other VCR uses can constitute
all,” thinks A, “I have paid for all these things.” Yet the author of the word processing program may have a copyright that makes A’s act unlawful. Palmer argues: “[A]ny system of ‘property rights’ that requires the violation of other property rights, e.g., the right to determine the peaceful use in one’s home of one’s own videocassette recorder or to purchase blank tapes without paying a royalty to a third party, is no system of rights at all.”346 Is this correct? Does the restraint that copyright imposes on the privileges of use which ordinarily accompany tangible property make copyright illegitimate?

Clearly not. All entitlements limit each other. Recall in this regard Justice Holmes’s brief summary of a property owner’s presumptive entitlements, quoted earlier.347 He suggested that property owners were completely “accountable to no one.” If this were true without qualification, an owner could use his property as he wished, even if the usage hurt another’s property in the process. Yet Justice Holmes also suggested that owners are “protected” by the legal system against other persons’ “interference” and are “allowed to exclude all.”348 Left unmodified, the two statements are inconsistent, leading to two legal results—say, a reservoir owner being privileged to use his reservoir free from any liability and a neighboring mine owner having a right to keep the mine free from flooding—that could not coexist between the same two parties as to the same physical event. When the reservoir overflows into the neighbor’s mine shafts, each property owner would seem to have a claim inconsistent with the other’s.350

What saves this specification of entitlements from paradox or indeterminacy are the “limits prescribed by policy” that specify an ordering among entitlements.351 For example, in England, prior to Rylands v.

346. Palmer, supra note 6, at 281.
347. See O.W. Holmes, supra note 36, at 246; text accompanying note 36 supra.
348. Id.
349. Under the first statement, an owner “accountable to no one” could, for example, build a reservoir on his land which overflowed into a neighbor’s mine shafts without being subject to liability. Under the second, the neighboring mine owner “protected against interference” and “entitled to exclude all” would possess a right to have agents of the law take action against the threatened flooding that could not coexist between the same two parties as to the same physical event. When the reservoir overflows into the neighbor’s mine shafts, each property owner would seem to have a claim inconsistent with the other’s.
350. Hohfeld makes the logical impossibility clear. For X to have a right against Y means by definition that Y has a duty, not a privilege. If Y instead has a privilege, X must, as a definitional matter, have a no-right. See note 253 supra.
351. See text accompanying note 36 supra. Because Holmes admits that limits exist, he escapes the paradox. Since in the excerpt from The Common Law quoted above, see text accompanying note 36 supra, he leaves the nature of the limits unspecified, however, it yields an indeterminate result. When Justice Holmes turned his attention more specifically to tort law, he refined his description of property owners’ entitlements in a way that eliminated the indeterminacy, at least at the prima facie level. In Privilege, Malice and Intent, Justice Holmes suggested that everyone in society (including, presumably, property owners) had a duty to refrain from intentional infliction of harm and that the law gave privileges to do such harm only when justified by particular policies. Oliver Wendell Holmes, Privilege, Malice and Intent, 8 Harv. L. Rev. 1 (1894). Under this view, the example of the flooded mine shafts would no longer have
Fletcher, some of the mine owner’s property entitlements would have been subordinate to the neighboring reservoir owner’s privileges to use property nonnegligently. The mine owner could not legally redress the reservoir owner’s nonnegligent and indirect flooding of the mine shafts. In Rylands itself, the reservoir owner’s privileges were curtailed and the mineowner’s rights expanded. That case held the reservoir owner strictly liable for damage caused by the reservoir escaping into the neighbor’s mine. Some ordering, some curtailment, is logically necessary.

If property entitlements cannot be unlimited without potentially leading to paradox, one sort of entitlement can clearly restrain another. Since two pieces of adjoining land can be put to inconsistent uses, tort, nuisance, and environmental protection laws mediate among them, forbidding certain otherwise privileged uses of one piece of land in order to protect the other. Similarly, since cars can strike each other, the law of negligence says an automobile owner cannot drive as fast or as carelessly as he might like. Analogously, too, since copying can interfere with a copyright owner’s interest, the law says that photocopy machine owners cannot make as many photocopies as they like and that computer owners cannot make as many copies of programs written by others as they might like. And as zoning can restrict even nonharmful privileges to use one’s property, and as the law of intentional trespass forbids even nonharmful intrusions onto land, copyright can restrain the violation of a proprietor’s exclusion right even when the copying to yield an indeterminate result; if the release of the reservoir was intentional, then the owner of the reservoir would lose unless special circumstances or policies were present.

Justice Holmes also clarified his position on unintentional harm, but in the opposite direction. He seems to have envisioned a presumptive privilege to do unintentional harm that would be lost by negligence. See O.W. Holmes, supra note 36, at 77-99. Under this view, if flooding the mine involved neither intentional acts nor the reservoir owner’s negligence, then the mine owner would have no remedy unless special factors appeared.

The indeterminacy was thus resolved for Holmes: The owner had a prima facie right against intentional and negligent harms but none against unintentional, nonnegligent harms. Similarly, the owner had a prima facie privilege to inflict unintentional nonnegligent harm but was not privileged to inflict intentional or negligent harm. These were some of the more prominent outlines of “the limits prescribed by policy.” O. W. Holmes, supra note 36, at 246; see also Singer, supra note 41, at 1027-28, 1040-42 (discussion of Holmes).

The current law is tending toward resolving the indeterminacy in a somewhat different fashion—namely, that in an increasing number of cases today, even unintentional and nonnegligent harms are not privileged. See note 85 supra. More important for our purposes is the general point that no property entitlements can be unlimited and that one person’s set of rights can limit another’s privileges.

352. Rylands v. Fletcher, 1 L.R.-Ex. 265 (Ex. Ch. 1866), aff’d, 3 L.R.-H.L. 330 (H.L. 1868).

353. For a discussion of why other forms of action were unavailable to the plaintiff in Rylands, see M. Franklin & R. Rabin, supra note 304, at 438.

354. Even a court’s refusal to judge a dispute between two inconsistent land uses implicitly specifies entitlements: The person who would have been the defendant prevails. See Calabresi & Melamed, supra note 64; Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 612 (1943) (discussing the inevitability of compulsion); Singer, supra note 41 (discussing damnum absque injuria).
poses no threat to the proprietor's preexisting markets. That one person's intellectual property rights can limit another's privileges to use his things is no more remarkable than that tangible property rights can do the same.

Nor does distance matter. One who copies another's work miles away from where the author resides may still be liable for copyright infringement, but there is nothing remarkable about that; liability has long stretched across the continent. If one who places a dangerous defective product in the stream of commerce should be liable regardless of where the product causes injury, then one who sends a work into commerce should be able to demand a fee for the benefits it brings, wherever the beneficial uses occur.

2. Consent as a criterion for moral adequacy.

Part of the popular resistance to copyright is a protest against being restricted in using one's tangible personality. The last section discussed how such restraints are inherent in any system that gives some persons legal rights that operate against other persons. But even if copyright involves the same kinds of compulsions and restraints as do other kinds of property, are these compulsions nevertheless an evil to be avoided? Discussions of copyright and of other property rights systems are sometimes structured as if only the institution of property, but not systems built on other legal foundations—consent, for example—requires special justification. For example, Alan Ryan writes that "[a]nyone's property limits the freedom of everyone else to acquire and use what he feels like acquiring and using. It is an institution which therefore requires justification." Such statements are negatively pregnant with the implication that realms of liberty and consent (where one could use any resource desired as long as one had not bound oneself to refrain) are self-justifying.

Is this true? If the compulsions of copyright were eliminated so that the only restraints on intellectual property use would be those to which individual users had consented, would that give rise to a morally more desirable legal regime?

It is tempting to think that it would. Consent sometimes appears to provide a sufficient ground for moral acceptability: "If you've agreed, how can you complain?" Some consent theories therefore attract adherents because the theories offer an alluring illusion of providing legi-

355. It could be debated whether or not to characterize as a "harm" an act of copying that interferes with none of the copyright proprietor's preexisting expectations. See text accompanying notes 190-195 supra. My point in the text here is that, given the common law analogues, there is nothing illegitimate in using copyright law to require even such a copier to pay license fees, regardless of whether his act is viewed as "harmful."

356. Justice Holmes's doubts about copyright had a spatial aspect. See text accompanying note 15 supra.

357. See A. Ryan, supra note 7, at 8.
timization without the need for determining independent criteria for legitimacy. But the lure is false. One needs to know and evaluate the background entitlements upon which choices and consents are based in order to know if such consents are worthy of serving as guides for the legal order. Without making an independent normative judgment about background conditions and starting points, one cannot be sure that consent is a necessary or sufficient basis for normative acceptability.

For example, one might consent in a specific context to receive less than one is entitled on moral grounds to receive because one believes that, in that context, the moral entitlement will not be honored. The decision does not, however, erase the original entitlement. The classic example is the robbery victim who is given the choice, "Your money or your life." Few would suggest that the victim's assent to give the money should bind him later, however deeply the victim might have desired to make the trade. Because in our legal system all would agree that the victim is entitled to keep both money and life and that the robber is not entitled to use force, most people would not even view the victim's assent as "consent," regardless of what may have been the victim's own subjective state of willingness. Conversely, lack of consent does not indicate lack of legitimacy. For example, the robber would not consent to give up his spoils, yet few would think that a thief's lack of consent morally taints retrieval of the goods. Similarly, a driver on

358. The popularity of the law and economics view is at least partially attributable to the common but mistaken intuition that using a market model enshrines in the details of private law the noble models of consent on which many of our political orthodoxies are based. Among the several errors inherent in this intuition is its refusal to recognize that all contracts, even "social contracts," are not "immune from criticism in the light of pre-existing principles of justice." M. Sandel, supra note 242, at 109. A second is to underestimate the differences between hypothetical and actual compensation. A third is to equate actual compensation with consent. On the latter two points, see generally J. Coleman, supra note 206, at 95-132; Jeffrie Murphy & Jules Coleman, The Philosophy of Law 255-72 (1984).

Even those most adept at debunking these errors can fall prey to similar ones. As just suggested, not all of the people who use efficiency as a criterion do so solely because of a reasoned belief in its normative or descriptive powers. Some are influenced by the central image or "story" of law and economics: market deals which are consensual and not facially illegitimate leading to efficiency. Such market bargains are the discipline's constant reference point. From this attractive image emanates the illusion that in using criteria linked to efficiency we will respect legitimate entitlements and individual choice. Coleman, supra note 230.

359. M. Sandel, supra note 242, at 104-13; see also Hale, supra note 354; cf. Anthony Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 471, 474 (1980) (distributive justice "must be taken into account if the law of contracts is to have even minimum moral acceptability").

As John Rawls notes:

Acquiescence in, or even consent to, clearly unjust institutions does not give rise to obligations. It is generally agreed that extorted promises are void ab initio. But similarly, unjust social arrangements are themselves a kind of extortion, even violence, and consent to them does not bind.

J. Rawls, supra note 236, at 343; see also id. at 14-22, 137-42 (original position and veil of ignorance).

the highway may not want to pay a toll; but her distaste does not by itself disentitle the highway fund of its mite.

In these examples, using consent as a guide to moral adequacy is clearly unreliable, largely because there is consensus about who is entitled to pose what choices. When questions of entitlement are not so clear, the temptation to use consent as an independent criterion can be strong. Yet "consent" does not become a more reliable criterion just because other guideposts have lost their clarity. Consent simply cannot stand alone.

Thus, when Palmer suggests that it is improper to impose an independent duty not to copy on a user who has not willingly acceded to such restraint, we must question: Should the user's consent matter? The answer is that it depends. Is the author who employs copyright to demand payment more like a highwayman, or more like a highway authority toll collector? Or, to use a different analogy, is the person who wishes to use the intellectual product and who chafes at copyright's restraints more like a potential thief who resents that the law keeps her from raiding her neighbor's hencoop, or more like a homeowner who resents having to pay a local thug "protection" money to keep the house windows intact? Unless we know the relationship of persons to a resource, we do not know whose consent is required to stamp a given disposition of the resource "morally acceptable."

Sometimes consent is inferred from a finding that to consent would result in an excess of benefits over costs. But that benefits outweigh costs is not a sufficient basis for moral ratification of a given condition. Allocation B may give more benefits than allocation A, but one may be entitled to something even better than B. And if harm is a relevant

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361. See Palmer, supra note 6, at 280-83, 305-04. Palmer would accept restraints arising out of tangible property entitlements, id. at 279-83, 287-89, though he would not accept restraints directed specifically against copying. The answers he gives to the questions I pose would therefore not be as indeterminate as the answers I believe would flow from a position accepting no restraints at all.

362. Where for some reason it is impractical to obtain someone's actual consent, it is often nevertheless considered fair to impose a result on her as long as it appears to work to her long-term best interest. See Kronman, supra note 359, at 489-93 (Paretianism); Michelman, supra note 172, at 1176-81. For use of the implied consent mode of analysis in a copyright context, see Gordon, Fair Use, supra note 14, at 1615-18.

A finding of "implied consent," so common in the law, shares the same potential flaws as any hypothetical consent analysis. Among other problems, people sometimes consent to things that are not in their self interest; and welfare-based arguments are substantively different from arguments premised upon autonomy. See J. Murphy & J. Coleman, supra note 358, at 200-01. Also, there are difficulties inherent in having a third-party factfinder try to gauge whether conditions exist (such as no harm done, or an excess of benefits over harms) upon which a reasonable person would have been expected to give consent. For discussion of the difficulties and possibilities inherent in any third-party estimation of what another person's harm or benefit might be, see, e.g., Calabresi & Melamed, supra note 64 (particularly the discussion of "liability rules"). But see Brian Barry, Political Argument 44-47 (1965) (suggesting that interpersonal comparisons of utility are possible).

363. To illustrate, in a regime of copy-privilege an author may be willing to sell her manuscript to a publisher for a low price because the author recognizes that the publisher may be subjected to the competition of pirated editions; this may be the best deal the author
question, lack of consent does not even prove that the unconsenting person is being harmed. Absence of consent may mean no more than that the person withholding consent is angling for strategic advantage in order to maximize her benefits or that she is envious of another person obtaining something that (aside from envy) would do the objecting party no harm. Also, “harm” is a relative notion that obtains its content solely from comparison with a specified baseline, often the preexisting status quo. This is another reason why consent should be used as an ultimate criterion only by persons willing to accept the entitlement structure with which the parties began their negotiation.

Admittedly, consent can help safeguard autonomy. Whenever someone withholds consent, no matter what the motivation, any overdetermination of that person’s objections implies some lack of respect for his autonomy. Thus, philosophers who stress the independent value of consent may not care whether envy, strategy, or even perverseness motivates a refusal. But this focus on autonomy also fails to aid the copy-privilege proponent, because virtually all entitlements necessarily involve a lack of consent on the part of some persons affected. The

can make. The author’s consent in that context would not mean that the author lacked any entitlement to a right against piracy or that the author would consent to the same terms if such an entitlement were secured. Like the victim in the robbery hypothetical, the author’s consent is given only against a set of real-world constraints which may or may not be normatively appropriate to impose on her.

To illustrate again with the robbery example: Temporarily isolated from the legal system, which enforces his entitlement to be free from intentional killing, the victim temporarily and accurately perceives that he cannot expect such an entitlement to be honored. Rather, his only options are to be killed (which we might call allocation A) or to trade his possessions for his life (which we might call allocation B). That he chooses allocation B does not erase his entitlement to something better.

The question of who receives the benefits can also be important to the status of consensual agreements. A contract of silence between a blackmailer and victim may make those two people better off but at the expense of those persons who would be interested in learning the concealed information. Thus, under the law of blackmail the person who learns an unsavory secret may be entitled to be silent about it—but he is prohibited from selling that silence. Here a consensual agreement between a willing seller and willing buyer is not only unenforceable but criminal. See generally note 283 supra and accompanying text.

For example, the government’s power to condemn land that it needs for public projects is frequently justified as a response to the danger of strategic behavior by the land’s owners. Strategic threats can prevent parties from arriving at mutually beneficial outcomes. See Donald H. Regan, The Problem of Social Cost Revisited, 15 J.L. & Econ. 427, 429 (1972). Similarly, the free rider problem that can exist under copy-privilege results from individuals seeking to take strategic advantage of someone else’s willingness to purchase a first copy of the work.

Those observers who are committed to the position that individuals are the only accurate judges of their own welfare may refuse to guess whether envy or strategy motivates a refusal.

On the importance of a “baseline” and the related question of how to distinguish between being harmed and being prevented from obtaining a benefit, see J. Feinberg, supra note 190, at 53, 135-43.

See J. Murphy & J. Coleman, supra note 358, at 204 (discussing the position that “[c]oercion fails to treat the person with proper respect, as a rational autonomous agent capable of promoting his own ends”); id. at 255-75 (different approaches to consent).

See generally Hale, supra note 354; see also Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 Pol. Sci. Q. 470, 470-74 (1923) (“[T]he conduct is motivated,
copier's autonomy may be overriden in the intellectual property system, but the creator's autonomy receives insufficient respect under copy-privilege. Whether the entitlement is to keep or to share, right or privilege, someone will object. There is no way to avoid making entitlement choices on some normative ground other than consent.

That is why it is often so difficult to determine what should count as consent and what as compulsion. For example, an author might argue that there is no compulsion in property rights because a copyright owner gives potential copiers the freedom to choose whether or not to use a given work. When potential copiers encounter a work marked as owned, the argument would run, they can decline to reproduce it if they think the privilege not worth the price; the choice is theirs. The copiers might reply, in turn, that no one should force them to choose between paying for the work and doing without. But then the author might retort that she should not be forced to choose between keeping her work off the market and making it vulnerable to copying by free-riders. Behind both parties' assertions are implicit claims about substantive entitlements.

Unfortunately, the courts are not particularly helpful in illuminating the nature of what should count as a free choice. For example, the argument just mentioned raises issues similar to those that frequently arise under the "assumption of risk" doctrine when a plaintiff, who has engaged in a risky activity knowing of its dangers, argues that her knowledgeable choice should not bar her suit because the activity should have been available to her in a less risky form.369 Rather than explicitly addressing the normative issues raised, however, the courts sometimes simply punt to the jury as a "question of fact" the question of whether the plaintiff "voluntarily" encountered the risk in suit.370

not by any desire to do the act in question, but by a desire to escape a more disagreeable alternative." Id. at 472.

The question also arises in regard to explicit agreements to waive rights. See Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (clause purporting to exculpate hospital from negligence held invalid). As an example of where the normative question is perhaps less obvious than in the hospital context but equally interesting, consider a hypothetical loosely based on the facts in Verduce v. Board of Higher Education, 9 A.D.2d 214, 192 N.Y.S.2d 913 (1959), rev'd, 8 N.Y.2d 928, 168 N.E.2d 838, 204 N.Y.S.2d 168 (1960). In a college dramatics class conducted in a theater with extremely steep steps, assume that the drama coach has told a student she must "hold her head up" when stepping down from stage "or lose the part." The student knows she will not graduate if she loses her role in the play and also knows she might fall because of the extreme steepness of the steps. Continuing with head high might be considered a form of consent, or at least, a knowing encounter with the danger; she seems to have judged that the danger is less important to her than keeping the role. If she indeed falls and sues the teacher, the court or jury will have to decide whether or not she had "assumed the risk" of falling. It will probably make this decision by inquiring (implicitly or explicitly) into whether students should be entitled to safe places in which to complete their graduation requirements or, put another way, into whether teachers should be entitled to give their students a choice between physical danger and graduation. See ALAN WERTHEIMER, COERCION 54-57 (1987).

See Verduce, 8 N.Y.2d 928 (1960), rev'g and implementing the dissenting opinion below, 9 A.D.2d 214, 220, 192 N.Y.S.2d 913, 919 (ambiguously defined set of inquiries, apparently
But since the only “fact” involved is psychological willingness, and since even a psychologically willing consent can be found nonbinding, this judicial response only helps to conceal the true issue of whether the plaintiff was entitled to a less risky form of activity.

An approach that says “favor liberty and avoid compulsion” without specifying the kinds of liberty and compulsion is thus radically indeterminate. “[A]ll money is paid, and all contracts are made, to avert some kinds of threats.” Compulsion’s unavoidability is implicit in the Hohfeldian categories: One person’s privilege is another’s vulnerability, and one person’s security is another’s restraint. The question is therefore not whether compulsion is present, but whether the particular type of compulsion at issue in a given case is acceptable.

The weakness of the consent criterion is not always obvious because courts usually assume the justice of the background of liberties and compulsions against which consent is given or withheld. This tendency is due more to judicial acceptance of those background patterns, set by legal traditions sanctioned by precedent and unlikely to be overturned, than it is due to any independent virtue in “consent” itself. For example, consider what would happen if a person P wished to challenge the frustration that a grocer imposes on P by keeping food locked up behind the counter until customers pay for it. Even if P has money with which to pay, P is forced to choose between (a) having the food and including the question of whether the student was “free to act as she chose,” to be left to the jury.

On the general question of whether voluntariness or consent can ever be an objective concept free of normative presuppositions, see Catherine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence, 8 SIGNS 635 (1983).

371. See text following note 360 supra.


373. See Singer, supra note 41.

374. See generally Hale, supra note 354. My conclusion here is linked to the sometimes controverted view that coercion is a “moralized” concept that should not be defined solely by reference to empirical criteria. See A. Wertheimer, supra note 369, at 251-55 (suggesting that particular arrangements of property rights should not be judged as coercive without making reference to an underlying moral theory); id. at 257-58. A “moralized” approach to coercion can be consistent with the position that threats and offers are distinguishable. See id. at 204-21 (threats and offers); 305-06 (arguing that whether a proposal increases one’s range of voluntary options, or decreases them, should be initially evaluated in terms of moral baselines). Even Robert Nozick, who has strongly taken issue with the notion that all constraints are threats, see Nozick, supra note 372, at 112, has recently argued that whether the constraints other people impose on an actor make the actor’s conduct “non-voluntary depends on whether these others had the right to act as they did.” R. Nozick, supra note 227, at 262.

375. Similar assumptions play a role when courts uphold seemingly consensual agreements against one party’s later claim of invalidity on grounds of, for example, economic duress. There are circumstances in which courts will invalidate terms of a bargain even where the bargain was entered into without threats of physical force. Cf. U.C.C. § 2-302 (1978) (unconscionability provision).
paying money and (b) not having the food and keeping the money, when \( P \) would prefer (c) having the food for free. A “property privilege” regime (analogous to copy-privilege) would allow persons to take the food without paying. Absent extremely unusual circumstances, \( P \)’s challenge to the compulsion is unlikely to get very far, not because \( P \) has consented to the restrictions that make choice (c) unavailable, but because long precedent has determined that in the ordinary case it is the grocer’s consent that matters.

That compulsion is inescapable is as characteristic of the property area as it is elsewhere. If property rights were unenforceable, then armed and hungry strangers who wished to take a farmer’s corn would not be subject to property’s compulsions—but the farmer would be subject to the strangers’ compulsion. Eliminating property does not eliminate compulsion. The same is true of intellectual property. If compulsion were sufficient grounds for the copier to object to a legal regime of copyright, then compulsion would also be sufficient grounds for the work’s creator to object to the regime of copy-privilege. After all, if the copier is not subject to the compulsion of the creator’s copyright, the work’s creator will be subject to the user’s compulsion, because the user will employ his privilege to do things with the work which the creator would prefer he not do. In many ways, then, the users’ and creators’ interests in being free from compulsion appear symmetrical.\(^{376}\)

Someone who wishes to copy others’ created works might nevertheless strenuously deny that the important issues are symmetrical. For example, a copier’s advocate might argue that there is a real difference between being stopped from doing something (which he might call a “true” compulsion) and being frustrated in one’s ability to stop others from affecting one’s interests. Persons who desire to copy will, under copyright, be stopped from physically doing something that they desire to do, while under copy-privilege, authors may merely find themselves unable to collect as much profit as they desire. The advocate thus might suggest that property rights are suspect because they impose “true” compulsion on copiers, while privileges merely impose on creators a less objectionable form of compulsion.

Furthermore, the pro-privilege commentator might point out that harm done by the state in enforcing rights is potentially much greater than the harm done by private persons pursuant to state-granted privileges. For example, a person who wants to use a resource that is subject to another’s property right can be sued or arrested if he takes the property without permission. This state-decreed harm is often inescapable and usually carries stigma. In contrast, the harm that private

\(^{376}\) The person in the law and economics movement most closely associated with the position that the two sorts of costs are symmetrical is Ronald Coase. See R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).
parties do can often be undone by self-help and is less likely than government-imposed harm to bring with it an aura of moral condemnation. Thus, although a copier might decrease an author’s revenues, that is nevertheless much less painful than being arrested. Furthermore, an author subject to piratical copying is not being injured by the state; and individuals in our culture by and large expect more fairness from the government than from individual strangers. Many of us may be willing to accept the old saw that “life isn’t fair,” but we believe that the law should be. In fact, law, like morality, has often been explained as an attempt to impose human notions of fairness on an arbitrary universe. Similarly, the Constitution imposes many fairness requirements on the government as agent of the law that are generally inapplicable to private entities. The copier’s advocate thus might urge that state action needs a justification that private actions do not and that state-granted rights require a kind of justification that privileges do not.

An author’s advocate might reply that it is not only the exercise of

377. On the other hand, someone arguing that privileges require more justification than rights might claim that federal constitutional law provides no analogical support for copy-privilege. The Constitution’s tendency to require certain kinds of behavior more from government than from individuals may simply be a product of the document’s nature and the institutions involved and may not embody a substantive decision by legal decisionmakers as a whole that individuals should be free to act badly. The federal scheme is not indifferent to individuals’ behavior, it could well be argued; rather, sources of law other than the Constitution, such as federal and state statutes, control individual behavior.

Thus, other aspects of American law may demonstrate more willingness to require fairness from individuals. This can be true even at a state constitutional level. The California constitutional guarantee of freedom of speech and assembly constrains the actions of private parties more than does the first amendment to the federal Constitution, and the similar New Jersey provision appears to as well. See Pruneyard Shopping Center v. Robins, 25 Cal.3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), aff’d, 447 U.S. 74 (1980); State v. Schmid, 84 N.J. 535, 559, 423 A.2d 615, 628 (federal constitutional issue reviewed but decision based on state constitution), appeal dismissed, 455 U.S. 100 (1980).

378. The advocate of copy-privilege might seem to be exaggerating in viewing private property “rights” as forms of state action. Such rights are in fact different from direct expressions of governmental will, a point which a copyright advocate might advance in an effort to show that special burdens applying to governmental action should not be applied to her. Yet the differences between specifically directed governmental action and the government lending its force to assist a private plaintiff are not always determinative. The Supreme Court has held, at least in some circumstances, that when a private party asserts rights through the judiciary, the judiciary’s enforcement of those rights is an act of the state. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (state libel law is subject to certain constitutional limits); Shelley v. Kraemer, 334 U.S. 1 (1948) (Constitution prohibits state enforcement of racially restrictive private covenant). Shelley makes particularly clear how the difference between privilege and right can be relevant to determining when constitutional guarantees of governmental fairness should apply:

We conclude . . . that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State. . . .

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements.

Id. at 13-14. The Court has not gone so far as Shelley’s dicta suggested. Not all assertions of private right will be treated as state action subject to constitutional scrutiny.

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state power against defendants (which occurs in a rights regime) that might require justification. A refusal by the state to act (which occurs in a privilege regime) also implicates moral and economic issues.\textsuperscript{379} State inaction can have consequences as coercive (depending on one's definitions) as state action. In the area of constitutional law, for example, as Seth Kreimer has observed, a "conception of negative rights as freedom from coercive violence has questionable value in shaping constitutional restraints on a government that more often exerts its power by withholding benefits than by threatening bodily harm."\textsuperscript{380} Thus, the assumption of symmetry in rights and privileges might be attacked from the opposite direction, and a procopyright advocate might try to put the burden of persuasion on those who would give private persons liberties to affect others' interests.

For example, a creator arguing for copyright might draw on the common law's tendency to give rights against harm and contend that privileges that permit persons to do harm are wrongful unless justified.\textsuperscript{381} Ironically, the private law theorist most often associated with the view that such issues are not symmetrical is Richard Epstein, who stresses the value of liberty yet makes precisely this opposite contention: He suggests that the state has an obligation to give tort rights to private persons who have been caused direct harm by the acts of others.\textsuperscript{382} A creator taking his cue from Epstein might argue that it is government passivity in the face of private parties causing injury that requires special justification\textsuperscript{383} and that, at a minimum, the creator should be protected from copiers' damage. Rights against injury would protect authors substantially, even if less so than the copyright statute.\textsuperscript{384} (Copiers can and do cause damage. For example, unauthorized

\textsuperscript{379} A privilege arguably embodies the state's affirmative decision not to take action. See Kennedy & Michelman, supra note 252, at 769-70 (the common law property and contract systems are modes of regulation).


\textsuperscript{381} For common law dimensions of this question, see, e.g., Epstein, supra note 82; Kennedy & Michelman, supra note 252; Singer, supra note 41. For constitutional aspects of this question, see, e.g., David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986); Kreimer, supra note 380; see also note 378 supra.

\textsuperscript{382} See Epstein, supra note 82, at 160-66 (arguing that causation should trigger liability where excuse and justification are absent); id. at 166-89 (analyzing force, fraud, compulsion, and dangerous conditions). In arguing that liability should be imposed when certain harms are directly caused, Epstein demonstrates the irony of a proliberty commentator taking a strong stance in favor of liberty-limiting rights to protect current possessions.

Epstein's list of ways harm can be caused does not include harm done by copying. Adapting Epstein's argument to the intellectual property context thus extends his basic theory. Also, his argument is so oriented to physical events that he might reach quite different conclusions about harm to intangibles. Nevertheless, his antisymmetry argument is applicable to the general points made here.

\textsuperscript{383} This seems to be the core of Epstein's position regarding tort law. See id. (suggesting strict liability for "direct" harm).

\textsuperscript{384} In addition, copyright actually gives owners a share in the profits defendants draw from their work. 17 U.S.C. §§ 504(a)-(b) (1982).
persons who make copies can sell them at a price lower than that charged for the authorized edition since the pirate pays no royalties and need not cover the cost of generating the work in the first instance; the unauthorized edition will have a price advantage and could thereby drive the unauthorized but higher priced equivalent out of the market.)

Alternatively, an authors' advocate might abandon the debate over whether rights or privileges need justification more. She might argue instead that “the law ought to do what is morally required” and contend that it is morally wrong for users to take unconsented advantage of others' efforts. This argument also could support placing the burden of justification on copy-privilege proponents.

But neither the copier seeking privileges nor the creator seeking rights could make more out of their respective arguments than a rebuttable presumption of entitlement. Even the most ardent proponent of liberty seems obliged to concede that there are some occasions when liberty should be constrained. Even strong proponents of the view that the law should protect creators and all other persons from harm would probably shy away from enshrining the status quo in a presumptive entitlement unless there were some inquiry into how the status quo was reached or into the question of which status quo holdings are prima facie entitled to protection. Similarly, proponents of a “law as morality” view would have to explain what rights morality does and does not justify. As long as justification is possible, a need remains for a theory of entitlements to describe what kinds of justification are required or relevant.

Thus, whatever the starting place, the presence or absence of consent means little. Either consent by one party will be balanced by lack of consent by the other (the symmetry position), a presumptive privilege will be subject to rebuttal by a showing of a justified right (the proprivilege position), or a presumptive right will be subject to rebuttal by a showing of justified privilege or excuse (the proright position). Perhaps no flat presumption can be laid down, and everything should depend on the particular rights or privileges in question. In all these formulations, it is the underlying question of justification, the question of what entitlements rightfully attach to interests, that should determine an observer’s normative recommendation of whether a right or a privilege should govern in that particular context.

386. Philosphic arguments based on the laborer’s claim to deserve a reward are explored at length in W. Gordon, Creative Labor, supra note 14, and W. Gordon, Restitutionary Impulse, supra note 55.
387. See, e.g., R. Nozick, supra note 227, at 149-52.
388. Once a basic entitlement structure is determined legitimate, then consent can indeed be a quite useful building block in expanding it. For example, Congress has given the creator of a new work of art a prima facie right to control all copies made of that work. With acceptance of that entitlement, possible further doctrinal developments can be usefully explored by investigating the allocative patterns arising from the consensual relations between
In the end the choice for privilege is as freighted with moral charge as the choice for rights. Clearly, many have believed that private property entitlements are justified.\(^{389}\) We must therefore move on to examine the normative appropriateness of the underlying entitlement structures on which proponents of copy-privilege base their arguments.

C. Economics and Entitlements

Most of the literature discussing the desirability of intellectual property systems has focused on economics, and to some extent the analysis takes the same form as it does in regard to tangible property. Thus, supporters of private property often argue that, in a realm of pure privilege, exchange is unlikely to occur at an economically optimal level.\(^{390}\) In these arguments, a world without specified property rights\(^{391}\) is pictured as potentially quite disruptive. Resources that could not be physically protected from marauders would not be produced, potential buyers who feared they might be too weak to protect their purchases from third parties would discount their willingness to pay by the likelihood of loss, and so on. These problems would not vanish if buyers and sellers of resources had a state-enforceable contract between them, for even binding contracts are enforceable only against the people who sign them.\(^{392}\) Merely privileged dominion is insecure, it is often argued, since it is open to the equally privileged depredations of other persons. People will probably not invest in production or enter into contracts if the anticipated benefits are likely to be leached away by third parties.

As we have already seen, the economic arguments commonly made on behalf of intellectual property are essentially of the same sort. Free-riding and other strategic behaviors may preclude effective coordination among potential purchasers.\(^{393}\) Even persons who might other...

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\(^{389}\) See Gordon, Fair Use, supra note 14.

\(^{390}\) See, e.g., J. Locke, supra note 203, at §§ 25-51.

\(^{391}\) Compare R. Posner, supra note 210, at 27-54 (2d ed. 1977), with Kennedy & Michelman, supra note 41.

\(^{392}\) Property rights do not have to be privately owned in order to be specified and stable; as long as the state or other equivalent source of power guarantees a given allocation, the problems of a world with no rights will be avoided. Of course, varying sorts of problems are introduced with varying forms of ownership. See, e.g., F.A. Hayek, The Use of Knowledge in Society, 35 Am. Econ. Rev. 519, 524-25 (1945) (contending that without the pricing system that decentralized private ownership makes possible, needed information will not be transferred and the economic system will suffer from lack of flexibility and inability to respond to local conditions).

\(^{393}\) One of the parties could, however, sell “protection.” To the extent this protection was effective against other strong parties, such as competing protective associations, this privately provided protection would mimic property rights in impact. If the protection is a privileged activity, the activity will also be free from interference by any state that exists. Cf. R. Nozick, supra note 227, at 10-25 (“protective associations” in the state of nature).


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wise be willing to pay for access to a new intellectual product might be unwilling to do so if they expect to be able to duplicate their neighbor’s copy. As a result, revenues may be low, the resulting incentives to produce intellectual products may be low, and fewer intellectual products may be produced than the public desires.

If free-riding and other forms of depredation will not so easily occur, then property is less necessary to secure adequate incentives. In the realm of tangible property, a growing number of commentators are pointing out areas where a lack of private property need not be “tragic.” In the realm of intangibles, commentators such as Judge Stephen Breyer, Tom Palmer, and Stanley Liebowitz take the position that, at least in some branches of the publishing industry, property in works of expression is unnecessary to deter depredation or to provide incentives for creators. In addition, since a market in copy-

LEGAL STUD. 321 (1985) (suggesting that entitlements assigned to an “open class” of persons—for example, a privilege assigned to the public to use creative works—are less likely to lead to effective markets than are entitlements assigned to a “closed” class—for example, exclusion rights assigned to individual creators).

394. For tangible property, fences and physical force can enable owners to exclude others even absent state-enforced property rights, and exclusion in turn encourages market bargains. (Someone who wants an object locked in a warehouse will pay to obtain it, for example.) Inexpensive reproduction methods, however, make intangible property especially vulnerable to excludability problems. The more difficult it is to exclude nonpayors, the more tempting free-riding becomes. See Gordon, Fair Use, supra note 14, at 1610-14 and the sources cited therein (the public goods problem).

395. Garrett Hardin employed a “tragic common” abstract model to dramatize the difficulty of using voluntary coordination to solve population problems, and property teachers are now accustomed to using the model to demonstrate why private property rights in land might be more desirable than treating land as a commons. See Garrett Hardin, The Tragedy of the Commons, in Economic Foundations of Property Law 2 (B. Ackerman ed. 1975); see also Thomas C. Schelling, Micromotives and Macrobahavior (1975) (demonstrating that the self-interest of all individuals in a group can be frustrated by group coordination problems). It is simply a model, however, showing one of several possibilities. Commons may not be tragic. See Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711 (1986). See generally Kennedy & Michelman, supra note 41 (suggesting that a mixed regime may be superior to a “pure” property regime). Further, though even ineffective commons can impose very real human costs. See BARRINGTON MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY 20-29 (1966) (historical account of the human costs imposed by the enclosure movement in England).

396. See Breyer, The Uneasy Case, supra note 3. Judge Breyer examined several aspects of the book publishing industry and expressed doubt about the need for copyright in some of its segments. He did not go so far as to recommend that copyright be abandoned. Rather, he recommended, to no avail, that Congress not adopt the extensions of copyright it was then considering.

397. See Palmer, supra note 6. Palmer argues that a range of devices exist to “internalize the externalities” of intellectual products without intellectual property rights, such as technological fences, tie-ins with noncollective goods, and contractual arrangements. Id. at 287-300. Though he believes copy-privilege is therefore more consistent with efficiency than is copyright, id. at 303, his preference for that regime is also grounded in his belief that intellectual property poses unacceptable conflicts with tangible property entitlements and the “voluntary regime” based upon them. Id. at 303-04.

398. Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21 (recommending the “fair use” doctrine to implement an efficiency criterion). He suggests that price discrimination by journals may make copyright relief against photocopying by libraries unnecessary. Id. at 192-94.
righted works is likely to impose significant “deadweight losses” and transaction costs,\(^4\) these and like-minded commentators, such as Arnold Plant, and Robert Hurt and Robert Schuchman, suggest abandoning copyright protection where these costs are not outweighed by positive incentive effects.\(^5\)

The economic focus of intellectual property criticism is not surprising. As the prior discussion has made clear, the entitlement structures of intellectual property, like the structures underlying all forms of private property, enable economic markets to form.\(^6\) The relevant Constitutional clause exhibits an instrumental approach to intellectual property, authorizing Congress “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”\(^7\) In the copyright area, at least until very recently, the Supreme Court has consistently stressed copyright’s economic role, stating that reward to the author is a “secondary consideration” in a system aimed primarily at increasing social welfare.\(^8\)

\(^{399}\) With tangible property, it is at least conceptually possible to have “perfect competition.” For example, for tangible property, marginal cost, long run average cost, and price can (hypothetically) all be equal. When this occurs, anyone who is willing to pay a price above marginal cost can obtain the resource, and the producers’ costs will be covered. With intangibles, this alternative is unavailable. The choice is between allowing free-riders (which will raise the prospect of producers’ costs not being covered and thus potentially result in undercreation of new works) or giving the creator a right to control copying and other particular forms of use (which, barring perfect price discrimination, can result in fewer copies or uses of those works that are made). “Deadweight loss” represents the economic costs of the second choice. To explain further:

[Consumers who value the work at more than its marginal cost but less than its monopoly price will not buy it. ... [This] results in a “deadweight loss,” measured by the total of the consumer surplus that would have been reaped by the excluded consumers and the producer surplus that would have been reaped by the copyright owner had he sold the work to them.]

Fisher, supra note 5, at 1702 (footnotes omitted).

As a result of intellectual property rights, the price charged can be greater than the marginal cost of copying. For example, when a competitor copies a computer program written by someone else, the marginal cost per copy will likely be low: the costs of a new floppy disk and of using a computer or other copy device for a few minutes. Yet the person who invested a great deal in initially creating that intangible will need to charge more than the marginal cost of copying in order to recoup her investment. Copyright excludes the competitor from putting identical floppies on the market, making it possible for the owner of the program’s copyright to charge a price that more than covers marginal cost, but at the expense of the deadweight loss. See Gordon, Fair Use, supra note 14; Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21, at 183-88.

\(^{400}\) See Breyer, The Uneasy Case, supra note 3, at 316-18, 329-50; Hurt & Schuchman, supra note 25, at 430-32.

\(^{401}\) Plant, supra note 25, and Hurt & Schuchman, supra note 25, set forth what has become the basic form of the normative economic inquiry into the merits of copyright. Liebowitz shows how an inquiry balancing deadweight costs against incentive benefits might be conducted on a systemic level. See Liebowitz, Copyright Law, Photocopying, and Price Discrimination, supra note 21, at 183-88. Fisher suggests how the inquiry might be conducted on a case-by-case basis. See Fisher, supra note 5, at 1698-1744.

\(^{402}\) See text accompanying notes 210-231 supra.

\(^{403}\) U.S. Consr. art. I, § 8, cl. 8.

\(^{404}\) United States v. Paramount Pictures, 334 U.S. 131, 158 (1948); see also Twentieth
But it is one thing to suggest that the system serves economic goals and employs markets to achieve a rough compromise between authors' claims to reward and the public's needs, and quite another to suggest that intellectual property rights for creators are only justifiable when the public gains something it would not otherwise have had. Yet most economically oriented commentators ordinarily take the latter stance. Sometimes even the Supreme Court seems to take that position. For example, the Court wrote of patent rights: "The patent monopoly... was a reward, an inducement, to bring forth new knowledge. ... The inherent problem was to develop some means of weeding out [and rewarding with a patent] those inventions which would not be disclosed or devised but for the inducement of a patent."  

Under such a view, an inventor or author could not claim to deserve property rights as a reward for her effort or in recognition of her psychological investment in the creation. Instead, a creative person could claim property rights only if those rights would help the public. One might call persons holding these views "encouragement" theorists, because they are united in believing that copyright is justified only to the extent that it encourages authors to generate new works.

The extent to which intellectual property rights are in fact necessary to bring forth new works and the question of whether on the whole or in particular industries intellectual property rights do more harm than good are matters that raise complex empirical questions beyond our ability to resolve here. But we can make some important observations about the premises of such economic positions. To do so, the material in this section will first describe the underlying structure of the encouragement theorists' arguments and explore its potential justifications. I conclude that the most plausible defenses for the encouragement theory are inadequate. I then go on to suggest that the most attractive feature of encouragement theory—its sensitivity to the public's interests—can be better integrated into copyright law by other means.

1. Structure of the encouragement theorists' argument.

Essentially, the encouragement theorists adhere to the principle of wealth maximization, under which one asks "whether a policy seems likely to give its beneficiaries the equivalent of more dollars than it..."
seems likely to take away from its victims." William Fisher has recently applied this economic criterion, suggesting that an economically oriented judge should aim to refuse copyright protection whenever such protection would not yield sufficient incentives to outweigh the deadweight losses that society would have to bear if the copyright owner's suit succeeded. Sole reliance on the wealth-maximizing criterion to grant or deny copyright is highly questionable.

The dominant purpose of American statutory copyright is to provide incentives, and copyright can properly be viewed as an economic doctrine. But developing a coherent economic theory does not require blind pursuit of untrammelled wealth maximization, even if that were possible. Rather, we may seek to maximize wealth, subject to some constraints. One such constraint may be some creators' claims to deserve a degree of control or payment; while desert may not be the only component of justice, it does have a weight that deserves respect.

The normative ambiguities inherent in using the wealth maximization criterion are well known. One is the difficulty of using the criterion to set initial entitlements. Wealth maximization depends on prices; and prices depend on, among other things, the distribution of resources. A search for "the" wealth-maximizing distribution is likely to fail because of its inherent circularity. Putting that foundational difficulty aside, another problem with wealth maximization is its apparent failure to take into account issues of distributional justice or noneconomic measures of desert. Some proponents of the wealth maximization approach seem to suggest that any action that leads to a larger gross total is desir-

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For a critical review of this criterion of many names (it is variously called "wealth" or "value" maximization, "potential Pareto superiority," "Kaldor-Hicks efficiency," "efficiency," and even, most erroneously, "Pareto optimality"), see J. MURPHY & J. COLEMAN, supra note 358, at 262-72; see also Calabresi & Melamed, supra note 64, at 1093-94; Fisher, supra note 5, at 1699 n.194. Under this criterion, one asks not if the affected parties consented, or even if they are unharmed; rather the inquiry is into whether the gainers could compensate the losers and still come out ahead, as a hypothetical matter.

For the conceptual relationship between wealth maximization and Pareto superiority, see note 426 infra.

408. See note 399 supra (explaining deadweight loss).

409. See Fisher, supra note 5, at 1698-1744; see also note 440 infra (discussing Fisher's analysis). Fisher suggests that his economic approach is only one possible ground for granting users of copyrighted works the privilege of fair use treatment. He also advances substantive noneconomic conceptions of what might constitute the good life, and recommends that his pure economic approach be modified (but not abandoned) accordingly. Fisher, supra note 5, at 1744-79. References to Fisher in the following discussion apply to him when he is wearing his economist's hat.

Fisher is well aware of the normative problems in using economics as he does, see id. at 1695-97, 1698 n.190, which is in part why he presents a "utopian" analysis, id. at 1744. To the extent that Fisher stands by the antienforcement recommendations of his economic approach, see id. at 1768-83, 1794-95, 1795 n.586, he is fairly grouped among the encouragement theorists for our purposes. To the extent that he does not, he is nevertheless an accurate expositor of the encouragement theorists' presuppositions.

410. J. COLEMAN, supra note 206, at 108.
able, regardless of its impact on individuals.\textsuperscript{411} For example, if group $A$ would bear the burdens of a change that benefits only group $B$, most observers would demand some showing that group $B$ deserved to receive this boon and that there was some reason why members of group $A$ were the appropriate persons to provide it. However, advocates of the wealth maximization criterion tend to argue that as long as group $B$’s economic gain exceeds group $A$’s economic loss, the change is desirable. Such a focus on aggregate wealth unjustifiably\textsuperscript{412} ignores the moral claims that the members of group $A$ have to be recognized as individuals.\textsuperscript{413}

Often “law and economics” advocates temper their approach by suggesting that persons disadvantaged by a wealth-maximizing move can be compensated after the fact.\textsuperscript{414} However, the encouragement theorists do not urge that creators be compensated for a lack of copyright protection. The absence of a principle to justify the distribution of gains and losses is therefore telling.

But even if a wealth-maximizing economist possesses no explicit distributional preferences, distinct distributional patterns do result from any given programmatic recommendation. One can identify that pattern and then use independent standards to judge whether the distribution is appropriate. The encouragement theorists’ arguments appear consistent with this particular distributional principle: Consumers are entitled at a minimum to have whatever price and quantity of intellectual products would be available to them in a world without intellectual property rights.

This normative stance has long been apparent. For example, Hurt and Schuchman inquire whether the “copyright system induc[es] the creation of new goods which would not have been created in the absence of copyrights.”\textsuperscript{415} Similarly, Stanley Liebowitz argues that “under a more ‘optimal’ copyright law,” copyright protection would not be extended to creators who require no remuneration for their efforts.\textsuperscript{416} As noted above, the Supreme Court took this position toward

\textsuperscript{411} See, e.g., J. MURPHY & J. COLEMAN, supra note 358, at 273.

\textsuperscript{412} Various attempts have been made to supply an ethical basis for the criterion; none has thus far proved convincing. See, e.g., J. COLEMAN, supra note 206, at 111-22 (analyzing Judge Posner’s defenses of the criterion); \textit{see also} Ronald Dworkin, \textit{Why Efficiency?}, 8 HOFSTRA L. REV. 563, 573-84 (1980) (analyzing Judge Posner’s defenses of wealth maximization); \textit{id.} at 584-90 (outlining further questions to be addressed if wealth maximization were to be justified by Kantian principles).

\textsuperscript{413} See J. COLEMAN, supra note 206, at 105-22, 355-56 n.25; Dworkin, supra note 412, at 583.

\textsuperscript{414} See, e.g., A. MITCHELL POLINSKY, \textit{AN INTRODUCTION TO LAW AND ECONOMICS} 7-10, 105-21 (1983) (discussing equity and efficiency).

\textsuperscript{415} Hurt & Schuchman, supra note 25, at 425.

\textsuperscript{416} Liebowitz, \textit{Copyright Law, Photocopying, and Price Discrimination}, supra note 21, at 188. Note that although Liebowitz uses solely economic criteria, he never says explicitly that he believes such economic analysis is all that should matter in the area.
Copyright law, unlike patent, historically has not conditioned its grant of legal protection on an inquiry into each work’s novelty or other level of contribution to “science and the useful arts.” Nor have judges considered it permissible to deny copyrightability when a defendant proves that the plaintiff would have created the work without the incentive of copyright protection. Rather, fairly broad rules grant copyright to virtually all works within specified classes. Nevertheless, these broad rules have been subject to analysis by encouragement theorists, who have had to go beyond an inquiry into whether individual works need intellectual property incentives.

An illustration of their approach may be helpful. Liebowitz suggests the following method of analyzing the economic effects of copyright rules. Some works come into existence only because copyright allows their creators to maximize their revenues by limiting the number of copies available to the public and thus receiving a higher price per copy. As to these works, Liebowitz implicitly argues, the concept of deadweight loss is irrelevant and should be disregarded. This is plausible; after all, society does not lose when copyright protection results in a low quantity of copies produced if the work would not have been introduced at all but for the protection. Anything is better than zero. As to works that would have come onto the market even without copyright, however, deadweight losses do make society worse off than it would have been in a world without copyright. Liebowitz therefore recommends weighing the costs of the “unnecessary” loss against the benefits bestowed upon the public by those works that exist only because of copyright incentives. Where the positive economic value of a particular extension of copyright protection is less than the “unnecessary” deadweight loss it causes, he argues that an economic inquiry would...

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418. See Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 859-60 & n.20 (5th Cir. 1979) (copyright protection can be granted regardless of individual work’s contribution to science and useful arts; patent law distinguished), cert. denied, 445 U.S. 917 (1980).
419. Hutchinson Tel. Co. v. Frontier Directory Co., 770 F.2d 128, 130 (5th Cir. 1985) (holding telephone book that plaintiff was statutorily mandated to produce was copyrightable, reversing District Court denial of copyright on the ground that copyright protection was not necessary as an incentive to produce the work); see also Schnapper v. Foley, 667 F.2d 102, 111-12 (D.C. Cir. 1981) (governmentally commissioned work held copyrightable), cert. denied, 455 U.S. 948 (1982).
420. It is well known that a single producer, shielded from competition and able to charge only a single price, would produce [a quantity lower than the quantity that would be produced under conditions of pure competition where free entry were allowed] and sell at [a price higher than the price that would be received under conditions of pure competition].
421. See id. at 186.

Electronic copy available at: https://ssrn.com/abstract=3581843
recommend abandoning the right.422

Liebowitz’s calculation is again built upon a distinct premise: Consumers should not be made worse off by the adoption of intellectual property rights than they would be in a world of copy-privilege. The economic analysis may be appealing in its intricacy, but why should a world with copy-privilege provide the baseline for comparison? This distributional premise, the only one consistent with the encouragement theorists’ work, is equivalent to asking whether the consuming public would consent to adopt an intellectual property system if it understood where its own best interest lay.423 Why should consumers be entitled to demand that copyright give them compensation (in the form of new works) for any diminution in the access the consumers would have had in a world without copyright?

2. Potential justifications for encouragement theory.

Perhaps we should use a copy-privilege regime as the baseline because a safe, agnostic starting point for justifying an entitlement pattern (here, copyright) is to ask whether those who seem to be its immediate losers (here, potential copiers and other users) will in the end be better off than they otherwise would have been. Anthony Kronman names this general approach “Paretianism,” after Vilfredo Pareto, the economist whose seminal work on the criteria of social welfare has been important to today’s law and economics movement. Kronman defines Paretianism this way: “[Paretianism] states that a particular form of advantage-taking should be allowed if it works to the longrun benefit of those disadvantaged by it, but not otherwise.”424 Kronman adds, “[T]he baseline against which we are to measure changes in the welfare of the disadvantaged . . . is represented by the situation in which the advantage-taking in question is legally forbidden.”425 More familiarly, a move from allocation X to allocation Y is commonly said to be “Pareto superior” if no one would be harmed by the change and at least some would benefit.426

422. Id.
423. The encouragement theorists would probably disclaim the use of any distributional premise and instead claim to be applying only the wealth maximization criterion. See text accompanying note 411 supra. I am attributing to the encouragement theorists a distributional criterion which those theorists themselves have not explicitly adopted but which is most consistent with the structure of their arguments.
424. Kronman, supra note 359, at 486.
425. Id. at 491-92.
426. If the change is Pareto superior in the sense that no one is made worse off by the change, then an economist following Pareto could recommend that the change be adopted. To illustrate how this and related criteria operate, assume that in allocation X, Lincoln has seven bushels of wheat, and Washington has four bushels. Assume further that under some proposed law regarding land usage their respective wealth will change. Call the output under the proposed legal allocation Y, and assume that the law might have either of two possible results, allocation Y-1 or allocation Y-2. Under allocation Y-1 both farmers will have seven bushels. Allocation Y-1 is Pareto superior to allocation X. Lincoln is not hurt, and Washington-
Demanding that legal rules work to the long-term advantage of the have-nots, when one has no way to distinguish between the haves and the have-nots, it therefore makes some sense to adopt Paretianism as a criterion for judging whether a specific change should be adopted. If one were to concede for argument's sake that there were no way to distinguish the claims of authors and users, then one might indeed be tempted to ask (as the encouragement theorists seem to do) whether adopting copyright benefits users in the long run.

Pareto, however, offered no guidance on the question of what an appropriate starting point might be from which to measure harm.
One might equally well ask, therefore, whether adopting copy-privilege benefits authors in the long run.

Without a specification of a normatively appropriate starting point, the Paretian approach offers as little assistance as did the consent criterion, and for the same reasons. Essentially, criteria in both approaches are indeterminate unless joined to a specification of whose consent or welfare should be guaranteed and which state of affairs (copyright or copy-privilege) should bear the burden of proving itself Pareto superior to the other. As Bruce Ackerman has observed,

> [u]nless a legal rule is Pareto-superior to all other feasible rules [in the sense that no one would object to the adoption of that rule], there is a compelling need to advance one or another normative argument which seeks to explain why one group should be made better off at the expense of another.

The Paretian approach of asking whether a change is in the long-term interest of those who seem to lose in the short run makes the most normative sense when there is some satisfactory basis for judging that the “losers” can appropriately claim to be entitled to what they currently have. It is in this fashion that legal commentators usually employ Paretian analysis. In the fifth amendment “takings” context, for example, Frank Michelman suggests that property owners might be fairly required to bear without compensation certain losses if, in the long run, allowing such losses would be in the owners’ interest due to benefits they would receive over time from leaving others’ similar losses uncompensated.

In the copyright area, I have employed an analogous approach to argue that uses of a copyrighted work should be treated as “fair” and thus noninfringing when such treatment would not make the copyright owner significantly worse off than she would be if the copyright were enforced. Most notably, when transactional barriers or other factors cause a market failure that prevents the owner from selling to potential buyers in that market, and compulsory licenses or other forms of market “cure” are unavailable, the copyright owner loses no revenue that might otherwise have been available if consumers in that market are given free use of the copyrighted material. Granting fair use in that context largely yields a “Pareto superior” result: helping the public

starting points in determining harm, discussed in a criminal law context, see J. Feinberg, supra note 190, at 31-64, 127-86 (notions of "harm" are dependent on specification of baseline from which harm is to be measured).

431. See text accompanying notes 357-376 supra.

432. Bruce A. Ackerman, Introduction to ECONOMIC FOUNDATIONS OF PROPERTY LAW, supra note 395, at xiii; see also id. at xi-xii (inconsistent states of the world can all be Pareto optimal); cf. J. Murphy & J. Coleman, supra note 358, at 265-66 (using the Scitovsky Paradox to show that even inquiries into “net” benefit can yield indeterminate results).

433. See Michelman, supra note 172, at 1194-96, 1222-24; see also Kronman, supra note 359, at 485 n.32.

434. See Gordon, Fair Use, supra note 14.
without doing substantial harm to the copyright proprietor.435

But such analyses take as their starting point a specification, from the legal system or from independent normative criteria, that some possessions are legitimate. In the fifth amendment takings context, for example, the constitutional text itself designates some protection for existing property allocations.436 In the copyright context, the statutory framework within which fair use has evolved and the judicial origin and history of the doctrine both reflect a concern with protecting the copyright owner’s interests.437 Thus, an economic view of fair use should “begin[] with the premise that a copyright owner is ordinarily entitled to revenue for all substantial uses of his work within the statutorily protected categories.”438 From that statutory baseline, a Paretian approach can be used to identify those occasions where granting defendants a privilege to copy will not result in long-term harm to copyright owners.439

By contrast, even in the context of a statutory doctrine like “fair use,” the encouragement theorists implicitly begin with the notion that the public is entitled to the most it can practicably receive. Both Liebowitz and Fisher suggest that courts concerned about economic impact should honor only those entitlements whose enforcement will help to induce the creation of new works and should use the fair use doctrine to deny relief when enforcing a copyright owner’s rights would not economically benefit the public as a whole.440

What is the basis for such a position? It will not suffice to answer that “the net total of social wealth will be greater if the law works to the benefit of consumers rather than authors,” for this discussion began with the proposition that such arguments require distributional con-

435. Id.
436. Michelman, supra note 172, at 1165.
439. See Gordon, Fair Use, supra note 14, at 1606 n.38. The inquiry into fair use need not end with Paretian economics. See id. at 1601. There may be grounds for honoring a public entitlement to free use even if the use causes harm to the copyright owner—for example, first amendment considerations or an analogue to the common-law “privilege for extreme need.” See notes 457 & 518 infra and accompanying text (free speech interests); text accompanying note 75 supra (privilege of necessity); text accompanying notes 519 & 523-526 infra (analogic privilege to use copyrighted work in situations of exigency).
440. See Liebowitz, supra note 21. Fisher builds on the Liebowitz approach, arguing: The task of a lawmaker who wishes to maximize efficiency, therefore, is to determine, with respect to each type of intellectual product, the combination of entitlements that would result in economic gains that exceed by the maximum amount the attendant efficiency losses. Roughly speaking, the “gains” associated with a given combination of rights are the value to consumers of those intellectual products that would not have been generated were creators not accorded those rights. Fisher, supra note 5, at 1703 (footnote omitted, emphasis added); see also id. at 1705 n.218 (quoting Gordon, Fair Use, supra note 14, at 1613 n.81), where he compares wealth-maximization with my approach: “[Gordon argues] that courts interpreting the fair use doctrine should not strive to achieve ‘optimal’ levels of copyright protection, but rather should accept that ‘the copyright law treats the outcome of the ordinary copyright transaction as normatively equivalent to an ‘optimal’ result.’”
straints—some guidelines about how the costs and benefits of the “net total” will be distributed—to be normatively acceptable. Is there some other ground for arguing, as the encouragement theorists and Fisher implicitly do, that consumers are entitled to be made no worse off by copyright than they would have been in a hypothetical world of copy-privilege where they would have been free to share in whatever works were created? In short, is there some ground for arguing that the world of copy-privilege should provide the baseline?

3. Baseline entitlements: In search of a distributional principle

It is hard to see why the public should be entitled to share in a work merely because it would have come into existence without the incentive of property rights. True, the public may argue, as did Proudhon, that persons who have labored at a task for their own reasons should have no right to claim payment from others for it. But authors may reply, quoting Mill, that “[i]t is no hardship to anyone, to be excluded from what [we] have produced: [We] were not bound to produce it for [a stranger’s] use, and he loses nothing by not sharing in what otherwise would not have existed at all.” In my view, defensible and common sense notions of morality are in accord. Someone who works to produce something of value would seem to deserve a reward for her efforts from those who benefit.

Encouragement theorists have as yet offered no full-scale philo-

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441. See text accompanying notes 411-415 supra.
442. As indicated above, while Fisher is not convinced of the merits of “encouragement” theory, he both asserts it as the correct interpretation of the economic stance and advances recommendations for nonenforcement of copyrights based upon it. See note 409 supra.
444. See LAWRENCE C. BECKER, PROPERTY RIGHTS 41 (1977) (footnotes omitted). I have borrowed this hypothetical exchange between Proudhon and Mill from Becker, and the following discussion of Locke is also indebted to him. The quotation in text is from JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, bk. II, ch. 2, § 6, at 142 (1872); for Locke’s similar sentiments, see J. LOCKE, supra note 203, §§ 25-51.
445. John Locke is probably the best known advocate of the view that labor can, in appropriate circumstances, give rise to property rights. His central position regarding property is as follows: “For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.” J. Locke, supra note 203, § 27 (emphasis omitted). The intuitive appeal of Locke’s position is well illustrated by Judith Jarvis Thomson’s observation: If “enough and as good” is truly left after the laboring creator claims ownership in what he has made, then how could the Lockean argument fail to be “a sufficient condition for property acquisition”? Judith Jarvis Thomson, Property Acquisition, 73 J. PHILOS. 664, 666 (1976) (suggesting that satisfying Locke’s proviso that “enough and as good” remain is a sufficient basis—though not the only possible basis—for morally satisfactory property acquisition). Of course, the intuition contains within it a series of analytic steps—concerning, among other things, the relationship between normative claims and legal claims—that need to be addressed. Full examination of the question of authors’ desert is clearly beyond the scope of this article. For my current views of the philosophic issues, see W. Gordon, Restitutionary Impulse, supra note 55; W. Gordon, Creative Labor, supra note 14 (examining at some length the Lockean position, particularly the impact of Locke’s proviso on intellectual property issues).
I shall therefore concentrate on analyzing the two defenses based in positive law that they offer to buttress their position that the public should not have to reward its creative benefactors any more than maximally serves the public's own self-interest. The first such defense is to argue that the relevant constitutional and statutory provisions are solely concerned with providing economic incentives, not creators' just deserts. The second is the notion that copyright is inconsistent with the common law, which itself is seen as setting a baseline of copy-privilege.

As for the first issue, the Court has indeed often suggested that Congress has given a primarily economic interpretation to the Constitution's patent and copyright clause. But economic concerns are not always viewed as the only goals of the statute. In its most recent decision construing the fair use doctrine, Harper & Row, Publishers v. Nation Enterprises, the Supreme Court suggested that, although economic and other measures of social need remain important considerations, even under the statute an author deserves a reward for labor.

In Harper & Row, President Ford had sued The Nation magazine for having published a short article summarizing highlights of Ford's forthcoming memoirs. As a result of this “scoop,” Time magazine, which had contracted to publish an authorized excerpt, declined to do so, costing Ford at least $12,500 from Time plus book sales lost as a result of The Nation's story. The Court held that the Nation article, which included some 300 to 400 words of verbatim quotation, was not a fair use, despite President Ford's public position. The Court wrote, “The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.” Fisher has argued that the Court's fair return language stamps its “imprimatur” on the
theory “that authors and inventors deserve a reward for their labor and should be given it regardless of whether they would continue their work in the absence of compensation.”

In its treatment of economics, too, the Court did not adopt the encouragement theorists’ emphasis on seeking maximum totals of social wealth. Rather, the Court consistently pointed to authors’ entitlements as the starting points from which markets evolve. Thus, the Court noted that ordinarily copyright enforcement serves both the author and the public and stated that “the effect of the use upon the [author’s] potential market for or value of the copyrighted work . . . is undoubtedly the single most important element of fair use.” The Court went on to define the author’s entitlement over potential markets quite broadly. Finally, the Court seemed to approve the view that for economic analysis to justify nonenforcement of an author’s exclusive rights under the fair use doctrine, a Paretian economic standard, using the author’s interest as the baseline for measuring harm, would have to be satisfied. It cited the view that fair use should be granted to a copier on economic grounds only if the copyright holder would lose no substantial revenues as a result—only if “the market fails or the price the copyright owner would ask is near zero.”

The Court’s double-barreled concern with both public welfare and authors’ claims to deserts, is not unprecedented. The most famous statement of this dual concern is probably James Madison’s argument, in support of the proposed federal Constitution’s patent and copyright clause, that “the public good fully coincides . . . with the claims of individuals.” The Supreme Court’s recent return to a notion of individual entitlements effect” of copyright, Aiken, 422 U.S. at 156, to being an independently important goal for which copyright was “designed,” see Harper & Row, 471 U.S. at 546.

450. Fisher, supra note 5, at 1688-89.
452. Id. at 566.
453. Id. at 568; see also Fisher, supra note 5, at 1670-71 & nn.53-54.
454. Harper & Row, 471 U.S. at 566 n.9. This approach is proper when using Paretian economics itself as a basis for awarding fair use, though there can be other grounds for awarding fair use to a defendant, see note 439 supra, such as free speech interests. See note 457 infra and accompanying text (indicating that the Supreme Court would disregard both economics and authors’ claims of personal desert in the pursuit of free speech interests).

455. The precedent is not unambiguous, however. See, e.g., Mazer v. Stein, 347 U.S. 201, 219 (1954) (not only affirming authors’ desert claims, see note 448 supra, but also asserting that “[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration”) (quoting United States v. Paramount Pictures, 334 U.S. 131, 158 (1948)); REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 3-6 (1961) (suggesting that copyright has “an important secondary purpose: To give authors the reward due them for their contribution to society,” id. at 5, but that “the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end,” id.).

456. The full defense of the clause was as follows: The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public
ual claims makes the copyright statute a rather unsteady base for the solely aggregative approach of encouragement theory.

Admittedly, the Harper & Row decision would have been far different had President Ford been using his copyright to suppress facts. Then noneconomic arguments based on “First Amendment values” implicated by writings on “matters of high public concern” probably would have been sufficient to trump the author’s copyright claim. But since Ford and his authorized publishers were “poised to release [the work] to the public,” the Court viewed copyright as fulfilling its role as “the engine of free expression.” In such a context, they did not inquire into whether enforcing or denying the copyright owner’s claim would lead to “value maximization.” Rather, given the functioning market and the lack of any noneconomic claim that could credibly be made on behalf of the public, the Court insisted on “deference to the scheme established by the Copyright Act” and indicated that the appropriate starting point was the Pareto-like inquiry: “[W]ould the reasonable copyright owner have consented to the use?”

When a noneconomic ground for fair use, such as free speech, is at issue, arguably neither the “encouragement theorists” nor the Paretoians have much to contribute. But when making an economic inquiry, at least in the absence of an extremely strong public need, Harper & Row suggests that the correct baseline is an author’s entitlement. The apparent public-benefit orientation of the constitutional clause did not bar consideration of authors’ claims to fair return through copyright. Good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress. The Federalist No. 43, at 271-72 (J. Madison) (C. Rossiter ed. 1961). Given the reference to English precedent, it might be argued that Madison’s emphasis on individual claims rested on an (arguably inaccurate) view of the common law. At least one historian suggests that Madison’s view was independently based. See Bruce W. Bugbee, Genesis of American Patent and Copyright Law 128-30 (1967) (arguing that the founding fathers saw intellectual property rights as “inherent”); id. at 130-31 (quoting Madison as suggesting that one reason for his support of the clause was the “dread[] that the few will be unnecessarily sacrificed to the many”).

Harper & Row, 471 U.S. at 555, 556, 559 (partially quoting Consumers Union of the United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983)).

Harper & Row, 471 U.S. at 557, 558.

Id. at 545.


An element of uncertainty is introduced by the Court’s very different approach when patent law, rather than copyright, is at issue. See note 417 supra and accompanying text. In the patent area, issues of inventors’ fair return may receive quite limited solicitude, since in that area the Court has given significant force to the preamble to the Constitution’s grant of power to Congress, “[t]o promote the Progress of Science and the useful Arts.” See Graham v. John Deere Co., 383 U.S. 1, 6 (1966) (the clause imposes limits on what patent standards Congress may use); see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 109 S. Ct. 971, 975-80 (1989) (giving a public benefit interpretation to the “Patent Clause” in the context of preempting state rights over the duplication of useful objects). The same constitutional
The second possible foundation for the encouragement theorists' opposition to rewarding creators is their perception that copyright is inconsistent with the common law pattern, though one can interpret claims based upon the common law in several ways. The encouragement theorists might be using a specific historical referent—such as the period before adoption of the Statute of Anne, England's first copyright statute—to provide either a historical or normative baseline. Howard Abrams, for example, contends that if there was no common law copyright in the early period, then public access should be the starting point. He scrutinizes two well known early cases that examined the question of common law copyright and concludes that both decisions held that copyright did not exist in eighteenth century England or America.

Abrams has brought new light to the interpretation of these much-debated cases. Even if his interpretation is correct, however, and clause provides Congress its copyright powers. So far, however, the preamble has played a much smaller role in copyright cases. One reason for the disjunctive treatment given to copyright and patent may be the belief that copyright is virtually unable to violate the clause.

Unlike patents, the grant of a copyright to a nonuseful work impedes the progress of the sciences only very slightly, if at all, for the possessor of a copyright does not have any right to block further dissemination or use of the ideas contained in his works. . . . This is not true in the patent area, where an inventor has the right to prevent others from using his discovery.

Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 859-60 & n.20 (5th Cir. 1979) (obscenity of plaintiff's motion picture held not a bar to copyrightability; constitutional clause viewed as applicable, but to be interpreted by "lenient standard"), cert. denied, 445 U.S. 917 (1980). If granting copyright protection does not impede cultural or scientific growth, then the purposes mentioned in the clause would not be undermined if Congress chose to give authors more protection than a strict calculation of economic benefit would warrant.

Copyright cases that treat the clause's purpose language as applicable tend to give it no clear effect. See, e.g., Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1498-99 (11th Cir. 1984) ("We agree that the Constitution allows Congress to create copyright laws only if they benefit society as a whole rather than authors alone. . . . [But] a copyright holder need not provide the most complete public access possible.").

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even if one grants the appropriateness of using common law as a standard by which to evaluate legislation, the puzzle remains why that particular era in judicial history should matter more than any other. In fact, that time period seems a particularly inapt choice for making a judgment about the tendencies of the common law, for an explicit pro-copyright regime was unnecessary given prevailing institutional structures and the rudimentary publishing technology. English and American legislatures stepped in with statutory copyright as soon as institutional changes and advances in printing technology made it possible for someone other than an authorized publisher to reap significant revenues from the mass duplication of manuscripts. There was thus little opportunity for the gradual development of common law rights.

Perhaps the encouragement theory advocates point to the failure of eighteenth century common law to provide postpublication rights against copying because they believe that any time a statute is passed, the legislature is prima facie obligated to guarantee all those affected an equivalent level of welfare to what they had before. This would be a novel theory of legislation and one that would make it difficult for injustices ever to be corrected. Even if it were valid, it would not explain the conclusion from the common law starting point that copying should be permitted, for it is hard to see that the public was able to do any substantial amount of copying in the prestatutory period.

Common law intellectual property rights clearly have been considered legitimate in the twentieth century United States. In 1912 the Supreme Court held that common law copyright was a form of “property” that could be used to restrain the public from making copies of

See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (referring to “the contest in the English courts, [which] finally decided . . . whether the Statute of . . . Anne, . . . which authorized copyright for a limited time, was a restraint to that extent on the common law or not”). As for the Court’s own decision in Wheaton, it can be interpreted simply as holding that Pennsylvania did not carry into its jurisprudence a postpublication common law copyright that existed in England, see Abrams, supra note 462, at 1185, and aspects of the Wheaton opinion “invite[] disbelief of its fundamental conclusion that there was no common law copyright,” id. at 1183.

Abrams suggests that the Supreme Court in Wheaton did not have access to the full opinions of the House of Lords in Donaldson and that faulty historiography may have been the reason both for the commentators’ assumption that common law copyright existed prior to the Statute of Anne and for the Wheaton opinion’s “historically incorrect and unnecessary concession,” id., concerning the existence of common law copyright under English law. Even if so, both the assumption and the concession have nevertheless had their effect on legal development; by the late twentieth century, at least, some forms of common law copyright in publicly disseminated works have become well established in the United States. See notes 468-476 infra and accompanying text.

466. See B. Kaplan, supra note 8, at 1-37. Abrams seems to recognize this, noting: “[T]he common law never developed any law of copyright. This did not result from the common law either accepting or rejecting any particular idea or theory of copyright, but from the fact that other sources of governmental authority were already regulating the printing and distribution of books.” Abrams, supra note 462, at 1134 (footnote omitted); see also Landes & Posner, supra note 21, at 331 & n.11 (discussing institutional as well as physical methods of controlling copying in early England).

467. Possession does not in itself guarantee legitimacy. See text accompanying note 387.
material that was not private in any meaningful sense, so long as the material was technically unpublished, such as musical compositions or plays that had been widely performed but never distributed in printed form. Though not extended to formally "published" works, this common law copyright cannot be explained away as a mere outgrowth of the laws of tangible property or of privacy. In 1918, applying a pre-Erie notion of federal common law, the Court held that one news service could be enjoined from commercially using the publicly posted and circulated news of its competitor. This decision, *International News Service v. Associated Press (INS v. AP)*, spawned the "misappropriation" doctrine that protects a protean form of intellectual property and which serves as one of the bases upon which a number of states have adopted and aggressively expanded state intellectual property rights in the past two decades. In 1977, the Supreme Court upheld a performer's state common law copyright in his "human cannonball" performance against a constitutional challenge and indicated in dicta that one basis for the claimed right's legitimacy was its similarity to established common law principles of unjust enrichment. Although copyright in published, written work remains an exclusively statutory preserve, the evolution of sister doctrines in areas not covered by statute suggests that had the legislature not acted, the courts could have and likely would have.

Whether such common law rights are necessary or wise is not at issue here. In fact, since state common law intellectual property rights


469. As the Court made clear in *Ferris*, 223 U.S. at 436, common law copyright could be asserted regardless of whether the infringer had somehow obtained a copy of the work or had simply memorized what she had heard during a performance.


473. Zacchini, 433 U.S. at 576. "The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will." *Id.* (citing Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Probs. 326, 331 (1966)).


475. However, Congress's decision to legislate rights for authors undoubtedly has helped state judges to feel that such grants are legitimate. Cause and effect in these matters can be hard to trace.
supplement a set of federal intellectual property statutes that already
grant creative persons a wide range of legal remedies, a strong case can
be made that the promiscuous grant of state law rights over the last
twenty years has gone well beyond justifiable prudential or even moral
limits and that the courts have sometimes ignored the preemptive effect
of relevant federal law. Wise or not, potentially preempted or not, twentieth
century courts seem to consider the issue of common law intellec-
tual property as settled in a direction directly contrary to
Abrams's understanding.

Another strategy of the encouragement theorists might be to iden-
tify some more general pattern that has operated among various
common law doctrines over time and argue that an authorial claim to
deserve rewards is inconsistent with the basic distribution of entitle-
ments found in this larger scheme. Although such a methodology is
controversial, it has sometimes yielded important insights and, if appli-
cable, might minimize the impact of the particular common law cases
that explicitly grant rights over nonprivate works. For example, an
encouragement theorist might argue that economic efficiency is the over-
all goal of all common law, and that courts which grant intellectual
property rights have done so solely in an effort (however inept) to apply
the efficiency criterion. An argument at such a level of generality is
hard to evaluate. Here we can simply note that most of those who have
examined the claim that the common law solely pursues efficiency have
rejected it.

On a somewhat less abstract level, some encouragement theorists
seem to prefer arguing that the protections copyright gives are struc-
turally or functionally different from other common law restraints. The
notion may be that if copyright is an "exception[al]" and "queer branch
of our jurisprudence," as some commentators have suggested, then
we should view the institution with suspicion, tolerating it only when it
makes the public better off than in a world without copyright. But, as I
demonstrated earlier, such interpretations overlook the fact that copy-
right is structured in the same way as other forms of property and
serves many of the same functions. It is worthwhile to expand on that
discussion here.

An example of the differences that encouragement theorists see be-

476. See W. Gordon, Creative Labor, supra note 14, pt. III, at 3-13, 26-31; Lange, supra
note 471, at 147 (urging protection for the public domain); note 506 infra.
477. Arthur Leff wrote classic pieces evaluating the then-new "law and economics"
movement; among other things, he argued that economics is only one of several goals that the
law does or should serve and that no culture has a unitary goal system. Arthur Leff, Law and,
87 YALE L.J. 989 (1978); see also Arthur Leff, Economic Analysis of Law: Some Realism about Nom-
LAw). For recent scholarship on the question of whether the common law is or should be
primarily concerned with economics, see, e.g., J. COLEMAN & J. MURPHY, supra note 358, at 273;
Coleman, supra note 230; Kennedy & Michelman, supra note 41.
478. The words in quotation marks are adapted from Umbreit, supra note 16, at 932.
between intellectual property rights and common law rights in tangible property is Judge Breyer's argument that "[a]n intellectual creation differs radically from land and chattels. Since ideas are infinitely divisible, property rights are not needed to prevent congestion, interference, or strife."

Yet Judge Breyer's first two asserted distinctions are simply classic economic problems. As Kitch and Denicola suggest, intellectual property law, like tangible property law, prevents problems such as congestive overexposure and wasteful forms of exploitation. As for "strife," intellectual property law addresses battles to control intellectual products that can be as strife-provoking as battles over any other source of power or money.

A variety of common law case decisions also rejects the implication, sometimes found in encouragement arguments, that the common law gives the public a right to share in what others have made. Ordinary property and tort are fairly individualistic, and neither gives strangers claims to others' efforts or possessions without some kind of special justification. The most obvious illustration of this individualism is the tort rule that strangers have no "duty to aid" each other, even in extreme emergencies. If the common law gives people no prima facie claim to each other's efforts, then it would seem to give them no such claim to each other's work product.

But even if the common law gives no prima facie rights to share, does it give the public privileges to take advantage of others' effort? Judge Breyer argues that it does: "The fact that the book is the author's creation" does not "seem a sufficient reason for making it his property,"

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481. For example, necessity gives rise to a right and a privilege to enter others' property only to prevent "serious harm," see RESTATEMENT (SECOND) OF TORTS § 197 (1965); see also note 483 infra.
482. See Epstein, supra note 82, at 197-201 (discussion of the "no duty to aid" rule).
483. Various forms of public law, most notably taxation, do indirectly give persons claims on each other's work product, and the government uses tax funds for many purposes other than the relief of dire need. But public law does not need to be internally consistent. Legislatures can give, and legislatures can take away. At issue in the discussion here is whether any pattern in the common law can be utilized as a guide or reference point by lawmakers, whether legislative or judicial, who might be persuaded of the normative relevance of such patterns.

It might also be argued against the position in the text that the "no duty to aid" rule serves a limited set of purposes and that outside of the context of personal acts of rescue those policies are inapplicable. Most notably, it could be argued that the law refuses to impose a general duty to aid because of the intrusiveness inherent in giving rights over others' efforts, but that no such incursion on liberty would be threatened by a duty to share, which gives rights over others' things. The law does indeed respond to this distinction, by giving rights of access to others' property (but not their efforts) in emergencies. But even that right does not extend to all cases in which invalidating the owner's exclusion rights would serve "efficiency" but is generally limited to cases of dire need. See Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908) (boating family had right to use dock on private island during hazardous storm). Furthermore, even in cases of dire need the common law requires persons who have availed themselves of others' property to pay for what they take. Vincent v. Lake Érie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910).
because “[w]e do not ordinarily create or modify property rights, nor even award compensation, solely on the basis of labor expended.”

But when labor creates something of value to others, the recipient is not always privileged to keep the benefit without giving recompense; the common law of restitution often does award compensation. It does not always do so, of course; there is “no single uniquely explanatory web” in the law, and the desire to reward deserving laborers is one goal among many. Yet were there no common law intellectual property, restitution law itself might provide the basis for an author to recapture the value of his effort from those who intentionally use his creative work.

The link between unjust enrichment and intellectual property has been made before. For example, the Supreme Court has accepted, as one argument in favor of common law intellectual property rights, the “straightforward” rationale of preventing unjust enrichment. And just as unjust enrichment can give rise to “quasi-contract,” the Supreme Court has used similar principles to hold that an intangible intellectual product can be “quasi-property” as between someone who labors to produce it and a parasitic competitor.

A potential problem with my antiencouragement reading of unjust enrichment law is the denial of compensation under the common law of

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484. Breyer, The Uneasy Case, supra note 3, at 289 (emphases & footnote omitted).
485. Restitution law has two components: It provides remedies for other substantive areas of law, and it provides its own substantive base for recovery under the rubric of “unjust enrichment.” See 1 G. Palmer, supra note 170, § 1.1, at 1-6.
486. Left, Law and, supra note 477, at 1009.
487. There are two possible routes to this result. One is a right to monetary recovery, the other a right to enjoin use of the benefit and to require its return. Copyright law gives rights to both monetary and injunctive remedy; what remedies might evolve from restitutionary principles is a complex question. Yet any sort of remedy might induce potential users of a creative work to bargain with authors for permission before the fact, thus reducing the need to tackle difficult questions such as how much a use of a plaintiff’s product was “worth” to the defendant, or whether it is appropriate to give a plaintiff a veto over a complex structure that a defendant has created in which plaintiff’s work is one small but essential brick.
488. See generally W. Gordon, Restitutionary Impulse, supra note 53. This is a controversial claim, and I discuss it here only briefly. Among other difficulties is the question of how much generalization is appropriate. Thus, as Lord Goff and Gareth Jones noted of English law in 1966, “[T]hough all restitutionary claims are unified by principle, English law has not as yet recognised any generalised right to restitution in every case of unjust enrichment.” R. Goff & G. Jones, supra note 53, at 13 (1966). American law and commentary are more willing to generalize than the English on this point, and even England seems to be moving in that direction, see Lord Goff of Chieveley & Gareth Jones, The Law of Restitution 15-16 (3d ed. 1986) (omitting the prior edition’s caveat), but particular precedents on particular fact patterns continue to be quite important.
489. See note 478 supra.
490. International News Serv. v. Associated Press, 248 U.S. 215, 242 (1918) (news is “quasi-property” as between the parties); id. at 239 (“defendant . . . is endeavoring to reap where it has not sown”); see Dawson, supra note 127, at 1415-16 (interpreting INS v. AP as a restitution case). The Court’s use of the word “quasi” here may have been more than a hedging device. Quasi-contract represents a decision that it is fair to act as if there were a contract; the Court seemed to be making a similar decision in INS. Under the circumstances, it was fair to act as if there were property.

Note that economics also played a role in the decision. See INS, 248 U.S. at 241.
restitution to anyone “who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another.” ⁴⁹¹ Under this rule, “volunteers” and “officious intermeddlers” are not ordinarily entitled to restitution and, conversely, persons who receive benefits from volunteers and intermeddlers are not ordinarily required to pay for what they have received. By voluntarily writing and publishing a book, a person furthers his own interests and, except as to someone who has bargained with the author for production of the work (such as a patron, granting agency, employer, or contract-publisher), the author is a sort of volunteer. This might suggest that when members of the public copy an author’s book, the “intermeddler” rule would give the public a privilege to do so without paying.

But there are many exceptions to the rule that volunteers are not entitled to payment, and copyright generally fits those exceptions. For example, after analyzing a host of cases in which volunteers were held entitled to recover, John Wade presented the following criteria as accounting for the exceptions: no “intent to act gratuitously”; conferral of a measurable benefit; and offering the beneficiary an opportunity to decline (or a reasonable excuse for not doing so). ⁴⁹² If these criteria are present, Dean Wade wrote, the volunteer “is entitled to restitution.” ⁴⁹³

Each of these criteria is present in the typical copyright case. Most authors do not intend to act gratuitously. A copier’s benefit is often measurable; at least commercial copiers will have account books showing profit and loss figures, and the market may show the price that ordinarily would be paid for a license to copy. ⁴⁹⁴ Persons who wish to copy the work ordinarily have a choice whether or not to do so, and the context in which a work is encountered or the presence of a copyright notice will inform users that if they do copy, someone may claim

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⁴⁹¹ Restatement of Restitution § 106 (1937).
⁴⁹² John W. Wade, Restitution for Benefits Conferred Without Request, 19 Vand. L. Rev. 1183, 1212 (1965). Dean Wade conceded that his proposed rule went slightly beyond the available precedent in a subset of cases not relevant to our purposes. Also, additional restrictions apply if the beneficiary refuses the benefit.
⁴⁹³ Id.
⁴⁹⁴ Although there may be problems in apportioning the amount of profit attributable to use of the plaintiff’s work and the amount attributable to other factors, the mere possibility of suit may encourage the parties to deal with each other before the fact and resolve this issue between themselves.
⁴⁹⁵ When users do not have a choice, that may mean no protection should be given. Thus, for example, persons who want to describe the world have no choice but to use the facts others have discovered. This is arguably one reason why, generally speaking, copyright itself gives the discoverer of facts no copyright in them. See 17 U.S.C. § 102(b) (1982).
⁴⁹⁶ Legislation implementing the Berne Convention may reduce the use of notices. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §§ 7(a)-(b), 102 Stat. 2853, 2857-59 (notice requirement becomes a voluntary option, but applying notices will have certain advantages).
Copiers can therefore decline the benefit if they think it not worth the cost. Thus, Dean Wade’s set of general principles, summarizing a myriad of restitution cases which did not themselves focus on intellectual property problems, predicts copyright results. Far from being coincidence, this parallel suggests that some forms of common law intellectual property are consistent with whatever larger patterns exist in the law.

Other restitution scholars have indirectly suggested similar results. For example, when John Dawson investigated the issue of self-serving intermeddlers in restitution law, he suggested several sets of reasons behind the courts’ tendency to rule that such volunteers are not entitled to recover the value of their contribution. One set of reasons is social and instrumental: that a volunteer or intermeddler has her own sufficient incentives to do the good deed, rendering a reward unnecessary for creation of the benefit. Another set of reasons is individually oriented: that fairness to the unknowing recipient and concern with “individual freedom of choice” demand that the recipient not be placed under an unlooked-for burden. A third is a concern with limits: the possibility that requiring all “uncompensated gains” to be compensated after all would be a dangerous and impractical rule, potentially causing societal paralysis. Where not all of these reasons apply, one might infer from Dawson’s analysis that recovery is proper in order to honor the benefactor’s claim to deserve payment; arguably, none of these reasons for denying payment applies to copyright. With intellectual products the incentive issue is at worst a debatable question; the author may well have insufficient incentives to produce new works without a right of recovery. As for fairness, the copier of a work of authorship may also help to communicate this information. Estate of Hemingway v. Random House, 23 N.Y.2d 341, 349, 224 N.E.2d 250, 256, 296 N.Y.S.2d 771, 779 (1968), discussed at note 185 supra.

One type of copyright case is not consistent with Dean Wade’s approach. In copyright, even unintentional copying constitutes infringement. See Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976) (holding ex-Beatle George Harrison’s unconscious use of a musical phrase from the Chiffons’ song, “He’s So Fine,” in his own song, “My Sweet Lord,” an infringement). Were copyright perfectly aligned with restitution, only a knowing act of copying would incur liability. Copyright law in fact follows the pattern of torts like trespass to land, under which even good faith does not protect an unknowing trespasser from liability. Prosser & Keeton, supra note 47, at 74-75.

The area in which Dean Wade’s principle fails to square with better intellectual property practice is its lack of limits. The boundary problems, such as administrability and explosive liability, are too great to be resolved only by insisting that the benefit be measurable. This divergence means that Dean Wade’s rule would predict more intellectual property recoveries, rather than fewer, than there really are or should be, so the divergence could not easily be used as evidence helpful to those who would prefer to eliminate copyright.

See Levmore, supra note 289, at 113-17 (restitutary relief for submission of ideas).
ship is ordinarily an intentional actor, rather than an unknowing recipient who would be taken by surprise if payment were demanded.504 Regarding limits, the earlier discussion showed how copyright's demarcation and fixation requirements, combined with its limited definition of exclusive rights, can be employed to keep the boundaries of liability tolerably narrow.505 In the copyright context, then, all the reasons for denying someone a claim to their "just deserts" are either of doubtful applicability or absent. Professor Dawson's analysis, too, therefore indirectly suggests that intellectual property is consistent with the common law of restitution.506

Saul Levmore has suggested that many of the patterns in restitution law can be explained by the courts' desire not to allow judicially compelled payments to undermine complex consensual markets.507 If volunteers cannot expect to obtain restitution via the courts, Levmore suggests, they will be induced to enter into negotiations with persons whom they are in a position to benefit. Restitution for volunteers, therefore, is generally disfavored. But the same logic suggests that restitution should be favored for authors. Giving authors a right to payment will not discourage voluntary bargains. On the contrary, denying authors a right to payment causes free-rider problems that inhibit market formation, while granting a right to payment encourages markets to form.508 Although economic concerns are relevant to both Levmore's and Dawson's analyses, neither commentator proves that the judges who have developed the law of restitution have erred in starting their

504. Admittedly, some recipients know they are copying but think they are doing nothing unlawful. The clearer the law were in identifying what copying constituted "unjust enrichment," the less surprise a copier could claim.

505. See text accompanying notes 168-189 supra.

506. Professor Dawson, however, is properly wary of the unbridled application of the unjust enrichment principle. See Dawson, supra note 127. He was correctly disapproving of the insensitivity to the need for limits and boundaries shown by the majority opinion in International News Serv. v. Associated Press, 248 U.S. 215 (1918) (misappropriation of "hot news" enjoined). However, he was premature in suggesting that the Supreme Court had repudiated INS. See Dawson, supra note 127, at 1415-16. Professor Dawson's article was published in 1974, when the Court was just beginning to reveal its tolerance for state intellectual property in preemption cases. See id. at 1416 n.15 (briefly referring to Goldstein v. California, 412 U.S. 546 (1973) (state law prohibiting the piracy of musical recordings held not preempted)). More recently, the Court has cited INS with approval, see Carpenter v. United States, 108 S. Ct. 316, 321 (1987), and state courts have recently been quite willing to build new intellectual property rights. See generally Baird, supra note 471. The state courts may well be courting the very dangers of which Dawson warned, see Lange, supra note 471, and some federal courts are being less than wary in accepting state court rights. See Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (singer's claim of a state right against imitation of her voice during performance held valid and not preempted).

507. See Levmore, supra note 289, at 79-81.

508. The comparison between authors and other volunteers is explored in more depth in W. Gordon, Restitutionary Impulse, supra note 55, at 42-50; see also Gordon, Fair Use, supra note 14, at 1610-14 (how copyright helps markets to form); cf. Levmore, supra note 289, at 121-24 (suggesting that under some circumstances granting restitution to persons for their "profitable ideas"—a form of intellectual product—will be consistent with a desire to encourage "thick" and complex markets).
analysis at unjust enrichment rather than at value maximization.\textsuperscript{509}

To the extent there is a common law pattern, then, it militates against a starting point like the one the encouragement theorists use, which would give each of us, regardless of special need, a “right to . . . the benefit of another’s Pains.”\textsuperscript{510} The common law does not stand for the proposition that the public has a prima facie entitlement to share in others’ works, and the common law history does not cast any burden of justification upon copyright. To the contrary, basic common law patterns in torts and restitution law and recent developments in the common law of intellectual property all suggest that the consuming public has no such entitlement. They even suggest that, all other things being equal, authors have a right to payment.

One might investigate this analogic common law restitutio- nary right and seek to understand how the common law balances “just desert” against economic or other values when they conflict.\textsuperscript{511} One might further seek to determine whether a claim to restitution could lead to a property right of full ownership. That would be a long journey, which I undertake elsewhere\textsuperscript{512} and which is not necessary here. One need not accept the notion that restitutio- nary claims can be an appropriate basis for some forms of property in order to accept that authors have a better prima facie claim to the benefits of their own creations than do users. The encouragement theorists’ economic arguments in favor of copy-privilge are therefore flawed, either because they lack a distributional principle, or because they use a distributional principle that is not itself easily defensible.

Distributionally sensitive philosophic arguments do exist that might justify giving the public a baseline entitlement to whatever they could obtain in a world without intellectual property. For example, adoption of a “common pool” approach to human talents and energies might

\textsuperscript{509} Admittedly, Levmore gives economics center stage, and he seems to doubt that “unjust enrichment” is a concept with much explanatory power. Nevertheless, he does not endeavor to prove that the impulse to reward productive persons is irrelevant to the cases. In fact, one might view his catalogue of economic reasons for not granting restitution simply as a set of countervailing considerations that can in some cases outweigh the goal of rewarding benefactors.

\textsuperscript{510} Locke assumes that, absent extreme need or waste, each of us “ha[s] no right to . . . the benefit of another’s Pains.” J. Locke, supra note 203, § 34 (emphasis added).

\textsuperscript{511} For example, I use common law analogy to suggest that authors’ claims should give way in the face of public exigency. See note 519 infra and accompanying text. Full specification of the weights that should be given to desert claims and to competing considerations is of course outside the scope of this article.

\textsuperscript{512} See W. Gordon, Restitutionary Impulse, supra note 55 (investigating the links between intellectual property and restitution); W. Gordon, Creative Labor, supra note 14 (exploring philosophic justifications for a legal claim to restitution, and examining the rights to which a restitution-based or Lockean labor theory could lead). In the latter piece I conclude that though a restitutio- nary or a Lockean starting point generates a much more limited range of intellectual property rights than is usually understood to flow from such principles, the resulting set of entitlements does contain some rights for authors that would be greater than those generated by the encouragement theorists’ starting point.
justify giving the public something like this entitlement.\footnote{See note 242 \textit{supra} and accompanying text ("common pool" interpretation of Rawls). In his "utopian" analysis, Fisher briefly explores the Rawlsian difference principle and notions of desert. He does not contend that his quasi-Rawlsian theory justifies the results of his economic theory. \textit{See Fisher, \textit{supra} note 5, at 1756-62 (distributive justice); id. at 1774-79 (compensating creators).}} But such arguments are hard to maintain on the merits.\footnote{See generally George Sher, \textit{Effort, Ability, and Personal Desert}, 8 PHIL. & PUB. AFF. 361 (1979) (criticizing Rawls and arguing that personal desert can play a potentially significant role in deciding what distribution of goods is "just").} Even if copyright critics took such a stance, they would need to do so for all property rights, not just those that pertain to intangibles. And to take a leaf from the encouragement theorists' own book, we might demand that they defend their adoption of such a philosophic premise so at odds with the common law tradition.\footnote{\textit{See}, e.g., Abrams, \textit{supra} note 462, at 1126-27, 1186-87 (making reference to the common law).}


Although the encouragement theorists seem to be wrong in giving the public a baseline entitlement to share in what others have produced, any acceptable system of property rights must account for the interests of the nonpropertied for two reasons. First, it is likely that the public possesses justified noneconomic claims just as it is likely that authors do. A second reason lies in society's material welfare. Though economics should not be the only relevant consideration, material well-being has some importance. A strong public domain makes important contributions to a nation's cultural and scientific health. An intellectual property system must therefore be sensitive to the needs and claims of the nonowning public as well as those of authors.\footnote{\textit{See Lange, \textit{supra} note 471 (eloquently defending recognition of the public domain and its importance).}} If the encouragement theorists possessed a coherent statement of nonowners' interests, and no competing source of public entitlements were available, it might be necessary to defer to encouragement theory. For these reasons, and because many of the strongest doubts about common law intellectual property rights originated in doubts about judges' abilities to set and enforce limits,\footnote{\textit{See, e.g., White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring) (suggesting that copyright must be limited in time to be tolerable but doubting that courts could develop and implement appropriate limits); Letter from Oliver Wendell Holmes to Frederick Pollock (June 26, 1894), in 1 \textit{HOLMES-POLLOCK LETTERS} 53 (M. Howe ed. 1941) (raising a similar point); \textit{see also} International News Serv. v. Associated Press, 248 U.S. 215 (1918) (Brandeis, J., dissenting) (suggesting that a right of misappropriation needs to be limited in ways that a legislature is best able to evaluate and implement).} it is important to stress that rejecting the encouragement theorists' point of view need not deprive the public of all entitlements to copy nor send legislatures and judges into the morass with no guiding principles at all. While I cannot do more than briefly touch
upon some of these alternative sources of public entitlement in the space remaining, some particularly salient possibilities follow.

The most obvious source for public entitlement is the first amendment. So, for example, copyright should not be used to suppress facts or ideas, no matter how deserving the researcher or thinker whose efforts brought them forth.

Another source is common law analogy. The common law grants certain privileges to nonowners against even the most traditional property rights, and such privileges could apply to intellectual property as well. This article’s prior discussion of tangible property and torts suggests that the common law could easily support at least two kinds of entitlements for the public: a right or privilege of access in times of public emergency or great private need and a privilege against assertions of intellectual property rights that would do harm.

The doctrine of Pareto superiority suggests yet another source of entitlements to copy: Some limitations on authors’ rights may benefit the consuming public without harming authors. Since authors are part of the public—and in fact may constitute the part of the public most in need of using prior works as bricks when building new works—it is likely that some privileges to copy will aid authors more than harm them.

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518. See the discussion of Harper & Row, Publishers v. Nation Enterprises, text accompanying notes 457-461 supra (discussing the distinction between economic grounds for fair use and other grounds such as free speech). The “fair use” doctrine is often seen as incorporating first amendment policies, and some authors have suggested that in addition there should be a separate “first amendment” privilege. See I M. Nimmer & D. Nimmer, supra note 11, § 1.10.

519. See accompanying notes 75 supra (rights and privileges of entry, based on necessity). Recall that a person who enters land pursuant to a privilege of private necessity must pay for any harm she does; a private need exception to intellectual property might be similarly incomplete.

A “need” exception to property also appears in Locke, in the form of a “Right to the Surplusage” of another’s goods to keep one “from extrem[e] want.” JOHN LOCKE, THE FIRST TREATISE OF GOVERNMENT § 42, in TWO TREATISES OF GOVERNMENT 159 (P. Laslett ed. 1970).

520. A qualified do-no-harm principle not only underlies many tort rights, see text accompanying notes 79-85, but also plays a role in limiting those rights. For example, privileges of self-defense and defense of property limit some otherwise assertable rights against battery. RESTATEMENT (SECOND) OF TORTS §§ 63-68 (1965) (self-defense); id. § 77 (defense of possession). In addition, the pattern with which restitution cases award or deny recoveries to “volunteers” can be in part explained as an attempt to avoid imposing a net harm on those who receive the benefits the volunteers confer. See, e.g., Levmore, supra note 289, at 100-08; see also Robert A. Long, Jr., A Theory of Hypothetical Contract, 94 YALE L.J. 415, 431 (1985) (student author) (“Judges have limited recoveries for unsolicited benefits to the cost of the goods or services provided, or to the value of the benefit conferred whichever is less.” (footnote omitted)); see also id. at 429 (no recovery at all for benefits not measurable in dollars); W. Gordon, Creative Labor, supra note 14 (discussion of a do-no-harm interpretation of the Lockean proviso).

521. See note 172 supra (reciprocity) and text accompanying notes 424-439 supra (Paretianism).

522. This point is well made by Landes and Posner, supra note 21. Note, however, that such a position addresses the (objectively determined) welfare of classes of authors and, like all
Let us examine these last three entitlements (to ameliorate exigency, to avoid harm, and to achieve a form of Pareto superiority) in a bit more detail.

First, exigency: Though I contend that the law should take desert claims into account, even if that means attaining a less-than-maximal amount of societal wealth, I do not contend that such claims should be "trumps." Some degrees of public need may be great enough (whether measured economically or otherwise) to warrant giving less than full deference to authors' claims. An exception to copyright premised on urgent public need might, for example, privilege the reproduction of unique copyrighted photographs that are the only evidence on an important and disputed issue of public importance. For another example, deference to public exigency might give the public rights to employ eminent domain or other modes of mandatory sharing if a misanthropic inventor sought to withhold a cancer cure from public distribution.

Such need-based entitlements can be distinguished from those that would arise from an encouragement theory calculus of economic value. The issue in the common law cases giving rise to the privilege of necessity, for example, is not whether a stranger's use of the property is marginally more valuable to society than the owner's ability to exclude. Rather, the issue is whether such exclusion would threaten specific interests (such as life) that have a special status or that have a grossly disproportionate value in comparison with what is sacrificed.

such approaches is vulnerable to the claim that, to be normatively acceptable, any limitation on rights should benefit every individual affected. Autonomy-oriented commentators might even demand that each affected person give actual consent.

523. See Time, Inc. v. Bernard Geis Assocs., 295 F. Supp. 130 (S.D.N.Y. 1968) (scholar's duplication of unique copyrighted photographs of the Kennedy assassination held a noninfringing fair use). In such a case, the issues of "need" and of free speech tend to coalesce.

524. See text accompanying notes 289-304 supra (discussing a mandatory sharing model).

525. In the ordinary case a patentee is free to suppress her invention. Special Equip. v. Coe, 324 U.S. 370, 377-80 (1945). Justice Douglas argued that this ordinary rule was incorrect because "there is no difference in principle" between usual cases of patent suppression and cases where the suppression put public health at risk. Id. at 383 (Douglas, J., dissenting). The Justice assumed (I think correctly) that in the latter class of cases, which falls into our "public need" category, no judge would be willing to enforce the patentee's exclusion right fully:

Take the case of an invention or discovery which unlocks the doors of science and reveals the secrets of a dread disease. Is it possible that a patentee could be permitted to suppress that invention for seventeen years (the term of the letters patent) and withhold from humanity the benefits of the cure?

Id.; see also Vitamin Technologists v. Wisconsin Alumni Research Found., 146 F.2d 941 (9th Cir.)(suggesting that patentee's refusal to license vitamin-enriching process for oleomargarine, "the butter of the poor," might justify denying injunction against patent infringement) (dicta), cert. denied, 325 U.S. 876 (1945).

526. See RESTATEMENT (SECOND) OF TORTS §§ 196, 262 (1965) (privilege of public necessity available to avert "imminent disaster"); id. §§ 197, 263 (privilege of private necessity available to assert "serious harm"); see also id. § 73 (no privilege to inflict substantial bodily harm on one person in order to avoid similar harm threatened by an independent source; caveat to this section intimates that such privilege might exist if the two harms are "disproportional" and the harm to be inflicted by the privileged actor is slight).
Turning to a public entitlement against being "harmed," such an entitlement appears to be consistent not only with the common law but also with the desert basis for intellectual property rights. (After all, if an author has a right against a copier arising in part out of claims to deserve a reward for the benefit the author has given that person, consistency suggests that the "desert" justification of the right does not extend to occasions when its exercise would result in a net harm to the person against whom it is asserted.) Admittedly, a privilege against harm is fairly broad; but its principle can be seen already operating in several existing intellectual property doctrines. For example, under the doctrine of fair use, persons who have been maligned by a copyrighted work are privileged to replicate the work to the extent necessary to make an effective rebuttal and undo the harm done.

A public entitlement against being harmed by assertions of intellectual property rights would not reenshrine the encouragement theorists' starting point. If individuals without a special showing of need have no prima facie entitlement to share in others' creative productions, then, as in ordinary tort law, their harm should be measured against what their welfare level would have been had there been no interaction with the other party. We would therefore measure harm resulting from an assertion of intellectual property rights from this baseline entitlement: what the copier's welfare would have been in a world lacking the creative person and her efforts.

Finally, the use of a Paretian criterion could give the public substantial privileges to use works created by others because authors share in the benefits that many limitations to their rights bring. If benefits of a certain type are likely to be reciprocal over time, it can be argued that they need not be paid for because nonpayment does not make the immediate donor, who will later be a beneficiary, worse off. Furthermore, if the costs of administering a tracing and payment system are high,

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527. Locke's "proviso," which seems to condition a laborer's property claim on there being "enough, and as good left in common for others," has an analogous concern with avoiding harm. J. LOCKE, supra note 203, § 27. This is discussed at length in W. Gordon, Creative Labor, supra note 14; see also L. BECKER, supra note 444, at 51-55 (effect on desert claims of effects that subtract value).

528. Congress contemplated that the 1976 Copyright Act fair use provision would include such an entitlement: "When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment on the statements made in the work." House Report, supra note 145, at 73 (discussion of § 107). Recent court decisions affirm this approach. E.g., Hustler Magazine, Inc. v. Moral Majority, Inc. 796 F.2d 1148, 1153 (9th Cir. 1986) (Falwell's reproduction and distribution to his followers of a copyrighted Hustler cartoon that ridiculed him for purposes of "stimulating moral indignation" and raising funds held a fair use: "an individual in rebutting a copyrighted work containing derogatory information about himself may copy such parts of the work as are necessary to permit understandable comment," id. at 1153 (footnote omitted)).

529. See Rose-Ackerman, supra note 169.

530. See text accompanying note 173 supra (discussing Dawson's suggestion that tracing the fallout of important intellectual advances would be nearly impossible).
then artists would actually be better off receiving no payment in reciprocal situations. As taxpayers they would have to help bear the systemic costs of requiring compensation, and as sometime recipients of benefits they would not want the flow of positive interactions inhibited by a requirement for unnecessary payments. Speaking more generally, if artists' claims to a "just return for their labors" generate a requirement that authors be paid, the Paretoian approach suggests that payment for benefits should not be required when the payment system would work to those very artists' long-term detriment. 531

In much of intellectual property law it is plausible to argue that reciprocity determines the location of the crucial line between the benefits that one is legally obligated to pay for and the benefits that one can get for free. This notion can, for example, help to explain why general ideas (like the theory of relativity in physics or the use of perspective in art) are not ownable under any American version of intellectual property law. Even if the generator of a new general concept may give a benefit to the world greater than he has derived from contemporary colleagues, that creative individual has doubtless benefited from countless ideas originated by scientific or cultural predecessors. New idea generators will probably be far better off in a world where neither their ideas nor those of their predecessors are owned than they would be in a world that gave them ownership but also required them to refrain from using others' ideas without permission. Thus authors would likely gain from a provision in intellectual property law that made general ideas incapable of being owned.

Similarly, much of the case law construing the fair use doctrine can be explained by authors' implied consent. 532 Also, the notions of Pareto superiority and reciprocity might generate durational limitations like those in the current copyright and patent statutes. Most authors and inventors would probably prefer having their copyrights and patents expire, rather than face perpetual restrictions on all their predecessors' works. 533

Let me reiterate that I mean this discussion of alternative sources of public entitlement to be suggestive rather than exhaustive. I have not indicated beyond the barest sketch, for example, what principles should govern priority among entitlements when they conflict. The discussion

531. Thus, the inquiry could take the following form: whether a group of persons (e.g., authors) who are to be negatively affected by a governmental act (e.g., limitations on intellectual property rights) would be better off with these limitations, and thus likely to consent to them, than they would be if the limitations were not imposed. The inquiry has obvious links not only to Kronman's applications of Paretoism, but also to Michelman's applications of a fairness criterion, see Michelman, supra note 172, Fletcher's version of reciprocity, see Fletcher, supra note 82, Landes and Posner's analysis of authors' ex ante economic interest, see Landes & Posner, supra note 21, at 332-33 & n.13, and the legal construct of "implied consent," see Gordon, Fair Use, supra note 14, at 1616-18. For the summary and suggestive purposes here, it is unnecessary to analyze the distinctions among these notions.

532. See Gordon, Fair Use, supra note 14, at 1641-45.

533. For a related discussion, see Landes & Posner, supra note 21, at 362.
nevertheless should suffice to demonstrate that intellectual property law is quite capable of embracing a concern with the public’s welfare without having to accept the premises of encouragement theory.

D. Autonomy of the Intangible Realm

The preceding section suggested that copyright law is appropriately concerned with issues of fair return and that the public has no automatic entitlement to whatever they could receive in a world without intellectual property rights. It also argued that the public should have alternative sources for entitlements. Throughout I have argued that creators and copiers should have fine-tuned entitlements appropriate to their particular roles in particular contexts. This section will show that copy-privilege is further flawed in treating authors’ and users’ particular relationships to the intellectual creation as irrelevant.534

Copyright has one strong advantage over copy-privilege: It takes the claims of authors and users seriously in their capacities as authors and users. In a copy-privilege regime, an author’s ability to control the use made of the work and to profit from it, and the ability of someone other than the author to copy or otherwise use the work, depend on a host of considerations that are largely independent of the existence of the work and the author’s and user’s relationship to it.

Under copy-privilege, the law takes no active position regarding copying in and of itself; copying may or may not take place, with or without a state impediment, depending on the interrelationship of independent state policies with serendipitous physical circumstance.535 In such a system, a creator’s ability to obtain protection against copying would not be responsive to any quality inherent in the person seeking the reward, any quality of the work itself, or any characteristic of the audience. Mere happenstance would matter536 more than the amount of labor invested, the quality of a given work, the moral desert of a creator, the dependence on incentives of a particular industry, a creator’s emotional stake in what she has made,537 or the urgency of public need for access to a particular creative endeavor.

The discussion above is replete with examples of how copy-privilege takes its shape from background circumstance. For instance, in the discussion of the economic functions served by the entitlement package, I

534. I am particularly indebted to Bruce Ackerman here.
535. See text accompanying notes 305-307 supra (alternatives to copyright).
536. For example, under a copy-privilege regime, third parties would have privileges to copy, but the law might forbid them from impairing other of the creator’s interests, such as the creator’s interest in physical security. To the extent that protection of these other interests happened to provide some shelter for the creator’s copying interests, this shelter would be permitted. See text accompanying notes 255-264 supra (copy-privilege); text accompanying notes 319-343 supra (exploring Rothbard’s notion of copyright as contract).
537. Although this issue is given little attention here, an alternative defense of intellectual property might be erected on the ground of creators’ psychological cathexis to what they make. See text accompanying notes 208-209 supra.
suggested that some composers might earn significant revenues simply by using their legal rights in realty to exclude nonpayors from concert halls. That is, a composer could piggyback protection for her intellectual product on the legal system’s protection of physical security if the composer happened to have some way of linking performance of the work to a physical location. But what of record broadcasts? Piggyback approaches like using a right of physical exclusion to extract no-copy promises are not very effective in limiting illicit copies made from public radio broadcasts. Listeners can easily make and sell excellent copies of what their radios receive. Reproductive technology and its relationship to marketing patterns, not the composer’s energy or talent level or contribution to public benefit, determine what the composer receives.

For physical exclusion to work as a mode of generating revenues, a creator’s work must be of a type that can be enjoyed by some but be physically hidden from nonpurchasers. Contract might fairly easily protect such works from being copied in a world of copy-privilege. If the information necessary to copy the intellectual product can be hidden even from purchasers, so much the better for the originator. No ornate confidentiality contracts are needed to protect a trade secret if the device in which it is imbedded cannot be reverse engineered. But while a manufacturer might be able to profit from an innovative process without revealing it, authors cannot sell their books without exposing their creations to purchasers’ eyes. If concealment is impossible, and if initial sales make the intellectual product known both to purchasers and to third parties, creators may be unable to use their privileges of non-disclosure or their rights of contract and security of realty to obtain revenues.

Let me repeat an example I used in another context: A soft drink’s secret recipe might be more easily hidden than the “secret” of the safety pin and if so could be more easily protected under copy-privilege. The soft drink inventor can extract confidentiality contracts from those involved in the manufacturing process, while the safety pin inventor cannot prevent anyone who sees his invention from knowing how it is made. Though for all one knows fastener inventors may deserve more rewards (or need more incentives) than soft drink inventors, potential for concealment is determinative.

The same “luck of the draw” also operates on an industry-wide scale. In any given communications or publishing industry, the existing state of technology or complex distributional networks might allow an authorized disseminator such an extensive lead-time advantage that a de facto monopoly would result regardless of whether copyright were...
available. In such a case, a copy-privilege regime would be as profitable to authors as copyright. In an industry where reproductive technologies were more advanced, however, or where independent copiers could easily make their wares available to customers, copy-privilege might be fatal to authors' revenues. Yet the authors in both industries may have produced work that is equally valuable, and the authors themselves may be equally deserving and equally attached in an emotional sense to their work. Their future productivity might even be equally dependent on economic incentives. The impact of copy-privilege is no more sensitive to where economic need is greatest than it is to most other potentially relevant concerns.

To the extent that nonproperty solutions mimic property-like results, they impose similar costs. Thus, for example, lead-time advantage, marketing devices, and various institutional or technological arrangements can inhibit copying. Even if deadweight loss would be less in a copy-privilege regime than with copyright, there is no guarantee that the loss that remained would be distributed in normatively appropriate ways. And where nonproperty solutions did not avail authors, resulting in some inexpensive access to creative works, the decrease in cost would also be distributed in a largely arbitrary fashion among consumers. 541 Except if administered on an individualized basis, which would likely be impractical, 542 copy-privilege would not distribute the economic costs and benefits according to any systemic principle at all.

By contrast, copyright and other forms of property fill in the gaps left by physical control and can be fine-tuned to match a particular view of desert or other normative strictures. A pure contract mode of allocation, unaccompanied by property rights, cannot easily reward behavior considered desirable by the polity or make secure those interests the polity judges worthy of protection. It can only award what the parties have power to extract from each other—power derived largely from tangible property rights—and then cannot protect this allocation from potentially significant third-party interference. Only a mixed regime 543 that incorporates the possibility of property rights can be molded to reflect appropriate notions of justice and be sensitive to the peculiar characteristics of intellectual works and the relationships surrounding them.

Copy-privilege simply makes the contours of the physical world too

541. Judge Breyer does, however, suggest that at least some of the impact of restraining copyright would be distributed in socially valuable ways. See Breyer, The Uneasy Case, supra note 3, at, e.g., 315-16 (lower textbook prices).

542. See text accompanying note 309 supra (low probability that Congress could fine-tune intellectual property entitlements on an ongoing basis). Fisher has conceded and shown by the complexity of the economic inquiry he outlines that the encouragement theorists' version of copy-privilege is highly unlikely to be a practical method for judges to use in solving individual controversies. Fisher, supra note 5, at 1739.

543. Current copyright law is such a regime.
important. It accepts the patterns of compulsion and freedom governing that world as determinative and treats the interests of authors and users in the work as essentially irrelevant. The characteristics that determine the fate of creators and users in a world of copy-privilege have only an arbitrary relationship to either users' or creators' characteristics.

Creativity is too important to human life, economically, psychologically, and culturally, to have its legal treatment subordinated to the legal policies regulating the tangible domain. Both creators and the persons who wish to use their works should have a right to demand that their entitlements be defined by societal notions of the proper interests of authors, artists, inventors, adapters, copiers, and audience, rather than being defined as accidental byproducts of laws created with other interests in mind. Some claims may merit granting a liberty to copy, such as claims based on free expression interests. Some claims of use may even merit intrusive pro-access measures, such as imposing eminent domain or mandatory disclosure if lifesaving medical secrets are being hidden. Discrete policies should be set to accommodate the relevant interests, but in copy-privilege the law treats most of the relevant interests as nonexistent. Copyright defenders thus can make one claim not open to the supporters of copy-privilege: It respects the autonomy of the intangible realm.

The initial sections of the article analyzed the components of copyright as a species of intangible property and showed the common structure underlying both intellectual and tangible property. Among other things, that discussion revealed that all property involves compulsion. Yet some observers, both lay and scholarly, perceive the compulsions that emanate from intellectual property law to be more unfair than the more familiar and thus less striking species of coercion that regulates the tangible realm.\textsuperscript{544} The article has shown, however, that copyright's compulsion is simply the same stuff of which all property is constituted.

The two most likely regimes for regulating intangible works of authorship are copyright and copy-privilege. In a world with copyright, persons who have not consented to restraints on their activities may find their liberty restrained, as they may be prohibited from copying physical things to which they have legitimate access. In a world of copy-privilege, users have greater liberty, but then creators would be subjected to a fate to which they have not consented. Although the

\textsuperscript{544} For example, Palmer is willing to accept compulsions that stem from power over tangible property, such as the contractual promises not to copy that an author might be able to extract by virtue of his power over the physical embodiments of the work of authorship. See Palmer, \textit{supra} note 6, at 291-95. He does not, however, appear willing to accept compulsions that have independent bases arising out of policies relating to intellectual products. See id. at 263, 303-04.
sources of compulsion may be different under copyright and under copy-privilege, the problems are similar: One party wishes to do something to which the other party objects, and the law must choose between them.

One could use many possible normative criteria to parse authors’ and users’ claims. In addition to examining claims based on “consent,” I have examined the normative premises of most economically oriented copyright criticism and shown its weaknesses, particularly in regard to the use of an economic methodology blind to distributional considerations and the dependence upon a belief that copyright is suspect because of its supposed inconsistency with the common law. I then suggested that the common law supports giving authors’ right to be rewarded for their efforts. I also argued that the first amendment and the common law provide, directly or analogically, independent sources upon which safeguards to protect nonowners’ interests could be erected that are more finely tuned to the relevant issues than the safeguards the economic theorists could provide. In addition, a Paretian approach to economics, emphasizing reciprocity, is available to supplement the public’s privileges of use in ways that both respect authors’ claims to deserve reward and promote the mutually beneficial interchanges upon which cultural life depends.

The Supreme Court has indicated an openness to arguments based on the notion that creative persons deserve a fair return for their labor. In forthcoming articles I explore the nature of such desert claims and the extent to which they might justify particular forms of legal entitlement. As I suggested briefly earlier in this article, I do believe both that authors deserve some reward for their labor and that their desert claims have a weight that the law should take into account. But adoption of such desert-based arguments is not essential. What is essential is that the choice between author and user should be made on some considered judgment of the merits, not on the basis of happenstance and serendipity as would occur in a realm of copy-privilege. The realm of copy-privilege has an arbitrariness that renders it an unacceptable method for governing creative works.

545. See generally W. Gordon, Creative Labor, supra note 14; W. Gordon, Restitutionary Impulse, supra note 55.