



Queensland University of Technology
Brisbane Australia

This is the author's version of a work that was submitted/accepted for publication in the following source:

Suzor, Nicolas P. (2013) Access, progress, and fairness : rethinking exclusivity in copyright. *Vanderbilt Journal of Entertainment and Technology Law*, 15(2), pp. 297-342.

This file was downloaded from: <http://eprints.qut.edu.au/50021/>

© Copyright 2012 Nicolas Suzor

Notice: *Changes introduced as a result of publishing processes such as copy-editing and formatting may not be reflected in this document. For a definitive version of this work, please refer to the published source:*

Access, Progress, and Fairness: Rethinking Exclusivity in Copyright

Nicolas Suzor*

ABSTRACT

This Article provides a detailed critique of the incentives-access binary in copyright discourse. Mainstream copyright theory generally accepts that copyright is a balance between providing incentives to authors to invest in the production of cultural works and enhancing the dissemination of those works to the public. This Article argues that dominant copyright theory obscures the possibility of developing a model of copyright that is able to support authors without necessarily limiting access to creative works. The abundance that the Internet allows suggests that increasing access to cultural works to enhance learning, sharing, and creative play should be a fundamental goal of copyright policy.

This Article examines models of supporting and coordinating cultural production without exclusivity, including crowdfunding, tips, levies, restitution, and service-based models. In their current forms, each of these models fails to provide a cohesive and convincing vision of the two main functions of copyright: instrumentality (how cultural production can be funded) and fairness (how authors can be adequately rewarded). This Article provides three avenues for future research to investigate the viability of alternate copyright models: (1) a better theory of fairness in copyright rewards; (2) more empirical study of commons models of cultural production; and (3) a critical examination of the noneconomic harm-limiting function that exclusivity in copyright provides.

* © 2012 Nicolas Suzor. Senior Lecturer, Queensland University of Technology. Thanks to Derek Bambauer, Kylie Pappalardo, Robert Cunningham, Brian Fitzgerald, Peter Yu, and participants at the Drake Intellectual Property Scholars Roundtable for comments on drafts of this paper.

TABLE OF CONTENTS

I.	THE ENTRENCHED INCENTIVES-ACCESS PARADIGM	301
	<i>A. The Mainstream Copyright Debate</i>	302
	<i>B. The Entrenchment of Exclusivity</i>	304
	<i>C. The Process-Based Approach to "Progress"</i>	306
II.	THE IMPOVERISHED VIEW OF ACCESS IN THE COPYRIGHT BALANCE	309
	<i>A. The Impact of Limited Access on Users and Authors</i>	310
	<i>B. Access in an Abundant Age</i>	313
III.	A VISION OF PROGRESS THAT FOREGROUNDS ACCESS	314
	<i>A. Access</i>	315
	<i>B. Abundance</i>	316
	<i>C. Sharing</i>	317
	<i>D. Creative Play</i>	318
	<i>E. Pervasive Creativity</i>	320
IV.	REVISITING THE ASSUMED NECESSITY OF EXCLUSIVITY	322
	<i>A. Fairness in an Exclusive Marketplace</i>	323
	<i>B. Alternative Models</i>	325
V.	FAIR REWARDS IN COPYRIGHT THEORY	326
	<i>A. Fair Rewards</i>	326
	<i>B. A Better Model of Fairness</i>	327
VI.	THE RATIONAL CONSUMER AND COMMONS MODELS	329
	<i>A. What Is "Success"?</i>	330
	<i>B. Commons Models</i>	332
	<i>C. A Better Compensation Model</i>	336
VII.	NONCOMMERCIAL ASPECTS OF FAIRNESS	337
	<i>A. Traditional Conceptions of Authorial Harm</i>	337
	<i>B. Broader Conceptions of Authorial Harm</i>	339
VIII.	CONCLUSION	341

In an age of cheap digital distribution, radical copyright critiques have emerged that challenge the basic assumptions of copyright law. The standard justification for copyright is that it is a utilitarian balance between providing incentives to the creative industries¹ to invest in cultural production on the one hand, and encouraging access to and use of those works on the other. Copyright does this by providing exclusive rights over expression in order to allow copyright owners to recoup their costs of production. Radical critiques, which this Article calls "abundance models," challenge this

1. See generally STUART CUNNINGHAM, WHAT PRICE A CREATIVE ECONOMY? 1-50 (2006) (discussing the term "creative industries").

standard justification by envisaging models of copyright not rooted in scarcity of copyrighted goods. These models instead suggest methods of funding cultural production of creative works through public levy systems;² business models based on services, cross-subsidies, and advertising;³ tips and crowdfunding agreements;⁴ and profit-sharing obligations on commercial users.⁵

These models generally fall outside of the mainstream copyright-reform debate, whose bounds are set by utilitarianism and authors-rights theories, the two main theories underlying copyright law.⁶ This Article argues that the dichotomous opposition of these two theories masks a deeply ingrained assumption in copyright law that is common to both: exclusivity is necessary to provide the incentives and rewards to authors that “Progress”⁷ requires. Exclusivity creates a market that satisfies both theoretical approaches by (1) incentivizing authors and producers to invest in the most valuable cultural production and (2) rewarding authors in proportion to the worth of their work. Importantly, copyright is not ideologically pure.⁸ An exclusive market fulfills both instrumental and deontological functions by equating incentives with fair rewards.⁹ The abundance models have not found normative support in part because they break the link between incentives and rewards.

The Internet’s potential to reconfigure established modes of production and distribution raises questions about the assumed necessity of exclusivity. To challenge this assumption, this Article proposes viewing creativity as ordinary and abundant and emphasizing the importance of access to creative expression in order to enable individuals to learn, grow, share, and engage in creative

2. See, e.g., WILLIAM W. FISHER III, PROMISES TO KEEP 199-258 (2004); Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?*, 18 HARV. J.L. & TECH. 85, 92-94 (2004); Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 80-83 (2003).

3. See, e.g., CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE 20-33 (2009).

4. See Paul Harrison, *The Rational Street Performer Protocol*, PAUL HARRISON, <http://www.logarithmic.net/pfh/rspp> (last updated Nov. 25, 2002); John Kelsey & Bruce Schneier, *The Street Performer Protocol and Digital Copyrights*, FIRST MONDAY (June 1999), <http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/673/583>; Chris Rasch, *The Wall Street Performer Protocol: Using Software Completion Bonds to Fund Open Source Software Development*, FIRST MONDAY (June 4, 2001), <http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/865/774>.

5. See, e.g., Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 VA. L. REV. 149, 260-61 (1992).

6. Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1158 (2007).

7. U.S. CONST. art I, § 8, cl. 8.

8. See Cohen, *supra* note 6, at 1154-55.

9. *Id.* at 1158.

play.¹⁰ Prioritizing access provides a starting point to investigate whether and how society can realize copyright's instrumental and deontological functions without exclusivity. If creativity really is abundant, then a copyright model that supports cultural production without necessarily limiting access could represent a more efficient, more distributively fair, more empowering, and more innovative culture than the zero-sum view of culture entrenched in the incentives-access paradigm.¹¹

To consider potential alternatives to exclusivity, this Article moves beyond the opposition of utilitarian and authors' rights theories. More critically examining the claims of each is necessary in order to better understand how to economically support cultural production and simultaneously reward authors fairly. This Article outlines some of the weaknesses of current abundance models in copyright in order to uncover the theoretical tensions that constrain their development.

First, proponents of abundance models need to develop a better theory of fairness in order to understand the rewards to which creative producers are morally entitled. If abundance models are to gain normative acceptance, proponents must build consensus as to when uncompensated access, or free riding, is unfair. Separating fairness from efficiency is important in order to identify when uncompensated access can be appropriate, and when either exclusivity or an obligation to pay for access may be necessary to prevent exploitation of authors.

Second, scholars should conduct more empirical research to examine the extent to which abundance models are practically feasible across various creative industries. Classical economic theory explains that copyright is necessary to induce consumers to pay for access to expressive works, but many non-scarce models rely on the voluntary financial support of consumers. A new research model should investigate the factors that influence actors to support creative production beyond exclusivity and whether that level of support could sufficiently fund a diverse range of productions at varying degrees of expense. This Article suggests that viewing these models as collaborative action problems will assist in building an empirical base for understanding cultural-production processes that do not rely on public provision or the exclusive market.¹²

10. See *id.* at 1154, 1190-205 (articulating a model of progress based on decentering creativity).

11. See Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 492-98 (1996) (describing the "incentives-access paradigm").

12. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 25 (1990); Michael J. Madison et al., *Constructing Commons in the*

Third, any new model must appropriately deal with the other interests that copyright currently supports, beyond the instrumental goal of encouraging “Progress.” The most obvious of these are the moral rights of creators, which are currently partially protected by copyright’s exclusive rights in the United States.¹³ Copyright owners can also use (and misuse) copyright to protect other interests, however, including reputation and privacy. Abundance models that aim to reduce exclusivity must determine whether protection for these other interests of authors and copyright owners should accordingly increase. The first step in this process requires developing a better understanding of whether these noneconomic harms are wholly subjective and heterogeneous, such that only exclusivity can protect them, or whether they are adequately protectable through other means.

Part I of this Article examines how the orthodox justifications for copyright work to entrench the incentives-access paradigm in a way that systematically prefers incentives to access. Part II draws on the recent literature to sketch a reconstituted view of progress that emphasizes the importance of access for knowledge, entertainment, self-expression, and cultural play. In Parts III-VI, this Article explores these three initial research avenues in order to more fully understand the viability of potential abundance models for copyright.

I. THE ENTRENCHED INCENTIVES-ACCESS PARADIGM

The current copyright debate revolves around the fundamental, but assumed, necessity of exclusivity in copyright law. The major copyright struggle centers on the widening gap between doctrine and social norms concerning copying.¹⁴ Both sides of the mainstream

Cultural Environment, 95 CORNELL L. REV. 657, 675-96 (2010) (adopting the Institutional Analysis and Development framework for cultural production processes).

13. ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 30-35 (2010).

14. WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 109 (2009); see Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 61 (2002) (arguing that “greed,” of both copyright owners and consumers, has directly contributed to the poor public perception of copyright law); Paul Goldstein, *Copyright’s Commons*, 29 COLUM. J.L. & ARTS 1, 2 (2005) (arguing that the public perception of copyright as “a juggernaut . . . [that] is crushing cherished creative and expressive freedoms” must be rejected and addressed through public education); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 15 (2010) (“Copyright laws that make reading, listening, and viewing more difficult are problematic . . . [in part because] the sheer pointlessness of some of these restraints has undermined the perceived legitimacy of the U.S. copyright system.”); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 538 (discussing “the vast disparity between copyright law and copyright norms”); Tom R. Tyler, *Compliance with the Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT’L L. & POL. 219, 224 (1996) (“The effectiveness of intellectual property law is . . . heavily dependent on gaining *voluntary*

debate agree that reform is necessary to restore public faith in copyright, but disagree on the means. Copyright industry groups attempt to educate consumers that piracy is morally wrong and push for stronger rights, more distributed enforcement, and more pervasive information control.¹⁵ More moderate copyright commentators, on the other hand, converge on two points: (1) Congress should curtail the most egregious effects of copyright law to provide a better balance between the rights of users and owners and greatly simplify the law to make it more understandable;¹⁶ and (2) business models should continue to evolve to provide consumers with a simpler and more efficient alternative to infringement.¹⁷ Because both sides share the assumption that exclusivity is necessary, the debate marginalizes the promise that abundance models provide.

A. *The Mainstream Copyright Debate*

The two most visible sides to the debate agree on one central point: copyright law must provide a balance between the rights granted to authors and producers and the public's interest in accessing expressive works.¹⁸ As copyright reform movements begin to converge, the best we can aim for under a copyright theory that relies on a dichotomy between incentives and access is to develop a system that is "leaky" enough to mitigate the most harmful effects of scarcity, yet strong enough to encourage producers to invest in

cooperation with the law. As a result, it is necessary to influence what people want to do in situations in which there is little or no threat of immediate punishment for wrongdoing." (emphasis added)); Francis Gurry, Dir. Gen., World Intellectual Prop. Org., The Blue Sky Conference: Future Directions in Copyright Law (Feb. 25, 2011), in http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html (arguing that it is necessary to "effect a change in attitude" to the way that "that most people see or hear about copyright and the Internet").

15. See PATRY, *supra* note 14, at 94-96; Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 18 (2006) ("Entertainment industry representatives have deployed a variety of rhetorical tropes designed to position online copyright infringement, and particularly p2p filesharing, as morally objectionable and socially insidious.").

16. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 51-52 (1994); *Real Copyright Reform*, *supra* note 14, at 33-34 (arguing that there is "no excuse" for the complexity of copyright law); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1176, 1181 (2010) ("A well-functioning copyright law carefully balances the interests of the public [and] . . . copyright owners . . . [and] . . . should embody rules that are clear and sensible, yet flexible enough to apply in a changing environment.").

17. See Joe Karaganis, *Rethinking Piracy*, in MEDIA PIRACY IN EMERGING ECONOMIES 1, 66 (Joe Karaganis ed., 2011) (quoting an industry representative as saying industries will "isolate the forms of piracy that compete with legitimate sales, treat those as a proxy for unmet consumer demand, and then find a way to meet that demand" (internal quotation marks omitted)).

18. See Netanel, *supra* note 2, at 24.

copyright products.¹⁹ This debate leaves the core assumption—that copyright is a balance between providing incentives to authors and the interests of the public at large—mostly unexamined.²⁰

The orthodox view of copyright in Anglo-American discourse is that copyright provides the incentives necessary to encourage authors to create.²¹ Copyright, under this view, is a necessary evil, a finely tuned balance between providing incentives to create and encouraging dissemination of, and access to, copyright works.²² This balance, however, is fundamentally indeterminate—it is unclear what balance between incentives and access is optimal.²³ There is also deep uncertainty at the root of the utilitarian equation as to whether it makes sense to talk about incentives for creative labor at all; it is becoming increasingly clear that the financial rewards copyright provides may have very little role in stimulating creativity.²⁴ Recent

19. SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 184 (2001) (arguing that “a leaky copyright system works best”); see Brett M. Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649, 673 (2007) (“To best serve its economic and social objectives (to promote Progress, broadly conceived), copyright must be somewhat but not completely leaky.”); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 910 (2001) (“Even if some free riding slips by, in the guise of civil disobedience or otherwise, the empirical evidence suggests that voluntary compliance will likely prove sufficient to achieve a fair and efficient level of effective protection.”).

20. This assumption is furthered by:

[C]reating the appearance of controversy, the struggle between maximalists and minimalists sustains the underlying hegemony of the instrumentalist paradigm. As much as maximalists, minimalists deploy the concept of copyright as a way of providing incentives for creativity. The debate is not about the appropriateness of that concept but about the way in which it should be operationalized.

Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1872 (2011).

21. See *Real Copyright Reform*, *supra* note 14, at 8-9.

22. CHARLES ROBERT GASTON, MACAULAY’S SPEECHES ON COPYRIGHT AND LINCOLN’S ADDRESS AT COOPER UNION 25 (1914) (reprinting Lord Macaulay’s famous point that copyright “is a tax on readers for the purpose of giving a bounty to writers”); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

23. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2-3 (2011); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1065-69 (2005); David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 5-6 (2004); Ivan P.L. Png, *Copyright: A Plea for Empirical Research*, 3 REV. ECON. RES. ON COPYRIGHT ISSUES 3, 4 (2006) (arguing that insufficient empirical research exists on the appropriate balance in copyright law); Ruth Towse et al., *The Economics of Copyright Law: A Stocktake of the Literature*, 5 REV. ECON. RES. ON COPYRIGHT ISSUES 1, 15-16 (2008) (“There is nothing in all the literature we surveyed here to guide us towards the ‘optimal’ copyright standard.”).

24. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 75 (1967) (“[C]opyright has evidently more to do today with mobilizing the profit-propelled apparatus of dissemination—publication and distribution—than with calling the signals into first unpublished existence; the latter process must be to a considerable extent self-generated.”); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143; Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine*

critical examinations of creative processes highlight the importance of compulsion, inspiration, serendipity, need, and desire, rather than copyright or even financial gain, as key motivating factors for most creative labor.²⁵ At the same time, the lottery that copyright provides, rewarding an extremely small proportion of artists highly, suggests that copyright creates severe distributional problems and has serious failures in its inability, in practical terms, to provide the financial support that professional creators need to pursue their craft.²⁶ Certainly, copyright has a very real instrumental function in allocating capital: facilitating the coordination of expensive cultural production and the selection, marketing, distribution, and maintenance of works. But these functions may be substantially more limited than the standard incentives-access paradigm holds.²⁷

B. The Entrenchment of Exclusivity

The fundamental validity of the incentives-access dichotomy has “ascended to the status of an article of faith in the absence of any empirical validation.”²⁸ This assumption that “progress” is best furthered by exclusivity and a functioning market is firmly embedded

That?, 12 THEORETICAL INQ. L. 29, 42-48 (2011); see Keith Aoki, *Distributive and Synergetic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 800 (2006); Jonathan M. Barnett, *Is Intellectual Property Trivial?*, 157 U. PA. L. REV. 1691, 1722 (2009); Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, FIRST MONDAY (Aug. 2, 1999), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/Article/684/594>; Raymond Shih Ray Ku et al., *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1719 (2009); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Makes-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2113 (2011); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996).

25. Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1483 (2010); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1970 (2005); Silbey, *supra* note 24, at 2102; Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 522-36 (2009).

26. RUTH TOWSE, CREATIVITY, INCENTIVE, AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE 132-36 (2001) (arguing that copyright supports an asymmetry in market power between professional artists and publisher intermediaries and generally fails to adequately reward all but superstar artists). The problem is exacerbated because the likelihood of success in the market is unpredictable at best. See Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 616 (2010); Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 383-84 (2008); Litman, *supra* note 14, at 9-10; Tushnet, *supra* note 25, at 518; Zimmerman, *supra* note 24, at 41.

27. See Cohen, *supra* note 24, at 153-56.

28. Litman, *supra* note 14, at 29.

in the constitutional justification for copyright.²⁹ Given the indeterminacy of the utilitarian thesis, however, particularly in the context of great technological advances that substantially lower creation and distribution costs, its continuing uncritical acceptance should be surprising.³⁰ Partly, this is due to inertia—given copyright’s entrenched foundation, it is difficult to see any real alternatives.³¹ The political strength of copyright industries supports this inertia, as the industries have successfully argued that a copyright policy that is best for the publishers and producers must be best for both authors and the public.³² In part, however, rights-based theoretical justifications also supplement this faith in the incentives-access dichotomy, because while they are often officially disclaimed, rights-based theories provide a natural justification to authors’ exclusive rights through the labor or personality of the author.³³

Rights-based theories rely on a deontological proposition that interfering with a creator’s plans for the object of her labor or creative

29. Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 98 (1993) (“[B]ecause of the instrumental tone of the Copyright and Patent Clause (‘to promote the Progress . . . by securing’), no one truly disputes that such ‘Progress’ is to be encouraged through the frankly instrumental use of laws.” (emphasis added)).

30. See Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 305-07 (2002); Paul Romer, *When Should We Use Intellectual Property Rights?*, 92 AM. ECON. REV. 213, 215 (2002) (explaining that because digital copies have an extremely low marginal cost, copyright has the effect of imposing an extremely large commodity tax, which is unlikely to be efficient).

31. See the often-quoted passage from a review of the US patent system:

If we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible, on the basis of our present knowledge, to recommend abolishing it.

FRITZ MACHLUP, AN ECONOMIC REVIEW OF THE PATENT SYSTEM 80 (1958).

32. See JESSICA LITMAN, DIGITAL COPYRIGHT 35-70 (2006) (explaining that entrenched power and political compromise, rather than theory, predominantly shape copyright legislation); L. RAY PATTERSON & STANLEY F. BIRCH, JR., A UNIFIED THEORY OF COPYRIGHT 381-82 (Craig Joyce ed., 2009); see also BENEDICT ATKINSON, THE TRUE HISTORY OF COPYRIGHT: THE AUSTRALIAN EXPERIENCE 1905-2005 (2007) (arguing that the development of copyright law in Britain and Australia was based more on natural rights theory and sectional interests than orthodox utilitarian balancing); Sterk, *supra* note 24, at 1244-46.

33. MERGES, *supra* note 23, at 9-10; Bambauer, *supra* note 26, at 353-54; McGowan, *supra* note 23, at 36-38; Jean-Luc Piotraut, *Author’s Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared*, 24 CARDOZO ARTS & ENT. L.J. 549, 556-57 (2006) (“[B]oth natural law principles and economic policy decisions motivated copyright law development in the United States. . . . Decidedly, authors’ personal claims as well as an economic argument underlay both French and American copyright laws.” (emphasis added)). Samuelson notes that:

[M]any members of the public, and certainly most creators, are likely to have a dose of “natural rights” theory in their perception about copyright law, under which authors would have at least some control over the use of their works even if the use is non-commercial—and especially when the use is commercial.

Samuelson, *supra* note 16, at 1213.

expression can cause her intrinsic harm.³⁴ While rights-based arguments have strong internal limits that ensure that third parties have sufficient autonomy to create, the complexities of these limits are often lost in mainstream copyright discourse.³⁵ It follows, for common authors-rights arguments, that authors are morally entitled to an exclusive property right over their creations to prevent the harm that occurs from nonconsensual interference with expression.

Since copyright doctrine in practice is not wholly utilitarian or wholly rights-based,³⁶ the opposition of these two approaches provides fertile grounds for arguments about the proper scope of copyright law. Although the utilitarian and natural-rights justifications for copyright are maintained in opposition, requiring exclusive property rights in expression produces a result that is more or less acceptable to both. Despite fundamental differences between the two approaches, their mutual support for exclusive rights can be read either as a utilitarian attempt to provide necessary incentives to creators, or as a recognition of the rights of creators to the fruits of their labor or the manifestations of their personal expression.³⁷ While the differences matter at the margins—and they matter a great deal—they do not matter for maintaining exclusivity, the core function of copyright.³⁸ That core of exclusivity has accordingly become deeply entrenched.

C. *The Process-Based Approach to “Progress”*

Each of the orthodox arguments for exclusivity applies mainly to particular subsets of the subject matter protected by copyright law. Strictly speaking, economic approaches should not support exclusivity for authors who would create without it.³⁹ The two predominant natural rights justifications are similarly limited, for different reasons. Lockean approaches commit to a conception of creative labor as difficult and painful toil,⁴⁰ which suggests that copyright should

34. See, e.g., MERGES, *supra* note 23, at 9-10.

35. Drassinower, *supra* note 20, at 1871 (arguing that we should further examine “the as yet largely unexplored potential of a rights-based minimalism”); see HUGH BREAKEY, INTELLECTUAL LIBERTY (forthcoming 2012).

36. See McGowan, *supra* note 23, at 11.

37. For the utilitarian perspective, see James A.D. White, *Misuse or Fair Use: That is the Software Copyright Question*, 12 BERKELEY TECH. L.J. 251, 255-56 (1997). For the natural justification, see Gordon, *supra* note 5, at 208-09.

38. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 59-60 (1988).

39. Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 31-32 (2004).

40. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 302-05 (1988); cf. Tushnet, *supra* note 25, at 525 (“Contrary to the Lockean vision of difficult labor,

only reward production that is either labor-intensive or undertaken with the expectation of reward.⁴¹ Personality theories, on the other hand, protect only original works that embody the creative expression of the author and to which the author feels a special connection, rather than the more prosaic and fungible works that make up a large proportion of copyright subject matter.⁴²

It would seem absurd for copyright law to actually attempt to draw such distinctions in practice. Despite utilitarian and Lockean theories, it would appear grossly unfair to allow exclusive rights only for laborious economic production and not to the authors who create out of passion or desire.⁴³ Similarly, regarding the personality theories, it seems dangerously subjective to inquire whether an author felt a particularly close bond to her work before awarding her some form of exclusive control. It is only by reading all three of these approaches together that copyright theory arrives at a fundamental justification for exclusivity.

In order to avoid actually having to draw these distinctions in doctrine, copyright takes a process-based approach that equates incentives with reward and autonomy with control.⁴⁴ These theories align through a conception of progress that constructs a paradigmatic vision of the creative laborer as an individual author toiling for long hours on a labor of love with the hope that, once it is completed, she can sell it for a fair price, if she so chooses.⁴⁵ By viewing this abstraction as an ideal form of creative production, copyright theory constructs a generalizable approach that does not require the drawing of difficult—and seemingly arbitrary—distinctions between similar creative outputs on the basis of the author's time invested, motivation for creation, or attachment to the final work.⁴⁶

This romantic view of creative expression fits into a larger teleology of progress that prioritizes the continual professional

which people only do to avoid starving, engaging in creative labor is not a task in need of external incentives.”).

41. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1547-48 (1993).

42. Hughes, *supra* note 40, at 337-41; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986-88 (1982) (drawing a distinction between personal and fungible property).

43. Stan J. Liebowitz, *Is Efficient Copyright a Reasonable Goal*, 79 GEO. WASH. L. REV. 1692, 1693 (2010) (arguing that a perfectly efficient copyright regime would not be fair because it would deprive creators from a reward for their labor); see *Sharing and Stealing*, *supra* note 39.

44. See Cohen, *supra* note 6.

45. See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 468-71; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’*, 17 EIGHTEENTH-CENTURY STUD. 425, 426 (1984).

46. Cohen, *supra* note 6, at 1162.

development of new, highly original, and highly valuable works.⁴⁷ Utilitarian theories attempt to find an objective method to ensure that society directs investment in cultural production to the best (most valuable) ends.⁴⁸ For rights theories, it is important that authors are rewarded in proportion to the worth of the product.⁴⁹ The utilitarian and rights-based approaches align here when they share a view of copyright's purpose as a value-neutral method of promoting progress by providing a marketplace for expression.⁵⁰ By seeking an efficient competitive market in expression, utilitarian approaches are able to assume that the total price a creator receives in the market reflects her required incentive and the aggregate demand for the product.

For rights theories, the same meritocratic assumption works to identify an author's just deserts: the total price a creator is able to extract for a work reflects its social worth.⁵¹ A key attraction of the conjunction of utilitarian and rights theories is the ability to further progress while avoiding difficult judgments on the value of expression by "retreat[ing] to a process-based vision of merit-based selection."⁵² By equating merit with market value, this procedural approach ensures both that the market rewards authors in proportion with their talent and contribution⁵³ and that the market directs investment and creative labor to the most valuable ends.⁵⁴ In essence, this approach assumes the price an author can command is both the amount required to incentivize her to create and the amount she deserves.⁵⁵

47. See Chon, *supra* note 29, at 114-22.

48. See Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT'L REV. L. & ECON. 81, 83 (2002); see generally Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. ECON. 1 (1969).

49. See Cohen, *supra* note 6, at 1165.

50. See *id.*

51. See *id.*

52. See *id.*; see also *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903).

53. See Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management*, 97 MICH. L. REV. 462, 512 (1998) (arguing that in some circumstances, copyright's "merit-neutral stance is expressly intended to serve meritocratic as well as market ends").

54. See Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293, 296 (1970) (discussing the role of excludability in ensuring that optimal levels of public goods are produced); Lunney, Jr., *supra* note 11, at 489 ("From an allocative-efficiency perspective, copyright provides the proper degree of protection when it ensures that individuals will produce works of authorship if, and only if, such production would represent the most highly valued use of their resources."); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 842, 856 (1992); see also Cohen, *supra* note 6, at 1200; Frischmann, *supra* note 19, at 658 (critiquing the proposition that "[i]nternalization is the 'silver bullet' that aligns private and social welfare"); Lemley, *supra* note 23, at 1041 (critiquing the tendency in economic theory to favor full appropriation of social value in order to maximize welfare).

55. See Waldron, *supra* note 54, at 851-52.

This dominant vision of progress goes a long way to explaining the assumed necessity of exclusivity. The progress imperative requires a method of determining value in order to encourage and reward the continual development of new, highly original, creative works. Exclusivity allows a commodity market in expression, and the market provides an objective method of valuing creative works. In this context, abundance models that use purely economic arguments to decouple incentives from exclusivity in copyright fail because they break the link between incentives and reward. Economic theories aimed at providing alternative answers to the public goods problem seek to determine how authors can earn a reasonable return on creative production, but unlike the commodity-market model, these theories are unable to show that this return is also the amount that authors *deserve*.⁵⁶

Rather than engage directly with both the utilitarian and rights theories, mainstream copyright discourse suffers from a problematic quest for ideological purity, which attempts to prove one over the other.⁵⁷ Because these theoretical justifications supposedly cover the field of normative approaches, their opposition constrains our thinking about the potential evolution of copyright law.⁵⁸ The unfortunate result is a lowest-common-denominator endorsement of exclusivity that is able to satisfy both theories simultaneously, to the detriment of a richer understanding of the complex network of social interactions through which creative expression flows.

II. THE IMPOVERISHED VIEW OF ACCESS IN THE COPYRIGHT BALANCE

Both utilitarian and rights theories require some form of balance between the interests of authors in having exclusive rights and the interests of the public in having access to expressive works. This balance pits the authors' interests (incentives or rewards) against the more inchoate interests of society (or users), and the balance generally tips in favor of the more concrete authorial interests.⁵⁹ As a

56. See Kenneth Einar Himma, *The Justification of Intellectual Property: Contemporary Philosophical Disputes*, 59 J. AM. SOC'Y FOR INFO. SCI. & TECH. 1143, 1152 (2008).

57. See Cohen, *supra* note 6, at 1155.

58. See *id.* at 1158; see also John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 17 (2011) ("The existing polemic, which typically pits labor-desert and personhood interests against utilitarian interests, does not, and should not, fully define the metes and bounds of the policy discourse.").

59. See James Boyle, Essay, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 95-97 (1997); see also MERGES, *supra* note 23, at 82-83 ("An understanding of IP that embraces creator autonomy directs us to resolve close cases, those where the costs and benefits of IP protections are in doubt, in favor of creators."); PATTERSON &

result, both theoretical accounts commonly understand uncompensated access, or free riding, to be normatively harmful.

A. The Impact of Limited Access on Users and Authors

From the utilitarian perspective, the balance metaphor requires copyright policy to weigh the incentives provided to authors (or publishers) against the deadweight losses that arise from raising access prices above the minimum costs of distribution. This problem is largely intractable within the incentives-access paradigm; as Kenneth Arrow points out, “precisely to the extent that . . . [property rights in information are] successful, there is an underutilization of the information.”⁶⁰ If copyright incentives are necessary to produce creative expression, and greater incentives lead to more production,⁶¹ then reducing deadweight loss by decreasing copyright protection in order to increase access necessarily means reducing production.⁶² In general terms, as long as copyright incentives are necessary, any deadweight losses they produce are unavoidable.⁶³ If all users are

BIRCH, JR., *supra* note 32, at 235-36; Cohen, *supra* note 6, at 1196-97; Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 374 (2005). There are, of course, some notable exceptions. See, e.g., *CCH Can. Ltd. v. Law Soc’y of Upper Can.*, [2004] S.C.R. 339 (Can.) (treating fair-dealing exceptions as users’ rights, a fundamental component of copyright policy, not to be interpreted restrictively).

60. Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY* 609, 617 (Richard R. Nelson ed., 1962).

61. See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 *HARV. L. REV.* 1569, 1579-81 (2008) (discussing the dominant linear view of incentives in copyright doctrine); Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use? The 1999 Donald C. Brace Memorial Lecture* (Nov. 11, 1999), in 46 *J. COPYRIGHT SOC’Y USA* 513, 524 (1999); Jessica Litman, *War Stories*, 20 *CARDOZO ARTS & ENT. L.J.* 337, 343-44 (2002).

62. See Stan J. Liebowitz & Stephen Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, & Network Effects*, 18 *HARV. J.L. & TECH.* 435, 440-41 (2005) (“A system of private ownership providing the incentive for creation cannot give a reward to the creator without also having an apparent deadweight loss in the consumption market.”); see also Lunney, Jr., *supra* note 11, at 569.

63. See Liebowitz & Margolis, *supra* note 62, at 442. (“Once one accepts copyright as the mechanism to provide incentives for creative works, and agrees that all books are given the same copyright term, then the ‘productive’ deadweight losses are best understood as irrelevant to welfare considerations, since there is no other manner in which they could become part of the surplus within the confines of the chosen copyright mechanism.”). Note that the Authors distinguish between “productive” deadweight loss caused by necessary incentives and unnecessary deadweight losses realized after an author recoups a sufficient price to justify investment, but reach no conclusion as to whether any additional extension of copyright would result in more benefit from extra incentives than harm from unproductive deadweight loss. See *Real Copyright Reform*, *supra* note 14, at 29 (critiquing the argument that “[d]iminishing copyright . . . will decrease authors’ incentives to create and distribute new works, leaving readers, listeners, and viewers with fewer new works to enjoy”).

rational actors who would prefer not to pay for access, limiting free riding is a necessary part of maintaining an efficient market.⁶⁴

For rights-based approaches, free riding is often wrongful because there is no general right of access to another's creative expression.⁶⁵ Generally speaking, rights-based arguments rely upon one of two propositions: (1) the labor-desert proposition, which argues that creators should be able to control what they create, or (2) the proposition that creators are personally invested in their creations and are accordingly entitled to property rights to ensure that their personality interests are respected.⁶⁶ The common Lockean labor-desert claim is fundamentally based on avoiding the harm to the laborer that occurs when others appropriate the laborer's expression.⁶⁷ Because expression is nonrivalrous, this claim usually rests on the assumption that copying interferes with the laborer's plans to sell or control her expression.⁶⁸ Personality arguments justify similarly strong authorial control.⁶⁹ In these arguments, free riding is harmful because it can interfere with the author's plan for the work.⁷⁰

Because neither utilitarian nor rights theories view barriers imposed on access as undesirable, the major limit on copyright comes only from the impact of exclusivity on future authors. In utilitarian theory, this limit comes from the dynamic nature of incentives to create.⁷¹ Since creative expression inevitably draws on past works,

64. See Cohen, *supra* note 59, at 351 (arguing that from a perspective of copyright that focuses on an economic view of access, "[t]he economic user's motivations for unauthorized copying are easy to understand—he is trying to get away with paying less than the market price for a particular cultural good—but thwarting them is untroubling for the same reason"); see also Brett M. Frischmann & Mark A. Lemley, Essay, *Spillovers*, 107 COLUM. L. REV. 257, 276 (2007) (arguing that intellectual property law should not seek to internalize the full social benefit of new works); Lemley, *supra* note 23, at 1032 (arguing that free riding is a fundamental part of the utilitarian copyright balance).

65. See Himma, *supra* note 56, at 1159 ("The author's interest wins over the interests of other persons in content that is merely desired.").

66. See Tehranian, *supra* note 58, at 9-11.

67. See Gordon, *supra* note 41, at 1544-45.

68. See *id.* at 1547; McGowan, *supra* note 23, at 39.

69. See Hughes, *supra* note 40, at 337-39; see also Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 374-77 (1992). But see Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. MIAMI L. REV. 453, 500-01 (2005) (arguing that use of Hegel to justify the necessity of either exclusive property rights or moral rights regimes are based on a fundamental misreading of Hegelian theory, which holds that "[t]he content of any specific property regime can only be determined by positive law, and positive law is a creature of pragmatic reasoning, not speculative logic" (footnote omitted)).

70. See MERGES, *supra* note 23, at 77-78; cf. Waldron, *supra* note 54, at 883-84 (critiquing rights arguments that view copying as necessarily harmful).

71. See the argument that:

A single-minded focus on incentivizing creation could lead to maximalist intellectual property claims. The only limit on intellectual property would be found in (1) the claim

any increase of incentives for authors will impose more costs on future authors as access becomes more expensive.⁷² Law-and-economics approaches to copyright theory address the difficult balancing process largely by defining around it.⁷³ First, theorists point out that copyright rarely gives a monopoly in the classical sense, since most expressive works are fungible and substitutable on the market.⁷⁴ Second, the construction of the idea-expression dichotomy ensures that the pool of human knowledge is ever expanding; increasing copyright protection increases incentives and therefore the number of works produced, and users will thus have a greater pool of ideas to consume and build upon, even as access to any particular expression becomes increasingly costly.⁷⁵

For rights-based approaches, exclusivity must not interfere with the autonomy or liberty of other individuals. In Lockean theory, an appropriation can be justified only on the proviso that it leaves “enough and as good” an opportunity for future laborers.⁷⁶ Similarly, personality theories emphasize that future authors must have the ability to express themselves.⁷⁷ Again, these limitations are often defined by an assumption that the idea-expression dichotomy provides sufficient access for future authors.⁷⁸

In both cases, a view of progress that prizes originality in expression informs the trust that the idea-expression dichotomy is

that additional intellectual property rights are unnecessary to spur creation, and (2) situations where expanding intellectual property rights for some will interfere with others' ability to create.

Anupam Chander & Madhavi Sunder, Foreword, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563, 574 (2006).

72. See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 154-56 (2008); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 105 (2001); LITMAN, *supra* note 32, at 15-16.

73. See Boyle, *supra* note 59, at 96-97.

74. See, e.g., Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1734 (2000); William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 518 (“Valuable works are also those that confer monopoly power.”).

75. See Goldstein, *supra* note 14, at 2-3; Hughes, *supra* note 40, at 325; Kitch, *supra* note 74, at 1730; R. Polk Wagner, Essay, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1034 (2003).

76. See Gordon, *supra* note 41, at 1562-70.

77. See MERGES, *supra* note 23, at 91 (“Just as with Locke, Kant requires that an appropriator take others into account from the outset, from the moment of first appropriation. And Kant does so for a very similar reason: because he considers the needs and potential claims of others just as important as those of the owner.”); see also Hughes, *supra* note 40, at 336 (arguing that limits of appropriation based on autonomy of third parties in personality theory are very similar to the Lockean proviso that appropriation leave as much and as good for others).

78. See Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. & JURISPRUDENCE 3, 18-19 (2003); see also Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1254 (1992).

effective. The teleology of progress presupposes the continual romantic production of works of original genius that advance their fields, providing enjoyment in themselves and bringing new ideas into existence. Compared to the genius of original authorship, the “slavish copying” of expression appears relatively unimportant.⁷⁹

B. Access in an Abundant Age

The result of this teleology of progress and the conjunction of economic and rights theories is a view of access that the market adequately fulfills. “Access,” under the dominant ideal of progress, means access to a smoothly functioning commodity market with low transaction costs where almost every flow of information is metered and priced at a sufficiently low rate to satisfy broad demand.⁸⁰ A competitive, efficient marketplace means that both consumers and future authors can obtain a license for any use at a reasonable fee.⁸¹ Exceptions to the rule can then predominantly be confined to identifiable instances of market failure.⁸² Balancing incentives and access is accordingly reducible to ensuring that there are sufficient incentives to maintain diversity of expression and sufficient competition to ensure relatively low prices.

While this vision of access likely provides the best possible outcome for publishers, there is no guarantee that it represents the best copyright deal imaginable for the public.⁸³ This vision of copyright idealizes the market as a “celestial jukebox,” in which the entire store of recorded human creativity will be digitized and everyone will, for a reasonable fee, be able to access the most obscure, esoteric works in any format and on any device.⁸⁴ But the model of

79. See Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 348 (2007).

80. See, e.g., BART CAMMAERTS & BINGCHUN MENG, CREATIVE DESTRUCTION AND COPYRIGHT PROTECTION 9 (2011) (“Providing user-friendly, hassle-free solutions to enable users to download music legally at a reasonable price, is a much more effective strategy to enforce copyright than a heavy-handed legislative and regulatory regime.”); Karaganis, *supra* note 17 (arguing that media piracy should essentially be regarded as a failure in appropriate pricing).

81. See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801 (6th Cir. 2005) (“Get a license or do not sample. We do not see this as stifling creativity in any significant way.”).

82. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982).

83. See LITMAN, *supra* note 32, at 35-75 (explaining that copyright bargains reached by industry stakeholders are not generally drafted with the public’s interests in mind); see also Litman, *supra* note 39, at 39-40 (arguing that the digital marketplace model “is not particularly enticing”).

84. See generally PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (2003).

copyright as a commodity market⁸⁵ is a model of access fundamentally predicated on artificial scarcity—a model that deliberately limits access in order to make it more profitable.⁸⁶ It is a model that encourages publishers to attempt to control and monetize each distinct act of access and cultural dissemination.⁸⁷ It is a model, perversely, in which the most socially valuable expression is the most contained and the most expensive. It is also a model in which “access” predominantly means “consumption”; the room it leaves for creative play⁸⁸ remains tightly controlled by intermediary publishers.

The Internet infrastructure that provides zero-marginal-cost distribution should cast doubt on this conception of access. The potential abundance of expression has tremendous benefits for access to knowledge and culture. With some effort, all connected individuals could have immediate access to almost perfect reproductions of the entire wealth of recorded cultural expression on their personal computers, portable devices, and in schools and public libraries.⁸⁹ In that world, the common wealth of human creativity could circulate freely in a virtuous cycle of reexpression, in which citizens can freely learn, play with, and rearticulate cultural expression. But the continued prevalence of the incentives-access paradigm pushes these visions to the margins.⁹⁰ As long as scarcity is viewed as fundamentally necessary in order to stimulate future production and progress, increasing access by decreasing exclusivity will continue to be counterproductive.⁹¹

III. A VISION OF PROGRESS THAT FOREGROUNDS ACCESS

If progress is copyright’s core goal, we should critically examine the assumption that it is best served by an exclusive market of expression. The dominant view of progress focuses on a teleological ideal of romantic production. This Article explores how copyright

85. See Cohen, *supra* note 15, at 38.

86. See Georgia Harper, *OA, IRs and IP: Open Access, Digital Copyright and Marketplace Competition*, 4 AM. LIBRARY ASSOC. 2009 MIDWINTER MEETING, http://wikis.ala.org/midwinter2009/images/5/5e/Harper_G_MW09handout.pdf (last visited Oct. 29, 2012).

87. See Cohen, *supra* note 15, at 39 (“Pervasively distributed copyright enforcement seeks to produce standardized, predictable flows of information.”).

88. See Cohen, *supra* note 6.

89. There remains, of course, a significant digital divide problem in the disparity of access to telecommunications services enjoyed by marginalized groups in developed communities and the bulk of citizens in developing countries. See L.M., *Hailing the Google Bus*, *ECONOMIST* (Oct. 2, 2011, 10:22 AM), <http://www.economist.com/blogs/babbage/2011/10/internet-developing-countries>.

90. See Lunney, Jr., *supra* note 11.

91. See Harper, *supra* note 86, at 1.

might look if it focused on access, the impoverished half of the incentives-access binary. Much of the tension in modern copyright discourse stems from the clash between two normative visions: one where the celestial jukebox can provide adequate (even ideal) access to cultural expression, and one where users are substantially freer to access, learn from, and play with abundant expression.⁹² The shared understanding in the mainstream copyright dialectic is that the public's desire to access copyright expression without paying must be restrained for the common good.⁹³ Increasingly, however, stronger normative justifications for abundance models—and even piracy⁹⁴—are emerging.⁹⁵ By highlighting the positive effects of the nonrivalrous nature of information, this discourse has inverted the traditional conception of intellectual property as a solution to the tragedy of the commons. These “commons” theories challenge the implicit assumption that the commodity market provides adequate access to cultural expression, focusing on the benefits of abundant flow of expression that a tightly controlled, metered, and commoditized model of access cannot deliver.⁹⁶ Many authors have considered the virtues of nonrivalrous sharing; this Article draws on this literature to emphasize the benefits of abundance, sharing, serendipitous discovery, and the continuous flow of creative works to knowledge, entertainment, self-expression, and play.

A. Access

First, access in itself should be encouraged. Access to cultural expression is the means by which people learn and grow.⁹⁷ The spread of knowledge through society is a fundamental component of progress.⁹⁸ In particular, society should encourage access to learning

92. See generally Madison et al., *supra* note 12, at 659 (developing a model of commons management of intellectual property).

93. See *id.* at 666.

94. See, e.g., Letter from Shuddhabrata Sengupta, A Letter to the Commons (Jan. 19, 2007), available at <http://archive.icommons.org/articles/a-letter-to-the-commons>.

95. See Cohen, *supra* note 6, at 1157-58.

96. See, e.g., Netanel, *supra* note 2, at 5.

97. See L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 52 (1991); PATTERSON & BIRCH, JR., *supra* note 32, at 284 (“The primary goal of copyright is the promotion of learning.”); Rebecca Tushnet, Essay, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 565-66 (2004) (“Copying promotes democracy by literally putting information in citizens’ hands.”).

98. Eben Moglen, for example, makes the point that human society must have wasted the potential of thousands of Einsteins by not providing them with sufficient access to knowledge and potential to learn. He describes the political goal of the information society as realizing:

the desire to make it possible for everybody to be exposed to that which makes brains larger, more powerful, more humane, more thoughtful, which decreases recourse to

materials as widely as possible.⁹⁹ The nonrivalrous nature of information, in this sense, can be extremely beneficial to substantive equality by increasing access to cultural goods without imposing costs on creators (setting aside, for the moment, the public goods production problem).¹⁰⁰ On distributional grounds, the great social cost of excluding users who cannot afford to pay the monopoly price of copyright expression, which is costless to distribute, is deeply troubling.¹⁰¹

B. Abundance

Second, abundance in expression is fundamentally desirable. When expression is scarce, users must exercise judgment before determining whether it is worth consuming or not.¹⁰² Consumers must balance the benefit they expect to receive against the costs they expect to bear.¹⁰³ Even when the costs are insignificant, this

violence and the sense of desperation, the desire to do what we all know it is best to do for ourselves and therefore what we ought to know it is best to do for other people as well.

Eben Moglen, Software Freedom Conservancy, Free and Open Software: Paradigm for a New Intellectual Commons, Law of the Commons Conference (Mar. 13, 2009), *available at* http://www.youtube.com/watch?v=tbcy_ZxXLl8. Furthering that point, Professor Litman states:

Already, a network of people sharing what they know has made many of the most popular reference sources obsolete. Thus, one might reasonably expect that a law designed to promote the Progress of Science would encourage the robust growth and prodigious use of this network to exchange the full spectrum of interesting material.

Litman, *supra* note 39, at 14.

99. See Margaret Chon, *Intellectual Property from Below: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803, 846 (2006).

100. See *id.* at 841; Robert Cunningham, *The Tragedy of (Ignoring) the Information Semicommons: A Cultural Environmental Perspective*, 4 AKRON INTELL. PROP. J. 1, 19-20 (2010).

101. James Boyle, *Property Rights: Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2031 (2000) (“[A]ny analyst who is even a little uneasy about the ‘ability and willingness to pay’ metric of valuation would find it particularly hard to say that the poor should not get access to a social resource with zero marginal cost simply because they cannot afford to pay for it.”); Chon, *supra* note 99, at 833 (arguing that while “[i]n the public goods jargon, static inefficiencies (or higher costs of goods) are generated as an inevitable residual of IP protection such as copyright,” the costs of prohibiting access to educational materials, from a substantive equality perspective, are very great). Professor Gordon notes:

Culture is interdependence, and requiring each act of deliberate dependency to render an accounting would destroy the synergy on which cultural life rests. Even if the accounting were done painlessly—by a magic computer that somehow could costlessly determine who contributed what and could prepare a continuously up-to-date, self-executing list of debits and credits—part of our self-concept as a people depends upon our having a common heritage. Parceling out that heritage to only those willing and able to pay destroys part of its value.

Gordon, *supra* note 5, at 168.

102. See ANDERSON, *supra* note 3, at 59.

103. See *id.*

cost-benefit analysis plays an important role in slowing down access. The result is a dampening of serendipitous exposure.¹⁰⁴ Abundant access to cultural goods means that consumers are more likely to be exposed to expression that brings unexpected benefits—benefits they did not foresee and could not have bargained for. This can also provide a real benefit to authors, who are potentially able to gain increased exposure and reach a larger audience than if every reader had to estimate in advance whether the perceived benefit would be worth the asking price.¹⁰⁵ Abundance in culture promotes flow, which furthers progress by fostering diversity and destabilization in “settled modes of knowing.”¹⁰⁶

C. Sharing

Third, sharing has substantial social value. Economically, peer-to-peer file sharing can be much more efficient than centralized distribution models, particularly because volunteer users are often prepared to bear the costs of digitizing, organizing, and distributing expressive material.¹⁰⁷ It follows that copyright law should not aim to impose access costs in order to support entrenched distribution models unless no other viable, more efficient mechanisms exist.¹⁰⁸ More importantly, however, sharing is important in itself. Sharing can be personally expressive, as when someone puts great care into creating a mix-tape for a friend,¹⁰⁹ collates an obscure collection of her favorite works for the public to enjoy, or quotes extensively from powerful material to persuade an audience, to reaffirm a position, or to identify with a group.¹¹⁰ Communal enjoyment of shared expression is also very important; it provides a shared discourse for communication,¹¹¹ a

104. See *id.* at 61.

105. Cory Doctorow, *Think Like a Dandelion*, LOCUS MAG., (May 6, 2008, 8:10 PM), <http://www.locusmag.com/Features/2008/05/cory-doctorow-think-like-dandelion.html> (arguing that traditional conceptions of waste are much less important where distribution costs are negligible and that it is more important to increase the potential audience by facilitating copying than to ensure payment is received for each and every copy).

106. See Cohen, *supra* note 6, at 1168; see also Ralph D. Clifford, *Random Numbers, Chaos Theory, and Cogitation: A Search for the Minimal Creativity Standard in Copyright Law*, 82 DENV. U. L. REV. 259, 274 (2004) (“There is increasing scientific evidence that chance is the primary source for novel thoughts.”).

107. See Litman, *supra* note 39, at 8-9.

108. See *id.* at 30-31 (“If sharing is a more effective method of dissemination than selling copies, then prohibiting sharing to protect the market for copy sales is exactly backward.”).

109. Tushnet, *supra* note 97, at 545, 566-67.

110. *Id.* at 562, 566-67 (explaining the benefits of non-transformative copying for self-expression, persuasion, and affirmation).

111. Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397, 411-12 (2003); Tushnet, *supra* note 97, at 545-46.

way for fans to connect with others who enjoy particular works, and a way for groups to spread information about newly discovered works.¹¹² Much more than simple unpaid distribution and marketing, sharing is a social act, a conversation between users about the material that animates and connects them.¹¹³ Through these conversations, sharing is itself a vital part of progress that the more sterile and commercialized distribution systems that centralized marketing models provide cannot fully replace.¹¹⁴

D. Creative Play

Fourth, rich access to expression is important because it is a predicate for creative play, which is valuable for its own sake as well as for its contribution to progress. Borrowing, learning, and imitating are fundamental components of the creative process.¹¹⁵ “Progress” occurs when users grow and when they share their own creative play with society.¹¹⁶ The familiar emphasis on romantic creativity preferences “original” expression and undervalues the harm caused by exclusive restrictions on use of expression.¹¹⁷ As countless theorists have noted, creativity does not occur in a vacuum.¹¹⁸ The romantic myth of the author as a solitary genius creating wholly original work largely emerged from, and was popularized for, political purposes.¹¹⁹

112. See *Sharing and Stealing*, *supra* note 39, at 7 (explaining the benefits of sharing for the dissemination of information); see also Jenine Peta Beekhuizen, A Critical Ethnography of an Online File Sharing Community: An Actor-Network Theory Perspective of Controversies in the Digital Music World 31 (Dec. 2009), (unpublished Ph.D. dissertation, Griffith University) (on file with Griffith University), available at <http://www4.gu.edu.au:8080/adt-root/uploads/approved/adt-QGU20100909.072742/public/01Whole.pdf> (describing the active participation of members of an underground filesharing community).

113. See Litman, *supra* note 39, at 7.

114. See *id.* at 23-24.

115. See Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 482 (2007).

116. MIHÁLY CSÍKSZENTMIHÁLYI, CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION 6-7 (1997); Cohen, *supra* note 6, at 1191 (“Within the realm of creative practice, the play of culture is the to-and-fro in flows of artistic and cultural goods and in cultural practices of representation. Play in this sense is an essential enabling condition of cultural progress.”).

117. Silbey, *supra* note 79, at 350 (“Much copyright doctrine remains preoccupied with valuing certain works of authorship more strongly than others”).

118. See, e.g., Amy L. Landers, *Ordinary Creativity in Patent Law: The Artist Within the Scientist*, 75 MO. L. REV. 1, 59-60 (2010).

119. JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 52 (1996); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 219-20 (1998); KAPLAN, *supra* note 24, at 23-25; Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 296-97 (1992); Jaszi, *supra* note 45, at

In practice, creativity is much more collaborative, iterative, and improvisational.¹²⁰

This conception of creativity is not limited to modern appropriation of art, remix, and sampling; even the highest examples of classical (romantic) authorship are fundamentally based on borrowing.¹²¹ Creative expression has always been a social practice, firmly embedded within the author's cultural context.¹²² It is always, to some extent, the re-expression of existing cultural works.¹²³ Learning and imitating past expression is a vital part of the creative process that requires not that works be wholly original, but that they be sufficiently "appropriate" to be understandable within a particular cultural context.¹²⁴ Increased access and lower barriers to producing and distributing expression are likely to promote a more decentralized, diverse culture.¹²⁵ Recognizing that the romantic-author myth undervalues accessing, borrowing, and re-expressing existing expression should cast serious doubt on the appropriateness of the idea-expression dichotomy in providing sufficient leeway for future creators, therefore mitigating the harmful effects of exclusivity in copyright.¹²⁶ Even without the instrumental

458-59; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 287-89 (1992).

120. See BOYLE, *supra* note 72, at 153-54; LESSIG, *supra* note 72, at 105; Arewa, *supra* note 115, at 494 (arguing that views of creativity in copyright doctrine are often at odds with "the reality of borrowing and copying in the creation of new works"); Jaszi, *supra* note 119, at 304; Tushnet, *supra* note 97, at 552 ("As Picasso (or someone else) said, 'Good artists borrow; great artists steal.'" (footnote omitted)).

121. See JACK STILLINGER, MULTIPLE AUTHORSHIP AND THE MYTH OF SOLITARY GENIUS 98 (1991); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 601-06 (2006) (describing pervasive borrowing by masters in the classical music canon); John Carlin, *Culture Ventures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 106 (1988) ("In the early twentieth century, the incorporation of existing source material directly into works of art became commonplace. . . . In literature the same basic technique underlies some of the most important works of Modernism"); Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 837-38 (2010) (describing borrowing as intrinsic to the learning, practicing, and creative process of Vincent van Gogh).

122. Cohen, *supra* note 6, at 1189.

123. See *id.* at 1176-77; Jaszi, *supra* note 45, at 459-63; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990).

124. CSÍKSZENTMIHÁLYI, *supra* note 116, at 28-30 (defining creativity as being dependent on acceptance within a domain); Fromer, *supra* note 25, at 1499 ("[A]rtists, scientists, and engineers typically—although not always—need to spend substantial amounts of time learning that which came before them to be able to create in their particular domain.").

125. See Litman, *supra* note 39, at 26.

126. See Arewa, *supra* note 115, at 491 (arguing that the reasoning behind the idea-expression dichotomy conflicts "with views of creation evident in fields such as musicology and literary criticism"); Cohen, *supra* note 6, at 1192-93; Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 81-82 (2004) (arguing that

argument, however, when creativity is a private, unrewarded, and unacknowledged act, it is a fundamental component of the good life.¹²⁷ Creativity is active enjoyment, where the user grows through personal exploration and manipulation of cultural expression.¹²⁸ This growth is beneficial and desirable for its own sake.

E. Pervasive Creativity

Finally, while access is a predicate for creativity, the interests of authors should not be separated from those of users. The romantic distinction between creative authors and passive consumers is simply false.¹²⁹ Creativity, as Professor Eben Moglen says, “flows in the network” of society.¹³⁰ Creativity is not a scarce resource whose production society needs to incentivize—rather, creativity is abundant.¹³¹ More importantly, and perhaps most overlooked by the romantic vision, creativity is ordinary; it is not easily separable from consumption, but it instead forms part of a “continuous history of everyday cultural practice.”¹³² Recognizing that creativity is

suppressing the reuse of copyright expression by users with a personal connection does not satisfy the Lockean proviso that property is only justified where it leaves “enough” for others).

127. See William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1468-72 (2010); Silbey, *supra* note 24, at 2118 (“[T]he value of the work is in the everyday, not in the rare moment of inspiration. Even work that is less successful is a source of pride and honor because it is the doing, not the value of the end-product, that is worthwhile.”). Professor Tushnet also argues that:

Creativity, including remix creativity, is part of a good life. It should be valued for itself, not tolerated. . . . [R]espect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy. Instead of monetary rewards or even artistic control of how works are transmitted to others as our highest value, we should aim for policies that maximize participation

Tushnet, *supra* note 25, at 538-39 (footnote omitted).

128. CSÍKSZENTMIHÁLYI, *supra* note 116, at 2, 5.

129. See Cohen, *supra* note 6, at 1192-93; Silbey, *supra* note 79, at 348; Tushnet, *supra* note 97, at 566-68.

130. Moglen, *supra* note 24 (“It’s an emergent property of connected human minds that they create things for one another’s pleasure and to conquer their uneasy sense of being too alone.”).

131. Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 989-90 (2004) (explaining the importance of “selection” to the copyright industries in identifying the most valuable works from an abundant pool of creativity); Madison, *supra* note 121, at 821; Tushnet, *supra* note 25, at 522-27 (explaining that “[m]any standard experiences of creativity simply do not fit into the incentive model” and describing compulsions to create: “People create as a function of their humanity[,]” or “creativity routinely *feels good*.” (emphasis added)); see YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 92-99 (2006) (discussing motivations to produce).

132. See Jean E. Burgess, *User-Created Content and Everyday Cultural Practice: Lessons From YouTube*, in *TELEVISION AS DIGITAL MEDIA* 311, 316 (James Bennett & Niki Strange eds., 2011); see also Jean E. Burgess, *Hearing Ordinary Voices: Cultural Studies, Vernacular*

pervasive, distributed, and abundant highlights a deep bias in copyright theory: the preference for professional authorship over the “substandard” content that amateurs and copiers create.¹³³ Copyright must provide a means to allocate capital for large-scale professional productions.¹³⁴ Importantly, however, there is no strict dichotomy between amateur and professional creators; creative practice is much more fluid.¹³⁵ Copyright policy should also avoid assuming that the publisher-dominated market provides an objective evaluation of the value of cultural production.¹³⁶ Indeed, if creativity is not a scarce resource, society may be able to reject the meritocratic need to engage in *a priori* valuation and instead explore other selection mechanisms that evolve out of a richer abundance of creative output.¹³⁷ It follows that if one of copyright’s aims should be to encourage creativity itself, it should do so primarily by ensuring that members of society have sufficient access to cultural works and the ability to use, learn from, and reexpress them.¹³⁸

Creativity and Digital Storytelling, 20 CONTINUUM: J. MEDIA & CULTURAL STUD. 201 (2006) (explaining “vernacular creativity”).

133. See ANDREW KEEN, *THE CULT OF THE AMATEUR* 17, 92 (2007).

134. See *Copyright as Property*, *supra* note 24, at 148.

135. See Jean Burgess & Joshua Green, *The Entrepreneurial Vlogger: Participatory Culture Beyond the Professional-Amateur Divide*, in *THE YOUTUBE READER* 89, 90 (Pelle Snickars & Patrick Vonderau eds., 2009) (arguing, in the context of user-generated content on YouTube, that it is “clear that amateur and professional media content, identities and motivations are not so easily separated”); see also Fisher III, *supra* note 127, at 1434-35.

136. See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 324-27, 337-40 (1997) (explaining that the incentives provided by copyright will often favor some forms of content over others and encourage wasteful production and competition between substitutable products); Chon, *supra* note 29, at 117-22 (critiquing modernist teleological views of progress as growth); *Lochner in Cyberspace*, *supra* note 53, at 557-58; Frischmann, *supra* note 19, at 670 (arguing that the market “demand signaling function of the price mechanism does not necessarily work well when purchasers/licensees use a resource as an input to produce public goods (e.g., information) and merit/nonmarket goods (e.g., education)”); Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 70 (1994) (critiquing the marginalization of women in the public art marketplace); cf. DAVID W. GALENSON, *CONCEPTUAL REVOLUTIONS IN TWENTIETH-CENTURY ART* 341-42 (2009) (arguing that market price can be a useful indicator of artistic merit, but that a centralized art market with strong publisher control of expression can seriously inhibit creative experimentation and progress).

137. NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 87 (2008); Hunter & Lastowka, *supra* note 131, at 998 (“Now that distributed selection is possible, *ex post* selection among works by decentralized agents seems to be a more socially beneficial alternative.”).

138. See Cohen, *supra* note 6, at 1197 (“Creativity requires breathing room, and thrives on play in the system of culture.”); Moglen, *supra* note 24 (“The resistance of the network [of cultural production] is directly proportional to the field strength of the ‘intellectual property’ system.”). This powerfully suggests that copyright entitlements should be narrow and clearly incomplete, and that the scope for individual experimentation should be generous. Additionally:

[R]espect for creativity, and for the possibility that every person has new meaning to contribute, should be at the core of our copyright policy. Instead of monetary rewards or even artistic control of how works are transmitted to others as our highest value, we should aim for policies that maximize participation.

The opposition of the two main theoretical justifications in copyright theory has led to a focus on incentives and exclusivity that has systematically understated the importance of access in the formulation of copyright policy.¹³⁹ This result is wholly backwards: while the *function* of copyright is to provide incentives, its *purpose* is to promote progress, which fundamentally requires that users have access to expression.¹⁴⁰ Cultural flow, the continuous consumption and play of expression, is itself exactly what progress is.¹⁴¹ Progress depends on cultural flow in order to ensure “that settled modes of knowing not become entrenched and calcified. . . . Stripped of its association with modernist teleologies, progress consists, simply, in that which causes knowledge systems to come under challenge and sometimes to shift.”¹⁴² The reason society encourages cultural production is so that people can consume, enjoy, learn, and reexpress cultural works.

IV. REVISITING THE ASSUMED NECESSITY OF EXCLUSIVITY

This reconstituted vision of progress highlights just how problematic the incentives-access paradigm is. Fundamentally, the incentives-access paradigm assumes that creative culture is zero sum: any benefit granted to users necessarily comes at the expense of authors and producers and, therefore, also at the expense of new creative expression.¹⁴³ In a world where creativity is abundant and ordinary, however, this assumption is highly suspect.¹⁴⁴ A view of progress that rests firmly on a virtuous cycle of cultural flow—continual access and reexpression—rejects this zero-sum view in favor of a view of culture that is substantially more interdependent.¹⁴⁵ If incentives are unnecessary for creativity and

Tushnet, *supra* note 25, at 539; *see also* Arewa, *supra* note 115, at 518-19 (discussing the conflict between copyright’s exclusivity and the “freedom to copy” in artistic practice).

139. *See* Cohen, *supra* note 6, at 1996 (arguing that copyright’s “balance” metaphor tends to prefer concrete entitlements of authors and publishers over the more abstract interests of the public).

140. PATTERSON & LINDBERG, *supra* note 97.

141. Professor Litman explains:

The reason we want to encourage authors to create and distributors to disseminate works of authorship is so that people will read the books, listen to the music, look at the art, watch the movies, play the games, build and inhabit the architecture. That’s how copyright law promotes the progress of science.

Jessica Litman, *The Copyright Revision Act of 2026*, 13 MARQ. INTELL. PROP. L. REV. 249, 259 (2009).

142. Cohen, *supra* note 6, at 1168.

143. *See* Lunney, Jr., *supra* note 11 (describing the “incentives-access paradigm”).

144. *See id.* at 485.

145. *See id.* at 569-70.

exclusivity is directly harmful, this reconstructed view of progress requires reconsideration of the continued dominance of the incentives-access paradigm. A new paradigm must acknowledge that copyright has important functions not based in efficiency. Instrumentally, copyright must provide a mechanism for allocating capital and funding the production, marketing, and distribution of expressive works.¹⁴⁶ Importantly, however, it must do so in a way that is fair. If reconsidering exclusivity means severing the link between incentives and just rewards, the new paradigm must provide a new way to address both the desert function and the public-goods-production problem. Ultimately, any viable critique of the incentives-access paradigm must articulate a new vision of both what is economically efficient and what is fair.

A. Fairness in an Exclusive Marketplace

One of the key tensions in current copyright law is that the exclusive copyright market is often unable to show that it is fair to either authors or users. It provides an effective framework to facilitate the coordination of cultural production¹⁴⁷ and a process-based method of ensuring that authors are remunerated in proportion to the value of their work. At least in theory, exclusivity allows authors to obtain a fair market price for their creative productions. In practice, however, copyright is structurally designed to encourage assignments from authors to producers and publishers.¹⁴⁸ By concentrating power and money in the hands of intermediaries, copyright allows producers to offset the flops against the hits in a highly unpredictable marketplace.¹⁴⁹ Copyright provides some certainty to publishers, but the publisher-controlled marketplace ensures fairness to authors only on average: it provides extremely high rewards to an extremely small proportion of creators who are

146. See Cohen, *supra* note 24 (“In the contemporary information society, the purpose of copyright is to enable the provision of capital and organization so that creative work may be exploited.”); Fromer, *supra* note 25, at 1483 (“It is therefore essential that organizations and individuals provide creators with support for professional success by paying for, promoting, marketing, and distributing their works.”).

147. Cohen, *supra* note 24, at 153-54; Silbey, *supra* note 24, at 2123.

148. Litman, *supra* note 16, at 11-12, 35.

149. See Landes & Posner, *supra* note 74, at 495 (“Which will be hits and which will be flops is not known in advance. . . . Copyright protection enables the record company to earn enough money on the hits to cover both their costs and the production and marketing costs of the many failures.”).

able to win a lottery for attention.¹⁵⁰ A larger group is able to find employment somewhere in the creative industries, but the majority of independent professional creators work multiple jobs to fund their personal creative work.¹⁵¹ The current system problematically concentrates rewards among a very small proportion of authors in a way that is much more closely linked to luck than to individual originality, skill, and talent.¹⁵²

There have been a number of attempts to address the public-goods problem in copyright theory without relying on an exclusive market.¹⁵³ Broadly speaking, three main approaches for evaluating the reward that creators deserve have emerged, corresponding to a conceptual split between whether creators should be remunerated in proportion to their work's consumption, their time invested in creating the work, or the value a user derives from the work.¹⁵⁴

150. See TOWSE, *supra* note 26 (arguing that copyright supports an asymmetry in market power between professional artists and publisher intermediaries and generally fails to adequately reward all but superstar artists).

151. Litman, *supra* note 16, at 10; see also STUART CUNNINGHAM ET AL., WHAT'S YOUR OTHER JOB? A CENSUS ANALYSIS OF ARTS EMPLOYMENT IN AUSTRALIA 5 (2010) ("[In Australia,] arts employment is characterised by high levels of part-time work and the existence of many sole practitioners and business operators (unlike the total workforce in which full-time work by wage-earning employees is the norm)."); MARTIN KRETSCHMER ET AL., COPYRIGHT CONTRACTS AND EARNINGS OF VISUAL CREATORS: A SURVEY OF 5,800 BRITISH DESIGNERS, FINE ARTISTS, ILLUSTRATORS AND PHOTOGRAPHERS 3 (2011), available at <http://www.cippm.org.uk/publications/DACS-Report-Final.pdf> (finding that visual artists in the UK "have precarious careers, with typical earnings well below the UK national median wage" and that "[t]he distribution of income is highly unequal"); MARTIN KRETSCHMER & PHILIP HARDWICK, AUTHORS' EARNINGS FROM COPYRIGHT AND NON-COPYRIGHT SOURCES: A SURVEY OF 25,000 BRITISH AND GERMAN WRITERS 23 (2007), available at <http://www.cippm.org.uk/publications/alcs/ACLS%20Full%20report.pdf> (finding that professional writing is risky in the UK and Germany, with median wages of approximately 64 percent and 42 percent of the national median respectively and the top 10 percent of writers earning approximately 60 percent and 41 percent of the total income, respectively); Bureau of Labor Stat., *Musicians, Singers, and Related Workers*, OCCUPATIONAL OUTLOOK HANDBOOK, 2 (2010), <http://www.principiacollege.edu/sites/default/files/ACA/musicians,%20singers,%20and%20related%20workers.pdf> ("Because many musicians find only part-time or intermittent work and experience unemployment between engagements, they often supplement their income with other types of jobs. The stress of constantly looking for work leads many musicians to accept permanent full-time jobs in other occupations while working part time as musicians.").

152. Arewa, *supra* note 26 (arguing that unpredictable lottery awards are difficult to justify compared to other contemporary creators, and particularly so "in the case of collaborative traditions such as the blues in which multiple participants over extended periods of time may have contributed to the corpus that was in the end awarded to lucky lottery winners"); Waldron, *supra* note 54, at 855 ("[F]orces of supply and demand will certainly benefit some producers (and perhaps penalize others). But they should not therefore be construed as a matter of desert.").

153. Netanel, *supra* note 2, at 27.

154. Eckersley, *supra* note 2, at 99; Waldron, *supra* note 54, at 853-55.

B. Alternative Models

The first set of models, levy-based alternate-compensation models, attempt to directly measure the use of creative works as an approximation of value.¹⁵⁵ These models propose creating a simulated market to distribute a pool of money according to consumer preferences, calculated by various algorithms and reporting schemes.¹⁵⁶ These models explicitly address the valuation function of the exclusive market by replacing it with a simulated market, and attempt to bootstrap their legitimacy from the status quo by replicating the returns authors currently receive, at least initially, while doing away with scarcity.¹⁵⁷

A second set of models relies on the nonrivalrous nature of expression and reject the assertion that society should reward creators in direct proportion to the consumption of their work. These models emphasize the relational nature of creative production, arguing that without artificial scarcity, authors would be rewarded on the basis of what *is* scarce—skill and talent in creative services, complementary goods, or the audience attention authors are able to capture.¹⁵⁸ In these models, professional authors can support themselves by creating commissioned works through advertising and product placement, cross-subsidization from valuable services like performances or speaking engagements, and sales of merchandise and other value-added goods.¹⁵⁹ Some of these models also rely on alternative methods of raising capital for cultural production, where creators can solicit funds through voluntary tips, “pay-what-you-like” schemes, and crowd-sourced financing.¹⁶⁰

A third model seeks to fulfill copyright’s desert function by measuring an author’s entitlement by reference to the value of her expression.¹⁶¹ This model, loosely based on the principles of unjust enrichment, would impose an obligation on certain types of users, particularly commercial users, to account for a portion of the benefit

155. Eckersley, *supra* note 2, at 106-07.

156. *Id.* at 109-10.

157. See FISHER III, *supra* note 2, at 208.

158. Eckersley, *supra* note 2, at 131.

159. See generally ANDERSON, *supra* note 3, at 180-89 (providing an analysis of many business models that producers can rely on in the absence of scarcity).

160. See, e.g., Kelsey & Schneier, *supra* note 4; Kylie J. Veale, *Internet Gift Economies: Voluntary Payment Schemes as Tangible Reciprocity*, FIRST MONDAY (Dec. 1, 2003), <http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1101/1021>.

161. See Gordon, *supra* note 5, at 172-73; see also Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 57 (2002) (arguing that a profit-sharing liability rule for derivative works is necessary to avoid impinging on the free speech rights of authors of derivative works).

they derive through use of creative expression.¹⁶² This model takes seriously the rights-based arguments for copyright and attempts to create a structure that allows unremunerated personal use but requires compensation for commercial uses.¹⁶³ By tying desert to derived value, this model creates a measure of worth and reward that is not directly reliant on an actual or simulated market.¹⁶⁴

V. FAIR REWARDS IN COPYRIGHT THEORY

A. *Fair Rewards*

The first avenue for research that this Article proposes is a deeper investigation of fairness in copyright theory. Each of the abundance models discussed in this Article reflects a deep theoretical divide over how society should reward creative labor. The dominant view of progress in copyright rests on the ideal of the independent, romantic genius who toils to produce a creative work embodied (fixed) in a product: the book, the record, the painting, or the compact disc, to name a few.¹⁶⁵ In order to ensure that investors have the right incentives to invest in the best work and that authors are rewarded in proportion to the worth of their works, this dominant vision of progress requires an accounting system based on access and use of distinct pieces of expression.¹⁶⁶ It follows, in this system, that only a property or liability rule based on consumption will guarantee fair rewards.¹⁶⁷ This bias explains the development of the levy-based alternate-compensation models, which are attractive because they simultaneously seek to provide authors with incentives to create and a just reward for their efforts.¹⁶⁸ These models develop complicated schemes to simulate a market that can neutrally approximate the value of creative works, thus ensuring both that the *right* work is being created¹⁶⁹ and the *best* work is being rewarded.¹⁷⁰ They rely on

162. Gordon, *supra* note 5, at 183.

163. *Id.* at 190-91.

164. *Id.* at 183.

165. *See id.* at 150.

166. *See* Litman, *supra* note 14, at 13.

167. Gordon, *supra* note 5, at 182.

168. Netanel, *supra* note 2, at 85.

169- FISHER III, *supra* note 2, at 223 (“Only if [musicians and filmmakers] know what consumers desire—and know that the sizes of their own incomes depend upon the extent to which their products satisfy those desires—will they be induced, collectively, to produce an optimal mix of music and movies.”); Netanel, *supra* note 2, at 53 (arguing that a non-commercial use levy should mirror rewards under the current copyright system and ensure, as far as possible, that “the copyright holder’s remuneration reflects the work’s social value and thus gives copyright holders an incentive to produce more works that people want”).

and fulfill the familiar conception of expression as an owned good, for which every use should be compensated, even if the good does not share the exclusivity of personal property.¹⁷¹

The second set of models rejects the proposition that society should reward authors in direct proportion to the consumption of their works.¹⁷² Because expression is nonrivalrous, these models view creative labor as a service and attempt to find a method to reliably compensate authors for their time.¹⁷³ In a way, while these models differ from the romantic ideal of creative production, they provide a closer reflection of reality for many creative laborers.¹⁷⁴ For many in the creative industries, copyright is assigned to an employer or commissioner upon its creation—creativity is a service provided for a fee.¹⁷⁵ Though creative workers are substantially more likely to sustain themselves through employment and contract work than by becoming famous enough to sell copies of works, fairness in mainstream copyright theory remains somewhat star struck.¹⁷⁶ The idealization of mass-media stars entrenches a view of the author as genius, distinct from ordinary laborers, and deserving of reward in direct proportion to her popularity.¹⁷⁷ Success, in this popular meritocratic ideal, really means fame and monopolistic returns, not a more modest but more certain fair wage.¹⁷⁸

B. A Better Model of Fairness

This deep theoretical conflict about the rewards authors are morally entitled to opens the possibility of a better model of fairness in copyright theory. Although fairness plays a significant role in

170. That work is rewarded because:

At least in the view of most Americans and Western Europeans, distributive justice requires giving each person in a collective enterprise (whether it be a project, an industry, or a society) a share of its fruits proportional to his or her contribution to the venture. Applied in this context, that belief justifies adjusting artists' rewards to match their relative contributions to consumers' enjoyment of entertainment products.

FISHER III, *supra* note 2, at 223-24.

171. *Id.* at 224.

172. *Id.*

173. KWALL, *supra* note 13, at 12.

174. FISHER III, *supra* note 2, at 233.

175. Litman, *supra* note 14, at 10-11 ("The copyright statute incorporates a decided bias in favor of distributors. . . . [T]he copyright system encourages the author to assign her copyright to a distributor in exchange for exploitation.")

176. See KWALL, *supra* note 13, at 9.

177. JIB FOWLES, STARSTRUCK: CELEBRITY PERFORMERS AND THE AMERICAN PUBLIC 261 (1992) ("[N]o others are valued as much as stars.")

178. *Id.* at 9.

copyright discourse, it is significantly underdeveloped.¹⁷⁹ Utilitarian economic approaches tend to disclaim distributional and noneconomic issues in copyright doctrine, while rights theories tend toward a conception of fairness that prioritizes authorial control without adequately considering the social interest in greater access to cultural goods.¹⁸⁰ A better model might be to consider cultural policy in terms of positive capabilities for human flourishing.¹⁸¹ Before any of the nonconsumption-based models can provide a convincing account, they must first show that fairness does not require authors to be paid for each use of their work. Shifting our conception of progress opens up new ways of looking at rewards for creative labor in this regard. If creativity is ordinary and abundant, fairness to creators might not be so prescriptive. Fairness requires, in a negative sense, that creators are not exploited—that others do not unjustly benefit from the fruits of their labor. In a positive sense, it means both that authors must be sufficiently free in their creative processes and that professional creators are able to earn a dignified living from their work.¹⁸²

Viewing creativity as abundant lends weight to a view of fair returns based on the time and skill of the professional creative laborer. This view holds true particularly if society dismantles the hard distinctions between creative amateurs and professionals, employees and solitary geniuses, and creative work and other forms of labor.¹⁸³ The fact that creativity is ordinary and abundant, however, should cause doubt that any one model will provide just outcomes in all circumstances.¹⁸⁴ The ideal of creative labor in copyright theory requires an analysis of the rewards that the paradigmatic romantic author should be entitled to. In practice, creators are rewarded in a wide variety of ways, both economic and noneconomic.¹⁸⁵ Fairness, in this conception, is pragmatic; it turns more on the ability of creators to

179. Drassinower, *supra* note 20, at 1869-70.

180. *Id.* at 1869.

181. MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 20 (2012); Cohen, *supra* note 6, at 1159-60; see AMARTYA SEN, DEVELOPMENT AS FREEDOM 227, 242 (1999); Martha C. Nussbaum, Foreword, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 25 (2007); see also Chon, *supra* note 99, at 818-19; Fisher III, *supra* note 127, at 1463-72.

182. SUNDER, *supra* note 181, at 95-100 (arguing that fairness includes the capability to participate in cultural production, recognition of authorship and vulnerability to exploitation, ability to sustain livelihood, and support of non-market-based cultural production).

183. Lunney, Jr., *supra* note 11, at 610 (arguing that copyright can distort labor markets by providing much higher rewards for the production of intangibles than other socially productive work).

184. *Id.* at 649-51.

185. Gordon, *supra* note 5, at 156-57.

thrive than it does on the particular set of entitlements we choose to support creativity.¹⁸⁶

This critical examination of fairness has so far been largely missing from various proposals for nonscarce solutions to the public-goods problem in copyright. The alternate-compensation models are explicitly rooted in a conception of fairness that mirrors the existing market, without fully considering the distributive problems that market has created.¹⁸⁷ The service-based and voluntary-payment proposals tend to focus on efficiency grounds, but they generally fail to provide a strong normative account to justify business models that reward authors based on their labor and not individual acts of access.¹⁸⁸ Professor Wendy Gordon's unjust-enrichment model provides the most critical examination of what fairness to authors might require, and she focuses on an obligation for commercial users to pay authors for the commercial benefit they derive from expression.¹⁸⁹ Gordon's model addresses the negative sense of fairness—that authors are not exploited—but does not attempt to provide a fully fledged examination of whether a commercial restitutionary obligation could adequately solve the production problem.¹⁹⁰

The first avenue for future research this Article presents is the development of a better model of fairness in the rewards that authors deserve for their work. Proponents of abundance models must further explore what fairness consists of and how it can be ensured in both negative and positive senses. In all likelihood, no one solution will be able to provide a fully satisfactory answer; in practical terms, a combination of different methods of remunerating authors will likely be needed for different circumstances. Importantly, however, any potential alternatives to exclusivity must recognize that exclusivity plays an important role both in structuring cultural production and in providing a normatively accepted means of rewarding authorship.

VI. THE RATIONAL CONSUMER AND COMMONS MODELS

Pragmatically, if fairness does rely on the ability of any given model to financially support professional authors, the service-based and voluntary-payment models face a particularly acute difficulty: without the explicit link to consumption, these models embody a

186. *Id.* at 157-58.

187. Eckersley, *supra* note 2, at 106.

188. Lunney, *supra* note 11, at 486.

189. *See* Gordon, *supra* note 5, at 183.

190. *Id.* at 184.

higher, and almost fatal, perceived risk of free riding.¹⁹¹ The meritocratic assumption that underpins the copyright market ensures, tautologically, that successful authors can exploit their works.¹⁹² When payments are delinked from consumption, it is conceivable that a widely consumed (“successful”) creative work may not provide adequate remuneration for the author.¹⁹³ Property rules, liability rules, and benefit-sharing schemes would ensure that authors are paid in some ratio to the consumption of their works, but classical economics suggests that any model that relies largely on voluntary payments will likely face prohibitive free-riding problems.

A. What Is “Success”?

As a first step, proponents of these models may need to change their conception of success. Under more abundant views of creativity, success might mean that an author has been able to express herself; has been heard by an audience the author desires to engage with; has been treated fairly; and, if necessary and desired, has been able to raise the funds to cover production costs and secure a fair return on the investment. Unless such a vision of abundant success can substantially displace the dominance of the meritocratic mass-media superstar, many service-based models will be incapable of demonstrating that they are able to reward authorship in a sufficiently fair manner.

If both creativity and success can be viewed as abundant, then the next challenge is to demonstrate that any voluntary payment model can work at all. These models must overcome a large hurdle in providing a convincing argument that consumers will pay for the production of nonexcludable goods. The consumer in copyright theory is predominantly viewed as a classical rational actor; while the consumer will pay for valuable services and value-added exclusive products, the consumer will almost certainly not support crowdfunding or tipping models of production.¹⁹⁴ It seems to make no sense, through the lens of classical economics, to think that a consumer would voluntarily pay for the creation of a work that the

191. *Id.* at 169-70.

192. *Id.*

193. *Id.* at 171.

194. Some modified crowdfunding models attempt to minimize free riding and make it more rational to invest in cultural production. *See, e.g.*, HARRISON, *supra* note 4 (suggesting that other models attempt to provide rationality by providing incentives like value-added merchandise and services whose value scales with the pledged amount, for example offering limited-edition box sets, priority access to new releases, signed first editions, production credits, offers to perform live, and so on).

consumer knows will be freely accessible if the consumer waits for others to pay first.

This assumption that copyright must coerce rational users in order to fund cultural production, like the assumption that the law must incentivize creators, is highly suspect. Professor Yochai Benkler points out that, at least where capital costs are relatively low, the increased ability of individuals to communicate and organize can allow “various provisioning problems to be structured in forms amenable to decentralized production based on social relations, rather than through markets or hierarchies.”¹⁹⁵ There is growing evidence that some creators are able to use crowdfunding and other mechanisms to leverage the increased potential audience that zero-cost online distribution provides into a large array of revenue streams not anchored in artificial scarcity.¹⁹⁶ At this stage, the question is not whether these models work, but whether they can scale upward, both in terms of quantity and size. At least for projects that do not require high levels of capital investment, it seems plausible that these types of decentralized models can scale upward to fund a substantial proportion of professional creators, providing revenues at least comparable to the low rewards typically available under the current system. Because these models end up cutting out substantial revenue

195. BENKLER, *supra* note 131, at 121.

196. 1 BUILDING AN AUSTRALASIAN COMMONS: CREATIVE COMMONS CASE STUDIES 32-34 (Rachel Cobcroft ed., 2008) (discussing Nine Inch Nails, who raised \$1.6 million for their new album overnight); Alexis Koster, *The Emerging Music Business Model: Back to the Future?* 4 J. BUS. CASE STUD. 17, 19 (2008) (discussing Radiohead, who raised about \$3 million from their album “In Rainbows”); Naomi Alderman, *ZOMBIES, RUN! Running Game and Audio Adventure for iOS/Android*, KICKSTARTER (Sept. 8, 2011) (discussing Six to Start, an independent games producer who raised over \$72,000 for a new mobile video game); Rik Falch, *D-Day Dice Board Game*, KICKSTARTER (Oct. 30, 2011), <http://www.kickstarter.com/projects/1325766284/d-day-dice-board-game> (discussing Rik Falch, who raised over \$175,000 for the publication and commercial release of a new board game); Ariel Hyatt, *In Defense of 1,000 True Fans—Ellis Paul—300 Fans = \$100,000 in Contributions The Ultimate Testament to Fan Loyalty*, MUSIC THINK TANK (Mar. 11, 2010), <http://www.musicthinktank.com/blog/in-defense-of-1000-true-fans-part-vii-ellis-paul-300-fans-10.html> (discussing Ellis Paul, who raised \$100,000 for a new album); Greg Kot, *Reinventing the Music Business: Fan Donations Pay for New Jill Sobule Album*, CHI. TRIB. (Mar. 18, 2009), http://leisureblogs.chicagotribune.com/turn_it_up/2009/03/reinventing-the-music-business-fan-donations-pay-for-new-jill-sobule-album.html (stating that some of the most high-profile crowdfunding success stories include Jill Sobule, who raised \$75,000 for a new album in two months); Yancey Strickler, *Amanda’s Million*, KICKSTARTER BLOG (June 4, 2012), <http://www.kickstarter.com/blog/amandas-million> (discussing Amanda Palmer, who raised nearly \$1.2 million for a new album). Note that at this stage, only a small proportion of artists experimenting with crowdfunding are also releasing the entire final production for free; it seems that most authors continue to seek to be able to sell copies of the work to the public after it has been produced.

previously allocated to intermediaries, consumers or creators (or both) could in fact be better off than under the current system.¹⁹⁷

B. Commons Models

Both crowdfunding and peer-production regimes provide a commons-based solution to the public-goods problem. There is a longstanding assumption that the lack of excludability in a commons leads to underinvestment from the private sector, which is primarily addressed by creating property rights or through direct public regulation.¹⁹⁸ Professor Elinor Ostrom, through a detailed analysis of a large set of case studies involving natural-resource commons, has demonstrated that in some circumstances, private actors can develop complex sets of social norms to effectively manage common-pool resources through collective action.¹⁹⁹ Crowdfunding schemes, which provide methods for private actors to share the costs of creative cultural production, are an example of a collective-action solution to the problem of coordinating investment in the production of cultural works.

Crowdfunding, as a relatively new phenomenon, at least in its modern form, has not been extensively studied. There is no real empirical validation of whether the success stories seen so far are outliers or whether these methods can scale to a sufficiently broad proportion of cultural production. There is no real evidence as to whether these models can work adequately to support emerging artists, as opposed to authors with strong established networks.²⁰⁰ There is very little evidence about whether nonscarce models work for massive cultural production, as opposed to small and midsized projects.²⁰¹ None of these models have yet provided a fully convincing

197. Litman, *supra* note 14, at 20 (“Some erosion in the position of distributors under copyright is probably both natural and desirable.”); *see also* Hunter & Lastowka, *supra* note 131, at 957 (arguing that other distributed mechanisms might emerge to fill the functions traditionally carried out by publishers).

198. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

199. OSTROM, *supra* note 12, at 24-25.

200. *See, e.g.*, Guy Morrow, *Radiohead’s Managerial Creativity*, 15 *CONVERGENCE: INT’L J. RES. INTO NEW MEDIA TECH.* 161, 174 (2009) (concluding, of Radiohead’s *In Rainbows* pay-what-you-like “publicity stunt,” that, “[w]hile Radiohead have only been able to achieve this on a massive scale because they are a product of the old system that revolved around mass marketing, the success of their approach suggests that the industry is in transition”). It should be noted, however, that emerging artists struggle under the exclusive market until they build sufficient popularity to sell copies of their works; it is not clear whether crowdsourcing is substantially more difficult in this regard. *Id.* at 167.

201. *See* Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 *SETON HALL J. SPORTS & ENT. L.* 61, 96-97 (2011) (arguing that returns from voluntary models like KickStarter may not provide sufficient returns to support artists).

solution to the coordination problem of large-scale cultural production. More research is required to identify how to coordinate and fund large-scale projects in the absence of the exclusivity that copyright provides.

The Institutional Analysis and Development (IAD) framework that Ostrom developed to analyze natural-resource commons²⁰² is a very promising approach to examining these questions. Professors Madison, Frischmann, and Strandburg have developed a preliminary modified IAD framework adapted specifically for “constructed cultural commons,” which are “environments for developing and distributing cultural and scientific knowledge through institutions that support pooling and sharing that knowledge in a managed way.”²⁰³ Because cultural commons are actually engaged in producing the common resource, the cultural commons IAD framework must be more complex in the way it considers the resource in the context of attributes and rules of the community.²⁰⁴ The IAD framework, as adapted for constructed cultural commons, provides a useful analytical model to examine crowdfunding case studies. The framework provides a model to interpret producers’ motivations to create and individuals’ decisions to fund projects, as well as the outcomes and patterns of interactions between participants. The framework requires explicit examination of the characteristics of the cultural work, the attributes of the community involved, and the rules in use at multiple levels.²⁰⁵ This approach opens up a number of useful inquiries about the way in which crowdfunding projects and other commons models operate, the factors that influence their success, and the types of projects that they can support.

The promise of commons models is that they offer an approach to funding cultural production that does not rely on the trade-offs against access (in the exclusive-rights model) or autonomy (in the public-funding models). Particularly, commons models should assist in developing a better understanding of the user in terms of both access and the ultimate funder of creative production. Much of current copyright discourse attempts to fit creative practice and cultural consumption into the model of classical economics. The fundamental assumption that underpins the current copyright reform dialectic is that a workable compromise between evolving business models and harsher penalties is needed in order to create a normatively acceptable commodity market in expression. Focusing on

202. See ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 8-9 (2005).

203. Madison et al., *supra* note 12, at 659.

204. *Id.* at 681.

205. *Id.* at 689.

making cultural output fit the commodity model, however, obscures a more fruitful inquiry: whether there are other viable models, not based on the opposition of incentives and access, but instead based on a symbiotic view of cultural production as an ongoing process and dialog between authors and consumers.

The health of the copyright ecosystem certainly depends on users internalizing its goals. As Professor Litman argues, it “requires that members of the public believe that their investment in copyright is well spent.”²⁰⁶ The mainstream copyright-reform process seeks to drive this normative acceptance by creating a more efficient “celestial jukebox”²⁰⁷—a hybrid of simple markets and volume licensing priced appropriately with reference to demand and degrees of access. Certainly, paradigmatic models like the *iTunes Music Store*, *Steam*, *NetFlix*, and *Spotify* are already driving this sort of normative support for exclusivity with business models that provide users with a better deal than traditional models. In the long term, however, achieving normative support likely requires more than better business models, simpler rules, and bigger sticks. It requires significantly improving the limited level of access that exclusive distribution models represent, and visibly reducing the highly inequitable distribution of wealth in the creative industries. It may be that the largest threat to a sustainable copyright model is not the ease of massive infringement, but the failure of the copyright industry to convince its audience that the copyright model represents a fair deal both for artists and for consumers.²⁰⁸

A better model of the user should highlight not only the benefits of abundance for learning, expression, and creative play, but should more deeply examine the motivations that users have to support the production of creative work. Certainly, users are rational consumers in many of their interactions with creative expression. But at other times, users are deeply passionate about creative work, and, given an opportunity to connect with the creative process and a reason to do so, they will willingly invest in creative production.²⁰⁹ Users—or, more accurately, fans—fundamentally want to support artists. Fans develop incredibly strong links to their favorite artists that cannot be explained by the simplistic model of the rational consumer. It is possible that a more sustainable ecosystem could directly involve fans

206. Litman, *supra* note 14, at 18.

207. PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 199-200 (1994).

208. See Litman, *supra* note 14, at 31 (“The deterioration in public support for copyright is the gravest of the dangers facing the copyright law in a digital era.”).

209. See Mike Masnick, *The Future of Music Business Models (And Those Who Are Already There)*, *TECHDIRT* (Jan. 25, 2010, 10:18 AM), <http://www.techdirt.com/articles/20091119/1634117011.shtml>.

in the funding model and, in return, could provide all users with the benefits that expressive abundance promises. The mainstream copyright reform dialectic is struggling to maintain legitimacy and normative support from users for a system rooted in artificial scarcity that seems increasingly at odds with the abundance the Internet has been able to deliver. Perhaps it is possible, even if it seems irrational, to instead create a system that provides more abundance and distributively fairer rewards in order to support an alternative social norm that users should voluntarily choose to support the artists whose work they enjoy. Either way, social norms may need to shift, but there is no guarantee that exclusivity backed by threats of punishment will be more acceptable than abundance backed by a direct relationship between creators and fans.

Not all users feel so strongly about the creators of expression they use and reuse that they will help fund its production. The question is whether there are enough fans who do care to fairly subsidize the costs of production. More accurately, the question is likely whether enough creators are able to cultivate the personal relationships with their fans necessary to convince those fans to support the creators' next project. Any model based on voluntary payments will require creators to be much more involved with their audiences (whether directly or through an agent); the creators who are successful without artificial scarcity will likely be the creators who are able to connect to their audiences and deliver a service that is sufficiently popular to justify its expense. These models much more directly put control over creative production in the hands of artists and fans, rather than requiring producers to make educated guesses about what types of content will sell. Ideally, an enhanced dialogue between artists and fans could lead to more variety in the projects that receive funding and more value created in the goods and services that creators offer to their fans. This disintermediation could provide efficiency gains by limiting the huge investments in marketing and large rents required to support the massively inefficient hits and misses of the mass-media model.²¹⁰ At the very least, society should critically examine these voluntary payment- and service-based models. It is no longer clear that users will rationally refuse to support the production of works they enjoy. It is possible that new models may

210. See Bambauer, *supra* note 26, at 377 (describing the role of intermediaries in spreading risk in copyright markets); Hunter & Lastowka, *supra* note 131, at 991 (“[T]he majority of films, books, and songs are commercial flops.”); Patryk Galuszka, *Netlabels and Democratization of the Recording Industry*, FIRST MONDAY (July 2, 2012), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/3770/3278>.

arise that create a sustainable cultural environment based on real symbiotic relationships between creators and users.

C. A Better Compensation Model

Systems based on voluntary payments and crowdfunding, however, are unlikely to be able to provide a complete and fair solution to copyright's production problem. A better model of creativity and consumption in copyright may reveal some distinctions between categories of both users and works that are not amenable to disintermediated-funding models. As a first pass, it will probably be necessary to account at least for commercial users for whom consumption and reuse will likely be predominantly rational. Firms that depend on creative expression not for its intrinsic value, but for its commercial benefits, might be significantly more likely to free ride off of existing expression, and there is a strong argument that unrestrained commercial free riding could amount to harmful exploitation.²¹¹ In such circumstances, some level of exclusivity or liability-rule obligation might remain necessary to deal with commercial users.²¹² There may also be forms of expression that are basically fungible, like stock photography, whose creators are generally unable to develop sustainable relationships with audiences in order to fund a sufficient amount of cultural production. For these forms, either advertiser-funded production or levy-based alternate-compensation models might represent the best alternatives to an exclusive marketplace. Another set of creative practices could be too marginal to find stable support but too valuable to submit to the vagaries of the market, and for these, society could choose to use public grant programs to fund their production.²¹³ Many such cultural forms, like symphony or opera, are extremely expensive and currently depend to a large degree on public or philanthropic support.

The critical point is that there is no reason to adopt a one-size-fits-all model that assumes that large-scale commercial

211. See, e.g., SUNDER, *supra* note 181, at 97-98 (arguing that a "fair" culture must support livelihood and "recogniz[e] vulnerability to exploitation").

212. Gordon, *supra* note 41, at 1566; see also Litman, *supra* note 14, at 43-44 (suggesting limiting copyright to an exclusive commercial right, and arguing that "the difference between commercial exploitation and noncommercial enjoyment captures a distinction that is fundamental to our understanding of how the copyright system works").

213. Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 358-59 (1996) (arguing that while public support and private patronage can have detrimental effects on freedom of speech, "the democratic character of public discourse may well depend upon some measure of state subsidy and regulation to disseminate information and give a voice to persons and views that might otherwise receive insufficient attention in an unregulated media market").

producers share the same motivations as artistically motivated authors, or that fans will voluntarily pay for access no more than will rational investors. The second avenue for future research that this Article presents is the need for better empirical examination of the extent to which nonscarce models are workable and scalable. This research should try to develop a substantially better understanding of the types of situations and projects that are amenable to crowdfunding and other nonscarce business models; the characteristics and experiences of authors with successful and unsuccessful experiments; and the complex web of factors that influence users to support or not support various projects.

VII. NONCOMMERCIAL ASPECTS OF FAIRNESS

A. *Traditional Conceptions of Authorial Harm*

Because mainstream copyright theory has largely obscured fairness, more exploration into the other aspects of fairness that exclusivity currently supports is necessary.²¹⁴ Again, most attempts to address the public-goods-production problem from an economic perspective fail to take into account the ways in which exclusivity protects nonpecuniary interests of authors. These approaches therefore are vulnerable to criticisms that they will lead to exploitation of authors, even if they adequately address the incentives-reward problem. Any attempt to limit the exclusivity of copyright must seriously consider whether and how to fill the gap that would be left in terms of authorial control over expression.²¹⁵

There are hard questions about authorial control and, in particular, integrity, that do not have answers rooted in efficiency. Commercial exploitation is an important example; an efficiency-based approach to creative production would suggest that once an author has been paid for her creative services, no further permission or payment is necessary when her work is reused. But this does not fully answer the question of fairness or harm. It is plausible that unwanted commodification of creative expression could harm the author's personality interest in controlling the integrity of the author's work,²¹⁶

214. See Gordon, *supra* note 126, at 88.

215. KAPLAN, *supra* note 24, at 120 (“[T]he humane development of the ‘moral rights’ of authors to prevent abuses in the exploitation of their creations . . . will indeed be especially important if copyright itself recedes as a significant control.”); *Inspiration and Innovation*, *supra* note 25, at 1973 (“A legal system committed to authorial morality must be committed to recognizing authors’ dignity interests.”).

216. See, for example, the French case *Sté Gaumont and Luc Besson v Sté Publicis Conseil and Sté Française du Radiotéléphone*, Cour d’appel [CA] [regional court of appeal] Paris,

or that an author could feel that a commercial user who exploits a work to financial advantage owes the author some duty to account.²¹⁷

The interests that Continental moral rights protect pose similar dilemmas. It seems simple to suggest that authors have a serious enough interest in integrity in their works that society should grant them a presumptive power to prevent premature or unwanted publication.²¹⁸ Other questions are more difficult. For example, the extent to which authors should have a right to prevent derogatory treatments of their works is an important and unresolved tension. This tension is most evident in the conflict between Anglo-American copyright law and Continental copyright law, which explicitly provides moral rights protection.²¹⁹

Mainstream copyright theory struggles with a dual view of authorial control. Copyright's explicit utilitarian overtures suggest that copyright is not at all concerned with authors' rights, and that moral rights have no major place in US copyright doctrine.²²⁰ At the same time, however, exclusivity provides authors with an extremely powerful ability to control the use of their expression.²²¹ In this way, not only does copyright's exclusivity support a liberal solution to the question of value, it supports a liberal solution to the subjectivity of potential harm. Copyright law provides authors with a property-based contractual method to structure their own relations in a way that maximizes their autonomy and avoids forcing the state to

4 ch., Sep. 8 2004, D. 2004, No. 35, 2574, obs. J. Daleau (Fr.), where the court held that Vodafone's use of the character "Leeloo" from Luc Besson's film *The Fifth Element* in an advertising campaign was a distortion prejudicial to Besson's moral right of integrity. See Elizabeth Adeney, *Of Personalities and Personae: A French Victory for Film Producers and Authors*, 16 AUSTL. INTELL. PROP. J. 109, 118 (2005) ("The character had been denatured in its spirit by its use in the commercial environment of Vodafone Live advertising.")

217. See Rubinfeld, *supra* note 161, at 56-57.

218. Fair use law already recognizes that releasing unpublished material without the consent of the author can raise serious concerns, although it is not determinative. See 17 U.S.C. § 107 (2006); *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987); Pierre N. Leval, *Toward a Fair Use Standard*, Commentary, 103 HARV. L. REV. 1105, 1118 (1990). In mainstream copyright theory, this intuition is supported both by Lockean claims on the basis of a right to refuse to labor and personality claims on the basis of an autonomy interest in controlling the release of a personal work. See McGowan, *supra* note 23, at 22.

219. See Kwall, *supra* note 25, at 1972-73.

220. See *id.* at 1983.

221. See Piotraut, *supra* note 33, at 597-98 (arguing that US copyright law adequately protects moral rights through the exclusive rights and other common law doctrines); William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 537 (1955) ("Without using the label 'moral right,' or designations of the components of the moral right, the courts in the United States arrive at much the same results as do European courts. Substantially the same personal rights are upheld, although often under different principles."); cf. Roberta R. Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2-3 (1985) (arguing that while authors' moral rights are protected under a variety of doctrines in the United States, protection is not as comprehensive or coherent as under an explicit moral rights regime).

determine difficult questions of what types of actions should be considered harmful.²²²

B. Broader Conceptions of Authorial Harm

More research to investigate the harms that can result from a lack of strong exclusive rights could help inform the development of abundance models. The conjunction of economic and rights theories in requiring exclusivity supports a general presumption that unauthorized access is harmful, unless specifically excused. This proposition is, as Professor Wendy Gordon points out, “drastically overbroad”;²²³ a view of culture as interdependent requires recognizing that “the potential free riders—the users, copyists, and adapters—are not mere parasites.”²²⁴ A better conception of harm would instead consider the legitimate interests of authors within a social context.²²⁵ In a world where creativity is abundant, expression is nonrivalrous, and authors create more out of desire and compulsion than a rational decision to engage in difficult labor, it might not make sense to view harm in the acts of sharing, consumption, learning, and creative play, at least in relation to works made publicly available.

A more particularized view of harm might instead focus on the acts of users of creative expression—whether the user releases it before the creator is ready, fails to give proper attribution, subjects it to derogatory treatment, or unfairly commercially exploits it. Little consensus exists in the United States as to what degree of control authors should be entitled to, but without this consensus, critiques of exclusivity that focus only on the economic public-goods problem will likely continue to struggle to find normative support.

Fairness requires that creators are still able to flourish and thrive, and this probably entails some sort of control over expression, but it is by no means clear that a monolithic property right is necessarily the best method to protect authorial interests. Interestingly, these debates have been playing out in miniature over the last two decades in the free-software and free-culture communities, where participants have been shaping contractual solutions to lessen exclusivity but protect certain personal and economic authorial interests. Many different licenses attempt to strike subtly different bargains, and the normative superiority of each is often hotly contested. The most permissive licenses allow unlimited

222. See Bambauer, *supra* note 26, at 403.

223. Gordon, *supra* note 5, at 167.

224. *Id.* at 157.

225. Himma, *supra* note 56, at 1159.

distribution and modification and mainly impose a requirement of attribution.²²⁶ Some licenses include clauses designed to protect authorial integrity by forbidding all modifications.²²⁷ A particularly popular clause in the Creative Commons licenses prohibits all commercial use, requiring commercial users to seek explicit permission, and potentially pay appropriate license fees.²²⁸ Free software advocates—who place significant value on the ability to modify and use without discrimination—view both of these restrictions with particular hostility.²²⁹ Many users of both free-software licenses and free-culture licenses seek to protect themselves from unfair exploitation in another way: by requiring any modifications to their original work to be released back to the public under similar terms.²³⁰ These “copyleft” licenses effectively restrict commercial and noncommercial users from free riding and appropriating the benefits of the work of others, while still allowing nondiscriminatory use by those willing to contribute to the communal efforts.

The proliferation of different types of open licenses highlights the diversity of ways in which authors view potential harm to their works. Each of these different licenses reflects a particular conception of harm, and it is only by building on copyright’s exclusive rights that the licenses are able to strike a balance between access and integrity with which the author is comfortable.²³¹ The fierceness of the debate

226. See, e.g., *Attribution 3.0 Unported (CC BY 3.0)*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by/3.0> (last visited Feb. 9, 2012); *The BSD 2-Clause License*, OPEN SOURCE INITIATIVE, <http://www.opensource.org/licenses/bsd-license.php> (last visited Feb. 9, 2012); *The MIT License (MIT)*, OPEN SOURCE INITIATIVE, <http://www.opensource.org/licenses/mit-license.html> (last visited Feb. 9, 2012).

227. See, e.g., *Attribution-NoDerivs 3.0 Unported (CC BY-ND 3.0)*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-nd/3.0> (last visited Feb. 9, 2012).

228. See *License Statistics*, CREATIVE COMMONS WIKI, http://wiki.creativecommons.org/Metrics/License_statistics (last visited Feb. 9, 2012) (estimating that the Creative Commons Non-Commercial clause is used on up to two-thirds of creative works).

229. See Admin, *Stop the Inclusion of Proprietary Licenses in Creative Commons 4.0*, FREECULTURE.ORG (Aug. 27, 2012) <http://freeculture.org/blog/2012/08/27/stop-the-inclusion-of-proprietary-licenses-in-creative-commons-4-0>; see also *Debian Social Contract*, DEBIAN (Oct. 2, 2012, 11:25 PM), http://www.debian.org/social_contract (explaining the ten principles of free software that the Debian GNU/Linux operating system distribution adheres to); *What Is Free Software?*, GNU OPERATING SYS. (July 1, 2012, 10:12 AM), <http://www.gnu.org/philosophy/freesw.html> (outlining the four freedoms espoused by the Free Software Foundation).

230. The most common copyleft licenses are the *GNU General Public License, Version 2*, GNU OPERATING SYS. (Oct. 23, 2012, 2:20 PM), <http://www.gnu.org/licenses/gpl-2.0.html>, and the attribution share-alike license of the creative commons, *Attribution-ShareAlike 3.0 United States (CC BY-SA 3.0)*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-sa/3.0/us> (last visited Feb. 9, 2012).

231. See Brian F. Fitzgerald & Nicolas Suzor, *Legal Issues for the Use of Free and Open Source Software in Government*, 29 MELB. U. L. REV. 412, 414 (2005).

in free-software and free-culture communities about the acceptability of different restrictions indicates that it may be particularly difficult to identify a core set of authorial interests that ought to be universally protected or protectable in the absence of exclusivity in copyright generally. The liberal approach that copyright currently takes, by making exclusivity the default and allowing ad hoc contractual variations, certainly has its advantages.

The final avenue for research that this Article raises is the need for a better understanding of authorial control and harm. In particular, copyright theory needs to address the normative question of whether authors' apprehensions of harm are entirely heterogeneous, or whether the law can develop common understandings of potential harm in such a way that harm can be minimized without fully exclusive rights. It may be possible to achieve a desirable result by following a Continental moral rights approach and establishing personal rights that protect against specific forms of harm. Such rights could grant various entitlements, potentially including requirements of attribution, protection of integrity, and benefit sharing or veto rights for commercial uses. Whether any such set of entitlements could be comprehensive, acceptable, and still provide for a substantial degree of free access, however, remains an unanswered question. More research is needed to examine what forms of noneconomic harm authors should have a right to object to. So far, Anglo-American copyright theory has not needed to confront this question directly. Without some consensus about the personal interests copyright should protect, however, the highly subjective nature of potential harm is likely to pose fatal problems for abundance models.

VIII. CONCLUSION

The opposition of utilitarian and rights theories in copyright firmly entrenches the incentives-access paradigm. Together, these approaches dominate mainstream theoretical copyright discourse, reinforcing the continued necessity of exclusivity. Too much of the copyright-reform debate is bound up in a search for ideological purity or an empirical quest to find the appropriate balance between incentives and access.²³² Thinking of copyright as a necessary balance between the rights of authors and the interests of the public precludes some more fundamental critiques that aim to investigate whether society can realize the goals of the copyright system without the most harmful effects of exclusivity. Instead, we need a critical theory to

232. Drassinower, *supra* note 20, at 1873.

escape the perpetual opposition of utilitarian-economic and authors-rights approaches.²³³

A view of progress that foregrounds access to expression, cultural flow, and the ordinariness of creativity opens up the possibility that culture is not zero sum—that increases in access do not have to come at the expense of the creation of new works. Through this reconstituted view of progress, a new model can identify the specific functions that the exclusive rights play and the harms they try to avoid. Critically questioning the continued necessity of exclusivity requires disentangling and directly addressing at least three distinct issues that have long been bound up in copyright's differing ideological justifications. First, a better model of what fairness requires in terms of remuneration and reward for creative labor is necessary. This point is crucial to any discussion of the normative desirability of alternate-compensation schemes and nonexclusive funding models for the creative industries. Second, copyright theorists should develop a better empirical understanding of whether commons models and other pragmatic solutions to the public goods problem can convincingly provide adequate support to professional creators to enable the continued production of a sufficiently diverse culture. Third, it is necessary to identify when, in what contexts, and to what extent exclusivity may be required to fairly protect the nonpecuniary interests of authors. Models of abundance in cultural expression provide great promise, but until proponents can address each of these issues, any critique of exclusivity is likely to fail.

233. Anne Barron, *Copyright Infringement, 'Free-Riding' and the Lifeworld*, in *COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE* 93, 127 (Lionel Bently et al. eds., 2008) (“[T]he hegemony of economic analysis within scholarly commentary on copyright law can only be effectively challenged from the perspective of a critical theory of society.”).