

**DEFEATING THE ECONOMIC THEORY OF  
COPYRIGHT: HOW THE NATURAL RIGHT TO  
SEEK KNOWLEDGE IS THE ONLY THEORY  
ABLE TO EXPLAIN THE ENTIRETY OF  
COPYRIGHT’S BALANCE**

**MICHELLE M. WU\***

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\* Retired law library director and professor of law.

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## INTRODUCTION

The practice of copyright was once perfectly balanced, reflecting the intent of the Founders to create an environment where new works are constantly made available to the public. The author would create a work before a user would buy a copy of it and be free to use it. Neither party had any right to interfere with the other's activities. All of that changed with newer technologies, exposing the flaws both in our laws and the applications of them.

Copyright laws, on their face, prohibit many reasonable uses of copyrighted works by end users, such as making mixed tapes, converting LPs to MP3s, and playing music at a piano recital. However, for the better part of two centuries, the end uses of copyrighted works were treated by the public, Congress, and courts as free from copyright's purview. There was no need to amend the broad rights as described in § 106 because, in practice, they were applied primarily against entities that were believed to have used someone else's work for profit without paying for that use. On the few occasions where a lawsuit was filed and the defendant felt that their use was the type which copyright was not intended to control, they would assert a claim in equity, and the judges would make decisions on a case-by-case basis.<sup>1</sup> In that manner, the early body of fair use law developed.

When Congress passed the Copyright Act of 1976, it codified fair use; a doctrine formerly undefined and

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<sup>1</sup> See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

subject to no specific rules.<sup>2</sup> In doing so, lawmakers took care to describe it as “an equitable rule of reason . . .” where “no generally applicable definition is possible . . .”<sup>3</sup> To avoid foreseeable and unintentional narrowing of fair use in application, they went further to explicitly deny any intention to draw boundaries: “The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”<sup>4</sup>

Despite this intent, fair use is now analyzed primarily as a matter of law, not equity. The four factors listed in the statute drive every judicial opinion to the near exclusion of all others.<sup>5</sup> The test articulated by the statute, and developed through case law, leans heavily on market harm and lends itself well to an economic analysis.<sup>6</sup> The consequence is that the unspoken safe harbors of copyright use are no longer as safe.

The economic theory of copyright carried relatively few costs when infringement litigation was primarily between commercial actors and about for-profit uses. However, as newer technologies emerged, enforcement has expanded to include individuals and non-profit entities for non-profit uses that were once considered immune from the copyright owner’s control.<sup>7</sup> Some of these attacks are indirect, such as the suit against Sony for the Betamax,

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<sup>2</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976); 17 U.S.C. § 107.

<sup>3</sup> H.R. REP. NO. 94-1476, at 65 (1976).

<sup>4</sup> *Id.* at 66.

<sup>5</sup> See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 UNIV. PA. L. REV. 549, 549–50 (2008); see generally Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); see also Matthew Sag, *Predicting Fair Use*, 71 OHIO ST. L.J. 47 (2012).

<sup>6</sup> See Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990).

<sup>7</sup> See WILLIAM F. PATRY, *HOW TO FIX COPYRIGHT* 39.

which sought to prevent the use of technology by individuals for recording broadcast programs.<sup>8</sup> Though the technology was commercial, the use was by individuals who had already “paid” for the content they were viewing or taping.<sup>9</sup> Other attacks were direct, such as the current suit against Internet Archive—an effort by publishers to dictate how a library lends the content that it has legitimately acquired to its users.<sup>10</sup> In these types of cases, if the courts were to side with copyright owners, owners would gain the right to interfere with reasonable consumption and use of information.

The stakes in infringement litigation are therefore higher today than they have been in years past, potentially resulting in real harm to all. Any continued insistence on viewing copyright as purely a matter of positive law and economics only increases the jeopardy, as the value of copyright for society has little to do with financial interests.<sup>11</sup> The balance of copyright has meaning beyond the laws in which any nation has embodied it, and for that reason, current attempts to exploit copyright in opposition to those principles should be challenged. This paper will put forth the argument that in these cases, there remains a separate, equitable claim for the use of knowledge that survives despite fair use’s codification in § 107.

Part I shows how courts openly acknowledge copyright’s equitable purpose at the start of their opinions,

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<sup>8</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

<sup>9</sup> I use the word “paid” liberally, encompassing programs that were made available to the public by broadcasters without fees, as well as those available through paid cable.

<sup>10</sup> *See Hachette v. Internet Archive*, No. 20-CV-04160(JGK), 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023) (claiming against library lending is only one claim in the suit).

<sup>11</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also* Ellen Mueller, *History and Purpose of Copyright*, in *REMIXING AND DRAWING* (Routledge ed., 2018).

how they nonetheless find themselves reverting to an economic analysis, and why an economic theory of copyright is fundamentally flawed. Part II describes three natural law theories (labor, personality, and occupancy), explains why the same flaw has stopped them from replacing the economic theory, and introduces a new natural law basis (knowledge) that explains the entire balance of copyright in a way that other theories have failed to do. Part III provides a quick summary of how technology has changed copyright practice, allowing it to be wielded against the public and the authors it was designed to serve. Finally, Part IV sets out a strategy to raise equitable claims, as well as statutory claims where reasonable public use is challenged.

## I. THE BLIND SPOTS IN THE ECONOMIC THEORY OF COPYRIGHT

Introductory language in copyright decisions, particularly those involving fair use defenses, commonly nod to its equitable purpose: societal benefit. An example is *Aiken*, whose court stated that “[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”<sup>12</sup> However, that seemingly broad understanding inevitably falls by the wayside when it comes to the actual analysis. Any consideration of equity is confined to copyright’s exceptions, most notably fair use.<sup>13</sup> Even there, courts typically focus only on statutory language and base their reasoning on economic principles.<sup>14</sup>

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<sup>12</sup> *Aiken*, 422 U.S. at 156.

<sup>13</sup> Beebe, *supra* note 5; Netanel, *supra* note 5.

<sup>14</sup> Beebe, *supra* note 5 (statutory language); Netanel, *supra* note 5 (statutory language); Leval, *supra* note 6 at 1107 (economic principles); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (economic principles).

When viewed through the lens of commerce, the fair use factors, as chosen by Congress and developed by the courts' shorthand, make a great deal of sense. Of the four factors courts must consider, two have commercial components, and they happen to be the ones that empiricists have shown to predict case outcomes.<sup>15</sup> Where a use has a commercial purpose, factor one (purpose and character of use) weighs against fair use, and where there is market harm to a work, factor four (effect of the use upon the potential market for or value of the copyrighted work) will also weigh against fair use.<sup>16</sup> Generally, market harm (a monetary measure) is the most influential factor, where harm appears to be presumed if the new use substitutes for the original work.<sup>17</sup> A 2008 empirical study found a 97.3% correlation between a finding of market harm and the outcome of the case.<sup>18</sup>

Courts have developed exceptions to these general rules, and those are also easily explained in economic terms. For example, transformative uses can be fair despite a commercial purpose because transformation (1) creates opportunity for additional commerce that would not have existed but for the actions of a new actor (2) while not harming the market for the original work.<sup>19</sup> In contrast, courts view uses that create copies of a work that can substitute for the original as suspect because this offers no new economic benefit to society, and the copier seemingly profits from another person's labor without independent contribution.

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<sup>15</sup> Beebe, *supra* note 5; Netanel, *supra* note 5.

<sup>16</sup> *Id.*

<sup>17</sup> Leval, *supra* note 6, at 1125.

<sup>18</sup> Beebe, *supra* note 5, at 617.

<sup>19</sup> Leval, *supra* note 6, at 1111. Instead of the word commercial, Leval says a transformative use must be productive, even though his analysis is still based on market harm. *Id.*

The economic approach to copyright is reinforced by case law, without recognition that the expense of a lawsuit, as well as the economic incentives in statutory damages, will logically bring before the court more economic issues than non-economic ones.<sup>20</sup> The average costs of copyright litigation today (not including appeal) are \$161K for cases worth up to \$1M, \$882K for cases worth \$1M–\$10M; \$1.125M for cases worth \$10M–\$25M, and \$2.501M for cases worth more than \$25M.<sup>21</sup>

Non-economic claims are not absent in copyright, but (1) few public rights are explicitly defined, and even where they are defined (e.g., §§ 108, 109), they are treated as defenses, not freestanding rights, (2) few individuals or non-commercial entities who have non-economic claims have the resources to defend themselves when accused of infringement, and (3) copyright's remedies focus on the author and rely heavily on monetary rewards.<sup>22</sup> It is not by chance that early fair use cases—the ones on which the factors in § 107 are based—were brought by authors or by entities who had paid for the right to use a work commercially against those who had not paid for that right (and who were believed to be using the work for profit). The parties on both sides had financial reasons to engage in a legal battle.

Copyright laws and practices have therefore been shaped by cases that emphasize the economic aspects of

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<sup>20</sup> 17 U.S.C. § 504.

<sup>21</sup> AM. INTEL. PROP. LAW ASSOC., 2021 REPORT OF THE ECONOMIC SURVEY, I-208–I-214 (2021) (reporting on costs inclusive of discovery, motions, and claim construction).

<sup>22</sup> There are equitable remedies included in Chapter 5 of Title 17 of the U.S.C., such as injunctions, impoundment, and the destruction of infringing copies, but it is not by chance that cease-and-desist letters emphasize the risk to an alleged infringer of high monetary penalties. For an example see W. Michael Milom et al., *Copyright infringement "cease and desist" letter*, 13 TENN. PRAC., LEGAL FORMS REAL ESTATE LEASES, § 12:17.

copyright, blind to other purposes. In those cases, one of the two foundational interests in copyright (i.e., the public) consistently had no independent representation.<sup>23</sup> Having developed under such circumstances, it is unsurprising that our laws poorly represent the whole of non-financial interests in copyright; they drew from cases where those interests were either invisible or narrow in scope.

To be clear, private profit was (and is) certainly a motivation for copyright, but it logically cannot be the only, or even the primary, motivation for government protection under the United States' copyright structure. A purely economic basis fails to explain why copyright protects works with no commercial purpose (e.g., diary entries, personal photos) and excuses non-infringing uses that neither educate nor stimulate productive activity (e.g., recording songs from the radio).<sup>24</sup> The number of works and uses falling into these categories wildly outstrip the ones that have a financial purpose or use.<sup>25</sup>

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<sup>23</sup> Courts may say that they themselves represented these interests, but even judges have their own cognitive biases shaped by their experiences. Many judges will not have experienced, nor researched, the full range of not-for-profit activities involving copyright and therefore will be unable to do it justice.

<sup>24</sup> Leval dismisses the uses under the “doctrine of de minimis non curat lex--the law does not concern itself with trifles . . .”, Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 *UCLA L. REV.* 1449, 1458 (1997), but that approach is insupportable in a world where non-actionable infringement widely outstrips those in which a legal claim is recognized. A doctrine makes no sense if violations of it are as acceptable as adherence to it.

<sup>25</sup> For example, in 2022, it was estimated that every minute, 66K photos were shared on Instagram, 500 hours of video were uploaded to YouTube, 527,760 photos were shared on Snapchat, and 231.4M email messages were sent. *Data Never Sleeps 10.0*, DOMO <https://www.domo.com/data-never-sleeps#> [<https://perma.cc/E9YQ-MWBC>] (last visited Mar. 29, 2023) [hereinafter DOMO]. Many of these activities not only create new copyright works, but also qualify as common law fair use of copyrighted works (e.g., a fan video that incorporates pre-existing music or program footage).



This is the reason why infringement cases, once commercial actors started targeting not-for-profit uses, became so fraught. An economic analysis works best on for-profit use. In contrast, the law has ignored everyday infringements, such as writing fan fiction or capturing someone's artwork in the background of a picture, since copyright's inception.<sup>26</sup> These types of uses are more honored in the breach of copyright than in adherence to it, and courts have historically had no role in judging them. The economic theory cannot explain this long-standing inconsistency in practice.

## II. THE EQUITABLE UNDERPINNINGS OF COPYRIGHT

Copyright statutes are structured around the author as well as the rights to which copyright entitles them. However, copyright has never been solely about authors' rights; it includes implicit rights for the public contained in the purpose of copyright to promote "the progress of science and useful arts."<sup>27</sup> Courts, Congress, and scholars alike acknowledge this public purpose, and in fact, consistently name it as the only reason for copyright to exist.<sup>28</sup>

These public rights justify tolerance of the incidental and not-for-profit examples of infringement described above and serve as the foundation for statutory exceptions to copyright, such as first sale, fair use, and library use. If these natural rights did not exist, the whole of copyright—not just the law, but its everyday application—would make very little sense. So, how do we pinpoint which natural law justifies copyright?

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<sup>26</sup> Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433, 438 (2003); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and A New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 652 (1997).

<sup>27</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>28</sup> See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

We can start with the debates surrounding the first appearance of copyright language in American government documents. There, authors like Joel Barlow greatly influenced thought, explaining why authors might be reluctant to publish in the absence of copyright protection:

Indeed we are not to expect to see any works of considerable magnitude, (which must always be works of time & labor), offered to the Public till such security be given. There is now a Gentleman in Massachusetts who has written an Epic Poem, entitled “The Conquest of Canaan”, a work of great merit, & will certainly be an honor to his country. It has lain by him, finished, these six years, without seeing the light; because the Author cannot risque the expences [sic] of the publication, sensible that some ungenerous Printer will immediately sieze [sic] upon his labors, by making a mean & cheap improvision, in order to undersell the Author & defraud him of his property.<sup>29</sup>

Barlow’s most convincing argument was not that an author had a right to profit from their work, but rather that they should have a right to prevent others from using it for profit without paying them. In other words, copyright was necessary to combat unjust enrichment by publishers who were pirating authors’ works for financial gain.<sup>30</sup> This

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<sup>29</sup> Letter from Joel Barlow to the Cont’l Cong. (1783), PRIMARY SOURCES ON COPYRIGHT (1450-1900) (The National Archives, Ctr. for Legis. Archives: Papers of the Cont’l Cong., RG 360, 4: 369-373 (No. 78)), [www.copyrighthistory.org](https://www.copyrighthistory.org) [<https://perma.cc/K93N-G5AE>] (last visited Nov. 2, 2023).

<sup>30</sup> *Chapter One Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2079 (2020) (citing DIGEST OF JUSTINIAN 12.6.14) (“[n]atural justice requires that no-one should be enriched at the expense of another.”); HALL ET AL., *A HISTORY OF THE BOOK IN AMERICA: VOLUME 1: THE COLONIAL BOOK IN THE ATLANTIC WORLD 377–410* (Hugh Amory & David D. Hall eds., 2007) (describing reader interests and types of materials in demand); ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN* (2013) (detailing the history of piracy in the early American history).

argument persuaded the Continental Congress to issue a recommendation to states to “secure to the authors or publishers of any new books . . . the copyright of such books for a certain time . . . .”<sup>31</sup> All states but Delaware followed the recommendation—though most reserved the right only to authors<sup>32</sup>—and some explicitly called out unfair business practices by publishers as the motivation for the law (e.g., Maryland).<sup>33</sup> The vast majority named the public purpose of copyright as the reason for the law. That same public purpose was incorporated into the Intellectual Property Clause.<sup>34</sup>

This same equitable issue reappears with every major piece of copyright legislation. This is evidenced in the hearings surrounding the 1909 Copyright Act, where Samuel Clemens (aka Mark Twain) advanced his support for an extended copyright term, remarking that:

The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it for that term has had the profit of it long enough, and therefore the Government takes the property, which does not belong to it, and generously gives it to the eighty-eight millions. That is the idea. If it did that, that would be one thing. But it does not do anything of the kind. It merely takes the author's

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<sup>31</sup> JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 24:326.

<sup>32</sup> PHILLIP WITTENBERG, *THE PROTECTION OF LITERARY PROPERTY* 33 (The Writer Inc. rev. ed., 1978). The only exceptions were Pennsylvania and Virginia, who also extended the right to those who bought the rights to books from authors. Pennsylvania Copyright Statute, Pennsylvania (1784), PRIMARY SOURCES ON COPYRIGHT (1450-1900) , [www.copyrighthistory.org \[https://perma.cc/G68N-K5GP\]](https://perma.cc/G68N-K5GP) (last visited Nov. 2, 2023); Virginia Copyright Statute, Virginia (1785), PRIMARY SOURCES ON COPYRIGHT (1450-1900), [www.copyrighthistory.org \[https://perma.cc/4DME-M5TD\]](https://perma.cc/4DME-M5TD) (last visited Nov. 2, 2023).

<sup>33</sup> Maryland Copyright Statute, Maryland (1783), PRIMARY SOURCES ON COPYRIGHT (1450-1900), [www.copyrighthistory.org \[https://perma.cc/E5UY-NYG2\]](https://perma.cc/E5UY-NYG2) (last visited Nov. 2, 2023).

<sup>34</sup> U.S. CONST. art. I, § 8, cl. 8.

property, merely takes from his children the bread and profit of that book, and gives the publisher double profit. The publisher and some of his confederates who are in the conspiracy rear families in affluence, and they continue the enjoyment of these ill-gotten gains generation after generation [sic] They live forever, the publishers do.<sup>35</sup>

Clemens believed in the right of an author to profit from their work. However, the commentary above shows that this claim was seated in a sense of injustice where people other than the author could continue to financially benefit from a work long after the author had lost their own ability to do so. In contrast, he implies that if the government did what it claimed to do—to give copyrighted works to the public after the author had profited from it for some years—this would be justifiable (even if not particularly welcomed by the author).

In short, the inability to stop piracy was a barrier to getting books to the public, and that **public** interest is what gave state and federal governments justification to make copyright a matter of positive law instead of leaving ownership and use to be decided at common law.<sup>36</sup>

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<sup>35</sup> *To Amend and Consolidate the Acts Respecting Copyright: Hearing on S. 6330 and H.R. 19853 Before the S. Comm. on Patents and the H. Comm. on Patents, conjointly, 59th Cong. 116–7 (1906) (testimony of Samuel L. Clemens).*

<sup>36</sup> In a popular estate commonwealth, which is what a democratic republic is, a sovereign power acts for the common concern. JEAN BODIN, *THE SIX BOOKES OF A COMMON-WEALE* 1 (1606) (trans. Richard Knolles). In a country where the Constitution claims to “promote the general welfare,” private profit logically could not be the basis for government intervention in the matter of copyright. After all, authors who held any chance of making money from their works were a very small proportion of the population. Making money from books was therefore not a common concern, but access to knowledge was, as was shown by the voraciousness of the reading public. ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN* 23–24 (Oxford Univ. Press ed., 2013).

Copyright's purpose is the spread of knowledge, and author control was the means through which lawmakers hoped to achieve that purpose. The granting of control over their works was not about advancing private profit but about fairness; authors should be entitled to stop others from profiting from their work without payment, and copyright was intended to give them the necessary tools to combat these commercial pirates. Because we recognize that equity, not money, formed the basis for the statutory rights granted by copyright, we now look deeper into which natural law(s) drove the equitable argument.

**A. *Current Natural Law Theories of Copyright***

Natural law precedes the creation of positive law, does not change over time, is neither good nor bad (though can be used for either by an actor), and is not defined by the speaker. It simply is. Two points under natural law are key: it represents fundamental activities that are objectively necessary to the thriving of humanity, and the exercise of government authority on these activities is legitimate only insofar as it advances those activities.<sup>37</sup>

Summaries of commonly accepted natural theories of copyright are below, followed by an explanation of why those theories fail to account for the entirety of copyright and why a new theory could overcome those deficiencies.

**1. Labor**

One natural law theory is based on Locke's reasoning regarding labor and property, summarized as: a person owns themselves, labor comes from each person's body, and so belongs exclusively to oneself.<sup>38</sup> The natural rights that

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<sup>37</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23 (1980).

<sup>38</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, § 27 (1689). In contradicting himself, Locke implies that the labor of servants belongs

attach from this theory are explained in two parts. The first part explains that natural resources cannot be used without the intervention of human labor, so each person has the right to expend their labor on making these resources useful, and their labor converts common property to private property.<sup>39</sup> The second notes that conversion is legitimate only so long as (1) the object of conversion was common property, (2) the person does not take so much common property that there is an insufficient amount or a lesser quality left for others, and (3) the person does not convert so many resources that some will be wasted without use.<sup>40</sup>

Common resources are so plentiful that a person will be able to convert more things than they themselves can use. Because of this, society can maximize the benefits from labor while avoiding waste by allowing that person to donate excess resources to the common stock or sell the excess to those who need it and do not want to expend their own labor in conversion.<sup>41</sup>

The translation of Locke's theory into intellectual property is as follows: a person owns their own mind, the products of their mind can only be produced by their labor, and therefore, the resulting product is their private property. The typical resources used by such a laborer include the information common around them in the ideas and creations that preceded them and on which future creations are built. A laborer is able to create intellectual property without diminishing the ability of others to create products of their own minds based on these common resources.

Lockean theory justifies the creation of intellectual property, as well as the selling of any "excess" property (e.g.,

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to their owners. *See e.g.*, § 28. The two statements might be reconciled by saying that the labor belongs to the servant, but the end product has been sold to the owner in the form of wages to the servant.

<sup>39</sup> *Id.* at §§ 26–28, 44.

<sup>40</sup> *Id.* at §§ 27, 31–32, 36.

<sup>41</sup> *Id.* at § 46.

copies of books) not usable by the owner and valuable to others.<sup>42</sup> Note though that this theory does not speak to a right to profit. It speaks only to when private property comes into being and to how its use can be maximized not only for individual benefit but for public benefit. The labor theory has been used to support the utilitarian theory of copyright and shares its weakness: it cannot explain why many daily infringements on intellectual property have been tolerated.<sup>43</sup>

## 2. Personality

A second natural law theory for copyright resides in the personality theory, as articulated by Hegel, where “[T]he individual's will is the core of the individual's existence, constantly seeking actuality (*Wirklichkeit*) and effectiveness in the world.”<sup>44</sup> Property, in this way, is tied to personhood.<sup>45</sup> Its manifestation in intellectual property is found most often in moral rights, where an author is permitted to limit the use of their work, even after sale, to avoid reputational harm.<sup>46</sup> Moral rights may permit a painter to prevent destruction and modification of their work or to require their name be displayed (or withheld) along with the art.<sup>47</sup> Because these rights are an extension of oneself, they expire upon the individual's death. Like the labor theory, profit is absent from this analysis because when personality theory is applied to copyright, it concerns itself with the natural right to prevent psychic injury.<sup>48</sup> It is also unable to explain away frequently tolerated infringements.

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<sup>42</sup> *Id.*

<sup>43</sup> Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 295 (1988).

<sup>44</sup> *Id.* at 331.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 350.

<sup>47</sup> Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 364–65 (2006).

<sup>48</sup> Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in the United States and the United Kingdom: Challenges and Opportunities*

### 3. Occupancy

The third theory of copyright is based on a Roman natural law called “occupancy,” where ownership attached to the first person who claimed an unattached item, so long as the item was containable.<sup>49</sup> For example, a tract of land could be contained, whereas the air or the ocean could not be. A wild animal was free unless captured and kept continually in captivity; its escape would immediately sever any ownership claim, leaving anyone else free to capture it and become its owner.<sup>50</sup> Applied to intellectual property, ideas could then be owned as long as they could be contained (e.g., distilled into a tangible form). But they could not be owned if they eluded capture, such as factual observations (e.g.,  $1+1 = 2$ ), which are logical deductions possible by every mind able to reason, or unwritten thoughts. As with the other two theories, occupancy does not concern itself with profit, but rather with defining ownership.<sup>51</sup> Occupancy also does not fully explain why copyright permits frequent infringements by individual users.

### 4. Natural Law in Courts

Several attempts have been made to assert these natural law claims in copyright cases, primarily under labor or occupancy theories. Examples can be found with booksellers in England who were unhappy with the short term of copyright protection at the time, claiming that common law protected the author/publisher even when statutory law did not.<sup>52</sup> The most notable fight was between

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*Under the U.K.'s New Performances Regulations*, 24 B.U. INT'L L.J. 213, 220 (2006).

<sup>49</sup> Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 522 (1990).

<sup>50</sup> *Id.* at 522–23.

<sup>51</sup> *Id.*

<sup>52</sup> E.g., *Millar v. Taylor*, 98 Eng. Rep. 201, 208 (1769) (citing the earlier cases of *Atkyns* and *Roper v. Streater*, in which the common law interest in copyright had been recognized).



two publishers: Millar, the original publisher of a poem, and Taylor, who published the same poem after copyright term expiration.<sup>53</sup> Millar claimed rights at common law based on the labor theory, insisting that a man's right to benefit from a work produced by their labor outlasted any legislatively defined copyright term.<sup>54</sup> Taylor countered based on occupancy principles, noting that an incorporeal property was incapable of being possessed.<sup>55</sup> Millar won the case, with the court viewing the Statute of Anne as providing additional and temporary security to copyright owners, not replacing the ownership rights guaranteed at common law.<sup>56</sup> However, the House of Lords overruled Millar five years later in *Donaldson v. Beckett*:

Copies of books have existed in all ages, and they have been multiplied; and yet an exclusive privilege, or the sole right of one man to multiply copies, was never dictated by natural justice in any age or country; and of course the sole liberty of vending copies could not exist of common right, which gives an equal benefit to all . . . . The common law has ever regarded public utility, as the mother of justice and equity. Public utility requires, that the productions of the mind should be diffused as wide as possible; and therefore the common law could not, upon any principle consistent with itself, abridge the right of multiplying copies.<sup>57</sup>

In this decision, one can see where the economic theory of copyright took root. By denying any natural right

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 251. It should be noted that Taylor's argument was not contained solely to his reprinting after the copyright term ended, and this may have harmed his credibility with the court. Part of his claim was that publishing any work meant that it had been dedicated to the public, and anyone buying an authorized copy was fully within their rights to duplicate the work as many times as they wished. *Id.* at 202.

<sup>56</sup> Yen, *supra* note 49, at 527–28.

<sup>57</sup> *Donaldson v. Beckett*, 1 E.R. 840 (1774).

of the author to restrict duplication of their work, the justification for copyright had to come from elsewhere. Because the infringement cases that came before courts were always commercial in nature, the repeated association of profit with copyright resulted in seeing one as the basis for the other. Interestingly, though, the language of *Donaldson* does not eliminate natural rights as a basis for copyright principles. It only denies an author of any such rights, yet it affirms the public's natural right to information.<sup>58</sup>

*Donaldson* is held as the moment when the natural law theory of copyright died in England. However, the debate continued in America. Early Americans cited both economic and natural law arguments in the construction of copyright laws, both in the states and then later in the Constitution.<sup>59</sup> Courts also entertained common law claims to copyright. For example, in *Wheaton v. Peters*, two publishers debated the rights to publish case law that was not statutorily protected. One of the claims was based on the common law principle of labor and the right to prevent others from unjustly benefitting from that labor.<sup>60</sup> The court held that there was no right of an author to copyright at common law, although it recognized that an author did have a common law right to their manuscript and any copies they had made.<sup>61</sup>

Like *Donaldson*, *Wheaton* has been cited as proof that copyright is solely based on utilitarian principles, but Yen argues that the court's reasoning is actually based on common law principles of labor and occupancy.<sup>62</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> Yen, *supra* note 49, at 528–29 (citing first the Act of Encouragement of Literature, 1783 N.H. Laws 305; then citing THE FEDERALIST NO. 43, at 279 (J. Madison) (E.M. Earle ed., 1976)).

<sup>60</sup> *Wheaton v. Peters*, 33 U.S. 591 (1834).

<sup>61</sup> *Id.* at 592.

<sup>62</sup> Yen, *supra* note 49, at 531.

[A]n author has a natural right in her manuscript because it is the product of her labor. That right finds vindication as property because the author physically possesses the manuscript immediately after writing it. At this point, the author owns not only the manuscript, but also the intangible ideas embodied in the work because physical possession of the manuscript enables the author to prevent others from seeing the intangibles represented in the manuscript. However, once the manuscript is published and the copies are circulated to the public, the author has relinquished possession. As a matter of common law, the act of publication releases the author's work to the public just as exhaling returns the air in one's lungs to the public. Therefore, any post publication property rights given to the author must be granted by statute.<sup>63</sup>

Yen claims that three core copyright principles prove that copyright derives from the natural right of occupancy: (1) the differentiation between idea and expression limits copyright protection only to expression (which can be contained) and not ideas (which cannot be possessed), (2) the requirement of originality—the owner of the expression having claimed something previously unclaimed<sup>64</sup>—and (3) the separation of copyrightable parts from public domain parts when a single work merges both (only some parts can be contained).<sup>65</sup> In the third case, the labor theory is also present, as the author has a property right only to the portion of the work that originated from their creation (i.e., the parts which stem from her labor).

### ***B. Knowledge***

The problem with the labor, personality, and occupancy theories is that all of them might explain an

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<sup>63</sup> *Id.* at 550–51.

<sup>64</sup> *Id.* at 531–33.

<sup>65</sup> *Id.* at 534–36.

author's right to claim their work as their own and to limit its use in certain situations, but they cannot completely explain the other side of copyright, that of the public's right to use that work. Therefore, I would argue that there is a different natural law at the heart of copyright, knowledge. Knowledge, usually phrased as the seeking of knowledge, is universally recognized as a basic and necessary good in natural law.<sup>66</sup>

But this narrow phrasing ignores two unavoidable truths: it is impossible to benefit from the seeking of knowledge unless knowledge exists and can be accessed. For that reason, it is not only the seeking of knowledge that is part of natural law but also the creation of knowledge and the sharing of it. Creation and sharing of knowledge form the two primary interests in copyright, and therefore, copyright laws—both the defining of exclusive rights as well as the exceptions to such right—are the tools through which legislatures try to give natural law practical effect. They do not do so perfectly, as any attempt to confine a broad equitable principle in a narrow definition is impossible. Understanding the natural laws that drive copyright laws, therefore, can better illuminate sound copyright practices.

Copyright both obstructs and enables knowledge creation, seeking, and sharing, which is why it cannot be expressed as anything other than a balance. It facilitates knowledge creation by rewarding it, allowing authors to prevent others from unjustly enriching themselves from it and from misusing it. But it also frustrates creation, limiting

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<sup>66</sup> FINNIS, *supra* note 37, at 59–73. Note that a natural law claim in knowledge is distinct from the existing information theory of copyright, both in its justifications and in its applicability. It differs in that the information theory of copyright relies on the societal value of shared, creative information and therefore still cannot explain why copyright protects works that are not meant to be shared, works like emails, or misinformation (e.g., a false news story). For those interested in a discussion of information theory, see Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014).

the conditions under which future creators can build on others' works. Copyright encourages seeking and sharing in two ways: (1) by a term-limited copyright, guaranteeing a continually growing public domain, and (2) by largely treating individual use as outside copyright's purview. On the other hand, it reduces the opportunities for sharing by not allowing anyone to freely distribute unlimited, unrestricted copies of a work (until it enters the public domain) without the copyright owner's authorization.

When copyright practice is viewed through the lens of the natural right to knowledge, the reason for its balance becomes clear. There is the right to receive fair payment for sharing knowledge on one side, and the right to use knowledge on the other. Given this balance, the inconsistencies in practice no longer look inconsistent. Society will not tolerate a commercial actor making a profit from a work that is not their own without compensating the creator, but it accepts infringements by the average person (e.g., fan art, performing a song in a talent show) as reasonable because these are natural outgrowths of consumption and use. Permitting everyday consumer use supports the spread of knowledge and does not implicate the unjust enrichment principles that underlie copyright.

In short, an economic view of copyright applies to a very small percentage of copyright instances, and a natural law view based on labor, personality and occupancy explains only parts of copyright practice. However, a natural rights approach based on knowledge provides a principled way to explain all its protections, its exceptions, and the seeming infringements not explicitly permitted by law but widely accepted.

### **1. Why Knowledge is Considered a Natural Right**

Natural right is defined as "A right that is conceived as part of natural law and that is therefore thought to exist

independently of rights created by government or society, such as the right to life, liberty, and property.”<sup>67</sup>

Human communication depends on having common frames of references. Without a common language—written, verbal, or sign—people would be unable to understand, agree with, or disagree with each other. This knowledge is valuable whether anyone gives conscious thought to its use. Further, societal growth depends on the sharing of information. One cannot imagine a conveyance such as a cart or a car if one has not first learned about the wheel, and a person has a better chance of building a better house if they know what it is intended to do, can study current houses to identify their weaknesses and have access to research (e.g., engineering resources). It is not only entirely normal for us to share information, but sharing knowledge is essential to our survival and growth. That very fact does not change with time, technology, or function.

Few other things can claim to be as essential to human well-being. Take money, for example. It has utility in achieving other common rights, such as quality of life, but it is not necessary to it. In a world without money, for instance, one could very well achieve a strong quality of life through barter. Knowledge, on the other hand, is valued for itself, and there is no substitute for it or alternative way to reach it. It cannot be gained without its existence and its availability.

## 2. Fair Use as a Natural Right

Copyright law as explained through natural law is about the good of knowledge creation and the good of knowledge sharing, with the creator of knowledge on one side and the consumer of knowledge on the other, both participating in and benefitting from a good as defined by natural law.

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<sup>67</sup> *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Some of copyright's provisions, such as defining rights exclusive to the author (§106), push the balance towards knowledge creation, and others, such as those defining first sale (§109) push the balance towards knowledge sharing. Fair use (§107), sits between these, taking neither the side of knowledge creation nor of knowledge sharing, but it instead requires that the two be considered together. Fair use (not the statute, but the concept) is the embodiment not only of the balance of interests as described in the Copyright Clause but also the balance of interests in knowledge found in natural law. Where a use both supports knowledge creation and knowledge sharing, a reasonable claim can be made that the use is a natural right.

### **III. CURRENT COPYRIGHT PRACTICE RUNS COUNTER TO NATURAL RIGHTS**

Even those who agree that knowledge creation and sharing are goods recognized by natural law may still find reasons to hoard the goods for themselves or deny others the same access. Positive law is often seen as necessary to effectuate natural law because universal agreement on principles will not stop some actors from undermining them for their own benefit. Or, as phrased by Finnis, positive law is necessary to “force selfish people to act reasonably.”<sup>68</sup>

Unfortunately, positive law can be a poor reflection of underlying natural law because legislators can only use the tools available and known to them at the time of passage to effectuate a broad and multi-faceted purpose. To better understand what positive law is intended to do then, we have to start the inquiry at what type of reasonable behavior the applicable law was intended to force.

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<sup>68</sup> FINNIS, *supra* note 37, at 29.

Given the history above, in copyright, it was the actions of publishers that was seen as selfish and which copyright sought to control. It was the profiting from another's work without compensation that deterred information sharing by creators. Also, despite common assertions that economic incentives are necessary to the creation of new works, there is little evidence that information creation was ever a concern. In the points made by authors over the years—with Barlow's letter above being an example—knowledge had already been created. If anything related to knowledge was discouraged by the lack of copyright protection, it was the sharing of that knowledge.

Copyright laws were enacted to constrain the ability of publishers to exploit authors without payment, not to get in way of public access or use. Indeed, for most of the nation's history, that is how copyright was practiced.<sup>69</sup> Commercial actors sued other commercial actors (e.g., *Wheaton v. Peters*), or authors sued commercial actors (e.g., *Burrow-Giles Lithographic Company v. Sarony*) for infringement.<sup>70</sup> But, the public remained generally unpoliced, free to engage in all the activities that came naturally in the course of information sharing, including fan art, playing songs at recitals, or posting copies of comic strips on their office doors. Each of these activities technically infringes on one or more rights considered exclusive to the author, yet it is seen as a permitted, reasonable use.

Copyright was, at a practical level, an equal exchange, with a user paying a copyright owner for the content of a work and then being free to use it in whatever

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<sup>69</sup> Yvette Joy Liebesman, *Redefining the Intended Copyright Infringer*, 50 AKRON L. REV. 765, 783 (2017).

<sup>70</sup> Patry summarizes the shift on the meaning of copy through the lens of practice. From the beginning of copyright up to the introduction of digital media, the fight over copies was one between the entities that held power, like publishers. PATRY, *supra* note 7, at 38.



way they wished. Each party had equal power, and neither had any control over the other's actions; a user could not dictate what a copyright owner wrote or charged (e.g., terms of contract with their publisher), and a copyright owner had no control over downstream use, whether this was the setting of prices by distributors (e.g., bookstores) or how the end-user ultimately used the book.

Clearly, common practice showed that copyright laws were not meant to restrain normal use and sharing of information by people who had gained access. The fact that this was true regardless of the means of access demonstrates how strong end-user protection was. Someone singing a song at a local talent show, for instance, was as unlikely to be sued whether she learned the song from the radio, a mixed tape from a friend, or a purchased CD. Policing the activities by an end user were simply not seen as furthering the purpose of copyright.

Advances in technology, particularly digital technologies, fundamentally changed the copyright landscape in three different ways. The first was that technology enabled content creation and sharing at a volume and speed society had never seen before.<sup>71</sup> Authors flood the web with new creations daily and information can be shared in an instant, across vast distances. Automated translation and text-to-speech technologies have broken down longstanding barriers to information sharing, and publishers interested in doing so are able to provide broad access to information through networks or databases. This change aligns with both copyright and natural law. It fosters creation and facilitates both seeking and sharing of knowledge.

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<sup>71</sup> See DOMO, *supra* note 25; Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/> [<https://perma.cc/6GRA-Q29M>].

The second change in practice was the increased use of non-copyright tools to subvert copyright's public purpose.<sup>72</sup> One category of tools was the application of laws outside of copyright, such as contract law. By turning an acquisition into a license, copyright owners retained all the advantages of copyright protection while escaping all of the societal obligations on which that protection was based. They now not only could demand payment for their work, but they could interfere with the actual use of the work even after payment. This practice runs directly counter to the balance of copyright in that it allows the use of copyright's monopoly to condition access to a work on waiving the public use rights (e.g., lending, reselling, privacy) normally attendant to copyright end use. Another category of tools came in the form of technology itself, allowing for enforcement of copyright by a copyright owner instead of by the government (e.g., digital rights management or automated take downs). By using technological controls, copyright owners could prevent fair uses as well as infringement. This second change will not be discussed in detail here, as both it and proposed remedies of its harms have already been covered in depth elsewhere.<sup>73</sup>

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<sup>72</sup> See KYLE K. COURTNEY AND JULIYA ZISKINA, *THE PUBLISHER PLAYBOOK: A BRIEF HISTORY OF THE PUBLISHING INDUSTRY'S OBSTRUCTION OF THE LIBRARY MISSION* 15 (2023), <https://nrs.harvard.edu/URN-3:HUL.INSTREPOS:37374618> [<https://perma.cc/X4K3-AVJ7>]; Elizabeth McKenzie, *A Book by Any Other Name: E-Books and the First Sale Doctrine*, 12 CHI.-KENT J. INTELL. PROP. 57 (2013).

<sup>73</sup> See e.g., *id.*; see REBECCA GIBLIN & KIMBERLEE WEATHERALL, *WHAT IF WE COULD REIMAGINE COPYRIGHT?* (2017); see also Pamela Samuelson, *Members of the CPP, The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1194 (2010); Michelle M. Wu, *Restoring the Balance of Copyright: Antitrust, Misuse, and Other Possible Paths to Challenge Inequitable Licensing Practices*, 114 LAW LIBR. J. 131 (2022) (proposing combatting license terms through antitrust, misuse, preemption, and unconscionability); Michelle M. Wu,

The third change is in litigation targets.<sup>74</sup> On its face, the shift is understandable. The type of commercial exploitation that was once only possible for for-profit entities became possible for everyone, as new technologies made it easier to reproduce, distribute or make derivative works. The threat described by Barlow in his letter to the Continental Congress is now seemingly present not only in publishers but in users as well. So, everyone became a target of litigation. The cases that signaled this seismic shift were those on music sharing, where publishers sued users directly, even where there was no proof of harm.<sup>75</sup> A case could be made that some of these uses (e.g., uploading music to pirate sites) were not reasonable, neither incidental to ownership nor necessary to the use of a work. Though unreasonableness was what arguably brought a normally immune individual activity into copyright's grasp, the outrage by the public demonstrated how different music publishers' views of the proper use of copyright were from society's.

The backlash and public relations fallout from those lawsuits made publishers more cautious about suing end users directly but the aggressive stance against unpaid uses continued and even expanded to incidental and productive uses. Lawsuits were filed or threatened on temporary copies (e.g., caching) as well as against tools designed to help users get the full benefit of the materials they had purchased (e.g.,

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*The Corruption of Copyright and Returning It to Its Original Purposes*, 40 LEG. REF. SVC. Q. 113 (2021).

<sup>74</sup> PATRY, *supra* note 7 at 39; Matthew Sag, *IP Litigation in U.S. District Courts: 1994-2014*, 101 IOWA L. REV. 1065, 1074 (2016); Yvette Joy Liebesman, *Redefining the Intended Copyright Infringer*, 50 AKRON L. REV. 765, 768 (2016).

<sup>75</sup> Genan Zilkha, *The RIAA's Troubling Solution to File-Sharing*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 667 (2010); Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977, 983 (2008).

text-to-speech).<sup>76</sup> Suddenly, infringement suits were no longer solely about unjust enrichment but were aimed at controlling use by the consumer. Even where the litigation parties themselves remained commercial, the actual target was the public, because the uses challenged as infringing were private, personal uses. Fearful that some uses might harm current or future sales, some content owners tried to deprive everyone of technologies that made it easier to duplicate, distribute, or make derivative works.

The expansion in focus is illustrated in cases such as *Williams*, *Sony*, *Cambridge University Press*, *HathiTrust*, and *Hachette*. In these cases, the goal was to prevent users from preserving, accessing, or using information they had a right to access. In *Williams*, NIH libraries circulated copies of journals they had purchased to its researchers and would, upon request, copy an article for a researcher—an action that publishers considered infringing.<sup>77</sup> In *Sony*, studios sought to make the Betamax illegal, preventing users from taping shows to which they had legitimate access.<sup>78</sup> Against libraries, publishers sought to make illegal e-reserves and the provision of digitized texts to their vision-impaired users, as well as to dictate how libraries provided their users with the content that they had acquired.<sup>79</sup>

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<sup>76</sup> *E.g.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007) (caching); Mike Masnick, *Amazon Gives In to Ridiculous Authors Guild Claim: Allows Authors to Block Text-To-Speech*, TECHDIRT (Feb. 27, 2009), <https://www.techdirt.com/articles/20090227/1759173928.shtml> [<https://perma.cc/SD44-UXWV>]; Peter S. Lubin & Patrick Austermuehle, *Amazon's Audible Sued for Copyright Infringement over Caption Feature*, CHI. BUS. LITIG. LAW. BLOG (Oct. 10, 2019), <https://www.chicagobusinesslitigationlawyerblog.com/9096-2/> [<https://perma.cc/ZJ69-JJ8Z>].

<sup>77</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1347 (1973), *aff'd*, 420 U.S. 376 (1975).

<sup>78</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>79</sup> *Cambridge Univ. Pr. v. Patton*, 769 F.3d 1232, 1233 (2014) (illegal e-reserves); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir.

While threatening litigation is not the only evidence of copyright's changing reach, it is the most visible one and has the potential for the greatest impact, over not only the use of copyrighted works but the use of any works.<sup>80</sup> For instance, had home recording devices not survived a court's scrutiny, no one would have had access to technology to record even non-copyrighted programming (e.g., C-SPAN coverage of Congressional debate).

As noted earlier, the costs of litigation are beyond the capabilities of most individuals and nonprofits to bear, which means that the outcome of disputes is heavily influenced by wealth, with many potential defenses never making it to court.<sup>81</sup> The societal cost of expanding the enforcement of copyright beyond unjust enrichment to consumer use is steep, as each suit risks stripping more rights away from the public.

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2014) (digitizing the text to print-disabled users was only one of several claims); *Hachette v. Internet Archive*, No. 20-CV-04160(JGK) 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023).

<sup>80</sup> The expanded reach can also be seen in cease-and-desist orders received by libraries for interlibrary loan or course reserves. *See, e.g.*, Andrea L. Foster, *How a Lawsuit Over Electronic Reserves Could Affect Colleges*, CHRON. HIGHER ED. (May 16, 2008); George H. Pike, *The Delicate Dance of Database Licenses, Copyright, and Fair Use*, 22 COMP. IN LIBR. (May 2002) (interlibrary loan). It is present in the changing of laws to prevent the normal use of knowledge, including the extension of copyright, to keep works out of the public's hands, *See* Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.), and to legitimize technical controls (e.g., Digital Millennium Copyright Act).

<sup>81</sup> Elizabeth L. Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 U. COLO. L. REV. 561, 566 (2015) ("Threatening litigation can be an effective business model for putative rights holders, because paying for a license is more predictable, and likely cheaper, than fighting about whether a license is necessary.").

#### IV. (RE)ESTABLISHING AN EQUITY CLAIM IN FAIR USE CASES

The reason to reestablish an equity claim is simple. Fair use in §107 has been applied as a utilitarian principle and in application, downplays non-economic interests inherent to copyright. If an equitable claim can be raised alongside a §107 claim, it forces courts away from the four factors, back to natural law and the purpose of copyright. Where there is a conflict between law and equity, tradition dictates that equity prevails.<sup>82</sup> (It should be noted that an equitable claim is not limited only to fair use cases but applies to any practice that runs against the natural rights described in this paper. This paper spotlights its use in fair use claims because there is a current case before the courts.)

Fortunately, the existence of positive law does not close the door to equitable claims. “[B]oth law and equity seek the same result . . . but do not necessarily draw the line in the same place . . . The apparent similarity of the results achieved . . . is . . . deceptive. The claims . . . are different, require different facts to be proved, and have different consequences.”<sup>83</sup> Where I imagine that this will make the biggest difference is in the types of cases mentioned above, where copyright owners seek to stop normal use of copyrighted works or innovations to facilitate normal use.

##### A. *Hachette v. Internet Archive*

The example I will use to assert an equitable claim is *Hachette v. Internet Archive*, and the analysis will be confined to only to the legitimacy of Controlled Digital Lending (CDL). CDL has been described under a variety of names over the years but stands for the basic proposition that

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<sup>82</sup> See Andrew Burrows, *We Do This at Common Law but That in Equity*, 22 OXFORD J. LEGAL STUD. 1, 4 (2002).

<sup>83</sup> *Id.* at 2 (citing 92 L.Q. REV. 342, 346 (1976)).

libraries have a right to use materials they have purchased even as technology changes. At its core, CDL has three principles:

Properly implemented, CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an “owned to loaned” ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.<sup>84</sup>

The Internet Archive (IA) offers CDL through their Open Library platform.<sup>85</sup> Anyone can create a user account and check out a digitized version of a book that IA owns. How the platform works has changed over the years, but at the present time, anyone can search IA’s holdings; if they click on a book, it will automatically check the book out to them for an hour. If the user does not yet have an account, they will be prompted to create one before they can view the book in full. For some books, users will be given the opportunity to extend the loan period to a longer one (i.e., 2

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<sup>84</sup> *Position Statement on Controlled Digital Lending by Libraries*, CONTROLLED DIGITAL LENDING BY LIBRARIES, <https://controldigitallending.org/statement> [https://perma.cc/E656-P4UH] (last visited Nov. 2, 2023).

<sup>85</sup> INTERNET ARCHIVE, <https://openlibrary.org/> [https://perma.cc/DN2Y-MX6G] (last visited Nov. 2, 2023).

weeks). While checked out, the book cannot be checked out by anyone else,<sup>86</sup> though a user can add themselves to a wait list. IA does provide other services, including as a CDL provider for other libraries, but the analysis below will focus only on CDL in its most simplified form, where a library is lending digitized copies of books that it owns in print, in the same number as it owns, and controlled by DRM. While an equitable argument could still apply in other circumstances, such an analysis would be unique to IA's specific practices, less generalizable and therefore less useful in illustrating the point of this section.

Four publishers filed suit against IA, alleging, among other things, that CDL is illegal, relying heavily on existing fair use case law regarding market substitution determining whether a use is fair or not.<sup>87</sup> Courts have noted that if a copy does not substitute for the original, then copyright is not implicated.<sup>88</sup> The publishers assert the opposite is equally true, that if a copy substitutes for the original, it must be the product of an unfair use. But that assumption is belied by the fact that many reasonable uses substitute for the original. Recording a show on a DVR substitutes for watching that show live, a mixed tape substitutes for buying the songs, and so forth.

The fact that a library's reasonable use differs from that of the average person does not make their activities any less normal. A library buys books to lend them. CDL requires them to legitimately acquire – through gift or

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<sup>86</sup> This is assuming that Open Library only has one copy. For some books, IA offers additional copies, either because they have been given permission by other libraries to include their CDL copies in IA's holdings, or because IA owns more than one copy. The number of copies IA can circulate simultaneously at any given time is tied to the number of print copies owned by IA and its partners.

<sup>87</sup> Complaint, Hachette Book Group, Inc. v. Internet Archive, No. 1:20-cv-04160 (June 1, 2020).

<sup>88</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 344–345 (C.C.D. Mass. 1841); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).



purchase – the number of copies it circulates. It allows for a change in format, but not in the number of copies used.

The fair use defense of CDL has been exhaustively covered elsewhere, so it will not be rehashed here.<sup>89</sup> It is important to note, though, that the fair use cases that courts have handled so far have not involved non-commercial users who have purchased their copies and are using them for the not-for-profit purpose for which they were intended. If the court relies solely on existing analyses, which are disproportionately shaped by parties with commercial interests on both sides, there is a strong chance that it will fail to recognize that copyright protects the user as much as the copyright owner.

To establish an equitable claim, one must have a basis that is not already covered by statute. In this case, fair use is a defense, and §107 serves as a test, but nowhere in that defense or in that test is a guarantee of public rights. In contrast, author rights are clearly defined in §106. The equitable claim that could be established here is, writ broadly, the right to seek knowledge or the right to use knowledge. But that may be too broad for a court to apply in the context of copyright, as doing so would also allow anyone to take a work and sell it without paying an author. So, a narrower formulation of that right in the context of copyright is the right to reasonably use information legitimately acquired. Or, alternatively, the right to use information legitimately acquired for the purpose the acquisition was intended to meet. In both cases, the claims

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<sup>89</sup> See generally Michelle M. Wu, *Piece by Piece Review of Digitize-and-Lend Through the Lens of Copyright and Fair Use*, 36 LEGAL REF. SERVS. Q. 51 (2017); see also Dave R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, CONTROLLED DIGITAL LENDING BY LIBRARIES (2018), <https://controldigitalending.org/whitepaper> [<https://perma.cc/E7SX-2AY2>]; Michelle M. Wu, *Revisiting Controlled Digital Lending Post ReDigi*, 24 FIRST MONDAY (2019), <https://firstmonday.org/ojs/index.php/fm/article/view/9644/7793> [<https://perma.cc/FT5X-4Q59>].

are not defensive but rather a broader contention that reasonable uses of copyrighted works were never intended to be controlled by copyright law.

Let's see how an equitable analysis might apply. A library's lending of materials it has acquired in the same number of copies that it has acquired aligns with the principles of natural law and of the Copyright Clause. It supports the creation of knowledge by paying the author for the number of copies it uses, and it furthers the sharing of information both through the payment of that author for the number of copies used, as well as by extending access to those copies to their communities. If "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors,"<sup>90</sup> then in any instance, that test has arguably been met once the author has been paid for the number of copies being used.

On the flip side, if the publishers' claim were to prevail, they would injure both the creation of knowledge and the sharing of the same. Instead of allowing libraries to convert purchased materials into formats more easily used, the publishers wish to force libraries to reacquire the same knowledge for the same community repeatedly, each time technology changes. This would be contrary to natural law principles of minimizing resource waste and no undue burden on the commons.

Paying for the same content repeatedly (which results in no new creation) is wasteful and reduces common resources (e.g., public funds) that could be invested in other creations. The reduction in common resources is much greater than merely repurchasing the work, because presently, these publishers offer no digital equivalent to an analog book. There is no way to buy an e-book from them, so use rights (e.g., preservation) are also lost. Access is only

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<sup>90</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985).

through licensing, and they charge libraries more for the use of digital works than the average user pays while also limiting use.<sup>91</sup> This is in contrast to analog equivalents where a library could never be forced to pay more than the average user.<sup>92</sup>

If libraries are forced to reacquire content repeatedly, at higher prices than a free market would bear, this reduces the community funds available to invest in new content. Both natural law and copyright law are intended to prompt the distribution of new content, not merely to reward creators repeatedly for the same work. License terms themselves also reduce the information commons for that community, though the reduction is in the form of anticipated reduction than immediate reduction. Since licenses expire, these are temporary resources, unlike physical books, which can remain in a collection forever.<sup>93</sup>

The natural right to share information is also hindered. By forcing libraries to use works only in their

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<sup>91</sup> Costs and limitations vary by publisher, but Michael Blackwell's study showed that digital copies across nine major publishers consistently exceeded the cost of their print equivalents (up to four times more) while conveying fewer rights (e.g., limit on the number of uses). Michael Blackwell, *Ownership, Licensing, and Library Materials: Part 2*, METRO webinar (Mar. 16, 2023), [https://www.youtube.com/watch?v=8HLuhr4ymmg&list=PLIRJ\\_2k4sS0DjNiideBM88SW9H302GAFv&index=2](https://www.youtube.com/watch?v=8HLuhr4ymmg&list=PLIRJ_2k4sS0DjNiideBM88SW9H302GAFv&index=2) [<https://perma.cc/Q3X6-MXCK>].

<sup>92</sup> Controlling downstream costs in an analog world was practically impossible. A library could order a book from any store, and the publishers had no control over the prices set by booksellers. That's not to say that some didn't try, even though such efforts were denied by courts. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 341 (1908); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013).

<sup>93</sup> Some licenses are "perpetual" licenses, but even those are arguably temporary because they often contain clauses that allow the publisher to withdraw works at their discretion and because the data is not transferable. If the library is permanently closed, with its collections absorbed into a different library, it is not certain that the subsequent library will have rights to the content of the original perpetual license.

original formats, one deprives them of the very technological advances that are used daily by users to speed the delivery of information or communicate with each other. It gives publishers (1) the right to dictate to libraries how they serve their patrons, and (2) the right to limit the natural reach of a work. Under such restrictions, if a library feels it best to provide a homebound patron with content digitally, it will not be able to do so unless it buys the right to that particular method of transmission from the publisher, even where it has already paid for the content. It would also be unable to use a book for the life of that book, which it has always been able to do with print books, which can last for centuries and hundreds of uses (albeit with repairs along the way). Instead, that book's reach would be artificially limited by the terms of the publisher, whether those terms are in the number of permitted loans or in the form of a subscription term. With regard to CDL, where the same number of copies is being used as was purchased, just in a different format, the attempt to constrain how that copy is used is a direct attempt to abridge the right to share knowledge.

The equitable, natural law analysis is more aligned to the purposes of copyright than an economic § 107 analysis, bringing together all of the interests in copyright, including those implicit in our laws but rarely present in lawsuits.

It may be too late to assert an equitable claim in *Hachette*—as the district court has already made its ruling<sup>94</sup>—and appellate courts entertaining new claims on appeal is rare.<sup>95</sup> However, the equitable argument stands and should be considered in any future cases where plaintiffs

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<sup>94</sup> *Hachette Book Group, Inc. v. Internet Archive*, No. 20-cv-4160 (JGK), 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023).

<sup>95</sup> *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997). While new issues are not entirely foreclosed, the bar is high, largely permitted only when “the proper resolution is beyond any doubt or where ‘injustice might otherwise result.’” *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

seek to interfere with the reasonable use of copyrighted works.

## V. UMG RECORDINGS, INC. v. INTERNET ARCHIVE

In August 2023, another case was brought against IA and four other parties, this time by six music publishers for the “Great 78 Project” (hereinafter, Project).<sup>96</sup> The Project makes over 400,000 78rpm, pre-1972 sound recordings available to the public for streaming and download.<sup>97</sup>

Among other allegations, the plaintiffs claim that the Project infringes on their rights of reproduction (digitization & storage of copies on servers), distribution (allowing the public to download), and public performance (enabling streaming of the digitized content).<sup>98</sup> This section will assume that the court will (1) find the facts alleged in the complaint to be true, complete, and without distortion, (2) dismiss all statutory or constitutional challenges, and (3) hold the defendant liable for all the claims listed. It is critical to note that this hypothetical is just that, as there are ongoing constitutional challenges to the Act on which the case rests,<sup>99</sup>

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<sup>96</sup> Complaint, UMG Recordings, Inc. v. Internet Archive, Case No. 1:23-cv-07133 (S.D.N.Y. Aug. 11, 2023).

<sup>97</sup> Internet Archive, *The Great 78 Project*, <https://great78.archive.org/>, (“The Great 78 Project is a community project for the preservation, research and discovery of 78rpm records. From about 1898 to the 1950s, an estimated 3 million sides (~3 minute recordings) have been made on 78rpm discs. While the commercially viable recordings will have been restored or remastered onto LP’s or CD, there is still research value in the artifacts and usage evidence in the often rare 78rpm discs and recordings. Already, over 20 collections have been selected by the Internet Archive for physical and digital preservation and access.”) [<https://perma.cc/M2QT-2CPY>] (last visited Nov. 2, 2023).

<sup>98</sup> Complaint, *supra* note 96, at 3–5.

<sup>99</sup> See *e.g.*, Complaint at 2, Eight Mile Style, LLC v. Spotify USA Inc., No. 3:19-cv-00736 (M.D. Tenn. Aug 21, 2019). While the constitutional claim in this case is not the one expected to be raised in the UMG suit, it does show that constitutional issues regarding the Music Modernization

and a complaint is definitionally a partisan document. As such, it will rarely, if ever, contain a true, complete, and undistorted account of facts. For the purposes of illustration, though, it is useful to imagine an extreme outcome to demonstrate how natural law might still apply.

In their request for relief, the plaintiffs ask not only for monetary damages but also equitable remedies, including injunctions against all acts that reproduce, distribute, or publicly perform their works.<sup>100</sup> The brief's wording is ambiguous and could be read to include as infringing mere storage of digitized copies. If the court takes this broad reading, then the natural right claim that should not be preempted by statute is the right to knowledge continuity. The right simply recognizes that there is a strong public interest in published<sup>101</sup> knowledge remaining reliably available for verification and other culturally significant purposes. It is an affirmative right as opposed to the narrower defenses available under §§107, 108, or 1401.

Unlike the claim suggested for *Hachette*, this is not a personal claim but rather a societal one, so standing becomes an issue. A library or archive, which definitionally curates knowledge for communities, arguably has a stronger case for standing than any individual or entity without a public purpose. The claim, if allowed, would not change the statutory analyses but could influence the scope of remedies.

The most basic uses named in the complaint will show how information unlikely to be included in statutory

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Act are not quickly resolved. The constitutional issues likely to be raised in this case should be similar to those hypothesized in Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J.L. & ARTS 327, 372-8 (2014).

<sup>100</sup> Complaint, *supra* note 96, at 50–51.

<sup>101</sup> “Published” in this context is the historical meaning, where the copyright owner has exercised their right to make the work available to the public. More information on the legal meaning of publication can be found at 1 NIMMER ON COPYRIGHT § 4.01 (2023).

analysis may be highly relevant to a natural right. The plaintiffs describe digitization and uploading to servers as infringement, and they request an absolute bar on these activities.<sup>102</sup> However, harm, where it exists, does not come from a change of format or storage, and therefore, the equitable claim generally pushes courts to narrowly align remedies to uses. Where digitized copies are used for preservation, they meet societal interests in ensuring the continued existence of works, as availability is necessary to learning or development from them. Preservation becomes particularly meaningful for society where the items preserved are unique or where access is uncertain.

Uniqueness. There can be sonic differences between issuances of a sound recording, so any one release may contain unique sound impressions that cannot be found in current commercial markets.<sup>103</sup> If so, preservation, even if not unlimited public access, serves a singular purpose, to ensure that any distinctiveness contained in obsolete media will not be lost as the medium itself disappears. Of course, the creation of a repository may only be justified where no other guarantees for these sounds' survival exist. Since no entity – not copyright owners, the Copyright Office, or the Library of Congress – is required to retain a copy of works (and all versions of works) created or deposited,<sup>104</sup> it is

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<sup>102</sup> Complaint, *supra* note 96, at 50–51.

<sup>103</sup> In some cases, the sonical differences can be substantial enough for independent copyright protection, but only where the differences are human-made (e.g., result of editing), not merely sounds due to the peculiarities of a particular physical media (e.g., the scratchiness resulting from playing an LP on an older turntable). *See* NIMMER, *supra* 101 at §2.10[A][2].

<sup>104</sup> *See* 17 U.S.C. § 704 (discussing the rules on the retention of copyrighted works by the Copyright Office and the Library of Congress). The Library of Congress has further stated that it keeps only about 45-50% of the materials deposited. Library of Congress, *A Book was Copyrighted; Why Isn't It in the Library of Congress Online Catalog*,

possible that no alternative source for unique sounds in 78s lives. On the other hand, if there is any evidence of a pre-existing 78s repository,<sup>105</sup> this would weaken a knowledge continuity claim for new repositories of the same recordings.

**Availability.** Fluctuations in commercial availability are also meaningful, as they give some indication as to the vulnerability of the works to loss. For example, if a music label routinely ends commercial availability after 10 years of sales or after sales drop below a certain amount,<sup>106</sup> that can signal to a court that the copyright owner has a limited commitment to knowledge continuity. An independent repository guarantees that even if a commercial owner of a work becomes disinterested in sustaining a published work's availability, it does not disappear from cultural history and will remain available for uses such as education and analysis.

**Other creators.** Knowledge continuity serves not only the long-term interests of the public but also of non-sound-recording copyright owners associated with the work. The interests of other creators are unique in sound recordings because recordings are wholly derivative and have no

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<https://ask.loc.gov/rare-books-special-collections/faq/312592>  
[<https://perma.cc/AZ4X-4WLM>] (last visited Nov. 2, 2023).

<sup>105</sup> While the author is not aware of another 78 repository, repositories in other fields do exist so the possibility of one here is not beyond imagination. See, for example, CLOCKSS (<https://clockss.org/>), a partnership between libraries and academic publishers to preserve scholarly knowledge. Such repositories meet societal interests only where control sits outside commercial entities, as money creates known conflicts of interest, making an objective review of a use request less likely.

<sup>106</sup> See, for instance, the commercial unavailability of 95% of Motown Records' sound recordings. PATRY, *supra* note 7 at 61.



independent existence.<sup>107</sup> The interests of the performer,<sup>108</sup> the composer, the lyricist, or the book author may well differ from that of the sound recording's owner. If one purpose of copyright is to encourage knowledge creation, then there are many creators beyond the plaintiffs to consider when it comes to sound recordings.<sup>109</sup>

In this basic use example, the inquiries all relate to a core issue: is there any societal benefit in prohibiting preservation copies? Prohibiting storage or retention of a library collection does not have any obvious benefits for knowledge creation or sharing, especially where many, if not all, of the preservation copies were created either before the works gained federal protection under the Music Modernization Act (MMA)<sup>110</sup> or as digital replacements for physical materials owned by IA. Such a repository is essentially a trust of resources for the public, and decisions about access to and control of the trust are separable from the value and legitimacy of the trust itself.

Natural law requires societal benefit be at the heart of every determination, and this would lead to more

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<sup>107</sup> Compare this with other derivative works, such a movie based on a book, where some words will be unique to each. An audio book or a song, though, typically does not have separate content aside from sound (e.g., the singer's voice).

<sup>108</sup> "In theory, the copyright in a sound recording is owned by the performers and the sound engineers; in practice, the copyright in a sound recording is usually owned by a record label under a work-made-for-hire or assignment agreement." *An Analysis of the Music Modernization Act*, 5 LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 9:3.50 (3d ed. n.d.)

<sup>109</sup> Some scholars have noted that MMA's language on pre-1972 sound recordings does little to incentivize actual creators (e.g., performers and musicians). See e.g., Greg R. Vetter, *Modern Music Dissemination and Licensing Innovation*, 99 B.U. L. REV. 2551, 2555 (2019).

<sup>110</sup> The legitimacy of actions prior to the MMA is murky because works were protected by state and common law copyright even before the MMA though there was no unified view of the scope of protection. The portions of the MMA cited in this case are codified at 17 U.S.C. §1401 et seq.

modulated outcomes, such as allowing the continued existence and creation of some reproductions even if found to be infringing by statutory standards but strictly limiting their use.

## VI. CONCLUSION

The history of copyright clearly demonstrates that it was based on equitable principles. The right to copyright was not about the right of an author to make a profit but rather about the right of an author to stop someone else from profiting from their work without payment. The former is about economic gain, but the latter is about equitable action: the ability to stop someone from engaging in behavior considered to be unjust. Granting that ability to authors was seen as necessary by Congress to ensure distribution of their work to the public for consumption and use.

This original purpose and balance of copyright has been lost over time as the voices heard by Congress and judges have primarily been those with a financial interest in copyright. Because these issues were more visible and measurable to our government representatives, they are disproportionately represented in our laws and cases.

The skewing of law towards private, financial gain undermines the natural law basis for copyright (i.e., the creation, seeking, and sharing of information), allowing copyright owners to expand enforcement of copyright far beyond its reasonable bounds. Where once individual use was largely considered outside of the scope of copyright, it is now the target of publishers. They have weaponized copyright to maximize profit, in direct opposition to equity and the purpose of the grant, using laws within and outside of copyright to do so.<sup>111</sup>

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<sup>111</sup> As an example, see Letter from SPARC to Assistant Attorney General Makan Delrahim, [https://sparcopen.org/wp-content/uploads/2019/08/DOJ\\_Filing\\_08142019830.pdf](https://sparcopen.org/wp-content/uploads/2019/08/DOJ_Filing_08142019830.pdf) (August 14, 2019) (quoting Cengage,

The bargain that Congress made in copyright was that authors would have the right to prevent others from unfairly profiting from their works so long as the public had the right to consume and use those works in a reasonable manner. Current lawsuits, legislation, and technologies are being used to end or restrict many of these normal uses, and this article seeks to restore them, not through law but through equity.

By affirmatively asserting public rights to use copyrighted materials at natural law, we can readjust copyright's focus, directing it away from profit back to its original equitable, balanced intentions.

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“The growth in our digital business gives us access to a greater number of students in any given classroom and generates new sources of revenue from our existing adoption customers. In contrast to print publications, our digital products cannot be resold or transferred. We therefore realize revenue from every end user.”).