THE INTERDISCIPLINARY FUTURE OF COPYRIGHT THEORY

ALFRED C. YEN*

I. INTRODUCTION

The proper scope of an author's property has long troubled copyright analysts. Most agree that authors should (and do) own the right to prevent others from literally duplicating original copyrighted material. Beyond that, the reach of an author's rights becomes very hazy. Can an author prevent the use of her plot or characters? What about the general appearance of sculpture, a painter's style or a photographer's perspective and choice of subject matter? One hundred and fifty years ago all of these items were part of the public domain.[1] Recent decisions, however, suggest that these items have now become private property.[2]

At first glance, extending authors' rights beyond literal reproduction seems like a good idea. As Judge Learned Hand stated, "It is of course essential to any protection of literary property . . . that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."[3] However, sober reflection indicates that too much of this good thing is undesirable. Authorship is possible only when future authors have the ability to borrow from those who have created before them.[4] If too much of each work is reserved as private property

* Associate Professor of Law, Boston College Law School. B.S., M.S., 1980, Stanford University; J.D., 1983, Harvard Law School. The author would like to thank Tracy Tanaka, Boston College Law School class of 1991, for her able research assistance. Some of the research reflected in this essay was supported by research grants from Boston College, Boston College Law School and the Boston College Law School Fellows.

[1] Early copyright decisions reflect a very narrow view of the kinds of appropriation which constitute infringement. *See* Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514) (refusing to find defendant's German translation an infringement of Harriet Beecher Stowe's Uncle Tom's Cabin).

[2] *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977) (protecting "total concept and feel" of plaintiff's costumed characters and television series); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936) (protecting plot of play); Steinberg v. Columbia Pictures, Inc., 663 F. Supp. 706, 709 (S.D.N.Y. 1987) (protecting plaintiff's perspective and style in illustration referred to as "a parochial New Yorker's view of the world"); Kisch v. Ammirati & Puris, Inc., 657 F. Supp. 380 (S.D.N.Y. 1987) (denying defendant's motion to dismiss copyright claim based in part on plaintiff's choice of camera angle, lighting, and subject matter).

[3] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[4] *See, e.g.*, Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436):

through copyright, future would-be authors will find it impossible to create. Society would presumably suffer from the decreased production of creative works. Proper construction of our copyright law therefore depends on striking a socially acceptable balance between the interests of authors and the public.

From a purely intuitive point of view, two issues certainly seem relevant. First, society would like to ensure the promotion of social welfare through the production of creative works. Second, society would also want to strike a just and fair compromise between authors and consumers of creative works. If we are to believe various statements made by the Supreme Court, however, the first issue is the only one which may be considered when interpreting American copyright law. For example, in *Sony Corp. of America v. Universal City Studios Inc.*, the Supreme Court wrote:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[5]

In my view, this one-sided approach to copyright cultivates an obviously cramped view of an area which is assuming ever-increasing importance for our society. After all, justice and fairness are key considerations in most areas of the law, especially property law.[6] Why should copyright be any different?

This Essay will briefly, but critically, examine the major reasons which have been given for why copyright should be different from other areas of the law. Part II will begin by sketching two copyright theories which follow the intuitions outlined above. The first theory justifies copyright as an economic incentive which advances social welfare. The second justifies copyright as

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> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. . . . No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.

[5] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429, *reh'g denied*, 465 U.S. 1112 (1984).

[6] For an overview of various philosophies of property, see LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS (1977).

the legal vindication of a person's moral right to property in the fruits of her labor. Part III will study the reasons for suppressing the discussion of justice and fairness in copyright jurisprudence. This Essay will show that these reasons are insufficient to support the suppression, and goes on to outline arguments which demonstrate that considerations of justice and fairness are essential to a complete copyright theory. The Essay concludes with some remarks about the future of copyright theory.

II. Two Models of Copyright

Modern American copyright scholars recognize two apparently conflicting copyright theories. The first, and dominant, theory states that copyright exists solely to provide necessary economic incentives for the production of creative work. Under this view, copyright is necessary because in its absence those interested in using the author's work would simply copy the work instead of buying it from the author. Authors would then find their economic returns too small to justify the costs of authorship. In such a situation authors might not produce and social welfare would presumably suffer.[7] To remedy this problem, economic theory supports granting authors copyright in their works. However, those rights are necessarily limited in scope, because copyright imposes costs on society in exchange for the benefits of induced creative activity. First, the owner of copyright will charge a monopoly price for her work. The number of people who gain access to the work will therefore decrease.[8] Second, copyright raises the production cost of future works, because prohibiting borrowing from existing works makes it more difficult for future authors to create.[9] Thus, the proper degree of copyright protection is that which maximizes the difference between the benefits of induced creative activity and the costs of increased authors' rights.[10]

The second, and generally less well explored "natural law theory" considers copyright as the legal vindication of a person's

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[7] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 328 (1989). In economic terms, an inefficiency, or "market failure," has occurred.

[8] William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1700-02 (1988).

[9] Landes & Posner, *supra* note 7, at 332.

[10] Fisher, *supra* note 8, at 1717. *See also* Landes & Posner, *supra* note 7, at 326. This economic statement captures the conventional adage that copyright balances incentives for production against the need for free access to works.

moral right to property in the fruits of her labor.[11] Under this theory, copyright's justification does not rest upon any showing of economic necessity. Instead, copyright exists because society's failure to protect authors' property interests would result in the denial of a basic human right. Thus, the author rightfully gains copyright in her work to the extent that she can claim sole credit for the work's creation.

A. *The American Choice*

Although both of the above described theories support copyright's existence and suggest its boundaries, American analysts generally insist that copyright rests solely on economics. Both the United States Supreme Court and Congress have stated that copyright exists only for the purpose of advancing social welfare through economic incentives for authorship.[12] Moreover, the Supreme Court has explicitly rejected natural law copyright arguments.[13] Analysts generally follow this lead by explaining copyright's basic doctrines such as originality and the idea/expression dichotomy in economic terms.[14] Two separate lines of thinking support this choice.

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[11] This theory descends from eighteenth-century concepts of property. These concepts are reflected in the writings of William Blackstone and John Locke. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *8; JOHN LOCKE, TWO TREATISES OF GOVERNMENT at § 27 (Peter Laslett ed., 1970) (3d ed. 1698).

[12] *See supra* text accompanying note 5. *See also* H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909), *reprinted in* 6 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, at S7 (1976).

> The enactment of copyright legislation . . . is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

[13] *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 654-68 (1834).

[14] These concepts are embodied in our present copyright code at 17 U.S.C. § 102 (1988). Together they define the existence and scope of copyright in a given work. Originality provides the basic requirement for copyrightability by providing that only "original works of authorship" are eligible for protection. 17 U.S.C. § 102(a). Copyright therefore does not protect works which lack minimal creativity or are simply copies of other preexisting works. *See* Toro Co. v. R & R Prods. Co., 787 F.2d 1208, 1213 (8th Cir. 1986) (denying protection to manufacturer's parts numbering system because of lack of originality); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.) (holding that a copy of preexisting work in public domain lacks sufficient originality), *cert. denied*, 429 U.S. 857 (1976); Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc., 634 F. Supp. 769 (W.D. Pa. 1986) (advertising phrases on envelope lack originality).

However, the mere fact that a work is "original" does not mean that copyright prohibits all borrowing from that work. Instead, the idea/expression dichotomy permits some borrowing from every copyrighted work by specifically excluding ideas from an author's property. 17 U.S.C. § 102(b). Thus, even though a book is protected by copyright, a future author is free to borrow the ideas embodied in the book. Only the book's expression remains protected from copying. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485 (9th Cir.) (denying protection for instructions on how to play

The first rests on the descriptive claim that Americans have always viewed copyright as a matter of economics, and not a basic matter of fairness and justice. Proponents of this argument base their position on statements such as those noted in the preceding paragraph. They also point out that the Constitution explicitly contemplated an economic basis for copyright by authorizing Congress to "promote the progress of . . . the useful arts."[15] Departure from economic copyright theory therefore represents an unwarranted, and perhaps unconstitutional, change from established practice.

The second line of thinking rests on the normative claim that natural law copyright theory leads to dire consequences. As an initial matter, proponents of this view note that copyright lasts for only a limited duration.[16] By contrast, natural law principles would allow copyrights of unlimited duration. Furthermore, copyright sometimes allows individuals to borrow original material created by other authors.[17] They contend that a serious re-

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Scrabble), *cert. denied*, 469 U.S. 1037 (1984); Baker v. Selden, 101 U.S. 99 (1879) (idea of a double-entry bookkeeping system not protected by copyright).

For example, since originality defines the works eligible for copyright protection, its economic interpretation becomes an exercise in determining whether extending copyright to a given work promotes social welfare. Similarly, application of the idea/expression dichotomy becomes an economic cost-benefit calculation. If authors need more incentive to produce creative works, then fewer facets of works should be considered ideas, and more facets should be considered expressions. If society needs greater access to works, the converse is true. This vision suggests the use of economic analysis to strike the required balance between the interests of authors and the interests of society. *See* Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1235 (3rd Cir. 1986).

> [P]recisely because the line between idea and expression is elusive, we must pay particular attention to the pragmatic considerations that underlie the distinction and copyright law generally. In this regard, we must remember that the purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development.

cert. denied, 479 U.S. 1031 (1987).

Major articles which adopt a primarily economic view of copyright include Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); 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 (1982); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); Landes & Posner, *supra* note 7; Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045 (1989). A recently published treatise by a leading copyright scholar, Professor Paul Goldstein, also reflects the current primacy of economic theories of copyright. PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE (1989). Although Professor Goldstein does not exclusively use economic terms to explain copyright principles, they certainly play a major role in many key areas of his work.

[15] U.S. CONST. art. 1, § 8, cl. 8.

[16] Copyright terms presently last for the life of the author plus fifty years. *See* 17 U.S.C. § 302 (1988). Additionally, the Constitution requires Congress to secure an author's copyright for only a limited period of time. U.S. CONST. art. 1, § 8, cl. 8.

[17] For a description of the so-called idea/expression dichotomy, see *supra* note 14.

gime of property in the fruits of an author's labor would never allow such a result. Thus, adherents to the second justification state that recognition of copyright's natural law basis destroys any balance between the interests of authors and the public.[18]

1. Evaluation of the Descriptive Claim

As noted previously, the descriptive claim for suppression of copyright's natural law facets rests on constitutional language and a long string of statements which purportedly restrict copyright analysis to economics. Closer examination of the record shows, however, that the case for suppression is far from air tight. If nothing else, early Americans did not view copyright as a purely economic instrument. Instead, they referred explicitly to copyright's support in both economics and natural law. For example, no fewer than seven state copyright statutes contained preambles such as New Hampshire's, which read:

> As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind . . . .[19]

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[18] See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1185-87 (1983); Lyman Ray Patterson, *Private Copyright and Public Communication: Free Speech Endangered*, 28 VAND. L. REV. 1161, 1210 (1975).

[19] Act of Nov. 7, 1783, 1783 N.H. Laws 305. The copyright statutes of Massachusetts and Rhode Island contained essentially identical preambles. *See* An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing their Literary Productions, for Twenty-One Years, ch. 26, 1783 Mass. Acts 236; An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing their Literary Productions, for Twenty-One Years, 1783 R.I. Acts & Resolves 6. Furthermore, the Connecticut statute provided:

> Whereas it is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the profits that may arise from the Sale of his Works, and such Security may encourage Men of Learning and Genius to publish their Writings which may do Honor to their Country, and Service to Mankind . . . .

Act of Jan. 8, 1783, 1783 Conn. Pub. Acts 617. The New York statute is substantially identical. An Act to Promote Literature, ch. 54, 1786 N.Y. Laws 298. The New Jersey statute contained the following preamble:

> Whereas Learning tends to the Embellishment of Human Nature, the Honor of the Nation, and the general Good of Mankind; and as it is perfectly agreeable to the Principles of Equity, that Men of Learning who devote their Time

This thinking was echoed in Madison's support for the Federal Constitution's grant of congressional authority to enact copyright legislation:

> The utility of [the copyright power] will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.[20]

Evidence of copyright's non-economic heritage exists in modern copyright as well. Despite ostensibly relying on a purely economic outlook, the Supreme Court occasionally adopts statements which reflect copyright's roots in fairness and justice.[21] From statements like these we can conclude that natural law actually motivates courts, despite protestations to the contrary. Furthermore, it has been suggested that modern copyright doctrine is entirely consistent with a regime constructed from natural law principles, and that economically interpreted concepts such as the idea/expression dichotomy actually owe their ancestry to natural law.[22] Finally, when one considers the existence of copyright protection for works which do not require economic incentives for production,[23] it is hard to believe that the repeated state-

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> and Talents to the preparing of Treatises for Publication should have the profits that may arise from the Sale of their Works secured to them . . . .

An Act for the Promotion and Encouragement of Literature, ch. 21, 1783 N.J. Laws 47. Finally, the North Carolina statute provided:

> Whereas nothing is more strictly a man's own than the fruit of his study, and it is proper that men should be encouraged to pursue useful knowledge by the hope of reward; and as the security of literary property must greatly tend to extension of arts and commerce . . . .

Act of Dec. 29, 1785, ch. 26, 1785 N.C. Laws 22.

For a more complete analysis of evidence that early Americans viewed copyright as a matter of natural law, see Gary Kauffman, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COLUM.—VLA J.L. & ARTS 381, 403-08 (1986).

20 THE FEDERALIST No. 43, at 279 (James Madison) (E.M. Earle ed., 1976). Madison's reference to common law copyright in Great Britain approvingly refers to the famous case of Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (1769), which explicitly recognized and enforced a natural law copyright claim. Although *Millar v. Taylor* was overruled in 1774, Madison's reference still stands as an endorsement of its result and reasoning. For a discussion of common law copyright, see LYMAN RAY PATTERSON, COPYRIGHT IN PERSPECTIVE (1968); Abrams, *supra* note 18, at 1119.

21 *See* Mazer v. Stein, 347 U.S. 201, 219 ("Sacrificial days devoted to such creative activities deserve reward commensurate with the services rendered."), *reh'g denied*, 347 U.S. 949 (1954).

22 See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 529-39 (1990).

23 For example, copyright protects theses papers written by graduate students in fulfillment of degree requirements. These works would be produced with or without copyright law. Thus, it is hard to see how copyright protection for such works increases the

ments which restrict copyright theory to economics provide an accurate description of actual copyright thinking. The claim that courts and legislatures never associate natural law principles with copyright is simply untrue. We should therefore criticize the extant purely economic copyright regime for its failure to recognize copyright's roots in both economics and natural law.

2. Evaluation of the Normative Claim

The second reason for suppressing copyright's natural law roots is the belief that consideration of natural law will destroy any balance between the interests of authors and consumers. This concern is certainly understandable. The idea that a person should have a property interest in the fruits of her labor is powerful. Since a copyrighted work is surely the product of an author's labor, it would seem that all borrowing from a copyrighted work violates the author's property in the fruits of her labor. Copyright would therefore necessarily have to prohibit any unauthorized use of a copyrighted work. Future authors would find no public domain from which to draw because everything (including language) would owe its existence to other human beings.

This fear is unjustified, for the notion that authors can claim creative responsibility for (and therefore property in) an entire work is simply false. Any frank appraisal of authorship must conclude that each author's work contains both the author's original creations and material drawn from other authors[24] and the society in which the author lives.[25] Authorship is therefore not the creation of works which spring like Athena from the head of Zeus, but the conscious and unconscious intake, digestion, and transformation of input gained from the author's experience within a broader society. This realization provides the factual basis from which the natural law theorist justifies a strong public domain.

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production of creative works. Their protection must therefore rest on something other than economic theory.

[24] *See supra* note 4; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1010-11 (1990). Brief consideration of one's own work should prove the essential truth of this proposition. The honest legal scholar must admit that his arguments, conceptions, methods of analysis, writing style, and terminology are heavily influenced, if not directly formed, by the writings of others. Similarly, composers use sounds they have heard before, writers recycle plots, and computer programmers use logic and techniques that they have seen before.

[25] A good example of this is our recognition of Mozart's music as both "Mozartean" and German in its personality. Similarly, the work of Renoir and Monet can be identified both individually and as French.

The easiest case occurs when authors borrow material from society without restatement. In this situation, the natural law implication is clear. Since the author did not create the borrowed material, the author has no moral claim to property in it. Indeed, granting an author property in the material by prohibiting its use in future works would be unjust, for society would be deprived of material that it had created. Thus, to the extent that borrowed material already belongs to society, it should remain in the public domain.

When material is borrowed and restated, the case for a public domain is less clear, but equally sound. Consider a work in which an innocent person is convicted of a crime and imprisoned. Even if the work is fictional, it is not solely the product of the author's labor. Rather, the work captures the products of society (the plot) and the author (the rewriting of the plot). In effect, society and the author are jointly responsible for the work's creation, and both should own some property rights in the work. This implies putting part of the work into the public domain while allowing the author property rights in other parts through some sort of equitable division.[26] Thus, certain aspects of this material become the author's property even though some public property will be lost. More important, other aspects of the material become public property even though the author will lose property rights in some of her original creations. The point is that society and authors must each get a fair share of works for which they are jointly responsible.

Of course, the foregoing analysis leaves open the question of how copyright should treat material which can be separately identified as solely that of the author. A superficial natural law analysis might conclude that copyright protects all of this material. After all, if society did not create the material, it must have been created by the author, and she should be able to claim her property rights.

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[26] In other words, others have the right to copy some portions of the author's work. In defining the scope of borrowing, courts must remain cognizant of the possibility that the author's original material may be inseparable from public domain material. In these cases, the so-called doctrine of merger should be applied so that the public domain is not privately appropriated through copyright. The public domain is actually augmented by denying property rights in original material. *See* Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (holding that defendants did not copy plaintiff's jeweled bee pin because it was not "an 'idea' that defendants were free to copy"). Additional natural law support for this proposition comes from the famous Lockean proviso. In that passage, Locke denies the existence of property in the fruits of a person's labor where the appropriation fails to leave "enough and as good" for others. LOCKE, *supra* note 11.

A closer examination, however, shows that this position actually understates the extent of a natural law public domain, which prefers including original creations rather than excluding them.

If the public domain only contained material for which no person could claim creative credit, authors would receive compensation from all who borrowed their original material. Concurrently, all authors who wanted to borrow from their predecessors would have to pay for the privilege of doing so. Although such a scheme seemingly gives each person the fruits of her labor, it would in fact create an unjustified windfall to authors fortunate enough to have already created copyrighted material.

If existing authors gained the power to prohibit all borrowing from their works, they would reap huge benefits from subsequent authors who borrowed from them. At the same time, however, they would probably never be forced to compensate prior authors from whom they had borrowed. In some cases the prior authors (and their heirs) may be dead. In other cases the prior works may never have been copyrighted. Worse yet, in some cases the prior authors might not be aware that borrowing had even occurred. Thus, present day authors would gain the fruits of their labors while never paying for their use of the labor of others.

By contrast, a vigorous public domain that contains original material avoids the problem of unjust enrichment. Since practically every author would both owe and be owed compensation under a complete property rights scheme, it would seem eminently fair to simply abandon the futile task of trying to reach a perfect accounting of compensation among all authors. Instead, society could "balance the books" in a more equitable manner by forgiving many of the "debts" owed by modern authors to their predecessors. In return for this windfall, modern authors should forgive similar debts to future authors by dedicating some of their material to the public domain. In other words, the public domain would be used as a device through which authors could both borrow from and compensate one another. The effect of such a scheme would be to place even original material into a public domain.[27]

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[27] The equitable contribution of authors to the public domain could be achieved in two ways. First, portions of every work should be dedicated to the public domain immediately upon creation. These portions should include those which are both likely to have been borrowed (and therefore not original) and likely to be borrowed in the future. A good example in modern copyright is the doctrine of *scenes a faire*, which places trite

III. THE NECESSARY CONSIDERATION OF FAIRNESS AND JUSTICE

So far this Essay has shown that the primary reasons for suppressing natural law theories of copyright are not compelling. Indeed, it seems that the use of a natural law theory would be consistent with present doctrine and would justify the existence of a healthy public domain which complements the property rights of authors. However, die-hard economic theorists will surely not give up so easily. They may contend that economics alone provides the best way to construct any system of rights, including copyright.[28] In my view, however, any attempt to construct a copyright regime solely on economics is likely to fail. The relevant problems can best be exposed by briefly setting forth the premises on which an economic copyright regime would stand.

As the reader is undoubtedly aware, a fundamental proposition of modern economics is that, under perfect conditions, the unregulated self-interested transactions of individuals maximize social welfare.[29] Of course, perfect conditions never exist. Government should therefore use the legal system to correct the misallocation of resources caused by the lack of perfect conditions. If one assumes that social welfare can be expressed in dollar terms, we should then select the copyright regime which maximizes society's wealth, where wealth is defined as "the value in

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plots, scenes, and sequences into the public domain. *See, e.g.*, Schwartz v. Universal Pictures Co., 85 F. Supp. 270, 275 (S.D. Cal. 1945); Cain v. Universal Pictures Co., 47 F. Supp. 1013, 1017 (S.D. Cal. 1942). Although these trite devices may sometimes be original, the likelihood of their having been borrowed and their use by future authors makes their immediate inclusion in the public domain fair. Second, all works should receive copyright protection for a limited time only, thereby ensuring eventual dedication to the public domain while providing a fair vindication of the author's creative labor. Such a result presently exists under 17 U.S.C. § 302 (1988), which terminates copyright fifty years after the death of the author.

28 The pros and cons of such a proposition require a lengthy ethical and economic discussion which space will not permit. Suffice it to say that such theorists have grown numerous in recent years through the proliferation of the "Chicago School" of the law and economics movement. It should also be stated that not all economic analysts agree with the strong normative claims of the Chicago School. For defenses of an economics only approach to all of law, see A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1989); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). For criticisms of these defenses, see JULES COLEMAN, MARKETS, MORALS AND THE LAW (1988); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 10 n.8 (1988):

> The claim that law can be reduced to economics is similar to the claim that used to be made in psychology that mind can be reduced to behavior. This proposition, called "reductivism" in philosophy, is dead in psychology, and it ought to be laid to rest in the economic analysis of law, too.

Id.; Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

29 COOTER & ULEN, *supra* note 28, at 44-49 (describing economic efficiency theorems and defining conditions necessary for efficient operations of markets).

dollars or dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up."[30]

In other words, government should correct misallocations of property rights by 1) determining the price each person sets for her property; and 2) reassigning each person's property to others whenever the amount others are willing to pay for the property exceeds the amount for which the individual is willing to sell that property.

Although quite brief, the foregoing is sufficient to expose two practical problems which make reliance on a purely economic copyright model highly questionable. First, the necessity of ascertaining prices means that courts require information they simply do not have. This lack of information causes two related problems for the economist. If economists do not have reliable data on individual preferences, their calculations are necessarily estimates. In an area such as copyright, the lack of information is so severe that economic recommendations become little more than random guesses about whether certain interpretations of copyright actually stimulate creativity.[31] Moreover, even if information related to copyright were available, the lack of information for other sectors of the economy would mean that recommendations that appear to increase welfare through copyright may in fact decrease social welfare overall.[32]

Even if these information problems could be overcome, sole reliance on economics to assign copyright rights would remain a highly dubious proposition, for economics is sometimes incapable of choosing among conflicting alternatives. For example, it is

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30 Posner, *supra* note 28, at 119.

31 *See* George L. Priest, *What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung*, *in* 8 RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHT 19, 21 (John Palmer & Richard O. Zerbe, Jr. eds., 1986).

> The inability of economists to resolve the question of whether activity stimulated by the patent system or other forms of protection of intellectual property enhances or diminishes social welfare implies, unfortunately, that economists can tell lawyers ultimately very little about how to enforce or interpret the law of intellectual property.

32 *See* E.J. MISHAN, COST-BENEFIT ANALYSIS 98-101 (1976) (describing the problem of second best). This problem may be illustrated by the following example. Suppose that the available information suggests that an increase in copyright incentives would cause a net increase in productive works of $100 million. At first blush, such a change seems presumptively desirable. The net increase, however, occurs only by diverting capital and human labor from other sectors of the economy to the production of copyrightable works. The losses incurred in those other sectors must therefore be weighed against the gains in the copyright area before one can consider the change wealth maximizing. The difficulty of identifying all of the affected sectors and gathering the necessary information makes it extremely difficult, if not impossible, for the economist to make an unequivocal welfare maximizing recommendation.

a well known fact that the price a person is willing to pay for a resource depends on what the person already owns. If a person owns very little, then she is unable to offer more than a small amount for a resource no matter how badly she desires it. By contrast, if she is wealthy, she is able to offer a lot.[33] Furthermore, the price a person is willing to pay for an entitlement is generally less than what she will sell the entitlement for once she owns it.[34] Since those who own entitlements such as copyrights are likely to value them more than those who do not, the wealth maximizer naturally prefers to assign rights according to the status quo. This turns wealth maximization into a normative principle which justifies whatever assignment of property rights is proposed.[35] The only way out of such a dilemma is to consider other reasons (such as fairness and justice) for assigning property rights to an individual.

V. THE INTERDISCIPLINARY FUTURE OF COPYRIGHT THEORY

American copyright theory should thus be expanded to include the natural law model which has long been suppressed. This does not mean that we should discard the economic model. Copyright obviously functions as an economic instrument in our society, and we should continue to analyze it from that perspective. At the same time, however, we must realize that we cannot find all the answers to copyright's riddles in the discipline of economics. By restoring natural law thinking to copyright jurispru-

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[33] One might be tempted to consider how much those who are not wealthy would pay for rights if they were. Economists ignore hypothetical preferences, however, based on unowned wealth. As Judge Posner states, "[t]he only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market." Posner, *supra* note 28, at 119.

[34] MISHAN, *supra* note 32, at 133-134 (1976); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1151 (1986).

[35] MISHAN, *supra* note 32, at 140-141, 398-401. A similar problem is raised by the so-called Scitovsky Paradox. *See* Tibor Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941). The problem noted in the text can be illustrated by the following example. Consider proposal A. If proposal A is adopted, the producers of records own the right to make cassette tapes from the records they produce. Producers value this right at $200 because this is the additional revenue that they can gain by making and selling cassette tapes to consumers. Suppose further that consumers would be willing to buy the rights of making cassette tapes, but only if the price were $190 or less. In this hypothesized situation, proposal A seems clearly wealth maximizing and should be adopted. Since producers value the right more than consumers do, wealth is maximized by assigning the right to producers.

For purposes of comparison, now consider proposal B, which is the opposite of proposal A. Consumers now have the right to freely make cassette tapes from records. Since they now own the right in question, consumers in situation B value the entitlement more than they did in situation A. Suppose that they consequently will not part with the right for anything less than $203. Under these facts, proposal B is preferable to proposal A, and should be adopted.

dence, we simply recognize that copyright exists not only to promote social welfare, but also to secure to each person a basic human right.[36] Proper construction of our copyright law therefore depends on two separate inquiries. First, we must decide just how much property we think authors deserve. Second, we must decide how to structure the laws which secure those rights to take advantage of our economic system's ability to stimulate creative activity for our mutual benefit. The study of these questions forecasts a broad and interesting cross-disciplinary future for copyright theory.

For example, the question of how much property authors deserve starts with an attempt to separate original material from borrowed material in each work. Of course, the nature of authorship makes it likely that this attempt will only be partially successful in giving authors and society their just desserts. Borrowed material is often recast and reshaped to the extent that its identification or separation is impossible. Even seemingly original creations sometimes depend on borrowing which is not readily apparent. When this happens, society must construct an equitable division of property between the author and the public. Brief reflection shows how the legal theorist's conception of this division would benefit from cross-disciplinary inquiry. First, any separation of original material from borrowed material requires sophisticated notions of creativity and borrowing. Second, if we are serious about making an equitable division between authors and society on the basis of the author's debt to her predecessors, society's belief about the size of this debt becomes vitally important. Art historians, literary critics and authors themselves will undoubtedly have valuable insights to contribute to this debate.

Similarly, the question of how to structure legal entitlements to take advantage of our economic system also requires competence in areas often outside a lawyer's training. Regardless of how much property society thinks an author deserves, a wide range of legal tools will become available to secure the necessary rights. The obvious tool is the "breadth" of copyright's reach. If authors deserve a lot, even very faint borrowings might become actionable. However, other tools may secure for authors their just desserts equally as well. Changing the length of copyright's term, creating licensing schemes, or even making cash payments

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[36] This view is reflected in the Universal Declaration of Human Rights, G.A. Res. 217 [III], U.N. Doc. A/810, at 76 (1948), which states, "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

to authors would all affect the size of authorship's rewards. If society wants to structure its copyright rewards to take advantage of our capitalist system, economists will undoubtedly have helpful recommendations for choosing among the various alternatives. Since capitalism in turn depends on the cooperative behavior of individuals, psychologists may be able to suggest legal arrangements which facilitate bargaining.[37]

Without question, the future sketched out above will be difficult to explore. Few persons can claim expertise in all the disciplines relevant to copyright's construction. This problem may deter some from changing the monolithic economic inquiry which presently dominates copyright jurisprudence. Perhaps too many cooks will ultimately spoil copyright's broth. Although such a fear is perfectly understandable, I believe that we should nevertheless expand our copyright discourse. Copyright law gives individuals the power to control the future use of texts, paintings, compositions, and other forms of communication. It therefore fundamentally affects the kind of intellectual life each of us is able to lead. Everyone, regardless of perspective, should therefore be encouraged to participate in the ordering of that life.

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[37] For example, economists often suggest that property rights exist for the purpose of facilitating the private bargaining which promotes social welfare. Since empirical research shows that bargaining is more likely to occur when the parties' rights are clear, it seems that a judge or legislature interested in using copyright to advance social welfare would select the least ambiguous rules possible. *See* COOTER & ULEN, *supra* note 28, at 99-100. This insight is noteworthy because the present trend permits plaintiffs to claim copyright in increasingly vague facets of their works. *See* Fisher, *supra* note 8, at 1659 (criticizing fair use doctrine as vague and uncertain); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L. J. 393 (1989) (criticizing modern interpretation of the idea/expression dichotomy as vague). To the extent that these decisions are justified as welfare maximizing economic incentives for authors, the potential welfare benefits may be offset by the difficulty authors and potential consumers will face in bargaining over exploitation of these vague rights.